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November 17, 2010

Elizabeth M. Murphy, Esq.
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 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 are pleased to submit this comment letter on the definition of "family office," as proposed in Rule 202(a)(11)(G)-1 (the "Proposed Rule").

Withers Bergman LLP is an international private client law firm with eight offices around the world. We serve as counsel to more than 75 single family offices in the U.S., Europe, South America, Asia, the Middle East and Africa. Historically, these family offices have relied on the "private adviser" exemption under Section 203(b)(3) of the Investment Advisers Act of 1940 (the "Advisers Act"). During the course of our representation, we have gained significant experience and familiarity with "the range of organizational, management, and employment structures and arrangements employed by family offices."[1]

In July 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, which, among other things, repeals Section 203(b)(3) of the Advisers Act and directs the Commission to adopt new rules providing for an exclusion of family offices from registration with and regulation by the Commission as investment advisers.

We appreciate the swiftness with which the Commission has drafted and released for comment the Proposed Rule, which defines "family office" for the purposes of the aforementioned exclusion. As requested by the Commission in Investment Advisers Act Release No. IA-3098 (October 12, 2010) (the "Proposing Release"), we are submitting comments with respect to certain provisions of the Proposed Rule. We do so because our clients share the

[1] *See* Investment Advisers Act Release No. IA-3098 (October 12, 2010) at 6.

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Commission's goals of (a) meeting the Dodd-Frank Act's mandate to craft a rule that reflects the real-world structures of family offices;[2] (b) avoiding, as much as possible, the need for family offices to burden the Commission with individual applications for exemptive orders;[3] (c) avoiding the regulation of family members' management of their own wealth;[4] and (d) avoiding involvement of the Commission in disputes among family members concerning the operation of the family office.[5] We have not written this letter on behalf of any particular client, although we expect certain of our clients might benefit from changes made to the Proposed Rule.

While the Proposed Rule also reflects the Commission's goal of ensuring that hedge funds and similar private advisers will not avoid registration under the Advisers Act by way of the "family office" exclusion,[6] we believe that the Proposed Rule can be revised to achieve that goal in a way that intrudes less upon typical, *bona fide* single family offices, thereby reducing the need for individual exemptive orders.

We also wish to stress to the Commission that the impact of the definition of family office on primarily non-U.S. families cannot fairly be overlooked. Given the way in which the Advisers Act has been applied to non-U.S. entities with U.S. clients, family offices that serve primarily non-U.S. family members and family clients could be subjected to regulation by the Commission simply because a limited number of family members have chosen to live in the U.S. or because, for tax or other reasons, the family office has created U.S.-organized entities that could be considered family clients. For these reasons, we urge the Commission to recognize that it is necessary to consider the structures and practices typically employed by international as well as domestic family offices when adopting its final definition.

Attached to this letter as Exhibit A is a marked version of the Commission's proposed definition of family office, which identifies our proposed revisions. This letter discusses each of our proposed revisions and is intended to assist the Commission in its review of those proposed revisions. We would be pleased to discuss with appropriate Commission personnel the issues addressed in this comment letter, if such a discussion would be helpful.

Successor Entities

As proposed, the definition of "family office" appears to contemplate an entity in the family structure that has been created at a specific point in time to address a family's need for investment advisory services, which need is recognized only at the time that the family office is established.

In certain cases, however, a family office may be a successor entity to an operating company or a unit thereof, to another entity within the family enterprise or to another family office that has been providing investment advisory services for a family over several generations. For example, where a family's wealth originated as part of a family operating company or unit

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[2] *Id.*

[3] *Id.* at 28.

[4] *Id.* at 8.

[5] *Id.* at 5.

[6] *Id.* at 6.

thereof several generations in the past, investment advisory functions on behalf of the family may have been undertaken by a business unit within the operating company, and not by a separate entity in the family structure. In such a situation, a separate family office might only be established after investment advisory functions had been provided to the family for generations within the operating company, such that the separate family office "opened its doors" to a far-reaching clientele of family members. Alternatively, a family may already have a generations-old entity within the family structure to provide investment advisory services, but later create a successor advisory entity in conjunction with a restructuring of the family holdings.

These examples represent the natural evolution of family structures. It must be made clear that a family office may include not only a company established at the time that a family first determines that it has a need for, and begins providing, investment advisory services through a separate dedicated entity, but also a company that takes over already-existing advisory functions within the family structure. As such, we propose that the first clause of Section 275.202(a)(11)(G)-1(b) of the Proposed Rule be replaced with the following formulation:

> A family office is a company (including its directors, partners, trustees, and employees acting within the scope of their position or employment), or a successor to a previously established company, that: . . . ."

"Company" as a Defined Term

Although Section 275.202(a)(11)(G)-1(b) of the Proposed Rule describes a family office as a "company," and implies in the list of individuals in the parenthetical following "company" that such term is intended to include a range of entities including corporations, partnerships and trusts, the term "company" is in fact not defined in the Proposed Rule.

The absence of a definition of "company" leads to uncertainty when attempting to discern whether a particular type of entity qualifies as a family office. For example, some family offices could be structured as trusts, which are not entities one usually refers to as "companies." In light of the specific reference to "trustees" in the Commission's proposed language, we believe that a trust was intended to be considered a "company" for purposes of the Proposed Rule. Likewise, the reference to "partners" leads us to believe that general partnerships, limited partnerships and limited liability partnerships – all of which are organizational structures frequently used as family offices – were intended to be included within the ambit of "company." We would note that the Proposed Rule did not specifically refer to "member" and "manager," leading to some confusion as to whether a limited liability company is a "company" for this purpose.

Finally, because the Proposed Rule could apply to primarily non-U.S. families whose structures are established under the laws of foreign jurisdictions, we believe it is important to specifically state that foreign law equivalents are intended to be included within the term company.

We therefore propose adding the following definition of "company" to the Proposed Rule:

> Company means any corporation, limited liability company, general partnership, limited partnership, limited liability partnership, non-stock corporation, unincorporated association, foundation, trust (whether

business or personal), the foreign law equivalent of any of the foregoing or other entity that can be formed by one or more natural persons.

We believe this definition would reduce any potential confusion as to whether a particular type of legal entity falls within the family office exclusion.[7]

Involuntary Transfers

Subparagraph (b)(1) of the Proposed Rule contemplates the temporary addition of non-family clients in the event of an involuntary transfer of assets as follows: "...if a person that is not a family client becomes a client of the family office as a result of the death of a family member or key employee or other involuntary transfer from a family member or key employee, that person shall be deemed to be a family client for purposes of this section 275.202(a)(11)(G)-1 for four months following the transfer of assets resulting from the involuntary event."

Imposing such a deadline fails to account for the significant lag time frequently faced between the death of an individual and the transfer of assets from such individual's estate to the beneficiaries under his or her will. In our experience, the time between a wealthy individual's death and the close of his or her probate is measured in years, *not* months. Much of this delay derives from the preparation and audit of relevant estate tax returns and simply is not within the control of the executors of the deceased. In many instances, it is only then that assets are transferred to beneficiaries. In particular, requiring a non-family client to dispose of assets received from a family member or key employee within four months simply is not a realistic time frame to assess which assets must be transferred and then to re-transfer such assets to a family client. It is possible that the Commission intended a transfer in the event of death to be deemed to have occurred only upon the final probate of the deceased's estate and, as such, the estate of a family member or key employee would be deemed a family client until that time. If so, this result is not clear from the language of the Proposing Release, as the estate of a key employee ordinarily would not fall within the definition of a family client. In any event, a requirement to eliminate a non-family client transferee from the family office structure within four months would place the family office at a distinct disadvantage. The family office risks disqualification if it cannot both value the assets to be transferred and come to terms with the successor in interest. This would be true in the case of transfers occurring either as a result of a death or upon the termination of a trust.

Most existing family collective investment vehicles were not created in anticipation of a potential need to eliminate investors. As such, few if any family offices currently have the ability to force the redemption of non-family clients. In these circumstances, the choice faced by the family office – to eliminate the non-family client transferee within four months or register under the Advisers Act – places significant leverage in the hands of the non-family client transferee that could be used to force unfair terms on the family office.

In addition to imposing an unrealistic time frame on disposal of transferred assets, the involuntary transfer provision of the Proposed Rule unnecessarily interferes with family members' management of their wealth. Consider the Commission's contention, on page 8 of the Proposing Release, that "most of the conditions of the proposed rule (like our exemptive orders)

[7] Please note that, in light of our proposed definition of "company," we have also clarified subsection (v) under the definition of "family client" to refer to "Any company...."

operate to restrict the structure and operation of a family office relying on the rule to activities unlikely to involve commercial advisory activities, while permitting traditional family office activities involving charities, tax planning, and pooled investing." It cannot be the case that a commercial investment adviser would arrange to have an asset transferred upon death to a new advisory client simply to earn an advisory fee for managing it, or to gratuitously transfer ownership of an asset for that purpose. However, by including in subparagraph (b)(1) of the Proposed Rule a restriction on involuntary transfers of wealth to clients who otherwise would not fit within the definition of "family client," the Proposed Rule restricts the structure and operation of the family office in similar instances, where the transfer of assets would not result in commercial advisory activities being undertaken.

We propose removing the involuntary transfer language of subparagraph (b)(1) quoted above, eliminating the deadline for removing non-family clients from the family office structure, and adding the following additional category of "family client":

> Any donee, with respect to any gifts or bequests received by such donee directly or indirectly from family clients, all proceeds therefrom, and all products thereof, provided that such donee shall not receive investment advice from the family office (or invest additional assets with a family office-advised trust, foundation or entity) other than with respect to assets received as a gift or bequest from a family client, all proceeds therefrom and all products thereof, except that a donee shall be permitted to receive investment advice from the family office with respect to additional investments that the donee was contractually obligated to make, and that relate to a family office-advised investment received as a gift or bequest from a family client, all proceeds therefrom and all products thereof.

We suggest that "Donee" be defined as follows:

> Donee means a person who becomes a client of the family office as a result of a gift or bequest from a donor that, at the time of such gift or bequest, was a family client.

In considering our proposal to replace the involuntary transfer language with the "donee" concept, we urge the Commission to consider that this is a mechanism the Commission has already endorsed in similar circumstances. The Commission has endorsed the donee concept in its treatment of collective investment vehicles exempt from registration under Section 3(c)(7) of the Investment Company Act of 1940 (the "Investment Company Act"). Under Section 3(c)(7), the collective investment vehicle is excluded from registration based upon the nature of its investors as qualified clients. This is similar to the Commission's intention to exclude a family office from regulation based upon the nature of its clients as family members or family clients.

Rule 3c-6 under the Investment Company Act recognizes that a party benefiting from the exclusion ought not to be deprived of the exclusion as a result of the death of, or a gift by, a person participating in the collective investment vehicle. Specifically, Rule 3c-6 permits a person who receives an interest in a 3(c)(7) fund as a bequest or gift from a qualified purchaser to be treated as if he or she were a qualified purchaser too, regardless of whether his or her own

circumstances would support such a conclusion.[8] Additionally, no time limit is imposed on how long a transferee under Rule 3c-6 may hold such asset. To the contrary, such transferee is permitted under Rule 3c-6 to transfer the asset to yet another person who otherwise may not be a qualified purchaser.

We respectfully submit that there does not appear to be a valid reason to treat bequests or gifts of assets managed by family offices more stringently than the transfer of interests in Section 3(c)(7) entities. By following the precedent of Rule 3c-6, the Commission will be closer to its intention to allow families to manage their wealth as they see fit, and should not create any opportunity for gamesmanship by the commercial investment advisory industry.

Ownership and Control

Under subsection (b)(2) of the Proposed Rule, a family office must be "wholly owned and controlled (directly or indirectly) by family members." We presume this means that a family client may directly own and control a family office, if such family client is itself owned and controlled by a family member (i.e., the family member's *direct* ownership and control of the family client entity yields *indirect* ownership and control of the family office), but this is not clearly stated in the Proposed Rule.

If the intent of the Proposed Rule were to exclude ownership of the family office by family clients, several of our clients would fail to qualify for the exclusion. For legitimate succession planning, estate and tax reasons, among others, none of which reflect a desire to enter into the commercial investment advisory business, many single family offices are owned not by individuals but by entities that qualify as family clients. For example, it is quite common for our clients' family offices to be owned in whole or in part by one or more family trusts.

In order to avoid the uncertainty that would result if it is not clearly stated that a family office can be owned and controlled by a family client, we propose to explicitly state this in the definition of a family office. As such, as an alternative, we propose that subsection (b)(2) read as follows:

> Is wholly owned and controlled (directly or indirectly) by family clients who are not family clients solely by reason of clause (d)(4)(viii)[9] of this section;...

Even if the control requirement is intended to permit indirect control of a family office through direct control of a family client owner, the Proposed Rule may still prohibit such a scenario, since the family trust will often have a non-family member serve as trustee. If such a

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[8] Rule 3c-6 of the Investment Company Act provides: "Beneficial ownership by any person ('Section 3(c)(1) Transferee') who acquires securities or interests in securities of a Section 3(c)(1) Company from a person other than the Section 3(c)(1) Company shall be deemed to be beneficial ownership by the person from whom such transfer was made ('Section 3(c)(1) Transferor'), and securities of a Section 3(c)(7) Company that are owned by persons who received the securities from a qualified purchaser other than the Section 3(c)(7) Company ('Qualified Purchaser Transferor') or a person deemed to be a qualified purchaser by this section shall be deemed to be acquired by a qualified purchaser ('Qualified Purchaser Transferee'), provided that the Transferee is: (a) The estate of the Transferor; (b) A Donee; or (c) A company established by the Transferor exclusively for the benefit of (or owned exclusively by) the Transferor and the persons specified in paragraphs (b)(1) and (b)(2) of this section."

[9] Clause (d)(4)(viii) corresponds to the foregoing proposed addition of "Donee" to the definition of "family client."

non-family member trustee is deemed to control a trust that owns a family office, this fairly typical family office structure will not fall within the exclusion.

Accordingly, we further propose adding the following clarification after the first sentence in the definition of "Control":

> Without limiting the generality of the foregoing, for purposes of this section, where control is exercised by one or more trustees or directors, or persons exercising a similar function, of a foundation, organization or trust described in clause (d)(4)(iii) or (iv) of this section,[10] such control shall be deemed to be exercised by a family client.

With respect to our suggestion that the definition of "Control" deem the exercise of control by a trustee (or, similarly, by foundation directors) to be exercise of control by a family client, we urge the Commission to consider the fact that trustees have a fiduciary duty to act in the interests of the family trust beneficiaries. That is, even where a trustee's actions are not directed by a family member, the trustee must act on behalf of family clients and not in such trustee's own self-interest. Additionally, it is typical for a family member to have been the grantor of the family trust and, as such, to have exercised discretion over the selection of its initial trustee and the mechanism by which successor trustees are selected. While we acknowledge that tax considerations limit the extremes to which this discretion may reach, it is important to note that it commonly will be used to achieve as close a surrogate for family control as other considerations permit. Given these legal and practical considerations, which encourage the trustee of a family trust to act in the interest of family clients, it should not be of primary concern who nominally controls the trust that owns a family office.

Regarding the clarification that family clients may own a family office, we note that the Proposed Rule already treats certain trusts and corporate and partnership entities as family clients. As such, permitting ownership of a family office by any such entity will not broaden the parameters of the family office structure beyond what is already contemplated by the Proposed Rule. Moreover, we note that the Commission has already issued exemptive orders with respect to family offices owned by trusts, and such exemptive orders are in fact cited in the Proposing Release.[11] One of these exemptive orders specifically states that a family trust not only owned the family office in question, but also was a client of such family office.[12]

In light of such prior treatment, we respectfully request that the Commission follow its own precedent by permitting family offices that are owned by family clients – including family trusts – to fall within the Proposed Rule. On page 6 of the Proposing Release, the Commission states that "any definition [of a family office] the Commission adopts should be 'consistent with the previous exemptive policy' of the Commission and recognize 'the range of organizational, management, and employment structures and arrangements employed by family offices.'" The

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[10] Clauses (d)(4)(iii) and (iv) as referred to herein retain the same subsection numbers as provided in the Proposed Rule; such clauses, however, contain suggested revisions as described in the "Charitable Entities; Trusts and Estates" section in this letter.

[11] *See Longview Management Group LLC*, Investment Advisers Act Release Nos. 2008 (Jan. 3, 2002) (notice) and 2013 (Feb. 7, 2002) (order); and *Moreland Management Company*, Investment Advisers Act Release Nos. 1700 (Feb. 12, 1998) (notice) and 1706 (Mar. 10, 1998) (order).

[12] *See Moreland.*

Commission further states on page 7 of the Proposing Release that the Proposed Rule "largely would codify the exemptive orders that we have issued to family offices." Absent a change like that proposed, such an attempt at "codification" would break down.

Charitable Entities; Trusts and Estates

Charitable Entities

The Proposed Rule includes as a "family client" any "charitable foundation, charitable organization, or charitable trust, in each case established and funded exclusively by one or more family members or former family members."[13]

By requiring charitable foundations, organizations or trusts to have been established by a family member in order to qualify as family clients, the Proposed Rule unnecessarily excludes a number of existing charitable entities established by family clients, and currently receiving family office advisory services. A family office may, for example, provide investment advisory services to a family charitable organization that was formed by a family trust. Under the Proposed Rule, however, if such a charitable organization were to continue receiving advisory services from the family office, the exclusion would be inapplicable.

Further, the requirement that charitable entities may only be considered family clients if family members are their sole source of funding is problematic in that it necessarily means that family charities that receive any donations from any outside source will not be considered family clients. Even where a charity receives a large portion of its funding from family members, it is often the case that some funding will originate from sources outside of the family.

By denying family charities with any outside funding status as "family clients," the Proposed Rule essentially creates a disincentive for families to engage in efficient charitable giving. Our clients' family structures often include charitable entities that receive funding not only from the family but also from outside donations. Adopting the language of the Proposed Rule without taking into account such a common method for distributing family wealth would force a choice between charitable giving and limiting such giving in order to qualify for the exclusion, a result we feel certain the Commission did not intend. Perhaps even more harshly, family charities that have already accepted even trivial amounts of outside funds would be retroactively penalized for conduct they had no reason to worry about at the time it was undertaken.

It should also be recognized that the Proposed Rule arguably prohibits other family clients from funding a charitable organization. It is common, for tax planning purposes, to have a family member establish a charitable lead annuity trust, which provides that the trust must pay a specific amount to a charity for each year of the trust's term, with the remainder paid to certain family members. If the annual payment were to be paid to a family charitable foundation, it is not clear that the family charitable foundation would remain a family client in light of the funds it would have received from the trust.

In light of the issues raised by the establishment and funding restrictions, we propose that the definition be revised such that "family client" includes:

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[13] *See* subsection (d)(2)(iii) of the Proposed Rule.

> Any charitable foundation, charitable organization, or charitable trust, recognized as such by such foundation's, organization's or trust's governing law, in each case established by one or more family clients and funded primarily by one or more family clients;

We note that the reference to the foundation's, organization's or trust's governing law is intended to address the potential application of the Proposed Rule to structures established by primarily non-U.S. families.

If this formulation is unacceptable to the Commission, we respectfully request that, at the very least, funding obtained from non-family clients before a date falling ninety (90) days after the publication of a final rule be grandfathered, so that family charities which have historically proceeded in an innocent fashion are not unfairly harmed by this development.

Trusts and Estates

Similarly, the Proposed Rule provides that "any trust or estate existing for the sole benefit of one or more family clients" shall be a family client. Many of our clients' family trusts or estates permit both family members and charitable organizations as beneficiaries of a trust. Additionally, it is common for family trusts or estates to name as contingent beneficiaries or potential discretionary beneficiaries third parties that are not considered "family clients." These might include, for example, a charitable organization that receives public donations.[14]

Additionally, it is not unusual for a family member to direct a substantial gift at death to a long-time domestic employee through either a family trust or a last will and testament. It seems unduly harsh that a family trust or estate should be removed from the exclusion by reason of such one-time gift.

The Proposed Rule effectively bars these common forms of wealth planning if a family office is to fall within the exclusion, penalizing innocent historical practice and leaving the family to choose among a radical restructuring, an exemptive order or registration with, and regulation by, the Commission. Further, any change in beneficiaries for purposes of complying with the Proposed Rule will be particularly burdensome for trusts, many of which are set up in such a way as to require a judicial order to revise their terms and could require approval by a state attorney general's office if charities are involved.

As an alternative, we would propose the following, more flexible version of the trusts and estates provision in the "family client" definition:

> Any trust or estate existing for the primary benefit of the members of a group of beneficiaries that consists of one or more family clients and/or

[14] Many of our trust clients include charitable beneficiaries as a general class without reference to a named charity, either in the class of discretionary beneficiaries and/or as a default beneficiary. For example, a trust may give the trustee broad discretion to pay or apply trust assets to or for the benefit of family members and charities. This type of family trust would fall outside of the exclusion. It should be noted that one commonly used trust form book includes a form which permits gifts to "any charities as the trustee determines to be desirable under the circumstances (including tax planning considerations), if such action is not significantly detrimental to the welfare" of the settlor or the settlor's spouse. Richard Underwood, Keith Bruce-Smith, Murray Hallam and Paul Clark, "Practical Trust Precedents" (ed. Withers LLP) (2010). We do not intend to suggest that the clause alluded to here is extracted from a typical trust, but rather, that its use is "blessed" by a form book in general circulation. We are aware of many trusts of a more typical character which have borrowed such concept from this sort of form.

one or more charitable organizations recognized as such by the trust's or estate's governing law.

By focusing on who *primarily* benefits from a trust or estate in order to determine whether such trust or estate qualifies as a family client, our proposed revision will not eliminate trusts or estates that exist with the intent of benefitting persons within the family, but that contemplate non-family beneficiaries in very specific situations. We note that the reference to governing law is intended to address the potential application of the Proposed Rule to structures established by primarily non-U.S. families

The Commission also should be assured that a non-family contingent beneficiary of a family trust generally will not become a "client" receiving investment advice. Rather, it is typically the case that the trust itself is the recipient of investment advice, while the trust beneficiaries are only eligible to receive distributions from the trust.[15]

Returning to the Commission's statement that the Advisers Act, "was not designed to regulate the interactions of family members in the management of their own wealth,"[16] we urge the Commission to reconsider the Proposed Rule such that families are not forced to decide between common forms of giving and registration with the Commission.

Former Family Members

The Proposed Rule includes former family members in the definition of "family client," but it inappropriately restricts investments that are eligible to receive continuing family office investment advice to those that were under advisement by the family office before the individual became a former family member, or "additional investments that the former family member was contractually obligated to make, and that relate to a family-office advised investment existing, in each case prior to the time the person became a former family member."

Although we do not disagree that it is appropriate to place a restriction on the extent to which former family members may take advantage of family office services, by restricting in such a way the investments of former family members that are eligible for family office services, the Proposed Rule disqualifies common planning structures. It is typical, in a divorce, for a family to establish a trust or to otherwise disburse assets or investments for the benefit of the ex-spouse, and for such assets or investments to receive the benefit of family office advisory services. Under the Proposed Rule, such assets or investments would not be able to receive advisory services from the family office, because they did not exist *prior to* the moment at which the individual became a former family member.

As such, we would suggest that the inclusion of former family members in the definition of "family client" be revised as follows:

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[15] Treating a trust, and not such trust's beneficiaries, as the "client" receiving investment advisory services is a position the Commission has taken in other contexts. Rule 203(b)(3)-1(a)(2)(i) of the Advisers Act provides that a trust (which does not have as its only primary beneficiary a natural person who is otherwise deemed a single client) may be deemed a single client if it receives investment advice "based on its investment objectives rather than the individual investment objectives of its… beneficiaries."

[16] *See* Proposing Release at 8.

Any former family member, provided that from and after becoming a former family member the individual shall not receive investment advice from the family office (or invest additional assets with a family office-advised trust, foundation or entity) other than with respect to assets advised (directly or indirectly) by the family office immediately prior to the time that the individual became a former family member (or assets that were created in connection with such individual becoming a former family member), except that a former family member shall be permitted to receive investment advice from the family office with respect to additional investments that the former family member was contractually obligated to make, and that relate to a family office-advised investment existing, in each case prior to the time the person became a former family member (or an investment that was made in connection with such individual becoming a former family member);

Family Members

The Proposed Rule introduces the term "founders" as a point from which to measure who may be included in the definition of "family member."[17] But the way the Commission proposes to use the term "founder" presumes that the person who built the family's wealth also is the person who founded the family office, which often is not the case. In fact, many of our clients' family offices (particularly European families' offices and family offices that began with long-standing operating businesses) were established by lineal descendants several generations remote from the creator of the family wealth.[18]

By assuming that the originator of the family wealth is also the founder of the family office, and including as "family members" only the lineal descendants of such family office founder's parents (along with spouses and spousal equivalents), the Commission fails to take into account the possibility that a family office may be formed when an investment opportunity or an organizational need arises, rather than when wealth is first created. For example, two cousins may decide to establish a family office to manage family wealth created by a common grandparent. That is, where the originator of the wealth and his or her children may not have deemed it necessary to create a family office, the Proposed Rule bars the third generation from creating a family office together.[19]

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[17] The Proposed Rule defines "family member" in subsection (d)(3) as follows: (i) the founders, their lineal descendants (including by adoption and stepchildren), and such lineal descendants' spouses or spousal equivalents; (ii) the parents of the founders; and (iii) the siblings 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.

[18] One of our clients is a family office, recently founded, that advises a wide group of family members. The current generation of family members invests together in a family business that was established at least three generations prior. As the family's wealth has grown over time, family structures, such as the family office, have been created to support family members; and because the family office has only recently been established, a focus on the founders of the family office would reveal that the cousins "founded" the family office but would ignore the fact that the cousins are lineal descendants of a common ancestor who created the family's wealth.

[19] As another example, one of our clients is a family office, recently founded, that supports the founder's father and uncles (and their families). The founder took control of part of the family business upon his father's retirement, and

Further, the Commission's proposed definition of "founder," which is limited to a single natural person and his or her spouse, fails to recognize several common practices. For example, a family office may be created by multiple siblings or cousins, by the trustee or trustees of one or more family trusts or by a family operating company, or unit thereof, which has spun out the family office into a separate entity for the purpose of more efficiently managing the family's investments.

For all of these reasons, we support the position taken by The Private Investor Coalition, Inc. ("PIC") in its comment letter dated November 11, 2010 with respect to founders. More specifically, we recommend that the definition of "founder" be deleted from the Proposed Rule and that subsection (d)(3) of the Proposed Rule[20] be revised to define "family member" as follows:

> *Family member* means:
>
> (i) the individual whose economic activities created or substantially contributed to the family's wealth, and such individual's spouse;
>
> (ii) any natural person who is a lineal descendant of a common ancestor whose economic activities created or substantially contributed to the family's wealth, and such lineal descendant's spouse;
>
> (iii) the parents and grandparents of such a person and his spouse, and the spouses and siblings and spouses of siblings of such persons;
>
> (iv) the siblings of such a person and such siblings' spouses and their lineal descendants and such lineal descendants' spouses; and
>
> (v) to the extent a person is a child, the term "child" is intended to include children of a person as well as children by adoption and stepchildren, and to the extent a person is a spouse, the term "spouse" is intended to include a spousal equivalent.

The foregoing definition is substantially the same as that proposed by PIC, but adds a new subsection (i) to assure that the creator of the family wealth and his or her spouse is included in the definition of "family member."

Our suggested revision to the definition of "family member" continues to limit family members to the lineal descendants of those who created the wealth overseen by the family office and their close relatives. We believe that in order to accommodate most of our clients' existing family offices, the exclusion could permit the limited expansion in the definition of "family member" as we propose without broadening the scope of the definition so widely that it is likely to provide a haven for the type of commercial venture the Commission is seeking to exclude.

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it is the founder who has been instrumental in establishing many family structures to hold and administer the family wealth.

[20] Note that due to our proposals to include definitions for the terms "company" and "donee," what was subsection (d)(3) of the Commission's Proposed Rule appears as subsection (d)(5) in Exhibit A hereto.

Key Employee

The Proposed Rule includes certain key employees in its definition of "family client," limited, in part, to executive officers, directors, trustees, general partners, persons serving in similar capacities, or certain other employees, and any person who holds a "joint, community property, or other similar shared ownership interest with that person." We believe that this definition of "key employee," as provided in subsection (d)(6) of the Proposed Rule, does not meet the Commission's goal of permitting such employees of a family office to channel bequests from the family through such employees' own estate planning vehicles.

The Commission states on page 21 of the Proposing Release that "key employees would be able to structure their investments through trusts and other entities, subject to the conditions relating to control and ownership described earlier in this Release." However, (a) by defining permissible trusts or estates as those that are for the sole benefit of one or more family clients, and (b) by treating as a family client only the key employee (and any person who holds a joint, community property, or other similar shared ownership interest with that person), the Proposed Rule does not, in fact, permit a key employee to structure his or her investments through trusts which benefit the key employee's lineal descendants.

In light of the foregoing, we propose that the Commission adopt the following revised definition of "key employee":

> Key employee means any natural person (including the key employee's spouse or spousal equivalent, their lineal descendants (including by adoption and stepchildren), and such lineal descendants' spouses or spousal equivalents) who is an executive officer, director, trustee, general partner, member, manager or person serving in a similar capacity of the family office or any employee of the family office (other than an employee performing solely clerical, secretarial, or administrative functions with regard to the family office) who, in connection with his or her regular functions or duties, participates in the investment activities of the family office, provided that such employee has been performing such functions and duties for or on behalf of the family office, or substantially similar functions or duties for or on behalf of another company, for at least 12 months.

Pension Plans and Deferred Compensation

We wish to highlight and express our support for the position taken by The PIC in its comment letter dated November 11, 2010 with respect to the Commission's treatment of pension plans and deferred compensation in light of the Proposed Rule.

PIC explains in its comment letter that it interprets the Proposed Rule's silence as to pension plans as an indication that the Commission has decided not to follow its historic position that a pension plan is a "client" of an investment advisor, and as a result, a pension plan sponsored or administered by a single family office may receive investment advice from such single family office, even though the pension plan is not deemed a "family client." PIC bases this interpretation on the fact that the Proposed Rule does not include pension plans in the definition of "family client" even though the Commission historically has taken an informal

position that a pension plan is a "client" of an investment advisor. In the case of a pension plan administered for the benefit of family office employees, PIC explains, the family office does not receive compensation for its investment advice and does not provide such advice to an "other" as specified in the definition of "investment adviser" in Section 202(a)(11) of the Advisers Act. PIC also includes deferred compensation plans in this analysis, explaining that any such plan is "merely a promise to pay a sum certain to a specific person at some point in the future," and not a recipient of investment advice from a family office.

Conclusion

If the Proposed Rule is adopted without change, we believe most of our family office clients will fail to qualify for the exclusion. If that were to occur, we would expect most of our clients to file with the Commission individual applications for exemptive orders under new Section 202(a)(11)(H) of the Advisers Act, an outcome that the Commission has said it wishes to avoid. Independently of the Commission's wishes, we believe the expense of such an application to be unreasonably burdensome, since by far the largest part of most of our clients' conduct which diverges from that which would be mandated by the Proposed Rule in order to qualify for the exclusion is reasonable in light of historic family office practice, and is unrelated to any interest in engaging in the commercial investment advisory industry.

By contrast, we believe that, modified as proposed herein, the Proposed Rule would exclude most of our single family office clients from the registration requirement, without encouraging abuse by commercial investment advisers wishing to escape regulation by the Commission. We would welcome the opportunity to be of further assistance to the Commission in its efforts to revise the Proposed Rule to be responsive to a larger number of existing family office structures.

Sincerely,

David S. Guin
Head of U.S. Securities Practice Group

Christopher R. Uzpen
Co-Head of Family Office Practice Group

EXHIBIT A

§ 275.202(a)(11)(G)-1 Family offices.

(a) *Exclusion.* A family office, as defined in this section, shall not be considered to be an investment adviser for purpose of the Act.

(b) *Family office.* A family office is a company (including its directors, partners, trustees, and employees acting within the scope of their position or employment), or a successor to a previously established company, that:

(1) Has no clients other than family clients; ~~provided that if a person that is not a family client becomes a client of the family office as a result of the death of a family member or key employee or other involuntary transfer from a family member or key employee, that person shall be deemed to be a family client for purposes of this section 275.202(a)(11)(G)-1 for four months following the transfer of assets resulting from the involuntary event;~~

(2) Is wholly owned and controlled (directly or indirectly) by family ~~members~~clients who are not family clients solely by reason of clause (d)(4)(viii) of this section; and

(3) Does not hold itself out to the public as an investment adviser.

(c) *Grandfathering*. A family office as defined in paragraph (a) above shall not exclude any person, who was not registered or required to be registered under the Act on January 1, 2010, solely because such person provides investment advice to, and was engaged before January 1, 2010 in providing investment advice to:

(1) Natural persons who, at the time of their applicable investment, are officers, directors, or employees of the family office who have invested with the family office before January 1, 2010 and are accredited investors, as defined in Regulation D under the Securities Act of 1933;

(2) Any company owned exclusively and controlled by one or more family members; or

(3) Any investment adviser registered under the Act that provides investment advice to the family office and who identifies investment opportunities to the family office, and invests in such transactions on substantially the same terms as the family office invests, but does not invest in other funds advised by the family office, and whose assets as to which the family office directly or indirectly provides investment advice represents, in the aggregate, not more than 5 percent of the value of the total assets as to which the family office provides investment advice; provided that a family office that would not be a family office but for this subsection (c) shall be deemed to be an investment adviser for purposes of paragraphs (1), (2) and (4) of section 206 of the Act.

(d) *Definitions*. For purposes of this section:

(1) *Company* means any corporation, limited liability company, general partnership, limited partnership, limited liability partnership, non-stock corporation, unincorporated association, foundation, trust (whether business or personal), the foreign law equivalent of any of the foregoing or other entity that can be formed by one or more natural persons.

(2) *Control* means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of being an officer of such company. Without limiting the generality of the foregoing, for purposes of this section, where control is exercised by one or more trustees or directors, or persons exercising a similar function, of a foundation, organization or trust described in clause (d)(4)(iii) or (iv) of this section, such control shall be deemed to be exercised by a family client.

(3) *Donee* means a person who becomes a client of the family office as a result of a gift or bequest from a donor that, at the time of such gift or bequest, was a family client;

(~~2~~4) *Family client* means:

(i) Any family member;

(ii) Any key employee;

(iii) Any charitable foundation, charitable organization, or charitable trust, recognized as such by such foundation's, organization's or trust's governing law, in each case established by one or more family clients and funded ~~exclusively~~primarily by one or more family ~~members or former family members~~clients;

(iv) Any trust or estate existing for the ~~sole~~primary benefit of the members of a group of beneficiaries that consists of one or more family clients and/or one or more charitable organizations recognized as such by the trust's or estate's governing law;

(v) Any ~~limited liability~~ company~~, partnership, corporation, or other entity~~ wholly owned and controlled (directly or indirectly) exclusively by, and operated for the sole benefit of, one or more family clients; provided that if any such entity is a pooled investment vehicle, it is excepted from the definition of "investment company" under the Investment Company Act of 1940;

(vi) Any former family member, provided that from and after becoming a former family member the individual shall not receive investment advice from the family office (or invest additional assets with a family office-advised trust, foundation or entity) other than with respect to assets advised (directly or indirectly) by the family office immediately prior to the time that the individual became a former family member (or assets that were created in connection with such individual becoming a former family member), except that a former family member shall be permitted to receive investment advice from the family office with respect to additional investments that the former family member was contractually obligated to make, and that relate to a family- office -advised investment existing, in each case prior to the time the person became a former family member~~; or~~ (or an investment that was made in connection with such individual becoming a former family member);

(vii) Any former key employee, provided that upon the end of such individual's employment by the family office, the former key employee shall not receive investment advice from the family office (or invest additional assets with a family office-advised trust, foundation or entity) other than with respect to assets advised (directly or indirectly) by the family office immediately prior to the end of

such individual's employment, except that a former key employee shall be permitted to receive investment advice from the family office with respect to additional investments that the former key employee was contractually obligated to make, and that relate to a family- office advised investment existing, in each case prior to the time the person became a former key employee; or

(viii) Any donee, with respect to any gifts or bequests received by such donee directly or indirectly from family clients, all proceeds therefrom, and all products thereof, provided that such donee shall not receive investment advice from the family office (or invest additional assets with a family office-advised trust, foundation or entity) other than with respect to assets received as a gift or bequest from a family client, all proceeds therefrom and all products thereof, except that a donee shall be permitted to receive investment advice from the family office with respect to additional investments that the donee was contractually obligated to make, and that relate to a family office-advised investment received as a gift or bequest from a family client, all proceeds therefrom and all products thereof.

(~~3~~5) *Family member* means:

(i) the ~~founders, their lineal descendants (including by adoption and stepchildren), and such lineal descendants' spouses or spousal equivalents;~~

~~(ii) the parents of the founders; and~~ individual whose economic activities created or substantially contributed to the family's wealth, and such individual's spouse;

(ii) any natural person who is a lineal descendant of a common ancestor whose economic activities created or substantially contributed to the family's wealth, and such lineal descendant's spouse;

(iii) the parents and grandparents of such a person and his spouse, and the spouses and siblings and spouses of siblings of such persons;

(~~iii~~iv) the siblings of ~~the founders~~such a person and such siblings' spouses ~~or spousal equivalents~~ and their lineal descendants ~~(including by adoption and stepchildren)~~ and such lineal descendants' spouses ~~or spousal equivalents.~~ ; and

(v) to the extent a person is a child, the term "child" is intended to include children of a person as well as children by adoption and stepchildren, and to the extent a person is a spouse, the term "spouse" is intended to include a spousal equivalent .

~~(4~~(6) *Former family member* means a spouse, spousal equivalent, or stepchild that was a family member but is no longer a family member due to a divorce or other similar event.

~~(5) *Founders* means the natural person and his or her spouse or spousal equivalent for whose benefit the family office was established and any subsequent spouse of such individuals. (6~~

~~(~~7) *Key employee* means any natural person (including ~~any person who holds a joint, community property, or other similar shared ownership interest with that person~~the key employee's spouse or spousal equivalent, their lineal descendants (including by adoption and stepchildren), and such lineal descendants' spouses or spousal equivalents) who is an executive officer, director,

trustee, general partner, member, manager or person serving in a similar capacity of the family office or any employee of the family office (other than an employee performing solely clerical, secretarial, or administrative functions with regard to the family office) who, in connection with his or her regular functions or duties, participates in the investment activities of the family office, provided that such employee has been performing such functions and duties for or on behalf of the family office, or substantially similar functions or duties for or on behalf of another company, for at least 12 months.

(~~7~~8) *Spousal equivalent* means a cohabitant occupying a relationship generally equivalent to that of a spouse.