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BY EMAIL

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

Re: File Number S7-25-10; Proposed Rule 202(a)(11)(G)-1 (the "Proposed Rule") under the Investment Advisers Act of 1940 (the "Advisers Act")

Ladies and Gentlemen:

We are pleased to submit comments on behalf of family office clients of our firm with respect to the Proposed Rule. The Proposed Rule defines "family offices" to be excluded from the definition of an "investment adviser" in Section 202(a)(11) of the Advisers Act. The rulemaking is contemplated by Section 409 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and is occasioned by that act's revisions to the Section 203(b)(3) exemption from registration under the Advisers Act.

In general, we support the Commission's straightforward approach to defining "family office." We recognize the Commission's efforts to heed Congress' instruction in the Dodd-Frank Act to reflect in the Proposed Rule the "range of organizational, management, and employment structures and arrangements employed by family offices." Finally, we applaud the Commission's effort to move forward on its rule on a timely basis, in advance of the July 21, 2011 effective date for the revisions to Section 203(b)(3).[1]

Not surprisingly, however, we find that the Proposed Rule is unnecessarily restrictive in a number of technical respects in identifying "family clients" and "family members." These issues of detail only come to light when one attempts to apply the Proposed Rule to the particular circumstances of a tightly-knit family that are, by all measures, clearly within the legislative intent of the call to exclude family offices from regulation under the Advisers Act. We hope that the Commission will countenance these factual variations in its final rule, eliminating much of the need for specific

[1] To the end of ensuring an orderly transition to the new rule, we have proposed in our final comment below a conditional extension of the default requirement for family offices to register under the Advisers Act.

exemptive applications.[2] It is our distinct impression that the variations described below are widespread throughout the universe of true family offices and in several cases represent the norm and not the exception. We believe that these variations may be accommodated comfortably in the final rule, without loss of investor protection.

At several points below, we have proposed alternative formulations for revising the Proposed Rule. Some of these are broader than others. We have proposed the broader alternatives fully aware of the natural regulatory desire to limit the scope of an optional exclusionary rule. However, in the case of family offices, there are natural limiting principles at work. Of all the tests of status and affiliation employed in various federal securities law exemptions, the hardest to achieve or abuse are those based on family relationships. Family offices are themselves complex arrangements not lightly undertaken. Many family offices do not directly engage in investment activities but instead arrange for the services of third-party managers, an increasing number of which will now be registered under the Advisers Act as amended by the Dodd-Frank Act. As such, family offices are also removed to a significant extent from the possibility of abuse. Consequently, we hope that, in fashioning the final rule, the Commission will see the benefit of broader formulations outweighing the cost of only marginal differences in investor protection.

By way of recapping the Proposed Rule to provide context for our comments, it would exclude family offices, as defined, from the application of the Advisers Act (subclause (a)). A family office would be defined as having only "family clients" (subject to a transition rule for certain persons ceasing to be family clients), being wholly owned and controlled by family members, and not holding itself out to the public as an investment adviser (subclause (b)). "Family clients" include "family members," key employees, certain charitable entities, certain trusts and estates, certain family entities, and former family members and key employees (subclause (d)(2)). "Family members" are the "founders" of the family office, their lineal descendants, spouses and spousal equivalents of such lineal descendants, parents of the founders, and siblings of the founders, such siblings' spouses or spousal equivalents, and such siblings' lineal descendants and their spouses and spousal equivalents (subclause (d)(3)). The "founders" are the person for whose benefit the family office was established and his or her spouse or spousal equivalent (subclause (d)(5)).

1. Expand the definition of "family member"(subclause (d)(3)(ii)) at least one generation further back from the "founder" (subclause (d)(5)). The proposed definition of "founder" reflects a constructive, modern concept, which in turn provides a workable identification of those "family members" descended from the founder. However, by focusing the definition of "founder" and, in turn, "family member" on the person establishing the office but not necessarily the person creating the family wealth or prevailing family legal instruments, the Proposed Rule will inadvertently fail to cover many family offices. Often the family office has been established by a lineal descendant of

[2] Estimated by the Commission to cost on average $200,000 per application. This estimate obviously does not and cannot take into account incremental restructuring and uncertainty costs involved in pursuing an exemption, which would be highly fact-dependent.

the person who originally set in motion the creation, preservation, management and application of family wealth. Over time the founder of the office comes to be joined in the endeavor by siblings, cousins, aunts and uncles seeking to pool expertise and expenses with respect to their mutually inherited resources.

Instead of engaging in the difficult definitional exercise of trying to identify the family patriarch or matriarch, the drafting issue here can be solved by referring in subclause (d)(3)(ii) to the grandparents of the founders, the lineal descendants of such grandparents, and such lineal descendants' spouses or spousal equivalents.

An alternative might be to refer to the founders' great-grandparents in subclause (d)(3)(ii), instead of grandparents. This would allow family office services to be provided to second cousins of the founders. We are not immediately aware of any existing family offices that would require this further expansion but reason that they likely exist.[3]

2. Revise the definition of "family client" to eliminate the "exclusive funding" requirement for foundations (subclause (d)(2)(iii)). The proposed definition of "family client" includes charitable foundations, organizations and trusts "established and funded exclusively by one or more family members or former family members." The exclusive funding requirement is problematic in view of widespread philanthropic practice and not necessary.

It is not unusual for a successful family foundation to attract contributions from third-party agencies and donors, large and small, eager to join in the good works of the foundation. There are several well-known examples of this phenomenon, all generally agreed to be leading models for philanthropy. Within the charitable sector, there has been considerable high-level discussion of the potential social desirability of further concentrating charitable resources in this fashion.[4] The treatment of foundations within the definition of "family client" should not provide a legal incentive to maintain absolute separation of funds.

The "family" nature of the foundation can be maintained in the rule by a requirement that the organization in question be "established and controlled by one or more family members or former family members." Substitution of a "control" test for an exclusive funding test clearly achieves the

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[3]Established state laws defining the family body for purposes of comparable regulatory permissions take significantly more expansive approaches that that proposed by the Commission or this letter. For example, for purposes of chartering a "family trust company" serving only family members, Section 669A.070 of the Nevada Revised Statutes defines "family member" by allowing one to choose a reference person (the "designated relative") and then look from him or her to the tenth degree of lineal kinship and the ninth degree of collateral kinship. We are not advocating this approach here, notwithstanding its simplicity and flexibility, but simply point out that it is not as expansive as it might at first appear simply by reason of the requirement of kinship.

[4] In the United Kingdom, matters have moved well beyond high-level discussion. There has been a major legislative effort to actively foster charitable consolidation.

objective of investor protection while eliminating an unnecessary constraint on the organic development of successful family philanthropic ventures.

Again, there are alternative formulations. A test with a funding requirement as an alternative to a control requirement would safely allow for long-term evolution of the governance of a family foundation. In this regard, we would propose "established by one or more family members or former family members, and either (i) controlled by one or more family members or former family members or (ii) as to which one or more family members or former family members shall have at any time been a 'substantial contributor' within the meaning of Section 507(d)(2) of the Internal Revenue Code of 1986, as amended." In this regard, the tax definition of "substantial contributor" provides tried solutions to the difficult issues of measuring periods, relative and absolute thresholds, valuation, and persistence of status that otherwise exist with respect to funding tests.[5]

Another possibility is a test of "established or controlled." The case for further liberalizations is supported by a simple principle limiting the possibility for abuse. Philanthropy at its root involves persons making a charitable decision and not an investment decision to buy or sell a security or engage a particular manager. This principle underlies the amendments to the federal securities laws accomplished by the Philanthropy Protection Act of 1995 and the prior staff positions codified in large part by that act.

3. Replace the "sole benefit" test in the definition of "family client" as it relates to trusts and estates (subclause (d)(2)(iv)). The proposed definition of "family client" includes "any trust or estate existing for the sole benefit of one or more family clients." Again, the proposed definition is directionally constructive, although its requirement -- in this case, "sole benefit" -- is unrealistically restrictive.

There are relatively few planned estates for persons of substantial wealth that solely benefit family members and family philanthropic endeavors. As a general rule, such estates typically include specific bequests in favor of non-family members and third-party charities, as well as in many cases significant residual gifts to such persons. This raises the prospect of serious disruption in the administration of an estate created by the need to change investment management as a result of the accidental timing of death. In this regard, the four-month "transition rule" for "involuntary transfers" in proposed subclause (b)(1) provides only limited assistance, as many, if not most, significant estates typically remain open for periods of two years and upwards.

In the case of estates, the word "sole" should be eliminated, and the rule should provide either that the estate include as a beneficiary one or more family clients or, more restrictively, that the estate be "primarily" for the benefit of one or more family clients. The high likelihood that the estate will

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[5] Under the IRC test, there are both absolute and relative thresholds and the relative thresholds naturally take into account the growth of the foundation through contributions (i.e., become harder to meet as other contributions are made).

remain under the supervision of the state probate court for its duration provides yet another natural protection.

With respect to trusts, there are many complex trusts, particularly testamentary trusts, that include non-family members as beneficiaries. Here it seems appropriate to provide that, in order to qualify as a family client, the trust must be "primarily" for the benefit of one or more family clients, instead of "solely" for such benefit.

There is an alternative way to identify family trusts and estates that more accurately reflects the way in which families and their offices think about investment management services. Under this approach, an estate or trust would be treated as a family client if the testator, trustor or grantor was a family member. After all, it is this person who almost invariably makes the "investment decision" to arrange investment management services. It is in the nature of estates and trusts that testators, trustors and grantors receive investment management services whereas their beneficiaries receive transferred wealth. The analogy of a beneficiary to a "client" is a weak one at best.

3A. Provide a special transition rule for estates (subclause (b)(1)). For reasons noted above, we suggest that the Commission also extend the general transition rule of four months to at least two years for an estate, or alternatively to the entire duration of any court-supervised settlement of the estate.

4. Revise the definition of "family client" to allow former spouses to have additional investments through family offices (subclause (d)(2)(vi)). The definition of "former family member" includes divorced spouses (as well as spousal equivalents who are no longer family members) (subclause (d)(4) . The proposed definition of "family client" (subclause (d)(2)(vi)) comes with a proviso that the former spouse may not receive from the family office advice with respect to additional investments (with certain exceptions not relevant here). We support the inclusion of divorced spouses (and former spousal equivalents) as family clients but propose the elimination of the proviso.

There are several reasons to eliminate the proviso. In many modern families, divorced spouses play a continuing and central role (even with respect to the operation of family offices). Their financial arrangements often remain intertwined with those of the family, and particularly those of their children. In the absence of being able to consolidate their investments with the family office, many divorced spouses will likely find that the proviso in fact operates as an exclusionary rule. The proviso will likely create endless interpretative questions along a continuum (e.g., does the reinvestment of money market fund dividends represent additional investment? The reinvestment of ordinary mutual fund dividends? The automatic investment of payroll checks into a fund?) There are natural family forces and protections at work here as well. While more commonplace than it once was, divorce is a difficult route to the procurement of continuing investment management services. And, in the usual case, it is the family office itself that is best positioned to determine

whether it is appropriate to continue to treat the divorced spouse as a family member or help the divorced spouse establish other financial arrangements.

In connection with eliminating the proviso, the Commission may want to further consider directly including divorced spouses in the definition of "family member" (subclause (d)(3)).

5. Permit other relevant forms of ownership in the ownership requirement for family offices (subclause (b)(2)). As noted above, a company must be owned and controlled by family members in order to qualify as a "family office" (subclause (b)(2)). The requirement does not reflect some of the basic ways in which family offices are owned. "Family client," as opposed to "family member," is a better starting point for identifying the owners. In particular, it is not unusual for a family office to be owned, in whole or in part, by family entities (including voting trusts) (subclause (d)(2)(v)), family estates for their pendency (subclause (d)(2)(iv)), and particularly family trusts (subclause (d)(2)(iv)).

6. Broaden the permitted activities of family offices to include services to a limited number of close family friends. Previous Commission exemptive policy has permitted family offices to provide services to a limited number of close family friends or confidantes.[6] It seems clear from the existing exemptive orders that the Commission will avoid significant need for future such orders by providing this permission in the final rule in an appropriately circumscribed way. The necessary modification to the Proposed Rule can be made in the operative subclause ((b)(1)) or the subclause defining "family client" ((d)(2)). Perhaps most appropriately and consistent with the Longview Management Group exemption, the change can be made in the applicable description of family entities (subclause (d)(2)(v)).

7. Provide a phase-in rule for the family office exclusion. Effective July 21, 2011, the Dodd-Frank Act shall have eliminated from Section 203(b)(3) of the Advisers Act the current "fewer-than-fifteen-clients" exemption from registration, which, of course, is the impetus for the Commission's current rulemaking on family offices. Even if the Proposed Rule is finalized in time to allow family offices to make restructuring changes before July 21, 2011, it will likely be very difficult for many such offices to complete their restructuring before that time. For this reason we suggest that the final rule provide an additional year (until July 21, 2012) for certain companies to either register under the Advisers Act or achieve the family office exemption. More specifically, this allowance would be extended to companies which (i) are described in subclauses (b)(2) and (3) of the Proposed Rule, (ii) were, prior to July 21, 2011, exempt from registration under the Advisers

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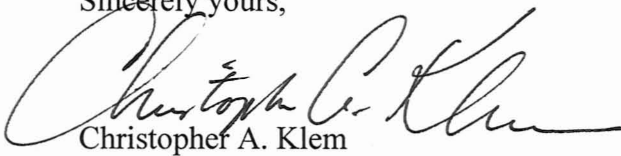
[6] Longview Management Group LLC, Investment Advisers Act Rel. No. 2013 (February 7, 2002) (a limited number of close, long-time family associates and their descendants participating in family investment vehicles); In the Matter of Roosevelt & Son, Investment Advisers Act Rel. No. 54 (August 31, 1949) (agency accounts for family friends). *See also* In the Matter of Slick Enterprises, Inc., Investment Advisers Act Rel. No. 2745 (June 20, 2008) (administrative services provided to investment vehicles created, but not wholly owned, by family members). *Cf.* Adler Management, LLC, Investment Advisers Act Rel. No. 2508 (April 14, 2006) (family employee with beneficial interest in family investment vehicle; additional investment by employee not permitted).

Act by reason of Section 203(b)(3) or a specific exemptive order, and (iii) are actively and in good faith either pursuing an exemptive application under Rule 202(a)(11)(G)-1 or restructuring their operations so as to comply with the new rule. Again at little or no cost to investor protection, this extension would allow family offices seeking to remain exempt to avoid the considerable one-time burden of registration (if only a temporary registration), including possible disclosure of sensitive personal information.

The Proposed Rule is a good start to providing needed and justified relief from the Advisers Act for family offices. We appreciate the opportunity to submit these suggestions designed to make the final rule more workable.

Sincerely yours,



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