UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: **THE ROBARE GROUP, LTD., MARK L. ROBARE, AND JACK L. JONES, JR.** **Respondents.**	ADMINISTRATIVE PROCEEDING File No. 3-16047 **RESPONDENTS' RESPONSE TO THE DIVISION'S MOTION *IN LIMINE***

Respondents Robare Group, LTD (the "Robare Group," or "the Firm"), Mark L. Robare, and Jack L. Jones, Jr. (collectively, the "Respondents"), by and through their attorneys, hereby submit the following response to the Division's Motion in Limine.

I. INTRODUCTION

The Commission has objected to, and sought to exclude *in limine* the testimony of the Respondents' expert witness, Miriam Lefkowitz, on the grounds that (1) she is not qualified as an expert and (2) her testimony is irrelevant. Further, the Commission seeks to exclude evidence that the Firm relied on the results of a 2008 SEC examination in maintaining its good faith belief that its customer disclosures were in compliance with the applicable regulatory standards.

The Commission's objections should be overruled and its motions *in limine* denied. First, there can be no dispute that Ms. Lefkowitz is qualified to present expert testimony on the relevant standards governing client disclosures (including ADV disclosures) over the course of the vast time period at issue here (nearly a decade). Further, her testimony is incredibly relevant to this dispute. Not only can she assist the trier of fact in understanding the regulatory schemes applicable to each time period at issue, she can also provide testimony as to why the Robare Group's disclosures complied with those standards.

Second, with regard to the motion to exclude evidence relating to the SEC examination, the Commission has wildly mischaracterized Respondents' intentions in introducing that evidence, as well as its relevance to this dispute. It is important to note, at the start, that Respondents are not suggesting – and do not intend to suggest during this proceeding – that they have somehow "unloaded" their obligation to comply with the rules governing their operations onto the SEC examiners. The Commission suggests as much in its motion in an attempt to discredit the evidence before it has even been presented. Its theatrics should be ignored.

Instead, the evidence serves a very relevant and very specific purpose. The Commission has alleged that the Respondents acted with *scienter*. This allegation, of course, requires an analysis of the Firm's intent. Evidence of good faith is acutely relevant to this analysis – including good faith reliance on the actions of the SEC itself. That is, that Respondents, upon receiving a clean bill of health in its 2008 exam, proceeded onward, honestly believing their Firm was not deficient in any manner.

Because the above evidence is both relevant and proper, the Commission's objections should be overruled and its motions *in limine* should be denied.

II. THE COMMISSION'S MOTIONS *IN LIMINE* AS TO MS. LEFKOWITZ SHOULD BE DENIED.

The Commission has alleged that the Firm failed to adequately disclose a particular commission arrangement among itself, its broker-dealer, and Fidelity. Respondents deny that allegation and will present evidence at the hearing demonstrating the existence and sufficiency of that disclosure. In support of its defense, Respondents will introduce the testimony of Ms. Lefkowitz on (1) the disclosure requirements for each of the time periods at issue in this dispute; (2) the 2010 statutory amendments to Form ADV and resulting standards imposed on member firms; (3) the applicable guidance issued by the SEC throughout the applicable time period

advising firms on disclosure requirements and expectations; (4) how the industry interpreted and implemented those standards; and (5) that the Respondents' disclosures were in compliance with both the regulatory requirements and industry standards, throughout each applicable time period.

This testimony is relevant and therefore admissible under the SEC Rules of Practice.

A. Ms. Lefkowitz is Qualified to Present Expert Testimony.

The Commission first attacks Ms. Lefkowitz' credentials, arguing that she lacks "specialized knowledge" and that she has never been qualified to testify as an expert. The first argument is wrong. The second is meaningless. As the Commission states, Rule 702 of the Federal Rules of Evidence states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;
>
> **(c)** the testimony is the product of reliable principles and methods; and
>
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Ms. Lefkowitz meets each of the above metrics.

First, without question, she possesses "technical [and] other specialized knowledge that will help the trier of fact understand the evidence and determine an issue." Ms. Lefkowitz is a leading professional in investment advisor regulation and compliance possessing over a decade of experience, not simply in the context of investment advisor regulation but, specifically, with Form ADV. A former SEC Enforcement Attorney with a law degree from Columbia University, Ms. Lefkowitz has worked, since 2002, for various registered investment advisory firms (both as

General Counsel and Director of Compliance). She currently serves as both the Chief Legal Officer and Chief Compliance Officer for an RIA while also serving as a compliance consultant to other firms. Her positions required that she remain up to date on the standards governing investment advisers, including those surrounding Form ADV. Yet, she has not merely kept abreast of legal and regulatory developments. She is also a frequent speaker, panelist, and author on Form ADV topics and concerns. *See* Miriam Lefkowitz *curriculum vitae* (attached as "Exhibit A") and reflecting public speaking engagements and publications on such topics as: (1) IA-Compliance in the Very Small Firms; (2) Dual Registrant Conflicts of Interest; (3) The Amended ADV Part 2: What Compliance Professionals need to Know about the Upcoming Changes (August 2010); and (4) Amendments to Part 2 of Form ADV (April 2007). Further, it is of great importance that her practice and expertise span the entire time period at issue in this dispute (2003-2013). Indeed, since 2002, she has been responsible for drafting Forms ADV and advising on regulatory issues surrounding client disclosures.

It is clear that Ms. Lefkowitz possesses specialized knowledge regarding Form ADV, the disclosures made therein (and in response thereto), as well as the applicable regulatory framework. Moreover, she has specialized knowledge in these topics for the entire time period at issue in this dispute, nearly ten years.

The Commission's attack on her expertise focuses the fact that she has never served as an expert witness. This has absolutely no bearing on whether or not she possesses specialized knowledge that will assist the Court in determining the issues before it. Her specialized knowledge of Forms ADV and the relevant disclosure requirements is sufficient to qualify her as an expert. Further, Respondents selected Ms. Lefkowitz as their expert because of her incredibly specialized knowledge of this particular regulatory issue. As the Commission suggests in its

motion, there are plenty of experts who make a living testifying for anyone willing to write out a check. Ms. Lefkowitz is not such an expert. The Commission's objection based on her lack of prior testifying experience is, simply, silly, and should be rejected.

B. Ms. Lefkowitz' Testimony is Relevant.

The Commissions' objections to the relevance of Ms. Lefkowitz's testimony should likewise be rejected. The Commission's objection to Ms. Lefkowitz' testimony is predicated on the Court's blanket acceptance of the following argument:

> Respondents have already conceded that the Fidelity Arrangement created at least a potential conflict of interest...Because it is well-settled that even potential conflicts of interest are material as a matter of law, no expert testimony on this issue – or on whether Respondents were required to disclose the conflict of interest on Form ADV – is required.

Commission's Motion *in Limine* p.11. This incredibly conclusory sentence assumes – falsely –at least three things: (1) that the Respondents failed to disclose the arrangement; and (2) that Form ADV required disclosure of all conflicts of interest (opposed to only material conflicts of interest)(false). Moreover, it ignores the bulk of Ms. Lefkowitz' opinion, namely, (1) that the Robare Group *did* properly disclose the relationship; (2) why the SEC's position on the disclosure is incorrect; and (3) how the Robare Group's disclosures compared with the rules and standards in place during each applicable time period. *See* Expert Report of Miriam Lefkowitz, attached hereto as "Exhibit B." Her conclusions are also instructive in any potential determination of sanctions. *In the Matter of Morgan Stanley & Co., Inc.*, Release No. 391 (June 13, 1991) (June 13, 1991) ("Expert evidence as to what was considered legally appropriate behavior, at the time and in these circumstances, would be relevant in making a public interest determination.").

C. The Federal Rules of Evidence do Not Apply to This Proceeding.

Even though Ms. Lefkowitz clearly meets the requirements of Rule 702 of the Federal Rules of Evidence, and her testimony would be admissible in federal court, the Rules of Evidence do not strictly apply to this proceeding. *See* Rule of Practice 320; 17 C.F.R. § 201.320 ("The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious."). Pursuant to this Rule, the Court is empowered to admit all relevant evidence. Ms. Lefkowitz' testimony meets the relevance threshold, and is properly admitted.

Further, to the extent this Court finds Rule 702 to be instructive, it has long been the practice of the Commission to err in favor of including evidence rather than excluding it.

> The notion of "relevance" embodied in [Commission Rule of Practice 320], however, is much broader than that concept under the Federal Rules of Evidence. The Federal Rules of Evidence are designed for juries and do not apply to administrative adjudications. Administrative agencies such as the Commission are more expert fact-finders, less prone to undue prejudice, and better able to weigh complex and potentially misleading evidence than are juries. Our law judges should be inclusive in making evidentiary determinations.

In the Matter of City of Anaheim, City of Irvine, Irvine Unified Sch. Dist., N. Orange Cnty. Cmty. Coll. Dist., & Orange Cnty. Bd. of Educ., Release No. 42140 (Nov. 16, 1999). Accordingly, the Commission favors the admission of expert testimony. *See, e.g., In the Matter of Morgan Stanley & Co., Inc.*, Release No. 391 (June 13, 1991) ("[T]he Commission's most recent case law on this subject favors the admission of expert testimony.").

D. Excluding Ms. Lefkowtz's Testimony Would Be Improper.

Moreover, excluding Ms. Lefkowitz's testimony *in limine* would be improper. If the Commission has any question as to the foundation for her testimony or her qualifications, it is free to cross-examine her. *In the Matter of F.N. Wolf & Co., Inc., et al.*, Release No. 478, 1995

WL 424932 (July 12, 1995) ("[A]s to the Division's concern that a witness may not qualify as an expert, the Division is free, as usual, to examine the expert at the hearing to determine if he is qualified."). In seeking to exclude the testimony, the Division cites to *Vernazza v. S.E.C.* That case has no application to the case at bar. First, *Vernazza* involved a total failure to disclose (that is, when the form asked whether any disclosable items existed, the Firm merely answered "no" without explanation). This case involves a question as to whether a disclosure was properly made, a question which inherently involves a comparison between the disclosure at issue and the applicable legal standard prescribed by the SEC during the relevant period.

Further, the Commission provides only part of the Court's reasoning in *Vernazza,* omitting its finding that:

> We do not approve of the Commission's general statement that "[w]hether Form ADV is difficult or not is irrelevant," which implies that a strict liability standard always applies to the identification of conflicts of interest. In a different case, where the financial interests are more complex or uncertain, an investment adviser might not be reckless to answer a particular question incorrectly or incompletely. In such a case, expert testimony might also be relevant to determine whether the adviser's conduct is so far outside the range of reasonable conduct so as to be considered reckless.

Vernazza v. S.E.C., 327 F.3d 851, 862 (9th Cir.) amended, 335 F.3d 1096 (9th Cir. 2003). Finally, the Commission overstates the importance of *Vernazza,* in which the Court's ultimate determination was that the Administrative Law Judge was empowered to make determinations as to the admissibility of evidence and that the federal court would not upset its decision. *Vernazza* does *not* create a per se rule excluding expert testimony in the ADV context. Accordingly, the Commission's Motion *in limine* to exclude Ms. Lefkowitz' testimony should be denied.

III. THE COMMISSION'S MOTION *IN LIMINE* TO EXCLUDE THE AFFIRMATIVE DEFENSE SHOULD BE DENIED.

The Commission seeks to exclude Respondents' good faith defense that it reasonably relied on the advice of others in determining the propriety of its disclosures. Specifically, the Commission seeks to exclude evidence that in 2008, the Firm underwent an SEC examination which concluded without indicating any issues relating to the Firm's ADV. The Commission quite indignantly (but wrongly) concludes that Respondents are somehow attempting to "shift their duty of compliance" onto the agency.

Respondents have made no such assertion. The Commission appears to have forgotten that they have charged Respondents with intentional violations of the Act, that is, that in making the disclosures at issue, Respondents supposedly acted with *scienter* in believing the disclosures compliant. Of course, in rebutting that allegation, Respondents are entitled to introduce evidence of their good faith, such as the fact they retained two compliance firms to advise them on the ADV process, and the fact that the SEC inspected the Firm in 2008, reviewed the ADV, and did not raise any concerns or take any action thereon. The successful SEC exam is *not* being introduced for purposes of estoppel or waiver (as the Commission suggests), but merely to show why the Firm acted *without* scienter in its continued belief the disclosures were proper.

Further, the 2008 SEC exam supports Respondents' Statute of Limitations defense – it establishes that the SEC was, or should have been, aware of any alleged deficiencies in the Form ADV as of 2008 and, because five years have elapsed since that time, its allegations relating to pre-2008 events are time-barred.

For these reasons, the Commission's Motion *in Limine* to exclude this evidence should be denied, and the evidence should be admitted into the record.

IV. CONCLUSION

For the reasons put forth herein, Respondents request that the Commission's Motions *in Limine* seeking to exclude (1) evidence as to the 2008 SEC examination and (2) the expert testimony of Ms. Lefkowitz be denied in their entirety, and that the evidence be admitted into the record.

Respectfully submitted this 26th day of January, 2015.

ULMER & BERNE LLP

Alan M. Wolper
awolper@ulmer.com
Heidi VonderHeide
hvonderheide@ulmer.com
500 West Madison Street, Suite 3600
Chicago, Illinois 60661
(312) 658-6500 – General
(312) 658-6565 – Fax

Counsel for Respondents

EXHIBIT A

Miriam Lefkowitz
Relevant Experience, Publications and Speaking Engagements

MIRIAM LEFKOWITZ, LLC
- Principal, 2010 - Present
- Private consulting practice providing regulatory, compliance and legal advice, training and support directly to financial institutions (including dually registered broker-dealers-investment advisers) and to law firms and vendors that support broker-dealers and investment advisers

SUMMIT EQUITIES, INC. and its affiliates
- Chief Legal Officer/Chief Compliance Officer, September 2014 - Present
- Dually registered, full service financial planning and asset management firm with retail and high net worth client base

SHUFRO, ROSE & CO., LLC
- General Counsel, July 2007 – September 2014
- Dually registered, discretionary asset management firm with retail and high net worth client base

J.B. HANAUER & CO.
- General Counsel/Director of Compliance, June 2002 – July 2007
- Member of the Board of Directors, July 2004 – July 2007
- Dually registered, full service asset management firm with retail and high net worth client base

UNITED STATES SECURITIES & EXCHANGE COMMISSION
- Senior Counsel - Division of Enforcement, June 2000 -May 2002
- Staff Attorney - Division of Enforcement, April 1999 - May 2000

KENNY NACHWALTER SEYMOUR ARNOLD CRITCHLOW & SPECTOR, P.A.
- Litigation Associate, October 1995 - March 1999
- Boutique law firm specializing in financial services

INDUSTRY INVOLVEMENT

- Member, Board of Directors at National Society of Compliance Professional (NSCP)
- Vice Chair, Financial Services Committee, Association of Corporate Counsel (ACC)
- Series 7 and 24 licensed
- Regular guest speaker at Seton Hall University Law School, 2007 - 2014
- Frequent presenter on compliance, securities and legal topics - see below for list of speaking engagements and publications
- Quoted in Compliance Reporter, ACC Docket, Bankrate.com

EDUCATION

- JD, COLUMBIA UNIVERSITY SCHOOL OF LAW, New York, NY
- BA, COLUMBIA COLLEGE, COLUMBIA UNIVERSITY, New York, NY

Selected Publications and Speaking Engagements

Date	Type	Sponsor	Topic
October-14	Panelist	ACC	Internal Investigations
October-14	Panelist	NSCP	IA – Compliance in the Very Small Firms
Jun-14	Moderator	ACC	The Importance of FCPA and Anti-Corruption Risk Assessments
April-14	Panelist	NSCP	Supervision vs. Compliance Oversight
April-14	Panelist	NSCP	Regulatory Examinations
October-13	Panelist	IA Watch	CCO and General Counsel Liability: Tips to Protect Yourself and Reduce Risk in Today's Regulatory Environment
October-13	Panelist	NSCP	Enterprise Risk Management
October-13	Facilitator	NSCP	Risk Assessments and Compliance Testing
June-13	Facilitator	NSCP	Ethics are Important - But How Do I Make Them Practical?
April-13	Panelist	RegEd	Managing Regulatory Examinations
November-12	Panelist	BD Week	CCO and General Counsel Liability Webinar: How to Protect Yourself and Avoid Risk
October-12	Facilitator	NSCP	IA Compliance Testing
October-12	Panelist	NSCP	Dual Registrant Challenges: BDs Registered as Advisers and Reconciling the Differences
September-12	Moderator	ACC	Managing the Fallout from a Financial Scandal: Brand Damage, SIPC Coverage, Litigation
May-12	Facilitator	NSCP	How to Conduct a Branch Exam
May-12	Panelist	RegEd	Dual Registrant Conflicts of Interest
April-12	Panelist	BD Week	Managing a FINRA Exam - Before, During, After
April-12	Author	NSCP	How to Implement Joint SEC and FINRA Guidance on Implementing and Effective Branch Examinations Program
December-11	Panelist	NSCP/West	Detecting and Preventing Fraud
October-11	Panelist	NAIBD	Stretching the Compliance Budget: Tips and Tricks
August-11	Panelist	BD Week	Managing Conflicts for CEOs/CCO
March-11	Author	Wolters Kluwer	FINRA's New Rules on Suitability and Know Your Customer
November-10	Panelist	NSCP	BD – Compliance in the Very Small Firms
November-10	Panelist	NSCP	IA – Compliance in the Very Small Firms
November-10	Panelist	NSCP	Outside Business Activities
November-10	Moderator	NSCP	Roundtable on Resources for Compliance Professional
October-10	Panelist	ACC	Train the Trainer: Be a Better Compliance-Training Presenter and Provider
August-10	Panelist	NSCP/West	The Amended ADV Part 2: What Compliance Professionals Need to Know about the Upcoming Changes
July-10	Author	Ignites Magazine	White Paper: How to Adapt Risk Management to HR Policy
July-10	Author	Wolters Kluwer	Identifying Problem Employees - From a Compliance Perspective
June-10	Facilitator	NSCP	Lab - Monitoring Supervisory Controls
March-10	Panelist	NSCP	Monitoring Supervisory Controls
October-09	Panelist	NSCP	BD Compliance in the Very Small Firms
October-09	Panelist	NSCP	Privacy Considerations and Safeguarding Client Information (Red Flags Rules)
October-09	Panelist	ACC	SEC Update
October-09	Moderator	NSCP	How Do You Keep Up With Market and Regulatory Changes
October-08	Panelist	NSCP	Amendments to Part 2 of Form ADV
April-07	Panelist	SIA	Advising Senior Investors: Challenges and Opportunities
April-07	Moderator	FCC	Correspondents' Roundtable on Compliance Challenges
March-07	Panelist	NSCP	Things You Should Know about Outside Counsel and Compliance Consultants
October-06	Panelist	SIA	The Compliance-Centric BD/RIA

EXHIBIT B

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter Of :	:	**ADMINISTRATIVE PROCEEDING**
	:	**File No. 3-16047**
THE ROBARE GROUP, LTD.	:	
MARK L. ROBARE, AND	:	
JACK L. JONES, JR	:	
	:	
Respondents.	:	
	:	

EXPERT REPORT OF MIRIAM LEFKOWITZ

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A. Nature of Assignment

1. I have been retained by counsel for the Respondents to provide expert testimony in the administrative proceeding In the Matter of The Robare Group, Ltd. (TRG), Mark L. Robare (Robare), and Jack L. Jones, Jr. (Jones).

2. I have been asked to formulate and render opinions related to the Robare Group's disclosures to its clients regarding payments received by Respondents in connection with the investment by their clients in certain mutual funds.

B. Summary of Expert Qualifications

3. I have more than 19 years of work experience in broker-dealer and investment adviser securities compliance. I have served as an in-house legal and compliance professional, an enforcement attorney at the SEC, private securities law defense counsel and as an independent compliance consultant.

4. Since 2002, I continuously served as General Counsel (or Chief Legal Officer) and the senior compliance and regulatory advisor to small and regional SEC-registered retail-focused investment advisers and broker dealers. Throughout this period, I have been the person with responsibility for drafting the Forms ADV, either as Chief Compliance Officer (CCO) or as the person responsible for advising the CCO with respect to all regulatory disclosures.

5. Since 2010, I also provided consulting services to private clients through Miriam Lefkowitz, LLC. One prominent engagement was a multi-year project in which I served as an investment advisory subject matter expert to RegEd, a leading provider of continuing education and compliance technology to financial services firms.

6. Prior to going in-house, I served as Senior Counsel in the Enforcement Division of the Southeast Regional Office of the Securities & Exchange Commission. I started my legal career in private practice where I represented broker-dealers and investment advisers in regulatory matters, customer-initiated securities disputes, inter-broker controversies and employment cases.

7. I am a Member of the Board of Directors for the National Society of Compliance Professionals (NSCP), a leading industry organization dedicated to serving and advancing the needs of the financial services compliance professionals. I am the Vice-Chair of the Association of Corporate Counsel's (ACC) Financial Services Committee. In these capacities, and as a general member of both organizations, I frequently interact with senior compliance professionals at other firms and discuss industry trends and best practices.

8. I regularly speak on a broad range of securities and compliance issues, and conduct continuing legal education programs, for NSCP, SIA (now SIFMA), NAIBD, ACC, BD Week and West LegalEd Center. Among other topics, I have presented on how to handle compliance challenges at small and very small firms. For eight years, I also have guest lectured at Seton Hall Law School regarding ethics, disclosure and compliance issues.

9. I have published compliance-related articles in NJ Lawyer Magazine, Ignites, Practical Compliance and NSCP Currents, and have been quoted in Compliance Reporter, Bankrate and ACC Docket. Among other topics, I presented on Form ADV disclosures in an August 2010 Webinar hosted by Westlaw titled *The Amended ADV Part 2: What Compliance Professionals Need to Know about the Upcoming Changes* and an October 2008 compliance panel titled *Amendments to Part 2 of Form ADV* for the NSCP. As a consultant, I also moderated roundtables on the revised ADV disclosure obligations for RegEd.

10. I was graduated from Columbia Law School in 1995 and Columbia College in 1990. A summary of relevant work experience is attached to this report.

C. Prior Testimony and Compensation

11. I have not previously provided expert testimony. I have been engaged through Miriam Lefkowitz, LLC and am being compensated for the time I spend in connection with this engagement. My compensation is not dependent upon the conclusions I have drawn in this engagement.

D. Materials Considered

12. In formulating opinions stated herein, I reviewed the Forms ADV II/2A filed by TRG between 2001 and 2013, as well as certain communications between Respondents and their clients, representative samples of Commission Statements received by Respondents from Triad Advisors, Inc. ("Triad"), their broker-dealer, showing the payments at issue, legal filings, professional literature, SEC and other published guidance on investment advisory disclosure obligations, and other documents. I also reviewed all of the testimonies taken in connection with this matter and all of the marked exhibits in the OTR testimonies, including the two agreements (the 2004 Servicing Fee Agreement and 2012 Custodial Support Services Agreement) that formed the basis for the payments at issue in this matter. Finally, I also interviewed Mr. Robare, Mr. Jones and Bart McDonald, the securities consultant who reviewed a number of the Forms ADV that TRG prepared.

E. Summary

13. Based upon my review and analysis of TRG's documents and industry studies, together with my knowledge of the issues and the regulations governing SEC-registered investment advisers (RIAs), as well as my more than 12 years working in-house at RIAs, serving on panels and committees with other experienced compliance professionals from other RIAs, attendance and participation at numerous industry conferences where such matters are addressed both formally and informally, and my counseling and consulting experience, I have reached the following opinions concerning disclosures by TRG.

    i. In the aggregate, TRG's disclosures regarding Respondents' compensation and the conflicts created thereby were accurate and in-line with the disclosures made by other firms during the same time periods at issue here.

ii. In the aggregate, TRG's disclosures regarding Respondents' compensation and the conflicts created thereby were not likely to mislead their clients regarding Respondents' incentives to select certain securities over other securities.

iii. In the aggregate, Robare and Jones' efforts to draft adequate disclosures to meet regulatory requirements conformed to or exceeded industry standards.

F. Full Opinion

14. There is no clear guidance about how investment advisory firms can satisfy their regulatory disclosure obligations, both within the Form ADV II/2A and outside of it. The regulatory guidance that exists is internally inconsistent and at times at odds with the conclusions of SEC-commissioned studies to assess effectiveness of such disclosures. In the absence of clear direction, and in a continuing effort to meet changing regulatory requirements, many firms (and the investment advisory community, generally) have struggled to determine what is sufficient disclosure.

15. An overview of the history of the Form ADV disclosure obligations is helpful to highlight some of the reasons for this struggle. The Commission adopted Form ADV in 1954 and has amended it a number of times. In 1979, the SEC adopted the "brochure rule" that added the requirement that certain firms develop and distribute (i) Part II of Form ADV, or (ii) a narrative "brochure" which addressed the same topics as the Part II. Fifteen years, later, in 2000, the SEC concluded that there needed to be "a better approach to client disclosure. . . [since, among other deficiencies] an adviser's response to a question may be accurate but paint an inaccurate picture of its practices." *Proposed Rule: Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV*, Release No. IA-1862 (April 5, 2000). The SEC did not adopt the changes proposed in 2000, however, and left the issue unattended for eight years.

16. The SEC revived discussion in 2008, ultimately adopting modified Rule 204-3 in July 2010 (Release No. IA–3060). The updated rule mandated compliance with the new disclosures for the annual updates due at the end of the 1st quarter of 2011 (for firms with a fiscal year ending in December, as was the case for TRG.) This new document is called an ADV 2A.

17. The SEC published detailed instructions detailing the purpose of the ADV 2A and how firms should prepare these documents. Specifically, the General Instructions for Part 2 of Form ADV provide the following guidance regarding the content and presentation of that content.

> Plain English. The items in Part 2 of Form ADV are **designed to promote effective communication between you and your clients. Write your brochure and supplements in plain English, taking into consideration your clients' level of financial sophistication. Your brochure should be concise and direct.** In drafting your brochure and brochure supplements, you should: (i) use short sentences; (ii) use definite, concrete, everyday words; (iii) use active voice; (iv) use tables or bullet lists for complex material, whenever possible; (v) avoid legal jargon or highly technical business terms unless you explain them or you believe that your clients will understand them; and (vi) avoid multiple negatives. Consider providing examples to illustrate a description of your

practices or policies. **The brochure should discuss only conflicts the adviser has or is reasonably likely to have**, and practices in which it engages or is reasonably likely to engage. If a conflict arises or the adviser decides to engage in a practice that it has not disclosed, supplemental disclosure must be provided to clients to obtain their consent. **If you have a conflict or engage in a practice with respect to some (but not all) types or classes of clients, advice, or transactions, indicate as such rather than disclosing that you "may" have the conflict or engage in the practice**. (Emphasis added.)

18. The SEC did not then nor has it subsequently published examples of "sufficient disclosure." But. the stated goal is clear – to facilitate "effective communication" that discuss[es] "only conflicts the adviser has or is reasonably likely to have." The SEC indicated that "Plain English" writing was the manner by which to accomplish this objective. "Plain English" has the same meaning earlier used in SEC initiatives in the 1990s that required issuers of securities to eschew legalese in certain disclosure documents in an effort to improve investor understanding, taking into consideration the clients' level of financial sophistication.

19. Contemporaneous with the rollout of the revised ADV 2, the SEC also released the *Mandatory Documents Telephone Survey*, a 2008 report commissioned by the SEC's Office of Investor Education and Advocacy (OIEA) to evaluate how effective Plain English had been at improving investor understanding. This report found that "[m]ost investors said the reason they do not read a specific disclosure was because they are too complicated or too difficult to understand, and that they are too long and wordy." The report expressly challenged the premise that using Plain English is sufficient to ensure that disclosure documents will be useful to the investors who receive them - because that approach does not consider the financial literacy of the actual audience (which is not uniform) or the stamina of the reader, who must decide whether to read a lengthy disclosure (even if they were capable of understanding it).

20. In 2012 the SEC solicited public comment on improving financial literacy in general and received more than 40 comments offering a range of suggestions. It also published the results of a study it had commissioned which combined qualitative and quantitative research techniques to conduct public opinion research among U.S. investors to investigate the usability and effectiveness of the Form ADV Part 2A, among other documents. The *Investor Research Report* (July 26, 2012) reinforced the themes that had emerged in 2008; that is, most investors do not benefit from longer or more complicated disclosures, and what matters to one group of investors does not matter to others. For example,

    - Survey respondents were provided with sample disclosure language regarding asset based fees, commissions, third party compensation, among others. When asked how they would prefer to receive this type of information, survey respondents were hopelessly divided as to preferred format, with no format garnering critical mass.

I would prefer it in table format with examples	23.0%
I prefer it the way it was presented	22.9%
I would prefer it in bulleted format with examples	20.9%
I would prefer it in bulleted format	19.8%
I would prefer it in table format	11.7%

Other 1.7%

- The following table was presented to survey respondents.

Fee structure

DEF representatives charge fees for financial planning services. DEF does not charge performance based fees (i.e. fees based on a share of the capital gains or capital appreciation of managed). The client will be charged an annual investment advisory fee based upon a percentage (%) of the market value and type of assets placed under DEF's management as follows:

Market Value of Portfolio	% of Assets
$1 - $200,000	2.00%
on next $200,001 - $400,000	1.75%
on next $400,001 - $500,000	1.50%
on next $500,001 - $5 million	1.25%
Over $5 million	1.00%

97% of the survey respondents indicated they "fully" or "somewhat" understood this fee disclosure, seemingly validating the SEC's recommendation that tables be used to present complex information. Despite this expressed understanding, however, only 29% of the survey respondents actually were able to apply this information and select the correct fee that would be charged in a multiple choice question. With only with only four choices given, this 29% result is negligibly better than random selection.

- With respect to disclosures regarding conflicts of interests, survey respondents compared two sets of hypothetical disclosures. One was a single page; the other ran four pages. 75.8% of the survey respondents were satisfied with both sets of disclosures overall, but when asked about a particular practice, 36.6% believed they had enough information to assess the impact of the conflicts of interest for either hypothetical firm and 39.4% believed they did not have enough information to fully assess the impact of the conflicts.

21. Both of these SEC-commissioned reports underscored what many in the RIA field already believed to be empirically true – that the objectives of "full disclosure" on one hand, and "concise," "effective communication," on the other, are largely incompatible. Adding more and more disclosure, even if presented in tables and short sentences, will satisfy some investors but will alienate others.

22. In response to this dilemma, many RIAs have sought guidance from industry professionals on how to balance the level of detail required to inform clients of actual conflicts without overloading clients and diminishing client understanding, when not obvious. Some firms err in favor of lengthy, complicated disclosures, perceived to provide complete information. Other firms err in favor of shorter disclosures, perceived to be more likely read and understood by clients. However, in the abstract, no RIAs or consultants can say with confidence if either approach actually satisfies the SEC mandate to say enough without saying too much.

23. Ultimately, the test for sufficient disclosure inherently is a facts and circumstances test that depends both on the operating and disclosure practices of the RIA and on the audience reading the ADV.

The Robare Group's disclosures prior to 2010 Amendment to Rule 204-3

24. In May 2004, Mr. Robare, on behalf of TRG, entered into a tri-party Investment Advisor Commission Schedule and Servicing Fee Agreement ("Servicing Fee Agreement") with Triad and Fidelity Brokerage Services, LLC ("Fidelity"). The Servicing Fee Agreement provided, among other things, that Fidelity would pay Triad "eligible shareholder servicing fees on eligible NTF mutual funds" and detailed the amounts to be paid ("NTF Servicing Trails"). Messrs. Robare and Jones both testified that Triad paid 90% of the NTF Servicing Trails to Robare, just as Triad paid the other transaction-based revenue to which they were entitled based on their status as registered representatives of Triad, rather than as investment advisory representatives.

25. Their understanding is consistent with how trailing commissions (generally referred to as 12b-1 fees) are used by mutual fund companies to compensate intermediaries who market mutual fund shares to investors. Although called fees, this type of revenue essentially is deferred transaction-based compensation. The SEC and FINRA permit this revenue to be paid to brokers and persons associated with brokers (or persons exempt from registration), but not to RIAs.

26. From 2005 until March 2011 (when the new Form ADV 2A became effective), Respondents used a number of documents to disclose to their RIA customers the NTF Servicing Trails . I have been advised that Respondents delivered a "General Information & Disclosure Brochure" to all their advisory clients at or before account inception along with the Investment Advisory Agreement. These two documents were signed by the clients and disclosed, among other things:

    - that TRG charges a fee based on the assets under management;
    - that other managers may be used as part of Respondents' management of the client account, and when such managers are used Respondents will receive a portion of the of the fees that manager received from the client;
    - that Robare and Jones are registered representatives with Triad and "may receive normal and customary sales commissions and other income" for trades they execute; and
    - that these practices create a conflict of interest.

27. In addition to these disclosures, Respondents maintained, updated and distributed their Forms ADV II to new clients. Throughout this period, TRG's ADV II cautioned clients that Messrs. Robare and Jones would receive "commissions" in connection with transactions conducted through Triad and that conflicts of interest exist between Respondents' interests and the

clients' own. Those documents were modified over the years, and the disclosures became increasingly more detailed.

28. Significantly, SEC rules permitted RIAs to give clients either the Form ADV II or a separate disclosure document. TRG used both documents. This practice exceeded the regulatory requirement.

29. Respondents went even further by requiring clients to sign the Disclosure Brochure, acknowledging they had read it. The practice of getting signed acknowledgements of disclosures is often considered a best practice in the industry.

30. Not only did Respondents explain to their advisory clients that some of their income may be provided by the managers Respondents selected, Respondents expressly and repeatedly used the term "commission" to identify the compensation they received under the Servicing Fee Agreement. Nothing in the Servicing Fee Agreement or the manner in which the NTF Servicing Trails were paid refutes Respondents' testimony and stated understandings that those payments were earned through Triad because they were only available to registered persons, similar to 12b-1 fees. Rather, this revenue was specifically identified as broker-dealer revenue and categorized as or alongside other trails, throughout this period on the Triad Commission Statements.

31. For all intents and purposes, those fees constituted "trail commissions," which are treated in the industry as a species of commission revenue earned only by broker-dealers and their registered representatives. As noted in the studies cited above, investors are as likely to ignore or be confused by too much information as misinformed by too little information. It is my opinion that these disclosures informed Respondents' clients, in reasonably straightforward terms, that Respondents received revenue from sources other than the clients themselves, what the nature of the revenue was, and that this created a conflict of interest between Respondents and clients.

The Robare Group's disclosures subsequent to 2010 Amendment to Rule 204-3

32. After amended Rule 204-3 became effective, the standard for disclosure in the Form ADV changed but the fiduciary duty to make appropriate disclosures did not change.

33. In March 2011, TRG amended its Form ADV 2A in an effort to comply with revised and enhanced disclosure obligations. As is common at small, retail-oriented asset managers, TRG retained a compliance consultant to assist it in meeting its disclosure obligations. The consultant chosen was led by two former SEC employees and had a good reputation in the industry. Based on the testimony in this matter, it is my understanding that the consultant reviewed the disclosures and deemed them acceptable. Mr. McDonald advised me that he was familiar with the SEC guidance on the Form ADV 2A as well as the literature which cautioned that the effectiveness of disclosures depends significantly upon the financial literacy of the audience.

34. TRG's March 2011 ADV 2A disclosed the NTF Servicing Trails by expressly explaining that Messrs. Robare and Jones may receive selling compensation from [broker] as a result of the facilitation of certain securities transactions in the following way:

> Certain of our IARs, when acting as registered representatives of Triad, may receive selling compensation from Triad as result of the facilitation of certain securities transaction on your behalf through Triad. Such fee arrangements shall be fully disclosed to clients. In connection with the placement of client funds into investment companies, compensation may take the form of front-end sales charges, redemption fees and 12(b)-1 fees or a combination thereof. The prospectus for the investment company will give explicit detail as to the method and form of compensation.

35. In my opinion, this disclosure is an accurate characterization of the fee arrangement under the Servicing Fee Agreement and clear in all significant respects. The ADV plainly explains that compensation will only result when clients purchase "certain" securities, not all. Although Respondents could have added, and eventually did add, more detail to the ADV 2A disclosure, the reports cited above suggest that many clients would have found (and may very well find) additional language diminishes the value of the disclosures. Based on the clear preference that investors have expressed for shorter, simpler disclosures, this disclosure satisfies the objective of the ADV 2A.

36. Moreover, even though it was not required, Respondents continued to deliver the Disclosure Brochure and all of the disclosures to new clients, which still revealed:

- that The Robare Group charges a fee based on the assets under management;
- that other managers may be used as part of Respondents' management of the client account - and when such managers are used, Respondents will receive a portion of the of the fees that manager received from the client;
- that each of the persons associated with TRG are registered representatives with Triad and "may receive normal and customary sales commissions and other income" for trades they execute; and
- that these practices create a conflict of interest.

37. Whether the payments under the Servicing Fee Agreement technically constituted a 12b-1 fee (or equivalent) from the mutual fund company, on the one hand, or selling compensation (or rebate) from Fidelity or Triad, on the other hand, would not likely have impacted Respondents' clients' understanding of the issues. What mattered was that Respondents received compensation from third parties based on clients' investments and disclosed it in terms they believed their clients would understand.

38. I also compared Respondents' disclosures to the SEC's own disclosures on mutual fund servicing fees. This is a reasonable comparison because the SEC is obliged by the Plain Writing Act of 2010 to draft documents in a manner designed to be easily understood by the public. Its own mandate, however, does not also restrict it to being "concise."

39. The SEC has an 8-page *Investor Bulletin on Mutual Fund Fees and Expenses*, dated May 2014, which explains that "[s]ome 12b-1 plans also authorize and include 'shareholder service fees,' which are fees paid to persons to respond to investor inquiries and provide investors with information about their investments. A fund may pay shareholder service fees without adopting a 12b-1 plan."

40. The SEC's OIEA published a 28-page brochure in 2007, still available on the SEC's website as of the date of this report, titled *Mutual Funds - A Guide for Investors*, which omits a number of the details in the newer release, but does provide that service fees may constitute 12b-1 fees or may fall outside of that category.

41. These SEC excerpts influenced my opinion in a number of ways. First, the SEC's own descriptions of servicing fees provide that they are effectively the same thing, whether or not they constitute 12b-1 fees. Second, even though the purposes of the SEC's descriptions and Respondents' are not identical, they are both designed to educate investors about the nature of these particular fees. (The SEC's descriptions are much longer and the 2014 one is more complicated, which is generally not favored by investors.) Third, the SEC's descriptions of these practices have evolved over the years since it became subject to its own Plain Language requirements. This is consistent with my experience that well-advised RIAs adjust disclosures in an effort to improve clarity and as part of an ongoing process.

42. It is my opinion that Respondents' disclosures subsequent to the 2010 Amendment to Rule 204-3 informed TRG's clients, in reasonably straightforward terms, that Respondents received revenue from sources other than the clients themselves, what the nature of the revenue was, and that this created a conflict of interest between Respondents and clients.

Robare and Jones' efforts to make appropriate disclosures

43. The Commission alleges that TRG "failed to disclose that it had an incentive to prefer certain NTF funds" and that Robare and Jones knew that the Form ADV filings failed to adequately disclose the conflicts. In response, Robare and Jones each testified that at no time did the fact that a particular fund would result in them receiving NTF Servicing Trails influence the selection of one fund over another, and that fund selection instead was based on Alpha, Beta, manager tenure, performance, standard deviation, allocation, among other things. They testified they did not review the Commission Statements that disclosed the NTF Servicing Trails in any detail, did not know which funds in particular were eligible to generate NTF Servicing Trails, and did not consider the eligibility for generating NTF Servicing Trails in any way.

44. I have seen nothing in the record that contradicts their testimony. If revenue from NTF Servicing Trails had influenced their decision making, I would expect to see a sudden and sustained increase in concentration in funds invested in such assets. "Following the money" in this way is the typical manner in which compliance departments attempt to identify and measure conflicts. There was no such increase, however, and TRG's allocation to such funds varied dramatically both immediately following the execution of the Servicing Fee

Agreement and in the years that followed, but not in any way that suggests that their receipt of NTF Servicing Trails influenced the particular investments they selected for their clients.

45. As quoted above, the SEC cautions in its instructions on the ADV 2A that the "brochure should discuss only conflicts the adviser has or is reasonably likely to have." Messrs. Robare and Jones were both involved in selecting investments and have stated their belief that NTF Servicing Trails did not influence product selection. Under these facts and circumstances, that stated belief appears reasonable and the alleged conflict appears more theoretical than actual.

46. Moreover, I have been advised that Respondents' income from the fee arrangement over the course of the examined period constituted only a modest portion of Messrs. Robare and Jones' total revenue, around 2.5% annually. Even looking solely at the IA revenue, it constituted less than 5%. Significantly, the same SEC release that provides guidance on the ADV 2A expressly provides a presumption that an outside business activity that represents less than 10% of a person's time or income is not substantial and need not be disclosed on the ADV 2B. Insubstantial activities may still need to be disclosed on the ADV 2A if they create a conflict, of course, but the low level of income supports Messrs. Robare and Jones' belief that the fee arrangement was not a per se conflict.

47. Additionally, Respondents exerted significant efforts to comply with the disclosure obligations. They testified that they engaged two securities experts to assist them in meeting their disclosure obligations. At no time did Respondents ignore suggestions to update disclosures, whether from their own experts or from Fidelity. And the very disclosure that is the subject of the SEC's complaint had been reviewed by SEC examiners in 2008, who found no fault with it. These efforts and events support my contention that Messrs. Robare and Jones reasonably believed TRG complied with its disclosure obligations.

48. Integral to my conclusion is my understanding of the relationship that Messrs. Robare and Jones had with their clients. TRG is not a large or internet-based firm with anonymous or nameless clients. I have been advised that the firm has fewer than 300 families as clients, most of whom are business-savvy executives and management level employees of energy companies, or retirees from those positions. Respondents do virtually no advertising and most of their clients have come from referrals. Messrs. Robare and Jones host regular events to interact personally with their clients.

49. When the SEC initiated this action, Mr. Robare sent an email to most of their advisory clients informing them of the following:

> This note is to inform you that the SEC is pursuing an administrative action against our firm alleging we have "inadequately" disclosed that we receive a fee from Fidelity, our third-party custodian, when we utilize certain mutual funds in our client portfolios and custody them at Fidelity. This fee is paid by Fidelity, never by our clients, and going back to 2004, has amounted only to 2.5% of our firm's annual revenues. The SEC has also alleged that we failed to adequately disclose the potential conflict of interest that the receipt of this fee from Fidelity purports to create.

50. The email attached the details of Respondents' investments practices and the payments they received. Although no response was requested, twenty of the families responded by email, and I have been advised that others called Respondents with supportive comments. I have reviewed all of the written responses they received and they were uniformly positive. Comments included –

- You guys have always communicated well with us.
- Which of your clients would assume that you don't make money from the companies that you work with?
- I personally have never felt misinformed or under-informed.
- Your firm's integrity is beyond any doubt.
- I SALUTE your efforts to fight.

51. In its complaint, the SEC examined disclosures made over several years and "objectively" concluded the disclosures, or lack of disclosure, constituted a deception perpetrated on Respondents' clients. However, the SEC cannot know in the abstract whether there is a perfect level of detail that will sufficiently identify conflicts, yet not overwhelm or alienate the recipients. But the questions before me are not abstract. Many of Respondents' actual clients – the very ones that the SEC is seeking to protect – have had the opportunity to consider the content of the SEC's assertions, as well as the gravity of the SEC's allegations, and nonetheless concluded they were in no way misled. Further, Respondents have advised me that none of their clients have closed their accounts since they learned of the SEC action.

52. In short, with the input of their expert advisors, Messrs. Robare and Jones considered their practices, motivations, revenue sources, as well as the sophistication of their clients, in the context of their full client communications, and endeavored not to burden their clients with too much detail. It is my opinion that this approach complies with the industry understanding of the SEC's instructions and intent of this rule. Further, it is my opinion that this approach is more consistent with detailed findings published in 2008 by OIEA, which concluded that knowing the audience was a critical part to increasing investor understanding of disclosures. And, the reaction of TRG's own clients support this contention that the disclosures were not misleading.

Miriam Lefkowitz

1/12/15
Date