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November 17, 2010

By Electronic Delivery

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

RE: File No. S7-25-10

Dear Ms. Murphy:

We respectfully submit this letter in response to the request for comments by the Securities and Exchange Commission (the "Commission") with respect to the proposed rule (the "Proposed Rule") set forth in Release No. IA-3098[1] defining "family offices" that would be excluded from the definition of "investment adviser" under the Investment Advisers Act of 1940, as amended (the "Act"). We recognize the Commission's important role in implementing the regulatory initiatives under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") and appreciate the opportunity to provide our comments to the Proposed Rule.

We represent a variety of family offices that heretofore have been exempt from registration under the Act. We have received numerous inquiries from our family office clients regarding the Proposed Rule and the need for each of those family offices to obtain its own exemptive order in light thereof. We respectfully request that the Commission consider the issues and recommendations presented in this letter prior to adoption of the final Rule.

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1 *Family Offices*, Investment Advisers Act Release No. 3098 (Oct. 12, 2010) (hereinafter, the "Release").

As noted in the Proposed Rule, "family offices" are multi-purpose entities that serve, in part, to provide investment advisory services to members of an extended family, managing the family's wealth and preserving it for future generations.[2] Most family offices render their services for compensation and, as a result, fall within the definition of "investment adviser" under Section 202(a)(11) of the Act.[3] Currently, these family offices are exempt from registration under the Act under the "private adviser" exemption under Section 203(b)(3) of the Act (for advisers with fewer than fifteen clients)[4] or have obtained an exemptive order from the Commission declaring the family office not to be an investment adviser for purposes of the Act.

Title IV of the Dodd-Frank Act eliminates the private adviser exemption. Recognizing that, without more, this change would require many family offices to register under the Act, Congress created an exclusion from the investment adviser definition for "family offices" and directed the Commission to adopt a definition of "family office" that is consistent with the Commission's previous exemptive policy and that "recognizes the range of organizational, management, and employment structures and arrangements employed by family offices."[5] Thus, Congress recognized that there is no federal interest in regulating family offices that generally provide advice only to members of a family and that the application of the Act "would unnecessarily intrude upon the privacy" of family members.[6] This is consistent with the Commission's rationale for its prior practice of granting exemptive relief to family offices.[7]

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2 *See* Release at 3.

3 15 U.S.C. § 80b-2(a)(11).

4 15 U.S.C. § 80b-3(b)(3).

5 *See* Dodd Frank Act, Pub. L. No. 111-203, § 409(b)(2), 124 Stat. 1376 (2010).

6 *Family Offices*, 75 Fed. Reg. 63,753, 63,754-55 & n.13 (quoting S. Rep. No. 111-176, at 75 (2010)).

7 The relief granted by these orders is premised on the grounds that the family advisers described therein were not within the intent of the "investment adviser" definition under Section 202(a)(11) of the Act or the primary purpose of regulation under the Act, which is to protect the public from fraudulent and unscrupulous asset managers. *See, e.g., WLD Enters., Inc.*, Investment Advisers Act Release Nos. 2804, 94 SEC Docket 1280 (Oct. 17, 2008) (notice) and 2807, 94 SEC 1881 (Nov. 14, 2008) (order); *Woodcock Fin. Mgmt. Co.*, Investment Advisers Act Release Nos. 2772, 93 SEC Docket 3084 (Aug. 26, 2008) and 2787, 94 SEC Docket 606 (Sept. 24, 2008) (order); *Slick Enters., Inc.*, Investment Advisers Act Release Nos. 2736, 93 SEC Docket 796 (May 22, 2008) (notice) and 2745, 93 SEC Docket 1616 (June 20, 2008) (order); *Gates Capital Partners, LLC/Bear Creek, Inc.*, Investment Advisers Act Release Nos. 2590, 90 SEC Docket 65 (Feb. 16, 2007) (notice) and 2599, 90 SEC Docket 788 (Mar. 20, 2007) (order); *Adler Mgmt., L.L.C.*, Investment Advisers Act Release Nos. 2500, 87 SEC Docket 1813 (Mar. 21, 2006) (notice) and

We appreciate the difficulty faced by the Commission in crafting a rule that exempts family offices without unintentionally exempting other investment advisers. We also appreciate the speed with which the Commission issued the Proposed Rule and the Commission's understanding that family offices will need sufficient time to seek their own exemptive orders if the final Rule does not provide the requisite relief.

We understand that no rule could conceivably address all of the structures used for family offices. Notwithstanding this, we believe that the Proposed Rule should be modified because, as currently drafted, the Proposed Rule would inadvertently exclude many multi-generational and other family offices from the definition of family office.

For example, many family offices have been formed by or for the benefit of siblings or cousins whose families have co-invested jointly through the generations since their common ancestor who began the creation of the family wealth and who may be a great-grandfather or an even more senior ancestor. Other family offices are created in trust for the benefit of future generations of the settlors of the trust. Indeed, many times the family office will consist of several entities: a family trust company (established and owned by one group of family members) providing trustee and other services; one or more entities (established and owned by another group of family members) serving as general partners or managing members of pooled investment vehicles; and another entity (established and owned by a third group of family members) providing asset management and advisory services.[8]

2508, 87 SEC Docket 2432 (Apr. 14, 2006) (order); *Riverton Mgmt., Inc.*, Investment Advisers Act Release Nos. 2459, 2005 WL 3404118 (Dec. 9, 2005) (notice) and 2471, 2006 WL 119133 (Jan. 6, 2006) (order); *Parkland Mgmt. Co.*, Investment Advisers Act Release No. 2362, 84 SEC Docket 3156 (Feb. 24, 2005) (notice) and 2369, 85 SEC Docket 118 (Mar. 22, 2005) (order); *Longview Mgmt. Grp. LLC*, Investment Advisers Act Release Nos. 2008, 2002 WL 10528 (Jan. 3, 2002) (notice) and 2013, 2002 WL 192323 (Feb. 7, 2002) (order); *Kamilche Co.*, Investment Advisers Act Release Nos. 1958, 75 SEC Docket 1209 (July 31, 2001) (notice) and 1970, 75 SEC Docket 1687 (Aug. 27, 2001) (order); *Bear Creek Inc.*, Investment Advisers Act Release Nos. 1931, 2001 WL 236772 (Mar. 9, 2001) (notice) and 1935, 2001 WL 327593 (Apr. 4, 2001) (order); *Moreland Mgmt. Co.*, Investment Advisers Act Release Nos. 1700, SEC Docket 1051 (Feb. 12, 1988) (notice) and 1705, 66 SEC Docket 1605 (Mar. 10, 1998) (order); *In re Roosevelt & Son*, Investment Advisers Act Release No. 54, 1949 WL 35524 (Aug. 31, 1949); *In re Pitcairn Co.*, Investment Advisers Act Release Nos. 52, 1949 WL 35503 (Mar. 2, 1949); *In re Donner Estates, Inc.*, Investment Advisers Act Release No. 21, 1941 WL 37202 (Nov. 3, 1941). *See also* S. Rep. No. 1775, 76th Cong., 3d Sess., 21-22 (1940); H.R. Rep. No. 2639, 76th Cong., 3d Sess., 28 (1940).

8 The reasons for the disparate ownership are varied, e.g., tax planning, liquidity available to fund the office and geographical concerns. *See WLD Enters., Inc.*, Investment Advisers Act Release Nos. 2804, 94 SEC Docket 1280 (Oct. 17, 2008) (notice) and 2807, 94 SEC 1881 (Nov. 14, 2008) (order) (applicant provides advisory services to family clients directly or indirectly through entities that are wholly owned by the applicant, family members or family trusts and that manage pooled investment vehicles created exclusively for the benefit of family clients). *See also Gates*

Other family offices are organized by the key employees. For the reasons described below, none of these family offices would be covered by the Proposed Rule, notwithstanding that exempting each of these entities is consistent with the purpose of the Proposed Rule.

1. The "Founder"

In delineating the type of company or other entity that is a family office, the Proposed Rule relies, as a starting point, on the "founder" of the family office, i.e., the individual for whose benefit the family office was established.[9] The Proposed Rule envisions a single individual for whose benefit the office was established.[10] In our experience, however, almost all family offices are organized by or for the benefit of more than one family member. They are intended to provide a broad range of services to the extended family, taking advantages of economies of scale. In addition to providing investment management services, many family offices also assist family members with obtaining a mortgage, health insurance, life insurance and medical care, purchasing a home, art and other significant personal assets, managing their residences, etc. Accordingly, it is not unusual for the family office to be established for the benefit of more than one individual.

Focusing on the "founder" serves no policy reason and unnecessarily complicates the analysis of the type of entities that qualify as family offices and inappropriately excludes from the exemption many family offices. We believe that the policy reasons underlying the exemption can be served by focusing on the persons to whom a "family office" renders services and limiting it to members of a single extended family (as proposed to be defined below) and that the concept of "founder" should be deleted from the final Rule.

We appreciate that defining a "family" is easier said than done. One approach we suggest to replace the definition of founder would be to define a company as a family office if the persons who use its services can trace their familial relationship to a common ancestor by blood or marriage. We believe that this would address a substantial majority of the family offices currently in existence and would

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Capital Partners, LLC/Bear Creek, Inc., Investment Advisers Act Release Nos. 2590, 90 SEC Docket 65 (Feb. 16, 2007) (notice) and 2599, 90 SEC Docket 788 (Mar. 20, 2007) (order) (one applicant provides investment advisory services to a family by managing an entity that was formed by the family to facilitate its investments and that is owned by the family and a limited number of senior level employees, and the other applicant provides trustee services for trusts created by and for the sole benefit of the same family).

9 *See* Release at 39-40.

10 The Proposed Rule also includes such individual's spouse (or spousal equivalent) as a founder if the family office was established for such spouse's benefit and any subsequent spouse of such individual. *See* Release at 40.

not inadvertently exempt any non-family offices from registration. Should this approach not be acceptable to the Commission, an alternative would be to permit the most senior family members in being on the promulgation of the final Rule (or, if later, the organization of the family office) to trace back to their great-grandparents and permit the family office to provide services to any persons descended therefrom (and their spouses, adopted children, stepchildren, etc.).[11]

Should the Commission not accept our recommendation to eliminate the concept of "founder" in the final Rule, we respectfully request that, at the least, the definition of "founder" be revised to recognize that a family office may be organized by or for the benefit of any number of family members. Limiting the family office exemption to family offices established to benefit only one person is inconsistent with the legislative history of the Dodd-Frank act and prior exemption orders of the Commission. Absent the adoption of an alternative approach to the definition of "founder" contained in the Proposed Rule, many of the family offices we advise will need to seek exemptive relief.

2. Family Clients

a. Family Member

The definition of "family member" under the Proposed Rule includes the individual and his or her spouse (or spousal equivalent) for whose benefit the family office was established and any of their subsequent spouses (or spousal equivalents), their parents, their lineal descendants (including by adoption and stepchildren), and such lineal descendants' spouses (or spousal equivalents).[12] We support the Commission's recognition that a family is not simply defined as a husband, wife, and children and that adopted, stepchildren, and spousal equivalents are included as part of a family.[13]

As previously indicated, however, we believe the proposed definition of "family member" is too narrow and needs to be revised to include additional multi-generational family members that are commonly advised by a family office (e.g., great-grandparents, grandparents, aunts and uncles of the founder and their lineal descendants). We believe the inclusion of these people in the definition of "family member" is consistent with the Commission's view in granting prior exemptive orders to family offices and that the definition set forth in the Proposed Rule may inadvertently omit them. The Proposed Rule seems to be based, at least in

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[11] We are aware of several family offices that can trace their origins to early in the twentieth century.

[12] *See* Release at 39-40.

[13] *Id.* at 9-10, 39.

part, on the premise that the founder of the family office is always the family member who created the wealth or, where that is not the case, that each line of descendants of the original patriarch or matriarch will establish its own independent family office. This premise is not consistent with the history of many of our family office clients. In our experience, it is common for the family members who establish the family office to have inherited the wealth from their parents, grandparents or great-grandparents. Indeed, the liquidity event that precipitated the formation of a family office (e.g., the sale of all or a part of the family business) often arose in the second or third generation. Consistent with the likely intent of the great-grandparent or grandparent that is the source of the family wealth, many of these family offices have been (and many family offices formed in the future under similar circumstances are likely to be) collectively formed by siblings or cousins for the purpose of managing the wealth and other personal needs of descendants of the original matriarch or patriarch and for maintaining the family legacy. Consequently, in order to ensure that the Proposed Rule also excludes from the definition of "investment adviser" family offices that, like many of our clients, were formed by or for the collective benefit of the members of an extended family, we recommend that the definition of family member be expanded to include, at a minimum, the parents, grandparents and great-grandparents of the founders and their spouses and descendants (including persons who have become descendants by adoption or marriage).

Not only will revising the definition of "family member" in accordance with the foregoing obviate the need for many family offices to have to seek exemptive relief, but it will also avoid the following perverse (and we hope unintentional) results that would arise from the Proposed Rule's permitting descendants, but not ancestors, of the founder to be family office clients:

- The Proposed Rule does not permit a family office to provide advice to the founder's grandparents, cousins, second cousins, aunts, uncles, great aunts or great uncles, each of whom is a relative the founder may have known for most (if not all) of the founder's life and that may be extremely close or otherwise important to the founder, but it does permit (appropriately, in our view) a family office to provide advice to descendants of the founder, even those he may not know.
- The Proposed Rule favors family offices that were established decades ago over those that have been more recently established or will be established in the future. A family office that was formed a long time ago can provide services to persons that are, for example, currently third or fourth cousins to each other. A family office that starts today may need to wait at least 40 to 50 years before being able to provide services to equivalent types of family members.

We see no policy reason for (i) permitting a family office to advise all future generations of a family but not all existing generations of a family or (ii) treating long-ago established family offices differently from newly formed family offices, and we believe that such differing treatment is inconsistent with the intent of the Dodd-Frank Act.

Finally, revising the definition of "family member" in accordance with our proposal raises little concern that commercial investment advisers will be able to use the family office exemption to escape registration. The clients of the family office will continue to be members of a single extended family and will not include members of the general public, thereby complying with the policy objectives of the exemption from registration. It also does not raise any concerns regarding protection of investors.

b. Involuntary Transfers

We agree with the Commission's view that an involuntary transfer should not jeopardize the exemption from registration enjoyed by a family office. Further, we appreciate that the Commission recognizes that a separation resulting from the involuntary transfer should not "result[] in harmful investment or tax consequences."[14]

In this regard, it is quite common for a family office client to bequeath assets for the benefit of a public charity or other third party. We believe that it would be unnecessarily draconian if such a bequest would require a family office to restructure the ownership of assets in order to comply with the Proposed Rule. It may not be possible to extricate the devisee from a commonly owned family investment vehicle without substantially adversely affecting the family or the devisee. For example, extricating the devisee may require the family office to lose control of a privately held business. Alternatively, third-party consents that may need to be obtained may not be forthcoming. There may also be regulatory and tax considerations that would adversely affect or limit the ability of the family office to separate itself from its new client. In other instances, buying-out the interests of the transferee could raise valuation issues or may require the making of redemptions from investment funds managed by third-parties (some of which may have significant lock-up periods) or otherwise disposing of investments in order to obtain sufficient liquidity to buy-out the transferee's interests. The hardship may be particularly severe if the death in question is that of a family member that was intimately involved in the operation of the family office. Consequently, we would recommend that the new client be treated in the same manner as former key employees and, thus, be permitted to continue as clients but be precluded from

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[14] Release at 17.

contributing more assets to be managed by the family office. Treating involuntary transfers arising under these circumstances in this manner raises no "investor protection" concerns and would be consistent with other situations in which involuntary transfers are ignored under the securities laws.[15] It may also be the most practical approach given the wide range of issues that could arise in extricating the interests of the transferee.

Nevertheless, if the Commission must impose conditions on involuntary transfers, we strongly recommend that the Commission (i) permit the family office to continue to manage investments that cannot be transferred due to the inability to obtain required third-party approvals, other illiquid investments and investments, which if transferred, would cause the family or transferees to lose control over the issuer of such investment or other material rights with respect to the retained or transferred portion of the investment and (ii) in the case of liquid assets not subject to the foregoing, extend the four month transition period to at least two years after the date of the involuntary transfer (or, in the case of an involuntary transfer triggered by death, one year after the completion of probate). After all, an orderly transition of assets to the transferee is in the interests of all parties and the policy behind the Act would not be offended by permitting such transition.

c. Former Family Members

We support the Commission's proposal that a former family member not be excluded as a family client with respect to capital advised by the family office at the time of separation.[16] We would also be supportive of a rule that permits the family office to manage "new money" of a former family member as well. A former family member may be as involved with the family after the divorce, etc. as before or may otherwise maintain close ties to other family members. For example, it would be peculiar for the family office not to be able to manage the assets of a former family member who is the mother (or father) of individuals who may be the family office's largest clients.

d. Family Trusts, Charitable Organizations, and Other Family Entities

We support the Commission's inclusion of charitable foundations, charitable organizations, charitable trusts, and trusts and estates as family clients.[17]

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15 In most cases, the charity or other transferee is not even required to pay any compensation to the family office other than (at most) its pro rata share of the cost of maintaining the applicable investments.

16 Release at 16-17.

17 *Id.* at 17.

We believe, however, that the terms are too narrowly drawn and fail to take into consideration traditional trust and estate planning structures used by individuals.

First, under the Proposed Rule, the definition of family client includes any trust or estate existing for the "**sole** benefit" of one or more family clients.[18] This definition inadvertently fails to take into account how many trusts are organized and how estates are administered. The settlor of a trust may name a charitable entity as a remainderman and may include third parties as contingent beneficiaries in the event of the death of the family members without issue surviving. Further, we note that many trusts advised by family offices today were established many years ago and provide for contingent beneficiaries that are not family members. These trusts cannot be reformed to comply with the Proposed Rule. Consequently, at a minimum, the Proposed Rule should permit the following trusts to qualify as family clients: (i) charitable lead trusts and charitable remainder trusts[19] (two common estate and charitable planning vehicles) as long as the non-charitable beneficiaries of the trusts are family members or former family members and (ii) any other trust that exists primarily for the benefit of family members. This is consistent with traditional estate planning practice and, given that the establishment of a trust is in the nature of a gift, it should not raise any investor protection concerns.[20] Moreover, in the event charities or non-family members become the sole beneficiaries of the trust as a result of death of a family member or otherwise, the involuntary transfer rules would apply. Absent this change, in our experience, most trusts advised by family offices would not be classified as family clients under the Proposed Rule.

Similarly, the Proposed Rule requires that an estate exist for the sole benefit of family members. It is highly unusual, in our experience, for an estate of a wealthy person not to contain a number of bequests to non-family members. Consequently, we believe that the circumstances relating to an estate may be more properly addressed under the rule relating to involuntary transfers.

Second, we note that the Proposed Rule requires that any charitable entity (i.e., charitable foundation, charitable organization, or charitable trust) be established and funded exclusively by family members or former family members. We believe that it would be consistent with the policy behind the Proposed Rule to

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18 *Id.* at 9 (emphasis added).

19 These are trusts where charitable entities are beneficiaries or remaindermen, with the noncharitable person having the other interests. As long as these noncharitable persons consist of family clients, the policy objectives of the exemption are fulfilled.

20 For example, Rule 3c-6 of the Investment Company Act of 1940, as amended (the "Investment Company Act"), permits the recipient of a gift in a "Section 3(c)(7) Company" from a qualified purchaser to be treated as a qualified purchaser for purposes of section 3(c)(7) of the Investment Company Act. *See* 17 C.F.R. § 270.3c-6 (2010).

permit others to make contributions to any charitable foundation or similar organization formed by a family member. It is not uncommon for one person to make contributions to a charitable foundation established by another person as a way of honoring the latter person. Given that the assets will not be invested for the benefit of the former person, as long as the charitable entity was established or is controlled by family members it serves no policy purpose to preclude such contribution. We understand that the Commission may not wish to create a blanket exception and we believe that this situation could be addressed for most instances in our experience if a small amount (e.g., 10%-20%) of the assets contributed to the charitable entity since inception could be contributed by non-family clients.

Finally, we think it would also be appropriate to include, as a family client, a trust that is funded solely by family clients and whose trustee is a family client, regardless of the identity of the beneficiary. The establishment of such a trust would be the equivalent of a gift to the beneficiaries and investor protection concerns therefore do not arise. Also, because the trust would be funded and controlled by family clients, it does not raise any concerns of potential abuse of the family office exemption by third-party investment advisers.

e. Key Employees

General. The Proposed Rule defines a key employee to include "any natural person . . . who is an executive officer, director, trustee or general partner . . . of the family office."[21] We support the inclusion of key employees as permissible clients and the Commission's approach of basing this definition on the knowledgeable employee standard of Rule 205-3(d)(1)(iii). For the sake of clarity, however, we recommend importing the definition for "executive officer" from Rule 205-3(d)(4) of the Act. There, "executive officer" is defined as the "president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions."[22]

In addition, similar to the definition of "Knowledgeable Employee" set forth in Rule 3c-5 of the Investment Company Act,[23] the definition of "key employees" of a family office under the Proposed Rule should be revised to include "key employee" of the following related entities of a family office: (i) entities that would be permissible family clients of the family office and (ii) other family offices of the family. As previously indicated, and as with other private fund advisers, it is

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[21] Release at 40.

[22] 17 C.F.R. § 275.205-3(d)(4) (2010).

[23] *See* 17 C.F.R. § 270.3c-5 (2010).

quite common for a family to use more than one related management company, general partner or other type of family office entity to manage its wealth, whether for tax, jurisdictional or other reasons. For similar reasons, it is not unusual for the employees of the various related family offices to be different from each other. Consequently, the inclusion of key employees of family clients and related management entities in the definition of "key employees" is essential to give family offices the structural flexibility they need in order to operate in an efficient manner. Moreover, it is consistent with the Dodd-Frank Act's requirement that the family office exemption "recognizes the range of organizational, management and employment structures and arrangements employed by family offices."[24]

Finally, the definition of "key employee" does not include a trustee of a family client. We believe that this omission is inadvertent. Instead, the Proposed Rule includes "trustees" of the family office. Typically, the family office will itself not have any trustees but will render services to family clients that are trusts. Moreover, although many family offices may have appurtenant family trust companies, in most instances, the trustee of any family trusts will be an individual who may not have any formal role at the family office. Given that the trustee of any family trusts is an important and senior function, we believe that the Proposed Rule should be clarified to ensure that the trustee of any family trust is treated as a key employee.

Key Employee Entities and Family Members. Further, we agree with the Commission's suggestion that key employees be permitted to structure their investments through trusts and other entities.[25] We also believe that immediate family members of the key employee (e.g., a key employee's spouse (including spouses that do not otherwise hold joint community property or a similar shared ownership interest), former spouse, and lineal descendants of the foregoing) should be permitted to be direct or indirect permitted beneficiaries of any investment entity utilized by a key employee and that the Proposed Rule should be revised accordingly. In addition, we believe that the types of entities that can be used by key employees should mirror the suggestions made above regarding entities organized by other family clients. These are commonly used estate and personal tax planning structures and no policy is advanced by treating key employees differently.

Other Employees. In the Release, the Commission requested comments on whether other employees should be included as key employees. In particular, the Release questioned whether the family office could provide

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[24] Section 409(b)(2) of the Dodd-Frank Act; *see also* S. Rep. No. 111-176 at 75-76.

[25] *See* Release at 21.

investment advice to a long-term employee that did not qualify as a key employee.[26] In our experience, it is common for some families to reward long-tenured employees in this manner. We do believe that it is consistent with the policy underlying the Proposed Rule to permit a family office to provide investment advice to a long-tenured (e.g., more than 10 year) employee of the family office.

In addition, we believe the Proposed Rule should also permit any employee of a family office (even an employee that is not a key employee) and its immediate family members and related entities to own a profits interest in a family client (e.g., an interest acquired without the making by the employee of any capital contribution or other payment). The grant of such interests by a family client as a form of "discretionary bonus" is a common practice. Often these interests are granted to help a family office better incentivize its employees and maintain an "all for one and one for all" type of morale in the work place. Sometimes, a profits interest will be granted only to a few employees in recognition of special performance or for other similar reasons. In addition, because the grant of the profits interest to the employee would be issued at no cost to the employee, the employee would not be making any investment decision and would not require the protection contemplated by the sophistication-oriented requirements of the proposed definition of "key employee." Consequently, consistent with the objectives of the Proposed Rule, permitting family clients to continue to grant profits interests to employees (senior or otherwise) would allow family offices to continue existing compensation arrangements without raising any policy concerns.

3. **Ownership and Control**

The Proposed Rule requires that the family office be wholly-owned and controlled by family members.[27] For the reasons described below, we believe that there is no policy advanced in restricting the ownership of the family office to family members and that, at a minimum, key employees should be permitted to own a part of a family office so long as the family office is controlled by family members.

First of all, as noted in the Release, prior exemptive orders have permitted ownership by key employees.[28] Ownership of all or a portion of a family

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26 *Id.*

27 Release at 23, 37.

28 *See generally id.* at 18-19; *see also, e.g.*, *Slick Enters., Inc.*, Investment Advisers Act Release Nos. 2736, 93 SEC Docket 796 (May 22, 2008) (notice) and 2745, 93 SEC Docket 1616 (June 20, 2008) (order) (permitting the family office to advise entities created by family members to invest in or to operate other businesses or real estate, which are not wholly owned by family clients); *Adler Mgmt., L.L.C.*, Investment Advisers Act Release Nos. 2500, 87 SEC Docket 1813 (Mar. 21, 2006) (notice) and 2508, 87 SEC Docket 2432 (Apr. 14, 2006) (order) (permitting a

office by key employees may be desirable for tax, jurisdictional or other reasons. Consequently, permitting family offices to be owned by key employees would be consistent with both the potential needs of family offices and the Congressional directive to adopt a rule that reflects previous exemptive policy and that recognizes the wide range of structures employed by family offices.

Second, we believe many of the policy reasons set forth in the Release for requiring 100% ownership and control of the family office by family members are misplaced.

- The Release states that this requirement helps distinguish family offices from family-run offices that provide advice to third parties.[29] We believe that the policy behind the exemption is fulfilled by requiring that the family office renders advice only to a single family.

- The Release states that requiring the family office to be wholly-owned and controlled by family members places the family in a position to protect its interests and, thus, less likely to need the protection of federal securities laws.[30] To the contrary, based on our experience, it is safe to presume that the family – as the sole client of the family office – will have the negotiating leverage to obtain all the protection it desires, whether with respect to compensation, governance or other matters.

- The Release notes that "[r]equiring that the family office be wholly owned by the family members alleviates any concern that [the Commission] may otherwise have about the profit structure of the family office."[31] A family office, however, that is owned by family members would compensate its key employees and would pay the salaries and bonuses of those key employees from its fees. If the family office is owned by key employees (and not the family members) and the family

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"long-standing loyal family employee" to hold a beneficial interest in an entity advised by the family office); *Riverton Mgmt., Inc.*, Investment Advisers Act Release Nos. 2459, 2005 WL 3404118 (Dec. 9, 2005) (notice) and 2471, 2006 WL 119133 (Jan. 6, 2006) (order) (permitting the family office to advise trusts benefiting primarily, but not exclusively, family members); *In re Pitcairn Co.*, Investment Advisers Act Release No. 52, 1949 WL 35503 (Mar. 2, 1949) (permitting four churches to hold minority equity interests in the family office); *In re Donner Estates, Inc.*, Investment Advisers Act Release No. 21, 1941 WL 37202 (Nov. 3, 1941) (permitting a former employee of a family member to be the sole beneficiary of an entity advised by the family office).

[29] Release at 23.

[30] *Id.*

[31] *Id.*

> controls the fees paid to the family office, then any profit inuring to the benefit of the key employees is not much different than the compensation that would be paid to them if the family members owned the family office.

For similar reasons, we also believe that the Proposed Rule should make clear that a family office can be operated at a profit. As long as a family office meets the ultimate requirements of the Rule regarding permissible clients and permissible levels of non-family member ownership and control and does not hold itself out to the public, it should be irrelevant whether the family office operates to generate net profit or operates at cost. For various tax reasons, many family offices are advised to ensure that the family office earns a profit; and, in our experience, many, if not all, family offices generate a profit in most years.

4. Holding Out

The Proposed Rule precludes the family office from holding itself out to the public. We agree with the Commission's approach and believe that this best serves the policy behind the exemption.[32]

5. Grandfather Provisions

We agree with the Commission's approach relating to the grandfathering provisions.[33]

6. Previously Issued Exemptive Orders

The Release requested comments regarding family offices that were exempt from registration pursuant to exemptive relief previously granted by the Commission.[34] We believe that it is consistent with the Dodd-Frank Act and the policy underlying the exemption granted to family offices to permit any family office to continue to rely on an exemptive order previously issued to it. Further, we believe that a family office that previously received an exemptive order may choose to rely on the final Rule instead.

* * *

We thank the Commission for giving us the opportunity to comment on the Proposed Rule. We hope that our comments, observations, and

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[32] *See id.* at 24.

[33] *See id.* at 25, 37.

[34] *See id.* at 26.

recommendations contribute to the important work of the Commission in carrying out the regulative initiatives under the Dodd-Frank Act. If you have any questions with respect to any of the matters raised in this letter, please do not hesitate to contact us at (212) 735-3000.

Very truly yours,

Richard T. Prins

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Lawrence D. Frishman

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