

## **Alert**

### **Broker-Dealers — Coronavirus Update for Broker-Dealers — BC/DR Implications and FINRA Regulatory Relief**

March 16, 2020

In light of the public health issues caused by the outbreak of coronavirus disease 2019 (“COVID-19”), many broker-dealers either have implemented, or are about to implement, their Business Continuity/Disaster Recovery (“BC/DR”) plans.<sup>1</sup> Firms employing remote office/telework arrangements and emergency office relocations as part of these plans should be mindful of their obligations under FINRA rules, as well as other regulatory regimes. Additionally, on March 9, 2020, FINRA published Regulatory Notice 20-08 (“Notice”),<sup>2</sup> which addresses COVID-19-related BC/DR considerations and provides member firms limited regulatory relief from certain obligations. The Notice does not create new rules or obligations, but highlights key considerations for members and notes the possibility of additional regulatory relief and guidance in the future.

#### **Remote Office/Telework Arrangements**

Given the nature of this public health issue, some firms are looking beyond their disaster recovery sites to enable social distancing. These measures may include dividing employees into groups and having them alternate weeks at an office or requiring employees to work from home. Firms employing remote office/telework arrangements and emergency office relocations<sup>3</sup> as part of their BC/DR plans should keep the FINRA definition of “branch office”<sup>4</sup> in mind along with the attendant supervisory obligations.

The FINRA definition of “branch office” generally excludes “personal residences,” although the carve-out requires, among other things, that associated persons using their personal residences to conduct a member’s securities business utilize company email and systems<sup>5</sup> and that the member maintain written supervisory procedures (“WSPs”) addressing the supervision of any sales activities conducted out of an associated person’s residence.<sup>6</sup> Accordingly, an office that is a personal residence may qualify as a non-branch office even though activities, such as soliciting and entering orders, may be conducted at the location.

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<sup>1</sup> See FINRA rule 4370 and FINRA rule 4380.

<sup>2</sup> See FINRA Regulatory Notice 20-08: Pandemic-Related Business Continuity Planning, Guidance and Regulatory Relief (March 9, 2020), available [here](#).

<sup>3</sup> I.e., using office space not previously identified to FINRA as a “branch office” of the firm.

<sup>4</sup> See FINRA rule 3110(f)(2)(A).

<sup>5</sup> See FINRA rule 3110(f)(2)(A)(ii)(f).

<sup>6</sup> See FINRA rule 3110(f)(2)(A)(ii)(h).

Accordingly, firms must not only ensure that associated persons are limiting their communications to firm-approved applications, they must also ensure that they are able to adequately supervise a workforce that is geographically dispersed. Supervision of personnel working from home may include enhanced review of such personnel's communications and network access, as well as the personnel's personal trading activity.

Additionally, there is a significant limitation on the branch office exclusion for a personal residence. FINRA rule 3110(f)(2)(B) defines any location that is responsible for supervising the activities of persons associated with the member at a non-branch location as a branch office. As a result, there may be locations that would generally qualify to be considered non-branch offices that are branch offices because supervisory personnel, such as a desk head, is using that office. Notwithstanding this potential issue, based on CDC and other state and federal administration guidance recommending that employers implement social distancing and telework strategies, we do not expect this to be a FINRA enforcement priority.<sup>7</sup> Additionally, and as further discussed below, FINRA has provided relief from Form BR filing requirements.

### **Emergency Office Relocations**

The FINRA definition of "branch office" excludes "a temporary location established in response to the implementation of a business continuity plan."<sup>8</sup> That said, the Notice states that if a firm uses emergency office space that meets the definition of "branch office," but is not registered as a "branch office" or identified as a regular non-branch location, the firm should use best efforts to provide written notification to their FINRA Risk Monitoring Analyst as soon as possible after establishing the arrangement. That notification should include at a minimum (i) the office address, (ii) the names of each firm involved, (iii) the names of registered personnel, (iv) a contact telephone number and, if possible, (v) the expected duration of the temporary location. Firms should also ensure their BC/DR plans address the use of an emergency office.

### **FINRA Regulatory Notice 20-08**

While the Notice provides little in the way of regulatory relief, in addition to reminding firms to review their BC/DR plans, it identifies certain areas of particular concern. These are (i) potentially heightened cybersecurity risks due to the use of remote office or telework arrangements, (ii) procedures for communications with customers and ensuring customer access to funds/securities.<sup>9</sup> The Notice also suspends the requirements that a firm update Form U4 to reflect an employee's work address and that a firm file a Form BR for new branch office locations provided that the location is a temporary location established due to the pandemic.

When a member utilizes new business locations, the Notice states that they should provide written notification to their FINRA Risk Monitoring Analyst as soon as possible to indicate whether persons associated with the member will be sharing space with another entity, and if so, the type of business in

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<sup>7</sup> See Center For Disease Control and Prevention, Interim Guidance for Businesses and Employers - Plan, Prepare and Respond to Coronavirus Disease 2019, available [here](#).

<sup>8</sup> See FINRA rule 3110(f)(2)(A)(vii).

<sup>9</sup> Firms engaged in municipal securities business should also review MSRB Notice 2020-07, available [here](#), which reminds regulated entities of their supervisory obligations in light of COVID-19.

which that entity is engaged.<sup>10</sup> Members should take into account the risks associated with sharing office space. Such risks include protection of customer and firm confidential information and maintenance of the member's books and records. Relatedly, in considering space-sharing arrangements, FINRA has consistently identified the potential for customer confusion as a significant concern. Members sharing space, even temporarily, must take steps to limit the possibility that a customer may be confused regarding what entity they are dealing with. Such steps typically include, among other things, physical separation within the shared space and the use of signage.

FINRA is also urging firms that may require additional time to submit a response to an inquiry or comply with a regulatory filing obligation to contact their FINRA Risk Monitoring Analyst to request an extension. Firms should consider whether to request, as needed, extensions of time to respond to exam, surveillance, enforcement or other investigative requests for information. Firms should also consider whether they will require an extension for other filings such as FOCUS filings, Form Custody filings and supplemental FOCUS information pursuant to FINRA rule 4524. In considering regulatory filing requirements and requests for extensions, firms should also consider the requirements in rule 15c3-3 under the Securities Exchange Act of 1934, as amended, regarding reserve formula computations and required deposits that are intended to protect customer funds and securities.

## **Conclusion**

Schulte Roth & Zabel continues to stay abreast of regulatory developments in connection with COVID-19 and will provide further updates as they come in. However, firms should independently review any regulatory updates, including the Notice, and also review, potentially post-COVID-19, their BC/DR program to identify areas to improve and address in light of action taken in response to COVID-19.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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<sup>10</sup> While it does not appear that this obligation extends to instances where associated persons use their primary residence to work remotely, firms should track dates where associated persons were told to work remotely due to BC/DR planning to ensure proper supervision of their activities.