



NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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Submitted electronically to rule-comments@sec.gov.

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Release No. IA-4439, File No. S7-13-16, Adviser Business Continuity and Transition Plans (June 28, 2016)

Dear Mr. Fields,

The North American Securities Administrators Association, Inc. (“NASAA”)¹ submits this letter in response to Securities and Exchange Commission (“SEC” or “Commission”) Release No. IA-4439, File No. S7-13-16, *Adviser Business Continuity and Transition Plans* (June 28, 2016) (the “Proposal”), proposing rule amendments under the Investment Advisers Act of 1940 (“Advisers Act”) and requesting comments. NASAA supports the Proposal but encourages the Commission to clarify: (i) whether proposed rule 206(4)-4 would create any new legal duties for SEC-registered investment advisers to preserve records or information, and (ii) to what extent a business continuity and transition plan must address advisers’ duties under Rule 30 of SEC Regulation S-P (the “Safeguards Rule”) to safeguard “customer records and information” and to properly dispose of “consumer report information.”

NASAA Supports the Proposal

As reflected in the Proposal, NASAA has adopted a *Model Rule on Business Continuity and Succession Planning*² for state securities administrators that is substantially similar to proposed rule 206(4)-4. NASAA’s model rule contemplated universal applicability to all state-

¹ The oldest international organization devoted to investor protection, NASAA was organized in 1919. NASAA’s membership consists of securities administrators in the 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands, Canada and Mexico. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² *Model Rule on Business Continuity and Succession Planning*, NASAA Model Rule 203(a)-1A or 2002 Rule 411(c)-1A (adopted April 13, 2015), available at <http://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Model-Rule-on-Business-Continuity-and-Succession-Planning-with-gu....pdf>.

registered investment advisers.³ NASAA agrees that proposed SEC rule 206(4)-4 should apply to all SEC-registered advisers. Business continuity and transition planning is a sound business practice, but more importantly it is an important foundation for investor protection. NASAA agrees as well that a new Commission rule is warranted. Although SEC-registered advisers should be conducting business continuity and transition planning in accordance with Advisers Act rule 206(4)-7 (the “Compliance Rule”), the Proposal aptly demonstrates that SEC staff have observed many advisers giving insufficient attention to this issue in their overall compliance policies and procedures. Issuing additional guidance under the Compliance Rule would seem inadequate to impress upon reluctant advisers the importance of undertaking thoughtful, comprehensive business continuity and transition planning.

One difference between NASAA’s model rule and the Proposal is that the text of NASAA’s model rule would explicitly require state-registered advisers to plan for transitions of key personnel whereas the text of proposed rule 206(4)-4 is silent on key personnel. The Proposal makes clear in guidance, though, that advisers should consider key personnel in their business continuity and transition planning. The Proposal thus appears consistent with NASAA’s model rule on this point.⁴

NASAA Recommends the Commission Clarify Whether Rule 206(4)-4 Creates Any New Duties to Preserve Records or Information and Whether an Adviser’s Business Continuity and Transition Plan Must Address an Adviser’s Obligations under the Safeguards Rule.

The SEC adopted the Safeguards Rule in 2000 pursuant to the Gramm-Leach-Bliley Act (“GLBA”) as part of the Commission’s adoption of Regulation S-P.⁵ The SEC amended the Safeguards Rule in 2004⁶ (and considered doing so again in 2008).⁷ The Safeguards Rule exists

³ The NASAA model rule is a model that states may adopt through rulemaking. The NASAA model rule, however, assumes that once it is adopted in a jurisdiction, it applies to all advisers registered (or required to register) in that jurisdiction.

⁴ Typical differences in scale between state-registered advisers and SEC-registered advisers also is consistent with treating key personnel differently under the NASAA model rule versus in the Proposal. State advisers often are sole proprietorships or small businesses with one or just a few owners or employees. In contrast, many SEC-registered advisers are large organizations with complex ownership structures (though it is noteworthy that, according to publicly available data on investment adviser registrants, approximately one-third of SEC-registered advisers have five or fewer employees). (See <https://www.sec.gov/foia/docs/invafoia.htm>.) Thus, while all advisers should anticipate potential changes in key personnel, the nature of an adviser’s preparations on this issue – and the consequent implications for the adviser’s business continuity and transition plan – will vary from one adviser to another.

⁵ *Final Rule: Privacy of Consumer Financial Information (Regulation S-P)*, SEC Release No. 34-42974 (June 22, 2000), available at <https://www.sec.gov/rules/final/34-42974.htm>.

⁶ *Final Rule: Disposal of Consumer Report Information*, SEC Release No. 34-50781 (Dec. 2, 2004), available at <https://www.sec.gov/rules/final/34-50781.htm>.

⁷ *Proposed Rule: Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Personal Information*, SEC Release No. 34-57427 (Mar. 4, 2008), available at <https://www.sec.gov/rules/proposed/2008/34-57427.pdf>.

alongside advisers' general obligations to maintain required books and records under Advisers Act rule 204-2.⁸

The Safeguards Rule requires SEC-registered investment advisers (and other SEC registrants) to adopt written policies and procedures designed to safeguard “customer records and information.”⁹ The definitions in Regulation S-P indicate this encompasses records and information in an adviser’s possession about the adviser’s clients that are natural persons.¹⁰ The Safeguards Rule also requires advisers to properly dispose of “consumer report information” as defined in the rule.¹¹ More generally, rule 204-2 requires advisers to maintain various books and records, including certain client records.¹² The SEC has brought enforcement actions for violations of the Safeguards Rule,¹³ including for failure to safeguard customer information in connection with the winding down of a business,¹⁴ and has brought actions for violations of rule 204-2.¹⁵

The duties imposed by the Safeguards Rule and rule 204-2 exist independently of proposed rule 206(4)-4. It is unclear to NASAA, though, how proposed rule 206(4)-4 would relate to these existing rules.¹⁶

⁸ 17 C.F.R. § 275.204-2.

⁹ See 17 C.F.R. § 248.30(a).

¹⁰ Regulation S-P defines “customer” as “a *consumer* who has a *customer relationship* with you.” 17 C.F.R. § 248.3(j) (emphasis added). A “consumer” is any “individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family, or household purposes, or that individual’s legal representative,” and a “customer relationship” exists with a consumer when “you provide one or more financial products or services to the consumer that are to be used primarily for personal, family, or household purposes.” 17 C.F.R. §§ 248.3(g)(1), (k)(1).

¹¹ See 17 C.F.R. § 248.30(b).

¹² See 17 C.F.R. § 275.204-2.

¹³ E.g., SEC Press Release 2016-112, *Morgan Stanley Failed to Safeguard Customer Data* (June 8, 2016), available at <https://www.sec.gov/news/pressrelease/2016-112.html>; *In re Craig Scott Capital, LLC, et al.*, SEC Release No. 34-77595 (Apr. 12, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-77595.pdf>; SEC Press Release 2015-202, *SEC Charges Investment Adviser with Failing to Adopt Proper Cybersecurity Policies and Procedures Prior to Breach*, (Sept. 22, 2015), available at <https://www.sec.gov/news/pressrelease/2015-202.html>.

¹⁴ See SEC Press Release 2011-86, *SEC Charges Brokerage Executives with Failing to Protect Confidential Customer Information* (Apr. 7, 2011), available at <https://www.sec.gov/news/press/2011/2011-86.htm>.

¹⁵ E.g., *In re New Line Capital, LLC, and David A. Nagler*, SEC Release No. IA-4017 (Feb. 4, 2015), available at <https://www.sec.gov/litigation/admin/2015/ia-4017.pdf>.

¹⁶ States have enacted numerous privacy statutes and rules that protect personal and financial information. See, e.g., California Financial Information Privacy Act of 2003, CAL. FIN. CODE § 4050 *et seq.*; Privacy of Consumer Financial and Health Information, FLA. ADMIN. CODE § 690-128 *et seq.* State-registered investment advisers are also subject to privacy obligations pursuant to Section 505(a)(7) of the GLBA. NASAA’s *Model Rule on Business Continuity and Succession Planning* similarly requires that business continuity and transition plans must provide for the “protection, backup, and recovery of books and records.”

Proposed rule 206(4)-4 states that a business continuity and transition plan must (among other things) provide for “the protection, backup, and recovery of data, including *client records*,”¹⁷ and, in the event of a business transition, “facilitat[e] the prompt generation of any *client-specific* information necessary to transition each client account”¹⁸ (emphasis added). The Proposal does not define the precise scope of “client” and does not specify whether the scope of documents and information an adviser must address in its business continuity and transition plan is or is not co-extensive with the scope of documents and information advisers are currently required to preserve under rule 204-2 and the Safeguards Rule.

NASAA thus encourages the Commission to clarify in the Proposal how rule 206(4)-4 would relate to rule 204-2 and the Safeguards Rule, including: (i) whether rule 206(4)-4 creates any new duties to preserve documents or information,¹⁹ and (ii) to what extent a business continuity and transition plan must address an adviser’s duties to safeguard “customer records and information” and to properly dispose of “consumer report information” under the Safeguards Rule.

If you have any questions regarding the comments in this letter, please do not hesitate to contact A. Valerie Mirko, NASAA’s General Counsel, at vm@nasaa.org or 202-737-0900.

Sincerely,



Mike Rothman
NASAA President
Minnesota Commissioner of Commerce

¹⁷ Proposed rule 206(4)-4, subparagraph (b)(2)(i).

¹⁸ Proposed rule 206(4)-4, subparagraph (b)(2)(v)(B).

¹⁹ It is clear that the Proposal would create new obligations through amendments to rule 204-2 for advisers to maintain copies of their business continuity and transition plans and records of their annual reviews of their plans.