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November 11, 2010

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

**Re: Proposed Rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940
File Number S7-25-10**

Dear Ms. Murphy:

We represent The Private Investor Coalition, Inc. ("Coalition"), an entity all of whose members are single family offices. The Coalition is submitting this letter to express its views on the nature and scope of the rule that the Commission must adopt to implement the authority granted to it in Section 409 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") to define the term "family office." As you know, an entity that can comply with the rule will be excluded from the definition of "investment adviser" and not be subject to registration or regulation under the Investment Advisers Act of 1940 ("Advisers Act"). Because Section 403 of the Dodd-Frank Act repeals Section 203(b)(3) of the Advisers Act on July 21, 2011, the Coalition strongly supports the timely adoption of a rule under Section 202(a)(11)(G) of the Advisers Act that will exclude single family offices from the definition of "investment adviser."

The Coalition appreciates this opportunity to comment on Proposed Rule 202(a)(11)(G)-1 ("Proposed Rule"). In general, Investment Advisers Act Release No. 3098 ("Release") is consistent with the exemptive orders previously issued by the Commission, and is not unfaithful to the legislative mandate contained in Section 409. As the Commission will appreciate, however, reviewing just a dozen or so exemptive applications during the past 70 years could not possibly have given the Commission or its staff a thorough or deep understanding of each possible structure or arrangement that has been used to form a single family office. Therefore, the Coalition's comments in this letter are intended, in substantial part, to give the Commission additional information, in particular about the variety of structures and arrangements that have been used to form and operate single family offices for the benefit of the members of families. Other comments will identify what appear to be unintentional drafting issues. Finally, the Coalition appreciates how promptly the Commission was able to turn to the rulemaking mandated by Section 409 so that single family offices will have a substantial amount of time to work with the Proposed Rule well before the repeal of Section 203(b)(3) is effective on July 21, 2011.

Comments

1. General Approach

The Coalition understands the approach that the Commission has followed in drafting the Proposed Rule. While the Coalition appreciates that the Commission may have to use its exemptive authority in new Section 202(a)(11)(H) to address certain specific situations that may not fit cleanly within the four corners of the Proposed Rule, the Coalition also strongly urges the Commission to make every effort to amend the Proposed Rule, as discussed more fully below, and to adopt a final Rule that the vast majority of single family offices, now and in the future, will be able to use to administer their affairs without any involvement of the Commission.

It cannot be emphasized strongly enough that single family offices have existed for over 100 years. They were formed to implement very important and complex objectives, including investment management, corporate succession, estate, gift, and income tax planning and charitable giving issues that are important to the members of the family. Implementation of these goals has often required multifaceted structuring, through irrevocable trusts, for example, that cannot easily be changed and that contemplate lengthy time horizons for their administration. As a result, it will be extremely difficult, if not almost impossible, for many single family offices to engage in any kind of significant restructuring, solely to come into compliance with the Proposed Rule as drafted, without triggering very serious collateral consequences to the important and complex goals that were the reason for their formation. While the Coalition appreciates the Commission's desire not to create or leave loopholes that non-qualifying entities might attempt to exploit, it is equally important that the Commission fully understand that the Proposed Rule is being imposed now on single family offices that have been self-policing and fully functional for a long, long time, and have been operated quite successfully for the benefit of members of the family. At the end of the day, the Commission needs to provide enough additional flexibility so that those single family offices that would be adversely impacted by the provisions of the Proposed Rule can comply with the final Rule, and can still continue to evolve and adapt over time to meet the dynamic needs of the members of the family.

2. Family Clients

Founder

Like the central place that the term "client" serves for purposes of determining the applicability of many of the regulatory provisions of the Advisers Act, the concept of "founder" is critical to any analysis of a single family office. On page 12 of the Release, the Commission appears to assume that the founder of a single family office is always the person whose economic prowess created the family's wealth, whether such person is older or younger. This is not always the case. In quite a number of situations, it is a person (or persons) in the second or third generation who creates the single family office. In those situations, the person whose economic prowess created the family's wealth (as well as his[1] spouse) may be deceased even though the family office is dedicated to his memory and, in family office parlance, he is often referred to as the "patriarch" of the family.[2] Moreover, the single family office may be created by several persons, each of whom is a lineal descendant of the person whose economic prowess created the family's wealth. Or the trustee of trusts created by the "patriarch" for the benefit of his descendants may have created the single family office to assist in the administration of the affairs of the members of the family. Or the single family office may be an affiliate of a bank or trust company that has been created by the family to provide corporate trustee services to the family members. Or the single family office may have been created by the key employees of the single family office as a more efficient way of providing services to the members of the family.[3] Finally, many single family offices exist as a division or a department within, or a subsidiary of, an industrial or operating company that is owned by the family;[4] unlike a subsidiary, such a

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[1] Use of the male gender in the comment letter is not intended to suggest that the same considerations would not apply equally to persons of the female gender, and vice versa. And use of the singular is not intended to suggest that the same considerations would not apply equally to two or more persons in the same situation.

[2] Where the founder of the single family office is from the third generation, the person whose economic prowess created the family's wealth would be the grandfather of the founder. Paragraph (d)(3)(ii) of the Proposed Rule would limit the term "family member" to the parents of the founder. It would be bizarre indeed if the definition of "family member" did not include the founder's grandfather who would be, in this hypothetical, the person whose economic prowess created the family's wealth.

[3] The Coalition believes that the Commission in drafting the Proposed Rule used words generally associated with traditional corporations, but did not intend thereby to exclude members and officers of a Limited Liability Company ("LLC"), for example. The Commission could clarify this point to include LLCs, as well as any person routinely performing functions corresponding to any of the enumerated categories with respect to any organization (whether incorporated or not). *Cf.* Rule 3b-2 under the Securities Exchange Act of 1934.

[4] Section 202(a)(5) defines the term "company" to mean, among other things, "any organized group of persons, whether incorporated or not." As the Commission is aware, the definition of "company" has

division or a department may not be a juridical person that can sue or be sued, and it may not be "owned" by the family separate and apart from the family's ownership or control of the industrial or operating company, although there can be little doubt that family "controls" the single family office.[5]

Because of those various facts and circumstances, none of which degrades in any respect from the core concept that a single family office exists to serve the members of the family and one or more of which describes all of the members of the Coalition, the Coalition urges the Commission to determine that, to be a single family office, the founder must be a lineal descendant of some common ancestor whose economic prowess created the family's wealth. In that context, the Coalition suggests that it would be the better drafting policy to delete the definition of "founder" in subparagraph (d)(5) of the Proposed Rule because of the daunting complexity of drafting a comprehensive definition that would suit the diverse needs of so many single family offices. Instead, the Coalition believes that the Commission should leave the term undefined so as to give the families involved flexibility in determining who, for purposes of that single family office, is deemed to be the founder, and thus from whom the family tree described in the defined term "family member" will grow and be populated for purposes of the final Rule.

Family Members

In general, the proposed definition of "family client" is not inconsistent with the types of persons who are usually served by single family offices. The Coalition notes that the term "family member" appears to assume that the member of the family on whom the definition would be based is an older person, while at page 12 of the Release the Commission acknowledges that the founder of a single family office could be a much younger person. For that reason, we believe the term "family member" should also include the individual, his parents, his grandparents, and the siblings of each such person, *i.e.*, his aunts and uncles and great aunts and uncles, and their spouses and children. They are members of the same "family," and it is not at all unusual for a single family office to include such individuals within the single family office.

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been interpreted by the Commission, and by the courts, to apply to a separate account of insurance company and to other "ectoplasms." *See* SEC v. Variable Life Ins. Co., 359 U.S. 65 (1959) (variable annuity contract is a "security," and the issuer of a variable annuity contract is an "investment company"). It is the position of the Coalition that, where the single family office exists as a division or department within another company, the other company is not itself engaging in the investment advisory and other activities being engaged in by the single family office. In short, the other company is not engaged in the business of giving investment advice with the meaning of Section 202(a)(11).

[5] Subparagraph (d)(1) of the Proposed Rule also contains a definition of "control" which appears to differ somewhat from the definition in Section 202(a)(12). It is unclear what the slightly different definition in the Proposed Rule is intended to accomplish.

The Coalition unequivocally supports the inclusion of adopted children, step children, and spousal equivalents. In this day and age, it is the rare single family office in which some member of the family does not have adopted children, step children, and/or spousal equivalents. If the member of the family wishes to share his home and his assets with an adopted child, step child, or a spousal equivalent, the Coalition believes that the single family office should make the decision whether to include such a person as a client of the single family office without being subject to regulation under the Advisers Act. For the same reason, the Coalition would support the inclusion of siblings of the founder and spouses and descendants of the siblings in the definition of "family client." The Coalition assumes that it was the intention of the Commission to include siblings, adopted children, step children, and spousal equivalents of each other person in the family tree that is created with the definition of "family member." Finally, it would be inappropriate for the Commission to place any conditions on the inclusion of adopted children, step children, or spousal equivalents in the definition of "family member."

Involuntary Transfers

Heretofore, single family offices relying on Section 203(b)(3) have not experienced serious problems with involuntary transfers because Rule 203(b)(3)-1(b)(4) under the Advisers Act provides that a person who or which is not being charged compensation for investment advice is not a "client." Assume hypothetically that all of the natural persons who are beneficiaries of a family trust perish simultaneously and assume further that the remote, default beneficiary of the trust is a charity. If the charity was established by a member of the family, then the charity would probably have been considered an advisory client of the single family office and the single family office may be asked to continue to provide investment advice, whether or not it is being compensated for the investment advice. If the charity was a public charity like the Red Cross, the assets constituting the corpus of the trust would probably be transferred in kind to the public charity when the legal proceedings caused by the demise of those family members were brought to a conclusion, such as the probating of each of the relevant estates. We assume that the phrase in subparagraph (b)(1) of the Proposed Rule, "following the transfer of assets from the involuntary event," is intended to be read in the manner described above, *i.e.*, that the four months only begins to run after it becomes legally possible to effect a transfer.[6]

The Commission should appreciate, however, that a number of the types of investments in which single family offices invest are illiquid or the ability to redeem, such as interests in a

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[6] This reading is consistent with the discussion on page 15 of the Release which references transitioning to another investment adviser, seeking an exemptive order, or other restructuring the activities of the family office to comply with the Advisers Act. Each of those potential alternatives would almost surely take a considerable period of time, not just four months from the hypothetical demise of the other beneficiaries of the trust.

private investment company, will be governed by a contract with the sponsor of the private investment company, and even then the single family office may receive illiquid securities in kind in satisfaction of its request for redemption. It would be most unfortunate indeed if, to preserve its ability to rely on the Proposed Rule, a single family office were given the Hobson's choice of (i) making a distribution prematurely, or in contravention of the terms of the governing trust instrument, or in violation of the orders of a probate court, or (ii) having to register as an investment adviser under the Advisers Act. The Coalition recommends, therefore, that the condition be revised to state that the single family office be required to transfer the assets as soon as it is both legally and practically feasible,[7] and in any event would have a grace period of at least one year to allow the single family office to dispose of illiquid assets in as an orderly a manner as possible within such a time frame.

The Coalition believes that the Proposed Rule correctly provides a safety valve by permitting the single family office to continue to give investment advice to the trust or charity, if indeed it has been engaged to do so, until the corpus can be transferred to the remote beneficiary which is not a member of the family.

Former Family Members

The Coalition supports the Commission's proposal to allow former members of the family to retain any investments made through the single family office, but opposes the restriction on making any "new" investments through the single family office. Applied literally, the spouse of the founder, and thus the father of at least some of the lineal descendants of the founder, who has been divorced from his spouse would be frozen out of the single family office by the Proposed Rule even if the former spouse is expected to continue to play an important role in the lives of his children and/or grandchildren. The Commission seems to have assumed that a former spouse would automatically cease to have any financial relationship with the single family office. In the experience of the members of the Coalition, that assumption is not well-founded, and in any event the business and family affairs of the single family office may require the former spouse to be an active participant. As was true with the status of adopted children, step children, and spousal equivalents, if the members of the family wish to share their resources assets with a former spouse, the Coalition believes that the single family office should make the decision whether to include such a person as a client of the single family office without being subject to registration under the Advisers Act.

Moreover, this provision raises many practical interpretive questions. Assume that the former spouse receives interest on the bonds that he owned before the divorce, or makes the

[7] As the Commission will recognize, the phrase "legally and practically feasible" appears in Section 7(d) of the Investment Company Act of 1940 ("Investment Company Act"), and the Commission has had a significant amount of experience in making determinations based on that phrase.

decision to reinvest proceeds of a sale of securities in a money market fund. How is a single family office expected to decide whether interest earned on a bond is a "new" investment or an "old" investment? If the proceeds of the sale of an asset are used to increase a position in an existing money market fund investment, is the increased number of shares a "new" investment or an "old" investment?

Finally, the term "former family members" is unclear. It could be argued that a widower is still the spouse of the deceased individual, and thus is not a "former family member." It could also be argued that the term "former family member" includes widowers even though the widower continues to live in the former residence of the couple when they were married and continues to have a place of honor at the family dinner table at important or even daily events. Either way, the Coalition requests that the Commission please clarify that a widower is in fact still considered to be a "family member" for purposes of the Proposed Rule.

Family Trusts, Charitable Organizations, and Other Family Entities

The Coalition supports the inclusion of family trusts, charitable organizations, and other not-for-profit entities as "family clients." However, the tests in the Proposed Rule for inclusion are both too stringent and wholly inconsistent with traditional methods of income tax, gift tax, estate planning, charitable giving, and wealth distribution.[8] For example, the Proposed Rule would require that each such entity would have to be established and funded exclusively by one or more family members. As so limited, a family office would not be allowed to give investment advice to an otherwise unobjectionable trust established by a member of the family solely because a beneficiary of the trust was a public charity, or a charity as to which members of the family were not the exclusive donors,[9] or apparently a charity which was eligible to receive

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[8] In this regard, it is very important that the Commission carefully distinguish between a person who is a "client" to whom investment advice is being given, and a person who is simply a beneficiary under a will or a legatee or devisee of an estate. Until that beneficiary becomes a "client" and is receiving investment advice from the single family office, the Coalition believes that the existence of such a beneficiary, however immediate or however remote or contingent and even if the beneficiary is eligible to receive current distributions based on the discretion of the trustee, should have no effect on the analysis of whether the single family office is in compliance with the Proposed Rule. It is the experience of the members of the Coalition that it is the grantor or trustee of the trust who is the "client" and to whom the single family office will be held accountable, not the person or entity to which distributions may be made.

[9] Assume for this purpose that a Foundation was established by a husband and wife, that they control it, directly or indirectly, and that the family office for the husband and wife gives investment advice to the Foundation. Assume further that another, unrelated person, also a philanthropist, has agreed to transfer a substantial portion of his wealth to that Foundation. As written and assuming that no other exemption or exclusion or exception was available, the Proposed Rule would require the husband and wife's family office to register as an investment adviser now solely by virtue of having previously agreed to add a series of gifts from the unrelated philanthropist to the corpus of the Foundation for the sole purpose of achieving

distributions on a current basis based on the discretion of the trustee of an irrevocable trust.[10] Many single family offices presently give investment advice, and make distributions, to trusts or charities that were established many, many years ago and whose terms could not be amended, even with the assistance of a court in a *cy pres* proceeding, to comply with the narrow test propounded in the Proposed Rule.

The Coalition strongly urges the Commission to adopt, instead, the language submitted by the Coalition prior to the issuance of the Release which will address all existing arrangements of which the members of the Coalition are aware:

> foundations, charitable trusts, charitable funds, and other charitable or non-profit organizations established or controlled, directly or indirectly, by persons one or more of whom are a family client.

The verbs "established or controlled" would permit a family to solicit contributions from non-family members to the charity which was controlled by the members of the family, and would permit the charity to receive such contributions. The phrase "directly or indirectly," when used together with "established or controlled," would permit family members to use a variety of ownership tools to manage their ownership of a charitable foundation consistent with effective income tax and estate tax planning, and charitable giving.[11]

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the charitable purposes for which the Foundation was established. The point, again, is that single family offices have existed and decisions have been made about how to effect income tax, estate planning, and charitable giving goals for a number of years without regard to, or in reasonable anticipation of, the provisions of the Proposed Rule. It is entirely possible that that hypothetical transaction could not be undone, yet the result (registration under the Advisers Act) would be harsh indeed, and quite unfair to all concerned – the husband and wife, the unrelated philanthropist, the Foundation, and the beneficiaries of the Foundation's charitable work. Nor would it further the purpose of Section 409 because the single family office for the husband and wife is still being operated for the benefit of the members of the family.

[10] In Rule 203(b)(3)-1(a)(iii) and (iv) under the Advisers Act, the Commission used the phrase "of which the natural person … are the only primary beneficiaries." While intended to be of use in interpreting Section 203(b)(3), this strongly suggests that the Commission has long understood the need to use a broad definition where accounts and trusts are being defined to avoid an overly restrictive standard that would, as here, lead to the unsatisfactory result of being required to register under the Advisers Act solely because there was a non-family beneficiary of the trust that was primarily intended to benefit members of the family. Single family offices have experience with applying the interpretive conditions in Rule 203(b)(3)-1.

[11] In any event, it should be recognized that, like any other beneficiary, a charity rarely has an entitlement to the assets of trust, or have any kind of enforceable right against the trustee of the trust from which it would receive distributions on a discretionary basis, that could cause such a charity even to be considered a "client."

In a similar vein, the requirement in the Proposed Rule that pooled investment vehicles be wholly owned and controlled, directly or indirectly, by one or more family clients and operated for the sole benefit of family clients, also creates problems -- in addition to being triply redundant. Assume hypothetically that the single family office decides to invest in a private investment fund, and decides to do so by creating a limited partnership whose general partner will be an LLC formed by a member of the family or the family office itself. The general partner then offers interests in the limited partnership exclusively to family clients. All of the limited partnership interests would be owned by family clients, and the general partner would be owned by a member of the family or the family office itself. No one could reasonably argue that the pooled investment vehicle was not controlled, directly or indirectly, by the family office, yet the private investment fund itself is almost surely owned by a number of other, unrelated persons, and it is certainly not operated for the sole benefit of the single family office or controlled by the family in question. Again, the Coalition recommends that the Commission amend the operative test in the Proposed Rule to make it disjunctive, "owned or controlled, directly or indirectly," so that all proper and legitimate corporate structuring alternatives are available to a single family office when it is considering a potential investment. And the definition in paragraph (d)(2)(v) of the Proposed Rule must explicitly exclude from its scope any commercial private investment company, or other form of investment offered to the single family office by a third-party – such third-party investment vehicles not only do not receive investment advice from the single family office, but it is highly unlikely that they would ever be offered or operated for the sole benefit of any single family office.

Key Employees[12]

The Coalition supports the inclusion of certain key employees in the definition of "family clients," supports use of the "knowledgeable employee" concept from Rule 205-3(d)(iii) under the Advisers Act and Rule 3c-5 under the Investment Company Act, and supports allowing such key employees to effect their co-investments with the family members in any manner, or through trusts and other entities.[13] The Coalition also supports the restriction on additional investment by

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[12] Many single family offices are relatively small, and often need to outsource a number of functions related to employment, such as the function of serving as a paymaster, sponsoring and administering benefit plans, and all related employment matters. The outsourcing function may have the collateral effect of causing employees of the single family office to be, technically, employees of the administrative services firm for purposes of a number of those functions, including withholding income taxes. It is the Coalition's position that a single family office's decision to outsource certain of its functions is irrelevant to any analysis of whether a person is an "employee" of the single family office for purposes of the Proposed Rule.

[13] The Coalition supports the provision in the Proposed Rule that would permit a key employee to create trusts for the ownership of the investment and name members of the key employee's family as beneficiaries of those trusts.

the key employees after their employment by the family office has ended,[14] and the decision not to require the liquidation or transfer of such investments when the key employee leaves. However, the Coalition opposes the restriction that would require a key employee to be such for a twelve-month period before he or she could make an investment. It is not at all clear what public policy purpose is served by requiring an employee to be subject to a twelve-month probationary period. Key employees, as defined in the Proposed Rule, necessarily have from the onset of their employment the investment sophistication and access to information sufficient to permit them to understand and accept the economic risks associated with co-investing with the single family office. The practical effect may be to deter prospective key employees from accepting offers of employment where interesting investments are expected to occur during the first twelve-months of his tenure.

3. Ownership and Control

The question should not be how and when the single family office was created, or by whom, so long as, at the end of the day, the single family office is operated for the benefit of the members of the family. For the same reason, the sharp dividing line between an entity that ought to be registered as an investment adviser and an entity that should be treated as a "family office" for purposes of Section 409 should be by whom the entity is operated or controlled, or for whom the entity is being operated.[15] A commercial investment adviser may have fiduciary duties of care and loyalty to its clients and responsibilities for properly implementing their investment objectives, but its business purpose is to provide a living to the owners and employees of that particular commercial enterprise, its clients do not own or control the entity, nor is the entity being operated exclusively for the benefit of the clients.[16] The proposed definition, based on the

[14] The Coalition would note the same practical questions that it has raised, *supra*, regarding how a single family office is expected to distinguish between "new" and "old" investments.

[15] The Commission is correct in understanding that single family offices are not operated for the purpose of generating a profit for the benefit of the owners of the single family office, and that single family offices generally receive funding from the members of the family designed to cover their costs over a reasonable period of time, including effecting a business plan that forecasts significant expenditures in the future to improve the functionality or efficiency of the single family office. The Coalition would like to make clear, however, that single family offices generally take the position that that they are in a trade or business for purposes of the Internal Revenue Code of 1986, as amended, and are not not-for-profit institutions, such as foundations or charities.

[16] Based on that analysis, the Commission should be willing look favorably on a family office that consists solely of two business partners (and their descendants) whose business affairs have been shared as if they were brothers for an extended period of time, and to a family office that consists solely of two families whose business affairs have been shared as if they were all members of the same family for an extended period of time. In both instances, the family office is not a commercial enterprise, its "clients" are limited solely to members of the family, and there is no one who is a "client" of the family office (an

concept of "owned and controlled," does not adequately reflect the variety of organizational arrangements that are already in place with single family offices and which in most instances cannot be changed easily. Requiring that an entity be wholly-owned and controlled (directly or indirectly) is both redundant and misses the ultimate point: the public policy reason for excluding single family offices from all of the provisions of the Advisers Act is that they are being operated for the benefit of the members of a single family. The Coalition strongly urges the Commission to adopt, instead, the language submitted by the Coalition prior to the issuance of the Release which will address all existing arrangements of which the members of the Coalition are aware:

> the term "family office" means any company formed by, primarily for the benefit of, or subject to the control of, the members of a single family.

If the Commission is totally committed to the "owned and controlled" drafting style, then the Coalition recommends that the phrase at issue be amended to read (i) owned, directly or indirectly, (ii) controlled, directly or indirectly, or (iii) operated primarily for the benefit of the family members.

4. Holding Out

The Coalition supports the requirement that the family office not hold itself out to the public as an investment adviser.

5. Grandfathering Provisions

The Coalition supports the grandfathering required by Section 409(b)(3) of the Dodd-Frank Act.

6. Previously Issued Exemptive Orders

The Coalition believes that each of the family offices that previously received exemptive orders from the Commission should be allowed to decide whether it wishes to continue to rely on the exemptive order that it received or decide to rely on the Proposed Rule. The Coalition believes that it would be most unfair to the particular family office involved for the Commission to attempt to rescind any of the prior exemptive orders even if the exemptive order at issue does not contain all of the conditions and restrictions in the Proposed Rule.

"others" as used in Section 202(a)(11)) whose interests should be protected by the Commission through the applicability of the registration provisions of the Advisers Act.

7. Pension Plans and Deferred Compensation

The Coalition is aware that a number of family offices (or their affiliated companies) sponsor and administer pension plans and deferred compensation plans solely for the benefit of employees (including former employees) of the single family office (and/or their affiliated companies). As the Commission is aware, a deferred compensation plan does not involve a segregated pool of assets, but is instead merely a promise to pay a sum certain to a specific person at some point in the future, which liability is evidenced on the liability side of the balance sheet of the company which has made the promise. In those circumstances, it cannot reasonably be said that deferred compensation plans involve the giving of investment advice by anyone, nor for compensation, and certainly not to an "other" within the definition of "investment adviser" in Section 202(a)(11) of the Advisers Act.

The Coalition also understands that the SEC staff has informally taken the position in reviewing applications filed under the Advisers Act that a pension plan is a “client” in and of itself.[17] The Coalition believes that a family office that is giving investment advice to its own (or its affiliated company's) pension plan, almost always for no compensation whatsoever, does not with respect to that activity satisfy the definition of “investment adviser” because it is <u>not</u>, for compensation, giving investment advice to “others.”[18] Rather, the single family office is giving investment advice to itself or an affiliated company as sponsor of the pension plan or, in the case of a defined benefit plan where a trustee (who is often an employee of the single family office) is appointed to manage the pension fund, the trustee is making the investment decisions in his capacity as trustee (*i.e.*, self-advising).[19] We assume that the absence of pension plans from the definition of “family client” means that the Commission is no longer taking the informal position that a pension plan is a “client,” and therefore a pension plan sponsored or administered by a single family office could receive investment advice from that single family office without being a “family client.”

The Coalition requests that the Commission confirm in the release accompanying the final rule that we have correctly analyzed the intent of the Commission with respect to both pension plans and deferred compensation plans. To state the obvious, it cannot be the intent of

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[17] Leaving aside single family offices, such a position would adversely implicate the status of treasurers, controllers, and/or chief investment officers of every company in the United States that sponsors a pension plan.

[18] To be specific, the investment adviser to the pension plan does not give investment advice that is tailored or individualized to any extent whatsoever to the investment objectives of any particular participant in the pension plan.

[19] Some pension plans make use of third-party administrators, and employees of the single family office serve on the investment committee.

Section 409, nor of the Proposed Rule, that every employee of a single family office is statutorily precluded from being eligible to participate in a pension plan or deferred compensation plan, and that Section 409 mandates that every employee of a single family office be compensated only with cash.[20]

8. Cost-Benefit Analysis

At page 30 of the Release, the Commission recognizes that some family offices may be forced to consider whether to restructure their business to meet the conditions in the Proposed Rule. The Coalition emphasizes again that many single family offices have existed for generations in a particular organizational format. The organizational format that was selected by the founder of the single family office was based on legal and other income tax, gift tax, estate planning, and charitable giving considerations that were deemed important at that time. Some trusts were drafted and some charities were formed before the Advisers Act even became law in 1940, and several single family offices were formed before there were income taxes in the United States. Some irrevocable trusts have been in operation since at least the early 1900s. For better or worse, none of that structuring was effected with Section 409 of the Dodd-Frank Act in mind, and for so long as Section 203(b)(3) was in place very few family offices had to be structured in any particular manner. The Coalition strongly urges the Commission not to insist on unnecessary restrictions in the Proposed Rule that would force single family offices to seek to tear up and change arrangements that have served their families well for a number of generations; in many instances, such as with irrevocable trusts for example, the single family office may be legally incapable of changing the decisions that were made some time ago. The Coalition also urges the Commission to understand that any restructuring will necessarily be very expensive, and will almost surely cause unintended consequences that would not further the public policies behind Section 409 nor the Proposed Rule.

Conclusion

The Coalition believes that, in general, the Proposed Rule would meet the needs of single family offices, taking into account the drafting recommendations that have been made throughout this comment letter. As the Commission itself noted in the Cost-Benefit Analysis, it can be expected that single family offices which cannot satisfy all of the conditions of any rule that the Commission may finally adopt will file individual applications for exemptive orders

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[20] Moreover, pension plans are subject to significant regulation and oversight from the Department of Labor with respect to ERISA, the Internal Revenue Service, and the PBGC, as needed. That oversight is comprehensive and specialized to the appropriate needs of the sponsors and participants in pension plans. With respect, the Advisers Act is not the vehicle, and the Commission is not the primary Federal agency, that should be responsible for protecting the interests of participants in pension plans or deferred compensation plans.

under new Section 202(a)(11)(H), and seek exemptive relief based on their particular facts and circumstances. Such applications would have to be reviewed on an application-by-application basis.[21] That simply cannot be the highest and best use of the Commission's scarce resources. For that and many other reasons, it is in everyone's best interests to fashion a rule that can be applied by single family offices broadly and effectively, with little additional administrative oversight from the Commission. The Coalition stands ready to work with the Commission and its staff to achieve a final rule that fulfills the mandate from Congress in Section 409. Thank you again for this opportunity to express the Coalition's comments.

Very truly yours,

Martin E. Lybecker

[21] When adopting the final rule, the Commission should provide additional exemptive relief of the kind that exists in Section 3(b)(2) of the Investment Company Act of 1940 ("Investment Company Act") and in Rule 6b-1 under the Investment Company Act that would protect a single family office that had filed an application in good faith under Section 202(a)(11)(H) from registration under the Advisers Act until the Commission had agreed to issue it an exemptive order or its request for an exemptive order had been denied by the Commission and every opportunity to appeal that decision by the Commission had expired or been found wanting by a U.S. Circuit Court of Appeals pursuant to Section 213 of the Advisers Act. Without such a safe harbor while its application was pending, a single family office would be forced to register and comply with all of the provisions of the Advisers Act while simultaneously attempting to seek an order exempting it from all of the provisions of the Advisers Act. As a practical matter, mere delay (even if entirely in good faith solely as a consequence of a heavy workload caused by mandates in the Dodd-Frank Act) on behalf of the Commission's staff while reviewing the exemptive application would otherwise have the practical effect of being a denial without due process.