Lowenstein Sandler
ATTORNEYS AT LAW

November 12, 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
File Number S7-25-10 (the "Release")

Dear Ms. Murphy:

This letter is in response to a request by the Securities and Exchange Commission (the "Commission") for public comments to proposed rule 202(a)(11)(G)-1 (the "Proposed Rule").[1] The Commission drafted the Proposed Rule to exclude "family offices" from the Investment Advisers Act of 1940[2] (as amended, the "Advisers Act") by excluding from the definition of "investment adviser" any company that, subject to certain qualifications, (1) has no clients other than family clients, (2) is wholly owned and controlled (directly or indirectly) by family members, and (3) does not hold itself out to the public as an investment adviser (a "family office").[3]

Our firm represents a number of family offices. This letter reflects our consideration of the Proposed Rule as well as feedback we have received from many of our clients. Specifically, we have set forth below in Section II, Suggested Revisions to the Proposed Rule (the "Suggested Revisions") that, if implemented, would have the effect of exempting from the definition of "investment adviser" (and thereby exempting from the Advisers Act) any company which has no more than three[4] unrelated natural persons (excluding such person's spouse or spousal equivalent) as its founders and that otherwise meets the criteria for family offices established by the Commission pursuant to the Proposed Rule (a "qualifying shared-family office"). We have also set forth an additional Suggested Revision that, in addition to limiting to three the number of unrelated founders of a qualifying shared-family office, requires that the family of each founder have at least 10% of the total assets under the management of the family office and membership on the board of directors (or its equivalent) of the family office. In summary, if adopted, the

[1] Advisers Act Release No. IA-3098.

[2] 15 U.S.C. 80b.

[3] Advisers Act Release No. IA-3098 at 36.

[4] We believe that permitting up to three unrelated natural persons to co-found a qualifying shared-family office will, in connection with the other restrictions set forth in the Proposed Rule, ensure that a qualifying shared-family office is tailored to serve the needs of closely-affiliated families, without becoming a "family-run office."

Suggested Revisions will ensure that each client of a qualifying shared-family office is a family client of at least one founder, and has a degree of control and is afforded protections that are similar to the control and protections afforded family clients of a single-family office. The substance of the Proposed Rule is otherwise unchanged. In Section I, we set forth the arguments in favor of the adoption of the Suggested Revisions. As discussed in Section I, the Suggested Revisions are consistent with, and preserve and foster, the policies underlying the Commission's exemptive orders excluding family offices from the Advisers Act and the Proposed Rule.[5]

SECTION I
DISCUSSION

The Commission has the authority to exclude from the definition of "investment adviser" persons that are "not within the intent of [the definition], as the Commission may designate by rules and regulations or order."[6] Pursuant to this authority, the Commission distilled the specific reasoning behind its relevant exemptive orders into the general Proposed Rule and, in the process, explained that "family offices" are excluded from the Advisers Act because the Advisers Act "was not designed to regulate the interactions of family members in the management of their own wealth."[7] The Commission has also explained that the "application of the Advisers Act would intrude on the privacy of family members,"[8] and "disputes among family members concerning the operation of the family office could be resolved within the family unit or, if necessary, through state courts under laws specifically designed to govern family disputes, but without the involvement of the Commission."[9]

Thus, it is apparent that the Commission's exemptive orders exclude single family offices from the ambit of the Advisers Act because (1) as relatives of those who own and control the family office, family clients are less likely to need the protections of the Advisers Act; (2) family offices have an interest in maintaining the privacy of their confidential, familial information; and (3) internecine familial disputes are not a matter of public interest and alternative means of dispute resolution are readily available to family offices and their family clients. Accordingly, the argument for excluding qualifying shared-family offices from the Advisers Act is strengthened to the extent that such reasoning applies to shared-family offices.

---

[5] As most family offices have been structured to take advantage of the exception from registration under Section 203(b)(3) of the Advisers Act, requests for an exemptive order have been rare and the exemptive orders have only addressed a small portion of the particular issues associated with family offices. Therefore, in promulgating a rule "consistent with the previous exemptive policy of the Commission" (Section 409(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")), the exemptive policy embodied in the rule should not be limited to the specific facts of the exemptive orders but should reflect the principles underlying the exemptive orders. See "Characteristics of Prior Exemptive Orders" in Section I below.

[6] Formerly 15 U.S.C. § 80b-2(a)(11)(G), and renumbered to be 15 U.S.C. § 80b-2(a)(11)(H) under Section 409 of the Dodd-Frank Act.

[7] Advisers Act Release No. IA-3098 at 8.

[8] *Id.* at 5. *See also*, S. CONF. REP. NO. 111-176, at 38-39 (2010) ("Senate Committee Report"): "The Advisers Act is not designed to regulate the interactions of family members, and registration would unnecessarily intrude on the privacy of the family involved."

[9] *Id.*

Client Protection in the Qualifying Shared-Family Office

A familial relationship necessarily connects each client with a founder in every qualifying shared-family office. Thus, the interests of every client are represented by at least one founder of the qualifying shared-family office, and each such founder will be well-positioned and highly incentivized to establish governance provisions, operating procedures, and client protections (and to define dispute resolution mechanisms in advance) that protect his or her family members' interests, without the need to involve the Commission. Such protections parallel those that inhere in the single-family office context as a consequence of the close relationship between all clients, and which underlie the policy decision to exclude single-family offices from the intent of the Advisers Act.[10]

Indeed, the same incentives that motivate the founder of a single-family office to undertake extensive measures to protect the interests of family clients, including family clients existing several generations after the founding generation, also motivate the founders of the qualifying shared-family office to ensure that such governance provisions, operating procedures, and client protections survive so as to protect the interests of their respective posterity. The Proposed Rule is based upon the determination that the public has no interest in the Commission supervising and regulating single-family offices. For the same reasons, the public has no interest in the Commission supervising and regulating closely-knit qualifying shared-family offices. In this regard, qualifying shared-family offices are nearly identical to single-family offices that the Commission has determined are exempt from all of the provisions of the Advisers Act in the limited number of exemptive orders which have been issued by the Commission. For the same reasons that the exemptive orders have been issued, the Commission should exempt qualifying shared-family offices from the Advisers Act.

Control

The founders of a shared-family office have the ability to provide a high degree of control for their family over the operations of the shared-family office that is comparable to the degree of control afforded to family clients of a single-family office. Family clients that maintain control over their family offices are less likely to need the protections of the Advisers Act, whether such family clients invest through single-family offices or qualifying shared-family offices. The additional Suggested Revision of the term "family office" set forth in Section II below would require that the family members of each founder have membership on the board of directors (or its equivalent) of the family office, and that the family of each founder have a significant percentage of the assets under management, as evidence of such control.

Privacy

As the Commission notes, family offices that are excluded from the Advisers Act "would be able to maintain greater privacy because they would not have to make the public filings with

[10] Such protections would presumably be enhanced if the Commission also requires that each family have at least 10% of the assets under management and a seat on the board of directors (or its equivalent), as proposed in the additional Suggested Revision set forth on pages 9-10 below.

the Commission that they would otherwise have to make as a registered investment adviser."[11] However, the goal of maintaining the privacy of family-related matters is not specific to the single-family office. To be sure, any family that participates in a shared-family office must necessarily disclose at least some private information to the other families participating in the same shared-family office. However, disclosure to other families with similar financial interests and privacy concerns is very different than disclosure to the public as a consequence of registration pursuant to the Advisers Act. The Commission should reasonably assume that family members participating in qualifying shared-family offices are as concerned with the privacy of their affairs as are family members participating in single-family offices. Thus, since the Commission is "concerned that application of the Advisers Act would intrude on the privacy of family members,"[12] qualifying shared-family offices should also be excluded from the Advisers Act.

Similarities between Single-Family Offices and Qualifying Shared-Family Offices

A shared-family office that qualifies for exclusion from the definition of "investment adviser" pursuant to the Suggested Revisions would be nearly identical to a single-family office. For instance, all clients of a qualifying shared-family office would be family clients of at least one founder; the qualifying shared-family office would be wholly-owned and controlled directly or indirectly by family members; and the qualifying shared-family office would not hold itself out to the public as an investment adviser or otherwise engage in commercial advisory activities. In addition, single-family offices and qualifying shared-family offices would have similar operating profiles. In our experience, a substantial portion of both single-family and shared-family offices identify family security, philanthropic planning and advice, concierge services, and tax planning, as important components of the services that they provide to their family clients. Further, the opportunity to provide better service to family clients and achieve economies of scale are primary reasons for structuring family offices, whether the family office consists of one, two or three families. That is, both qualifying shared-family offices and single family offices tend to engage primarily in "traditional family office activities involving charities, tax planning, and pooled investing."[13]

Qualifying Shared-Family Offices are Distinct from Family-Run Offices

In its discussion of the Proposed Rule, the Commission explained that its exemptive orders do not provide relief to a "*family-run office* that . . . provides advice to a broader group of clients and much more resembles the business model common among . . . investment adviser firms that are registered with the Commission."[14] Accordingly, the Suggested Revisions are not intended to, and will not, exclude shared-family offices that provide services to a broad group of clients and that otherwise resemble the business model of registered investment advisers. However, a rule that requires shared-family offices to register merely because some "family-run

[11] Advisers Act Release No. IA-3098 at 28.

[12] *Id.* at 5.

[13] Advisers Act Release No. IA-3098 at 8.

[14] *Id.* at 5. Emphasis added.

Lowenstein Sandler
ATTORNEYS AT LAW

offices" serve multiple families is unnecessarily narrow and unfair. In this regard, the Suggested Revisions modify the Proposed Rule in a manner that unambiguously distinguishes between qualifying shared-family offices, on the one hand, and "family-run offices" that advise multiple families and other clients, on the other. In particular, a qualifying shared-family office is distinct from a family-run office to the extent that the former (1) has no clients other than family clients, (2) is wholly owned and controlled (directly or indirectly) by family members, (3) does not hold itself out to the public as an investment adviser, and (4) is founded by not more than three unrelated natural persons.

Along these lines, the defining characteristic of the "family-run office" is its holding itself out to the public as an investment adviser for the purpose of providing commercial advisory services. The "family-run office" continuously solicits and advises new clients for profit-making purposes, whether or not such clients are unrelated to people controlling the business and operations of the "family-run office," and it advertises its investment advisory services. In this regard, the "family-run office" is, essentially, an investment adviser that happens to be run by people who are related to one another. As such, the "family-run office" is and should be subject to the regulatory framework of the Advisers Act and their clients should receive the benefit of the investor protections in the Advisers Act. The qualifying shared-family office, conversely, shares none of the above characteristics. It will not hold itself out to the public; it will not solicit new clients; it will not advise any client who is unrelated to at least one of the founders of the qualifying shared-family office; and it will not advertise its advisory services.

As described above, the Suggested Revisions are not intended to, and will not, exclude "family-run offices" from the Advisers Act. Rather, the Suggested Revisions are intended to modify the Proposed Rule so as to exclude from the definition of "investment adviser" only those shared-family offices that satisfy all of the Commission's criteria for excluding single-family offices, except that such qualifying shared-family offices may be founded by up to three unrelated persons and, therefore, consist of up to three unrelated families. Ultimately, qualifying shared-family offices are very similar to single-family offices, and, as the Senate Committee Report notes, "[f]amily offices are not investment advisers intended to be subject to registration under the Advisers Act."[15] The committee's colloquial use of the term "family office" should be understood to include qualifying shared-family offices that are nearly identical to single-family offices in terms of the control and protections afforded to family clients, the variety of services provided (including investment advisory services), and the relationships that bind the family clients to one another.

Characteristics of Prior Exemptive Orders

The Release states that "certain key employees of the family office . . . have been treated like family members in some of [the Commission's] exemptive orders"[16] because such persons are "likely to be in a position . . . to protect themselves."[17] The Release also notes that the

[15] Senate Committee Report at 75.

[16] Advisers Act Release No. IA-3098 at 18.

[17] *Id.* at 20.

Commission's "exemptive orders have not always included stepchildren,"[18] but the Commission proposes "including stepchildren in [the] definition of a family client" because of the "close ties to the family members who would be included."[19] Similarly, the Release acknowledges that the Commission has not "permitted former family members to receive investment advice from an exempt family office",[20] but the Release nonetheless proposes to permit former family members to retain any investments held through the family office upon becoming a former family member. Further, the Release notes that the Commission has never provided exemptive relief to spousal equivalents, but believes that doing so "seems appropriate in a rule of general applicability."[21] Accordingly, the Proposed Rule would exclude certain family offices from the definition of "investment adviser," even though such family offices include (1) clients who are employees, and not family members, of such family office, (2) clients who, although they have been *excluded* from some of the Commission's exemptive orders, have "close ties" to family members otherwise within the governing definitions, and (3) clients who have never been advised by a family office excluded from the definition of "investment adviser" in an exemptive order issued by the Commission and with respect to whom no family office has sought exemptive relief.

All clients of the qualifying shared-family office will consist of family members who are related to at least one founder of the qualifying shared-family office and, as such, would "be in a position . . . to protect themselves," and would have "close ties" to those with control of the business and operations of the qualifying shared-family office. Thus, although the Commission has "never granted an exemptive order to a multifamily office," it does not follow that excluding *qualifying* shared-family offices from the definition of "investment adviser" "would seem to be inconsistent with [the Commission's] prior exemptive policy."[22] Indeed, expanding the Proposed Rule to cover qualifying shared-family offices would be consistent with the logic underlying the decision to include parents,[23] siblings,[24] and adopted children,[25] as well as key employees and stepchildren,[26] in the definition of "family client," because all clients in the qualifying shared-family office are family members of at least one founder *and*, thus, are afforded the protections and benefits that define the single-family office. That is, family clients of the qualifying shared-family office are situated at least as favorably as parents and siblings

---

[18] *Id.* at 10.

[19] *Id.* at 11.

[20] *Id.* at 16.

[21] *Id.* at 12.

[22] *Id.* at 14.

[23] *Id.* at 12. The Commission notes that the "proposed rule also would permit a family office relying on the exclusion to provide investment advice to parents of the family office's founders" even though "the family offices that have obtained an exemptive order from the Commission typically were managing wealth built by an older generation."

[24] *Id.* at 13. The Commission's "proposed definition of 'family member' also would include siblings of the founders of the family office."

[25] *Id.* at 10. "Exemptive orders issued to family offices typically have included adopted children as family members because adopted children generally are not treated differently as a legal matter than children by birth."

[26] *Id.* at 12 and 20.

(and, arguably, adopted children and step children) in the single-family office context, and more favorably than former family members and key employees in the single-family office context. Furthermore, they are certainly afforded more effective client protections than the client protections afforded spousal equivalents in the single-family office context.[27] To the extent a qualifying shared-family office has not been expressly included in previously granted exemptive orders, the Proposed Rule has already stepped outside of the boundaries of these orders where policy considerations warrant.

Preclusion of Numerous Requests for Exemptive Relief

As the Commission notes in the Release, family offices that are not exempt from the Advisers Act pursuant to the Proposed Rule "could seek an exemptive order from the Commission."[28] As a result, if the Commission declines to implement the Suggested Revisions, a large number of shared-family offices would be required to register under the Advisers Act or seek an exemptive order from the Commission. Accordingly, the Commission should expect that a significant number of shared-family offices will seek exemptive relief based on some manifestation of the following argument: shared-family offices that are identical in all material respects to single-family offices, except to the extent that they are wholly-owned and controlled by multiple families, should be exempt from registration since each family is "in a position to protect its own interests and thus is less likely to need the protection of the federal securities laws."[29] By implementing the Suggested Revisions, the Commission will minimize the unnecessary expense of time, money and effort that will invariably arise if qualifying shared-family offices are not statutorily exempted from the Advisers Act.

Cost Savings from Avoidance of Exemptive Relief

The Commission observed that, based on its experience with prior applications for exemptive relief, it "estimate[s] that a typical family office (and thus indirectly their family clients) would incur legal fees of $200,000 on average to engage in the exemptive order application process."[30] The Commission also notes that the Proposed Rule would "eliminat[e] the costs and inefficiencies of seeking (and considering) individual exemptive orders."[31] Moreover, it is reasonable to assume that some shared-family offices that would otherwise be excluded from the definition of "investment adviser" pursuant to the Suggested Revisions will not apply for exemptive relief. Accordingly, a comprehensive evaluation of the merits of the Suggested Revisions should account for the ongoing financial costs that will be imposed on shared-family offices that are required to register pursuant to the Advisers Act, which costs could be quite substantial. In addition, the Commission should consider the additional burden that it

---

[27] For example, spousal equivalents in many States do not benefit from the laws of intestate succession, probate, and other similar laws, which are of particular importance in the family-office context.

[28] Advisers Act Release No. IA-3098 at 8.

[29] *Id.* at 23.

[30] *Id.* at 28. The Commission also explained that one benefit of exemption from the Advisers Act is "reduced regulatory costs should result in direct cost savings to these family offices and thus to their family clients."

[31] *Id.*

will face in the process of supervising and overseeing the operations of such registered shared-family offices, notwithstanding that neither the public nor the investors in such shared-family offices have an interest in oversight by the Commission.

As the Commission states in the Release, the Proposed Rule would reduce the expenses incurred by single-family offices (and by family clients) in connection with the exemptive order process, as well as the time and effort expended by the Commission reviewing and responding to individual exemption requests.[32] The Commission also acknowledged the cost savings of not having to register with the Commission as an investment adviser.[33] However, each of these benefits also substantiates the argument in favor of excluding qualifying shared-family offices from the Advisers Act pursuant to the Proposed Rule as amended by the Suggested Revisions.

Conclusion

As described above, qualifying shared-family offices and single-family offices are formed for many of the same reasons, including because shared-family offices are highly responsive to families' needs, they provide financial solutions as well as related estate planning and other advice, and they do not solicit or serve non-family clients. Such features are particularly relevant to the argument for excluding qualifying shared-family offices from the Advisers Act, and simultaneously comport with the Commission's concern that "the proposed rule . . . restrict the structure and operation of a family office . . . to activities unlikely to involve commercial advisory activities, while permitting traditional family office activities involving charities, tax planning, and pooled investing."[34] As the Commission explained, the Advisers Act "was not designed to regulate the interactions of family members in the management of their own wealth."[35] Such reasoning applies to the qualifying shared-family office no less than to the single-family office, and the Commission should exclude from the Advisers Act those shared-family offices that comply with the Suggested Revisions and the other provisions of the Proposed Rule.

SECTION II
SUGGESTED REVISIONS

In order to accommodate a qualifying shared-family office that, as discussed in Section I, is not intended to be included in the definition of "investment adviser," we propose that certain of the defined terms in the Proposed Rule be revised. Such Suggested Revisions include changes to the proposed definitions of "founders," "family client," and "family member." In addition, we include an additional Suggested Revision of the definition of "family office."

---

[32] *Id.*

[33] *Id.*

[34] Advisers Act Release No. IA-3098 at 8.

[35] *Id.*

Suggested Revision to the Term "Founders"

The Proposed Rule should be revised so that the definition of "founders" accounts for the shared-family office that is, by definition, co-founded by at least one founder who is neither a spouse nor a spousal equivalent of at least one other founder. This difference constitutes the only essential distinction between the single-family office and the qualifying shared-family office, and can be implemented by revising the definition of "founders" as follows.

> *Founders* means the natural person ***or natural persons, whether or not related, and each such natural person's*** spouse or spousal equivalent for whose benefit the family office was established and any subsequent spouse of such individuals, ***provided that not more than three unrelated natural persons (excluding, for the purposes of this proviso, each such natural person's spouse or spousal equivalent) may be the founders of any family office.***[36]

The proviso, by requiring that not more than three unrelated natural persons serve as the founders of any family office, has the effect of ensuring that shared-family offices that otherwise satisfy the criteria established by the Proposed Rule, will be exempt from the Advisers Act only if they also consist of not more than three[37] unrelated families. By limiting the qualifying shared-family office to not more than three founders, the Commission will ensure that each family client in the qualifying shared-family office has a degree of control and is subject to protections that are similar to each family client in a single-family office. Moreover, an upper limit of three unrelated founders avoids the difficult problem of determining the point at which a shared-family office becomes a loose collection of families who have pooled their assets for the purpose of receiving commercial investment advisory services, which arrangements are and should be subject to the Advisers Act.

Additional Suggested Revision to The Term "Family Office"

If the Commission determines that a limit on the number of families in a qualifying shared-family office is not sufficient, the Commission could further amend the Proposed Rule so that the term "family office" is qualified to require, when there are two or three unrelated natural persons as founders, that (a) the family members and family clients of each founder's family, in the aggregate, have at least ten percent (10%)[38] of the total net assets under the management of the family office and (b) a family member of each founder be a member of the board of directors (or its equivalent) of the family office. A requirement that each family in a shared-family office have such a material participation in the family office will ensure that each family of a shared-family office has the same incentive as the various family members of a single-family office to control and protect the family's interest and to obtain the benefits of a family office.

---

[36] Proposed amendment to 17 C.F.R. 275.202(a)(11)(G)-1(d)(5).

[37] See note 4 above discussing the selection of the limit of three unrelated founders in the Suggested Revision.

[38] Because the assets under management of each family may vary from time to time due to individual circumstances, investment performance, and other personal factors, 10% seems an appropriate minimum threshold to ensure the active participation of each family. We would expect that in practice each family would have a significantly greater share of the assets under management to eliminate the need for frequent attention to the valuation of individual assets and to provide leeway for variances in contributions, distributions and performance.

Accordingly, the additional Suggested Revision would amend the definition of "family office" by adding at the end thereof a new subsection (4) reading as follows.[39]

> ***(4) If unrelated natural persons have been founders (excluding for this purpose such natural person's spouse or spousal equivalent) of a family office, the family office may provide investment advice to any family member or family client of such a founder only if (i) at least one family member of such founder shall be a member of the board of directors (or its equivalent) of the family office and (ii) at least ten percent (10%) of the net assets subject to the investment advice of the family office shall be net assets of the family members and family clients of such founder.***[40]

Conforming Revisions to the Terms "Family Client" and "Family Member"

In the event that the Commission decides to implement any of the Suggested Revisions described above (or other revisions with a similar effect), the Commission should also make conforming changes to the definitions of "family client" and "family member." First, the Proposed Rule should be revised to expand the definition of "family client" to include clients that are family members of at least one founder and possibly multiple founders, as follows.

> (i) Any family member ***of one or more of the founders***;[41]

Second, the Proposed Rule should be revised so that the definition of "family member" accounts for the possibility that a family office may be established by founders that are not related, as follows.

> (i) ***each of*** the founders, their ***respective*** lineal descendants (including by adoption and stepchildren), and such lineal descendants' spouses or spousal equivalents;[42]
>
> (ii) the parents of ***one or more of*** the founders;[43] and
>
> (iii) the siblings of ***one or more of*** the founders and such siblings' spouses or spousal equivalents and their lineal descendants (including by adoption and stepchildren) and such lineal descendants' spouses or spousal equivalents.[44]

* * * * *

[39] As an alternative, the Commission could limit the application of the Suggested Revisions to shared-family offices in existence on July 21, 2010, if the reluctance to adopt the Suggested Revisions is based upon a concern that the exemption for shared-family offices will be misused.

[40] Proposed amendment to 17 C.F.R. 275.202(a)(11)(G)-1(b).

[41] Proposed amendment to 17 C.F.R. 275.202(a)(11)(G)-1(d)(2)(i).

[42] Proposed amendment to 17 C.F.R. 275.202(a)(11)(G)-1(d)(3)(i).

[43] Proposed amendment to 17 C.F.R. 275.202(a)(11)(G)-1(d)(3)(ii).

[44] Proposed amendment to 17 C.F.R. 275.202(a)(11)(G)-1(d)(3)(iii).

We would be pleased to respond to any inquiries regarding this letter or our views on the Proposed Rule or the Suggested Revisions generally. Please contact Allen B. Levithan at 973-597-2406 or Scott H. Moss at 973-597-2334.

Respectfully submitted,

LOWENSTEIN SANDLER PC

Lowenstein Sandler
ATTORNEYS AT LAW