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August 11, 2015

Via e-mail to: rule-comments@sec.gov

US Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0213
Attention: Brent Fields, Secretary

Re: Amendments to Form ADV and Investment Advisers Act Rules
(Reference: File Number S7-09-15)

Ladies and Gentlemen:

We are responding to the invitation of the Commission for comments to proposed amendments to Form ADV pursuant to Release No. IA-4091 (May 20, 2015). The principal thrust of these amendments is the collection of new industry data, and we recognize the importance of that initiative to the Commission's goals and purposes. While we defer to the Commission and industry participants on the scope and detail of the initiative, we offer a number of comments, both technical and substantive, for the Commission's consideration.

As background to our interest in these matters, Shearman & Sterling LLP is a global law firm with offices in numerous financial centers worldwide. The firm's clients include a wide variety of U.S. and non-U.S. financial institutions and financial market participants, including investment advisers, sponsors of hedge, private equity and venture capital funds, family offices and institutional investors. Our investor clients access the markets through self-directed investment portfolios, professional investment advisers and/or private funds and other pooled vehicles.

Proposed Amendments to Form ADV: Information Regarding Separately Managed Accounts

Public Availability of Data Collected. Separate account data proposed to be reported on Form ADV will, we believe, be viewed by investment advisers and their clients as highly sensitive. Among other concerns, we expect investment advisers and their clients will view the structure of the proposed reports as providing for sufficient detail and line-by-line categorization that the data might be readily "reverse engineered" and linked to one or a small number of clients. Assuming public availability of the identity of an investment adviser's clients (e.g., from media reports, state or local government reports, etc.), anonymity of actual client account information could then be at risk; observers will rush – rightly or wrongly – to associate the new Form ADV information with individually identifiable clients. Given those risks, we strongly believe that the proposed separate account data should be collected by the Commission in a format that assures it remains non-public. This would accord with the precedent already in place for private fund data collected by the Commission on Form PF.

We also observe as a practical matter that there may be restrictions on disclosures of client information under an investment adviser's agreements with its separate account clients. Reporting on a confidential, as opposed to public, basis reduces the likelihood that contractual restrictions will apply. Finally, and as a separate but related point, the more that information can be said to be reported on a truly anonymized /aggregated basis, the less likely it is that a specific contractual restriction will apply. This favors a fresh review of the proposed reporting formats to minimize outcomes in which a given line item is identified as relating to one or a small number of accounts.

Frequency of Reporting. The Commission requests comment on whether updated information about an adviser's separately managed accounts should be triggered by an "other than annual" Form ADV amendment. It is our experience that most advisers find it necessary or desirable to file non-ordinary course (i.e., intra-year) updates from time to time, but that in many cases whether such a filing is required is a judgment call. Naturally, each additional requirement that might attach to an update is a practical disincentive that could reduce the likelihood that a filing is ultimately made. We encourage consideration of the prospect of any non-annual triggering requirement in that light and suggest that the Commission continue, as proposed, to require advisers to file separate account reporting information on a solely annual basis.

Non-U.S. Managers and Non-U.S. Clients. We presume that it is intended by the Commission that a non-U.S. adviser would, in the normal course, not be required to include non-U.S. client data in the proposed separate account reporting. This is not entirely clear from the proposal, however, and we respectfully suggest the Commission make that explicit. Doing so would accord with the carve-out from Form PF reporting of many non-U.S. funds managed by non-U.S. advisers, as well as long-standing precedent more generally that most of the substantive provisions of the Investment Advisers Act do not apply to non-U.S. clients of a non-U.S. adviser.

Other Proposed Amendments to Form ADV

Third-Party Chief Compliance Officers (Item 1.J. of Form ADV). The Commission proposes that an investment adviser identify whether it retains a non-employee to serve as the firm's chief compliance officer (CCO). While disclosure can be innocuous, in this instance, we presume the practical effect of that requirement is that such a hire will be subject to additional scrutiny, whether by the Commission staff, the public, advisory clients or the adviser firm itself. It is our experience, however, that for some advisers employing a third-party CCO is the best course of action and one that does more to mitigate risk than an internal hire. In our view, that appropriately commercial judgment should not be discouraged without careful regulatory consideration.

PCAOB Registration Numbers for Surprise Security Count Audit Firms (Section 9.C. of Schedule D). The Commission proposes that an investment adviser list Public Company Accounting Oversight Board (PCAOB) registration numbers for auditors retained to perform surprise security counts under the Investment Advisers Act custody rule. Given that PCAOB registration is not an eligibility requirement to perform these security counts, the proposed disclosure of PCAOB registration numbers could be misunderstood. Investment advisers and the public could take it to imply that registration is required (or preferred) by the Commission. To avoid that confusion, we respectfully suggest it be made clear during the course of the rulemaking and in the related Form ADV instructions that PCAOB registration is not required for an auditor to perform Investment Advisers Act surprise security counts.

Proposed Amendments to Form ADV: Umbrella Registration

"Umbrella registrations" for investment advisers are in wide use by our clients, and we view them as generally beneficial for the reasons suggested by the proposal. They offer administrative efficiency to both firms and the Commission and typically deliver a clearer picture of the business than the alternative, which would be a patchwork of separately filed forms. We welcome the Commission's efforts to improve ease of use of Form ADV for umbrella registrations and encourage the Commission to consider expanding their availability in two instances specific to non-U.S. advisers. We also offer a technical suggestion on the proposed content for these filings.

Non-U.S. Adviser Umbrella Registrations. With respect to a business that has one or more U.S.-based relying advisers, we agree the filing adviser should have its principal office and place of business in the United States. This condition operates (as the proposal says and appropriately in our view) to prevent a group of related advisers based inside and outside of the U.S. from designating a non-U.S. adviser as their filing adviser and then asserting that the Investment Advisers Act's substantive provisions may not apply to the U.S.-based relying advisers' dealings with their non-U.S. clients.

That potential for what might be called "jurisdictional arbitrage" is not present, however, when all of the advisers in an organization are based outside the United States. In that case, the scope and application of the Investment Advisers Act is the same regardless of which entity is a filing adviser versus a relying adviser. Presuming "jurisdictional arbitrage" is the primary reason the Commission proposes not to permit umbrella registrations when the filing adviser is a non-U.S. firm, and given the acknowledged benefits of umbrella registrations, we therefore respectfully suggest the Commission refine its position. For an organization where all of the advisers involved have their principal office and place of business outside the United States, we believe umbrella registration should be an option.

Exempt Reporting Adviser Umbrella Registrations. It is proposed that exempt reporting advisers will not be able to file under umbrella registrations. Since it is our experience that there is strong interest on the part of exempt reporting advisers in a version of umbrella registration that would be appropriate to them, we encourage the Commission to further consider whether this is appropriate and desirable. If ultimately not the case, we encourage the Commission to articulate why not, as we believe this is not well understood by the industry. To assist the Commission in its review, we offer views on several potential concerns that might be raised.

First, to the extent that the decision to exclude exempt reporting advisers from umbrella registrations simply represents a judgment that this is a "registration" and therefore inappropriate for advisers that are facially exempt from registration, we urge the Commission to consider whether a version of umbrella registration could be made available to address this concern. The current treatment of exempt reporting advisers, which file a Form ADV but are clearly identified on the IARD click-through pages as not registered, is a clear starting point.

Second, to the extent the issue might be raised that exempt reporting advisers cannot satisfy the proposed condition of umbrella registration that cross-references to the compliance program and code of ethics rules under the Investment Advisers Act, we suggest this is a technical failing. We acknowledge that exempt reporting advisers (because they are not subject to the relevant regulations) would not have these precise procedures. But it is our experience that exempt

reporting advisers typically maintain analogs to these procedures. They would meet a more broadly phrased condition that simply required a unified compliance program and code of ethics.

Finally, and more substantively, to the extent that the proposed prohibition reflects a concern that operating multiple exempt reporting advisers side by side presents the possibility of abuse of the terms of the relevant exemptions (as was illustrated, for example, in the Commission's *TL Ventures* settlement), we suggest reconsideration in the case of non-U.S. advisory organizations. Differences in the operation of the private fund adviser exemption as between U.S. and non-U.S. firms will illustrate this, as follows:

- Let us first look to two U.S. exempt reporting adviser firms, which are operationally integrated and thus find it desirable to seek a form of umbrella registration. As a result of their operational integration, they count their collective assets and activities when assessing eligibility for exempt private fund adviser status and could, in many cases, be at risk of ineligibility. Ineligibility could arise as a result of (a) one or the other of the firms serving clients other than private funds or (b) aggregate private fund assets under management across the two firms exceeding the maximum permitted amount.

- Let us next look to two similarly situated non-U.S. exempt reporting adviser firms. For these firms, the risk of ineligibility as a result of aggregation is much reduced. This is because (a) both firms are free to serve non-U.S. clients of all types (i.e., not just private funds) and (b) assuming U.S. contacts are limited to U.S. investors in pooled vehicles managed from a place of business outside the United States, then a non-U.S. adviser and its affiliates will qualify for the terms of the private fund adviser exemption regardless of the scale of their assets under management (in that private funds assets are counted towards the maximum only if managed from a U.S. place of business).

It is this significantly reduced risk of ineligibility as a result of aggregation that we encourage the Commission to consider. The practical effect is that among non-U.S. advisers there is both limited risk of abuse and a much larger population of firms that will potentially benefit from a form of exempt reporting adviser umbrella registration.

Proposed Requirement for Multiple Schedules A and B. It is proposed that firms that proceed under an umbrella registration complete a separate Schedule A and Schedule B for each relying adviser. While that mimics the treatment of a fully registered adviser, in our experience there can be an unexpected and potentially concerning outcome, as follows. Many relying advisers are special purpose general partner or similar entities formed for the management of a single private fund. It is common industry practice for employees of the advisory business who manage the private fund to own a portion of these entities as a mechanism to share in the "carried interest" or incentive compensation payable by the fund and generally not with the intent that the employee will exercise other, non-economic aspects of the ownership interest. Ownership of such a special purpose entity is thus principally a form of employee compensation or employee benefit, and required disclosure of that ownership as proposed is thus akin to required disclosure of individual employment arrangements.

We respectfully suggest therefore that the sensitivity of employment compensation and benefit information – which is not otherwise required to be disclosed on Form ADV in any format – be considered and an exception made. Such an exception could, for example, limit

disclosure of the ownership of a relying adviser that is a special purpose entity of this nature to its 25% or greater owners. It is our experience that at that level only a small number of employees are at issue. They are also likely to be the most senior, holding ownership stakes across the broader business, such that disclosure of their personal interests is more reasonably expected.

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In closing, we express our appreciation to the Commission for its care in undertaking these additions to the Investment Advisers Act. We are available at your convenience to discuss our comments and views expressed here. The primary author of this letter is Nathan J. Greene, who is at [redacted] and [redacted]

As a final note, we wish to add that our comments and views should not be ascribed to any current or former client of Shearman & Sterling.

Respectfully submitted,

Shearman & Sterling LLP /NG

Shearman & Sterling LLP

Please assure copies to the following:

Chair: Mary Jo White
Commissioners: Luis A. Aguilar, Daniel M. Gallagher, Kara M. Stein, Michael S. Piwowar
Director of the Division of Investment Management: David Grim