

May 20, 2008

Nancy M. Morris, Secretary  
Securities and Exchange Commission  
Office of Investment  
100 F Street, N.E.  
Washington D.C. 20549-1090

Re: Release No. IA-2711; 34-57419; File Number S7-10-00

Dear Secretary Morris:

The Personal Financial Planning Executive Committee of the American Institute of Certified Public Accountants ("AICPA") appreciates the opportunity to comment upon the Securities and Exchange Commission's ("SEC") proposed rules to the Investment Advisers Act of 1940 and Part 2 of Form ADV.

The comments set forth in this letter address a number of the issues raised in the proposed rule and form amendments that are of particular interest to our members. The AICPA appreciates the opportunity to comment on this matter and requests that the SEC consider our comments when revising the proposed rule and form amendments for final adoption.

## **I. Proposed Procedural Requirements**

### **A. Delivery Requirements for Part 2A (*Firm Brochure*)**

#### **Initial Delivery**

Similar to existing requirements, initial delivery of an adviser's brochure would be required before or at the time of entering into an advisory contract under proposed rule 204-3(b)(1). Under proposed rule 204-3(c)(1), advisers would not be required to deliver brochures to clients receiving only *impersonal investment advice* for which the adviser charges less than \$500 per year – an increase from the current dollar amount threshold of \$200.<sup>1</sup>

AICPA requests additional clarification as to what constitutes "impersonal investment advice". While the proposed amendment to rule 204-3 provides a definition, there could be a difference of opinion in terms of how advisers interpret the definition.

#### **Annual Delivery**

Currently, rule 204-3 requires advisers to annually deliver, or offer to deliver upon request, a written disclosure statement (either a copy of Part 2 or a brochure containing information required in Part 2). Under proposed rule 204-3(e), advisers would be required – in addition to the initial delivery requirement – to deliver its current brochure to existing clients at least once each year no later than 120 days after the end of the adviser's fiscal year. Advisers have the option of delivering updated brochures electronically, provided that certain requirements are met<sup>2</sup>, which would significantly reduce delivery costs.

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<sup>1</sup> Proposed amendment to rule 204-3 defines "impersonal investment advice" as investment advisory services that do not purport to meet the objectives or needs of specific individuals or accounts.

<sup>2</sup> The SEC's published interpretive guidance on delivering electronically – referred to in Proposed Instruction 3 of Part 2A - is located at: <http://www.sec.gov/rules/concept/33-7288.txt>

AICPA believes that imposing an annual delivery requirement upon advisers is burdensome and unnecessary. In reality, few clients take advantage of adviser offers to deliver a brochure. AICPA believes that the ability to offer electronic delivery of brochures is a significant improvement over paper delivery. However, AICPA suggests that the SEC provide advisers with additional concise clarification on electronic delivery (e.g., retention guidelines) that is specific to the delivery of the annual brochure. It is recommended that these guidelines be incorporated into Proposed Part 2A's Instructions.

While we recommend against imposing an annual delivery requirement, AICPA suggests that the SEC provide guidelines for advisers to follow when making the required "offer to deliver". Many advisers currently make the annual offer as follows: "We are required to offer to you, at least annually, our most recent Form ADV Part II."

In lieu of the proposed annual delivery requirement, AICPA suggests the following guidelines for advisers to use when making their "offer to deliver":

"Our Form ADV Part 2A and 2B (as applicable) discloses the business practices, conflicts of interest and background of the Firm and advisory personnel. You may obtain a copy of our Form ADV Part 2 at the SEC's website ([http://www.adviserinfo.sec.gov/IAPD/Content/Search/iapd\\_OrgSearch.aspx](http://www.adviserinfo.sec.gov/IAPD/Content/Search/iapd_OrgSearch.aspx)); our website (adviser's URL). We are also required to provide our Form ADV Part 2 to you upon written or oral request, or by contacting us by email ([adviser's](#) email) or phone (adviser's phone)

## **II. Proposed Substantive Requirements**

### **A. Format & Content of Form ADV (*Proposed Part 2*)**

#### **Narrative Brochure**

The Proposed General Instructions to Part 2 of Form ADV detail the SEC's proposal to require registered investment advisers to provide prospective and existing clients with a narrative brochure written in plain English. The narrative brochure would replace current Part II, which combines a check-the-box form with supplemental disclosures provided in Schedule F. Brochures would be filed electronically in Adobe Portable Document Format, or "PDF", with the SEC through the IARD. Hence, the most recent version of advisers' brochures would be publicly available through the IARD, providing the public with access to these brochures.

The AICPA is in favor of more comprehensive and accessible disclosure to the investing public and agrees that the proposed narrative brochure will greatly improve the ability of current and prospective clients to thoroughly evaluate registered investment advisers, their business practices and related conflicts of interest. Under the current Form ADV Part II, the most meaningful disclosures are typically made in the current Schedule F's narrative information, rather than the check the box portion, further supporting the goal of greater disclosure to investors via a narrative brochure. Filing via PDF in lieu of the more cumbersome direct input that characterizes Part 1A is also more time-efficient and in keeping with evolving business practice(s).

The AICPA agrees that the public would additionally benefit by having access to advisers' brochures through the Commission's website. However, we believe that the resources required for the transition to a narrative brochure will be significant for many firms, particularly smaller firms with fewer resources. We therefore suggest that the transition period be re-evaluated and extended six months beyond the initial deadline.<sup>3</sup>

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<sup>3</sup> Under the current proposal, existing advisers would be required to comply with the new requirements at the next required annual updating amendment (90 days after FYE) after the effective date of the rules, but in no event before six months after the effective date of the amendments. AICPA suggests that the deadline be extended an additional six months past this deadline.

### Disciplinary Actions

Proposed Item 9 of Part 2A would require an adviser to disclose - in its brochure - material facts about any legal or disciplinary event that is “material to a client’s (or prospective client’s) evaluation of the integrity of the adviser or its management”. This would replace the current disclosure requirement of Rule 206(4)-4, under which disciplinary disclosures may be made either orally or in writing.

Items 9A, 9B & 9C of Proposed Part 2A list “specific legal and disciplinary events” that are “presumptively material” and must be disclosed for ten years following the event. The list of events presumed to be material – similar to existing requirements for disclosure on current Form ADV 1 - would not be exhaustive, and advisers would be required to use their own judgment in assessing the potential materiality of other, not listed, events. Advisers rebutting the presumption of materiality would be required to document their determination and retain a copy in their files. Even if more than ten years have passed since the date of the event, the event must be disclosed if it is so serious as to remain currently material to a client’s (or prospective client’s) evaluation.

AICPA agrees with the SEC as to the importance of this type of information to clients and prospective clients and accordingly, supports mandating such disclosure in advisers’ brochures. However, an assessment of what is considered to be “material” is inherently subjective, notwithstanding the four guidelines/factors provided in the Note to Item 9 of the Proposed Instructions to Part 2A. Advisers making an assessment of “materiality” will invariably arrive at different conclusions faced with similar facts and circumstances, potentially resulting in an un-level playing field among investment advisers.

As an example, consider the case of an advisory firm’s CEO who, over ten years ago, was given a ten-day suspension and \$1,250 fine by the NASD for an alleged violation of the 1933 Securities Act (participated in a limited partnership interest on the advice from counsel that he/she was exempt from the Act’s registration requirements). Some advisers may opt to disclose on the grounds that the nature of the infraction and severity of the sanction rise to the level of “material”; others may consider it to be non-material given that the fine was only \$1,250, the time elapsed since the event, and further, that the management person does not deal directly with clients or offer investment advice.<sup>4</sup> The AICPA believes that additional guidance would be helpful to advisers so as to facilitate consistent disclosure.

Very Truly Yours,

American Institute of Certified Public Accountants

cc: Personal Financial Planning Executive Committee

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<sup>4</sup> Factors listed in note to Item 9 of Proposed ADV Part 2A: 1) proximity of person involved in the disciplinary event to the advisory function; 2) nature of the infraction that led to the disciplinary event; 3) severity of the disciplinary sanction; and 4) the time elapsed since the date of the disciplinary event.