82

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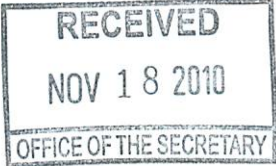

November 17, 2010

Elizabeth M. Murphy, Esq.
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

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

Dear Ms. Murphy:

We represent three families who have established family offices for the purposes of assisting family members with tax and estate planning, monitoring family businesses, preparation of financial statements and tax returns, property and liability management, as well as advice regarding investments and asset allocation. These family offices have generally attempted to conduct the investment advisory portion of the business through structures that permitted them to rely upon the exemption from registration as an investment adviser provided by Section 203(b)(3) of the Investment Adviser Act of 1940 (Act). With the repeal of that provision of the Act effective July 21, 2011 pursuant to Section 403 of the Dodd-Frank Wall Street Reform Act of 2010 (Dodd-Frank), these family offices requested that we review the Proposed Rule 202(a)(11)(G) implementing Section 409 of Dodd-Frank that would exclude a "family office" from being persons subject to the Act.

We appreciate the opportunity to provide comments on the Proposed Rule on behalf of our clients. While generally we found many of the provisions of the Proposed Rule consistent with prior orders, we believe that some proposed provisions would narrow the definition of family office to such an extent that many offices could be precluded from the exclusion contrary to the expressed purpose of Section 409 of Dodd-Frank and the prior orders. As we understand the prior orders, the rationale for the exclusion of the family office is based on the fact that the offices were formed for the benefit of a family and not for the purposes of engaging in the business of investment advisory services to the general public. The services provided by the office, which in most cases are far more extensive than investment advisory, are limited and intended primarily for the benefit of and to promote the interests of the family members and are not available to the public. As a result, the need for regulatory oversight is obviated by the fact that the family controls the office and requires the services to be provided for its purposes and benefit.

Our comments below are intended to preserve the purpose behind the orders and to highlight those portions of the Proposed Rule which we believe unnecessarily restrict the availability of the exclusion without promoting an incremental public benefit or protection.

1. **Proposed Rule 202(a)(11)(G)-1(b)(2) Ownership and Control by Family Members**

As drafted, this provision would require the family office to be owned and controlled (directly or indirectly) by "family members" who are defined and limited to natural persons. In many instances, the family office is owned by trusts beneficially owned by the family members. While the recognition that ownership by the family members may be either direct or indirect would include offices formed, owned and controlled by companies owned by the family, such direct and indirect ownership rights would not be present when the office is owned, in whole or in part, by a trust created for the benefit of the family members.

To accomplish this expansion, we suggest that the ownership and control provision permit ownership and control by "family clients" as currently defined. This would permit trusts, estates and entities formed for the purpose of benefiting the family to maintain ownership of the office. Such an expansion is consistent with prior orders that permitted ownership or control of the family office by a trust created by and for the benefit of the family members. See *In the Matter of Donner Estates* Investment Advisers Act Release 21 (Nov. 3, 1941) [stock of family office corporation held by family trust] and *In the Matter of Pitcairn Company* Investment Advisers Act Release 52 (March 7, 1949) [churches held ownership interest in family office]. Expanding ownership and control to entities that have been formed for the benefit of the family members retains the limitations sought within the prior orders while permitting the family to have flexibility with respect to how ownership of the office is structured through entities created for and beneficially owned by the family.

We understand that our proposal to expand ownership and control to the persons currently defined as "family clients" would permit ownership or control by "key employees." We recognize that permitting ownership and control by "key employees" might cause concern that the family could be removed from the control of the office business with the potential loss of a significant check and balance on expanding the business to persons beyond the family. To eliminate such concerns, however, we would support excluding key employees from the ownership and control provision required for the family office.

2. **Proposed Rule 202(a)(11)(G)-1(d)(2) Exclusivity Provisions Relating to Family Clients**

Portions of the proposed definitions of those persons who qualify as "family clients" use phrases such as "wholly owned", "sole" and "exclusively" to restrict the eligibility of certain persons from being within the defined phrase. We understand the need to craft a regulation that would not allow the use of the family office exclusion in a manner that would permit the provision of investment advice to the public rather than limited to a small group that constitutes the family. However, in this case we believe the use of such phrases is inconsistent with prior orders and creates undue restrictions on the ability of the family office to advise trust and estates created primarily for family members.

We believe the focus of the limitations within the regulation should be on the purposes for which the entities were created. Such a focus is consistent with the mandate within Section 409(b)(2) of Dodd-Frank requiring the regulations governing family offices to "recognize

the range of organizational, management, and employment structures and arrangements employed by family offices." Provided the entities and structures were created primarily by and for the benefit of the family members, the fact that a trust or estate may potentially benefit a limited number of non-family members or organizations that are not controlled solely by the family does not change the character or the purpose of the entity being served by the family office. Despite the fact that there may be ancillary beneficiaries of the trusts and estates, the family office remains dedicated to the purpose of serving the family. It does not exist to serve the public.

The following are examples of what we believe are unduly restrictive definitions of persons that would qualify as "family clients":

(a) Proposed Rule 202(a)(11)(G)-1(d)(2)(iii) requires that "charitable foundations, charitable organizations, or charitable trusts" in order to be defined as a family client must, in each case, be established and funded exclusively by family members or former family members. Charitable trusts served by family offices are often funded by family trusts, corporations or estates not exclusively by individual family members. To exclude such charitable trusts from the term family clients would not, in any manner, expand the scope of the persons being served by the family office to the public. We suggest that the definition be modified to permit funding of such entities by trusts or estates or other entities that have been created for the benefit of family members and not exclusively by individual family members.

(b) Proposed Rule 202(a)(11)(G)-1(d)(iv) requires any "trust or estate" to exist for the "sole benefit" of one or more family clients in order to qualify as a family client as defined. Aside from being circular in using the same phrase to define a phrase, we read the requirement that a trust or estate exist for the "sole benefit" of a family client as unnecessary and unduly restrictive.

Family offices typically form close and long-lasting relationships with the families they serve, assisting family members with a wide array of matters during their lifetimes (often over a period of many decades). When family members die, it is expected that their family office will provide assistance in the administration of their estates. Likewise, when family members establish trusts, it is expected that their family office will provide assistance in the administration of the trusts. Indeed, in many cases, a staff member of the family office may serve as the executor of a deceased family member's estate or as the trustee of a trust created by a family member. These reasonable and customary arrangements should not be disrupted merely because an estate or trust has one or more beneficiaries who are not "family clients" and who are not the primary beneficiaries of the estate or trust.

Under the Proposed Rule, charitable organizations are included within the term "family client" only if they are founded by the individual family members. Accordingly, the estate or trust of a family member would fail the test of Section 202(a)(11)(G)-1(d)(iv) if it required or permitted distributions to any public charity – for example a family member's alma mater, a local hospital, or a symphony orchestra association. Family office clients should be encouraged – certainly never discouraged – to include provisions for public charities in their wills and trust documents. The Proposed Rule would discourage such provisions, without any public policy justification. The fact that a charitable organization not controlled by the family is a beneficiary of a trust

created by a family member or the estate of a deceased family member does not change the scope or expand the services of the family office. The family office only serves the trust created by the family member or the estate. It must provide advisory services consistent with the purposes of the trust instrument or testamentary document. The fact that a public charity may receive a benefit as a beneficiary of the trust or estate does not make that organization a client of the office or expand the scope of the office's duties.

Further, we note that it is quite common for family members to designate non-family members as beneficiaries of a trust or estate. A common example would be a family member might create a trust for a former spouse, incident to a divorce, designed to pay income to the former spouse for life and then revert to family members (typically, the settlor's children). Another common example would be bequest under a family member's will or revocable trust agreement to one or more domestic employees, care givers or friends. Additionally, some family members routinely include all public charities as potential beneficiaries for tax and distribution flexibility. In such cases, the fact that a small number of beneficiaries of a trust or estate are not family members does not change the character of the services provided by the family office and should not disqualify the trust or estate for purposes of the exclusion for family offices. The trust or estate of the family member remains the client of the office, not the beneficiaries. We suggest modifying the definition under Proposed Rule 202(a)(11)(G)-1(d)(iv) by changing the phrase "sole benefit" to read instead "primary benefit". This would permit flexibility to family offices in providing services to family members' trusts and estates without concern over the inclusion of non-family beneficiaries who are not the primary beneficiaries.

(c) Proposed Rule 202(a)(11)(G)-1(d)(vi) requires that former family members must be excluded from receiving investment advisory services from the family office with respect to certain assets or new funds after becoming a former family member. The exclusion of former family members is, in our view, unduly complex especially considering the fact that certain advisory services continue to be permitted with respect to some assets but not others and the allowance of former family members does not significantly expand the universe of persons eligible to receive investment advice from the family office.

Former family members (most typically, ex-spouses) are often deeply involved in the family businesses and in family planning. The fact that they have ceased to be family members does little to remove them from family involvement or consideration by those who are family members. As discussed above, former family members are often designated as beneficiaries of trusts whose assets revert back to other family members upon death. Allowing former family members to continue to receive advice from the family office does not significantly expand the scope of persons served by the office or alter the principle purposes of that office.

3. **Proposed Rule 202(a)(11)(G)-1(d)(5) Definition of Founders**

The definition of "founders" defines the term in such a manner as to require the family office to have been established for the benefit of those persons defined as founders. By requiring the office to have been established for the benefit of the founders, the persons who qualify as "founders" is significantly restricted. Further, since only lineal descendants of "founders" as defined qualify as family members, unless the family office can demonstrate that it

was established for the benefit of the natural persons who are defined as "founders" it would not be eligible for the exclusion provided by the Rule.

In most cases the common ancestor of the lineal descendants that comprise the family for whom the family office was organized were deceased at the time the office was created. In many cases, the family office was established by the lineal descendants rather than the common ancestor who was the matriarch or patriarch of the family. See *In the Matter of Roosevelt & Sons* Investment Advisers Act Release 54 (Sept 2, 1949) [brothers successors to a family business carried on since 1792]. We find nothing in the prior orders or the intent of the regulations that would require the family office to have been established for the benefit of the founders. We suggest the following revision to the definition in order to avoid an undue limitation on the family offices qualifying for the exclusion:

> (5) *Founders* means the natural person and his or her spouse or spousal equivalent who constitute the common ancestors of the lineal descendants comprising the family members for whose benefit the family office was established. ~~and any subsequent spouse of such individuals.~~

Our comments are submitted for the purpose of assisting the Commission in crafting a rule that is consistent with prior orders while upholding the intent and purpose of the Act. We believe the revisions suggested will provide additional clarity to the rule and permit family offices to operate in compliance effectively. We would welcome the opportunity to work with the Commission and its staff to achieve a final rule that fulfills the regulatory purposes of the Act as well as the relief intended by Section 409 of Dodd-Frank.

If you have any questions or if we can clarify or amplify upon any of our suggestions, please contact me directly at (612) 340-5678.

Sincerely,

Bruce A. MacKenzie