VORYS

Vorys, Sater, Seymour and Pease LLP
Legal Counsel

52 East Gay St.
PO Box 1008
Columbus, Ohio 43216-1008

614.464.6400 | www.vorys.com

Founded 1909

Russell R. Rosler
Direct Dial (614) 464-8294
Direct Fax (614) 719-4931
Email rrrosler@vorys.com

November 17, 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:

Our firm represents a client that functions as a family office for a single family, now seven generations removed from the individual who established the business that gave rise to the family's wealth. This letter responds to the request of the Securities and Exchange Commission (the "Commission") for comments to the Commission's proposed rule defining "family offices" for purposes of the Investment Advisers Act of 1940 (the "Advisers Act").

Many family offices have relied on the exemption from registration in section 203(b)(3) of the Advisers Act--the "private advisers" exemption. This exemption was repealed, effective July 21, 2011, by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). However, the Dodd-Frank Act created a new exemption under which family offices, as a category, will be excluded from registration under the Advisers Act. The Dodd-Frank Act directs the Commission to further define this new family office exemption, by rules, regulations or orders consistent with the previous exemptive policy of the Commission (as reflected in the Commission's exemptive orders) and with due recognition of the range of organizational, management and employment structures and arrangements employed by family offices.

On October 12, 2010, the Commission issued a proposed rule (the "Proposed Rule") defining "family offices," in a release (the "Release") marked as File No. S7-25-10. We appreciate and support the Commission's actions to adopt a rule of general applicability under the authority of new section 202(a)(11)(G) of the Advisers Act to further define the new family office exemption, and the Commission's invitation to comment on the Proposed Rule. This letter sets forth for your consideration our comments to certain aspects of the Proposed Rule.

As an initial matter, we note the comment letter submitted to the Commission by Martin E. Lybecker of Perkins Coie on behalf of The Private Investor Coalition, Inc., dated November 11, 2010 and publicly available on the Commission's website. In general, we concur with the comments of Mr. Lybecker, recognizing his expertise and experience in this area, and we urge the Commission to take his comments into consideration as the family office exemption rule is finalized. Rather than reiterating comments made by Mr. Lybecker, we would like to emphasize in this letter areas of particular interest to our client and a few points of broader application.

Section 409(b)(2) of the Dodd-Frank Act directs that that the new family office exemption "recognize[] the range of organizational, management, and employment structures and arrangements employed by family offices." Given the extraordinary variety of possible structures and arrangements and the extended duration to many family offices, the rule should be commensurately flexible to implement this directive. The rule also should accommodate changes of structures and arrangements, including the establishment of new structures and arrangements, that occur over time as families evolve and adapt to changing family goals, charitable impulses and the general tax and legal environment.

In particular, the rule should recognize that the family member or members who establish the family office for the family might not be the same as the family member or members whose activities were primarily responsible for creating the family's wealth; in some cases the family office in question might be established many years or several generations after the wealth was created. The rule also should recognize that multiple family members in multiple generations in a variety of endeavors might have had a hand in creating the family's wealth.

Furthermore, the rule should recognize that a family office for the benefit of members of a single family might not be entirely owned and controlled by family members, and that an appropriate "client" of a family office might be a company owned by or for the benefit of family members but not entirely controlled by family members. For example, the trustee of a trust for the benefit of family members might not himself or herself be a family member, and a corporation or limited liability company owned by family members might have one or more directors or managers who are not family members.

With these principles in mind, we ask that you consider the following comments to the Proposed Rule:

1. *Definition of Family Office.* We suggest the definition of "family office" be modified to refer to any company that satisfies all of the following requirements:

    a. the company does not hold itself out to the public as an investment adviser;

b. the company has no clients (for purposes of section 203(b)(3) of the Advisers Act) other than persons who are "family clients" in respect of a single family; and

c. the company is either (i) majority-owned, directly or indirectly, by members of a single family (ii) controlled, directly or indirectly, by members of a single family or (iii) operated for the exclusive benefit of family clients in respect of a single family (with de minimis exceptions, for charitable beneficiaries, for example).

(This would be in addition to the "grandfathering" mandated by section 409(b)(3) of the Dodd-Frank Act.)

2. *Definition of Family Client.*

a. We suggest the definition of "family client" be modified to expressly include any company owned, directly or indirectly, exclusively by one or more persons who are, themselves, family clients (with de minimis exceptions, for charities, for example), regardless of whether the company is "controlled" by family members.

b. We note that §275.202(a)(11)(G)-1(b) of the Proposed Rule would exclude from the definition of "family client" any "pooled investment vehicle" unless it is "excepted from the definition of 'investment company' under the Investment Company Act of 1940." It is not clear to us why a company should be precluded from relying on the family office exemption merely because a family-owned company it advises happens to be subject to the Investment Company Act. The fact that a family-owned company has more than a certain number of owners or otherwise is subject to the Investment Company Act would not change the company's essential characteristic as a vehicle owned and operated for the exclusive benefit of members of that family. This *intrafamily* characteristic is the fundamental rationale for the family office exemption. We urge the removal of this exclusion from the rule on the grounds that neither the language nor the policy of the family office exemption in the Dodd-Frank Act contemplates such an exclusion. If such an exclusion from the rule does remain in the rule, we suggest that the exclusion be modified to provide that *any* company exempted from the Investment Company Act, whether by the terms of the Investment Company Act itself or by any of the rules, regulations and orders of the Commission, be eligible to be a family client.

3. *Definition of Family Member*. A central premise of the Proposed Rule is the notion that a "founder" establishes the family office, and accordingly the definition of "family member" in the Proposed Rule is based on familial relationships of various individuals to the founder. This premise creates a number of challenges in drafting a rule of general applicability. Instead, we suggest that the term "founder" not be used in the rule and that the core of the rule--the definition of "family member"--be revised to include all of the following:

    a. an identified common ancestor;

    b. any sibling, parent or grandparent of the identified common ancestor;

    c. any lineal descendant of any of the persons identified in (a) or (b); and

    d. any current or former spouse of any of the persons identified in (a), (b) or (c).

    We suggest that emphasizing the centrality of the concept of an *identified common ancestor* is a more intuitive and efficient approach to crafting the family office exemption, and in our view more clearly flows from the policy rationale that the familial relationships of the participants is the basis for the exclusion of family offices from registration under the Advisers Act.

4. *Familial Relationships*. We concur with the suggestions in the Release to the effect that relationships by adoption, step-relationships and spousal equivalent relationships be respected as wholly familial for purposes of the family office exemption. We suggest that this concept be incorporated more fully in the text of the rule.

5. *Treatment of Former Family Members*. We suggest that a "former family member" (i.e., a person whose familial status changes as a result of a divorce or a termination of a spousal equivalent relationship) be recognized not only as a "family client," as is provided in the Proposed Rule, but also as a "family member" for purposes of determining whether a company is owned or controlled by, or was established or is operated for the benefit of, members of a single family. It seems to us that the practical risk of abuse of such a provision is low, the likelihood of possible impediments or significant burdens on the participants' ability to make adaptive changes in governing and ownership arrangements is relatively high, and the unduly punitive effect of a different outcome is too high. Further, we suggest that a former family member retain such status indefinitely, rather than being restricted from further investments as is contemplated in the

Proposed Rule, given the practical compliance difficulties and, again, the low practical risk of abuse of such a provision.

6. *Treatment of Special Legal and Fiduciary Relationships*. There are certain legal and fiduciary relationships in which a person acts directly on behalf of or for a family member or other family client that are likely to be implicated in many family offices, and thus should be addressed in the rule (or, in the cases of trusts, addressed more fully in the rule), including the following:

    a. a trustee of a testamentary or inter vivos trust established by one or more family members or other family clients and existing for the exclusive benefit of one or more family members or other family clients (with de minimis exceptions, for charitable beneficiaries, for example);

    b. a legal guardian or custodian of a family member or other family client; and

    c. a nominee for one or more family members or other family clients;

    in each case, regardless of whether or not the trustee, legal guardian, custodian or nominee is himself or herself a family member or other family client.

    In our view it is consistent with the rationale and intended flexibility of the family office exemption to treat any such trustee, legal guardian, custodian or nominee, when acting in such capacity, as a "family client" or as a "family member," as applicable, for purposes of the rule.

    In addition, we suggest that the rule be modified to clearly establish that any such trustee, legal guardian, custodian or nominee who does not hold himself or herself out to the public as an investment adviser, when acting in such capacity for one or more members of a single family, is exempt from registration as an investment adviser. The family office exemption rule is an appropriate opportunity for the Commission to state clearly that the repeal of the private advisers exemption by the Dodd-Frank Act does not operate to sweep into registration as investment advisers the many, many thousands of persons who serve as ordinary trustees, legal guardians, custodians and nominees, who do not hold themselves out to the public as an investment adviser but who do receive compensation for their services and who might be deemed to be providing advice, incident to their roles, regarding investing in, purchasing or selling securities, and thus could be deemed to be an investment adviser without a corresponding exemption from registration.

In many cases, persons serving in these roles have relied on the now-repealed private advisers exemption.

7. *Treatment of Involuntary Events and Similar Circumstances*. There are certain circumstances in which a non-family member succeeds to an interest in a family office or other family enterprise held by a family member or other family client by operation of law or otherwise in a manner that does not involve an intentional investment decision by the successor. In many cases, these circumstances are involuntary, inadvertent or unexpected. Often, but not universally, the family has arrangements in place (through governing documents or contractually) or otherwise takes steps to return the interest to the family as promptly as practicable. Examples of such successors and circumstances include the following:

    a. the estate of a deceased family member or other family client (including an executor or personal representative of the estate), any other transfer incident to or precipitated by the death of a family member or other family client, and any transfer incident to estate planning or charitable giving arrangements by a family member or other family client;

    b. a bankruptcy trustee, receiver, liquidating agent, conservator or other holder in respect of a bankrupt or insolvent family member or other family client, and any other transfer incident to a bankruptcy, insolvency, foreclosure, execution of judgment, garnishment, marshalling of assets or similar proceeding or action involving of a family member or other family client;

    c. a governmental body under laws governing unclaimed property and escheat;

    d. any transfer incident to the termination of a trust or the dissolution of a legal entity; and

    e. any transfer incident to a legal separation or divorce of a family member or other family client;

    in each case, regardless of whether or not the successor is himself or herself a family member or other family client.

    The rule should recognize the likelihood of such circumstances in typical family office and family business arrangements. During the pendency of such circumstances and for a reasonable period thereafter sufficient to allow the family to make arrangements to address the circumstances (such as repurchasing the affected interest under a contractual buy-sell agreement or by way of a negotiated purchase), we suggest it is consistent with the rationale and intended flexibility of the rule to treat any such successor as a "family client" or as a "family member," as applicable, for purposes of the rule. Alternatively, the rule could be modified to provide simply that any such circumstances would not jeopardize the status of a company as a family office for purposes of the rule. While the Proposed Rule does address certain "involuntary transfers" to some extent, we suggest that this concept be expanded and incorporated more fully in the text of the rule.

8. *Directors, Officers, etc.* We suggest the rule be modified to state clearly that directors, managers, partners, trustees, officers and employees of a family office, acting in such capacities, are not thereby required to register under the Advisers Act. While this concept is affirmed in the Release and is articulated parenthetically in §275.202(a)(11)(G)-1(b) of the Proposed Rule, we suggest that it be set forth in a stand-alone provision of the rule.

With the drafting recommendations noted above and those reflected in the November 11, 2010 comment letter from Mr. Lybecker, we believe that the Proposed Rule can be adapted to meet the needs of family offices on a wide scale, consistent with the Dodd-Frank Act, and avoid the necessity of the many individual applications for exemptive orders that otherwise would be likely, based on the particular facts and circumstances of each affected family office. We would be happy to provide specific language suggestions to effect the recommendations in this letter. Again, we appreciate the opportunity to provide comments to the Proposed Rule.

Very truly yours,

Russell R. Rosler

RRR/rrr