The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 30120

August 8, 2016

ICI Draft Comment Letter on SEC Business Continuity and Transition Planning Proposal for Advisers; Comments Due by August 15

[30120]

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TO: ACCOUNTING/TREASURERS COMMITTEE No. 17-16
BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 25-16
BROKER/DEALER ADVISORY COMMITTEE No. 26-16
CHIEF RISK OFFICER COMMITTEE No. 21-16
COMPLIANCE ADVISORY COMMITTEE No. 9-16
INVESTMENT ADVISERS COMMITTEE No. 14-16
OPERATIONS COMMITTEE No. 19-16
SEC RULES COMMITTEE No. 35-16
SECURITIES OPERATIONS ADVISORY COMMITTEE
SMALL FUNDS COMMITTEE No. 21-16
TECHNOLOGY COMMITTEE No. 11-16
TRANSFER AGENT ADVISORY COMMITTEE No. 34-16 RE: ICI DRAFT COMMENT LETTER ON SEC's BUSINESS CONTINUITY AND TRANSITION PLANNING PROPOSAL FOR ADVISERS; COMMENTS DUE BY AUGUST 15

The SEC issued a proposed rule in late June that would require SEC-registered investment advisers ("advisers") to (i) adopt and implement written business continuity and transition plans addressing several components, and (ii) review the adequacy and effectiveness of those plans at least annually. [1] On the same day the SEC issued the proposal, the SEC staff issued guidance addressing business continuity risks for registered fund complexes. [2] See Institute Memorandum No. 30010, dated July 5, 2016, for a more detailed summary of the proposal and Guidance.

ICI's draft letter (attached below) generally supports the proposal. The letter begins by describing the registered fund industry's business continuity planning (BCP) efforts to date. We maintain that industry focus and regulatory oversight have created a sound baseline of BCP practices, and that to a large extent the proposed rule would codify the key components of current industry practices.

With respect to the BCP component of the proposed rule, the letter recognizes that the rule could foster incremental improvement across the industry and supports the BCP-related rule text itself. It also addresses specific points related to the application and interpretation of certain BCP requirements, making the following points:

- Personnel-related considerations should be flexible, and should not subsume succession planning as it is traditionally understood.
- Advisers' means of implementing the pre-arranged alternate physical location requirement will differ, and geographical diversity should be a consideration only.
- Advisers' assessments of vendors' BCPs, and their ability to change vendors, are subject to practical limitations.

With respect to transition planning, the letter considers advisers' experience in managing transitions to date, and concludes that this assessment does not demonstrate a compelling purpose or need for extensive rulemaking in this area, either on client protection or systemic risk grounds. Nevertheless, the letter concedes that it may prove beneficial to require advisers to evaluate the legal and operational implications of transitions in advance and to adopt plans that could facilitate their execution should the need arise. Because the proposed rule's requirements in this area, as we read them, are sensibly drawn, the letter generally supports this component of the rule.

The letter strongly objects to a sentence in the Release that seems to indicate that BCP- or transition planning-related violations (as determined by the SEC) would constitute per se fraud or deceit. We acknowledge that the SEC has prophylactic rulemaking authority under Section 206 of the Advisers Act, but explain why the SEC's statement supporting this rulemaking is vague and legally overbroad. The letter recommends, in the strongest terms, that the SEC clarify in any adopting release that these violations, in and of themselves, do not constitute fraud and deceit.

The letter responds directly to a number of questions that the Release poses and:

- Requests that the SEC convey the proposal's substance through guidance under existing Rule 206(4)-7 (the compliance rule for advisers) rather than adoption of a new rule;
- Supports the SEC's decision to take a principles-based approach to this rulemaking rather than mirror the Dodd-Frank Act's resolution plan or "living will" requirements applicable to certain bank holding companies and other financial companies;
- Supports the SEC's decision to exclude required disclosure to clients about their plans;
- Supports the SEC's decision to exclude requirements to report to the SEC, and disclose to clients, plan "incidents;"
- Supports the SEC's decision to exclude a requirement to file plans with the SEC; and
- Requests confirmation that an adviser may adopt and implement a single plan that satisfies all applicable legal requirements (e.g., for a dually-registered entity, those of the SEC and FINRA).

The letter recommends that the SEC provide at least a one-year period from adoption of any final rule for advisers to comply with the rule.

Finally, the letter voices practical concerns with requiring advisers to maintain all prior iterations of their plans over a five-year period, and offers alternatives that would provide the SEC with a very good sense of how the plans had evolved over that period.

If members have any comments on the draft letter, please contact me at matt.thornton@ici.org or (202) 371-5406 by no later than Monday, August 15 (close of business). The deadline for submitting the comment letter is Tuesday, September 6, but our intention is to file this letter in advance of this date.

Matthew Thornton
Assistant General Counsel

Attachment

endnotes

[1] Adviser Business Continuity and Transition Plans, SEC Release No. IA-4439 (June 28, 2016)(the "Release"), available at www.sec.gov/rules/proposed/2016/ia-4439.pdf.

[2] Business Continuity Planning for Registered Investment Companies, SEC Division of Investment Management Guidance Update (June 2016)("Guidance"), available at www.sec.gov/investment/im-guidance-2016-04.pdf.