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FOUNDED 1866

May 23, 2008

Nancy M. Morris, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: File No. S7-10-00: Comments on Proposed Amendments to Form ADV

Dear Ms. Morris:

On March 3, 2008, the Securities and Exchange Commission (the "Commission") proposed amendments to Part 2 of Form ADV (currently designated "Part II" and often referred to as the investment adviser's "brochure") and related rules (collectively, the "Proposal") under the Investment Advisers Act of 1940, as amended (the "Advisers Act").<sup>1</sup> Among other things, the Proposal would, in many instances, require an investment adviser registered under the Advisers Act to file its brochure electronically with the Commission through the Investment Adviser Registration Depository,<sup>2</sup> thereby making such brochure publicly available via the internet. Accordingly, detailed information about such an investment adviser's business would be readily available on the internet to the general public. In many instances, such information would include specific details about investment funds whose securities are offered and sold in transactions that are exempt from or not subject to the registration requirement of Section 5 of the Securities Act of 1933, as amended (the "Securities Act"). The Proposal would also require many investment advisers registered under the Advisers Act to deliver a brochure supplement (a "Supplement") providing information about the advisory personnel on whom clients rely for investment advice, together with the investment adviser's brochure, to the investment adviser's advisory clients.

We support the Commission's efforts to provide clients and prospective clients of registered investment advisers with clear, current, and more meaningful disclosure of the business practices, conflicts of interest, and background of investment advisers and their advisory personnel. We also agree that the public would benefit by having the ability to access an investment adviser's brochure containing much of this disclosure through the Commission's web site. Nevertheless, we believe that revisions should be made to the Proposal to address

<sup>1</sup> Amendments to Form ADV, Advisers Act Release No. 2711 (Mar. 3, 2008) (the "Proposing Release").

<sup>2</sup> Certain advisers, who do not have any clients to whom a brochure would have to be delivered, would not have to prepare and file a brochure. See Proposing Release, at Section II.A.3.a.

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certain potential regulatory compliance concerns posed by the public availability—through a brochure—of specific information regarding investment funds whose securities are offered and sold in transactions that are exempt from or not subject to the registration requirement of Section 5 of the Securities Act. Additionally, we believe that it is appropriate to expand the types of clients to whom investment advisers would not be required to deliver Supplements to include “knowledgeable employees” as such term is defined in Rule 3c-5 under the Investment Company Act of 1940, as amended (the “Investment Company Act”). We appreciate the opportunity to comment on these aspects of the Proposal.

Many investment funds offer and sell their securities in transactions that are exempt from the registration requirement of Section 5 of the Securities Act in reliance upon Section 4(2) of the Securities Act (“Section 4(2)”) and the safe harbor provided by Rules 501-508 under the Securities Act (“Regulation D”), or that are not subject to the registration requirement of Section 5 of the Securities Act pursuant to the safe harbor provided by Rules 901-905 under the Securities Act (“Regulation S”). In general, Section 4(2) and Regulation D provide safe harbors from the Securities Act’s registration requirement, provided an issuer does not offer or sell its securities by any form of “general solicitation” or “general advertising.”<sup>3</sup> Regulation S provides, in general, a safe harbor from the Securities Act’s registration requirement for offers and sales of securities that occur outside the United States, and where no “directed selling efforts” are made in the United States.<sup>4</sup> Additionally, many investment funds rely on the exclusion from the definition of the term “investment company” contained in Section 3(c)(1) or 3(c)(7) of the Investment Company Act. Among other requirements, an issuer seeking to rely on either of these exclusions must not make or propose to make a public offering of its securities.

We are concerned that the public availability—through an investment adviser’s brochure—of specific information regarding investment funds relying on Regulation D and/or Regulation S could jeopardize the availability of these safe harbors. The Proposal indicates that the brochure would be required to contain narrative responses to nineteen specified items designed to, among other things, elicit disclosure regarding an investment adviser’s business practices and conflicts of interest. In responding to the various required items, an investment adviser may be compelled to provide detailed information regarding investment funds that offer and sell securities in reliance on Regulation D and/or Regulation S. In light of the extensive nature of the disclosures that would be required in the brochure under the Proposal, it is likely that, in many instances, there will be a significant overlap between the disclosure contained in the brochure and the disclosure contained in the private offering document relating to the

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<sup>3</sup> See Rule 502(c) under the Securities Act.

<sup>4</sup> See Rules 901 and 903 under the Securities Act.

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offering of securities pursuant to Regulation D and/or Regulation S.<sup>5</sup> In an effort to maintain consistent disclosure, many investment advisers may elect to harmonize the disclosures contained in their brochure and in the private offering documents for investment funds that they manage. While this approach minimizes the potential for inconsistent disclosure, it raises the potential risk that having a publicly available brochure, which contains information that is, in part, substantially identical to information contained in a private offering memorandum, could jeopardize the availability of Regulation D (if the publicly available brochure were to constitute a general solicitation or general advertising) and/or Regulation S (if the publicly available brochure were to constitute directed selling efforts in the United States). We do not believe that the Commission intended to create this regulatory risk by requiring an investment adviser's brochure to be made publicly available; accordingly, we believe it is appropriate to clarify that compliance with the Proposal, if adopted, would not render the safe harbors provided by Regulation D and Regulation S unavailable. By the same token, such clarification would provide assurance as to the continuing availability of the exclusions provided by Section 3(c)(1) and 3(c)(7) of the Investment Company Act, notwithstanding the public availability of the information contained in the investment adviser's brochure.

Indeed, the Commission addressed a similar concern in connection with its recent adoption of amendments to Form D, which, among other things, mandated the electronic filing of Form D through the internet.<sup>6</sup> The Commission acknowledged that since Form D information that is electronically filed would be easily and broadly available, a concern could arise that such information could be used as a marketing document to generate interest in an offering. This, in turn, could raise concerns regarding compliance with Regulation D's prohibition on the use of general solicitation and general advertising. To address these compliance concerns, the Commission revised Rule 502(c) to provide that filing a brochure with the Commission shall not be deemed to constitute general solicitation or general advertising for purposes of Regulation D if the information is provided in good faith and the issuer makes reasonable efforts to comply with the requirements of Form D.<sup>7</sup> An issuer complying with the terms of Rule 502(c) is assured that the electronic availability of its Form D filing would not, in and of itself, cause the issuer to have violated this prohibition.

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<sup>5</sup> In fact the Proposing Release implicitly acknowledges this potential overlap by indicating that "much of the information that would be required in the brochure concerns conflicts between an adviser's own interests and those of its clients and is disclosure the adviser already must make to clients, as a fiduciary, under the [Adviser Act's] anti-fraud provisions." *See* Proposing Release, at Section II.A.2.

<sup>6</sup> *See* Electronic Filing and Revision of Form D, Securities Act Release No. 8891 (Feb. 8, 2008).

<sup>7</sup> *See* Rule 502(c) under the Securities Act. *See also* Electronic Filing and Revision of Form D, at Section II.C.

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Since the Proposal would make an investment adviser's brochure easily and broadly available via the internet, we believe that the Proposal raises concerns similar to those addressed in connection with the amendments to Form D, and that the Commission should revise Rule 502(c) to provide that filing a brochure with the Commission shall not be deemed to constitute general solicitation or general advertising for purposes of Regulation D. Similarly, we believe that if the Proposal is adopted, the Commission should amend Rule 902(c) to provide that filing a brochure with the Commission shall not be deemed to constitute directed selling efforts within the meaning of Rule 902(c). Alternatively, we request that the Commission clearly state as part of any adopting release for the Proposal that good faith compliance by an investment adviser with the filing requirements would not, in and of itself, render the safe harbors provided by Regulation D and Regulation S unavailable.

We also believe that it is appropriate to expand the types of clients to whom investment advisers would not be required to deliver Supplements to include "knowledgeable employees" as such term is defined in Rule 3c-5 under the Investment Company Act. The Proposal would not require investment advisers to deliver Supplements to four types of clients:<sup>8</sup> (i) clients to whom an investment adviser is not required to deliver a firm brochure (*e.g.* registered investment companies and business development companies); (ii) clients who receive only impersonal investment advice; (iii) clients who are "qualified purchasers;"<sup>9</sup> and (iv) certain "qualified clients" who also are officers, directors, employees and other persons related to the investment adviser.<sup>10</sup> The exceptions to the Supplement delivery requirement provided for qualified purchasers and qualified clients are premised upon the conclusion that sophisticated clients do not need the protections of the Supplement delivery requirement because they are in a position to obtain, and frequently do obtain, information about the advisory personnel on whom they rely for investment advice.<sup>11</sup> We believe that this conclusion is equally applicable to knowledgeable employees as such term is defined in Rule 3c-5 under the Investment Company Act. We recognize that the portion of the definition of the term qualified client contained in Rule 205-3(d)(1)(iii) is similar to the definition of the term knowledgeable employee contained in Rule 3c-5 under the Investment Company Act. However, the term knowledgeable employee is somewhat broader (*e.g.*, the term includes certain employees of and members of an advisory board of a company relying on the exclusion contained in Section 3(c)(1) or 3(c)(7) of the Investment Company Act).

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<sup>8</sup> See Proposing Release, at Section II.B.1.

<sup>9</sup> As defined under Section 2(a)(51)(A) of the Investment Company Act.

<sup>10</sup> *I.e.*, "qualified clients" as defined in Rule 205-3(d)(1)(iii) under the Advisers Act.

<sup>11</sup> See Proposing Release, at Section II.B.1

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We appreciate you considering our comments.

Sincerely,

*Sidley Austin LLP*