

January 20, 2011

Via e-mail to: rule-comments@sec.gov (File No. S7-25-10)

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

**Re: Dodd-Frank Wall Street Reform and Consumer Protection Act--Exclusion of
Family Offices from the Definition of Investment Adviser (*Release/Reference
No.: IA-3098*)**

Ladies and Gentlemen:

This letter is in response to the request of the U.S. Securities and Exchange Commission (the "Commission") for comments to the Commission's proposed Rule 202(a)(11)(G)-1 ("Proposed Rule") under the Investment Advisers Act of 1940, as amended ("Advisers Act"), which excludes family offices from the definition of an investment adviser. We request that the Commission revise the Proposed Rule to provide that a family office be "wholly owned or controlled (directly or indirectly) by, or be held in trust for the benefit of, family members." We believe this would reduce the number of requests for exemptive relief on this issue.

Winstead PC is a Texas-based law firm with a significant financial services practice. Our clients include investment advisers, investment companies, private funds and family offices. Some of these family offices were created many years ago and have operated as private fund investment advisers under exemptions to registration afforded by the Advisers Act.

We believe this suggested revision of the Proposed Rule is consistent with Congress's intent that the family office exclusion "recognize the range of organizational, management, and employment structures and arrangements employed by family offices." There are often circumstances where family offices provide advice to a trust established and operated for the benefit of the family members. Independent trustees are subject to fiduciary duties under state law, and, as a result, the family beneficiaries are not likely to require the protection of the federal securities laws.

Under the Commission's Proposed Rule, a family office, to be excluded from the definition of an Investment Adviser under the Advisers Act, must satisfy the following:

(1) Have 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) Be wholly owned and controlled (directly or indirectly) by family members; and

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

The second prong of the Proposed Rule specifies that a family office must be "wholly owned and controlled (directly or indirectly) by family members." The inclusion of the phrase "indirectly" suggests there may be multiple permissible structures through which family members may hold interests in a family office, including holding interests in trust for the benefit of family members.

In Texas, the trustee holds legal title to the assets held in trust. The beneficiaries enjoy equitable ownership, which essentially consists of rights enforceable against the trustee. Under the Proposed Rule, family members who are beneficiaries of a Texas trust owning the family office might not be considered the owners of the family office and, accordingly, might not be able to rely on the proposed exclusion. Furthermore, since a trustee may be considered to control the assets held in trust, a family office owned by a family trust might not be wholly-controlled by the family and not meet the requirement of the proposed exclusion.

As a result, we believe that the Commission's final release and rules should eliminate any ambiguity which might result in requests for exemptive orders and state that a family office may be held in trust for the benefit of family members.

There are a number of reasons why the inclusion of ownership and control of family offices by a trust should be acceptable. Some of these reasons were cited in the comment letter of Shearman and Stearling (Nov. 18, 2010) and set forth below.

- First, there are many situations where it is advantageous to have trustees rather than family members. Some families may not have the requisite background to oversee a family office, while other families may not be able to dedicate the necessary time and human resources. Moreover, given their personal stake in the matters, a family-member trustee may be inclined to put his or her own narrow interests ahead of other beneficiaries, thereby putting a protective institutional premium on independence that we do not think should be disturbed.

- Second, there is an established body of trust law that imposes a fiduciary duty on trustees to act in the best interests of the beneficiaries.
- Third, trustees are essential to preserve the intended tax consequences of most irrevocable trusts.
- Finally, the use of trusts as family vehicles is so well established that we are confident that it cannot be the intent of Congress to create an incentive to unwind these arrangements (and indeed an unwind typically is not an option) in favor of other kinds of arrangements.

We note that our suggested revision is consistent with other aspects of the proposed rule that provide that trustees are included in the definition of key employees and are entitled to receive investment advice from and participate in investment opportunities provided by family offices. Also, we note that trusts for the benefit of family clients are permissible investment advisory clients of family offices.

Conclusion

Congress requested that the Commission draft an exclusion for family offices from the definition of investment adviser. We respectfully request that the Commission provide in its final rules that a family office held in trust for the benefit of family members be covered by the family office exclusion to the definition of an investment adviser.

* * *

Thank you for the opportunity to submit our comments on the Proposed Rule. If the Commission or its staff wishes to discuss the matters mentioned in this letter, please contact Norman R. Miller at 214/745-5269.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Winstead PC", is written over the typed name.

Winstead PC

Copies to the following:

Mary L. Schapiro, Chairman
Luis A. Aguilar, Commissioner
Kathleen L. Casey, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Andrew J. Donohue, Director, Division of Investment Management