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Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Comments on Release No. IA-3098; File No. S7-25-10; "Family Offices"

Dear Ms. Murphy:

We appreciate the opportunity to comment on the Securities and Exchange Commission's proposed new Rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940 (the "Advisers Act"), which defines "family offices" that would be excluded from the definition of "investment adviser" under the Advisers Act. Goodwin Procter LLP represents several family offices in various matters related to estate planning, tax and securities law matters. Among these clients is Fernwood Advisors, Inc., a family office located in Boston, Massachusetts. On behalf of these clients, we wish to provide comments on proposed Rule 202(a)(11)(G)-1 (the "Proposed Rule")[1].

We believe that Fernwood is typical of family offices having been established more than 40 years ago to manage the wealth of a founder for the benefit of his descendants and other beneficiaries. Family offices like Fernwood not only maintain the wealth of the founder for future generations, they also maintain the intangible legacy of the founder. Fernwood has a written statement of core values ("Family, Integrity, Knowledge") to ensure that the values of the founder are passed down to subsequent generations. Such family offices provide more than investment advisory services, they provide a forum for family meetings and advice on matters

[1] *See* Family Offices, 75 Fed. Reg. at 63753 (October 18, 2010), Release No. IA-3098 (October 12, 2010) (the "Release").

unrelated to investments. Part of the value of a family office is the privacy that it affords its members. The Staff has recognized this right to privacy by granting confidential treatment to the Forms 13F filed by Fernwood.[2] Given the increased public disclosure required by the Commission for registered investment advisers,[3] Fernwood seeks to ensure that the Proposed Rule is broad enough to encompass the current activities of private family offices.

Fernwood and other family offices wish to continue to serve their role as the guardians of family legacies for as long as possible without having to either restructure or register with the Commission (and incur the cost and public disclosures that go with that) in order to comply with rules designed to apply to commercial investment advisers.

1. Definition of "Family Members"

We are concerned that legitimate family offices and the family members that they serve not be excluded from the benefits of the Proposed Rule by reason of the definitions of "founders" and "family member" that do not reflect the historical and current structures of family offices. Often, as in the case of Fernwood, there is one identifiable "founder," but that is not always true We respectfully suggest that the inclusion of the defined term "founders" (the "natural person and his or her spouse or spousal equivalent *for whose benefit* the family office was established" [emphasis added]) causes unnecessary complications for many family offices. In many cases, the family office is not formed for the benefit of the founder (who may be deceased), but rather by and for his or her heirs who must manage the wealth accumulated by the founder during his or her lifetime. We suggest that the definition of "founders" be deleted, or modified to just refer to the natural person or persons who established the family office, and that families be given the flexibility to select a designated ancestor, who defines the family by degrees of lineal and collateral kinship from such designated founder, including spouses and spousal equivalents of these individuals, and others as described below.

We also suggest that, if the concept of "founders" is retained, in paragraph (d)(3)(ii) of the Proposed Rule spouses and spousal equivalents of the parents of founders be included in the definition of "family members."

We support the inclusion of adopted children, stepchildren and spousal equivalents as "family members" in the Proposed Rule. We also support the inclusion as "family clients" of persons

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[2] As a separate matter, we urge the Staff to continue to grant confidentiality treatment for Forms 13F filed by family offices exempt under the Proposed Rule.

[3] *See* Amendments to Form ADV, 73 Fed. Reg. at 13958 (March 13, 2010), Release No. IA-2711; 34-57419; File No. S7-10-00 (March 3, 2008)

under guardianship by family members.[4] It is also important that the widows and widowers of family members be expressly included. It would cause an unnecessary hardship and be contrary to public policy to exclude these legitimate family members from the services of the family office because of the death of their spouse.

For similar reasons, we believe that family offices should also be able to continue to serve divorced family members, including making new investments for such persons, at the discretion of the family office. Although no longer married to a family member, a divorced spouse may be the parent of family members who retain their status as linear descendants of a founder, and the divorced spouses may continue to have other legal ties to the family as trustees and executors.

2. Other Family Clients

Key Employees. We support the inclusion of key employees of the family office within the definition of "family client."

Trust Beneficiaries. We respectfully suggest, however, that the aspect of the definition related to "any trust or estate existing *for the sole benefit* of one or more family clients" [emphasis added] is too limited. Almost all family trusts have contingent beneficiaries that are not family clients. Under so-called "disaster clauses," if there are no living family beneficiaries, then the remainder of the trust must benefit a non-family member, typically a charity. Even if it is not specified in the trust documents themselves, there will be default provisions under state law. These remaindermen are considered beneficiaries for trust purposes. Additionally, trusts which are primarily for the benefit of family members may include provisions for non-family members as well.

In addition, trusts which provide for both family members and charities are common estate planning vehicles. Charitable remainder trusts and charitable lead trusts are specifically defined in the Internal Revenue Code. Other trusts may not qualify for the same tax benefits but nonetheless include both charitable and non-charitable beneficiaries.

We therefore suggest broadening the reference to "any trust or estate" in paragraph (d)(2)(iv) of the Proposed Rule to include: any trust or estate existing for the *primary* benefit of one or more family clients *or charities, or both.*

Charities. Similarly, the reference to a "charitable foundation, charitable organization, or charitable trust, in each case *established and funded exclusively* by one or more family members or former family members" [emphasis added] in paragraph (d)(2)(iii) of the Proposed Rule is too

[4] Release at p. 63756.

narrow. For example, Fernwood manages endowments established by family members for charitable organizations which the family member did not establish and to which other donors have made minor contributions. We respectfully suggest that the Commission include endowments established for charitable purposes and funded *primarily by* family members.

No definition of "charitable trust" is given, but we request that the Proposed Rule be clarified so that the "charitable trust" expressly includes charitable remainder trusts, which have both charitable and non-charitable beneficiaries but are themselves exempt for federal tax purposes. Similarly, we believe it would be helpful to define "charitable foundation, charitable organization." We suggest that an appropriate definition would be "any organization described in section 170(c), 2055(a) or 2522(a) of the Internal Revenue Code of 1986, as amended" (the sections regarding charitable deductions for income, estate and gift tax purposes, respectively). We believe that this broader definition is consistent with the policy behind Section 203(b)(4) of the Advisers Act, which exempts certain advisers whose advice is provided solely to charitable organizations.

<u>Divorced Family Members</u>. As discussed above, we believe that former spouses should not automatically be treated as "former family members" under paragraph (d)(2)(vi) of the Proposed Rule. We request that the Proposed Rule be amended to permit family offices, at their discretion, to continue to provide advice to divorced family members, especially in situations where they are parents of minor family members. We note that nothing in the Proposed Rule *requires* a family office to provide services to a person who falls within the definition of "family client." We only request that in case of divorced family members and family employees (discussed below), that family offices be permitted to continue to serve such clients without potentially forfeiting their exemptions under the Advisers Act.

<u>Family Employees</u>. We also request that an additional category of family clients be created to cover *employees of family members* who have provided long-term services directly to the family. For example, some family members have current and former employees (e.g., caregivers for children or ill or elderly family members, housekeepers, gardeners, etc.) who have served generations of family members and are dependent on the family for their financial well-being. These employees and former employees depend on the family office like other family members. Family members may want to continue to provide support for them through trusts or other entities that the family office would manage. It may not be practical to extricate them from a family trust. Moreover, they would be faced with the choice of paying another adviser or managing their finances themselves. We believe that, in many cases, it would cause great hardship to exclude such employees and former employees from family offices at this point.

<u>Involuntary Transfers</u>. With regard to the provision in paragraph (b)(1) of the Proposed Rule that deals with persons who are not family clients who become a client of the family office as the

result of involuntary transfers, we have a number of comments. First, it should be clarified when a transfer arising as the result of a family client's death is deemed to occur. Does it occur at the family member's death, or when the executor (or trustee of a trust which forms part of the family member's estate plan) actually makes the distribution to the non-family member? If the former, the four-month time frame is clearly too short given that a typical probate proceeding may last several years. If the latter, the four-month time frame may still be too short to allow for orderly liquidation and transfer of assets. We request that the Proposed Rule be clarified to indicate when the transfer is deemed to have occurred, and also amended to provide that family offices may continue to manage the investments of estates of individual family clients and any trust established by an individual family client which was fully revocable by such family client immediately prior to such family client's death for as long as reasonably required to settle the estate or trust.

3. Ownership of Family Office

While the family office of Fernwood is currently owned and controlled exclusively by family members, we have other family office clients where this is not the case, and there can be no assurance that this will always be true for Fernwood in the future. We believe that the important distinguishing characteristic of family offices is that they *exclusively serve* family clients, not their ownership. At a minimum, we believe that the required ownership of family offices should be expanded to permit both family members and key employees to be owners. The Commission should be mindful of succession and generational issues. Not every generation of a family has members who are qualified to own and control the family office. Moreover, even with the best succession planning, unexpected events can leave a gap in ownership that we believe key employees should be permitted to fill. With regard to any concerns about potential profits generated by a family office that was not owned by family members[5], we believe that family members keep a close watch on the expenses of family offices. This, together with the fiduciary duties of trustees, will be sufficient to ensure that the compensation received by owners of family offices, paid directly or through any profits generated by the family office, will be reasonable.

Conclusion

We believe that the changes to the Proposed Rule requested above will ensure that family offices will continue to provide services to their family clients as they have done for many generations

[5] Release at p. 63759.

without subjecting them either to additional the costs of obtaining exemptive orders from, or registering with, the Commission under the Advisers Act.

Thank you in advance for considering these comments.

Sincerely yours,

Rufus C. King

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