

ensure that the business continuity plan continues to operate effectively as a whole notwithstanding any operational or business changes that may have occurred in a defined business area or department.

- *Senior Management Approval*

Proposed NASD Rule 3510(d) requires that “[m]embers must designate a member of senior management to approve the plan and he or she shall be responsible for conducting the required annual review.” One commenter requested clarification of whether the member of senior management would actually be required to conduct the review or whether he or she must only ensure that the review was completed.¹⁷ The NASD believes that it is the responsibility of the designated member of senior management to ensure an adequate, (at least) annual, firm-level review of the member’s business continuity plan. This would not require the member of senior management to personally conduct all aspects of the review; however, he or she would be required to review the final plan, including any proposed changes to the existing plan, and have a reasonable basis on which to believe that any persons delegated to conduct the more detailed parts of the review had the appropriate levels of knowledge in their assigned areas.

- *Business Constituent, Bank, and Counter-Party Impact*

The proposal would require a member’s business continuity plan to address “business constituent, bank, and counter-party impact.” In addressing this category, the NASD stated that firms should have procedures that assess the impact that a significant business disruption has on business constituents (businesses with which a member firm has an ongoing commercial relationship in support of the member’s operating activities), banks (lenders), and counter-parties (such as other broker-dealers or institutional customers). In addition, the NASD stated that members should provide for alternative actions or arrangements with respect to their contractual relationships with business constituents, banks, and counter-parties upon the occurrence of a material business disruption to either party.

The commenters expressed concern over this provision. Commenters contended that the requirement to provide for alternative actions or arrangements would place an undue burden on members, might upset existing contracts, and presupposes that all such actions or arrangement are

sufficiently critical to require consideration of alternatives.¹⁸ Another commenter suggested that the term “business constituent” should be limited to customer relationships.¹⁹

The NASD disagrees with the commenters that the provision is unduly burdensome or that it might upset existing contracts. The provision would require only that a firm consider and include in its plan alternative steps that the firm would take in the event that a member’s critical business constituents, bank, or counter-parties were inaccessible. The rule would not mandate that a member enter into supplemental contracts or conditional agreements. For example, if a member were to determine that a telecommunications company is a critical business constituent, the member would then be required to create procedures or actions to follow in the event that this business constituent was unavailable. Alternatively, the member could enter into a supplemental agreement with another telecommunications service to provide back-up services. The rule permits each member to adopt an approach in dealing with its business constituents, banks, and counter-parties that is best suited to the member’s particular operations, structure, business, and location. It would require a member only to assess the effect of a significant business disruption on its business constituents, banks, and counter-parties and decide appropriate actions if faced with any such situation.

The NASD, however, recognizes that certain business constituent, banking, and counter-party relationships might not be critical to a firm’s business or operations. The NASD, therefore, is amending the category of “business constituent, bank, and counter-party impact” in proposed NASD Rule 3510(c)(6) to read, “[c]ritical business constituents, banks, and counter-parties.” Members would be responsible for identifying those relationships that they deem critical for purposes of complying with the rule; the NASD, however, would consider, based on its experience in working with the rule following its adoption, whether to enumerate specific relationships that it views as critical to all members.

- *Disclosure Provision*

Following discussions with Commission staff and NYSE staff, the NASD also is amending the proposed rule text to require each member to disclose to its customers how its business continuity plan addresses the

possibility of a future significant business disruption and how the member plans to respond to events of varying scope. Furthermore, such disclosure would be required, at a minimum, to be made in writing to customers at account opening, posted on the member’s Internet Web site (if the member maintains a Web site), and mailed to customers upon request. The NASD believes that this requirement would enable investors to make an educated decision about whether to place their funds and securities at the specific member based on the firm’s business continuity planning and also would deter members from creating plans that do not adequately address contingency planning. The NASD, however, notes that members would not be required to disclose their actual plans; rather, each member would be required only to create a summary of how its plan addresses the possibility of significant business disruptions and disclose the member’s general planned responses to significant business disruptions. Members would not need to disclose such factors as: the specific location of any back-up facilities; any proprietary information contained in the plan; or the parties with whom the member has back-up arrangements. Members, however, would need to disclose the existence of back-up facilities and arrangements.

- *Technical Amendment*

Two commenters questioned a technical amendment made by the NASD to the proposed rule text. Originally, proposed NASD Rule 3510(a) would have required that a member have a plan identifying procedures “to be followed in the event of an emergency or significant business disruption.” In Amendment No. 3, the NASD changed “to be followed in the event of an emergency or significant business disruption” to “relating to an emergency or significant business disruption.” The commenters believed that this new language is less clear than the language originally proposed.²⁰ This technical amendment, however, intends only to reflect that a plan might include more than a list of procedures to be followed by the member in the event of a significant business disruption. For example, a plan may reference an existing arrangement with another entity that permits the entity to perform services for the member in the event of a future business disruption. While this arrangement is not necessarily a procedure to be followed by the member in the event of a significant business disruption, it does reflect the member’s

¹⁷ See Edward Jones Letter.

¹⁸ See SIA/BMA Letter; A.G. Edwards Letter.

¹⁹ See Edward Jones Letter.

²⁰ See A.G. Edwards Letter; SIA/BMA Letter.