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BY EMAIL TO: rule-comments@sec.gov

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

Re: File No. S7-25-10
Proposed Rule 202(a)(11)(G)-1: Definition of "family office"

Dear Ms. Murphy:

On behalf of a number of our family office clients, we appreciate the opportunity to comment on proposed Rule 202(a)(11)(G)-1 (the "Proposed Rule"), the definition of "family office" under the Investment Advisers Act of 1940 ("Advisers Act"). The Proposed Rule would implement Section 409 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). As a general matter, our clients support the Proposed Rule. We recommend, however, that the definitions of "family office," "family client" and "founders" be broadened to permit existing family office arrangements to continue and that the Commission modify the Proposed Rule in a manner that permits modest amounts of charitable giving by non-family members to charitable entities organized by family members. In addition, the definition of family client should include trusts that may make distributions to a broad class of charities. Finally, we believe that it should be left up to family offices to determine whether former family members and former key employees may remain as family clients free from restrictions on managing new assets.

We explain our suggestions below and attach a marked version of the Proposed Rule reflecting those suggestions.

1. The definition of family client should be expanded to include family-established charitable entities that (a) are established by companies primarily controlled by family members or former family members, and (b) accept a modest amount of donations by non-family members.

The Proposed Rule requires that a charitable entity that is a client of a family office to be established and funded *exclusively* by family members or former family members. Some family members, however, have caused family companies to fund charitable entities. The result is the same – a charitable entity was created and funded, directly or indirectly, by a family member. We do not believe a charitable entity should be excluded from the definition of family client

simply because it was indirectly funded by one or more family members or former family members through a company that they "primarily control" within the meaning of Rule 3a-1 under the Investment Company Act of 1940, as amended ("1940 Act"), and request that the definition of family client reflect this concept.

In addition, a number of family offices have established and substantially funded charitable entities that may receive donations from non-family members. For example, an individual may donate to a family charitable foundation because the mission appeals to them. A client's charitable foundation may receive donations from family office employees that are not family clients, as well as from related companies and their employees. We believe that the Commission should not discourage charitable giving, and propose instead that the Commission use a "funded substantially" concept that would permit a charitable entity to remain a family client so long as the charitable entity is established by one or more family members or former family members and at least 75% of the donations to the charitable entity are made by family members, former family members, and companies that they primarily control.

2. The definitions of family client and family member should be expanded to include trusts or estates existing substantially for the benefit of one or more family clients.

The Proposed Rule provides that a trust or estate may be a client of a family office so long as the trust or estate exists for the *sole* benefit of one or more family clients. This definition would exclude a trust or estate whose beneficiaries include public charities, former family members, distant family members that do not meet the definition of "family members," or household employees who receive a gift or bequest of an interest from a family member – no matter how small the beneficiary's interest in the trust or estate. This is particularly problematic when considering that it is typical for a trust to allow distributions to family members and a broad class of charities. It may impractical or impossible to exclude these beneficiaries from an existing trust or estate, and these entities are not included in the Proposed Rule's grandfathering provision. The "sole benefit" provision also would force family offices in the future to use another adviser, at a possibly higher cost, to manage family assets held in an estate or trust if there is even one beneficiary that is not a family client, and it would discourage family members from making charitable or other donative bequests. We ask the Commission to permit trusts and estates to be defined as family clients and family members where their beneficiaries include non-family clients that received their interest as a gift from a family client and where the value of such non-family interests does not exceed 25% of the trust or estate at the time of the bequest.

Further, some family offices are owned in part by a family trust. Trusts and estates are excluded from the definition of family member, and thus would be unable to remain owners of family offices. No policy reason would be served by forcing a family office to reorganize itself to eliminate an owner that is a family trust or estate, given that such a family office would be indirectly owned by family members that are beneficiaries of a trust or estate. We recommend that the Commission avoid disturbing current family office arrangements needlessly, and add family trust and estates, as proposed above to be defined, to the definition of "family member."

3. The definition of family client should be expanded to include limited liability companies, partnerships, corporations, or other entities wholly owned and primarily controlled

(directly or indirectly) by, and operated substantially for the benefit of, one or more family clients.

The Proposed Rule defines family client to include "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." The "controlled exclusively" test could prevent non-family members, such as key employees that are not family clients, from acting as officers, directors, members or trustees of family companies. The Proposed Rule defines "control" as "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." Many family investment vehicles have officers or board members that are non-family clients and that could be considered "control persons" under the Proposed Rule because it may be difficult to determine if their control arises *solely* because of their official position. To avoid forcing these family company trustees and officers to step down, we suggest that a family client that is a family company be defined as a company exclusively owned and *primarily* controlled by family members. Similar to the "primarily controlled" concept in Rule 3a-1 under the Investment Company Act of 1940, a family company would be "primarily controlled" by family members if family members in the aggregate controlled the company within the meaning of Section 2(a)(9) of the 1940 Act, and the degree of family members' control was greater than that of any other person.[1]

5. The definition of "founders" should be revised to include a person who established a family office solely to benefit his or her descendants.

"Founders" of a family office is proposed to mean 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. We request that the staff clarify that a family office may have more than one "founder" (for example, two brothers), and that a person may be considered a "founder" even if he or she neither established a family office nor benefited from it, provided that the family office was established for the benefit of the family (ancestors and descendants) of such persons.

Family offices, as "offices" *per se*, generally evolve over time, often as an outgrowth of a family business. As such, they may exist in different forms for many years, usually -- in their early years -- as loose affiliations of relationships among family members and, later as relationships evolve, in more sophisticated, formal organizations with corporate charters. Accordingly, it is often the case that a family office is "established" not to benefit the family "patriarch" (often deceased) but to benefit the descendants of such patriarch. Several family offices, for example, have been organized many years after the death of the connecting ancestors but retain their vitality as organizations supporting solely descendants of founders. Accordingly, the definition of "founder" should be revised to state that founders means "the natural person, including a deceased person, his or her spouse or spousal equivalent, and any subsequent spouse of such individuals, who established a family office for his or her benefit and/or for the benefit of

[1] See Investment Company Act Release No. 10937 (Nov. 13, 1979)(proposing Rule 3a-1).

family clients, or who is the lineal ancestor of the family members for whose benefit the family office was established and their respective family clients."

6. Former family members and former key employees should be permitted to remain as family clients free from restrictions on managing new assets.

The proposed rule would prevent a family office from providing advice to a family client who became a former family member due to divorce or similar event, or to a family client that became a former key employee, except as to (1) assets that were managed immediately before the person became a former family member, and (2) additional investments that the former family member was contractually obligated to make, and that relate to a family office-advised investment existing, before the person became a former family member.

We believe that the decision as to whether to manage new assets of a former family member or former key employee is best left up to the family office. In many cases, it may be desirable for a family office to manage all of the assets of a former family member because, for example, the divorced spouse's assets may eventually become the property of children or grandchildren, and the former family members and family members alike may desire continuity of management for those assets. In some cases, the divorced spouses may wish or need to be involved in certain family financial affaires, especially where children and grandchildren are concerned. In the case of former key employees, we believe that the Commission should not prevent family offices from being able to attract and retain key employees by offering them post-separation or retirement investment opportunities. We propose that family offices be permitted to manage new assets of former family members and former key employees at their discretion.

7. Spouse should be defined to include spouses, surviving spouses, spousal equivalents and surviving spousal equivalents.

The proposed rule would prevent a family office from providing advice to surviving spouses and surviving spousal equivalents after the death of a family member. We believe it should be up to the family office to determine whether to provide advice to surviving spouses or spousal equivalents. The assets held by or for the surviving spouse or spousal equivalents may eventually become the property of children or grandchildren. We propose that the definition of spouse be defined to include spouses, surviving spouses, spousal equivalents and surviving spousal equivalents so that family offices will be permitted to manage the assets of surviving spouses and spousal equivalents at their discretion.

Thank you for giving us the opportunity to comment on the Proposed Rule. If you have any questions regarding this comment letter, please contact me at 202.739.5662.

Very truly yours,

Thomas S. Harman

Thomas S. Harman

cc: Sarah ten Siethoff, Senior Special Counsel
Vivien Liu, Senior Counsel
Division of Investment Management

APPENDIX 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) 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~~ **from the date of involuntary event** until four months following the transfer of assets resulting from the involuntary event;

(2) Is wholly owned and **primarily** controlled (directly or indirectly) by family members; and

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

(c) ***Grandfathering.*** **Notwithstanding the provisions of paragraph (b), a**~~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 **(directly or indirectly)** by one or more family clients and persons described in paragraph (c)(1); 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:

[~~3~~]

(1) ***Charitable entity*** **means any charitable foundation, charitable organization, or charitable trust, in each case established by, and funded substantially by, one or more family members, former family members, or companies they primarily control (directly or indirectly).**

([~~1~~]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.

[~~2~~]

(3) ***Existing substantially*** **means that the interests in a trust, estate, or company are for the benefit of or are held by one or more family clients and persons other than family clients who received their interests from one or more family clients and did not provide any consideration for their interests, provided that such non-family interests do not represent more than 25% of the value of the trust or estate at the time of the bequest;**

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

(i) Any family member;

(ii) Any key employee;

(iii) 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~~] **entity**;

(iv) Any trust or estate existing **substantially** for the [~~sole~~]benefit of one or more family clients;[~~;~~]

(v) Any limited liability company, partnership, corporation, or other entity wholly owned and **primarily** controlled (directly or indirectly) ~~exclusively by, and created for the sole~~ and existing **substantially for the** 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, 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~~]

[~~39~~][~~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

(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.~~

[~~(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

(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.

[~~(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.[~~40~~]

([~~5~~]7) ***Founders*** means the natural person, **including a deceased person,** ~~and~~ his or her spouse or spousal equivalent ~~for whose benefit the family office was established~~, and any subsequent spouse of such individuals**, who established a family office for his or her benefit and/or for the benefit of family clients, or who is the lineal ancestor of the family members for whose benefit the family office was established and their respective family clients.**

(8) *Funded substantially* means that at least 75% of the donations to a charitable entity are made by one or more family clients or companies they primarily control.

[~~6~~] **(9) *Key employee*** means any natural person (including any person who holds a joint, community property, or other similar shared ownership interest with that person's spouse or spousal equivalent) who is an executive officer, director, trustee, general partner, 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.

(10) *Primarily controlled* means that family members control the entity within the meaning of Section 2(a)(9) of the Investment Company Act of 1940, as amended, and the degree of family members' control is greater than that of any other person.

([~~7~~]11) ***Spousal equivalent*** means a cohabitant occupying a relationship generally equivalent to that of a spouse.

(12) *Spouse* means a spouse, surviving spouse, spousal equivalent or surviving spousal equivalent.