

MEMO# 30163

August 23, 2016

ICI Submits Comment Letter on SEC Business Continuity and Transition Planning Proposal for Advisers

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TO: ACCOUNTING/TREASURERS MEMBERS No. 21-16
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SECURITIES OPERATIONS ADVISORY COMMITTEE
SMALL FUNDS MEMBERS No. 36-16
TECHNOLOGY COMMITTEE No. 13-16
TRANSFER AGENT ADVISORY COMMITTEE No. 38-16 RE: ICI SUBMITS COMMENT LETTER ON SEC'S BUSINESS CONTINUITY AND TRANSITION PLANNING PROPOSAL FOR ADVISERS

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.

Today the ICI filed the attached comment letter, which generally supports the SEC's regulatory initiative and the proposed rule text. Notwithstanding this support, the letter strongly recommends that the SEC issue guidance under existing Rule 206(4)-7 (the compliance rule for advisers) rather than adopt a new rule. The letter also strongly objects to a sentence in the Release that seems to indicate that plan-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 final release that these violations, in and of themselves, do not constitute fraud or deceit.

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 this initiative could foster incremental improvement across the industry and supports the substance of BCP-related rule text. It also addresses specific points in the Release 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.
- Inventories of "key documents" should be high-level and focus on identifying locations.
- 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 states that it may prove modestly 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 them.

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

- 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 compliance period from adoption of any final requirements.

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 adequately demonstrate how the plans had evolved over that period.

Dorothy M. Donohue
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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.

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