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

Re: File No. S7-18-09
Proposed Rule 206(4)-5
Release No. IA-2910;

Dear Ms. Murphy:

We are sending this letter to comment on Release No. IA-2910 (the *Pay-to-Play Release*) issued on August 3, 2009, in which the Securities and Exchange Commission (*Commission*) proposes to adopt a new rule, Rule 206(4)-5 (*Rule 206(4)-5* or the *Proposed Rule*), under the Investment Advisers Act of 1940 (*Advisers Act*). The Commission is proposing Rule 206(4)-5 to address certain wrongful activities referred to as "pay-to-play," which involved payments made in connection with the hiring of investment advisers to manage assets for government agencies or pension funds (hereinafter, we refer to both as *governmental entities*). The Commission has brought several enforcement actions[1] against persons involved in requiring or accepting those payments.

We do not disagree with the goals of the SEC in proposing the new rule, nor do we disagree in concept with the provisions of the Proposed Rule that would limit or ban contributions by investment advisers to persons involved in making decisions about the management of the assets of governmental entities. In fact, we commend the Commission for taking the initiative to address this area.

We do have concerns, however, with the provisions found in Section 206(4)-5(a)(2)(i) of the Proposed Rule, that would ban federal registered investment advisers from making payments to third parties for soliciting or acting as placement agents in connection with obtaining business from governmental entities. We also offer comments and recommendations on other provisions

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[1] See for example, *SEC v. Henry Morris, et al*, Litigation Release No. 21036 (May 12, 2009); *SEC v. Paul J. Silvester et al.*, Litigation Release No. 16759 (Oct. 10, 2000).

of the Proposed Rule, particularly those that would impact, directly or indirectly, third parties who act as solicitors or placement agents.

Summary of Comments

Our comments are discussed in detail below. In summary, however, we strongly object to the proposed ban and recommend that the Commission reconsider the proposal. We believe that the ban of solicitors/placement agents currently included in the Proposed Rule, if adopted, would:

- decrease rather than increase transparency by allowing the activities of solicitors/placement agents to be conducted by internal staff or related entities without any regulatory oversight, while prohibiting participation by those currently regulated and subject to extensive regulatory oversight;

- create ambiguity for compliance staff of investment advisers who would be asked to evaluate activities by associated persons and affiliates to determine if they fall within the definition of 'related person,' what activities can be conducted by a 'related person,' what is the difference between marketing activity and soliciting, what is the difference between indirect compensation that is prohibited and payments for simple marketing or advertising services, and when is a broker-dealer acting as a distributor or selling agent rather than a placement agent;

- decrease competition by severely inhibiting access by small and mid-sized investment advisers to the governmental markets;

- prevent firms currently providing legitimate services as marketing firms and placement agents, from continuing to provide a service that is needed, and regulated, inhibiting their ability to stay in business.

We recommend that instead of a ban, the Commission use this opportunity to adopt rules that would:

- affirm the ability of solicitors/placement agents to participate in the marketing process, provided they are appropriately registered/licensed and that they provide to all parties involved in the contracting process, full disclosure of the solicitor/placement agent activities, compensation, services and possible conflicts involved in those activities;

- clarify positions the staff has enunciated in no action letters, but which positions remain unclear for many industry participants, by

- eliminating any so-called 'finder' exemptions, except in cases where the person complies with the requirements enunciated in the no action letters[2];
- requiring all solicitors/placement agents that share in advisory fees to be registered as investment advisers;
- requiring all solicitors/placement agents who receive transaction-based compensation to be registered as broker-dealers, unless they clearly qualify for an exemption based on the staff no-action letters discussed above;
- clarifying what the Commission considers transaction-based compensation in the context of solicitor and placement agent activities.

- permit the registration with the Commission under Section 203 of the Advisers Act, those firms that are required to register as investment advisers because they provide solicitor/placement agent services and share advisory fees with federal covered investment advisers so that there is uniformity of regulation, disclosure and oversight;
- expand the disclosure requirements of Rule 206(4)-3 to apply to all solicitations of advisory services for governmental entities, whether or not the investment adviser is registered and whether or not the solicitors are registered, internal staff, consultants, associated persons or unaffiliated with the investment adviser.

In addition to the above, we recommend that the Commission expand the rule proposal to include a ban on contributions by all investment advisers seeking to manage the assets of governmental entities, whether the advisers are registered or exempt and whether they are state-registered or federal covered advisers. To do otherwise, would create an incentive for advisers to move from registration to exempt status, thus decreasing transparency and regulatory oversight. We also recommend that the ban include a ban on hiring former government officials or any persons who were employed by the governmental entity or who were employed by or associated with the persons responsible for selecting investment advisers for the governmental entity.

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[2] See, *Dominion Resources, Inc.* (avail. March 7, 2000), in which the staff listed the following factors as significant in concluding that a 'finder' was required to register as a broker-dealer: recommending underwriters or broker-dealers for the marketing of the securities; assisting in negotiations with stand-by purchasers and banks; on occasion, introducing potential purchasers to the issuer; and receiving a negotiated fee payable only on the successful closing of the financing. See also, *Chubb Securities Corporation* (avail. Nov. 24, 1993), in which the staff noted as significant in requiring registration the following: the person would act as an intermediary repeatedly, be involved in negotiations concerning the terms of the transactions, would have direct contact with purchasers of the securities, provide investment banking services, and would receive compensation tied to the transactions.

Discussion

Bryant Law

Bryant Law is a boutique law firm that offers legal, regulatory and compliance advice and consulting services to firms in the financial services business and other business entities. Clients include investment advisers, broker-dealers, registered representatives, third party marketers and placement agents, among others. The undersigned, Susan E. Bryant, is the principal of Bryant Law and has been practicing law since 1976, concentrating on state and federal securities laws, in a variety of capacities, providing a unique overview of securities regulation and compliance. With a total of over 20 years in private practice, clients have included public and private oil and gas drilling programs; issuers of public and private securities, mutual funds and variable products; underwriters, broker-dealers, investment advisers, investment companies and investors.

During five years as the Administrator of the Oklahoma Department of Securities, activities included serving as President of the North American Securities Administrators Association (*NASAA*) and working with state and federal securities regulators to enforce securities laws, prosecute violators and adopt uniform laws and regulations. Two years were spent as the Chief Compliance Officer and Corporate Secretary of a mutual fund complex working with regulators to resolve internal compliance issues, advising senior management, mutual fund advisers and their compliance officers. Five years were spent as in-house securities counsel at a large financial services firm where responsibilities included advising several investment advisers, broker dealers, insurance entities and investment companies, as well as their board members, senior officers and compliance staff. The breadth of the preceding experience provides a unique understanding of the effects of any new rules on clients, on their compliance officers and on the regulators that will be required to oversee the implementation of, and compliance with, the new rules. The comments presented in this letter are based on the experiences of both Bryant Law and its clients who would be directly affected by the Proposed Rule if it were adopted in its current form.

Marketing Firms

We have been asked to submit this letter on behalf of certain of our clients (*Marketing Firms*) that provide marketing services to investment advisers as an ongoing, legitimate business. These clients object to the assumption on which the ban is apparently based, that because solicitors have been used in connection with past fraudulent pay-to-play activities, all solicitor/placement agent services would involve fraud or illegal activities.

Marketing Firms provide legitimate services to investment advisers that include more than simple introductions to prospective clients. Some of these firms are actively involved in an association, the Third Party Marketers Association (*3PM*), which strives to provide guidance and legitimacy to persons involved in providing solicitor/placement agent services.[3] A comment

[3] See information at www.3pm.org.

letter has been provided by 3PM, with which we have substantial agreement; however, the Marketing Firms we represent are a subset of the firms represented by 3PM, with a much more focused business protocol.

The Marketing Firms we represent limit their services to representation of the strategies and performance of investment adviser clients (*Asset Managers*), which are generally the smaller to mid-sized investment advisers. The clients of the Marketing Firms are almost always registered investment advisers that are seeking to expand their assets under management, whether for a single strategy or several and whether through direct management of assets for clients (often called investments in *Separate Accounts*) or through pooled vehicles, whether registered investment companies, private funds or other types of entities. The Asset Managers are generally mid-sized investment advisory firms that seek assistance from the Marketing Firms with developing marketing strategies, creating marketing materials and targeting potential markets for their advisory services.

The Marketing Firms contact pension consultants, registered investment advisers, internal investment staff of large institutional investors or other representatives of institutional or high net worth investors (collectively, *Representatives*) on behalf of the Asset Managers to present the advisory services to those Representatives. The Marketing Firms do not contact investors, do not solicit investments in any security and only have direct contact with prospective advisory clients if those clients are large institutions with internal staff serving as the Representative of the entity. In many situations, the Marketing Firm meeting with a Representative may not be given even the name of the prospective advisory client.

The Marketing Firms assist in arranging meetings between staff of the Asset Manager, usually the chief investment officer or portfolio manager for the strategy being considered, and Representatives of prospective advisory clients. The Marketing Firms handle questions about strategy and performance of the Asset Manager and answer simple questions about types of services offered by the Asset Managers, which may include information about mutual funds or other pooled investment vehicles managed by the Asset Manager using the strategy under consideration. The Marketing Firms we represent comply with the following standards, which are documented in the contracts they negotiate with their Asset Manager clients:

- The Marketing Firm works directly for the Asset Manager and not on behalf of any fund or pooled investment vehicle that might be offered by an Asset Manager.[4]

[4] Our firm also represents placement agents who provide services that do involve finding investors for investment in funds or other securities. Those firms are registered as broker-dealers and are not included with the Marketing Firms we discuss in this letter. Separate comment letters have been submitted on behalf of these placement agents by other parties. Nonetheless, many of our comments in this letter and our objections to the ban on solicitors/placement agents apply to those placement agents as well.

- The Marketing Firm provides substantial marketing services in addition to contacting prospective clients for the Asset Manager.

- All compensation is paid by the Asset Manager out of the advisory fees earned by the Asset Manager and is usually based on a share of advisory fees paid to the Asset Manager by the clients obtained through the marketing efforts of the Marketing Firm.[5]

- The Marketing Firm does not receive compensation that is based on a transaction in a security, does not receive compensation from any fund, any fund distributor or any other issuer of a security.[6]

- The Marketing Firm is registered as an investment adviser under state law because of the requirement under a majority of state securities acts that solicitors be registered, but also because the firm shares advisory fees with a registered investment adviser and although under current federal law it is not clear, arguable, the firm must be registered as an investment adviser to do so.[7]

- The Marketing Firm assists in the marketing of one or more strategies of the Asset Manager and not the securities of any pooled investment that may use the strategy.

- The Marketing Firm is not hired to market any securities that may be managed by the Asset Manager (such as mutual funds or privately offered pooled vehicles), though the Marketing Firm may answer direct questions from a Representative about the vehicles through which assets are managed using a particular strategy.

- The Marketing Firm provides to each Representative, usually before the first meeting and again at each meeting:

  - a copy of the Asset Manager's brochure (*Adviser Brochure*) required under SEC Rule 204-3 (*Brochure Rule*), which is usually Form ADV Part II for the Asset Manager;

  - a copy of the Marketing Firm's Adviser Brochure in compliance with the applicable state brochure rule,[8] and

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[5] Some Marketing Firms also receive fixed fees or may receive retainers plus a share of advisory fees.

[6] We note that an investment adviser to an investment company under certain circumstances may be considered the issuer of a mutual fund sponsored by it. In those circumstances, it could be construed that the Marketing Firm is providing services to an issuer, but the services would never be provided to the investment adviser in its capacity as an issuer.

[7] See footnote 9, *infra*.

[8] In most cases, the states have adopted brochure disclosure rules that are substantially the same as the federal

- a copy of a disclosure document (*Solicitors Disclosure Document*) prepared in compliance with SEC Rule 206(4)-3, which describes in detail the services that the Marketing Firm performs and the compensation it receives for the services.

- The contract between the Marketing Firm and the Asset Manager is in writing and complies with:
  - the requirements of SEC Rule 206(4)-3 (the *Solicitors Rule*),
  - the requirements of Section 205 of the Advisers Act governing investment advisory contracts and compensation; and
  - comparable requirements under the laws of the states in which the Marketing Firm is registered.[9]

- The services provided by the Marketing Firm include assisting in developing marketing plans, developing marketing strategies for the Asset Manager, preparing and disseminating marketing materials for the Asset Manager and contacting Representatives on behalf of the Asset Manager.

- The Marketing Firm discusses the strategies offered by the Asset Manager but not any details concerning any specific security or structure.

- The Marketing Firm introduces the Representative for prospective clients to the Asset Manager and assists in scheduling and may participate in meetings between the Asset Manager and the Representative.

- The Marketing Firm may assist an Asset Manager in preparing and submitting responses to Requests for Proposals (*RFP's*) from prospective clients.

- The Marketing Firm does not participate in the negotiations or discussions concerning the final arrangements between the Asset Manager and the advisory client.

- All advisory contracts between the Asset Manager and its clients are negotiated and signed by the Asset Manager - the Marketing Firm has no authority to act for or to bind the Asset Manager.

Brochure Rule.

[9] We note that in connection with a recent application by a Marketing Firm for registration as a state investment adviser, the state securities examiner attempted to have the firm remove from its form of contract language that is required under the Solicitors Rule, hence our request that solicitors/placement agents for federal covered investment advisers be included with those allowed to register with the Commission.

- If a Representative indicates an interest in having a client invest in a strategy through a fund or other pooled investment that constitutes a security, the Marketing Firm will refer the Representative to the appropriate person at the fund from whom the Representative can obtain a prospectus or other offering documents and more information about the security.

Transparency

Because the Marketing Firms are registered and because they are complying with the state and federal disclosure requirements noted above, there is currently a substantial amount of transparency in their relations with governmental entities or any other prospective client that the Marketing Firm contacts. The Adviser Brochures for the Asset Manager and Marketing Firm describe the types of clients they represent, the types of services they provide, the fees both entities charge for their respective services, the background of the principals involved with the firms and other material information required by ADV Part II.

The Solicitors Disclosure Document provided by the Marketing Firm and often the Asset Manager as well, describes the services provided by the Marketing Firm, the fact that the Marketing Firm is being paid by the Asset Manager to solicit clients for the Asset Manager, whether or not the fees that are being charged by the Asset Manager are higher when the Marketing Firm is involved and the amount of the fees being paid to the Marketing Firm by the Asset Manager. Other conflicts would also have to be disclosed in the Solicitors Disclosure Document and/or the Adviser Brochures.

Because the Marketing Firm is registered as an investment adviser, it is subject to audit by state securities regulators who have the ability to assure that the activities of the Marketing Firm and its relationship to its Asset Manager clients are fully disclosed to clients and compliant with the states' securities laws. Clients have the ability to obtain additional information about the Marketing Firms through public access to investment adviser registration documents on the Commission Website. Any firm that is registered as a broker-dealer to carry out activities as a solicitor/placement agent is also subject to audit by state and federal securities regulators and is subject to public review through broker check, which is accessible through the FINRA Website.

If the proposed ban on solicitors/placement agents is adopted all of this disclosure and oversight will be lost. No registered firms would be participating in the marketing of advisory services to governmental entities. Internal staff or related parties that could be soliciting on behalf of an investment adviser would not be subject to the same regulatory oversight and scrutiny as are solicitors and placement agents currently. Instead of eliminating a source of illegal activities, the proposed ban would eliminate those firms that are providing legitimate services and leave those individuals who could be hired by Asset Managers as internal staff and compensated without any disclosure or regulatory oversight.

We submit that rather than banning solicitors/placement agents, the Commission should adopt rules that would require that all firms involved in the solicitor/placement agent business be

registered as appropriate to their activities and compensation. To increase uniformity of oversight and to enhance transparency, we recommend that the registration of solicitors/placement agents should be allowed under Section 203 of the Advisers Act, so that examiners for the Commission could audit both the Asset Manager and the solicitor/placement agent marketing the services of the Asset Manager. By having oversight over both entities, the examiners could assure that there is consistency in the firms' respective compliance with the disclosure and recordkeeping requirements of the Brochure Rule, the Solicitors Rule and the provisions of Rule 206(4)-5, when adopted.

Lack of Deterrent Effect

We submit that the implementation of a total ban on third party solicitors/placement agents will only serve to eliminate from the business these Marketing Firms, the activities of which are regulated and transparent, while leaving firms able to use unregulated persons providing the same services. Allowing firms to use 'related persons' or affiliates to conduct solicitation activities does not prevent the illegal and fraudulent activities found in the *Morris* and *Silvester* cases. The Proposed Rule does not appear to prohibit investment advisers from hiring directly as staff, former officials, employees or associates of the governmental entities with which they want to do business. By hiring these persons, compensation could be paid to them without any regulatory oversight or disclosure to prospective advisory clients

We respectfully submit that implementation of a complete ban will only serve to remove those solicitor/placement agents who provide legitimate services and who offer transparency as regulated entities themselves. Those persons who are intent on evading the provisions of law that currently exist, will not be deterred by the ban, but could in fact be legitimized. Persons using their influence to direct the award of advisory contracts could require that prospective Asset Managers employ them or their associates as internal staff and pay them any kind of compensation. Such activity would be within the provisions of the Proposed Rule and outside of any regulatory review or oversight.

Instead of the ban on solicitors/placement agents, we recommend that the Proposed Rule ban the hiring of former government officials or government staff and provide oversight over internal staff that provide solicitor activities.

Loss of Competition

Rather than reduce the costs of advisory services for governmental entities, we submit that the proposed ban on solicitors/placement agents would limit or eliminate access to the government markets by the small to mid-size Asset Managers that outsource their marketing functions. Many of these firms offer a limited number of strategies that may have been very successful, but that may not be widely known. Many do not have the resources to hire internal staff to prepare and deliver marketing materials, to follow up on requests for information, to devote time to completing RFP's, and to arrange follow up meetings. The Marketing Firms provide those functions, often without front-end payments, relying on earning a share of compensation earned

by the Asset Manager from the increased business. Often, the Asset Manager does not have to compensate the Marketing Firm until the Marketing Firm is successful in attracting new clients for the Asset Manager.

Eliminating this source of marketing expertise for the smaller Asset Managers, could eliminate their ability to compete with the larger firms that have internal marketing staff and resources to dedicate to the marketing function. The ban would result in severely limiting, if not preventing the ability of smaller firms to compete for government or pension business. The elimination of small to mid-sized advisers from consideration by governmental entities will only serve to reduce the number of advisers competing for the business of governmental entities, increase fees to the ultimate clients and potentially lose the benefits of strategies or opportunities only available from smaller advisers.

Again, we strongly recommend that instead of a ban on solicitors/placement agents, the Commission consider adopting rules that clarify the oversight, regulation and disclosure requirements that apply to solicitor/placement agents.

Increased Compliance

We submit that the proposed ban will not serve to stop the 'pay-to-play' activities, but will increase the obligations of compliance officers trying to determine what kinds of services are allowed and what constitute banned activities. Compliance officers for Asset Managers will face an increased burden in addressing new questions and resolving new issues in the application of federal securities laws to marketing and placement activities. For example, if an Asset Manager hires a Marketing Firm to prepare marketing materials and the Asset Manager uses those materials with governmental entities, has the Marketing Firm solicited those entities – probably not. However, what if the Asset Manager asks the Marketing Firm to mail the materials to a governmental entity, does that constitute solicitation or is it simply an administrative function? What if the Marketing Firm assists the Asset Manager in compiling a list of prospective clients and included on the list are governmental agencies? When does an administrative function become a banned solicitation activity and when does a marketing activity that is allowed for non-governmental clients become tainted because a governmental entity is inadvertently included? If the Marketing Firm were paid by a fixed fee related to the number or quality of the marketing materials, would there be a different result? What if the Asset Manager hires a Madison Avenue advertising firm to assist with a marketing program to governmental agencies, is that banned solicitation or simply an advertising campaign?

The consequences to the Asset Managers and their compliance staff are significant. We are already being asked to provide guidance to clients concerning what is acceptable, what is not and if there is, any way to structure services so they do not constitute solicitation that is proposed to be banned. Rather than preventing the problems of the *Morris* and *Silvester* cases, we submit that the ban as proposed would only serve to increase the burden of compliance officers and regulators and add to the cost of outside counsel for these firms, while leaving unregulated those persons who are intent on violating existing laws by setting themselves up as internal staff.

Asset Managers seeking legitimate services from established Marketing Firms and Marketing Firms who have been conducting a legitimate business for many years could find themselves unintentionally violating the new rule, when they have been conducting the same activities without any regulatory problems for years.

Certification by Chief Compliance Officers

For the reasons discussed in the previous section, we would strongly object to the suggestion in the Release that perhaps the Commission should require compliance officers to certify to a firm's compliance with the requirements of the Proposed Rule. We suggest instead that the Rule require firms to adopt and implement policies and procedures reasonably designed to detect and deter violations of the rules as being a more reasonable standard.

Uniformity and Consistency

As proposed, Rule 206(4)-5 would only apply to federal registered investment advisers and those exempt under Section 203(b)(3) of the Advisers Act. All other asset managers, including those exempt under other provisions of the Advisers Act, those subject to state law and those excluded from the definition of investment adviser could continue to use solicitors/placement agents. Furthermore, there would not be (and we do not recommend that there should be) any ban on the use of solicitors/placement agents when seeking business from non-governmental entities. If adopted, the Proposed Rule would result in a disparity in the treatment of persons providing the same services to different types of entities. We see no basis for such a differentiation and the disparity could result in an increase in those asset managers relying on exemptions or exclusions, increasing the lack of transparency and disclosure.

In addition, under current law, the Commission has left the regulatory treatment of persons acting as solicitors, placement agents, finders or similar functions to interpretation in no-action letters and court cases. As a result, some are registered as investment advisers, some are registered as broker-dealers, some as both and some not at all. We recommend that the Proposed Rule require registration and oversight of all solicitors/placement agents and clarify the types of registration required. We submit that requiring federal registration of all solicitors sharing advisory fees would provide uniformity. Requiring registration as broker-dealers of all persons including 'finders' who provide services on a regular basis in connection with transactions in securities and who are compensated through transaction-based fees, would also provide uniformity.

Finally, since some of the solicitors/placement agents would be registered as broker-dealers, we recommend that the Proposed Rule track the requirements of the MSRB Rules and the FINRA Rules on gifts and entertainment to the extent practicable. Consistency among the definitions of what constitutes a contribution, indirect compensation, including a discussion of gifts and entertainment, conforming the timing and type of reporting requirements and consistency in the amounts of *de Minimis* contributions exempted from the rule will assist those firms seeking to comply with the Proposed Rules, in doing so. Many firms may have already adopted policies

and procedures governing gifts to third parties and political contributions. Minimizing the disparities among the various requirements of new and old rules will reduce the burden on those firms that will be required to comply with the new rule.

If the Proposed Rule is to be successful in eliminating illegal activities, it should apply to all persons contracting with governmental entities, not just federal covered advisers and should attempt to attain uniformity to the full extent practicable.

Comparison to Municipal Consultants

The pay-to-play Release states that one consideration for the ban on solicitors/placement agents were the problems encountered in allowing payment to consultants in connection with municipal transactions. One of the problems noted in footnote 129 to the Release was the fact that the consultants were making political contributions. We recommend that instead of a ban, the problems noted could be addressed by a combination of registering the solicitor/placement agent and mandating the same prohibitions and restrictions on solicitors/placement agents as apply to the investment advisers. We suggest that the consequences for a violation by a solicitor/placement agent of the ban on contributions would be to require that the solicitor/ placement agent repay compensation it received to the governmental entities and that the investment adviser be sanctioned only if it knew or should have known about the payments or if it failed to adopt policies and procedures reasonably designed to prevent or detect unlawful contributions. We also recommend that solicitors/placement agents be subject to a two-year ban on hiring former government officials or staff.

The pay-to-play Release also notes problems in the oversight of consultants in the municipal markets, because the regulators only had the ability to regulate the contracts between the municipal broker and the consultant. Again as noted elsewhere in this letter, most solicitors/placement agents are currently registered in some capacity and, based on current law, we believe that the Commission could mandate that all solicitors and placement agents be registered in some capacity to carry out their activities. As such, regulators have oversight not only over the contracts between the investment advisers and the solicitors or placement agents, as it did in the municipal markets, but also over all other activities of the solicitors and placement agents. Registration provides transparency and uniformity to the activities of solicitors and placement agents and provides better protection to the public than would a ban on solicitor/placement agent activities.

The consultants in the municipal markets were not separately regulated and their activities lacked transparency. Such would not be the case if our recommendations were adopted.

Disclosures

One of the significant problems in both the municipal markets and in the solicitation of governmental entities for advisory services is the lack of uniformity in disclosures to the ultimate client. We recommend that the disclosures required under Rule 206(4)-3 for Solicitors be

expanded to apply to all persons providing marketing, solicitation, placement agent or finder services for governmental entities. Instead of limiting the application of Rule 206(4)-3 it should be expanded to cover all parties involved in marketing to governmental entities and to require disclosure of all fees, conflicts and services to be performed by the marketer/solicitor/placement agent.

Resolving Ambiguity

As noted above, we recommend that the Commission take this opportunity to clarify its position on the registration and licensing of solicitors, placement agents, finders and others involved in sharing fees and referring business. The available law is only found through staff interpretations in releases, no action letters and court cases. Currently, there is a lack of consistency among the firms providing marketing/placement services and in the advice given to them by outside counsel. Some firms are registering as investment advisers, some as broker-dealers, some as both and others claim to rely on some undocumented exemption for finders and solicitors. There is ambiguity about when payments are transaction-based, when they are shared advisory fees and the consequences of making or receiving such payments. As a law firm, we spend too much time and our clients incur unnecessary fees, simply discussing these issues with counsel for the Asset Managers seeking to hire our clients. We spend hours discussing the significance of staff no-action positions, attempting to achieve concurrence on how the parties should be registered, how the fees should flow and what laws apply.

No action letters, federal court cases and the language of the federal securities acts themselves would appear to require that all solicitors, placements agents or finders be registered in some capacity. We recommend that rules be adopted clarifying and synthesizing the various existing laws, rules and interpretations. There is authority indicating that persons who share advisory fees paid to registered investment advisers, must themselves be registered as investment advisers[10] and that persons who receive transaction-based compensation for assisting in obtaining investors for funds or other securities must be registered as broker-dealers[11]. There is

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[10] See *FPC Securities* (avail. Dec 1, 1974) in which the staff stated "where a broker-dealer receives a share of an investment adviser's advisory fee for forwarding Clients to such an investment adviser, the broker-dealer would be required to register under the Advisers Act." See also *Equity Assets Management, Inc.* (avail. Jan 22, 1976) and *Stralem & Company Incorporated* (avail May 12, 1974). Although the SEC subsequently adopted Rule 206(4)-3 to address some of the concerns raised in the letters, the compensation issue has never been clearly addressed and it would appear from the conclusions of the federal appeals court in *Financial Planners Association v. Securities and Exchange Commission, 375 U.S. App. D.C. 389* (March 2007), that the receipt of advisory fees would require registration.

[11] See for example, *John R. Wirthlin* (avail. Jan. 19, 1999) where the staff stated that "transaction- based compensation [is] one of the hallmarks of being a broker-dealer"; *Dominion Resources, Inc.* (Mar. 7, 2000) where the staff rescinded a prior letter and stated that an entity receiving a negotiated fee for services in connection with introducing buyers to sellers of securities at the successful closing of the financing, even though the fee was not based on the public sale of securities was required to register as a broker-dealer; *BSC Financial Corporation* (avail. Oct. 3, 1996) where the staff required insurers and their agents to be registered to receive referral fees in connection with securities sold to insurance clients of the insurers and *1st Global, Inc.* (avail. May 7, 2001).

also authority indicating that an entity does not have to be dually registered, but that the type of registration depends on the services being provided and the compensation being paid.[12]

We urge the Commission to provide clarity in this area. Such clarity could provide uniformity in the oversight of firms providing marketing, solicitor, placement agent or finder services by codifying the requirement for regulatory oversight and providing guidance on the sharing of fees.[13]

Conclusion

Persons, such as those involved in the *Morris* and *Silvester* cases,[14] accepted fees and took payments for the sole purpose of giving the investment adviser access to the governmental entity. Their only goal appeared to be personal enrichment and the only service they provided was access to the governmental entity, not even assurance that the adviser would be awarded the contract. Persons receiving the fees were not appropriately licensed or registered to accept such fees, did not comply with the disclosure requirements of the Solicitors' Rule and in many cases were in violation of state laws, most of which require registration of solicitors.

We submit that the ban on solicitors/placement agents does not address these violations. The proposed ban makes no differentiation among the various solicitors and placement agents involved in these kinds of transactions, whether they are registered or not, whether they provide disclosure or not and what actual services they are providing. The implication of the proposed ban is that no solicitors/placement agents provide any legitimate services. This conclusion is profoundly inaccurate and does a disservice to those firms that have consistently provided high quality services in compliance with applicable laws and with full disclosure to all parties. We submit that a ban on the use of solicitors/placement agents who provide legitimate services will not prevent the kinds of problems found in the *Morris* and *Silvester* cases and will only serve to punish firms that have no history of regulatory problems.

The provision in the Proposed Rule banning solicitors and placement agents, if adopted as proposed, would prevent Marketing Firms such as those described above from continuing to offer legitimate services that provide substantial benefit to the investment advisers they represent, merely because a few individuals, illegally, and in violation of existing statutes and rules, paid fees to entities and individuals purportedly providing similar services. To ban the use of solicitors and marketers based on these cases would be the equivalent of banning all investment advisers because Mr. Madoff used an investment adviser license to commit fraud. To address the problems inherent in the kinds of activities in the *Morris* or *Silvester* cases, we suggest that, rather than imposing a ban on the use of solicitors/placement agents, the Commission consider an approach, such as the one we suggest above, that would provide more

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[12] See, *FPC Securities,* supra note 9. See also *Dana Investment Advisers, Inc.* (avail. Oct 12, 1994), in which registration as a broker-dealer was not required for activities that involved solicitation of advisory services.
[13] See *FPC Securities*, supra and *Financial Planners Association v. Securities and Exchange Commission, 375 U.S. App. D.C. 389* (March 2007).
[14] See note 1, *supra.*

disclosure and oversight, address all aspects of solicitation and marketing services, and would encompass all relationships among investment advisers, governmental entities and marketers, solicitors, placement agents and finders.

In summary, our recommendations include the following:

1. clarify the application of the federal securities acts to solicitors/placement agents by providing clear regulatory guidance preferably by the adoption of rules and/or safe harbors that describe clearly in the registration/licensing requirements that apply to solicitor/placement agents, considering such factors as:

   - persons who solicit on behalf of investment advisers, whether registered or unregistered and who share in advisory fees or are otherwise paid by the investment adviser, must themselves be registered as investment advisers or investment advisory representatives of a registered investment adviser;

   - persons who act as solicitors, finders or placement agents by assisting in placing investors into securities offered by third parties and who are compensated by the issuer or the distributor/underwriter of the security, must be registered as broker-dealers and/or representatives of registered broker-dealers, whether the securities offered are (i) interests in private funds managed by registered or unregistered investment advisers or (ii) interests in securities offered in reliance on Regulation A, Regulation D or otherwise, or (iii) publicly offered securities; and

   - under what circumstances must a solicitor/placement agent be registered as both an investment adviser and a broker-dealer.

2. provide that solicitors/placement agents who are required to register as investment advisers as a result of their solicitation activities for federal registered investment advisers, be included in those advisers allowed to register with the Commission under Section 203 of the Advisers Act, thereby giving the Commission the ability to impose uniform standards for solicitors and placement agents whether the services involve governmental entities or otherwise;

3. clarify the disclosures that would be required by solicitors and placement agents through amendments to Rule 206(4)-3 or otherwise, to include:

   - all fees paid to the third party by the investment adviser;

   - all services provided by the solicitor/placement agent to or for the investment adviser;

- all affiliations between the solicitor/placement agent and the entity being solicited, including political contributions whether or not allowed by the Proposed Rule, all current, past or prospective employment relationships between staff or officials of the entity and the solicitor/placement agent; and

- any other potential or existing conflicts of interest that might apply to the solicitation activities;

4. require that the mandated disclosures apply to all solicitors/placement agents of all investment advisers, whether or not the investment adviser is registered with the Commission and whether or not the solicitor/placement agent is a related person of the investment adviser, an associated person or an independent third party;

5. impose limits and bans on contributions by third-party solicitors/placement agents comparable to those imposed on the investment advisers seeking to do business with the governmental entity;

6. impose penalties on solicitors/placement agents for violation of contribution bans that would result in loss of compensation, penalties or rescission payments by the solicitor/placement agent to the entity solicited;

7. penalize the investment advisers for violations by their solicitor/placement agents only if the investment adviser knew or had reason to know of the violations, or the violations were undetected or allowed to occur because the investment adviser failed to adopt and implement policies and procedures reasonably designed to detect such violations; and

8. require all parties involved in solicitation of governmental entities to adopt and implement policies and procedures reasonably designed to prevent violations of any of the applicable securities laws and rules.

If the above requirements had been in place, the investment advisers seeking business from the pension fund could only have made payments to persons if they were registered in some capacity and if they made full disclosure to all parties of all payments. It is unlikely that *Morris* and his associates would have been able to meet those requirements.

We understand the need and the desire of the Commission to adopt standards and guidelines that would assist in preventing future schemes such as those in *Morris* and *Silvester*. We recommend, however, that instead of imposing a complete ban on such activities, the Commission should provide clarity where there has been ambiguity and adopt rules acknowledging the legitimate business interest served by solicitors and placement agents and imposing clear regulatory oversight over those activities.

We appreciate very much the opportunity to provide these comments.

Sincerely yours,
BRYANT LAW, a Professional Corporation

Susan E. Bryant

cc: Elisse B. Walter, Commissioner
Andrew J. Donohue, Director, Division of Investment Management