SEWARD & KISSEL LLP

ONE BATTERY PARK PLAZA
NEW YORK, NEW YORK 10004

TELEPHONE: (212) 574-1200
FACSIMILE: (212) 480-8421
WWW.SEWKIS.COM

1200 G STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE: (202) 737-8833
FACSIMILE: (202) 737-5184

October 6, 2009

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Request for Comment on Proposed Rule Under the Investment Advisers Act of 1940 Regarding Political Contributions by Certain Investment Advisers; File No. S7-18-09

Dear Ms. Murphy:

We submit this letter in response to the specific requests of the Securities and Exchange Commission (the "Commission") in Release No. IA-2910 (the "Release")[1] for comment on proposed rule 206(4)-5 (the "Proposed Rule") and proposed amendments to rules 204-2 and 206(4)-3 (the "Proposed Amendments") under the Investment Advisers Act of 1940 (the "Advisers Act"),[2] which would address "pay to play" practices by investment advisers. Specifically, the Proposed Rule would, among other things, (i) prohibit an adviser from providing advisory services for compensation to a government entity for two years after the adviser or any of its covered associates makes a political contribution to a public official of the government entity that is in a position to influence the award of advisory business;[3] (ii) prohibit an adviser from paying third parties to solicit government entities for advisory business;[4] and (iii) prevent an adviser from soliciting from others or coordinating contributions to an official of a government entity to which the investment adviser is seeking to provide investment advisory services, or payments to a political party of a state or locality where the adviser provides or seeks to provide investment advisory services to a government entity.[5] The Proposed Amendments would require a registered adviser to maintain certain records of the political contributions made by the adviser and its covered associates.[6]

[1] Political Contributions by Certain Investment Advisers, Advisers Act Release No. IA-2910, 74 Fed. Reg. 39,840 (proposed August 7, 2009) (to be codified at 17 C.F.R. Part 275).
[2] Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 - 80b-21 (2008).
[3] Proposed Rule 206(4)-5(a)(1).
[4] Proposed Rule 206(4)-5(a)(2)(i).
[5] Proposed Rule 206(4)-5(a)(2)(ii).
[6] Proposed Amendment 204-2(a)(18)(i).

We appreciate the opportunity to comment on the Proposed Rule and the Release. Seward & Kissel LLP has a substantial number of clients who would be affected by the adoption of the Proposed Rule. We respectfully submit the following comments and request that the Commission consider them before adopting the Proposed Rule. The views we express in this letter, however, are our own and do not necessarily reflect those of our clients.

I. Purpose of the Proposed Rule

The Commission has indicated that the Proposed Rule has been motivated, at least in part, by recent events which suggest that pay to play has become a factor in the selection of investment advisers in managing pension fund assets. In particular, the Commission notes the recent kickbacks scandal involving the New York State Common Retirement Fund, and the Commission's enforcement action relating thereto, as evidence of the need for greater regulation of investment advisers.[7] The Commission believes that this scandal, and others like it, "may reflect more widespread involvement by securities professionals in pay to play activities."[8] In noting the harm that pay to play practices cause in the management of public funds, the Commission states that "pay to play practices can distort the process by which investment advisers are selected and can harm advisers' public pension plan clients, and the pension plan beneficiaries, which may receive inferior advisory services and pay higher fees because, for instance, advisers must recoup contributions, or because contract negotiations are not handled on an arm's-length basis."[9] Thus, the Proposed Rule is designed to protect public pension plans from the consequences of pay to play practices by ensuring that advisory business is awarded based on merit rather than on the payment of improper kickbacks.[10]

II. Commission Has Tools to Enforce Existing Laws in Order to Address Pay to Play Practices

While we are mindful of the need to curtail pay to play practices, especially in light of the recent scandals involving the payment of kickbacks in exchange for investment advisory business, we believe that the Commission has the tools necessary to address pay to play concerns through the monitoring and enforcement of existing laws. Under the Advisers Act, a solicitor that is engaged by a registered investment adviser to obtain investment advisory business is required to furnish to the client a written disclosure document which discloses the names of the solicitor and the investment adviser, the nature of the relationship between the solicitor and the investment adviser, a statement that the solicitor will be compensated for his solicitation services by the investment adviser, the terms of such compensation arrangement, including a description of the compensation paid to the solicitor, and the amount, if any, that the client will be charged in addition to the advisory fee as a result of the investment adviser's arrangement with the solicitor.[11] To the extent that the Commission believes that this rule does not adequately address pay to play practices, we request that the Commission amend the rule in

[7] *See SEC v. Henry Morris, et al*, Litigation Release No. 21036 (May 12, 2009).
[8] *Release*, at 39,843.
[9] *Id.*, at 39,841.
[10] *Id.*, at 39,861.
[11] 17 C.F.R. § 275.206(4)-3(b).

order to address its perceived inadequacies, rather than adopt the Proposed Rule, a more drastic, and perhaps unnecessary, measure. For example, the Commission might consider amending the rule to provide that in the case of a pension plan client, disclosure regarding the adviser's relationship to the solicitor must be made not only to the plan (which might involve disclosure to a plan trustee who may benefit from the advisory relationship) but to each member of the pension plan's investment committee or other body that is charged with making investment decisions. Thus, we request that the Commission address its concerns regarding pay to play practices through stricter enforcement of existing laws and, to the extent necessary, amendments thereto.[12]

III. Alternative Approach to Address Political Contributions Made by Investment Advisers

As an alternative to the Proposed Rule, we recommend that the Commission require all investment advisers to adopt policies and procedures designed to prevent an adviser from engaging in pay to play practices. Under such a requirement, each adviser would adopt and implement procedures taking into account the nature and particular circumstances of the adviser's business. Procedures might require a pre-clearance process for political contributions or the disclosure of contributions. In the event that an adviser or any of its covered associates is found to have made a political contribution to a public official of a government entity that is in a position to influence the award of advisory business, the appropriate personnel of the adviser, rather than the Commission, would address the issue in accordance with the particular policies and procedures adopted by the adviser.

The Proposed Amendments, if adopted, would require an investment adviser that has or seeks government clients or that provides investment advisory services to a covered investment pool in which a government entity invests or is solicited to invest, to make and keep certain records of contributions made by the adviser and its covered associates.[13] Specifically, registered investment advisers would be required to maintain a list of the names of its covered associates, the states in which the investment adviser has or is seeking government clients, the identity of those clients, and the contributions made by the investment adviser and its covered associates to government officials and candidates.[14] The Proposed Amendments, along with our suggestion that an investment adviser adopt appropriate compliance policies in connection with political contributions by the adviser and its covered associates, would provide the Commission with the necessary information regarding an adviser and its covered associates and any contributions made by them during the course of a routine examination by the Commission. In the event that the Commission has reason to believe, based on its review of an adviser's records, that political contributions were made with the purpose or effect of influencing the award of advisory business, the Commission could take appropriate action with respect to such adviser.

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[12] In this regard, we note that in the Commission's complaint against the various persons alleged to have been involved in the fraudulent kickback scheme concerning the New York State Common Retirement Fund, the Commission alleges that the payment of finder's fees was not disclosed to the pension fund clients as required by Rule 206(4)-3. *See SEC v. Henry Morris, et al*, Litigation Release No. 21036, at 3 (May 12, 2009).
[13] Proposed Amendment 204-2(a)(18)(i).
[14] Proposed Amendment 204-2(a)(18)(ii).

The Commission states that it has "narrowly tailored the [Proposed Rule] to achieve [its] goal of ending adviser participation in pay to play practices, while seeking to limit [its] burdens."[15] We disagree. We believe that the Commission can address its concerns using the less burdensome measures discussed above.

IV. Prohibition on the Use of Placement Agents Would Have Adverse Consequences for Small or Emerging Investment Firms and Government Pension Plans

A. Effect on Investment Firms

The Commission states that pay to play practices "may manipulate the market for advisory services by creating an uneven playing field among investment advisers."[16] Specifically, the Commission notes that pay to play practices harm "smaller advisers that cannot afford the required contributions."[17] While we are mindful of the negative effect that pay to play practices can have on smaller investment firms, we believe that the Proposed Rule will only exacerbate the challenges facing smaller investment firms. By prohibiting an investment adviser from retaining professional placement agents to assist the adviser in the solicitation of government entities for advisory business, the Proposed Rule would place the burden of seeking advisory business solely on the adviser. We believe that this would significantly disadvantage small and emerging investment firms that cannot afford to hire and retain internal marketing personnel and would result in an unfair advantage for large, established investment firms that have ample resources to market their investment services.

B. Effect on Government Pension Plans

We believe that reduced competition among investment firms would result in a more limited selection of investment options for many government pension plans, which would have reduced access to smaller, potentially more qualified, investment firms. The Commission states that if pay to play is a factor in the selection process, "the most qualified adviser may not be selected, potentially leading to inferior management, diminished returns or greater losses."[18] We agree, but the Commission's solution will likely lead to the same result, as qualified investment firms that cannot afford to hire internal marketing personnel may not be able to effectively market their services to pension plan clients. By preventing smaller and emerging investment firms from successfully competing for investment advisory business, we believe that the Proposed Rule would limit, rather than expand, the investment opportunities available to government pension plans.

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[15] *Release*, at 39,860.
[16] *Id.*, at 39,841.
[17] *Id*.
[18] *Id.*, at 39,844.

V. Two-Year Time Out and Related Look-Back Provision Should be Eliminated

A. Two-Year Time Out Should be Eliminated

The Commission requests comment on whether two years is an appropriate length of time.[19] We believe that two years is unnecessarily long and punitive in nature. In many cases, the Proposed Rule would, in effect, force an investment adviser to terminate its business relationship with a government entity to which it or any of its covered associates made a political contribution, as most advisers cannot afford to provide investment advisory services to an entity for two years without compensation. Furthermore, the Proposed Rule makes no distinction between an adviser that intentionally makes an improper contribution and an adviser that violates the Proposed Rule inadvertently or as a result of the improper actions of a covered associate even though the adviser has reasonable policies and procedures addressing pay to play practices. Accordingly, we respectfully request the Commission to eliminate the two-year time out in its entirety.

In the event that the Commission rejects our recommendation to completely eliminate the two-year time out, we recommend that the Commission reduce the proposed time out to a period of six months. A six-month time out on receiving compensation, we believe, would provide adequate disincentive to an investment adviser and its personnel from making political contributions to officials of government entities to which they provide or seek to provide investment advisory services.

B. Look-Back Provision Should be Eliminated

Under the Proposed Rule, the two-year time out would continue in effect even after the covered associate who made the triggering contribution left the advisory firm.[20] Furthermore, a contribution made by a covered associate of an adviser would be attributed to any other adviser that employs or engages the person who made the contribution within two years after the date the contribution was made.[21] The Commission requests comment on the proposed look-back provision.[22] We believe that the application of the look-back provision would have an exceedingly burdensome effect on advisers.[23] This is especially true in the circumstances in which a covered associate failed to report a contribution in accordance with the adviser's policies and procedures or made a contribution prior to joining the adviser. Accordingly, we respectfully request the Commission to reject the look back provision in its entirety.

Alternatively, we recommend that the Commission reduce the look-back period to six months. As previously discussed, we believe that a six-month look-back requirement would be sufficient to address pay to play concerns, as the loss of six months' worth of fees is

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[19] *Id.*, at 39,847.
[20] *Id.*, at 39,850.
[21] Proposed Rule 206(4)-5(a)(1).
[22] *Release*, at 39,850.
[23] We note in this regard that certain states may place restrictions on the ability of an employer to inquire about the political activities of its employees, including political contributions.

significant enough to deter advisers and their covered associates from resorting to pay to play practices to obtain advisory business.

VII. The Commission Should Raise the *De Minimis* Amount to $1,000

The Proposed Rule contains a *de minimis* exception that would permit a covered associate to make aggregate contributions of $250 or less, per election, to an elected official or candidate for whom the covered associate is eligible to vote.[24] The Commission requests comment on whether the *de minimis* amount should be increased.[25] We request that the Commission raise the *de minimis* amount from $250 to $1,000.

We appreciate the opportunity to comment on the Proposed Rule. If you have any questions regarding this letter, please contact the undersigned at the telephone numbers indicated below.

Very truly yours,

/s/ Patricia A. Poglinco__
Patricia A. Poglinco
212.574.1247

and

/s/ Robert B. Van Grover_
Robert B. Van Grover
212.574.1205

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[24] Proposed Rule 206(4)-5(b)(1).
[25] *Release*, at 39,850.