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November 18, 2010

Elizabeth M. Murphy, Esq.
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. S7-25-10

Re: Proposed Rule 202(a)(11)(G)-1
File Number S7-25-10 (the "Release")

Dear Ms. Murphy:

This letter is written in response to a request for comments to Proposed Rule 202(a)(11)(G)-1 (the "Proposed Rule")[1] issued by the Securities and Exchange Commission (the "Commission") for the purpose of defining "family offices" that would be excluded from the definition of an investment adviser under the Investment Advisers Act of 1940 (as amended, the "Advisers Act") and thus not be subject to the rules and regulations of the Advisers Act. We appreciate the opportunity to comment on the Commission's Proposed Rule. We submit this letter primarily to highlight the points discussed below where we think the Proposed Rule is too limiting. In this regard, all of our comments are centered on our view that the Commission's approach to defining the term "family office" is overly focused on genetic relationships and pays too little mind to social arrangements. In these respects, we believe that the Commission's Proposed Rule would have a discriminatory effect and is not grounded in economic or social policy.

Most specifically, we focus on the Commission's limitation in the Proposed Rule of the family office exemption to a single, genetically related family, without regard to the fact that there is a more important concept—broader than the happenstance of a mere genetic linkage—that should underlie the definition of a family office: **it is the congruence between the advisers and the advised.** In a similar vein, we also discuss (1) the limitations in the definition of "key employee"[2], (2) the requirements in part (iii) of the definition of "family client" that charitable foundations, charitable organizations, or charitable trusts must be

[1] Advisers Act Release IA-3098.

[2] Advisers Act Release IA-3098 at 40.

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"established and funded exclusively" by a current or former family member or members[3] in order to fall within such definition, and (3) the prohibition in the definition of "former family member"[4] that prevents such former family members from receiving investment advice from the family office or investing additional assets with family office advised entities in the same manner as when they were family members.

1. Single Family Office

We feel that the Commission's starting point of limiting a family office to a single family begins from too narrow a place. The Commission states in the Release that, although many family offices currently consist of more than one family which have joined together to achieve cost-savings and other efficiencies, such a multi-family office has never been granted exemptive relief.[5] However, as the Commission itself concedes in the Release, this fact is largely irrelevant as it ignores the reality that, before the recent amendments to the Advisers Act due to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), almost any multi-family office would have been exempt from registration under the Advisers Act by reason of the 15-client exemption provided under Section 203(b)(3) of the Advisers Act. As Section 403 of the Dodd-Frank Act repeals this exemption, the Commission is obligated to look afresh at the underlying concept behind a family office, and should acknowledge that it ought not to be a concept wholly limited by genetic linkages.

The Proposed Rule takes some concrete, helpful steps to expand the reach of a "family" office by including stepchildren, spousal equivalents, founders' siblings, founders' siblings lineal descendants, etc., in the defined term "family member."[6] Such language would bring the Proposed Rule nearer in line with the realities of modern family structures.

Nonetheless, we feel that the Proposed Rule as drafted is too constricted in that its bright-line rule would exclude from its benefits as little as two unrelated people who found a family office for the purpose of providing themselves with joint services. To take a very obvious example, in the case of two nonrelated investors with a long-term social and business relationship who decide to (i) enter into a contractual relationship to invest their pooled capital, (ii) make all decisions with respect to the shared capital in common, and (iii) not hold

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[3] Advisers Act Release IA-3098 at 38.

[4] Advisers Act Release IA-3098 at 38-39.

[5] Advisers Act Release IA-3098 at 14.

[6] Advisers Act Release IA-3098 at 39.

themselves out to the public as an investment adviser, there is a perfect identity between those persons making the investment decisions through the investment advising entity and those persons whose capital is being advised. Furthermore, that identity is equally perfect if there is a group of three or five or larger investors who choose to enter into such a relationship, as long as each of them has significant control or veto power over the decision making of the investment adviser.

In declining to extend the concept of a family office beyond mere genetics, the Commission purports to worry that commenters may be confused by the distinction between a "family-run office" and a "family office," as if there were somehow a risk that an overly broad definition of family office might somehow also capture a family-run office. This is not a risk: there is not a subtle distinction between the two terms. In a **family-run office**, there is a relationship between the persons acting for and managing the adviser, but they may have **no relationship at all**, beyond the advisory contract, with the persons to whom they are providing advice. By contrast, the key characteristic of a **family office** is the existence of a **significant control relationship or identity of interests** between the advisees whose assets are being managed and those persons that control or manage the entity acting as investment adviser to the family office ("family office investment adviser"). Further, the existence of this significant control relationship or identity of interests **does not solely turn on genetics; it turns on the bond of social and economic arrangements.**

Against that background, we strongly object to the notion that a family office must be defined solely by a genetic linkage. Rather, we believe the definition of a family office should equally apply where there is some mutuality of control between the family office investment adviser and the family clients. Accordingly, however the Commission defines the term family office, we would propose that a family office should be defined broadly enough to include a group of families that may be unrelated genetically, so long as each of the following characteristics are met:

1) each family (including the respective family members and family clients of each family) owns at least ten percent (10%) of the total net assets under the management of the family office investment adviser;

2) each family either (a) owns at least ten percent (10%) of the family office investment adviser, (b) controls, directly or indirectly, at least ten percent (10%) of the board of directors (or any similar managing group) of the family office investment adviser, **or** (c) maintains a veto right over sale of the family office investment adviser, or any other similarly significant transaction; **and**

3) the family office investment adviser solely advises family clients and does not hold itself out to the public as an investment adviser.

2. Key Employees

In regards to Section (d)(6) of the Proposed Rule that defines the term "key employee," we offer the following limited comments.

The definition should clarify, in much the same way that Rule 3c-5 under the Investment Company Act of 1940 (as amended, the "Company Act") and Rule 205-3 under the Advisers Act does, that the term "executive officer" of a family office includes any vice president in charge of a principal business unit, division or function, any other officer who performs a policy-making function or has significant authority with respect to the operations of the family office, or any other person who performs similar policy-making functions or has such similar significant authority. This clarification would help ensure that those employees who have been entrusted with the requisite significant authority or power to direct policy of a family office, but who are not family members and may not have a job title that makes their responsibilities clear to the outside observer, would be able to be clients of the family office without having the family office jeopardize its exemption under the Advisers Act.

Our second comment is with respect to the requirement of Section (d)(6) that any employee who participates in the investment activities of the family office must have so participated, or performed similar functions and duties for or on behalf of another company, for at least 12 months. While such time period may have appropriate uses in Rule 3c-5 for the purposes of counting beneficial owners and/or qualified purchasers in an investment company attempting to take advantage of the relevant exemptions under the Company Act, or in Rule 205-3 for the purposes of defining a qualified client, we feel that there is no real need to mandate the use of such a waiting period in the family office context. Prospective employees that are considered by a family office for a position that has the ability to materially affect the assets of the office[7] presumably already possess the financial sophistication and knowledge of investing risks and know-how necessary to decide whether to invest alongside family assets in an investment of the family office. For a family office to entrust such a person with the power to substantially influence the wealth of its clients from the first day of their employment, but then be prohibited by the Proposed Rule from granting such person the right to invest for up to a year, does not make good sense. It would be more logical to permit the interests of such a

[7] Such a position might be that of a portfolio manager of a significant portfolio of family office assets that is not in charge of a principal business unit.

critical employee to be aligned with the family office that employs him or her from the very beginning of his or her employment, regardless of whether such employee had similar responsibilities with a previous employer.

3. Charities

Section (d)(iii) of the Proposed Rule limits the reach of the term "family client" with respect to charitable foundations, charitable organizations, or charitable trusts (collectively, "charities") to those charities that are in each case "established and funded exclusively" by one or more family members or former family members (collectively, "family charities").

We feel that the Commission's policy with respect to limiting family clients to those charities that are family charities is overly narrow. If a family member whose assets are managed by a family office is generous enough to donate family assets under his or her control to a recognized, legitimate charity[8], it seems inconsistent to exclude the beneficiary of such assets from the assistance of investment advice or services offered by the family office simply because non-family members are also able to contribute to such charity.

4. Former Family Members

Section (d)(vi) of the Proposed Rule limits the participation of a former family member in receiving investment advice from, or investing additional assets in an entity advised by, a family office, except with respect to (a) assets of such former family member that were advised by the family office immediately prior to the time that the person became a former family member, and (b) assets that the former family member was contractually obligated to make in connection with an existing family office advised investment.[9]

We think that excluding a former family member from participation in a family office in such a manner is more restrictive than necessary. A better solution would be to leave the decision over whether, and to what extent, a former family member continues to be financially connected to a family office in the hands of the relevant family members themselves. It is easy to foresee a situation wherein amicably divorced spouses (or spousal equivalents), although perhaps no longer living in the same residence, would want to continue to share (i) management of certain assets, (ii) the provision of family office advice to the former spouse in

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[8] For example, if a family member establishes a valid trust, one of whose beneficiaries is a public charity that receives donations from other members of the public as well.

[9] Advisers Act Release IA-3098 at 38-39.

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a future investment, and/or (iii) participation in a future family office-advised entity. This inconsistency is highlighted by imagining a scenario where a former family member shares custody of children with a family member, but, contrary to the wishes of the family member, is prohibited from continuing to participate in and benefit fully from the advisory services of the family office. In such a set of circumstances, the rule excluding former family members as drafted would cause unneeded inconvenience and inefficiency to a former family member who is still heavily involved in family affairs, namely, by helping raise the next generation of the family. We feel that retaining the power to make a decision whether to continue to extend the services of a family office to a former family member should stay within the borders of the family. Additionally, this will more closely align the language of this part of the Proposed Rule with the concern of the Commission to not intrude "on the privacy of family members."[10]

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We appreciate the opportunity to have our comments be included in the Commission's subsequent review of the Proposed Rule. We do strongly urge the Commission to re-examine its over-focus on genetic linkages and to define the term family office in a less discriminatory manner that also takes account of social arrangements. If you have any questions with respect to the above comments, please do not hesitate to contact me at (212) 504-6700.

Sincerely,

Steven Lofchie

[10] Advisers Act Release IA-3098 at 5.