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January 31, 2011

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

Re: File No. S7-36-10;
Release No. IA-3110;
Rules Implementing Amendments to the Investment Advisers Act of 1940

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities, in conjunction with the Committee on State Regulation of Securities and the Committee on Private Equity and Venture Capital (together, the "Committees" or "we"), of the Section of Business Law (the "Section") of the American Bar Association (the "ABA"). The letter is in response to the request by the Securities and Exchange Commission (the "Commission") for comments in its November 19, 2010 proposing release referenced above (the "Proposing Release").

The comments expressed in this letter represent the views of the Committees 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 letter does not represent the official position of the Section.

I. Overview

In the Proposing Release, the Commission has proposed new rules and rule amendments under the Investment Advisers Act of 1940 (the "Advisers Act") to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). These rules and rule amendments are designed to give effect to provisions of Title IV of the Dodd-Frank Act that, among other things:

- Increase the statutory threshold for investment adviser registration with the Commission;
- Require advisers to hedge funds and other private funds to register with the Commission; and
- Require reporting by certain investment advisers that are exempt from registration with the Commission.

The Committees' comments are intended to further these goals.

II. Eligibility For Registration with the Commission: Section 410

A. Conforming Form ADV Instructions with Multi-State Advisers

The Committees recommend that the proposed instructions to Item 2.A.(2) of Form ADV, Part 1A (see pp. 1-2 of Appendix B of the Proposing Release) be revised to provide that an exempt reporting mid-sized adviser should follow a procedure similar to that required of exempt multi-state advisers (see the instructions to Item 2.A.(10) at p. 4 of Appendix B). The suggested revision would add greater certainty to the process applicable to such mid-sized advisers.

Thus, we recommend that the instructions to Item 2.A.(2) provide that an exempt reporting mid-sized adviser would:

(i) Create and maintain a record detailing the applicable exception from the definition of investment adviser or exemption from registration as an investment adviser in the state where it has its principal office and place of business and upon which the adviser is relying (which record may include an opinion or memorandum of counsel confirming the availability of the applicable exception or exemption);

(ii) Update this record each time the adviser submits an annual updating amendment in which it continues to represent that it is not subject to registration as an investment adviser in the state where it has its principal office and place of business; and

(iii) Maintain the record in an easily accessible place for a period of not less than five years from each date on which the adviser indicates that it is not subject to registration as an investment adviser in the state where it has its principal office and place of business.

B. "Client" Definition for Section 203A(a)(2)(B) of the Advisers Act

State investment adviser laws often do not define the term "client" for purposes of determining the availability of exceptions or exemptions under such statutes. Moreover, where states do define the term, their definitions are sometimes inconsistent with the definitions of other states. To add greater clarity and uniformity to mid-size adviser determinations, the Committees recommend that the Commission adopt a rule-based definition of the term "client" for purposes of Section 203A(a)(2)(B) of the Advisers Act, so that mid-sized advisers may rely on paragraphs (a) and (b)(1)-(3) of proposed Rule 202(a)(30)-1.

The adoption of such a rule would avoid the possibility of one state insisting that mid-sized advisers must "look through" entities they advise to count the beneficial owners of such entities as "clients," while another state might take a contrary position. Consider identically worded exceptions or exemptions in the laws of states A and B for advisers whose only clients in the state are institutional in nature. A mid-sized adviser with only institutional clients in state A,

which insists on a "look-through" approach, so that the adviser must consider investors in such institutional clients as separate "clients," may have to register in state A, while a similar mid-sized adviser in state B, which does not insist on such a "look-through," may be excepted or exempt in state B, and would be required to register with the SEC.

The absence of a Commission rule defining the term "client" will increase the compliance burden on advisers that must attempt to reconcile and comply with the inconsistencies from state to state.

C. State Examination Affirmations

The Proposing Release provides that the Commission will poll the states as to whether investment advisers registered therein would be subject to examination as investment advisers.[1] In addition, footnote 110 of the Proposing Release states that the Commission will "request that each state notify the Commission promptly if advisers in the state will… no longer be subject to examination." The Committees recommend that (i) the Commission should request that states provide an *annual* affirmation to the Commission stating whether they are, in fact, conducting investment adviser examinations, and (ii) an existing affirmation remain in effect until superseded.

State securities laws generally make examinations of investment advisers permissive, and not mandatory.[2] A state securities authority's ability and willingness to conduct such examinations are generally governed by state budgetary considerations, and frequently by state politics. It is possible that a more frugal or fiscally constrained state legislature might eliminate funding for investment adviser examinations or otherwise cut the budget of the state securities authority. Also, a gubernatorial change might also involve a turnover of senior securities personnel, with concomitant changes in policies and priorities, including the policies regarding the conduct of investment adviser examinations. We therefore believe that it would be appropriate for the Commission to request annual state affirmations, to help ensure the availability of accurate and current information.

In addition, we note the citation to the "NASAA Report" in footnote 107 on page 34 of the Proposing Release, and believe that only those states that affirm that they perform investment adviser examinations on a "formal cyclical" basis (irrespective of the frequency of such examination cycles) should be deemed to be conducting "examinations" within the scope of Section 203A(a)(2)(B)(i) of the Advisers Act. A formal cyclical program contrasts with those states that perform examinations only on a "random or ad hoc" basis, as described in greater detail in Part II.B on pages 7 – 9 of the NASAA Report. Otherwise, a state could claim it is performing "examinations" solely because it has, on a very infrequent basis, conducted an examination during the year (for example, only in response to a complaint from a client of that adviser). By stating it is performing "examinations," but without any formal cyclical

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[1] See pp. 34-35 of the Proposing Release.
[2] See, *e.g.*, Section 203(d) of the Uniform Securities Act (1956) and Section 411(d) of the Uniform Securities Act (2002).

examination program, the state's response could foreclose advisers otherwise qualified to register with the Commission from doing so.

In our view, the better interpretation of Congress' intent in connection with the use of the term "examination" was to connote a structured adviser examination program, rather than one conducted on an occasional, sporadic or informal basis. The Committees therefore recommend that the form of affirmation sent to state securities administrators should require information such as a confirmation that they examine advisers on a formal cyclical basis and the number of examinations conducted.

D. Assets Under Management Calculation

The Committees support the proposed revisions to Item 5.b of the Instructions to Form ADV, Part 1A regarding the calculation of assets under management. In particular, we support the change to paragraph (1), which would make inclusion of certain securities portfolios mandatory, rather than optional, thereby creating a more uniform approach to such calculations.

E. Switching To and From Registration with the Commission

1. Deleting $5 Million Buffer

Concerning the proposed amendments to Rule 203A-1 (switching to and from registration with the Commission), the Committees support the proposal to delete the current $5 million "buffer" between the $25 million threshold set forth in the statute and the $30 million threshold set forth in the rule. We view the multiple thresholds as unnecessary and potentially confusing.

2. Application Filing Deadline

We recommend that paragraph (a) of Rule 203A-1 be revised to require that the application for registration with the Commission be filed within 180 days of an adviser's fiscal year end, and not within 90 days of the date an annual updating amendment is filed. By referring to the fiscal year end, the paragraph would provide greater certainty regarding the date by which the application is required to be filed with the Commission.

3. Switching From Commission Registration to State Registration

We also recommend that paragraph (b) of Rule 203A-1 be revised to provide that an adviser required to switch from Commission registration to state registration by reason of Section 203A would have 270 days from its fiscal year end to register in at least the state where it has its principal office and place of business. Furthermore, the adviser's registration with the Commission should remain effective until that state registration is effective. This will set a time certain for the filing of such state registration applications, and will provide the adviser sufficient time for at least its first state registration to be cleared and eliminate the possibility of a "gap" in regulatory oversight.

We make this recommendation because the state registration process is typically more involved, and thus more time-consuming, than the registration process with the Commission. For example, most states require certain personnel of the adviser to take and pass qualification examinations, and many states require the filing and review of information (*e.g.*, financial statements) in addition to that required by Form ADV.

With certain exceptions, states may impose conditions on registered advisers that may differ significantly from the requirements of the Advisers Act and the Commission's rules, as well as the requirements of other states. Although Section 406(c) of the Uniform Securities Act (2002) provides for automatic effectiveness of a state investment adviser registration on the 45th day after the application is filed, provided that no denial proceeding is pending, a state securities administrator may by order or otherwise defer the effective date.

We believe that a filing period of 270 days from fiscal year end should be sufficient to allow the filing and clearance of a registration in the state where the adviser has its principal office and place of business. Also, by maintaining the adviser's Commission registration status during that period, the adviser would not be required to terminate its operations while its state registration is pending.

F. Transitional Rules For Section 410

With respect to the special "transition rules" applicable to the post-July 21, 2011 period in proposed Rule 203A-5, we recommend that:

- Paragraph (a) be revised to change the due date for filing an other-than-annual amendment to Form ADV from August 20, 2011 to October 19, 2011; and
- Paragraph (b) be revised to give an adviser required to switch from Commission registration to state registration until December 31, 2011 to become registered at least in the state where it has its principal office and place of business, and to require that a Form ADV-W be filed with the Commission within 30 days after effectiveness of such state registration.

We anticipate numerous applications by advisers forced to switch from Commission registration to state registration and believe there exists the possibility that some states may be unable to process such filings in a timely and efficient manner. Therefore, we believe that permitting an adviser required to make such a switch to consummate its state registration by December 31, 2011, at least in the state where it has its principal office and place of business, provides for a more reasonable time period. Moreover, requiring that such an adviser's Form ADV-W be filed within 30 days after effectiveness of the state registration will enable the adviser to continue its business in reliance on its Commission registration without terminating its operations while the state registration is pending.

III. Exempt Reporting Advisers: Sections 407 and 408

A. Reporting Required

1. Form ADV

The Committees recommend that "exempt reporting adviser" ("ERA") reports should be made on Form ADV and filed through the Investment Adviser Registration Depositary ("IARD"). We see no reason to create a new form or filing system when the existing ones have been designed for use by advisers and are suitable for that purpose. Using Form ADV and the IARD will also streamline the reporting and filing process for any ERA that is registered in a state, since most states require advisers to make filings on Form ADV through the IARD. In addition, any ERA that becomes required to register with the Commission will be able to apply for Commission registration more efficiently if it has already filed a Form ADV on the IARD.

ERAs should not be required to make filings on EDGAR instead of the IARD. Such an approach would be confusing and burdensome for any adviser that transitions between ERA and Commission-registered status.

2. Non-Public Information

The Committees recommend that ERA filing information should not be made available to the public. The Dodd-Frank Act authorizes the Commission to require ERAs to maintain such records and submit such reports as the Commission determines to be necessary or appropriate in the public interest. We agree that requiring ERAs to provide information to the Commission regarding their business models and owners would be in the public interest if it helps the Commission assess whether those advisers and their businesses may pose risks to their clients that warrant further regulatory attention. However, we do not believe that making such reports available to the public would serve the public interest.

ERAs are only allowed to advise private funds and venture capital funds, which are privately offered and available only to sophisticated investors who meet stringent qualification standards. ERAs may not offer their services to the general public. The Commission noted in the Proposing Release that public access to ERAs' Forms ADV would give investors access to information that was previously unavailable or not easily obtainable, such as disciplinary events involving the advisers' personnel and conflicts of interest, and thereby promote competition among ERAs. We believe otherwise.

In the experience of many legal practitioners, investors that are qualified to invest in private funds and venture capital funds are sufficiently sophisticated and generally have bargaining power enabling them to insist on receiving from the advisers much more detailed information about the advisers and the funds than the Commission has proposed ERAs disclose on their Form ADVs. Access to an adviser's Form ADV would therefore not increase the disclosure available to those investors. Although public availability would provide members of the general public who are not qualified to invest in ERAs' funds more information about ERAs

than they might otherwise obtain, we do not see how they would benefit from having access to information about advisers whose services would not be available to them.

Fewer advisers will qualify as ERAs than currently qualify for the private adviser exemption from registration under Advisers Act Section 203(b)(3), because of the $150 million in United States assets under management ("AUM") cap applicable to ERAs and the exclusion from the ERA category of advisers that manage accounts other than private funds and venture capital funds. The broader group of advisers that were previously exempt under the "private adviser exemption" did not make any filings with the Commission, much less filings that were publicly available.

The Committees do not dispute imposing an obligation on ERAs to submit reports to the Commission because such reporting significantly expands the transparency of ERAs' operations and greatly narrows the regulatory oversight gap between ERAs and registered advisers. However, especially in view of the substantive distinction contemplated in the Dodd-Frank Act between ERAs and registered advisers, and we believe that maintaining the non-public nature of ERA reports would be an appropriate means to maintain that distinction.

B. Information in Reports

1. Proposed Form ADV Part 1 Items

As discussed above, the Committees believe that Form ADV filings by ERAs should not be publicly available. Assuming that such filings are available only to the Commission, we agree that ERAs should be required to complete most of the proposed ADV items. We believe that most of the information requested is of a nature that will assist the Commission to identify potential compliance risks posed by ERAs and thus such disclosure responds to the mandate set forth in the Dodd Frank Act. The fact that some of the information requested may be competitively sensitive should not be relevant if the reports are not publicly available.

We expect that most ERAs will already have most of the information requested by Form ADV Part 1 readily available. One exception, however, is a list of each fund's assets and liabilities by class and categorization in the fair value hierarchy established by GAAP, which it is proposed that ERAs report under Form ADV, Part 1A, Section 7.B.1.A of Schedule D. Not all advisers prepare GAAP financial reports of their funds' portfolio holdings. Reporting this data would impose very significant compliance costs on their funds, which would most likely be borne by the funds' investors. The Committees believe that this level of detail regarding a fund's assets and liabilities goes beyond what is appropriate to require from an ERA, whose nature and scope of business have been statutorily determined not to warrant registration.

2. Third-Party Asset Valuations

The Commission's proposed rules would require that ERAs disclose in Form ADV, Part 1A, Section 7.B.1.B what percentage of each fund's assets are valued by an administrator or other party unrelated to the adviser. Although we do not object to this requirement in principle,

we believe further clarification would be needed to avoid confusion and disagreement between administrators and advisers about how to respond to this item.

In many cases, a private fund's publicly traded assets are valued in the first instance using data feeds from Bloomberg or another electronic pricing service, and the fund administrator may not necessarily review those valuations (or request the assistance of the adviser to do so), in calculating the fund's net asset value ("NAV"). Assets that are not publicly traded may be valued by the adviser, by the administrator (with or without the adviser's input), by the administrator using policies established by the adviser or the fund's auditor, or by the administrator using its own policies. Given the varying and sometimes overlapping or collaborative roles played by electronic pricing services, advisers, auditors and administrators, the extent to which an administrator is responsible for valuing particular assets may be difficult to specify. Further, regardless of the actual role of the administrators, administration agreements often expressly disclaim responsibility for valuations, in an effort to reduce advisers' liability exposure, even if ERAs and others may look to them to do some or most of the valuation work.

In view of the foregoing, we request that the Commission provide clarification in the instructions to Section 7.B.1.B. For example, if the Commission's intent is to require disclosure of what portion of a fund's assets are valued using data other than electronic feeds from trading markets, or valued partly or solely by a party independent of the adviser, this question should be modified to state so clearly.

3. Form ADV Part 2 Items

The Committees do not believe that ERAs should be required to complete any additional items on Part 1 of Form ADV beyond the items proposed, or any of Part 2, including Schedule F. As noted above, we believe that investors in private funds and venture capital funds are, in general, already able to receive the information that is in Parts 1 and 2 of Form ADV. Consistent with the Dodd-Frank Act's provisions that would preserve substantive distinctions between ERAs and registered advisers, we believe that imposing less detailed reporting requirements on ERAs would be an appropriate way to do so.

C. Updating Requirements

1. General Updates

We believe that the ADV updating requirements that apply to registered advisers should also apply to ERAs. Information reported by ERAs that is allowed to become significantly outdated or inaccurate would not serve the Commission's or public's interest or protect investors as mandated by the Dodd Frank Act, and could be misleading. Accordingly, the Committees support the proposed ADV updating requirements for ERAs.

2. Final Report

An ERA will be required to file an amendment to its Form ADV when it ceases to be an ERA, including a statement that it is a final report. We agree that a final report is a reasonable

way for an ERA to notify the Commission that it is no longer an ERA, and we endorse this feature of the proposed rule.

3. Transition to Commission Registration

An ERA that files a final report because it has become required to register with the Commission would indicate in its ADV amendment both that the filing will be its final "report" on Form ADV and that the filing constitutes an application for registration with the Commission. The Committee supports the concept of allowing ERAs that are transitioning to registration to use a single Form ADV amendment for the purposes of submitting their final ERA report and as their application for registration in a single ADV filing.

We believe that ERAs that become required to register should be given a period longer than three months to do so. The Committees recommend that the Commission adopt a six-month window. This would approximate the length of time under the current rules that a state-registered adviser is given to become registered with the Commission if it becomes required to do so (90 days after filing an annual updating ADV amendment stating that the adviser is no longer exempt from Commission registration, which amendment is due 90 days after year-end). We acknowledge that this would be longer than the 60-day period that proposed Rule 204-4 would allow for Commission-registered advisers to transition to state registration if they become ineligible for Commission registration under the new requirements. However, we believe that 90 days is an unrealistically short period for any registration transition. ERAs that are registering will require an adequate period of time to design, adopt and implement appropriate compliance policies and procedures that address all of their Advisers Act requirements.

D. ERA Transition Provisions

Each ERA will be required to file its initial report on Form ADV by August 20, 2011. Assuming that Proposed Rule 204-4 is adopted before March 2011, we believe the August 20, 2011 deadline will provide ERAs sufficient time to prepare the necessary filings. We suggest that the Commission should allow approximately six months from the adoption of the final rule to the initial filing deadline. This would provide ERAs adequate time to determine their filing status and prepare their filings. We recommend, then, that if the final rule is adopted after February 2011, the filing deadline be delayed.

In addition, we suggest that the Commission to be prepared to delay the ERA initial filing deadline if the IARD modifications take longer than planned. The initial filing deadline should be no earlier than several weeks after the IARD has been modified to accept ERA filings. Many ERAs may be unfamiliar with the IARD and may have technical difficulties using it, and the modified system may not operate perfectly at the start, especially if the system will receive a great many filings within a very short time. To ensure that the initial filings can be completed and received properly, we believe the Commission should delay the filing deadline if necessary so that there is an interval of several weeks between the date that the IARD is capable of accepting ERA filings and the initial ERA filing deadline.

We believe that requiring ERAs to submit their filings on paper if the IARD modifications have not been timely completed would impose unfair and needless burdens on some ERAs. The filing process for ERAs should not be more complicated or difficult than for registered advisers. In our view, there is no compelling compliance reason why the initial filing deadline cannot be later than August 20, 2011 if the Commission has not modified the IARD system by then.

IV. Form ADV – "Regulatory Assets Under Management"

Appendix B of the Proposing Release sets forth proposed instructions for Part 1A of Form ADV. Item 5.F of the Appendix provides instructions for calculating "regulatory assets under management," which in turn would be disclosed in Form ADV and used to determine whether an adviser may register with the Commission.

The instructions state that an adviser should "[i]nclude the entire value of each securities portfolio for which [the adviser] provide[s] … supervisory or management services. …" In addition, the adviser is instructed, "*do not deduct any outstanding indebtedness or other accrued but unpaid liabilities*." Item 5.F (2). In words, an adviser is instructed to calculate "total" (or "gross") assets, rather than "net" assets. Presumably, the Commission is seeking information regarding an adviser's use of leverage, among other forms of indebtedness.

We recommend that net assets would be a better indicator than total assets as a measure of when an adviser should be required to register and for general disclosure purposes. Section 410 of the Dodd-Frank Act addressing the asset threshold for federal adviser registration refers to "assets under management," which, in our view, is generally understood to mean net assets. From an investor protection standpoint, investors tend to think in terms of net assets (the money they have invested, and what they will receive upon a redemption of their interests) rather than total or gross assets. We also believe that net asset calculations are less subject to manipulation.

We understand total assets may be an appropriate measure to consider in terms of systemic risk. Accordingly, if the Commission believes it appropriate or in the public interest, the Commission should consider adding an additional reporting requirements regarding an adviser's use of indebtedness or other forms of leverage.[3]

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[3] Certain members of the Drafting Committee disagree with the use of a net assets, rather than total assets, test for purposes of Section 203A of the Advisers Act. These members believe that the $25 million and $100 million of "assets under management" tests in Section 203A, as amended by Section 410 of the Dodd-Frank Act, contemplate a total assets test, since all assets within a "securities portfolio" are "managed" by an adviser, regardless of whether the securities in that portfolio may have been purchased on margin or whether other indebtedness which would offset the value of such assets if a net asset test were adopted may apply to such assets. Considering that a total assets test has been applied since Section 203A was added to the Advisers Act in 1996 and the rules thereunder became effective in July 1997, these members are unaware of any instances where advisers were found to have abused the $25 million or $30 million threshold tests for optional or mandatory registration with the Commission under the

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The Committees appreciate the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the comments and recommendations set forth above. Members of the Committees are available to discuss these comments should the Commission or the staff so desire.

Very truly yours,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin, Chair of the Committee
on Federal Regulation of Securities

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current law and Rule 203A-1 thereunder, by use of excess leverage to qualify for such registration. By way of precedent, they also note that there are other instances where a total assets test appears in the federal securities laws or the rules of the Commission, *e.g.,* Section 12(g)(1) of the Securities Exchange Act of 1934, and Rules 501(a)(1), (3), and (7) of Regulation D.

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