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4 September 2009

Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-1090

Re: File Number S7-18-09

Dear Commission Members:

Our letter is in response to the aforementioned proposed rule, File No. S7-18-09, in the belief that an outright ban on the use of legitimate Placement Agents or third party intermediaries is a draconian response that affects an entire industry as a result of the misconduct of a few of its representatives and improperly supervised politicians.

It is broken down into three sections:

- I. Firm background and current practices
- II. Matters of equity
- III. Law of unintended consequences

### **Section I: Firm background and current practices**

Ocotillo Capital has two Managing Members. Each of us became involved in the institutional investment business in 1976, just after the passage of ERISA, and together bring almost seventy years of experience to the business. We have developed an extensive network of contacts through our work that includes the management of major corporate pension plans, consulting, and the marketing for both large and small investment firms.

We have been third party marketers / placement agents for ten years. As third party marketers and registered representatives of a broker-dealer, we each hold Series 7 and 63 licenses while one partner also holds a Series 6 and 24, and the other a Series 3. We comply with all SEC licensing and continuing education requirements.

We currently act as a third party marketer for a small, entrepreneurial value manager. When calling on prospects on their behalf, we clearly identify ourselves as third party representatives. After introducing the investment product and finding appropriate interest, we bring the prospect and manager together to discuss the investment strategy in detail. Prior to any account being initiated, the prospect receives the firm's ADV.

If the prospect decides to open an account with the management firm, the prospect must sign, a contract, and disclosure document. This document specifically states our role, the fact that we receive payment from the fees the prospect pays to the manager, and that the fees are the same whether or not our services were contracted, i.e., the prospect pays no higher fee by virtue of our involvement.

Most of the assets we raise are for separate accounts and, therefore, not deemed “securities”. However, we conduct all our business as Registered Representatives (“RR”) of a licensed Broker-Dealer (“BD”). The BD is a member of FINRA and SIPC. Our two-person office is physically separated from the BD headquarters and is deemed a “branch office”. The BD requires continual reporting, audits our office and has us, as RRs, participate in a regular Continuing Education program. As both a branch office and as RRs, we are under the eye of FINRA and the SEC and our files and correspondence are subject to audit at any time.

We meet the highest ethical and legal standards and represent what our industry has generally referred to as a “best practices” placement agent. We are not alone or unique in this regard. That is why our industry is so frustrated by what is unfolding.

## **Section II: Matters of equity**

The rule you have proposed will end our business and the businesses of other entrepreneurs.

We do not make direct contact with many institutional investors. The majority of our work is with the consultants that serve the institutional community, and who provide another layer of due diligence. Their imprimatur is virtually mandated before proceeding directly to their clients.

Nearly all consultancies have a mix of public and private clients. Consultants will not spend time reviewing firms they can recommend to only half their clientele. Overwhelmed by an array of investment opportunities and by the number of firms ready to deliver on them, consultancies choose carefully how they spend their research time. Any firm barred from public funds, because they have an external rather than internal marketing staff, by default will be barred from many private funds due to their inability to get in front of the consultants.

We fully support your efforts to remove political contributions from fiduciary decisions and a ruling that bars placement agents and investment managers from making political contributions for a specified period following the receipt of an investment account. Firms/personnel that use spurious means to obtain assets place our firm at a competitive disadvantage. We would much appreciate if both the third party marketer and the investment firm that engaged them and, knowingly or unknowingly, tolerated their practices, were barred from the process. Signed disclosure statements should be required and third party marketers should be Registered Representatives of a Broker-Dealer.

## **Section III: Law of unintended consequences**

What positive aspects do firms such as ours bring to the US capital markets and what consequences might your actions precipitate?

1. The proposed rule acts at cross-purpose to stated public-social policy. Many public funds, in order to encourage more woman and minority owned firms in the investment markets, have set aside capital for the specific purpose of nurturing such firms. These firms do not have the financial wherewithal to employ seasoned marketers who have the time and skills to interface with sophisticated investors. Such investment firms would have difficulty presenting themselves to the institutional investment community.
2. The prohibition against all placement agents operating before public funds will devalue investment firms, as they will not have the required marketing support, and consultants, who will deliver to clients a smaller range of investment possibilities. As noted, consultants cannot afford to expend due diligence efforts on managers who can serve only half their clientele.
3. There will be an opportunity loss for investment managers as placement agents often represent more than one firm – though never more than one in a particular investment space. Consultant and institutional investor time is more efficient as a short introduction can be made on multiple opportunities. Time is finite and the consultant or investor, by necessity, will not see the full range of opportunities if assessed one at a time.
4. Many other investors, not just public funds, will lose investment opportunities. A Brazilian manager working with a US placement agent anticipates more than half the assets raised in the US will come from public funds. If the placement agent cannot represent them before more than 50% of the market, they will have no US representation. Unless the investor-institution can uncover this opportunity on its own, and only a small minority has that ability, the institution will lose the opportunity.

Why would the manager relinquish all US source capital? The paraphrased response was that “the amounts of capital in Latin America being reinvested within Latin America, as well as capital flows from Pan Asia, Middle East sovereign funds and, to a lesser extent Europe, are such that US capital markets were important but not critical. Greater efficiencies of scale were available elsewhere”.

In a recent article about the decline of US power in Brazil, Hillary Clinton, the secretary of state, has noted that the large scale investments by China and Iran are allowing them to make “disturbing” gains in the region (*The Economist*, 13 Aug 2009, © The Economist Newspaper Limited, London 2009). In addition to the contravening effects on public-social policy noted above, the proposed ruling may have an unintended effect on foreign policy if it diminishes the US investment presence abroad.

We encourage the regulation of political contributions by investment firms that manage public funds, whether through internal marketing or external third party marketers. However, the actions of a few placement agents should not result in the wholesale destruction of the industry.

The elimination of a third party does not eliminate the problem of unscrupulous behavior between a political official in control of public funds and the investment firm hired to manage those funds.

Thank you for your consideration.

Sincerely,

Seth Rosenberg & Elliott M. Gartner  
Managing Members