sifma
asset management group

September 2, 2016

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields
Secretary
U.S. Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-13-16: Proposed Rule Requiring Adviser Business Continuity and Transition Plans and Related Recordkeeping

I. Executive Summary

The Asset Management Group[1] (the "AMG") of the Securities Industry and Financial Markets Association ("SIFMA") appreciates the opportunity to provide comments to the United States Securities and Exchange Commission (the "Commission" or "SEC") on the Commission's proposal to require registered investment advisers to engage in and maintain records regarding business continuity and transition planning (the "Proposed Rule") and the interpretive positions articulated in the accompanying proposing release.[2]

The AMG supports the objective of the SEC's initiative – to mitigate the risks of business disruptions for investors – and our members have historically prioritized the implementation of comprehensive and robust principles-based business continuity programs.[3] Given this history and our shared goal of mitigating the risks of business disruptions, we respectfully ask that the SEC reevaluate key elements of the proposal before any new rule is adopted or guidance is issued.

Specifically, we respectfully suggest that the SEC build upon its successful approach to business continuity planning under Rule 206(4)-7 (the "Compliance Program Rule") under the Investment Advisers Act of 1940 ("Advisers Act") by issuing additional guidance rather than a new rule. Should the SEC determine that a new rule is necessary, we also strongly urge the SEC to avoid imposing "fraudulent" liability for business continuity practices and establishing a new, unprecedented level of accountability for functions carried out by third-party service providers. Additionally, the AMG believes separate transition planning requirements for advisers are

[1] The AMG's members represent U.S. asset management firms whose combined global assets under management exceed $34 trillion. The clients of the AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS, and private funds such as hedge funds and private equity funds.

[2] *Adviser Business Continuity and Transition Plans*, Investment Advisers Act Release No. 4439, 81 Fed. Reg. 43530 (Jul. 5, 2016), available at https://www.gpo.gov/fdsys/pkg/FR-2016-07-05/pdf/2016-15675.pdf (the "Proposing Release").

[3] *See, e.g.*, SIFMA Comment Letter on Regulation Systems Compliance and Integrity (Dec. 18, 2015).

unnecessary since current operational management practices and the existing regulatory framework already address any transition-related concerns cited by the SEC that may impact investors. Finally, the AMG encourages the SEC to ensure that the resulting obligations for registered investment advisers align with the approach already established for broker-dealers and other market participants by the SEC, the Financial Industry Regulatory Authority ("FINRA"), the Commodity Futures Trading Commission ("CFTC") and others.[4] The AMG believes that revising these aspects of the Proposed Rule would better reflect the nature and characteristics of the asset management community and help protect investors against the risks associated with service disruptions.

II. Business Continuity is Not a New Requirement for the Investment Adviser Industry

A. Current Regulations

As a primary matter, the obligation to engage in responsible business continuity planning is not a new consideration for registered investment advisers. From industry wide outages, to terrorism events, to severe weather, investment advisers have absorbed lessons from decades of experience, working to mitigate risks to themselves and their investors and to inform and improve their subsequent practices.

Further, the SEC has already set forth expectations around business continuity that are appropriate for individual firms and the position occupied by asset managers in the larger financial intermediary space. Notably, in the 2003 release adopting the Compliance Program Rule, the SEC stated that an adviser's compliance policies and procedures should address business continuity plans to the extent that they are relevant.[5] As one example, following Hurricane Sandy, the SEC's Office of Compliance Inspections and Examinations ("OCIE") conducted a joint review with FINRA and the CFTC, and released the lessons learned and a set of best practices in the 2013 National Exam Program Risk Alert.[6] Even more recently, as the SEC adopted regulations in this arena for other market participants, the SEC chose not to impose additional regulations for investment advisers, noting that advisers generally pose less risk to the

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[4] *E.g.*, *Compliance Programs of Investment Companies and Investment Advisers*, Investment Advisers Act Release No. 2204, 68 Fed. Reg. 74714 (Dec. 24, 2003); *Business Continuity Plans and Emergency Contact Information*, FINRA Notice to Members 04-37 (May 2004); *Financial Stability Oversight Council Update on Review of Asset Management Products and Activities*, U.S. Department of the Treasury, Press Center (Apr. 18, 2016) (highlighting that "resolvability and transition challenges could exacerbate the risks arising from the stress or failure of an asset manager.") *available at* https://www.treasury.gov/initiatives/fsoc/news/Documents/FSOC%20Update%20on%20Review%20of%20Asset%20Management%20Products%20and%20Activities.pdf.

[5] *See Compliance Programs of Investment Companies and Investment Advisers*, Investment Advisers Act Release No. 2204 (Dec. 17, 2003) (citing an adviser's fiduciary obligations to mitigate the operational risks resulting from a natural disaster, death of key personnel or the adviser ceasing operations) *available at* https://www.sec.gov/rules/final/ia-2204.htm.

[6] *See National Exam Program Risk Alert*, SEC Examinations of Business Continuity Plans of Certain Advisers Following Operational Disruptions Caused by Weather-Related Events Last Year (Aug. 27, 2013) (observing that in the aftermath of Hurricane Sandy, the specificity of RIA's written business continuity plans varied and that some RIA's business continuity plans did not "adequately address and anticipate widespread events.") *available at* https://www.sec.gov/about/offices/ocie/business-continuity-plans-risk-alert.pdf.

financial markets than other regulated entities.[7] Specifically, the SEC indicated when adopting Regulation Systems Compliance and Integrity ("Reg SCI") that advisers were not among the types of entities that have "the potential to pose the most significant risk in the event of a systems issue" – suggesting that registered investment advisers do not pose the same potential risks to market stability as other market participants, such as SCI entities, when faced with significant disruption events and therefore, that existing regulations are sufficient.[8]

B. Current Practices

The investment adviser industry has effectively responded to the SEC's guidance and to the competitive forces in the marketplace for investment advisers, devoting significant resources to business continuity planning. As such, advisers fully recognize and embrace their obligation to conduct their business with reasonable diligence, mitigating foreseeable risks to investors and continuously refining contingency plans to address emerging risks.

Through these efforts, investment advisers have developed an understanding of what makes business continuity planning successful. Among the most important lessons learned has been that the most successful business continuity programs are not tailored to specific events or focused on prescriptive requirements. Contingency planning is a dynamic process, not a mechanical one. The best contingency plans are designed to ensure that the firm's leadership has the flexibility and information necessary to respond optimally to a variety of potential disruptions.[9] This flexibility is fostered through creating plans that prioritize communication channels and establish system resiliency and data availability. Well-thought-out plans do not pre-judge what decisions should be made in particular situations; they seek to mitigate short-term disruptions and resume ordinary working conditions as soon as practicable. Business continuity professionals support these efforts by anticipating a disruption's effects and quickly providing reasonable responses when questions arise during a disruption. This is very different from attempting to protect clients from "any potential harm."

As a result, the AMG recommends a more adaptive approach to business continuity than that described in the Proposing Release, which seems to indicate that each adviser should prepare a playbook to memorialize the adviser's regulatory obligations, contractual requirements to clients, counterparties, service providers, vendors, functions performed by service providers, key persons, and other significant details on the assumption that, once assembled and maintained, clients would be protected from "any potential client harm" caused by a disruption. The AMG

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[7] *See Regulation Systems Compliance and Integrity*, Securities Exchange Act Release No. 73639, 79 Fed. Reg. 72251 (Dec. 5, 2014) (requiring SCI entities to establish and test business continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical systems in the event of a wide-scale disruption) *available at* https://www.gpo.gov/fdsys/pkg/FR-2014-12-05/pdf/2014-27767.pdf.

[8] *Id.* at 72259.

[9] *See National Exam Program Risk Alert*, SEC Examinations of Business Continuity Plans of Certain Advisers Following Operational Disruptions Caused by Weather-Related Events Last Year (Aug. 27, 2013).

believes that investors would be better served by ensuring that investment advisers continue to have the ability to be agile and nimble to respond to emergent situations.

In addition, we are concerned that if the rule were adopted as proposed, an adviser that departs from its detailed playbook could be at risk for an adverse finding by the agency, even when doing so were believed to be in the best interest of the firm's clients given the circumstances presented. A prescriptive framework and one that, as discussed below, effectively imposes strict liability on advisers for disruptions of any kind, will inherently interfere with well-established industry best practices that enable an adviser to rely on the expertise of business continuity professionals to lead them through emergent situations.

III. Transition Planning Requirements are Unwarranted

As noted above, the AMG supports the SEC's goal of ensuring that investors are protected in the event of a market disruption or when transitioning funds to a different adviser. However, the Proposed Rule's transition planning requirements would not add an appropriate risk mitigation tool to assist investment advisers. We believe current business practices and the existing advisory regulatory framework address the reasonably foreseeable risks that could arise when client accounts are transitioned from one adviser to another or when an adviser's affairs are wound down, and these risks are not sufficiently unique from those found in the business continuity context to require, either by rule or in informal guidance, that advisers maintain separate transition plans.

As a practical matter, client or asset transfers are a well-managed part of an investment adviser's business, and clients routinely transfer the management of assets to another firm when they decide to retain a new adviser.[10] As was noted by one participant in a May 2014 FSOC roundtable, in the industry "the process of being hired and fired happens thousands of times a day."[11] The SEC itself has acknowledged that advisers and funds "routinely transition client accounts without a significant impact to themselves, their clients, or the financial markets."[12] This smooth functioning results from the expectations set by existing regulations and market discipline. Advisers already must stand ready to transition large volumes of assets and accounts daily and under all market conditions and the SEC has not demonstrated a need for additional planning by advisers in this context.

Should an adviser leave the business, the impact to investors is minimal because advisers are highly substitutable; investors have numerous choices should they wish to continue

[10] A client may also choose to self -manage its assets in which case the impact is even lessened.
[11] *See* Letter from Timothy W. Cameron, Asset Management Group Head and Managing Director, Securities Industry and Financial Markets Association, and John Gidman, President, Association of Institutional Investors, to Jacob J. Lew, Secretary of the U.S. Department of the Treasury, Re: Comments Summarizing the Financial Stability Oversight Council's May 19, 2014 Conference on Asset Management, SEC File No AM-1, at 10, available at http://www.sifma.org/comment-letters/2014/sifma-and-investors-group-submit-letter-to-us-treasury-summarizing-the-fsoc-s-conference-on-asset-management/.
[12] Proposing Release, *supra* note 2, at 43,535. For example, clients are free to move to new advisers after terminating their contracts, and for registered investment companies, this process is directly addressed under Rule 15a-4, which allows for the appointment of an interim manager.

professional asset management of their assets.[13] Client options also continue to grow and change: for example, according to the Investment Company Institute, from year-end 2009 to year-end 2015, the number of mutual fund sponsors increased from 682 to 873, with 440 sponsors entering the market and 249 sponsors leaving.[14] The advisory industry also continually changes through mergers and acquisitions, where the adviser does not truly leave the market and clients receive continuous services.[15] As a practical matter, since advisers operate in an agency capacity and do not directly absorb investor losses, they are highly unlikely to become insolvent suddenly and unexpectedly or to experience unexpected financial distress. These transitions and market changes occur during both normal and stressed market conditions (i.e., financial crisis period, etc.) and there is no evidence that there are unique difficulties or negative effects from transitions during times of market stress that warrant the creation of separate transition plans.

Transitions are also facilitated by the common use of third-party custodians. Custody arrangements insulate clients from potential impact during adviser transitions by facilitating the movement of accounts or funds between advisers - and in many cases, removing the need to physically move the assets.[16] In fact, the SEC noted in the Proposing Release that "[b]ecause client assets custodied by an adviser must be held at a qualified custodian and segregated from the adviser's assets, we have observed that transitioning accounts from one adviser to another can largely be a streamlined process that in many cases may not involve the physical movement or sale of assets."[17] The custodian itself segregates client assets and receives instructions for changes in adviser authority. For example, arrangements for mutual funds are governed by a contract between the mutual fund and the custodian. Current SEC rules require a detailed and methodical review for new advisory contracts, requiring for example, the board of a mutual fund to select and authorize a new adviser to transact on the fund's behalf even in the event the adviser exits the industry.[18] In the separate account context, clients themselves typically control the appointment and maintenance of a custodian, and the clients merely provide an instruction to the custodian to indicate that a different investment adviser now has authority to manage the assets. Indeed, U.S. asset segregation and custodian arrangements are a "substantial safeguard" that European regulators are seeking to imitate in designing their own recovery and resolution

[13] Notably, a significant portion of investors manage their own investments without the assistance of an investment adviser – further lessening the potential market impact the departure of any one adviser could have. *See* BlackRock, *Who Owns the Assets? Developing a Better Understanding of the Flow of Assets and the Implications for Financial Regulation*, (May 2014) available at http://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-who-owns-the-assets-may-2014.pdf, (noting that "more than three quarters of financial assets are managed directly by the asset owner").
[14] Investment Company Institute, *2016 Investment Company Fact Book*, 16 (56th ed. 2016), *available at* https://www.ici.org/pdf/2016_factbook.pdf.
[15] These transactions also include additional safeguards, given that there is a detailed due diligence process by both the exiting and acquiring adviser, as well as regulations requiring either investor or board and shareholder approval when there is an assignment of an advisory agreement. *See* 15 U.S.C. §§ 80a-15(a); 80a-15(c); 15 U.S.C. § 80b-5(a)(2).
[16] The "asset management infrastructure . . . really put[s] the end investors a very far distance away from the trials and tribulations of their asset manager." Ken Griffin, quoted in Cameron, *supra* note 11, at 13.
[17] Proposing Release, *supra* note 2, at 43,535.
[18] *See* 15 U.S.C. § 80a-15(a); 80a-15(c); and 15 U.S.C. § 80b-5(a)(2) for advisory agreements involving non-registered investment company clients.

frameworks for non-bank institutions.[19] In times of stress, including 2008, enormous transfers were effected without incident. In most respects, the only "delay" associated with such transfers are due to regulatory or operational issues, such as receipt of confirmations on the movement of assets, which would be no different from the potential delay a client may experience in the ordinary course and absent an adviser transition and therefore are sufficiently addressed by current business practices and existing regulations.[20]

Moreover, while the SEC states that it is not proposing to create a living will requirement on advisers akin to that imposed on banking entities,[21] the AMG is concerned that expectations set forth in the Proposing Release may ultimately amount to such a requirement. Unlike banks, advisers do not "fail" in a manner that requires intervention because they typically operate in an agency capacity, they do not engage in proprietary trading, and they operate with little or no leverage. Since an adviser does not take proprietary positions, or absorb investor losses, an adviser's "failure" would not result in a capital shortfall at the adviser or for clients in the same manner it would at a bank. And, unlike banks, advisers and their clients do not benefit from deposit guarantees or have access to central bank liquidity, such that the failure of an adviser or fund could put taxpayers or the financial market at risk. The SEC seems to recognize these differences,[22] yet certain requirements under the proposed rule clearly lend themselves better to banks than asset managers. For example, the Proposing Release notes that an adviser's transition plan should "consider" any material financial resources available to the adviser, and identify any material sources of funding, liquidity or capital that it would seek in times of stress in order to continue operating.[23] Given that advisers are highly unlikely to need emergency financing, as noted above, this requirement is far more helpful in the banking context and unnecessary for investment advisers.

Additionally, although the SEC notes that advisers routinely enter and exit the market and client accounts are opened, closed and moved seamlessly, the Proposing Release appears to disregard this track record by requiring detailed plans similar to the plans that banks maintain. For justification, the Proposing Release cites the circumstances during the credit crisis in 2008 when firms like Bear Stearns, Lehman Brothers, Countywide, AIG, IndyMac and others struggled, failed, and/or were acquired, arguing that these types of scenarios could affect an adviser's ability to continue operations, possibly leading to a transition event.[24] However, none of these entities had investment advisory services as their primary business. Indeed, there is no data regarding the number of advisers who have ceased operations each year where the termination of activities was not orderly, harmed investors and/or caused harm to the broader financial markets. As a result, the AMG urges the SEC to reconsider whether a new rule specific to transition planning is necessary.

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[19] *See* Kay Swinburne, European Parliament Committee on Economic and Monetary Affairs, *Report on Recovery and Resolution Framework for Non-Bank Institutions* (Oct. 22, 2013), *available at* http://www.europarl.europa.eu/document/activities/cont/201310/20131023ATT73307/20131023ATT73307EN.pdf.
[20] Alan Greene, cited in Cameron, *supra* note 11, at 13.
[21] *See* Proposing Release, *supra* note 2, at fn 40.
[22] *See id.* at fn 40.
[23] *Id.* at 43543.
[24] *Id.* at fn. 38.

IV. Avoid Extending the Application of the Anti-Fraud Provisions

While the AMG supports the encouragement of thoughtful business continuity planning practices, the AMG has serious concerns about the SEC's proposal to expand the definition of "fraudulent and deceptive" activity to make an adviser potentially liable for fraud in connection with events that, by their nature, are beyond an adviser's reasonable control. We respectfully urge the SEC to reconsider this approach.

Under the existing regulatory regime, the SEC and its staff have an established and helpful track record of setting expectations for and monitoring business continuity planning: providing guidance that highlights the risks, supports best practices, respects the novelties and variations between advisers, and empowers the business and compliance leadership of each firm to thoughtfully address the relevant issues.[25] Prior failures in connection with establishing or executing business continuity procedures typically have resulted in either straightforward deficiency findings following an OCIE examination or a violation of the Compliance Program Rule. In adopting the Compliance Program Rule, the SEC stated that it had considered industry comments and determined that it was prudent to adopt a rule that made a violation "unlawful" rather than "fraudulent."[26] The SEC made clear that "[f]ailure of an adviser or fund to have adequate compliance policies and procedures in place will constitute a violation of our rules independent of any other securities law violation."[27] Thus, the Compliance Program Rule already provides a principles-based approach that affords each investment adviser the flexibility to tailor compliance expectations to its business, be thoughtful about the risks of its particular business model, and deploy resources in a manner that is both competitive and protects its clients' interests.[28]

In a departure from that approach, the Proposed Rule would significantly expand the scope of what constitutes fraudulent and deceptive activity by a registered adviser. Under Section 206(4), it is unlawful for an adviser "to engage in any act, practice or course of business which is fraudulent, deceptive, or manipulative" and authorizes the SEC only 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." Historically, fraud generally has been understood to mean an intentional act to deceive others for personal gain. By adopting this proposed rule under Section 206(4), the SEC would attach a concept of deceit or manipulation to circumstances, including temporary outages, where no such motivation

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[25] Notably, Compliance Program Rule and its accompanying adopting release, which includes business continuity planning in the list of topics a compliance program should address.

[26] *Compliance Programs of Investment Companies and Investment Advisers*, *supra* note 4, at fn 11.

[27] *Id.*, at Sec. II.

[28] Notably, the AMG's members have invested millions upon millions of dollars in the form of technology, staffing (many of which specialize exclusively on business continuity and disaster recovery planning), development of best practices, training, back-up centers, drills and simulations and other aspects of the practice. For example, many advisers have taken measures to implement industry best practices from sources such as the ISO 22301 standards. These types of standards have provided a helpful and consistent framework for advisers and other participants in the financial industry to utilize when designing their individual programs.

exists. In the proposal, the SEC articulates its rationale by stating that 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."[29] Yet, this rationale describes circumstances that may not involve any element of intent by the adviser – whether negligent or intentional. AMG argues that, as proposed, this rulemaking would capture activities that are not actually fraudulent.

By applying the standard articulated in the Proposing Release, independent external events, such as a natural disaster or homeland security event, could lead to a finding of fraud liability for an adviser. Further, liability could arise despite an adviser's good faith business continuity planning efforts, even in the absence of any actual disruptive event, if the SEC decides (with the benefit of hindsight) that the planning was insufficient to deal with a particular exigency. The AMG is concerned that under the Proposed Rule, an adviser could face such liability even if its planning efforts met industry best practices and were sufficiently disclosed to investors.

Advisers should not be held liable for fraud for business continuity plans even under the non-scienter based anti-fraud provision of Section 206. Such a fraud finding – where the term fraud could be used in SEC orders, press releases, and in general media coverage – would cause significant, unwarranted reputational harm to an adviser. It is a practical reality that the nuances of scienter are lost when the SEC takes action against an adviser or cites it for defrauding clients. Under the Proposed Rule, investment advisers stand to suffer irreversible reputational harm from such a charge for something as simple and unintended as having a reasonable business continuity plan that does not respond fully to unforeseeable events. Particularly given that it is not possible to know if a business continuity plan is sufficient until it is tested by actual continuity events, an adviser should not be liable for fraud for the universe of possible events (that are themselves not caused by the adviser) that may result in a service disruption.

A "fraud" implication is particularly inappropriate for expectations under the Proposed Rule that will turn on subjective interpretations examined with the benefit of hindsight. The industry may only learn what functions the SEC views as material or what contingency plans will be considered sufficient as the SEC brings enforcement actions and delivers deficiency letters during OCIE examinations. We provide recommendations for addressing this concern below, but urge the SEC not to move forward with a business continuity planning rule that incorporates a potential fraud charge.[30]

[29] Proposing Release, *supra* note 2, at 43,536 (asserting that advanced "planning and preparation may minimize an [RIA]'s exposure to operational and other risks and, therefore, lessen the possibility of a significant disruption in its operations, and also may lessen any potential impact on the broader financial markets.").
[30] In addition, if the SEC chooses to bring any action for violations of the transition planning part of the Proposed Rule, those actions likely could only be brought against individuals such as Chief Compliance Officers as, by definition, the investment adviser that wound down operations will no longer be in business.

V. Provide Detail Through Guidance Rather than Rulemaking

A. Continue to Provide Timely Guidance

The AMG encourages the SEC to adhere to its existing approach to an adviser's compliance policies and procedures, which imposes general obligations by rule and allows for the SEC's specific expectations to be delineated in guidance and modified over time to adapt to ever-evolving circumstances. Specifically, the SEC should articulate its expectations for contingency planning in guidance under the existing Compliance Program Rule.

In adopting and eventually enforcing the Compliance Program Rule, the SEC has emphasized the importance of policies and procedures that are tailored to the nature of an adviser's operations: "[A]dvisers are too varied in their operations for the rules to impose a single set of universally applicable required elements. Each adviser should adopt policies and procedures that take into consideration the nature of that firm's operations."[31] As the SEC acknowledged in the Proposing Release, this remains true for contingency planning.[32] However, the practical reality is that if the SEC adopts the Proposed Rule, it could become stale or obsolete. The risks facing investment advisers – from technology failures to natural disasters to cyber-attacks – inherently evolve over time, as do best practices related to addressing these issues. In addition, as discussed above, the vast bulk of guidance on best practices for business continuity planning comprise a set of principles that carefully avoid requiring specific requirements or measures.[33] To be effective, contingency planning must evolve alongside these risks. Imposing detailed requirements through rulemaking – which can result in static, inflexible requirements – constricts the SEC's and advisers' ability to adapt such planning appropriately.

As an alternative, the AMG encourages the SEC to consider continuing to articulate its expectations through guidance rather than a prescriptive rule.[34] The AMG understands that recent examinations by the SEC's OCIE have suggested sometimes inconsistent or insufficient approaches to contingency planning within particular firms. But the AMG contends that if, in fact, the SEC has concluded that there are existing shortcomings among some advisers, the solution is to continue to proactively articulate expectations through staff guidance or direct advisers toward third-party resources that identify industry best practices. The AMG believes that this approach would create a path to improved contingency planning while simultaneously giving the SEC and advisers the flexibility to adjust efforts to meet evolving demands – a preferable approach to rulemaking that, by its very terms, risks becoming obsolete or inapposite for the actual demands faced by advisers.[35]

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[31] *Compliance Programs of Investment Companies and Investment Advisers*, *supra* note 4, at sec. II.A.; *see e.g., In re* Consulting Services Group, LLC, Investment Advisers Act Release No. 2669 (Oct. 4, 2007).
[32] Proposing Release, *supra* note 2, at 43,536 (stating "we believe that SEC-registered advisers should be required to adopt and implement a written business continuity and transition plan that is tailored to the risks associated with the adviser's operations and includes certain components, reflecting its critical role as an agent for its clients").
[33] E.g., ISO 22301.
[34] This guidance could be provided simultaneously with the promulgation of a general rule requiring business continuity or under existing Rule 206(4)-7.
[35] Notably, even if the SEC establishes contingency planning requirements as a series of guidance pieces and best practice points, it is likely the requirements may still become formalized through another mechanism (e.g., states).

B. Pursue Rulemaking, If At All, Under Section 204

If the SEC believes that existing industry business continuity practices are insufficient, this can be remedied by expanding an adviser's recordkeeping requirements under Rule 204. Such a rule could mirror the approach of FINRA Rule 4370, and impose both a general obligation to maintain records relating to a business continuity plan and articulate the key elements such a plan should address.[36] In line with Rule 4370 and the SEC's recognition that programs should be appropriate to the nature of an adviser's business, the rule should require that an adviser address each key element only to the extent it is applicable and necessary to the investment adviser's business. A rule under Section 204 also could require an adviser to maintain records that provide an overview of an adviser's business continuity program and the results of an annual review.[37] This would have the effect of establishing a specific rule-based obligation to develop and maintain a business continuity plan without expanding an adviser's fraud-based liability. If it mirrored the approach of FINRA Rule 4370, it would also improve regulatory parity between registered advisers and broker-dealers, facilitating compliance efforts for dual registrants.

VI. Flexibility is Crucial to Successful Business Continuity Planning

Regardless of whether the SEC ultimately determines that a rule or informal guidance is appropriate in the context of business continuity, regulated entities and the investors they serve need clarity about what is required of them and flexibility to adopt policies and procedures appropriate to the nature of their business. Failure to provide sufficient clarity sets the table for regulation by enforcement or by examination – both of which result in inconsistent standards for entities registered with the SEC. Failure to allow for sufficient flexibility may likewise result in ineffective contingency planning that leaves investors at risk of unnecessary service disruptions. The AMG respectfully requests that the SEC clarify the flexibility it intends to afford advisers when it requires policies that are "reasonably designed to address operational and other risks."[38]

A. Application to Advisers of Varying Sizes

In considering how best to set expectations around business continuity planning, the AMG advocates that the SEC recognize how those requirements will affect and may be implemented by advisers of different sizes and mandates.

Notably, for larger firms, the number of moving parts (such as service providers) can expand exponentially and thus, the adviser requires flexibility. For example, the AMG recommends affording an adviser flexibility to determine whether a firm-wide or adviser-specific program is most appropriate. For some firms, requiring a single plan on a firm-wide basis may not be appropriate: what is a critical system for one may not be for another adviser in the same corporate family. Similarly, there may be challenges to implementing contingency plans on a

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[36] FINRA Rule 4370 (as amended on Feb. 12, 2015).
[37] See Appendix A for suggested language under Section 204. This suggested language follows the approach of FINRA Rule 4370 and includes the key elements from this rule that are generally applicable to the investment adviser industry.
[38] Proposing Release, *supra* note 2, at 43,536.

firm-wide basis that would need to capture advisory as well as other services and detail how continuity events will be handled among multiple related registered entities under a single plan. For others, adopting a firm-wide program is preferable in light of the unique challenges presented by a separate and distinct plan for each adviser – such as those circumstances where a single service provider may interact with several advisers within a single large firm either directly or indirectly. As a result, the AMG recommends that an SEC rule or guidance be modified to clarify expectations accordingly.

B. Firm-Wide Programming

The Proposed Rule lays out expectations, especially with respect to recordkeeping, that focus on having a singular contingency "plan." In contrast, well-established industry practice suggests that contingency planning is not necessarily contained in a single "plan" document – rather, to be successful, it is often approached more holistically and specific steps to support business continuity are integrated into policies and procedures that reach across various aspects of firm operations. The AMG encourages the SEC to avoid referring to a singular "business continuity plan" and expand its discussion to capture the programmatic nature of contingency planning and the practical reality that elements of a program may be articulated within multiple compliance policies rather than contained in a single business continuity document. In practical terms, the AMG believes the best way to accomplish this goal would be to follow the approach of FINRA Rule 4370, which calls for the use of a summary document and provides an overview of the key elements of an adviser's business continuity program – this document can describe the extent to which such programming is integrated into firm-wide business operations and related policies.

Additionally, the Proposed Rule would require advisers to "maintain copies of all written business continuity … plans that … were in effect at any time during the last five years."[39] Such a requirement may be unworkable for two reasons: first, as described above, comprehensive, effective business continuity plans are not typically contained in a single static document. Second, to address emerging risks and current conditions, contingency planning must be continually updated and tweaked in real time. The level of effort and complexity associated with fulfilling a recordkeeping obligation that requires an adviser to track and keep copies of each individual iteration when it is subject to such ongoing updates significantly outweighs the value or utility of this request, particularly when an equally informative alternative is available. This task may become so cumbersome and require such significant resources that the administrative obligations supplant the adviser's ability to focus on operational issues central to providing advisory services.

As a result, the AMG recommends a minor change to the proposed recordkeeping requirements. In place of the requirement for an adviser to "make and keep all business continuity … plans that are currently in effect or at any time within the past five years were in effect," the AMG recommends requiring advisers to create and maintain a summary document that provides an overview of the contingency planning efforts implemented across the adviser's operations. An adviser could then be required to update this document on an annual basis to

[39] Proposing Release, *supra* note 2, at 43,545.

reflect the significant operational adjustments made during the course of the year. Copies of the document could be kept and be available to the SEC for review for five years.

C. Third-Party Service Providers

The SEC has indicated that an adviser must "be prepared for significant business disruptions that could impair its ability to act in its clients' best interests by having a business continuity and transition plan that addresses the critical services provided to it by … third parties" that perform critical functions.[40] The AMG believes the SEC should continue supporting a risk-based evaluation requirement related to third party service providers and avoid indirectly imposing regulatory obligations on third-party service providers by regulating advisers. Instead, the SEC should look to an adviser to conduct a self-assessment to identify its critical service providers and the steps necessary to mitigate harm from service disruptions. An adviser may conclude that for certain service providers, it is sufficient for the adviser to establish a reasonable belief that the service provider it has retained is adequately prepared for business continuity events.[41] Moreover, an adviser should not be obligated to maintain redundant service provider relationships for all aspects of its business to account for catastrophic events. Redundancies, if required at all, should be expected for only particular services where the adviser reasonably determined that it is appropriate given the nature of the particular adviser's business. The AMG underscores that an adviser can only mitigate against business continuity events; an adviser cannot prevent them from occurring and cannot dictate how a third-party will handle a market disruption in practice. An adviser's fiduciary duty requires that the adviser take reasonable steps to mitigate the consequences of business continuity events – but only to the extent the consequences are within the adviser's control.

If a firm relies on a third-party vendor to carry out normal business practices, and that vendor suffers a business continuity event or goes out of business, the Rule as proposed could be interpreted to require these events to initiate action under the adviser's business continuity plan – which may require the adviser to have a redundant service provider ready to step in. For example, advisers that rely heavily on data terminals, such as those provided by Bloomberg or Thompson Reuters, could be required to maintain redundant subscriptions to other services to address the potential that one or the other service experiences down time. For some advisers, such a requirement would represent an extensive expansion of the adviser's obligation for the operations of a separate, third party entity. Therefore, the AMG encourages the SEC to focus on ensuring that advisers have done reasonable due diligence regarding service providers, and taken prudent steps to mitigate the harm that could result from a service interruption.

Regulatory requirements also should reflect the practical reality that an adviser does not always choose the providers that contribute essential services to an advisory account. For example, separate account clients typically select their own custodian. In this context, the client

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[40] Proposing Release, *supra* note 2, at 43,540.
[41] The AMG encourages the SEC to consider possible standardized approaches to obtaining assurances from service providers regarding their business continuity planning. For example, an adviser could obtain a copy of a service provider's SAS 70 or SOC 1 report. This has the benefit of giving the SEC and the adviser confidence in the information about the service provider while not requiring the service provider to divulge proprietary or other confidential information.

contracts directly with the custodian, conducting its own due diligence and negotiating the terms of its own agreements. Thus, while the custodian role is crucial to the provision of advisory services, the adviser itself is not in a position to dictate how custodians will prepare for and respond to an event that affects business continuity. Moreover, in part by design of the SEC's own regulatory regime,[42] client assets generally are held at custodians, which means an adviser is not able to "protect" the client's assets entirely. Protection of assets is afforded through the regulatory regime under which these custodians operate. In the unlikely event that an adviser dissolved with no notice, the client can terminate the relationship with its adviser and engage another adviser to trade on their account, with assets held safely at the custodian.

D. Reasonable Risk Mitigation Efforts

The AMG encourages the SEC to elaborate on the discussion it began in the Proposing Release regarding the balance an adviser must strike between using technological advancements to provide improved services to its clients and minimizing the risks associated with such technology use (e.g., cyber-attacks or system glitches). The AMG encourages the SEC to confirm that the agency does not expect advisers to be able to prevent all technological glitches or cyber-attacks. As mentioned above, the use of advanced technology to provide improved services to its advisory clients cannot reasonably cause the adviser to become a guarantor of such services. Rather, the expectation should be for an adviser to be reasonably prepared to handle such glitches and cyber-attacks when they do occur to minimize the impact on advisory clients.

E. Geographic and Business Resumption Plans Must be Tailored and Reasonable

The alternative physical location and business resumption requirements outlined in the Proposing Release may ultimately be overly prescriptive. The AMG seeks greater clarity regarding the SEC's expectations regarding what constitutes "reasonable" planning and the extent to which the Proposed Rule will allow for flexibility based on risk assessment and firm size.

The alternative physical location requirement raises distinct issues for an adviser depending on the scope and nature of its business. For example, the AMG contends that a small adviser with a single office and minimal number of employees does not reasonably need to have an alternative physical location that is sufficiently distant from its regular office so as to be outside the range of a storm such as Hurricane Sandy. The needs and expectations of such an adviser's clients may not require this specific approach to business continuity planning. A similar quandary exists for large firms. Continuity plans do not need to accommodate an alternative physical location for all employees. We are concerned that the rule, as proposed, could be interpreted to require this level of alternative location for both small and large advisers. As an alternative, the AMG advocates for giving the advisers the flexibility to determine whether enabling employees to work remotely during a disruption would be a reasonable resolution based on the nature of their respective business. Similarly, some advisers have determined that they are better able to provide uninterrupted advisory services during a business continuity event by

[42] through Rule 206(4)-2 under the Advisers Act,

moving services to individuals employed by the adviser that are not affected by the event rather than moving people who are affected to another location. Technological advances increasingly make specific physical office locations unnecessary. As a result, the Proposed Rule should provide for additional flexibility rather than require an "alternative physical location."

Finally, the AMG notes that there is no universal timeframe that will be deemed "reasonable" in each circumstance that might arise for an adviser to resume business operations following a business continuity event. Resumption will vary by firm in accordance with each adviser's scope of business and the particular circumstances of the business continuity event itself. Moreover, advisers may utilize the flexibility inherent in business continuity plans to determine whether to prioritize resumption of certain services over others in order to minimize the consequences for investors. For example, in some circumstances, such as cyber-attacks, an adviser may determine it is more important to ensure that client assets are secure before attempting to resume trading.

F. SEC Filing and Notification Requirements

The AMG recommends that any rule or guidance in this arena not require an adviser to file with the SEC (either publicly or under confidential treatment) any of the business continuity planning details or subsequent amendments thereof. As an initial matter, such planning details may contain proprietary information that is inherently confidential (such as the extent of financial resources dedicated to the area and governance structures). As a secondary matter, publicizing details regarding an adviser's contingency planning efforts, particularly in the area of cybersecurity, may provide information that is beneficial to potential hackers and make the adviser more vulnerable to cyber-attacks. As contingency plans will be repeatedly modified to address evolving risks, it would be increasingly difficult to keep any corresponding notifications and filings current. If any filing obligations are adopted, the AMG discourages the SEC from requiring "sign off" by the agency on even material aspects of or changes to an adviser's business continuity approach. This obligation would be too burdensome for firms, diverting attention and resources from focusing on implementation, and create backlog of additional reviews for the SEC staff.

Similarly, the SEC should not require an adviser to report to clients or submit a public or non-public filing to the SEC each time a business continuity event occurs or the response plan is triggered. Making a public filing or even submitting a confidential report to the SEC may raise unwarranted alarm bells, incentivizing advisers to structure their plans in such a way as to avoid triggering the plan. Thus, in practice, such filing and reporting requirements may have the unintended effect of discouraging advisory employees from turning to the contingency plan and taking advantages of the protections it may provide.[43]

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[43] As noted elsewhere, our view is that a well-designed business continuity plan is NOT a playbook for running the business in the event of a disruption. It is only designed to handle logistics and infrastructure needs in the short term to enable the decision makers of the firm to re-establish a position to make prudent decisions for the firm and its clients. It does not seek to anticipate all of those decisions that might need to be made and or what the decisions will be. The SEC's faith in more detail and documentation in business continuity planning and transition planning is misplaced. Notably, the Proposing Release does not suggest that there is any relationship between the theoretical

In the past, many of our members have "triggered" their plans out of an abundance of caution when world events have occurred, in order to ensure the appropriate personnel are available and quick decisions can be made. In these situations, the business continuity plans have provided valuable services, including the simple ability to quickly share information and provide updates. As we note above, the best business continuity plans are flexible, providing the adviser with a useful tool to address any unforeseen risk that may arise. The SEC should therefore encourage the use of thorough, usable business continuity plans that provide the adviser with the ability to appropriately react to any risk that may arise.

Finally, the AMG supports the SEC's position that advisers should ensure their clients are informed about the adviser's contingency planning. However, for the reasons discussed above regarding filing requirements, the AMG recommends that any disclosure be limited to providing clients, upon-request, with a high-level summary of an adviser's program.

VII. Avoid Disparate Regulatory Requirements

The Proposed Rule would result in an SEC-mandated requirement for all registered advisers that meets or even exceeds current requirements or best practices for other registered entities that play important roles in the financial services industry. Moreover, as proposed, the rule could create disparate regulatory expectations across various regulators, including the SEC, FINRA, and the CFTC. Greater consistency is pragmatic to avoid unnecessary costs or unanticipated consequences, especially for dual registrants or among firms operating under similar regulatory expectations. The SEC staff itself has recommended a harmonized regulatory regime to better protect investors when broker-dealers and investment advisers are performing the same or substantially similar functions.[44] Unfortunately, as proposed, the Rule may not achieve the harmonization across regulatory regimes for which the SEC strives. If the SEC does adopt a rule or provide guidance in this area, the AMG encourages the SEC to ensure that it is clearly consistent with, and does not exceed, existing requirements imposed by FINRA, the CFTC, and SROs.

We appreciate the SEC's discussion and recognition of initiatives other financial regulators have pursued that are aimed at mitigating certain operational risks through business continuity planning. For example, business continuity rules are mandated by FINRA[45] and the CFTC,[46] and model rules have been promulgated by the North American Securities

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lack of planning detail and actual outages caused by the natural disaster. In fact, the more detailed the plan is, the more likely it is to be "triggered" by ordinary course daily activities.

[44] *Study on Investment Advisers and Broker-Dealers – as Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, Staff of the SEC (Jan. 2011) *available at* https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

[45] *See Business Continuity Plans and Emergency Contact Information*, FINRA Rule 4370 (as amended on Feb. 12, 2015) (requiring that broker-dealer's business continuity plans address certain elements, including data backup and recovery, all mission critical systems, alternate communications, alternate physical location of employees, and critical business constituents) *available at* https://www.finra.org/sites/default/files/NoticeDocument/p003095.pdf.

[46] *See Business Continuity and Disaster Recovery*, 17 CFR Part 23.603(a) (requiring swap dealers and major swap participants to establish and maintain business continuity plans that address data backup, systems maintenance, communications, geographic diversity, and third parties).

Administrator Association.[47] We support the SEC's assessment that while these regulations target different types of entities, they share similar principles of business continuity planning, "including the need to address critical systems, data backup, communications, alternate and/or geographically diverse locations and third-party relationships."[48] We appreciate the SEC's recognition that many advisers are already working to address and mitigate the risks of business disruptions to comply with these rules and regulations.

At a minimum, these disparate requirements require a balancing act by the adviser. To facilitate this balancing act, the AMG encourages the SEC to undertake a detailed analysis of the requirements applicable to advisers and dual-registrants across the industry and ensure that any new obligations imposed on advisers reflect comparable expectations (and consequences) for advisers as those already imposed on broker-dealers and other peer institutions.[49] The SEC is more likely to see consistent approaches to business continuity planning – and see approaches that meet the agency's expectations – if the SEC reconciles the various strains of regulation in this arena that apply to advisers and dual registrants. Informal guidance may provide an optimum venue to achieve this reconciliation.

VIII. Estimated Economic Impact May Be Vastly Understated

Registered advisers facing absorption of the costs resulting from the Proposed Rule may pass them to clients and fund investors through higher fees. The AMG believes that the SEC's stated goals, which the AMG supports, can be accomplished through more efficient means that present a much lower time and financial burden – especially for smaller firms.[50] The Proposed Rule's requirement to analyze third-party service providers' plans to maintain business continuity in the face of a significant business disruption would likely result in significant costs for registered advisers and may, in some instances, be unfeasible, depending on the level of cooperation by such service providers. Although the Proposing Release acknowledges that it may be costly for an adviser to establish backup relationships with multiple third-party service providers, it nonetheless imposes an obligation on advisers "to address how [the adviser] will manage the loss of a critical service."[51]

The SEC requested comment on the costs and benefits in the Proposing Release. Unfortunately, the requirements of the rule are not sufficiently clear to enable a reasonable identification of the burdens involved, let alone estimates of the costs of those burdens. For example, the Proposing Release provides an example of identifying critical service providers and references the Bank of New York Mellon/SunGard InvestOne net asset value outage in August 2015.[52] The Proposing Release says that an adviser should review and assess how those service providers plan to maintain continuity and whether those plans include alternatives to allow it to

[47] *See NASAA Model Rule 203(a)(1)-1A* (requiring state-registered advisers to have continuity and succession plans to minimize "service disruptions and client harm that could result from a sudden significant business disruption.").
[48] Proposing Release, *supra* note 2, at 43,533.
[49] Notably, comparable rules do not include a transition planning requirement.
[50] See, e.g., recommendations in Sections III and VI, *supra*.
[51] Proposing Release, *supra* note 2, at fn 91 (noting that "it may not be feasible or may be cost prohibitive for an [RIA] to retain backup service providers, vendors, and/or systems for all critical services").
[52] Proposing Release, *supra* note 2, at fn 90.

continue during a significant business disruption. If the service provider does not have a plan to provide for alternatives, the adviser should consider other service providers or internal functions that can serve as a backup if needed. No business continuity plan for any service provider will ever be able to guarantee that they will be able to continue to operate during a significant disruption. The adviser can conduct due diligence on its service providers to a reasonable level but still be unable to guarantee a particular result. If the adviser ultimately is responsible to protect against "any potential client harm," the AMG is concerned that the SEC staff could interpret this to require advisers to maintain duplicate service providers or internal resources that can seamlessly take over performing tasks as needed. Maintaining such a duplicate framework to such a real-time standard would be a material cost. Absent clarification on this key point it is not possible to reasonably estimate of the costs required by the Proposed Rule.

There also are significant implicit costs with some of the expectations described in the Proposing Release. For example, the Proposing Release states that "an adviser's business continuity and transition plan generally should include short term arrangements, such as which specific individuals would satisfy the role(s) of key personnel when unavailable, and long-term arrangements regarding succession planning and how an adviser will replace key personnel." This effectively would require maintenance of a detailed playbook for a Human Resources Department and the broad dissemination of highly sensitive personnel and strategic information. The embedded costs would be significant to prepare and maintain plans of such specificity that are well beyond current best practices.

Another example is the requirement to "Review, no less frequently than annually, the adequacy of the business continuity and transition plan and the effectiveness of its implementation." The Compliance Program Rule has a similar "annual review" requirement, which has been supplemented with SEC guidance about risk rankings, forensic testing, compliance monitoring, and risk-driven more frequent monitoring. Advisers have assembled systems, staffing, and infrastructure to respond to this annual review requirement. In light of existing guidance regarding the Compliance Program Rule annual review requirement, it is reasonable to expect that the SEC Staff will interpret the annual review concept to require a wide range of testing, analysis, documentation – and likely not an "annual" process in reality.[53]

The Proposing Release estimates that the costs for updating policies and procedures, maintaining the plan, maintaining and upgrading systems, and the annual review would be $7,500 to $375,000 per adviser. Larger organizations now have multiple full time staff dedicated to business continuity and disaster recovery planning. Many others are involved in supporting those efforts from relevant business functions and systems perspectives as well as oversight and controls functions such as internal audit. Given the decisions that are contemplated by the Proposing Release, many of the others involved will be senior management with marginally higher costs per hour for their time and involvement (and time taken away from other tasks). Inserting more explicit regulatory requirements will likely involve costs for outside counsel that will be necessary to complement the professional expertise of their business continuity and disaster recovery staff. In addition, plans maintained by banks provide evidence that the SEC

[53] Additionally, it is unclear to the AMG what type of testing could occur related to transition planning, given the nature and characteristics of the asset management industry discussed throughout this letter.

should re-evaluate its cost estimate for adviser transition plans. No large financial institution spends a mere $375,000 on such efforts annually – major media reports placed the cost estimates in excess of $25-30 million on a single initial living will,[54] and the industry believes the actual number is likely multiples of that amount. Therefore, it seems the Proposing Release materially underestimates the cost for the annual review element alone.

In addition, an increase in liability for investment advisers that would arise were the advisers required by rule to prevent any harm to clients from business continuity or transition events will materially increase the implications of insurance coverage. Insurance companies will bear more risk for claims and will price coverage accordingly.

The costs also must be evaluated in the context of opportunity cost for other investments bypassed or reduced. In this environment of low interest rates and fee compression, advisers will make choices and need to re-allocate scarce budget to address these concerns. Especially for smaller advisers that may be struggling to be or remain profitable, that may mean cutting back on other important initiatives or bypassing business that might be viable with investments in additional staff, systems or expertise. To date, investors have benefited from relatively low barriers to entry, aided by the SEC's facilitation of capital formation, that have helped enable intense competition and ever-declining management and other administrative fees as advisers compete for assets. Every additional compliance burden makes smaller advisers less viable and increases barriers to entry.

The post-crisis regulatory onslaught is erecting barriers that will result in costs that are unaccounted for in the proposal. These costs are very difficult to quantify, but the threat of liability based on the new and higher standards described in the Proposing Release will necessitate expenditures for counsel and staff – drawing resources away from other priorities. Firms have already invested millions of dollars on business continuity planning, demonstrating its willingness to embrace the goals and objectives. While both the AMG and its member firms believe that business continuity planning is a high priority, they urge the SEC not to impose additional, unnecessary costs.

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[54] Steve Culp, *'Living Will' Regulatory Initiatives Can Help Banks Plan for Growth*, Forbes (Apr. 20, 2012), available at: http://www.forbes.com/sites/steveculp/2012/04/20/living-will-regulatory-initiatives-can-help-banks-plan-for-growth/#2f859b315478.

The AMG appreciates the opportunity to comment on the SEC's Proposed Rule. We strongly support robust policies and procedures designed to manage risks associated with business continuity, and the comments provided herein are designed to reflect the AMG's belief that investors are best served if the time and resources involved in contingency planning are guided by principles-based rulemaking that are well-suited to the asset management industry. Should you have any questions, please do not hesitate to reach out to Tim Cameron at [redacted] or [redacted], or Lindsey Keljo at [redacted] or [redacted].

Sincerely,

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cc: Mary Jo White, Chair
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Appendix A

Alternative Language for a Rule Under Section 204

§ 275.204-2 Books and records to be maintained by investment advisers.
(a) (20)(i) A copy of the record that provides an overview of the investment adviser's business continuity programming formulated pursuant to §275.206(4)-7;
(ii) Records relating to the manner in which the investment adviser's business continuity programming addresses the following categories:

(A) Data back-up and recovery (hard copy and electronic);
(B) All mission critical systems;
(C) Financial and operational assessments;
(D) Alternate communications between clients and the investment adviser;
(E) Alternate communications between the investment adviser and its employees;
(F) Alternate physical location of employees;
(G) Regulatory reporting; and
(H) Communications with regulators.

An investment adviser is only required to make and keep current the records referred to in paragraphs (a)(20)(ii)(A) through (I) of this section if the investment adviser reasonably determines that such a category is applicable and necessary to the investment adviser's business.

(iii) Records documenting the investment adviser's annual review of the business continuity programming conducted pursuant to §275.206(4)-7(b).

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(e)(1) All books and records required to be made under the provisions of paragraphs (a) to (c)(1)(i), inclusive, and (c)(2) of this section (except for books and records required to be made under the provisions of paragraphs (a)(11), (a)(12)(i), (a)(12)(iii), (a)(13)(ii), (a)(13)(iii), (a)(16), and (a)(17)(i) of this section), shall be maintained and preserved in an easily accessible place for a period of not less than five years, from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.