Via Electronic Submission

September 3, 2015

Mr. Brent J. Fields
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-09-15
Release No. IA-4091
Proposed Amendments to Form ADV and Investment Advisers Act Rules

Dear Mr. Fields:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "**Committee**" or "**we**") of the Section of Business Law of the American Bar Association (the "**ABA**"), in response to the request for comment by the U.S. Securities and Exchange Commission (the "**Commission**") presented in the proposing release referenced above (the "**Proposing Release**"). As set out in the Proposing Release, the Commission has proposed amendments to Form ADV to, among other things: (1) incorporate a method for private fund adviser entities operating a single advisory business to register using a single Form ADV; and (2) provide additional information regarding advisers' separately managed accounts. In addition to addressing these proposed amendments, we are commenting on the Commission's proposed amendment to the "books-and-records" rule, rule 204-2 under the Investment Advisers Act of 1940, as amended ("Advisers Act").

The comments set forth in this letter (this "**Comment Letter**") represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and, therefore, do not represent the official position of the ABA. In addition, this Comment Letter does not represent the official position of the Section of Business Law of the ABA.

The Committee thanks the Commission for this opportunity to comment on the Proposing Release and the proposed amendments to Form ADV and Advisers Act rule 204-2. Set out below in bold are specific questions posed by the Commission in the Proposing Release, followed by the Committee's comments.

A. Umbrella Registration and Reporting

1. Should we amend Form ADV to accommodate umbrella registration? Why or why not?

We support the Commission's Proposal to amend Form ADV to accommodate umbrella registration on a non-mandatory basis, and we applaud the Commission's efforts to simplify the process whereby private fund advisers can register and report information regarding their businesses. These proposed amendments, in particular proposed Schedule R, if adopted, would improve the quality of information available to investors, making information about a private fund adviser's business (including the different entities under which it operates and ownership information) more easily accessible to regulators and investors. We anticipate that the costs and burdens of an adviser's registering, reporting and updating information would be lessened by using a single Form ADV, as would the adviser's costs of eliminating inconsistencies and inadvertent errors across multiple filings. The Commission and its Staff would in turn benefit from uniform and consistent reporting by private fund advisers relying on umbrella registration, which we believe would facilitate more accurate data collection and analysis by the agency.

2. Are there additional or different conditions we should consider for umbrella registration?

The Commission's Proposal would appear to preclude two significant categories of private fund advisers from reporting on a single Form ADV: (1) non-U.S. based advisers; and (2) exempt reporting advisers ("ERAs"). For the reasons discussed below, we believe that both advisers and investors, as well as the Commission and its Staff, would benefit if information about these two categories of advisers also could be reported on a streamlined basis using Schedule R.

a. Non-U.S. Investment Advisers

On January 18, 2012, the Commission's staff issued a no-action letter providing for "umbrella registration" of multiple entities on a single Form ADV.[1] According to the Commission, approximately 750 advisory businesses have filed a single Form ADV for multiple entities in reliance on the 2012 Letter, reducing the number of additional filings for related entities by approximately 2,500.[2] The 2012 Letter specifies that the adviser whose name is listed at the top of the Form ADV (the "**filing adviser**") must be based in the U.S. In explaining this aspect of the 2012 Letter, the Staff noted a concern that "a group of related advisers based inside and outside of the United States could designate a non-U.S. adviser as a filing adviser, and assert that the Advisers Act's substantive provisions generally would not apply to the U.S.-based relying adviser's dealings with their non-U.S. clients."[3]

We understand and appreciate the Staff's concern, but we believe that this concern could be addressed in a far less restrictive manner without sacrificing the benefits of streamlined

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1 American Bar Association, Business Law Section, SEC No-Action Letter (pub. avail. Jan. 18, 2012) (the "**2012 Letter**").

2 Proposing Release at 28.

3 2012 Letter at footnote 9 and accompanying text.

registration that redound not only to registrants and their investment advisory clients and investors, but also to the Commission and its Staff . In our view, the Commission need not condition the availability of umbrella reporting upon the filing adviser having its principal office and place of business in the United States, and on non-U.S.-based advisers submitting to the substantive provisions of the Adviser's Act with respect to non-U.S. clients as a condition to use of umbrella registration. .

As a preliminary matter, it is clear under the Staff's current guidance that the Advisers Act applies with respect to all of a registered investment adviser's U.S. clients (regardless of such adviser's stated home jurisdiction) and with respect to all of the activities of a U.S.-based adviser. The simplest way to ensure that this point is clear to all investment advisers reporting on Form ADV is to include a statement in the body of Form ADV, and in the instructions thereto, that clearly indicates that the Advisers Act applies with respect to all U.S. clients of every registered investment adviser, and with respect to all of the activities of registered investment advisers with their principal place of business in the U.S. Any assertion that the Advisers Act does not apply to the U.S.-based adviser's dealings with its non-U.S. clients, or to a non-U.S. based adviser's U.S. clients, would be plainly incorrect and actionable by the Commission. The amendments we are suggesting would effectively address the Staff's concerns regarding possible abuse of umbrella registration in situations where a single advisory business is organized and operates as a group of separate legal entities on a global basis for "a variety of tax, legal and regulatory reasons[,]"[4] while according the full panoply of Adviser's Act safeguards to all U.S.-based advisory clients and, ultimately, to their investors.

We also believe that the implementation of umbrella registration through the proposed amendments to Form ADV should not change the Commission's long-standing substantive policy with respect to the extraterritorial application of the Advisers Act. The Commission's position on extraterritoriality with respect to adviser registration has been well-articulated, and has been relied upon by industry participants worldwide. As reiterated in the Proposal, the Commission has explained that: "we do not apply most of the substantive provisions of the Advisers Act to the non-U.S. clients of a non-U.S. adviser registered with the Commission."[5] We believe this principle should apply to all non-U.S. based advisers registered with the Commission, whether they file on a single Form ADV or not. We therefore suggest that non-U.S. based advisers should be permitted to use a single Form ADV to register with the Commission if they satisfy all of the other conditions of the 2012 Letter, without being compelled to extend the substantive provisions of the Advisers Act to their dealings with their non-U.S. clients.

b. Exempt Reporting Advisers

The Commission has noted that nearly 3,000 investment advisers to private funds currently rely on the "Private Adviser Exemption" under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), which requires that the advisers' only U.S. clients are private funds and that the adviser has less than $150 million of assets managed

[4] Proposing Release at 27.

[5] Id. at note 57.

from an office in the U.S.[6] Many such advisers are based outside the U.S. While not registered with the Commission, such advisers, referred to as "Exempt Reporting Advisers (**"ERAs"**), are subject to the Commission's examination authority and are required to file portions of the Form ADV. Under a set of Frequently Asked Questions (" FAQs") published by the Division of Investment Management prior to the March 2012 registration deadline under the Dodd-Frank Act, information about multiple ERAs may be presented in a single Form ADV filing if certain conditions – similar to those that apply to registered investment advisers under the 2012 Letter – are satisfied.[7]

The proposed amendments to Form ADV, if adopted as proposed, would prevent ERAs from continuing to report on a single Form ADV in accordance with the approach reflected in the ERA FAQs.[8] We note in this regard that the Proposing Release does not address the ERA FAQs, which provided to the contrary and which have been relied upon with, to the best of our knowledge, only positive consequences. Rather than explain why the agency seemingly has decided either effectively to terminate the availability of the Staff's constructive approach to multi-ERA disclosure via a single Form ADV, or to allow that approach to continue without taking the opportunity to develop a modified form of umbrella disclosure by ERAs, the Commission points to the inability of ERAs to meet the criteria for umbrella registration that require compliance policies and procedures pursuant to rule 206(4)-7 and a code of ethics pursuant to rule 204A-1.[9] In our view, the fact that ERAs are exempted from these requirements under the Dodd-Frank Act does not mean that the information that these unregistered entities are required to provide via their ADVs is better presented pursuant to costly, duplicative and potentially confusing multiple filings, or continued use of a Form ADV that has not been modified to provide more streamlined multi-ERA disclosure where multiple exempt non-U.S. advisers operate as a single advisory business.

We therefore recommend that the Commission codify and update the ERA FAQs to allow multiple ERAs that operate as a single advisory business to satisfy their existing disclosure obligations via a single Form ADV in a manner similar to the mechanism proposed for umbrella registration, but tailored to cover only those disclosure obligations Congress and/or the Commission have imposed on ERAs. This modified umbrella filing/disclosure approach could be implemented through an amendment to Schedule R, or the adoption of a new "Schedule ERA" that would include disclosure items similar to those set forth in proposed Schedule R, as modified to include only those items that apply specifically to ERAs.

To summarize, we are concerned that the Commission, in proposing to codify umbrella registration for relying advisers without addressing, one way or the other, the continued availability or need for modification of the original "umbrella" disclosure approach developed by the Staff for ERAs in the wake of the Dodd-Frank Act, the Commission has created a new dilemma for these non-U.S. entities that could have a serious chilling effect on legitimate

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6 Id., Section III, Economic Analysis (based on April 1, 2015 IARD data there are approximately 2,914 exempt reporting advisers).

7 Frequently Asked Questions on Form ADV and IARD, under the title "Reporting to the SEC as an Exempt Reporting Adviser" posted March 26, 2012 (the "**ERA FAQs**").

8 Proposing Release at note 56.

9 Id.

advisory activities. Does the Commission intend to eliminate the relief provided by the ERA FAQs or, in the alternative, to enable ERAs to continue to consolidate their disclosures without adaptation of Form ADV? We respectfully submit that neither scenario is necessary or appropriate for the protection of U.S. advisory clients and their investors. Instead, we recommend that the Commission take this opportunity not only to codify the Staff's ERA FAQs, but also to improve the quality of the required multi-ERA disclosures pursuant to a single Form ADV that has been modified to focus on those disclosure items specifically applicable to ERAs.[10]

B. Information Regarding Separately Managed Accounts

1. Would disclosure of aggregate holdings, derivatives and borrowings in separately managed accounts raise concerns, in light of Section 210(c) of the Advisers Act, regarding the identity, investments, or affairs of any clients owning those accounts when clients are not identified? If so, please explain, and address whether there are ways in which the Commission could address these concerns and still request comparable information.

We believe that the Commission's proposed amendments to Form ADV requiring the disclosure of information with respect to the investments held by, and the investment strategies and activities of, separately managed accounts ("**SMAs**") raise significant confidentiality concerns. The Commission indicates that "[w]e currently collect detailed information about pooled investment vehicles that advisers manage".[11] Such data are, however, either: (1) demographic type information that is publicly-reported in the Form ADV; or (2) portfolio investment information that is only privately-reported to the government on Form PF. Form PF was adopted with the Commission's express recognition that the investment-related data being gathered from private fund managers required strict confidentiality protections. As then-Chairman Mary Schapiro stated:

> I also know that the confidentiality of the information reported on Form PF is very important to those filing the information. The data is sensitive and proprietary and – by Congressional design – non-public. The Dodd-Frank Act contains strong protection for the information filed on Form PF. In addition, we are committed to building the controls necessary to provide appropriate confidentiality and limit the availability of proprietary hedge fund and other private fund information to those who have a regulatory need to know.[12]

The Commission's Proposal, if adopted, would compel public disclosure of highly-sensitive investment-related information, thus placing the proprietary investment strategies used by SMAs at risk. While individual types of securities would not be disclosed, the percentage of the portfolio in ten different asset categories would be subject to unprecedented public scrutiny, as would be detailed breakdowns of derivatives exposures and borrowings. Given the $150

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10 *See* Proposing Release at text accompanying note 55.

11 Id. at 8-9.

12 SEC Approves Confidential Private Fund Risk Reporting, Chairman's Statement October 26, 2011, *available at* http://www.sec.gov/news/press/2011/2011-226.htm.

million threshold, we are concerned that individual advisory clients and their proprietary investment strategies may be identifiable. In addition to raising serious client privacy concerns under Section 210(c) of the Advisers Act, the Commission's Proposal runs directly counter to the important policy underpinnings of the strong confidentiality protections afforded by the Dodd-Frank Act and by the Commission for this type of information when provided in respect of advisory clients that are pooled investment funds and certain parallel separately managed accounts, as evidenced by the Commission's adoption of a private reporting regime in the Form PF context. Moreover, certain investment advisers utilize strategies with respect to registered funds that are similar to those they use when advising SMAs. Disclosure of information relating to SMAs as is detailed in the Commission's Proposal could compromise the trading strategies of such registered funds, which could be detrimental to the investors in those funds. The information that the Commission proposes to collect regarding SMAs is of the same nature and sensitivity as that collected on Form PF, the only difference being that such information relates to SMAs and not to private funds (and certain parallel SMAs).[13] We see no reasonable basis for such disparate treatment. To the contrary, the same cost-benefit analysis that prompted the Commission to adopt confidential reporting via Form PF should apply to comparable information regarding SMAs.

Accordingly, if the Commission ultimately concludes, based on the rulemaking record, that it can utilize sensitive SMA-related investment information in a manner that justifies the costs to registered investment advisers and their clients, we recommend that any such information be reported solely to the Commission in a strictly non-public manner that protects the confidentiality of proprietary investments and strategies. This could be accomplished by the Commission treating the questions relating to SMAs on Form ADV in a confidential manner. We suggest that the Commission acknowledge that SMA investment information, like Form PF information, may be exempt from public disclosure under the Freedom of Information Act.

C. Proposed Books-and-Records Amendments

The Commission proposes to amend Advisers Act rule 204-2 to require registered investment advisers to maintain: (1) supporting documentation for all performance information contained in written communications distributed to one or more persons (as opposed to 10 or more persons, as provided for by the current rule);[14] and (2) originals of all written communications received and copies of written communications sent by an investment adviser relating to the performance or rate of return of any or all managed accounts or securities recommendations.[15] We believe that the maintenance of supporting records relating to performance information is important, and agree with the Commission's proposed approach to requiring that such records be maintained. In our experience, most investment advisers already

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[13] The collection of investment-related information pertaining to private funds on Form PF was mandated by Section 404 of the Dodd-Frank Act. The Commission subsequently promulgated joint rules with the Commodity Futures Trading Commission to implement the mandate from Dodd-Frank by requiring registered investment advisers meeting certain criteria to file Form PF. *See* Reporting by Investment Advisers to Private Funds, 17 C.F.R. § 275.204(b)-1 (2011). Section 203(c)(1) of the Advisers Act authorizes the Commission to collect certain types of information from registered advisers, which the Commission requires through Form ADV.

[14] Proposing Release at 44.

[15] *Id.* at 45.

maintain such records, and the operations of those businesses will not be significantly affected by this amendment.

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We appreciate the opportunity to comment on the Proposing Release and proposed amendments to Form ADV and rule 204-2, and respectfully request that the Commission consider our recommendations and suggestions. We are available to meet and discuss these matters with the Commission and its staff, and to respond to any questions.

Very truly yours,

/s/ Catherine T. Dixon
Catherine T. Dixon
Chair of the Federal Regulation of
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