



CENTER FOR CAPITAL MARKETS COMPETITIVENESS

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September 6, 2016

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Adviser Business Continuity and Transition Plans (File No. S7-13-16)

Dear Mr. Fields:

The U.S. Chamber of Commerce (the “Chamber”) created the Center for Capital Markets Competitiveness (“CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.¹ The CCMC appreciates the opportunity to comment on the Securities and Exchange Commission’s (the “SEC” or “Commission”) proposals to require investment advisers to adopt business continuity and transition plans (the “Proposal”) through amendments to the Investment Advisers Act (the “Act”).

Broadly, CCMC believes that enhancing preexisting business continuity plans of investment advisers is an important step to mitigate potential disruptions in an investment adviser’s operations. However, while we agree with the spirit of the Proposal, we believe that the Commission has made the Proposal at times unnecessary and potentially unworkable, particularly with respect to liability of an investment adviser. Specifically, we have three strong concerns that should be carefully considered by the Commission:

1. By grounding many of the Proposal’s requirements in the anti-fraud provisions of Section 206(4) of the Act, the Proposal unjustifiably expands the potential for liability of an investment adviser, particularly with respect to *force majeure* events.

¹ The Chamber is the world’s largest federation of businesses and associations, representing the interests of more than three million U.S. businesses and professional organizations of every size and in every economic sector. These members are both users and preparers of financial information.

2. No requirement should be made to file or publically disclose business continuity plans with the Commission, given the confidential nature of the information contained in such plans and the Commission's recordkeeping authority to access such information.
3. Transition plans should not duplicate the requirements of business continuity plans and should be narrowly tailored to reflect any potential transition issues in the event that an investment adviser is wound down. Transition plan requirements should also be clearly defined, especially with respect to identifying material financial resources available to an investment adviser.

We discuss these issues in greater detail below.

The Proposal Inappropriately and Unjustifiably Appears to Extend Liability of Investment Advisers to Unforeseeable Events Outside of Their Control

The Commission proposes to promulgate the business continuity and transition plan rule under Section 206(4) of the Act, as well as under Sections 204 and 211(a) of the Act. Section 206(4) authorizes the Commission to adopt rules and regulations that “define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.”

In discussing Section 206(4), the Proposal asserts:

Because an adviser's fiduciary duty obligates it to take steps to protect client interests from being placed at risk as a result of the adviser's inability to provide advisory services, clients are entitled to assume that advisers have taken the steps necessary to protect those interests in times of stress, whether that stress is specific to the adviser or the result of broader market and industry events.

The Proposal then states:

We [the Commission] believe it would be fraudulent and deceptive for an adviser to hold itself out as providing advisory services unless it has taken steps to protect clients' interests from being placed at risk as a result of the

adviser's inability (whether temporary or permanent) to provide those services.

In short, the Chamber strongly believes that these statements overstate Section 206(4). It is not possible for an adviser to ensure that it will never experience a significant business disruption that prevents the provision of advisory services to clients, especially when it comes to "broader market and industry events" that are outside the adviser's control, let alone *force majeure*. As a practical matter, no business continuity or transition plan can absolutely guarantee that advisory services will not be interrupted. Accordingly, it is inappropriate to suggest that any disruption of advisory services that places client interests at risk in and of itself means that the investment adviser engaged in fraud or deception.

To avoid any potential confusion as to the reach of Section 206(4), we ask the Commission to clarify that it is not necessarily fraudulent or deceptive for an adviser to be unable to provide advisory services.² Indeed, even an adviser that takes reasonable steps to protect clients' interests might still be unable to provide advisory services in certain instances, and yet we do not believe that one could credibly conclude that such an advisor committed fraud or deception solely based on the fact that its services to clients were interrupted.

Moreover, we strongly believe that there is a direct connection between what clients are "entitled to assume" and whether an investment adviser has disclosed that it has a business continuity plan, as well as whether an investment adviser has indicated to its clients that the adviser is not taking certain steps as part of that plan. This could include, for example, an investment adviser's legitimate inability to oversee all of a third-party vendor's business continuity plans, or an adviser's practical inability to *eliminate*, rather than *mitigate*, all possible operational disruptions (especially those relating to *force majeure*). In those circumstances, the investment adviser's clients would have no reason to assume otherwise.

An investment adviser could also be in breach of contractual representations made to its clients as a result of an inadvertent violation of the rule, given that violation of the Proposed Rule would constitute fraud. This could even occur in situations where such breaches do not result in any actual client harm. In those circumstances, we fail to see

² At a minimum, the proposing release should have explicitly solicited comment on the Commission's statements concerning Section 206(4).

how a business continuity plan requirement promotes investor protection, when it instead may promote more enforcement actions based on circumstances outside of the investment adviser's control or in situations where there is no showing of client harm.

As with other proposals, the Chamber strongly believes that any rulemaking by the Commission must be premised on a proper legal basis. Section 206(4) is not a sound footing for the rule because it stretches the meanings of fraud and deception too far to claim that an adviser's business disruption, merely by virtue of its occurrence, is fraudulent and deceptive. Therefore, the rulemaking would be fortified if it were grounded only in Sections 204 and 211(a) of the Act.

Moreover, in line with the above, we believe that the Commission should proceed with a disclosure-based approach that allows investment advisers to disclose circumstances in which risks to its operations are simply out of its control, thus informing clients of these situations and avoiding potential fraud liability under the Act. This would permit investment advisers to also focus on developing business continuity plans that focus on reasonably foreseeable disruptive events.

Business Continuity Plans Should Not Be Filed with the Commission or Publically Disclosed

In addition to forward-looking planning, business continuity plans will necessarily contain sensitive information, including confidential client information, the location of paper and electronic books and records, and the identification of functions, technology, and personnel critical for maintaining business operations. A great deal of this information is proprietary and would materially harm an investment adviser if it were publically disclosed. Such disclosure would also make an investment adviser more vulnerable to a potential cyberattack, particularly given that an investment adviser would necessarily be identifying their key remaining resources in a potential internal or external emergency.

We also agree that, because clients often request and receive business continuity plan information directly from an investment adviser, public disclosure of such information is not decision-useful or necessary. This rationale also applies to the Commission, given that the SEC will maintain access to business continuity plans through its recordkeeping rules. Indeed, filing such information with the Commission could even increase the risk of cyberattacks targeting confidential client or business

information, as similar attacks have recently been made against the Board of Governors of the Federal Reserve,³ the Commodity Futures Trading Commission,⁴ the Federal Deposit Insurance Company,⁵ the Internal Revenue Service,⁶ and the Office of Personnel Management.⁷ Indeed, Chair White has noted that cybersecurity threats are the biggest threat facing the financial system today,⁸ yet the Government Accountability Office has recently highlighted several continuing deficiencies in the Commission's security controls.⁹

Consequently, the Chamber strongly believes that business continuity plan information should not be publically disclosed or filed with the Commission, especially given the ability of clients and the Commission to access such information under existing law and through other amendments to the Act made in the Proposal. In particular, public disclosure could actually increase the chance of a threat that causes a business disruption that harms clients and the markets.

Transition Plans Should Be Narrowly Tailored, Clearly Defined, and Not Duplicative of Other Requirements

Finally, the Chamber strongly believes that a transition planning requirement should be narrowly tailored in light of the requirements of an investment adviser's business continuity plans. As envisioned under the Proposal, a transition plan will require policies and procedures relating to safeguarding and transferring client assets and generating client-specific information, among other information. In many cases, this information will necessarily already be included in business continuity plans, as the

³ David Murphy, *House Committee Investigates Federal Reserve Cyber-Attacks*, PC MAG, Jun 4, 2016, available at <http://www.pcmag.com/news/344991/house-committee-investigates-federal-reserve-cyber-attacks>.

⁴ Silla Brush, *CFTC Data Breach Risks Employees' Social Security Numbers*, BLOOMBERG NEWS, June 25, 2015, available at <http://www.bloomberg.com/news/articles/2012-06-25/cftc-data-breach-risks-employees-social-security-numbers>.

⁵ Joe Davidson, *FDIC cyberattacks included hit on former chairwoman's computer*, THE WASHINGTON POST, May 11, 2016, available at <https://www.washingtonpost.com/news/powerpost/wp/2016/05/11/fdic-cyberattacks-included-hit-on-former-chairmans-computer/>.

⁶ Stephen Dinan, *IRS hit by cyberattack, thousands of taxpayers' information stolen*, THE WASHINGTON TIMES, May 26, 2015, available at <http://www.washingtontimes.com/news/2015/may/26/irs-hit-cyberattack-thousands-taxpayers-informatio/>.

⁷ Julianne Pepitone, *Federal Data Breach: Can the Government Protect Itself From Hackers?*, NBC NEWS, Jun 5, 2015, available at <http://www.nbcnews.com/tech/security/federal-data-breach-can-government-protect-itself-hackers-n370556>.

⁸ Lisa Lambert and Suzanne Barlyn, *SEC says cyber security biggest risk to financial system*, REUTERS, May 17, 2016, available at <http://www.reuters.com/article/us-finance-summit-sec-idUSKCN0Y82K4>.

⁹ U.S. Government Accountability Office, *Opportunities Exist for SEC to Improve Its Controls over Financial Systems and Data*, Apr. 28, 2016, available at <http://www.gao.gov/products/GAO-16-493>.

purpose of those plans will be to locate key fund information on holdings and shareholders in times of internal and external stress.

However, the other requirements of the transition plans—such as the identification of any material financial resources available to an adviser—are open-ended and not clearly defined. Consequently, they invite varying interpretations of what steps an investment adviser must take to adopt a transition plan and be in compliance with the Proposal. Moreover, it will be exceedingly difficult for investment advisers to determine the “correct” availability of financial resources under this standard, especially when many investment advisers already have resources committed in these eventualities and will not be readily able to identify if additional resources are necessary.

Consequently, we believe that such requirements should be dropped from the Proposal in their entirety. Instead, transition plans should accurately and narrowly reflect steps that an investment adviser should take in the event that a winding down is necessary. In other contexts, such as living wills, we have noted our deep concern and frustration with the process established by the federal banking regulators and the inability to espouse clear and objective standards for passing these evaluations.¹⁰

Consequently, we strongly urge the Commission to narrowly tailor any transition plan requirement, especially given that the most pertinent information will already be required in business continuity plans, and to eliminate elements that are inappropriate for the asset management industry, such as the identification of material financial resources in a stressed event.

In sum, the CCMC agrees with the spirit of the Proposed Rule, but we have strong concerns relating to its extension of liability through Section 206(4)'s anti-fraud provisions. We also believe that business continuity plans should remain confidential and not filed or publically disclosed, especially given that market participants and the Commission will have access to this information. Finally, the transition plan requirement should be narrowly tailored in light of the Proposal's requirements for business continuity plan.

¹⁰ See U.S. Chamber Statement on Federal Regulation of Banks' Living Wills (Apr. 13, 2016), U.S. Chamber of Commerce, available at <https://www.uschamber.com/press-release/us-chamber-statement-federal-regulation-banks-living-wills>.

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Thank you for your consideration of these views and we stand ready to discuss these issues with you further.

Sincerely,

A handwritten signature in black ink, appearing to be 'TK' followed by a long horizontal flourish.

Tom Quaadman

Cc: The Honorable Mary Jo White
The Honorable Michael Piwowar
The Honorable Kara Stein