

KD Law Alert: SEC Proposes Rule Requiring Business Continuity and Transition Plans for Advisers

On Tuesday, June 28, 2016, the Securities and Exchange Commission ("SEC") proposed a new rule that would require registered investment advisers to adopt and implement written business continuity and transition plans.

While the rule was proposed two days ago, the concept of business continuity plans and transition planning (or, succession planning) has been a focus of regulators for some time. In fact, pursuant to SEC Rule 206(4)-7, under the Investment Adviser's Act of 1940, advisers have been required to adopt and implement written policies and procedures addressing business continuity plans since 2003. In 2015, the North American Securities Administrators Association ("NASAA") adopted a Model Rule requiring advisers to establish, implement, and maintain written procedures relating to a business continuity and succession plan. This Model Rule has begun to be adopted and enforced by individual states. The SEC's proposed rule is actually the culmination of years of planning by the regulator.

According to the SEC, the proposed rule is tailored to ensure that investment advisers have plans in place to address operational and other risks related to a significant disruption in the adviser's operations in order to minimize client and investor harm. Business continuity and transition plans are intended to assist advisers in preserving the continuity of advisory services in the event of business disruptions – whether temporary or permanent – such as a natural disaster, cyber-attack, technology failures, the departure of key personnel, and similar events.

The proposed rule would require an adviser's plan to be based upon the particular risks associated with the adviser's operations and include policies and procedures addressing the following specified components:

- 1) Maintenance of systems and protection of data;
- 2) Pre-arranged alternative physical locations;
- 3) Communication plans;
- 4) Review of third-party service providers; and
- 5) Plan of transition in the event the adviser is winding down or is unable to continue providing advisory services.

The plans would be required to address these elements that are critical to minimizing and preparing for material service disruptions, but the rule is intended to permit advisers to tailor the detail of their plans based upon the complexity of their business operations and the risks attendant to their particular business models and activities.

The proposed rule and rule amendments also would require advisers to review the adequacy and effectiveness of their plans at least annually and to retain certain related records for a period of not less than five years.

In addition to the proposed rule, SEC staff issued related guidance addressing business continuity planning for registered investment companies, including the oversight of the operational capabilities of key fund service providers.

The proposed rule will be published in the Federal Register in the coming days and the comment period will be 60 days from the date the proposed rule is published.

Please contact Stefan R. Dandelles, Esq. or Brendan P. McGarry, Esq. of KD's Chicago Office with any questions.