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**Business Not As Usual:
Practical and Regulatory
Responses to COVID-19 for the
US Financial Services Industry**

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Business Not As Usual: Practical and Regulatory Responses to COVID-19 for the US Financial Services Industry

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Introduction

The worldwide spread of “coronavirus disease 2019” (COVID-19) has created unusual challenges for all businesses, including financial services businesses. This article focuses on the impact of the COVID-19 outbreak on financial firms operating in the United States, with a particular focus on business continuity plan (BCP) requirements and relevant issuances from regulators.

For further information and guidance around COVID-19, the Centers for Disease Control and Prevention (CDC) and the World Health Organization (WHO) maintain robust websites of relevant information, which are being updated on an ongoing basis.¹

Business Continuity Requirements

Currently, most financial services companies operating in the United States are subject to requirements that they have comprehensive BCPs in place. These obligations are generally summarized in the comparison table below and stem from a variety of sources, including the National Futures Association (NFA), the Financial Industry Regulatory Authority (FINRA), the Commodity Futures Trading Commission (CFTC), and the Securities and Exchange Commission (SEC).

¹ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/index.html>; World Health Organization, *Coronavirus disease (COVID-19) outbreak*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

	NFA (Rule 2-38; Interpretative Notice No. 9052)	FINRA (Rule 4370)	CFTC (17 C.F.R. § 23.603)	SEC (17 C.F.R. § 270.38a-1; Inv. Mgmt. Guidance Update No. 2016-04)
Covered entities	NFA Members (i.e., futures commission merchants (FCMS), introducing brokers (IBs), commodity pool operators (CPOs), commodity trading advisors (CTAs) and forex dealers)	FINRA Members (i.e., securities broker-dealer firms)	Swap dealers (SDs) and major swap participants (MSPs)	Registered investment companies and business development companies ²
Essential contents (as applicable)³	<p>(1) Establishing back-up facilities, systems, and personnel that are located in one or more reasonably separate geographic areas from the Member's primary facilities, systems, and personnel (e.g., primary and back-up facilities should be located in different power grids and different telecommunication vendors should be used), which may include arrangements for the temporary use of facilities, systems, and personnel provided by third parties;</p> <p>(2) Backing up or copying essential documents and data (e.g., general ledger) on a periodic basis and storing</p>	<p>(1) Data back-up and recovery (hard copy and electronic);</p> <p>(2) All mission critical systems;</p> <p>(3) Financial and operational assessments;</p> <p>(4) Alternate communications between customers and the member;</p> <p>(5) Alternate communications between the member and its employees;</p> <p>(6) Alternate physical location of employees;</p> <p>(7) Critical business constituent, bank, and</p>	<p>(1) Identification of (a) documents, data, facilities, infrastructure, personnel and competencies essential to operations and obligations of the firm; (b) supervisory personnel responsible for implementing the BCP and emergency contacts; and (c) potential interruptions at third parties that are necessary to the operations of the firm and a plan to minimize the impact of such disruptions;</p> <p>(2) Communication plan for the following persons in the event of a disruption: counterparties; swap data repositories; execution facilities; trading facilities; clearing facilities; regulatory authorities; data, communications and infrastructure providers and other vendors; disaster recovery specialists and others essential</p>	<p>(1) Covering the facilities, technology/systems, employees, and activities conducted by the adviser and any affiliated entities, as well as dependencies on critical services provided by other third-party service providers;</p> <p>(2) Including a broad cross-section of employees from key functional areas at the fund complex typically including, but not limited to, senior management (including officers of the fund), technology, information security, operations, human resources, communications, legal, compliance, and risk management to assist in efforts to ensure continuity</p>

² Note that, in 2016, the SEC proposed BCP requirements for investment advisers, but such requirements have not been implemented to date. See Press Release, SEC, *SEC Proposes Rule Requiring Investment Advisers to Adopt Business Continuity and Transition Plans* (June 28, 2016), <https://www.sec.gov/news/pressrelease/2016-133.html>.

³ The SEC guidance does not contain minimum requirements, but rather presents the material included here as “notable practices” of fund businesses.

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Essential contents (as applicable) (cont.)	<p>the information off-site in either hard-copy or electronic format;</p> <p>(3) Considering the impact of business interruptions encountered by third parties and identifying ways to minimize that impact; and</p> <p>(4) Developing a communication plan to contact essential parties such as employees, customers, carrying brokers, vendors and disaster recovery specialists.</p>	<p>counter-party impact;</p> <p>(8) Regulatory reporting;</p> <p>(9) Communications with regulators; and</p> <p>(10) How the member will assure customers' prompt access to their funds and securities in the event that the member determines that it is unable to continue its business.</p>	<p>to recovery of documentation / data, resumption of operations, and compliance with Commodity Exchange Act and CFTC rules;</p> <p>(3) Procedures for back-up facilities, infrastructure, staffing and other resources for the recovery of data / documentation and to resume operations as soon as reasonably possible (ordinarily, by the next business day);</p> <p>(4) Maintenance of back-up facilities, infrastructure and staffing arrangements in areas geographically separate from the firm's primary facilities, infrastructure and personnel (including contractual arrangements for use of facilities and infrastructure of third parties); and</p> <p>(5) Back-up or copying, with sufficient frequency and off-site storage, of documents / data essential to the operations and regulatory obligations of the firm.</p>	<p>and resiliency when events occur; and</p> <p>(3) With respect to critical service providers: (i) understanding their backup processes and contingency plans, and how they interact with the BCP; (ii) understanding how the providers monitor, detect and respond to security incidents, as well as having communication protocols to implement if needed; (iii) addressing how the BCPs of key providers might interact with each other and with the fund's BCP; and (iv) contemplating how a service provider disruption might impact fund business under various scenarios.</p>
BCP Review required?	Yes – periodically	Yes – annually	Yes – annually	Yes – at a minimum annually
Key contacts	Each FCM, SD, MSP and forex dealer must provide NFA with names and contact information for all key management employees (as identified by NFA) and the	Member must report to FINRA prescribed emergency contact information for the member, including designation of two associated persons as emergency	Each SD and MSP shall provide to the CFTC the name and contact information of two employees who the CFTC can contact in the event of an emergency or	Funds must designate Chief Compliance Officers (CCOs), and these individuals' contact information is regularly reported to the SEC and can presumably be used by the

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	<p>addresses for its primary and alternate disaster recovery sites. Each IB, CPO and CTA must provide NFA with an individual who NFA can contact in the event of an emergency (with an additional backup contact if member has more than one principal). Emergency contact persons must be authorized to make key decisions in the event of an emergency.</p>	<p>contact persons. At least one emergency contact person shall be a member of senior management and a registered principal of the member. A member with only one associated person shall designate as a second emergency contact person an individual, either registered with another firm or nonregistered, who has knowledge of the member's business operations.</p>	<p>other disruption. The individuals identified shall be authorized to make key decisions on behalf of the SD or MSP and have knowledge of the firm's BCP.</p>	<p>SEC in case of emergency.</p>

COVID-19 — Specific Guidance from Regulators

Multiple regulators have issued informational guidance and/or specific regulatory relief in response to the COVID-19 outbreak. These releases are discussed herein.⁴

More generally, to the extent there may be regulatory compliance challenges, firms are advised to discuss them in advance with relevant regulators and seek relief, if possible; in all cases, ensure that all regulatory breaches or difficulties meeting regulatory standards are documented with as much specificity as possible.

Note that, although neither the SEC nor the CFTC have issued any written guidance for brokerage firm registrants (i.e., broker-dealers or futures commission merchants), the SEC has provided conditional regulatory relief for certain publicly traded companies' filing obligations and specific relief for certain in-person voting requirements for investment funds.⁵

NFA

On March 4, 2020, NFA issued a Notice to Members⁶ reflecting its understanding that, in developing contingency plans to deal with the impact of COVID-19, members may have “specific concerns” regarding their ability to comply fully with all CFTC and NFA requirements, particularly if some or all of their staff are unable to work from their offices or the firm’s backup locations. According to the Notice, NFA and CFTC staff “intend to take a practical approach that will give [m]embers appropriate flexibility in implementing contingency plans needed to continue to conduct business” if regulatory relief is required. However, NFA encourages members to review their BCPs to ensure they address situations like COVID-19 and contain up-to-date information (e.g., current key persons and contact information). NFA also recommends that members consider providing employees with new or updated training on working from remote locations.

⁴ The focus herein is on US regulators. Note that the UK Financial Conduct Authority (FCA) also issued a Statement reconfirming its expectation that all firms have contingency plans to handle major events. The FCA indicated it expects firms “to take all reasonable steps” to ensure they meet their regulatory requirements, including, for example, maintaining the capability to enter orders and transactions into appropriate systems, recording conversations when trading, and providing staff compliance support when required. FCA, Statement on Covid-19 (coronavirus) (Mar. 4, 2020), <https://www.fca.org.uk/news/statements/covid-19-coronavirus>.

⁵ Specifically, publicly traded companies required to file certain disclosure reports from March 1 through April 30, 2020, may have an additional 45 days to file such reports, provided they give the SEC a summary of why such relief is required. The SEC also advised companies to consider their disclosure obligations under federal securities laws should they become aware of some risk to their business because of COVID-19. *Order Granting Exemptions from Specified Provisions of the Exchange Act and Certain Rules Thereunder*, Exchange Act Release No. 34-88318 (Mar. 4, 2020), <https://www.sec.gov/rules/other/2020/34-88318.pdf>. The SEC’s Division of Investment Management separately indicated it would recommend no enforcement action against an investment fund board that did not comply with certain in-person voting requirements from March 4 through at least June 15, 2020, in case of “unforeseen or emergency circumstances affecting some or all of the directors.” The SEC indicated it might be open to extend its no-action position to a later date “as circumstances warrant.” SEC, *Division of Investment Management Staff Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19)* (Mar. 4, 2020), <https://www.sec.gov/investment/staff-statement-im-covid-19>.

⁶ NFA, Information on Coronavirus/COVID-19, Notice I-20-10 (Mar. 4, 2020), <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5208>.

FINRA

On March 9, 2020, FINRA issued a Regulatory Notice⁷ containing updated pandemic-related guidance and regulatory relief for its members. The Notice encourages members to review their BCPs and contact their FINRA Risk Monitoring Analysts to discuss implementing those BCPs, in addition to any other disruptions or business issues they have. The Notice provides a range of specific regulatory relief in various areas, including with respect to supervision and oversight of associated persons working in remote offices or via telework arrangements, suspension of Form U4 requirements for temporary relocations of registered persons or Form BR for new temporary office locations, and certain extensions or late-fee waivers in connection with filings or qualifications. FINRA stated that it understands that members may require additional time to respond to open inquiries or investigations and to make upcoming filings, and members should contact FINRA staff to seek extensions where needed. The Notice further provides for a process by which a member can notify FINRA of an emergency relocation of any of its offices, and details expectations around notices to customers in the case of service disruptions.

Employment Law and Other Legal Considerations

Companies face the challenge of protecting the health of their workforce while also meeting the needs of their businesses. Employers face a general duty, as imposed by the Occupational Safety and Health Administration (OSHA), to provide work environments “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”⁸ To that end, employers must follow public health recommendations while also complying with federal and state workplace laws and (hopefully) remaining operational.

Below are some practical considerations related to employment law matters that may be implicated by the COVID-19 outbreak:⁹

- Identify and contain (as best as possible) potential risks for workplace exposure to COVID-19. Perform reasonable workplace sanitation and cleaning measures, and encourage employees to engage in behaviors that reduce risk of transmission (e.g., proper hand washing).
- Establish and/or test emergency communication systems for employees and key business partners/customers, as well as a plan for potential disruptions and employee absenteeism. Engage with state and local health officials to confirm communication channels and understand how crucial information will be disseminated.
- Implement reasonable business travel protocols, which may include restricting nonessential business travel and requiring a telecommuting period for employees who have visited high-risk areas.

⁷ FINRA, *Pandemic-Related Business Continuity Planning, Guidance and Regulatory Relief*, Reg. Notice 20-08 (Mar. 9, 2020), <https://www.finra.org/rules-guidance/notices/20-08>.

⁸ OSHA, *COVID-19: Standards*, <https://www.osha.gov/SLTC/covid-19/standards.html> (citing 29 U.S.C. § 654(a)(1)).

⁹ See CDC, *Interim Guidance for Businesses and Employers* (Feb. 26, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html.

- Encourage sick employees to stay home, and explore telework policies and other means by which to separate employees from each other to reduce risk of transmission.
- Understand obligations to provide reasonable accommodation for disability and family/individual sick leave, while also respecting medical privacy.
- Understand wage payment obligations to employees who do not or cannot report to work.
- Be cognizant of preventing unlawful discrimination in the workplace by not making determinations of risk based on race or ethnicity.

Knowledge of COVID-19 and its impact on the community is quickly evolving day by day, so the best practice that any firm can follow is to closely monitor communications from government sources—particularly the CDC and OSHA—for additional guidance and information.

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