September 6, 2016

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

Re: Adviser Business Continuity and Transition Plans [File No. S7-13-16]

Dear Mr. Fields:

The Financial Services Roundtable ("FSR")[1] appreciates the opportunity to respond to proposed new Rule 206(4)-4 (the "Proposed Rule"), and related amendments to Rule 204-2 under the Investment Advisers Act of 1940 ("Advisers Act"), as set forth by the Securities and Exchange Commission (the "Commission" or "SEC") in Rel. No. IA-4439, dated June 28, 2016 (the "Proposal").[2]

If adopted, the Proposed Rule would require investment advisers that are (or are required to be) registered with the Commission (each an "Adviser") to adopt, implement and annually review business continuity and transition plans (each a "Plan"). These Plans would be required to include certain specific components and address certain considerations in order to be "reasonably designed to address operational and other risks related to a significant disruption in the [Adviser's] operations."[3] The Proposal also includes amendments to Rule 204-2 under the Advisers Act requiring Advisers to retain: (i) copies of their current Plans and any past Plans that were in effect within the previous five years; and (ii) records documenting the Adviser's annual review of their Plans.

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1 As *advocates for a strong financial future*™, FSR represents the largest integrated financial services companies providing banking, insurance, payment, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs. Learn more at FSRoundtable.org.

2 *Adviser Business Continuity and Transition Plans*, Rel. No. IA-4439 (June 28, 2016). Terms not defined herein have the meaning ascribed to them in the Proposal or in the Advisers Act.

3 Proposed Rule 206(4)-4(b)(1). Under the Proposed Rule, it would be unlawful for an Adviser who failed to maintain appropriate Plans to provide investment advice to clients.

FSR agrees with the approach taken in the Proposal, which reflects the Commission's experience and expertise in regulating the investment advisory industry for over seventy-five years. The Proposed Rule again demonstrates the value of the Commission as the primary functional regulator for Advisers. The comments and suggestions we offer are intended to allow the Proposed Rule to better effectuate its purpose to protect clients, investors and the industry by mitigating the impact of disruptive events, which are inevitable, while, at the same time, avoid imposing an undue burden or unnecessary requirements upon Advisers. FSR does not believe that the investment advisory industry (or any particular Adviser) is or will be a source of systemic risk and we note that implementation of the Proposed Rule, as modified by our comments, would result in every Adviser having in place a Plan reasonably designed to address disruptions contemplated by the Proposal to its business.[4]

Executive Summary

We believe the Commission's intention is to adopt a final rule that follows a principles-based approach, recognizing that each Adviser should adopt a Plan appropriately tailored to the nature of its business. In this vein, the Proposed Rule properly balances the protection of clients and investors with the need to avoid imposing an undue burden on Advisers. FSR believes that requiring specific components will ensure that Plans are appropriately robust while allowing Advisers appropriate latitude to tailor their individual Plans.

The Commission is the appropriate governmental authority to regulate business continuity and transition planning for Advisers. To prevent potentially duplicative or inconsistent rules, other regulators should not impose additional or differential requirements on Adviser Plans.

We generally support the Proposed Rule and recommend that the Commission adopt a final rule that is largely similar to the Proposed Rule. However, there are some areas of the Proposed Rule and the guidance in the Proposal that offer room for improvement. In addition, as requested by the Commission, we would like to answer certain questions included in the Proposal. In particular, we believe that:

- Transition plans should focus on the transition of an Adviser's accounts such that a new Adviser is able to assume responsibility efficiently, rather than being a "Living Will."

- Advisers must be in a position to control access to proprietary and other information contained in their Plans. Such information could be used to exploit a vulnerability and should not be publicly disclosed. Instead, Plans should be subject to review pursuant to the Commission's examination authority.

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[4] FSR recognizes the relevance of business continuity planning by industry participants to the resiliency of our financial system as a whole. The Proposal notes that "[f]ederal and state financial market and services regulators, including the Commission, have sought to highlight and address operational risks and the tools necessary to manage them." Proposal at 43,533. To this end, the Proposal specifically discusses business continuity planning regulations adopted by the Financial Industry Regulatory Authority ("FINRA") and the Commodity Futures Trading Commission's ("CFTC"), a model rule recently adopted by the North American Securities Administrator Association and the Financial Stability Oversight Counsel's request for comments on operational risks and transition planning in the asset management industry. We believe that each regulatory agency is best placed to understand the industries it regulates and impose requirements best suited to its regulated entities.

- Advisers should have the flexibility to determine whether and how to report business continuity or transition incidents that trigger application of a Plan to the Commission, instead of being bound by mandatory reporting obligations.

- Advisers must be certain that good faith deviations from a Plan, in response to emerging or changing circumstances, and the failure to anticipate any possible business continuity or transition events, will not result in a violation of the Advisers Act if their Plan is reasonably designed and tailored to their businesses. The Proposed Rule, or guidance associated with its adoption, should affirmatively state that Plans are not expected to be perfect or to contemplate and address any and all possible scenarios and permutations.

Introduction

Rule 206(4)-7 under the Advisers Act (the "Compliance Program Rule") requires every Adviser to "adopt and implement written policies and procedures reasonably designed to prevent violation . . . of the [Advisers] Act and the rules [thereunder]."[5] The Commission previously addressed business continuity planning, as an expected element of an Adviser's compliance program, in the adopting release for the Compliance Program Rule (the "Compliance Program Release"). Events such as Hurricanes Katrina and Sandy have brought attention to the varying levels of quality of existing Plans across the broader industry, including their degree of specificity and adequacy. Thus, while many Advisers have already taken steps to mitigate the risks of business disruptions (including implementing Plans) as a prudent business and compliance measure,[6] the SEC Staff in reviewing Adviser Plans,[7] "has noted weaknesses in some adviser [business continuity plans] with respect to consideration of widespread disruptions, alternate locations, vendor relationships, telecommunications and technology, communications plans, and review and testing."[8]

FSR applauds the Commission's efforts to stress the importance of business continuity and transition planning in order to help Advisers further mitigate risks to clients and investors associated with disruptions to the Adviser's business or operations. The Proposal benefits from the Commission's experience as the industry's primary regulator and its extensive knowledge of industry practice. Because FSR's membership, which includes only the largest Advisers most of

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5 The Compliance Program Release states that an Adviser's compliance policies and procedures should address business continuity plans to the extent they are relevant to the Adviser. *See Compliance Programs of Investment Companies and Investment Advisers*, Rel. No. IA-2204 (Dec. 17, 2003). The Proposal notes, however, that the Compliance Program Release did not "identify critical components of a [business continuity plan] or discuss specific issues or areas that advisers should consider in developing such [P]lans." Proposal at 43,534.

6 Proposal at 43,531.

7 For example, weather-related events such as Hurricanes Katrina and Sandy have provided regulators (as well as Advisers) with an opportunity to evaluate the robustness of Advisers' operational risk management practices and business continuity plans in light of actual disruptive events. *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); Joint Review of Business Continuity and Disaster Recovery of Firms by the SEC's National Examination Program; CFTC Division of Swap Dealers and Intermediary Oversight and FINRA (Aug. 16, 2013); and SEC Compliance Alert (June 2007).

8 Proposal at 43,532.

whom are part of larger financial services organizations, already have robust Plans that in nearly all cases reflect the specific components and considerations set forth in the Proposed Rule and described in the Proposal, FSR recognizes the prudence of adopting a rule (as a supplement to the Compliance Program Rule) that would be specific to business continuity and transition planning. Such a rule should, and we believe the Proposed Rule does, take a principles-based approach that incorporates a comprehensive list of specific components and considerations without prescribing a particular approach to addressing those components. While we believe it is the intent of the Commission to take a principles-based approach in the Proposed Rule, we encourage the Commission to affirmatively state that the Proposed Rule takes a principles-based approach with respect to Advisers' Plans. As the Commission recognized in the Proposal, the "complexity and risks associated with [Advisers'] diverse business models could be substantially different, and our [P]roposed [R]ule is designed to give [A]dvisers the flexibility to create business continuity and transition plans that accommodate such differences."[9]

Put simply, the Proposed Rule would provide a useful benchmark for Advisers who will adopt Plans for the first time, or develop and improve on existing plans, without resulting in requirements which are simultaneously insufficient for some Advisers and unworkable for others. The Commission's approach of laying out basic requirements and considerations but providing each Adviser considerable freedom to determine how to best apply those requirements and considerations to its own circumstances in crafting its Plans should result in Plans that are tailored to each Adviser. Plans that are tailored will be more effective and could exclude elements that the Adviser determines are irrelevant, overly burdensome or ineffective for that Adviser. Given the diversity among Advisers and their business models, we also agree with the Commission that Advisers should have considerable flexibility with respect to the format of their Plans. As the Commission pointed out in the Proposal, Advisers should not be required to adopt "'a' business continuity and transition plan" or "consolidate all of the components [of their Plans] into one document."[10] Instead, Advisers that have separate policies and procedures (or plans) in place or that choose to draft separate policies and procedures (or plans) that address applicable components of the Proposed Rule should have the ability to refer to such existing policies and procedures (or plans), and effectively incorporate them by reference into their Plans. In addition, an Adviser that is part of a larger group or organization should have the ability to implement its Plan on a group-wide basis, rather than an individual, entity-by-entity basis, if the Adviser believes that doing so is appropriate in light of the Adviser's and the group's circumstances. Similarly, Advisers with multiple units or divisions might have separate Plans for each.

FSR opposes unnecessary duplication of regulation. Where regulation is necessary with respect to a type of regulated entity, it should be first and best addressed by the primary regulator for that entity type. Advisers, generally act as fiduciaries and service providers that, as a general matter, have certain authorities with respect to client assets but, except in certain limited circumstances, do not hold client assets.[11] Generally, Advisers can be readily replaced by a client.

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[9] Proposal at 43,538.

[10] Proposal at 43,536 at n.54 (noting also that an Adviser "may maintain separate plans that address the components identified in the [P]roposed [R]ule").

[11] Except in limited cases, the Advisers Act custody rule prohibits an Adviser from having physical custody of a client's assets unless the Adviser is a qualified custodian (*e.g.*, a registered investment adviser that is also registered as a broker dealer).

This makes Advisers different from banks and other financial institutions and leads Advisers to have different needs and considerations when it comes to business continuity and transition planning. Therefore, FSR stresses that the Commission, as the primary regulator for Advisers, is the appropriate agency to adopt and implement rules surrounding business continuity and transition planning for all Advisers and FSR further believes that the Proposed Rule will successfully address and mitigate the concerns that have been raised by the FSOC and others in this area as it relates to Advisers. It follows that other regulators should not impose additional or differential requirements on Adviser Plans.

The Advisers represented by FSR are diverse; they advise a variety of types of clients in a variety of manners about a variety of instruments using a variety of techniques and tools and engage a variety of service providers to assist them. As such, FSR expects that its members' Plans have similar core principles and objectives but also vary significantly in design and implementation. There are over 12,000 Advisers and not all are members of FSR. Some of them vary significantly from our members, and include medium-sized Advisers and very small shops (including sole proprietorships). They also advise a variety of client types on a variety of instruments with a variety of service providers, etc. As the Commission recognized in the Proposal, a one-size-fits-all approach to business continuity and transition planning would not work given the diversity within the industry.[12]

Thus, while we believe that the risks faced by Advisers are well addressed, in a broad sense, by requiring *that* an Adviser consider, and a Plan address, certain specified components, it is imperative that the Rule not prescribe *how* those components are addressed. Each Adviser must have flexibility to reasonably design and implement its own Plan as it believes to be best suited to its own individual circumstances, within the bounds of a principles-based rule.

Adviser Plans Should be Regulated by the Commission

FSR strongly opposes duplicative and potentially inconsistent regulation and believes that Advisers' Plans should be regulated by a single governmental authority, namely the Commission.[13] The Commission has a long history of regulating Advisers and the most comprehensive knowledge amongst the various financial regulators of their business. We believe this long-standing history provides the Commission with a clear understanding of the diverse operations of Advisers, putting it in the best position to prescribe rules related to Plans and to evaluate conformity of such Plans with the requirements of, and principles behind, those rules through the examination process.

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[12] For example, many of our members (as well as other Advisers) are part of a larger group of related financial services companies including multiple advisers and other regulated or unregulated entities. In some cases, certain or all entities in a group might determine that a joint or combined Plan better suits the needs of the group and represents a more reasonable design for such a Plan while others may determine that an entity-by-entity approach is more appropriate. Provided that an Adviser, as part of a group, reasonably assesses the efficacy of a chosen approach, Advisers who are part of a larger structure should be permitted to determine for themselves whether a group-wide plan or an Adviser-specific plan is best suited to their circumstances.

[13] We recognize that some Advisers might also be subject to regulation by the CFTC as CPOs or CTAs or by FINRA as dually registered investment advisers/broker-dealers or by a banking regulator if the Adviser is a Separately Identifiable Department or Division of a Bank.

While other regulators have enacted rules and provided guidance on business continuity and transition planning for their regulated entities, those rules focus on industries which differ in important respects from the advisory industry. For example, unlike banks, which accept customer deposits and lend or otherwise utilize those same deposits, Advisers generally do not hold client assets or commingle client assets with their own assets. Instead, client assets are (with limited exceptions) held by a qualified custodian as defined by the Advisers Act custody rule, which is often independent of the Adviser, in the client's name or for the client's benefit. In most cases, Advisers act as a contracted service provider, are granted temporary authority over client assets for the term of the contractual relationship and can be replaced, often at will, by the client. In fact, many advisory contracts include specific provisions related to transition of an account following termination. As such, Advisers have experience transitioning client assets seamlessly in the ordinary course of business as well as in a continuity or transition event.[14] Given these structural differences in the nature of an Adviser's business when compared to banking entities, banking regulators should not be responsible for regulating Adviser Plans.

That the Commission should continue to be responsible for regulating Adviser Plans is further supported by the careful consideration of the Commission in effectively addressing the stated views and concerns of the FSOC and other regulators (including the Federal Reserve) in the Proposal and the Proposed Rule.[15] In particular, the Proposed Rule addresses the growing reliance on third-party service providers and transition planning. In addition to issues associated with resolvability in the context of transition planning,[16] an interagency authority composed of banking regulators highlighted four areas that financial institutions should focus on when outsourcing services to third parties: their responsibility for the plans associated with third-parties; the impact of a disruption and the ability of a third-party to restore services to multiple clients; the testing of technology of service providers; and the impact of disruptions associated with cyber-security events.[17]

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[14] Proposal at 43,535.

[15] Financial Stability Oversight Council's ("FSOC'') Notice Seeking Comment on Asset Management Products and Activities ("FSOC Notice") (Mar. 25, 2015); Financial Stability Oversight Council, *Update on Review of Asset Management Products and Activities* (April 18, 2016) ("FSOC Update"). *See also* Press Release, U.S. Department of Treasury, Financial Stability Oversight Council, Financial Stability Oversight Council Releases Statement on Review of Asset Management Products and Activities (April 18, 2016) ("FSOC Press Release").

[16] The FSOC Press Release noted that "the growing reliance on service providers, the concentration of some service provider markets, and the continuously evolving nature of their services," were areas of particular concern. FSOC Press Release.

[17] The Federal Financial Institutions Examination Council ("FFIEC") is an interagency body that prescribes uniform rules, standards and report forms for the federal examination of financial institutions by the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency and the Consumer Financial Protection Bureau. This guidance applies to financial institutions supervised by the Federal Reserve. Financial institutions include: state member banks, bank and savings and loan holding companies (including their nonbank subsidiaries) and U.S. operations of foreign banking organizations. The guidance is included in the FFIEC Information Technology Examination Handbook. *See* Board of Governors of the Federal Reserve System, Supervisory Letter SR 15-3 (Feb. 6, 2015).

As an initial step, the Proposed Rule would require Advisers to evaluate the third-party service providers responsible for maintaining their critical operations, including but not limited to portfolio management, custody of client assets, trade execution, pricing and recordkeeping.[18] An evaluation of a service provider may include review of: the summary of the service providers' plan, due diligence questionnaires, assurance reports on controls by independent parties, certification information regarding the service provider's operational resiliency and compliance program and controls, testing results and conducting onsite visits.[19]

The Proposed Rule would also require Plans to (i) identify and assess third-party services (such as, securities operations and processing, and post-trade compliance and reporting) that are critical to the operation of the Adviser, and (ii) review and assess whether third-party service providers' plans address business continuity when faced with disruption.[20] In addition, the Proposed Rule would require Advisers to assess how they would continue to provide the critical service if there is a disruption.[21] In regards to the Adviser's Plan to continue services, the Commission noted that it may be infeasible or cost prohibitive to retain backups for all critical services, and in such a case, the Adviser should consider how the Adviser will manage the loss of a critical service provider.[22] Moreover, the Proposed Rule would require Advisers to review the adequacy and effectiveness of their Plans on an annual basis, including a self-evaluation of the efficacy of the Plan and whether changes to critical third-party service providers would be required.[23] Finally, under the Proposed Rule, Advisers would be required to consider the risks associated with and the remedies available in the event of cyber-attacks to their systems or to data integrity.[24]

The Proposed Rule also adeptly addresses the considerations discussed by banking regulators with respect to resolvability and transition planning when asset managers are placed under stress. In discussing transition plans generally, the Commission noted that Advisers should prepare for transitions in both normal and stressed market conditions, and generally should consider each type of advisory client, its contractual obligations and the relevant regulatory regimes under which they operate.[25] Advisers exiting the market, commonly: (i) sell the Adviser

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[18] Proposal at 43,540-41. "Factors such as the significance of the service provider to advisory operations, the type of service provided, and the [A]dviser's ability to require or request actions of its service providers will impact the steps that [A]dvisers should consider taking." *Id.* at 43,541.

[19] *Id.* at 43,541.

[20] *Id*. at 43,540-41. Regarding assessment of third party service providers, an Adviser would be required to evaluate such service provider's contingency plan for whether the service provider has its own plan including alternatives, backups and continuation of service. If there is no plan, the Adviser would have to consider how it will continue to provide critical services, including whether another service provider should be engaged or whether internal functions can serve as a contingency. *Id*. at 43,541.

[21] *Id*. at 43,540-41. For example, Advisers would have to consider how (i) entities included in their communications tree would notify and communicate with each other (and with their stakeholders) in the event of a disruption and (ii) information would be made available to key executives concerning the inter-relationships between the Adviser and any affiliated entities, including for example, an affiliated qualified custodian. *Id.* at 43,540-42.

[22] Proposal at 43,541 at n. 91. Important considerations include backup plans, functions and processes. *Id*.

[23] *Id.* at 43,544. Reviews would also include an evaluation of identified weaknesses due to testing or self-assessment. *Id*.

[24] *Id.* at 43,539.

[25] *Id.* at 43,542.

or substantially all of the assets and liabilities of the Adviser (including the existing advisory contracts with its clients) to a new owner; (ii) sell certain business lines or operations to another Adviser; or (iii) orderly liquidate fund clients or terminate separately managed account relationships.[26] Under the Proposed Rule, a Plan would aim for a timely transition of the advisory business, including the prompt delivery of client-specific information (such as the identity of custodians, positions, counterparties, collateral and related records and any special instructions) in the event of a transition.[27] In the Proposal, the Commission recognized that, with respect to the corporate governance structure of the Adviser, senior executives, particularly in times of stress, need to be able to identify internal decision-makers quickly and understand inter-relationships between the advisory and affiliated entities.[28] Accordingly, a Plan would also be expected to include an organizational chart and the Adviser's ownership and management structure including key personnel and affiliates whose dissolution or distress could be material to the Adviser's business operations.[29] The Proposed Rule would also require a Plan to identify material financial resources available to the Adviser, in order to avoid or facilitate a transition when the Adviser itself experiences material financial distress, including consideration of any sources of funding, liquidity and capital.[30] Finally, the Proposed Rule would require an Adviser to assess applicable law and contractual obligations governing the Adviser and its clients and would require a Plan to take into account the product and security types an Adviser manages, jurisdictions of its investments and investors, contractual and legal obligations to its constituents and regulatory regimes.[31]

The "Living Will" is the Wrong Model for Adviser Transition Plans

As discussed above, Advisers differ significantly from bank holding companies, banks, insurance companies and other financial institutions which have been designated by FSOC as Systemically Important Financial Institutions ("SIFIs"). FSR believes that transition planning for Advisers necessarily differs from the "Living Will" approach that applies to SIFIs.[32] Under the Living Will approach, the SIFI must adopt a resolution plan that describes how the SIFI will effectuate a rapid and orderly resolution in the event of material financial distress or failure. The

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[26] *Id.* at 43,541-42. We note that, in regard to situations (i) and (ii), Section 205 of the Advisers Act requires each advisory contract (other than a contract with a registered investment company) to include a provision prohibiting its assignment without the client's consent and that an assignment, for this purpose, includes a change of control of the Adviser or its parent. For contracts with registered investment companies, Section 15(a) of the Investment Company Act of 1940 requires that advisory contracts be approved prior to advisory services commencing.

[27] Proposal at 43,542.

[28] *Id.* at 43,542. The Adviser would need to assess the effect of its exit and the steps required to protect itself from any issues with affiliated entities. *Id.*

[29] *Id.*

[30] *Id.* at 43,543.

[31] *Id.* at 43,542-43. For example, (i) the termination or insolvency of the Adviser could trigger a termination clause in a derivatives contract, (ii) registered investment companies, board and shareholder approval is required with any new Adviser and (iii) Section 205 of the Advisers Act requires that each advisory contract provide that it cannot be assigned by the Adviser without the client's consent. *Id.*; *Id.* at 43,543 at n. 106 and n.107. We note, with respect to (ii) and (iii), that an assignment would include a change of control of the adviser or any of its direct or indirect parent companies.

[32] *See* Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Resolution Plan Assessment Framework and Firm Determinations (2016) (Apr. 13, 2016); *Resolution Plans*, Federal Reserve, https://www.federalreserve.gov/bankinforeg/resolution-plans.htm (June 30, 2016) (last visited July 25, 2016).

Federal Reserve has stated that the goal of the Living Will "is to help ensure that a firm's failure would not have serious adverse effects on financial stability in the United States." Given the different nature of the investment advisory business, we believe that the Proposal appropriately focuses on transition plans' roles in minimizing client impact, rather than systemic impact.

By contrast to most SIFIs who enter into contracts, swaps, etc. on their own account and, thus, expose the counterparties to risk which could, in some circumstances become systemic, there is seldom a counterparty who is exposed to the Adviser's own credit risk. Instead, Advisers invest their client's money and any actions are based on or the result of a client's reversals and not the Adviser's. Moreover, the structure of most advisory arrangements facilitates transition of an advisory relationship from one Adviser to another, in the event an Adviser is unable to continue to provide advisory services[33] or in the event a client no longer wishes for that Adviser to provide it with such services. As such, we believe that the failure of an Adviser or other exit of an Adviser from its business is unlikely to have systemic impact.

With respect to separately managed accounts (including accounts managed for pensions, institutions and individuals as well as the portfolio management function of wrap fee programs), for example, the Adviser is a contracted service provider who is engaged to provide advice, usually on a discretionary basis, with respect to assets held (in nearly all cases) by a custodian who is not the Adviser. Advisers can be, and often are, terminated and replaced by other Advisers in this context in the ordinary course of business as well as in extraordinary circumstances.[34] In our experience and as discussed above, advisory contracts include provisions intended to govern and promote the orderly transition of an account following termination of the Adviser. While it is certainly the case that the loss of the availability of an Adviser may disadvantage a client, especially where the Adviser has, in the client's view particular skill or experience with respect to particular assets or types of assets, there are few if any situations where another Adviser could not step in if the incumbent Adviser became unavailable. Moreover, there are a number of industry participants, including some of our members, who specialize in transition management and are available to assist in "remodeling" an account to accommodate a change in Adviser.

While certain elements of a reasonably designed transition plan happen to coincide with what is expected in a Living Will, we believe that the Commission should not model transition plans on the Living Will approach. In contrast to Living Wills that focus on the orderly wind up of a SIFI's business and obligations with the primary focus to assure there is no "rippling effect" on the markets as a whole, Advisers' transition plans should focus primarily on the orderly transition of client accounts to new Advisers and ensure that the new Adviser is able to assume management expeditiously and with all information necessary to assume its fiduciary obligations.

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[33] As discussed above, an Adviser with discretionary authority or custody over client assets is required to disclose in Item 18 of Form ADV, Part 2A "any financial condition that is reasonably likely to impair [the Adviser's] ability to meet contractual commitments to clients."

[34] Although termination and replacement of an Adviser is less common in the context of pooled investment vehicles, the Proposal notes several circumstances where a seamless transition of management of a pooled vehicle was accomplished, even under significantly disruptive circumstances.

Public Disclosure or Filing of Plans is Contrary to the Public Interest

Prior rulemakings have required disclosure in public filings and to clients of information regarding an Adviser's policies and procedures with respect to such matters as proxy voting and codes of ethics.[35] The Proposal includes several possible approaches to disclosure regarding Plans and seeks comment as to whether, and to what extent, such disclosure should be required. These include: (i) requiring disclosure of a summary of the Plans on the Adviser's Form ADV and/or (ii) requiring that Advisers file their Plans or a summary of their Plans with the Commission. Any of these could result in public availability of material information about an Adviser's Plan which, as discussed below, could have profound adverse consequences. As a result, we recommend that the Commission review Adviser Plans pursuant to its examination authority under the Advisers Act, so that an Adviser can take reasonable steps to protect from public disclosure elements of the Plan that may be proprietary, sensitive or confidential or which might otherwise tend to expose the Adviser (or its service providers and clients) to enhanced risk of disruptive activities.

The Proposed Rule differs substantially from prior rulemakings requiring public disclosure of Adviser policies and procedures such that, policy considerations require a different approach here. In particular, unlike the prior rulemakings where disclosure has been mandated, Plans will inherently include information that is confidential or proprietary to the Adviser and, potentially, will include information about clients and service providers (including identity and private contact information) that should not be disclosed publicly. More troubling, as Plans are intended to describe how an Adviser will react to a disruption, public availability of Plans could aid persons who wish to disrupt an Adviser's business. Therefore, and as discussed in more detail below, we believe that any approach which requires or risks public disclosure of details of a Plan is inconsistent with the purpose of the Proposed Rule to reduce operational and other risks related to significant disruptions to an Adviser's business as well as other Commission rules and provisions of the Advisers Act designed to protect client information from public disclosure.[36]

Plans contain proprietary information about how an Adviser conducts its business and other confidential or sensitive information. Proprietary information that may be in a Plan includes, among other things, a detailed description of the Adviser's internal operations, including contingency planning, primary and back-up data sources and storage locations, the use of particular

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[35] *See* Items 17 and 11 of Form ADV, Part 2A, respectively, which require an adviser to provide a description of its proxy voting policies and procedures and its code of ethics and to explain to clients that the Adviser will provide a copy of the code and the proxy voting policies, as well as additional information about proxy voting matters on request. Rule 206(4)-6, which was enacted prior to the most recent Form ADV revisions, separately requires that an Adviser furnish clients with a copy of the proxy voting policies and information about votes cast on behalf of a client, at the client's request. While the Compliance Program Rule does not require that Advisers provide clients a copy of their Compliance Manual, various items in Form ADV, Part 2A have the effect of requiring Advisers to provide descriptions of certain policies and procedures.

[36] *See e.g.*, Regulation S-P, Advisers Act Section 210(c), Advisers Act Rule 204-2(d). For example, broadly speaking, Regulation S-P imposes on certain SEC-regulated financial institutions (including Advisers) an affirmative and continuing obligation to maintain the confidentiality and protect the security of their consumers' and customers' non-public information. Similarly, Rule 204-2(d) allows Advisers to maintain books or records in "such a manner that the identity of any client to whom such [Adviser] renders investment supervisory services is indicated by numerical or alphabetical code or some similar designation." In addition, under Section 210(c), the Commission shall not have the authority to require an Adviser engaged in rendering investment supervisory services to disclose the identity, investments or affairs of any client of such Adviser, except in limited circumstances, including for purposes of assessment of potential systemic risk.

strategies or platforms related to the execution of trades and the location of sensitive documents and/or servers. Sensitive information such as succession plans and the specialties or functions of particular portfolio managers or traders may be included. Plans likely will describe the use of particular off-site alternate business locations or storage sites and service providers. Plans might also include sensitive information about service providers or clients in connection with, for example, the component of the Proposed Rule requiring a Plan to address communications with clients, employees and service providers in the event of a disruption as well as detailed information about an Adviser's review and assessment of its critical third-party services including the use of particular vendors and evaluations of those vendors' contingency plans. Finally, the transition component of the Plan would include sensitive client information, the material financial resources of the Adviser and the reliance on (or lack of reliance on) a particular affiliate for a service. It may also potentially include information about functional succession of a firm's leadership or critical employees that is not known to all employees of an Adviser and that might be disruptive to an Adviser's ongoing business. Any of these has the potential to harm or disadvantage an Adviser or its clients if a Plan were broadly available. Obviously, a requirement to include this information in Form ADV would allow anyone with internet access to find out this sensitive information. FSR is also concerned that federal and state freedom of information laws would allow broad access to information filed with the Commission or provided to certain types of clients such as state pension plans.

Given the sensitivity of the information contained in Plans that would comply with the Proposed Rule, reaching the correct balance on disclosure is important to encouraging thorough and thoughtful Plans by Advisers while assuring that Advisers are not disadvantaged or placed at risk by such disclosure. We believe that, to the extent that the Commission desires information with respect to an Adviser's Plan, there are alternative means to assure that reasonable information is made available while minimizing the risk of public disclosure. For example, Plans could be obtained and reviewed through the Commission's examination authority without undue risk of public disclosure as the Freedom of Information Act provides a general exception for materials produced in connection with an examination.

Advisers Should Not be Required to Report Incidents Where They Rely on Their Plans

Advisers should have the flexibility to determine whether and how to report incidents to the Commission based on the totality of the circumstances rather than requiring reporting upon "reliance" on the Plan. We believe that "reliance" on a Plan is a difficult standard to define and exposes Advisers to being second-guessed. Some Plans require personnel to report ordinary events associated with the Adviser's business simply for evaluation and review of their ongoing critical services. Many of these events are very minor in nature and can occur in the regular course of business without any disruption to an Adviser's business. For example, technological glitches such as a failure to timely synch with off-site back-up database are common and can usually be repaired without any effect to ongoing service. Similarly, some Plans may require the internal reporting of incidents such as a temporary disruption on a trading platform or a temporary outage of trading systems (such as Bloomberg). Reporting these minor incidents, which do not subject Advisers (as well as clients or investors) to any material risk, would offer little benefit but would create undue burdens on both Advisers and the Commission.

In addition, we believe the timing of such reporting is also crucial. For example, reporting an incident that is in the process of being addressed may reveal confidential information about an Advisers' internal processes and systems, such as information about the service providers being used. Creating a report after the incident has been addressed may provide a more comprehensive understanding of any issues and steps taken to reach a resolution.

Advisers themselves are in the best position to determine whether and when an incident should be reported. In addition, Advisers are best able to determine how such incidents should be reported and should have the ability to take reasonable steps to protect from public disclosure elements of the Plan that may be proprietary, sensitive or confidential. We believe that our approach will encourage reporting of significant incidents and encourage Advisers to adopt robust Plans that allow them to consider and apply the Plan to more minor disruptions or inconveniences without the specter of burdensome reporting obligations.

Advisers Must be Able to Deviate from a Plan in Good Faith Without Fear of Enforcement and Should not be Expected to Anticipate All Possible Business Continuity and Transition Events

Like the Compliance Program Rule, the Proposed Rule would require Advisers to adopt and implement Plans that are "reasonably designed." However, unlike most other facets of an Adviser's Compliance Program, Plans (particularly as related to business continuity) are inherently expected to function in circumstances which, by definition, are "disruptive." While Advisers can, and will be required to consider in advance the types of events that are more likely to occur and the nature of the disruptions that might be associated with those types of events, no Adviser can anticipate all of the events that could possibly occur or all of the disruptions (or manifestations of a disruption) that might result. Additionally, an Adviser's Plan may include methods to deal with an event that, while reasonable in advance, prove insufficient to address an actual disruption. In some cases, well-intentioned and well-designed Plans may, as implemented in the face of a disruption, actually put an Adviser at a disadvantage.[37] Some events may be so disruptive that no Plan would be sufficient. Similarly, many of the types of business continuity and transition events to which an Adviser may be exposed are difficult, if not impossible to anticipate. Requiring Advisers to plan for every business continuity and transition event would force them to expend undue resources in an attempt to predict events that are often times by nature, unpredictable. Advisers should not be liable for failing to account and plan for such remote events. Instead, Advisers should have the flexibility to react in real-time to business continuity and transition events, provided that they have a Plan in place that is reasonably designed to allow them to address such events in good faith and as required by their business model.

[37] For example, an Adviser believes its primary risk to operations is an earthquake or wildfire impacting the area around its main office and reasonably arranges for remote office space in a different fault or fire zone from its main office. But a different type of disruption may impact both the main office and remote site. Or, a disruption may prevent personnel from reasonably accessing either site. Although that Adviser might, in retrospect, have been better off with a remote site that was further away from its main office, its reasonable choice should not be second-guessed with the benefit of hindsight. Moreover, the further a remote site is from the main office, the more difficult it may be for employees to expediently access the remote site if a disruption impacts transportation infrastructure.

The Commission should not view an Adviser's good-faith deviation from a Plan in real-time in the case of an actual disruptive event as a basis for determining the Plan is insufficient to meet the "reasonably designed" standard set forth in the Proposed Rule, nor should such a deviation be viewed as a failure of an Adviser to adhere to its Plan. We urge the Commission to affirmatively state that the Proposed Rule does not impose "strict-liability-like" standards with respect to Advisers' adherence to their Plans. Instead, Advisers must be encouraged to respond to events as they occur, including combinations of technology glitches or transition events that are not anticipated or have impacts that are different than anticipated in the design or prior testing of the Plan. The nature of business continuity and transition planning is such that, even with a robust Plan, it is a virtual certainty that circumstances will arise requiring Advisers to improvise in order to safeguard their clients' interests. As a result, any final rule, or associated guidance, should make clear that an Adviser will not be held liable either for deviating from a Plan or for failing to implement an adequate Plan when deviating in good faith to respond, in its reasonable judgment, to exigent circumstances.

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FSR appreciates the opportunity to submit comments on the Adviser Business Continuity and Transition Plans Proposed Rule and appreciates the Commission's efforts to clarify the existing regulatory framework surrounding Plans. We would welcome additional opportunities to assist the Commission in its efforts regarding the Proposed Rule. If it would be helpful to discuss our specific or general views on the Proposal, please contact Richard Foster at [redacted]; or Felicia Smith at [redacted]. We appreciate your consideration and look forward to working with you on this important matter.

Sincerely yours,

Richard Foster
Senior Vice President and Senior Counsel for Regulatory and Legal Affairs

Financial Services Roundtable

With a copy to:

The Honorable Mary Jo White, Chair
The Honorable Kara M. Stein
The Honorable Michael S. Piwowar