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October 6, 2009

By electronic submission.

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

Re: Political Contributions by Certain Investment Advisers; File Number S7-18-09; 74 Federal Register 39840 (Friday, August 7, 2009).

Dear Ms. Murphy:

The American Bankers Association[1] (ABA) appreciates the opportunity to comment on the Securities and Exchange Commission's (Commission) proposal to prohibit investment advisers from providing advisory services for compensation to a government entity for two years after the adviser or a "covered associate" makes a contribution to an official who has influence over the selection of the adviser. Many of our member institutions have investment adviser subsidiaries that could be subject to the proposal.

As we stated in our letter to the Commission in 1999, ABA strongly supports the notion that investment advisers to state entities must be chosen based solely on merit.[2] Nonetheless, we again believe that the new proposal should be amended (1) to limit the scope of the prohibition and reporting to the adviser and those individuals who actually provide advisory services or solicit business or set those policies, (2) to eliminate the "look-back" rule for those individuals who have become "covered associates," and (3) to allow third-party placement agents to continue providing their helpful services.

Background

For over fifteen years, the Commission has been concerned with the potential improper use of political contributions to state government officials and candidates

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.3 trillion in assets and employ over 2 million men and women.

[2] Letter from Sarah A. Miller, American Bankers Association, to Jonathan Katz, Secretary, Securities and Exchange Commission (November 1, 1999).

to influence the selection of advisers to those government entities. In 1999, the Commission released a similar proposal to the current proposal but never issued a final rule. The recent proposal would generally prohibit registered advisers and unregistered advisers that rely on Section 203(b)(3) of the Investment Advisers Act from:

- Providing investment advisory services for compensation to a government entity within two years after a contribution to officials or candidates with influence over the selection of the adviser is made by the adviser, a "covered associate," or someone who becomes a "covered associate" within two years of the contribution date.
- Providing or agreeing to provide payment to any person to solicit a government entity for advisory services on behalf of the adviser unless such person is a related person.
- Soliciting contributions for an official of a government entity while providing or seeking to provide investment advisory services to the government entity.

The proposal allows for two very narrow exceptions to the contribution prohibition. Under the de minimis exception, the prohibition does not apply to contributions of less than $250 made to an official for whom the individual is entitled to vote.[3] Alternatively, an exception will be made for contributions of less than $250 for an official for whom the individual was not entitled to vote, which contributions were discovered within four months of the making of the contribution and returned within sixty days after discovery. The adviser may only use the returned contribution exception twice during a twelve month period and never more than once for a particular covered associate.

The proposal further requires the adviser to maintain detailed records on the political contributions of relevant employees and executives of the adviser even if those contributions fall within the exception for de minimis or returned contributions.

Overly Broad Prohibition on Contributions

ABA believes that the scope of the proposal's prohibition on contributions is overly broad, burdensome, and not flexible enough to allow for inadvertent violations. We believe that the prohibition should only apply to the adviser and those employees and executives of the adviser that are actually engaged in the solicitation or provision of investment advisory services or are setting the policy for such activities. Narrowing the scope of "covered associates" would provide more certainty to advisers trying to comply with the prohibitions, as well as make compliance and recordkeeping efforts less onerous.

The need to apply a narrow scope is all the more compelling given the severe consequence of the two-year ban on doing business for even an inadvertent violation. As alternative illiquid investments become more and more popular, the potential damage to other investors from extricating a government entity from the covered investment could be profound. Indeed, sometimes the subscription agreement prohibits investors from pulling out within a certain period.

[3] Unfortunately, the proposal does not index for inflation the $250 threshold, thereby making the exception less helpful over time.

And lastly, given its fiduciary duties, the adviser may decide that it must provide services without compensation for several months, if not longer.

The exceptions for de minimis and returned contributions would not provide significant relief. The definition of a contribution includes not only traditional monetary donations, but the purchase of inaugural ball tickets and the hosting of a candidate forum. In most cases, these contributions cannot be returned and probably exceed the extremely low threshold of $250.[4]

Covered Advisers and Associates

Under the proposal, the contribution prohibition and recordkeeping requirements apply to the adviser and the broadly defined "covered associates." A covered associate includes an adviser's general partner, managing member, executive officer, or other individual with a similar status or function, or an employee who solicits a government entity for the adviser. An executive officer is defined as the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), or any other executive officer of the investment adviser who directly or indirectly supervises someone who either solicits or provides advisory services or supervises someone who does.

Under this definition, the adviser would have to track the contributions of a great network of individuals who directly or *indirectly* supervise those who in turn supervise someone who actually provides advisory services or solicits customers. In addition, the adviser must in anticipation track the contributions of those who may potentially be promoted into a "covered associate" position. How could the adviser reasonably know who may be promoted two years from any given point and therefore know to start tracking their contributions? Under such uncertainty, the adviser may feel it necessary to track the contributions of all but a few of the employees.

A similar concern applies to newly hired employees whose contributions from the previous two years would apply to not only the new firm, but also possibly the former firm. As we stated in our 1999 letter, the rationale for the "look-back" requirement is not credible. The new employee does not have an incentive to serve as an intermediary for the former employer, nor is the potential good will created at the former firm through the contribution likely to transfer to the new employer.

Given the likelihood of an inadvertent violation due to the contribution of a promoted or newly hired "covered associate," ABA respectfully requests that the Commission remove this "look-back" provision from the proposal. At a minimum, advisers should be given an exception to the look-back rule, as long as they asked and relied in good faith on the contributions disclosures and certifications of newly hired or promoted individuals.

Third-Party Placement Agents

One of the significant changes to the 1999 proposal is the new prohibition on the use of third-party placement agents to help advisers obtain business from government entities. Such a prohibition only serves to harm both the adviser and the government entity by depriving them of

[4] Although the U.S. Court of Appeals for the District of Columbia Circuit held in *Blount v. SEC* that the MSRB Rule G-37 was constitutional, the Supreme Court has since decided cases that raise new questions about such restrictions. *See Randall v. Sorrell*, 548 U.S. 230 (2006).

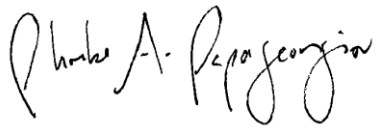
the helpful and legitimate services of these agents. These agents provide valuable screening, transparency, and oversight functions for the government entities that do not have the staff to research the extensive number of investment options available to their public pension funds, 529 college savings plans, and other retirement plans. Furthermore, the restriction would harm and potentially put out of business many of the smaller advisers that do not have the resources or related parties to provide those services.

Instead of imposing the proposed ban, ABA recommends that the proposal have the flexibility to allow the use of third-party placement agents that contractually or by regulation are subject to the same contribution restrictions as the adviser.

Conclusion

In conclusion, ABA appreciates this opportunity to offer comments on the proposed regulation under the Investment Advisers Act of 1940. As we mention above, we respectfully recommend that the Commission amend the proposal to (1) to limit the scope of the prohibition and reporting to the adviser and those individuals who actually provide advisory services or solicit business or set those policies, (2) to eliminate the "look-back" rule for those who have become "covered associates," and (3) to allow third-party placement agents to continue providing their helpful services. Should you have any questions or comments with respect to the issues raised in this letter, please do not hesitate to call the undersigned at (202) 663-5053.

Sincerely,



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