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3



April 24,2003

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: File No. SR-NYSE-2002-35;Business Continuity and Contingency Planning

Dear Mr. Katz:

The Securities Industry Association ("SIA")[1] is pleased to comment on the amendments to the proposal ("Proposal") by the New York Stock Exchange ("NYSE") to adopt Rule 446 (concerning Business Continuity and Contingency Plans).

**As** indicated in our previous comment letter[2], the **SIA** agrees with the **NYSE** that the requirements of a business continuity plan must be tailored to the size and needs of **an** individual member firm, but that each plan must at a minimum address certain elements of continuity. On this basis, the SIA expresses support for this and **a** nearly identical proposal of the NASD.

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[1] The Securities Industry Association brings together the shared interests **of** more than 600 securities firms to accomplish common goals. **SIA** member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. **and** foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In the year 2001, the industry generated **$198** billion in U.S. revenue and $358 billion in global revenues. Securities firms employ approximately 750,000 individuals in the United States. (More infomation about SIA is available on its home page: http://www.sia.com).

[2] Letter to Margaret McFarland, Deputy Secretary, SEC, from Jerry Klawitter, **SIA** Business Continuity Planning Committee, dated September 30,2002.

**Rulemaking Process and Request for Meeting** – The **SIA** is concerned about the apparent lack of coordination and incremental approach to rulemaking in the area of business continuity planning. The original proposals of the **NYSE** and NASD differed only slightly and were published simultaneously in the first round of rulemaking in September. In the latest amended filings, the **NYSE** proposal was noticed for comment after the comment period for the NASD proposal had expired. Moreover, the latest changes reflect an increased willingness on the **part** of both regulators to dictate what a firm's plan ought to include – something that the original **proposals** sought to avoid. **If** the regulators are proposing to dictate what a firm's plan ought to include, that must be further clarified due to the vague terminology now being employed, as stated more specifically below.

We encourage the SEC to promote consistency and flexibility in the area of business continuity planning and would encourage the SEC, NASD **and** NYSE to meet with representatives of the **SIA** Business Continuity Planning Steering Committee at the earliest opportunity to ensure a common purpose in addressing these goals.

The **SIA** applauds the NYSE's attempt to respond to concerns raised by commenters. In a few cases, however, the new language raises fresh questions about the intended scope and meaning of the rule. The letter discusses these questions in turn below:

**Proposed Rule 446(a) and *(c)*** – Requirement to have a plan.

The original proposal stated that a firm should have a plan identifying procedures to be followed ***in the event of*** a significant business disruption. The new language is less instructive and slightly more vague in that **it** requires procedures *relating to* such a disruption.

Of greater concern, however, is the new clause requiring plan procedures to be "reasonably designed to enable" and plan elements to "enable" the member to continue its business in the event of a future significant business disruption. The discussion makes clear that the NYSE's motive is to ensure that firms understand that merely having a plan is not in and of itself the goal of this regulation. Firms agree that the means selected should of course relate to the plan's continuity goals. Nevertheless, firms are concerned that the very broad language of "continue its business'' suggests, at a minimum, an expectation for a level of firm functionality that might not be realistic or contemplated by the firm's plan. Interpreted more broadly, the language suggests a general obligation to continue in business. **As** such, the new language removes the flexibility that the original proposal promised in allowing firms to determine which functions to recover, restore and/or resume under a variety of scenarios. Indeed, fi-om the standpoint of compliance, it is difficult to imagine what criteria a regulator might apply in evaluating whether a member's plan would enable that member to meet an abstract and undefined level of continuity.

The **SIA** believes that language should be revised to require that the procedures *be* reasonably designed to enable a member to meet the continuity goals set forth in ***the member's*** *plan*.

**Proposed Rule 446(c)(7)** – Plan element "Business constituent, bank, and counterparty impact."

The **SIA** had previously **asked** for additional guidance on this element and appreciate the responsiveness of the NYSE in providing for elaboration in the Discussion. The additional guidance clarifying the terms "constituencies," "banks" and "counterparties" is helpful. However, member firms believe that the new discussion language requiring members to provide for "alternative actions or arrangements with respect to their contractual relationships" is somewhat confusing and changes the focus and scope of the required plan element.

The **SIA** understands this plan element to commit the firm to create a process for *assessing* the impact on constituents, banks, and counterparties in the event of **a** significant disruption. **As** such, this plan element is a reasonable requirement. However, requiring the plan to provide for alternative actions or arrangements with respect to all contractual relationships with constituents, banks and counterparties once the results of that assessment are known is not realistic. Moreover, mandating which alternatives must be made is not consistent with the stated goal of the regulation to **allow** firms to make determinations about a plan's individual requirements.

First, by requiring that alternatives be developed and included in a plan, the proposal imposes a drastically different and larger burden on member firms. Given the vast number and types of contractual relationships with business constituents, banks, and counterparties, providing alternatives may be neither useful (i.e., the bank **is** a minor lender whose support is not deemed critical to the firm's continuity); nor meaningful (i.e., counterparty is the "800 pound gorilla in **a** specific market" and cannot be replaced); nor possible (i.e., counterparties include all 60 (approx.) other market makers in the highest volume Nasdaq stock). Second, the new requirement would upset existing contracts, and indeed contract law generally, by imposing on the parties a conditional obligation to undertake an alternative action or arrangement that the parties may not have expressly agreed to in the contract. Third, the new language requiring alternative actions or arrangements presupposes that a firm will perform a duty (i.e., commitment of new capital) when it may have no legal obligation, nor economic incentive for doing so. Fourth, the new language presupposes that all such actions or arrangements are sufficiently critical to even require consideration of alternatives. The fact that the requirement makes no distinctions based on the critical nature of the constituent, bank, or counterparty activity covered by the contract means that many ordinary activities will be given the same status as mission critical system or data back-up in terms of the necessity of alternatives.

The **SIA** recommends removing the sentence suggesting a requirement to provide for alternatives so as not to confuse the **goal** of making assessments with the goal of planning alternatives. Alternatively, the Exchange Information Memo that the NYSE plans to issue could suggest that, in planning a process for assessing the impact of a disruption to critical constituents, the **firm** consider possible alternative actions or arrangements in the event such critical constituents are unavailable. This would ensure that the **plan** element retains its focus on assessment and that the proposal retains its goal of providing the firm with the flexibility to develop alternatives, as it deems appropriate.

**Time Frame for Implementation** - The **SIA** requests that the rule proposal indicate the time required for implementation. We would suggest that this time be 360 days from publication of the **final** rule in the Federal Register. Obviously, the larger the scope of "alternative actions or arrangements" that may be required under Rule 446(c)(7), the more time it will take firms to complete such planning.

We hope that these comments are helpful. Please feel free to contact Art Trager, Vice-president & Managing Director, Technology & Operations (212-618-0546; atrager@sia.com) with any additional questions you may have concerning these matters or to set up a meeting with members of the Business Continuity Planning Steering Committee, as requested earlier in this letter.

Very truly yours,

Jerry W. Klawitter
**SIA** Business Continuity Planning Committee

cc: Richard Grasso, Chairman and CEO, NYSE
Ed Kwalwasser, Group Executive Vice President, **NYSE**
Dennis Covelli, Vice President, Trading Services, **NYSE**
Harry Weber, Director, Floor Services, **NYSE**
Robert L.D. Colby, Deputy Director, Division of Market Regulation, **SEC**
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