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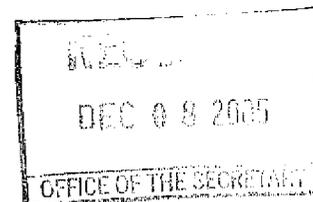
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December 2, 2005

Re: **Retention and Production of E-mail by Investment Advisers**

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549



Dear Mr. Katz:

We write today for several purposes. First, we would like to indicate our full agreement with the letter (the "**Letter**") from the Committee on Investment Management Regulation of the Association of the Bar of The City of New York (the "**Committee**") to the Commission on the issue of the retention and production of e-mail by registered investment advisers.¹ Like the Committee, we believe that the regulatory regime applicable to this issue is in need of clarification. Second, we also wish to offer our unqualified support for the proposed guidelines on procedures for the electronic maintenance of e-mail by registered investment advisers (the "**Guidelines**") that were recently submitted to the Commission by the Committee.² We believe that Commission endorsement of these Guidelines would be a good first step in addressing some of the ambiguities that have surrounded this area. Finally, we would like to take this opportunity to note a related issue that we believe could be beneficially addressed by the Commission.

Clarification of an Adviser's E-mail Related Obligations

In the Letter, the Committee alerted the Commission that it was unclear to some investment advisers what their obligations were under the Investment Advisers Act (the "**Act**") with respect to storing and producing e-mail. We agree with all of the positions taken by the Committee in the Letter on what those

¹ Letter from the Committee to the Securities and Exchange Commission (May 11, 2005), available at <http://www.sec.gov/rules/petitions/petn4-503.pdf>.

² Letter from the Committee to the Securities and Exchange Commission (Nov. 15, 2005).

obligations are and we would like to emphasize here several points made by the Committee.

First, we assume that the Commission will make it clear that only e-mail containing information otherwise required to be preserved pursuant to Rule 204-2 under the Act need be saved by an adviser and that it is not necessary for an adviser to retain *all* e-mail. After this clarification (which we believe is not controversial), the next step we would ask the Commission to take is to ensure that, when an inspection or examination occurs, only the e-mail that was required to be retained is subject to inspection or examination. We believe this is necessary because staff members in the course of inspections and examinations now routinely demand that an adviser produce *all* firm e-mail – including e-mail of a personal nature – without regard to whether the e-mail contains information required to be retained under 204-2.

Indeed, an interpretation from the staff stating that an adviser must only retain e-mail that contains information required by the Act would be meaningless for many advisers, if in fact, on inspection, the staff asks for *all* e-mail. This is because many advisers keep back-up and disaster recovery tapes that contain all e-mail, even that which has been deleted from the adviser's active computer system. To date, the inspection staff has asked to see those tapes on exams. There is little point to an adviser sorting through and separating e-mail, if the staff is going to ask to see all e-mail that is stored on back-up and recovery tapes.

In addition, requesting all e-mail on exams is an unnecessary intrusion on the privacy of employees. Most employers allow employees to use their e-mail systems for personal use. Since all e-mail is required to be turned over on inspections, the examiners see the personal e-mail. We note that this is not how the Commission historically conducted examinations of advisers. Before the advent of the internet, the examiner did not go into the offices of employees and rifle through their files and review their personal papers. Instead, the examiner requested and reviewed the documents that were required to be retained under the Act. The fact that an employee had other documents in his office did not mean that those documents were subject to inspection on an examination.

We acknowledge that a number of high profile cases and actions have turned on the type of e-mail that might not be found in a routine examination, if the examination were limited to e-mail required to be retained under Rule 204-2. Nevertheless, this does not counsel expanding the scope of e-mail available during an examination, because the e-mail in those cases and actions was found in the context of litigation, not routine examination. We do not dispute that, if the Commission uses its subpoena power in an enforcement action or if there is litigation, all of the e-mail of an adviser is subject to compulsory production.³ We

³ This assumes that the e-mail is responsive to a properly issued subpoena or other discovery order and is neither privileged nor otherwise protected from production, such as under the attorney work-product doctrine.

believe, however, that in the context of a staff inspection or examination of an adviser, compulsory production of all materials in an adviser's possession (in particular all e-mail) is neither warranted nor appropriate.

Second, we agree with the Committee that the Commission should clarify that Rule 204-2(a)(7), which requires retention of certain types of written communications, applies only to communications between an investment advisory firm and third parties, not to internal documents. We believe that, as a textual matter, there can be no other interpretation as the Rule speaks only of "written communications received and . . . sent by [an] investment adviser," not of communications within a firm.⁴ Further, as a matter of policy, interpreting Rule 204-2(a)(7) to apply to the internal communications of an adviser would be incredibly burdensome given the volume of e-mail sent among the employees of a modern office and it would also be inconsistent with the industry's longstanding understanding of this Rule.

Finally, we agree with the Committee that the need for Commission attention to these issues is urgent. Any delay in action by the Commission to clarify an adviser's e-mail retention and production obligations will only add to the growing expenses imposed on investment advisers and their clients by these uncertainties.⁵ Further, it is unfair that advisers are asked to make large

⁴ The staff has interpreted Rule 204-2(a)(7) to apply to communications sent and received wholly within the same investment advisory firm. The language of this rule, however, requires that an adviser retain "originals of all written communications received and copies of all written communications sent by such investment adviser relating to [certain subjects]." Rule 204-2(a)(7). Even by itself, the Rule's failure to mention either internal communications or communications among employees raises serious questions about the validity of staff's interpretation of this language, but we also believe the staff's interpretation is problematic in at least two other respects. First, the Rule's differentiation between the original of a received communication and a copy of a sent communication, clearly implies that the Rule only relates to external communications, because only the original of a communication sent outside of the firm would be unavailable for retention. Second, for the Rule to apply to internal communications, the quoted language must be read to encompass all written communications received and sent by an employee of the adviser, regardless of the respective sender or recipient. Such a reading, however, would have the bizarre effect of requiring, for any one internal communication, that the adviser retain both the original that was received by an employee and a copy of the *very same* communication that was sent by another employee. We can think of no plausible reason why the Commission, in promulgating Rule 204-2(a)(7), would have intended to require an adviser to retain both the original and a copy of an internal communication, but not of an external communication it receives (and not two copies of an external communication it sends). We believe, therefore, the staff's interpretation of Rule 204-2(a)(7), in breach of at least two of the most fundamental canons of construction, not only does violence to the Rule's plain meaning, but also imputes to the Commission an intent to promulgate a rule with absurd consequences. See United States v. Goldenberg, 168 U.S. 95, 102-03 (1897) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar."); United States v. Turkette, 452 U.S. 576, 580 (1981) (when interpreting a text, "absurd results are to be avoided"); see also Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

⁵ For example, those advisers who, for fear of failing to comply with Commission rules, retain all of their e-mail for five years face significant storage costs.

investments in technology to comply with their e-mail retention and production obligations at a time when so much confusion over the very nature of those obligations still abounds.

The Guidelines

As the Committee discussed in its Letter, Commission guidance on reasonable e-mail retention procedures would be of great help to investment advisers seeking to comply with their retention obligations. We believe that the Guidelines submitted by the Committee can well serve as the foundation for reasonable procedures for the retention of e-mail. Commission acknowledgement that e-mail may safely be deleted in accordance with procedures based on the Guidelines (which procedures could of course take many different forms) would materially reduce the uncertainties in this field.

Additional E-mail Related Issue

Voicemail Transmitted via E-mail. We understand that it has become increasingly common for voicemail messages to be converted into computer files and sent as attachments to e-mail, which can then later be played by the recipient. We believe that the Commission should clarify that such attachments are not subject to Rule 204-2, given that advisers are not required to retain the voicemail messages temporarily saved on their telephone systems.⁶

We would be pleased to answer any questions you might have regarding this letter and to meet with the staff, if that would assist the Commission's efforts. If you have any questions, please do not hesitate to call me, at (212) 450-4684, or my colleague Greg Rowland, at (212) 450-4930.

Very truly yours,



Nora M. Jordan

cc: Hon. Christopher Cox
Hon. Paul S. Atkins
Hon. Roel C. Campos
Hon. Cynthia A. Glassman
Hon. Annette L. Nazareth
Mr. Meyer Eisenberg
Ms. Lori A. Richards

⁶ In the case of an e-mail that contains both a voicemail attachment and Rule 204-2 information in the body of the e-mail, we submit that, while the underlying e-mail would need to be retained, the voicemail attachment could be deleted.