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Robert E. Plaze, Esq.
Associate Director
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Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Section 409 of the Dodd-Frank Act

Dear Mr. Plaze:

Thank you very much for agreeing to meet with us at 1:30 p.m. on Tuesday, September 7, 2010, to discuss Section 409 of the Dodd-Frank Act. I will be accompanied by David F. Freeman, Arnold & Porter LLP. Each of us represents The Private Investors Coalition, Inc. ("Coalition"), an entity all of whose members are single family offices. The purpose of our request for a meeting is to express the views of the Coalition on the nature and scope of the rule that the Commission must adopt to implement the authority granted to it in Section 409 to define the term "family office." As you know, any entity that can comply with the rule will be excluded from the definition of "investment adviser" and not be subject to registration or regulation under the Investment Advisers Act of 1940 ("Advisers Act"). Because Section 403 of the Dodd-Frank Act repeals Section 203(b)(3) of the Advisers Act on July 21, 2011, the Coalition strongly supports the timely adoption of a rule under Section 202(a)(11)(G) of the Advisers Act that will include single family offices.

What is a Single Family Office?

A single family office is a professional organization owned, formed, or controlled by the family it serves that is dedicated solely and exclusively to managing the personal, business, and financial affairs of the members of the family and protecting the legacy for descendants.[1] Single family offices provide investment support to family members and their affiliated entities,[2] which investment support may include asset allocation, selection of third-party managers, monitoring reporting, discretionary management, and formation and management of investment vehicles for investment by family members and affiliated entities. Many single family offices also provide

[1] Single family offices have been defined as "professional organizations dedicated to managing the personal fortunes and lives of very wealthy families… Their charge [is] to protect their particular family's investments and assets for both current and subsequent generations." Amit, R., Leichtenstein, H., Prats, M. Julia, Millay, T. and Pendleton, L., Single Family Offices: Private Wealth Management in the Family Context, IESE, Wharton (2006-2007).

[2] Single family offices may provide advice directly to family members, to trusts, limited partnerships, limited liability companies, or other entities owned or controlled by family members, and to foundations and endowments formed by family members, family trusts, or other family investment entities.

professional and administrative services such as: income tax advice, estate planning, education and succession planning, budgeting, coordination of professional relationships, and coordination of charitable, philanthropic, and other community affairs of family members.[3] As part of this set of services, many single family offices provide administrative services to trusts established by members of the family for estate planning and tax purposes, and employees of single family offices commonly serve as trustees of family trusts.[4] Single family offices often provide services to foundations and charitable organizations established and funded by members of the family.

Preservation of wealth is an important investment objective of a single family office and, thus, single family offices typically employ a variety of investment strategies, usually with modest to no leverage.[5] Single family offices may transact and custody securities with financial institutions, but do not make markets in derivative products or make markets like brokers and dealers. To the extent a single family office maintains investment discretion over some part of the family's assets, it may invest directly in exchange-traded and other publicly-listed securities;[6]

[3] Multi-family offices are entities formed by persons seeking to profit from the provision of investment advice and other services to multiple, unrelated families. The management, investment, and other policies of a multi-family office are determined solely by its owners. Multi-family offices are commercial, for-profit enterprises designed to maximize profit of the multi-family office for the benefit of the owners of the multi-family office, and are generally operated independently without the oversight or control of the families they serve. Multi-family offices are readily distinguishable from single family offices for purposes of implementing the exemptive authority in Section 202(a)(11)(G) of the Advisers Act.

[4] Family trusts generally are formed to benefit members of the family (as well as close relatives of spouses), although residual and contingent beneficiaries commonly include charitable organizations, churches, universities, or family friends and collateral relatives, to avoid the potential for escheat or distribution to "laughing heirs" (distant relatives) in the event no lineal descendants survive the full term of the trust. These residual and contingent beneficiaries of family trusts generally are not considered "clients" of the single family office and do not pay fees to or receive services from the single family office.

[5] The investment advisory services provided by single family offices are significantly different than those provided by a company that is in the business of being an investment adviser, who would typically solicit clients by offering them the investment adviser's own, well-defined investment strategies. In contrast, a single family office's office investment advisory services are simply available to members of the family, who determine in their sole discretion whether to make use of that particular functionality of the single family office.

[6] A single family office that exercised any investment discretion would, of course, remain subject to the various ownership reporting requirements in Section 13 of the Securities Exchange Act of 1934 ("Exchange Act"), and could be subject to the short-swing profit prohibition in Section 16, to the extent that either Section actually applies under all of the facts and circumstances.

others direct their investments into hedge funds, private equity, venture capital, real estate, and other funds managed by third-party managers.[7]

Single family offices generally retain professional staff, most of whom are not members of the family, including attorneys, accountants, administrators, and investment professionals, among others. In order to attract and retain qualified personnel to serve the single family office's interests, single family offices offer their employees the normal range of compensation, pension, and employee benefit plans common at private employers.[8]

Current Applicability of the Advisers Act to Single Family Offices

Section 202(a)(11) of the Advisers Act defines the term "investment adviser" to mean:

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities…

To the extent that the definition of "investment adviser" applies, many single family offices have previously availed themselves of exclusions from the definition of "investment adviser" and exceptions from the requirement to register. The broadest, most flexible, and most widely utilized exception from registration previously available has been the "private adviser"

[7] Third-party funds typically rely on Sections 3(c)(1) and 3(c)(7) to avoid registration under the Investment Company Act of 1940, but the advisers of many such funds will now be subject to registration and regulation under the Advisers Act, the beneficial ownership reporting requirements in Section 13 of the Exchange Act, and potentially will also subject to reporting, disclosure, and other requirements of the Commodity Exchange Act and regulation by the Commodity Futures Trading Commission. Section 404 of the Dodd-Frank Act empowers the Commission to require the investment adviser to such private funds to maintain records regarding, among other things, a private fund's trading activities, leverage, and counterparty credit risk exposures.

[8] Pension and employee benefit plans, whether qualified or exempt from qualification under ERISA, generally fund contractual and/or statutory liabilities of the single family office as an employer, and do not compensate the single family office for the services that they receive. The relationship between the employer/sponsor of the plans and employees is not the kind of client relationship to which the Advisers Act was directed. *See* Letters to Olena Berg, Assistant Secretary, Pension and Welfare Benefits Administration from Jack W. Murphy, Associate Director, SEC Division of Investment Management (Dec. 5, 1995 and Feb. 22, 1996); Lockheed Martin Investment Management Company (SEC Staff Letter avail. June 5, 2006). Congress incorporated this principle into Section 409(b)(2) of the Dodd-Frank Act.

exception in Section 203(b)(3).[9] Moreover, some single family offices that anticipated exceeding the fewer-than-fifteen-clients limitation in the "private adviser" exception have applied for and have received exemptive orders from the Commission pursuant to Section 202(a)(11)(F) or (G) [now, new subparagraph (H)].

Prior SEC Precedent regarding an Exemptive Relief

The legislative history of the Advisers Act makes clear that its essential purpose is to protect the public from fraudulent and unscrupulous investment managers. Single family offices do not advertise, market, or otherwise hold themselves out as investment advisers to the public. They do not solicit or accept money from the public. Funds subject to the direction of the single family office are limited to that of family members, their related entities, and, in limited instances, the single family office's senior non-family management. Indeed, single family offices are formed by or on behalf of, and subject to the control of, members of the family for the private purpose of providing services and advice to family members. As discussed above, single family offices do not create or market investment products or investment vehicles based upon the skills, ability, expertise, or performance of those providing advice. Consistent with the discrete purpose they serve, single family offices typically generate revenues solely for the purpose of recovering their direct and overhead expenses, not to generate a profit. These facts demonstrate that single family offices do not pose a threat to the general investing public, and requiring them to register under the Advisers Act would not promote the purposes of the legislation – protection of public investors – and would be inconsistent with the privacy and other needs of the family. Accordingly, the Commission has issued orders to a number of single family offices exempting them from all of the provisions of the Advisers Act.[10]

In general, the Commission has issued an order exempting a single family office where its only clients consisted of the owners and founders of the single family offices and their

[9] The "private adviser" exception is available to any person with fewer than fifteen clients within any twelve month period, who does not hold himself out to the public as an investment adviser and who does not advise a registered investment company. Advisers Act Rule 203(b)(3)-1, a non-exclusive safe harbor for determining who may be deemed a "single client" of an adviser, has been important to many single family offices in determining whether they are in compliance with the fifteen client limit.

[10] WLD Enterprises, Inc., Investment Advisers Act Release No. 2804 (October 17, 2008); Woodcock Financial Management Company, LLC, Investment Advisers Act Release No. 2772 (August 26, 2008); Slick Enterprises, Inc., Investment Advisers Act Release No. 2736 (March 22, 2008); Adler Management, L.L.C., Investment Advisers Act Release No. 2500 (March 21, 2006), Parkland Management Company, L.L.C., Investment Advisers Act Release No. 2362 (February 24, 2005); Longview Management Group LLC, Investment Advisers Act Release No. 2008 (January 3, 2002); Bear Creek Inc., Investment Advisers Act Release No. 1031 (March 9, 2001); In the Matter of Moreland Management Company, Investment Advisers Act Release No. 1705 (March 10, 1998); In the Matter of Roosevelt & Son, Investment Advisers Act Release No. 54 (August 31, 1949); In the Matter of The Pitcairn Company, Investment Advisers Act Release No. 52 (March 2, 1949); In the Matter of Donner Estates, Inc., Investment Advisers Act Release No. 21 (November 3, 1941).

spouses, their descendants and their spouses, the trusts and estates of such persons, and the foundations, charitable organizations, and investment vehicles formed by or for the benefit of such persons, and certain senior non-family managers of the single family office.[11]

Legislative History of Section 409

As it began work on what would become the Dodd-Frank Act, Congress was not unaware of the collateral consequences of the proposed repeal of Section 203(b)(3) and provided certain exceptions for a single family office. In the Senate, the Committee on Banking, Housing & Urban Affairs stated in its Report[12] that:

> Family offices provide investment advice in the course of managing the investments and financial affairs of one or more generations of a single family. Since the enactment of the Investment Advisers Act of 1940, the [Commission] has issued orders to family offices declaring that those family offices are not investment advisers within the intent of the Act (and thus not subject to the registration and other requirements of the Act). The Committee believes that family offices are not investment advisers intended to be subject to registration under the Advisers Act. The Advisers Act is not designed to regulate the interactions of family members, and registration would unnecessarily intrude on the privacy of the family involved. Accordingly, Section 409 directs the [Commission] to define "family office" and excludes family offices from the definition of investment adviser Section 202(a)(11) of the Advisers Act.
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> Section 409 directs the [Commission] to adopt rules of general applicability defining "family office" for purposes of the exemption. The rules shall provide for an exemption that is consistent with the [Commission]'s previous exemptive policy and that takes into account the range of organizational and employment structures employed by family offices. The Committee recognizes that many family offices have become professional in nature and may have officers, directors, and employees who are not family members, and who may be employed by the family office itself or by an affiliated entity. Such persons (and other persons who may provide services to the family office) may co-invest with family members, enabling them to share in the profits of investments

[11] *See* WLD Enterprises, Inc., Investment Advisers Act Release No. 2804 (October 17, 2008) (non-family employee invested in a family investment entity); Adler Management L.L.C., Investment Advisers Act Release No. 2500 (March 21, 2006) (non-family employee invested in a family investment entity); Donner Estates, Inc., Investment Advisers Act Release No. 21 (November 3, 1941) (non-family employee trust investor), and Roosevelt & Son, Investment Advisers Act Release No. 54 (August 31, 1949) (a number of non-family custodial accounts of family friends and employees). It should be noted that, to the extent such a person is involved in the formulation and delivery of the investment advisory activities of the single family office, he is essentially giving the same investment advice to himself that he has given to the single family office, not an "other" person.

[12] S. Rep. No. ____, 111th Cong., 2d. Sess. 57-58 (July 2010).

> they oversee, and better aligning the interests of such persons with those of the family members served by the family office. The Committee expects that such arrangements would not automatically exclude a family office from the definition.

The Conference Committee organized to reconcile the bill passed by the Senate and the bill passed by the House of Representatives also issued a report,[13] although in describing Section 409 it merely reported the words that would be adopted when the legislation was signed by President Obama. However, there was a colloquy between Senators Lincoln and Dodd during the debate on the floor of the Senate regarding Section 409:[14]

> Mrs. LINCOLN. Mr. President, I rise to discuss section 409 of the Dodd-Frank bill, which excludes family offices from the definition of investment adviser under the Investment Advisers Act. In section 409, the [Commission] is directed to define the term family offices and to provide exemptions that recognize the range of organizational, management, and employment structures and arrangement employed by family offices, and I thought it would be worthwhile to provide guidance on this provision.
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> For many decades, family offices have managed money for members of individual families, and they do not pose systemic risk or any other regulatory issues. The [Commission] has provided exemptive relief to some family offices in the past, but many family offices have simply relied on the "under 15 clients" exception to the Investment Advisers Act, and when Congress eliminated this exception, it was not our intent to include family offices in the bill.
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> The bill provides specific direction for the [Commission] in its rulemaking to recognize that most family offices often have officers, directors, and employees who may not be family members, and who are employed by the family office itself or affiliated entities owned, directly or indirectly, by the family members. Often such persons co-invest with family members, which enable those persons to share in the profits of investments they oversee and better align the interests of those persons with those of the family members served by the family office. In addition, family offices may have a small number of co-investors such as persons who help identify investment opportunities, provide professional advice, or managed portfolio companies. However, the value of investments by such other persons should not exceed a de minis percentage of the total value of the assets managed by the family office. Accordingly, section 409 directs the [Commission] not to exclude a family office from the definition by reason if its providing investment advice to these persons.

[13] H.R. Rep. No. 517, 111th Cong., 2d Sess., at 204-205 (2010).

[14] Cong. Rec., 111th Cong, 2d Sess., S5904 (July 15, 2010) (remarks of Senators Lincoln and Dodd).

> Mr. DODD. I thank the Senator. Pursuant to negotiations during the conference committee, it was my desire that the [Commission] write rules to exempt certain family offices already in operation from the definition of investment adviser, regardless of whether they had previously received an SEC exemptive order. It was my intent that the rule would: exempt family offices, provided they operated in a manner consistent with the previous exemptive policy of the Commission as reflected in exemptive orders for family offices in effect on the date of enactment of the Dodd-Frank Act; reflect a recognition of the range of organizational, management and employment structures and arrangements employed by family offices; and not exclude any person who was not registered or required to be registered under the Advisers Act from the definition of the term "family office" solely because such person provides investment advice to natural persons who, at the time of their applicable investment, are officers, directors or employees of the family office who have previously invested with the family office and are accredited investors, any company owned exclusively by such officer, directors or employees or their successors-in-interest and controlled by the family office, or any other natural persons who identify investment opportunities to the family office and invest in such transactions on substantially the same terms as the family office invests, but do not invest in other funds advised by the family office, and who assets to which the family office provides investment advice represent, in the aggregate, not more than 5 percent of the total assets as to which the family office provides investment advice.
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> Mrs. LINCOLN. I appreciate the Senator's explanation and ask that the Senator work with me to make this point in a technical corrections bill.
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> Mr. DODD. I agree that this position should be raised in a corrections bill and I look forward to working with the Senator towards this goal on this point.
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> Mrs. LINCOLN. I thank the Senator for his leadership and his assistance and cooperation in ensuring the passage of this important bill.

Finally, Section 409 itself instructs the Commission to provide an exemption that "(1) is consistent with the previous exemptive policy of the Commission, as reflected in exemptive orders for family offices in effect on the date of the enactment of this Act…[and] (2) recognizes the range of organizational, management, and employment structures and arrangements employed by family offices…."

Proposed Rule

For your consideration, we have prepared a draft rule (attached as Appendix A) that the Coalition believes would properly implement the exemptive authority that the Commission has received in Section 409, and is fully consistent with the expectations of Congress set forth

immediately above. We are prepared to discuss with you at our meeting any questions you may have about any particular word or clause in the proposed rule.

Issues Not Addressed by the Rule

The Coalition believes that some issues need not be addressed directly or explicitly in the draft rule, but should instead be the object of guidance from the Commission in the text of the release proposing the rule or adopting the final rule. For example, single family offices have existed and have operated without registering under the Advisers Act for the past 70 years. During that time, the members of the family may have believed it was appropriate, and in the family's best interests, to share the investment expertise of the single family office with persons (other than senior non-family members of management) who were not members of the family. The Coalition understands fully that that situation will not obtain prospectively, after the rule has been finally adopted. But it would be an intended consequence and very unfair to entities that were not previously required to comply with a rule to avoid registration under the Advisers Act for the Commission now to dictate how they should have made decisions in the past. Moreover, the only thing that the Advisers Act regulates is the circumstances under which a registered investment adviser may provide its investment advice. Therefore, the Coalition respectfully requests that the Commission take the position that non-conforming clients, like the persons described in Section 409(b)(3), be allowed to continue holding the investments they now have but that the single family office discontinue providing any investment advice to such non-qualifying clients when the final rule becomes effective according to its terms. In some recent instances, exemptive orders of the Commission have contained representations or conditions consistent with this analysis.[15] From the perspective of the single family office and the non-qualifying client, he or she would not have to suffer an unanticipated realized gain or loss from the sale of any investment.[16] From the perspective of the Commission, over some reasonably short period time the total number of non-qualifying clients will necessarily become zero.

Conclusion

The Coalition believes that the provisions of the draft rule would meet the needs of single family offices. Although it is impossible to know the exact number of single family offices in the United States, many estimates place the number at or above 2500, each of which

[15] *See* note 10, *supra*.

[16] Some investments may not be capable of being sold, such as an interest in real property, where the entire parcel of real estate would have to be sold solely to meet a requirement that each non-qualifying client's assets be disassembled from the assets held by the members of the family, thereby visiting unanticipated tax consequences on each and every owner of the interest in the real property as well as upon the non-qualifying client. We believe that this same solution -- cease providing investment advice to a person who becomes a non-qualifying client -- should also apply to senior management employees who co-investment with the family and subsequently become disassociated with the single family office for whatever reason.

have unique circumstances and their own family tree. When Congress enacted Section 409, it is notable that it did not designate new Section 202(a)(11)(G) as the exclusive path for a single family office to obtain relief from registration under the Advisers Act. Indeed, in the past the Commission used the authority in old subsection (F) and (G), now new subsection (H) of Section 202(a)(11), to issue exemptive orders to single family offices. It could be expected that single family offices which cannot satisfy all of the conditions of any rule that the Commission may finally adopt will file individual applications for exemptive orders under new Section 202(a)(11)(H) and seek exemptive relief based on their particular facts and circumstances. Such applications would have to be processed on an application-by-application basis. That simply cannot be the highest and best use of the Commission's scarce resources. For that and many other reasons, it is in everyone's best interests to fashion a rule that can be applied by single family offices broadly and effectively, with little additional administrative oversight from the Commission. The Coalition stands ready to work with the Commission and its staff to achieve a final rule that fulfills the mandate from Congress in Section 409. Thank you again for this opportunity to meet with you and share our views.

Sincerely,

Martin E. Lybecker

cc. David F. Freeman, Esq.

Appendix A

RULE 202(A)(11)(G)-1

DEFINITION OF "FAMILY OFFICE"

(a) *Definition*. For purposes of the exclusion from the definition of "investment adviser" in Section 202(a)(11)(G) of the Act, the term "family office" means any company formed by, for the benefit of, or subject to the control of, the members of a single family that: (1) does not hold itself out to the public as an investment adviser; (2) does not solicit or accept clients from the general public; and (3) provides investment advisory services solely to persons who are members of the single family and certain other permissible clients described in paragraphs (b) , (c), and (e) below.

(b) *Permissible Clients*. The clients of a family office may include: (i) natural persons who are members of a single family; (ii) estates and trusts formed by or for the primary benefit, directly or indirectly, of one or more natural persons who are members of a single family; (iii) foundations, charitable trusts, charitable funds, and other charitable organizations established or controlled, directly or indirectly, by persons one or more of whom are members of a single family; and (iv) companies owned or controlled, directly or indirectly, by any person described in clauses (i) through (iii) above.

(c) *Additional Permissible Clients*. In addition to the permissible clients identified in paragraph (b) above, any one or more of the following persons may be a client of a family office: (i) any natural person who is an executive officer, director, trustee, general partner, or advisory board member of, or person serving in a substantially similar capacity for the family office and any employee of the family office (other than an employee performing solely clerical, secretarial, or administrative functions with regard to the family office or its advisory or investment support activities) who, in connection with his other regular functions and responsibilities, participates in the advisory or investment support activities of the family office, and who is an accredited investor as that term may be defined from time to time in Regulation D under the Securities Act of 1933; and (ii) employee benefit plans as defined under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), bonus or incentive compensation plans that are exempted from ERISA, and qualified pension, profit sharing or stock bonus plans, non-qualified deferred compensation plans and welfare benefit funds subject to the Internal Revenue Code of 1986, as amended, that are sponsored by the family office or any person described in clauses (ii) through (iv) in paragraph (b) above.

(d) *Definition of Members of a Single Family*. As used in paragraph (a) above, the term "members of a single family" shall include: (i) a natural person (living or deceased) and such natural person's (A) spouse or domestic partner, including a former spouse or domestic partner under a divorce or similar judicial decree (collectively, a "spouse"), (B) descendants (including persons who have become descendants by adoption (collectively, "descendants")), and their spouses and descendants, (C) stepchildren and former stepchildren, and their spouses and descendants, (D) siblings and step-siblings (including former step-siblings and persons who have become siblings by adoption (collectively, "siblings")), and their spouses and descendants, and (E) parents and grandparents, and their spouses, siblings, and descendants; and (ii) the parents, grandparents, spouses, descendants, stepchildren, and siblings of any natural person described in clause (i) above.

(e) *Additional Permissible Client*. In addition to the persons described in paragraphs (b), (c), and (d) above, any person described in subparagraph (b)(3) of Section 409 of the Dodd-Frank Act is a permissible client of a family office.

(f) *Additional Restrictions*. A family office that would not be a family office as defined in paragraph (a) above because of the presence of a client of that family office who is a client of the family office solely by virtue of paragraph (e) above, shall be subject to Sections 206(1), 206(2), and 206(4) of the Act as if that family office were a registered pursuant to Section 203 of the Act.