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May 16, 2008

VIA E-MAIL

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: File No: S7-10-00; Release No. IA-2711 - Amendments to Form ADV

Dear Ms. Morris:

This letter responds to a request for comments by the Securities and Exchange Commission (the "Commission") on reproposed amendments to Part 2 of Form ADV, and related rules under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), to require investment advisers registered with the Commission to deliver to clients and prospective clients a brochure ("Brochure") and brochure supplement ("Supplement") written in plain English (the "Proposal").[1] We are submitting this letter on behalf of a number of our financial services clients that are either registered with the Commission as advisers or that have subsidiaries and affiliates that are registered as advisers (the "Firms").

As reflected in Appendix, the Firms are a coalition of ten leading financial services companies. To illustrate the reach of the Firms in the advisory industry, collectively, the Firms are registered as or affiliated with approximately 50 advisers and have in excess of 20,000 investment adviser representatives. The Firms' advisers consist of both retail advisers and institutional advisers. The Firms have investment advisers that are dually-registered as broker-dealers, are affiliated with broker-dealers, have investment adviser representatives ("IARs") who are dually registered as registered representatives ("RRs"), or have related persons that are broker-dealers, or are a combination of these types of investment advisers.

The recently issued "RAND Study" focused on the importance of these types of firms to the advisory industry in terms of assets under management, client accounts and employees.[2] Dually registered or broker-dealer affiliated firms "dominate the market in the sense that they manage the overwhelming majority of assets and account for most of the growth in assets under

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[1] Amendments to Form ADV, Release No. IA-2711 (March 3, 2008) (the "Release").

[2] Angela Hung, et al., RAND Corp., Investor and Industry Perspectives on Investment Advisers and Broker-Dealers (2008) (available at http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf).

management since 2001."[3] Furthermore, "dually registered firms constitute just more than 6 percent of all reporting firms [*i.e.*, firms registered as investment advisers with the Commission] but managed almost half of all accounts . . ."[4] The RAND Study also concluded that "dually registered firms tended to employ a much larger workforce than did the other investment advisers."[5] One can conclude from the data presented in the RAND Study that dually registered advisers such as the Firms will be greatly impacted by the document delivery, IAR-level disclosure and other aspects of the Proposal due to of their sheer size in terms of number of clients and IARs.

While the Firms admire and support the goals underlying the Proposal, they believe that many aspects of the Proposal fall short of the goals set forth by the Commission and would not effectively help clients and prospective clients make informed decisions about whether to rely on an investment adviser for advice. In fact, in many respects the Proposal would make that task more difficult and impose enormous burdens on investment advisers such as the Firms without providing a corresponding benefit to the public.

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[3] *Id.* at 42.

[4] *Id.* at 44.

[5] *Id.* at 43.

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I. EXECUTIVE SUMMARY

This letter sets forth the principal comments, themes and ideas that emerged from multiple group meetings of the Firms, which can be summarized as follows:

- The Proposal should not advance until the Commission concludes its ongoing reassessment of the basic regulatory framework for the advisory and brokerage industries;
- The paper or electronic delivery requirement of the Brochure should be replaced by a web-based, "access equals delivery" system that builds on the Investment Adviser Public Disclosure website ("IAPD");
- Supervised person-level information proposed to be conveyed to clients through the Supplement, a separate disclosure document, should instead be made available through BrokerCheck, a free online tool available to the public maintained by the Financial Industry Regulatory Authority ("FINRA"); and
- In light of the findings in the RAND Study that clients tend not to read the current Part II and Schedule F, the Commission should eliminate or revise a number of items in Part 2B in the ways suggested below.

II. COMMENTS

A. Timing of the Proposal in the Midst of the Evolving Regulatory Scheme of Financial Firms Offering Advisory and Brokerage Services

The Firms urge that this proposed rulemaking not advance until such time as the Commission's review of the RAND Study is complete. The Commission has stated that it is reassessing the fundamental principles underlying the regulatory framework for the advisory and brokerage industries. The Commission staff has also reported that it has provided a report to Chairman Cox on possible options regarding the future of investment adviser and broker-dealer regulation. As part of its review of the RAND Study, the Commission noted that it will consider the effectiveness of investment adviser and broker-dealer disclosures. In light of these fundamental considerations, it is premature to advance this rulemaking at this time. Delaying the Proposal would also allow the Commission time to consider utilizing an "access equals delivery" disclosure approach, which, as discussed in the next section, has been the centerpiece of other Commission disclosure initiatives.

B. Failure of Brochure Delivery Requirements to Take Advantage of SEC's Recent Innovative "Access Equals Delivery" Disclosure Approach - Part 2A: Instructions 2 and 4

The proposal is out of step with recent Commission disclosure rulemaking initiatives that are based on the concept of "access equals delivery," which provides that an investor who can access a disclosure document in electronic form via the Internet is deemed to have received the information contained in that document. As discussed below, this disclosure framework has been advanced with respect to securities offering documents and proxies, and has been proposed with respect to mutual funds.[6]

1. Requirement

The Proposal for the first time would require an investment adviser to deliver: (i) its Brochure to existing clients at least once each year no later than 120 days after the end of the adviser's fiscal year; and (ii) an interim updated Brochure to clients when an adviser amends its Brochure to add a disciplinary event, or to materially change information already disclosed concerning a disciplinary event.[7]

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[6] *See* Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Release No. 33-8861 (Nov. 21, 2007) ("Mutual Fund Prospectus Proposal").

[7] Currently, an investment adviser has the option of annually offering in writing to deliver upon written request its updated Form ADV Part II/disclosure brochure instead of delivering the actual document. *See* Rule 204-3(c) of the Advisers Act.

2. Proposal Relies on Outdated Electronic Delivery Guidance

Under the Proposal, the annual and interim Brochure could be delivered in paper or electronically, but only electronically if the form of delivery meets the guidelines developed in the Commission's 1996 interpretive guidance on electronic delivery ("1996 Electronic Delivery Release").[8] The 1996 Electronic Delivery Release requires advisers sending documents electronically to provide notice, access and evidence of delivery in order for documents to be deemed delivered. Many companies in the financial services industry have been reluctant to rely upon this guidance to use electronic delivery in lieu of paper delivery due to certain burdensome requirements in the 1996 Electronic Delivery Release, especially those related to evidence of delivery.

There have been numerous technological advances since 1996, including extensive use of communicating with clients through postings on the Internet, the widespread rollout of high-speed Internet access, improvements to software programs (such as Adobe Acrobat) that are used to read documents, and improvements to browser and network security. One significant development is interactive and tagged data that is powered by Extensible Business Reporting Language ("XBRL"), a computer software language which labels companies' data so that investors can easily find what they are looking for and use the information for comparisons and analysis. Given these developments and the "access equals delivery" approach the Commission recently took with respect to offering documents and proxies and proposed with respect to mutual funds (as discussed below), the Commission should not look back to the 1996 Electronic Delivery Release in devising a disclosure delivery scheme but instead look forward to the "access equals delivery" scheme that is the centerpiece of recent disclosure initiatives.

3. "Access Equals Delivery" In Recent Rulemaking

The Commission recently implemented a number of impressive disclosure initiatives that have advanced electronic delivery through an access equals delivery model. These achievements are worth highlighting.

Securities Offering Reform Rules. The access equals delivery concept was embraced by the Commission in the securities offering reform rules and amendments adopted in 2005.[9] These rules serve to modernize and liberalize the registration and offering of securities under the Securities Act of 1933, as amended ("Securities Act"). Among other things, the offering reforms include relief from the requirement under Section 5 of the Securities Act to deliver a final or statutory prospectus at or prior to the earlier of the delivery of a confirmation of sale or delivery of the security.[10] The rules embrace the access equals delivery model for delivery of

[8] *See* Interpretation; Solicitation of Comments; Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Rel. No. 33-7288 (May 9, 1996).

[9] Securities Offering Reform, Rel. No. 33-8591 (July 19, 2005).

[10] New Rule 172 under the Securities Act provides that a prospectus would be deemed to precede or accompany a security for sale for purposes of Section 5(b)(2) of the Securities Act as long as a prospectus meeting the

prospectuses, based on the assumption that investors have access to the Internet, and thereby permit issuers to satisfy the Section 5 delivery requirement if the prospectus is posted via EDGAR on the Commission's website.

The Proxy Rules. The Commission recently took an approach similar to the securities offering reform rules in its adoption of amendments to the proxy rules relating to the electronic delivery of proxy material.[11] Rule 14a-16(d) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), governs the contents of the notice that an issuer must send to its security holders in connection with the availability on the Internet of proxy material for that issuer. Paragraph (d)(1)(3) of that Rule requires the notice to state that if the security holder wants a paper copy of the proxy material, the security holder must request one. Paragraph (d)(5) of the Rule requires that the notice provide the security holder with a toll-free phone number, email address and Internet website where current and all future proxy material in paper form can be requested.

The Mutual Fund Summary Prospectus Proposal. Along the same lines as the securities offering reform rules and the proxy rules, the Commission recently proposed rules that would permit mutual funds to use a new summary section of the prospectus as an optional "summary prospectus" to satisfy the fund's prospectus delivery requirements under Section 5(b) of the 1933 Act. Funds would be permitted to use short-form summary prospectuses only on the condition that they make their full statutory prospectus and other specified fund documents available on the Internet, with paper copies available upon request. The fund's full statutory prospectus on the Internet would in turn be required to contain hyperlinks to assist investors in being able to quickly navigate the prospectus to obtain desired information. The Commission stated that this approach is "intended to provide investors with better ability to choose the amount and type of information to review, as well as the format in which to review it (online or paper)."[12]

It appears that mutual fund investors will strongly embrace the access equals delivery model. The Investment Company Institute (the "ICI") found in a recent study that 95% of investors surveyed use the Internet and that 90% of those surveyed "agree or strongly agree with the statement that 'getting investment information online is the wave of the future.'"[13] The ICI survey also found that almost 90% overall and more than 80% of mutual fund investors who access the Internet use the Internet to gather financial information.[14]

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requirements of Section 10(a) of the Securities Act were filed with the Commission. This allows for the delivery to investors of only the confirmation and no prior or accompanying delivery of a written prospectus. Notwithstanding the relief provided under new Rule 172, issuers relying on the Rule would still need to retain some paper copies of the prospectus. Specifically, new Rule 173 under the Securities Act requires the principal underwriter or selling broker-dealer to provide a paper copy of the prospectus upon request by an investor.

[11] Shareholder Choice Regarding Proxy Materials, Rel. No. 34-56135 (July 26, 2007).

[12] Mutual Fund Prospectus Proposal, *supra.* n.6.

[13] "Investor Views on U.S. Securities and Exchange Commission's Proposed Summary Prospectus" (March 14, 2008) at 19 (available at http://www.ici.org/stats/res/ppr_08_summary_prospectus.pdf).

[14] *Id.* at 19.

4. Proposed Delivery Requirements Should be Revamped to Advance the Electronic Delivery of Adviser Disclosure Along the Same Lines as Recent Commission Disclosure Rulemaking

In the release proposing the amended mutual fund access equals delivery scheme, the Commission noted that it had "drawn upon [its] recent initiatives that have harnessed technology in order to provide investors with better access to information."[15] Given its recent initiatives, the Commission should consider extending its access equals delivery model to the Brochure. An Internet-based disclosure scheme for the Part 2 Brochure would also complement the IAPD technology developed by the Commission to disclose the information contained in Part 1A of Form ADV.

Advisers Should be Required to File Their Brochures on the IAPD in Lieu of Delivering the Brochures. The Firms encourage the Commission to "pick up where it left off" with Part 1A by implementing an access equals delivery model and leverage disclosure technologies available in the IAPD. Clients who increasingly use the Internet in financial-related matters would benefit from a medium that allows the information required by Form ADV, Part 2, to be presented in a user-friendly, multi-layered format.

Since September 25, 2001, clients and prospective clients of advisers have had Internet access to Form ADV Part I filings made by investment advisers at the IAPD website located at www.adviserinfo.sec.gov. Recently, the Commission and NASAA revamped the IAPD to enable it to accept electronic submissions of Part II of an adviser's Form ADV. Many investment advisers have voluntarily posted their Part IIs through the IARD.

Annual Updates. Once the Brochure is posted, advisers should be required to have a prominently displayed link on their home pages to the Brochure and annually update their posted Brochures on the Internet in lieu of being required to deliver the Brochure by mail or electronically. There would be no need for advisers to send clients a hard copy or electronic copy of the Brochure because it would be available continuously on the Internet. This approach would improve delivery as it would mitigate the risk of the client losing the Brochure or it being overlooked in a slew of e-mails on the client's e-mail system (or in a pile of mail); the Brochure would always be available. Advisers could indicate on their web pages when the Brochure was last updated, making it unnecessary for them to notify by mail, e-mail or otherwise that an updated Brochure is available. Since clients generally "pull" information from adviser websites on a frequent basis, it would be unnecessary to require advisers to "push" a notice to clients that an updated Brochure is available.

Furthermore, this approach would lay the groundwork for the use of XBRL, the hidden computer tags that make data interactive, in the Brochures. Many of the technologies developed

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[15] *See* Mutual Fund Prospectus Proposal, *supra* n.6.

by the Commission and the ICI in the future could be adapted to the Brochure, allowing clients to compare information about multiple advisers.

Interim Updates. The Firms recommend that the Commission amend the Proposal to de-link the interim updating requirement from the material disciplinary event disclosure requirement. In the Firms' view, any disciplinary disclosure scheme should take advantage of the existing disciplinary information already available on the IAPD and FINRA's Broker-Check system. Under this approach, advisers (whether or not they are dually registered as broker-dealers) would be able to report and disseminate disciplinary information under one disclosure system instead of having to report the same information twice. A unified disclosure approach would not only eliminate inevitable errors caused by dual reporting systems, but would also eliminate logistical challenges posed by two disciplinary reporting systems with different updating and timing requirements.

As the Commission observed in the Release, "advisers have an ongoing obligation to inform their clients of any material information that could affect the advisory relationship. As a result, advisers may be required to disclose material changes to clients including significant disciplinary actions between annual updating amendments even if those changes do not trigger delivery of an interim update." Such updating could be easily and efficiently accomplished by uploading a revised version of the Brochure to the IAPD. A notice could be placed on the adviser's website notifying clients of the availability of the revised Brochure.

5. Access Equals Delivery Would be Far Less Costly than the Commission's Paper/Electronic Delivery Proposal

A forward-looking access equals delivery approach would save investment advisers significant amounts of money and resources.

The Proposal is Costly. With thousands and in some cases tens of thousands of clients, advisers like the Firms would incur significant costs to satisfy the requirements of the Commission's proposed Brochure delivery scheme. Because the Proposal will require the paper or electronic delivery of a document, advisers would have to make substantial investments to satisfy the delivery requirements. These include: reconfiguring and making significant changes to multiple computer systems, developing databases, designing, printing and mailing or e-mailing the Brochures and accompanying explanatory documents, developing new access and information tracking controls, developing new procedures to comply with the delivery requirements, designing training programs and training adviser staff on the new requirements, and implementing new internal audit procedures. In addition to the costs of the hardware and software and other tangible items necessary to build a delivery system for the proposed Brochure delivery scheme, advisers would have to devote hundreds of hours of personnel time from such departments as technology, compliance, operations, audit, legal, marketing, and customer service. The cost-benefit and Paper Work Reduction Act sections of the Release grossly underestimate the costs and burdens that would be incurred to comply with the proposed delivery requirements.

Interim Delivery Requirement Compounds Problem. The challenges described above will be compounded because advisers will have to build into their systems the capability of revising the Brochure and transmitting the revised Brochure to thousands or tens of thousands of clients at any time of the year should a material disciplinary event occur. A wide variety of disciplinary events could trigger the interim delivery obligation as proposed. Large financial institutions such as the Firms potentially could face numerous events each year involving the Firms or affiliates that would raise the question of whether interim disclosure is required. Given the lack of clarity on the meaning of "disciplinary event" and "material changes" in the Proposal, many advisers are likely to disclose, through interim deliveries, a number of events out of an abundance of caution and concern about being second guessed by a regulator that has the benefit of hindsight. Any conscientious firm with a recognized brand name and strong compliance culture will feel compelled to over-disclose changes that are not truly material, nor of importance to clients, out of concern over regulatory and reputational risk. Significant costs would therefore be incurred by advisers in order to deliver interim updates to clients; unfortunately, however, this expensive delivery requirement may not result in a corresponding improvement to disclosure as clients may be flooded with interim updates, in many instances because of events that are not in any way related to the advisory services they receive.

C. Proposed Supplement Should be Eliminated; Information Required in Supplement Should Be Made Available in Less Costly Internet-Based System - Part 2B

While the Firms recognize that clients could benefit from certain types of supervised person-level disclosure, they urge that the Proposal be revamped to not require such disclosure be delivered in a new, separate disclosure document called the "Supplement." In the Firms' view, there is a much better way to disclose material information about advisory personnel who are instrumental in determining the advice provided to clients. In fact, much of the information called for by the proposed Supplement already is readily available via FINRA's BrokerCheck system for those IARs who are also RRs. BrokerCheck is well-established and relied upon by the public to obtain important information about registered persons' qualifications, training, registration, employment history and customer dispute and disciplinary history. Given that BrokerCheck has proven to be an effective mechanism to disclose information about hundreds of thousands of registered persons who provide financial services to the public, there is little reason to impose significant operational challenges and costs on advisers by requiring advisers to create an additional disclosure document. It would be much more logical and efficient to use an existing system that has been meeting the goals sought to be fulfilled by the Supplement for many years.

1. Requirement

The Proposal would require the investment advisory industry for the first time to create Supplements that provide information about the advisory personnel on whom clients rely for investment advice. The Supplement would contain five categories of substantive information about each supervised person of an adviser: (i) educational background and business experience;

(ii) disciplinary information; (iii) other business activities; (iv) additional compensation; and (v) supervision.

2. Costs of New Disclosure Scheme

It is not uncommon for large advisers to have thousands of supervised persons and tens of thousands of clients. For such advisers, the costs of designing, creating, printing, distributing and tracking the Supplements would be enormous. The cost estimates of the Proposal regarding Supplements do not adequately take account of the tremendous operational and logistical challenges that would confront large advisers that would have to generate thousands of Supplements, update the Supplements annually and sometimes more frequently, deliver the Supplements and track such delivery. The Firms believe that large advisers would have to hire additional staff whose primary job functions entail fulfilling the foregoing tasks and determining and tracking: (i) which supervised persons need a Supplement; (ii) which supervised persons are assigned to which clients; and (iii) which supervised person/client relationships are exempt from the Supplement requirement.

Further compounding the challenges for investment advisers is the Proposal's requirement that advisers would have to amend a Supplement promptly if information in it becomes materially inaccurate. This requirement will necessitate elaborate monitoring procedures to ensure that thousands of Supplements are kept up-to-date. The difficulty of this task grows geometrically as the number of supervised persons and clients grow. If a Supplement becomes outdated, an adviser will have to promptly sticker or replace the Supplement prior to its dissemination to any client that was obtained after the Supplement became stale. Thus, an adviser will need to design and implement a fulfillment system that monitors new clients to make sure they receive current Supplement(s). This task may not be difficult where an adviser only has a few dozen supervised persons that would be subject to the proposed requirement. However, some of the Firms have over 10,000 supervised persons who would be required to have their own Supplement; the cost, time and effort that would be required to comply with the proposed changes would be enormous.

The Commission also proposed an interim delivery requirement for Supplements that would further compound the challenges described above. Under the Proposal, an adviser would have to deliver an updated Supplement to existing clients when there is a new disciplinary event or a material change to disciplinary information that has already been disclosed. Such occurrences may well happen on a regular basis where an adviser has thousands of supervised persons. This is especially true given the sweeping definition of "disciplinary event" that has been proposed. This definition could pull in many events that are not directly related to the provision of advisory services, such as state insurance administrative actions that are based on insurance licensing or books and records violations. Accordingly, the Proposal would have the effect of requiring advisers to re-direct limited resources to developing a system that monitors for such events, quickly updates the Supplements and transmits them to the appropriate clients.

The monumental challenges described above will be further complicated by the fact that both clients and supervised persons change. In a large adviser with thousands of supervised

persons and tens of thousands of clients, these changes will be constant. New employees begin and existing employees leave on any given day. Tracking these changes will be made more difficult because supervised person-client relationships also are fluid. Developing and operating an infrastructure to manage these changes will be a Herculean challenge and extremely expensive for large investment advisers such as the Firms.

3. Alternative Supervised Person Disclosure Schemes

Instead of a costly separate disclosure document, the Firms recommend utilizing a central database with supervised person information and giving investment advisers the option of providing more information about supervised persons on their web site or in the Brochure. The Commission should build upon BrokerCheck, an existing database that already houses information about supervised persons who are also RRs. It is estimated that approximately 35% of all investment advisory firms in the U.S. are dually registered.[16] As highlighted in the RAND Study, dual registrants tend to have numerous RRs that also are IARs. Therefore, information about a large portion of supervised persons already is accessible to the public. It would be relatively simple to expand BrokerCheck to include all IARs.

As discussed below, the information proposed to be required by Items 2 through 5 of Part 2B could be conveyed to clients through more user-friendly, less costly alternative disclosure schemes. With respect to Item 6 of Part 2B, which requires disclosure about supervision, the Firms believe that this type of information should not be included in the Supplement or the Brochure.

Educational Background and Business Experience – Part 2B: Item 2. In the Firms' experience, the majority of advisers have minimum educational standards. Currently, Part II of Form ADV requires disclosure of these standards in Schedule F and thus this information could be provided in the Brochure. In addition, the specific educational background and business experience of supervised persons who are subject to the Supplement requirement could easily be placed in BrokerCheck.

Disciplinary Information - Part 2B: Item 3. As noted, FINRA maintains BrokerCheck, a highly-developed, widely-utilized web-based system that provides the public with information about an RR's background, status and disciplinary history. The BrokerCheck database includes details regarding disclosure events reported by or about every RR. Examples of such disclosure events include formal investigations and disciplinary actions initiated by regulators, customer disputes, certain criminal charges and/or convictions, as well as financial disclosures, such as bankruptcies and unpaid judgments or liens.

The Commission should seize the opportunity to take advantage of the benefits available through the BrokerCheck system. Item 3 should be revised to require advisers to inform clients how to access the online information in the BrokerCheck depository, which the Firms believe

[16] *See* "Fidelity Takes Aim at Dual Registrants," *Investment News* 61 (May 5, 2008) (citing a study by Cerulli Associates, Inc.).

should function as a central depository to disclose disciplinary information about advisory personnel. Since FINRA already administers both the IARD and BrokerCheck systems, the Firms expect that it would not be difficult to enhance BrokerCheck so that it contains relevant information about advisory personnel. Brochures should point clients to BrokerCheck in case they are interested in obtaining more information on disciplinary information.[17] Clients could then review the disciplinary information at their leisure. The Firms believe that such an approach is a much better alternative than requiring a potentially lengthy narrative about each disciplinary event. This approach would also greatly simplify the process of updating information about supervised persons because an adviser would only have to maintain and update the information on the BrokerCheck system and not the information in thousands of Supplements.

Other Business Activities and Additional Compensation - Part 2B: Items 4 & 5. Advisers typically adopt general guidelines regarding the types of other business activities their supervised persons are permitted to engage in. Accordingly, within a given investment adviser, the non-advisory business activities of the supervised persons and the types of compensation such individuals receive typically are very similar. General information about: the types of "outside" activities supervised persons of the adviser engage in (*e.g.*, RRs of a broker-dealer and insurance agents of an insurance agency), the types of compensation such individuals may receive when acting in such capacity (*e.g.*, the receipt of commissions in connection with the sale of securities or insurance) and any conflicts on interest created thereby, could easily be disclosed at the advisory firm level in the Brochure. In fact, under the Proposal, if a supervised person receives commissions, bonuses or other compensation based on the sale of securities or other investment products, advisers would have to disclose this fact. The Firms believe that this requirement is sensible.[18] Information about the specific outside business activities of each supervised person that would be subject to the Supplement requirement (or of each IAR, as recommended below) should be made available through BrokerCheck instead.

If someone who is not a client provides an economic benefit to a supervised person "for providing advisory services," advisers would have to generally describe the arrangement. The Firms seek clarification that the proposed item would not require detailed disclosure of

[17] It would not be very difficult to point clients to the "right" supervised persons (*i.e.*, those supervised persons who have discretion to make investment decisions for the clients or who formulate investment advice for a client and have direct client contact). With respect to the latter category, clients will know with whom they have direct contact. In addition, it is very rare for persons other than a client's IAR/adviser representative (with whom clients have direct contact) or a small investment committee/investment policy committee to have discretion over clients' assets. In the latter case, the Brochure could simply name the members of the investment committee/investment policy committee and point clients to BrokerCheck.

[18] However, if the compensation is not cash, advisers would have to explain what type of compensation the supervised person receives and explain "that this practice gives the supervised person an incentive to recommend investment products based on the compensation received, rather than on the client's needs." The Firms question the propriety of requiring all advisers to disclose the same quoted language regardless of the facts at hand giving rise to the conflict. The Firms also note that the conflict of interest that is the subject of the disclosure arises when a supervised person acts in a different (*i.e.* non-advisory) capacity that is subject to a separate regulatory regime. For instance, the conflict of interest may arise after an advisory relationship has terminated and when the supervised person is acting solely as an insurance agent or as an RR.

compensation received in connection with the sale of securities by an IAR that is dually registered as, and acts in its capacity as, an RR even if such compensation is related in some fashion to investment advice (*e.g.*, the IAR receives securities commissions in connection with the sale of securities that occurs when an investment advisory client decides to implement a financial plan by, among other things, buying securities from an IAR after the advisory relationship has terminated, the IAR has "switched hats," and begun to act solely as an RR).[19]

Similarly, the Firms would like clarification that the proposed item would not require detailed disclosure of compensation received from an insurance company in connection with the sale of insurance products by an IAR of a Firm that is also licensed as, and acts in its capacity as, an insurance agent, even if such compensation is related in some fashion to investment advice (*e.g.*, the IAR receives insurance commissions in connection with the sale of insurance that occurs when an investment advisory client decides to implement a financial plan by, among other things, buying an insurance policy from an IAR after the advisory relationship has terminated, the IAR has "switched hats," and begun to act solely as an insurance agent).

Investment advisers generally have the same compensation rules for each supervised person. This information should be disclosed at the firm level in the Brochure. Since there generally is no variation of what is permitted from one supervised person to another, there is little benefit in disclosing this information at the supervised person level (or IAR level).

The Firms also note that the use of the term "supervised person" instead of "investment adviser representative" in the Proposal would add unnecessary complexity to the disclosure scheme. Associated persons of an investment adviser that provides investment advice solely to institutional clients will not meet the definition of "investment adviser representative" if they have few or no natural person clients. However, such individuals will generally meet the definition of "supervised person." Under the Proposal, information generally would have to be provided about such associated persons. The Firms request that the Commission re-consider the scope of the disclosure obligation such that it would apply only to "investment adviser representatives" and not to "supervised persons." Such an approach would recognize that institutional clients do not need the same protection as retail clients and are able to and generally do conduct a significant amount of due diligence that cannot be undertaken by retail clients.[20]

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[19] The instructions to Item 5 assert that "[f]or purposes of this Item, economic benefits include sales awards and other prizes, but do not include the supervised person's regular salary. Any bonus that is based, at least in part, on the number or amount of sales, client referrals, or new accounts should be considered an economic benefit." The word "sales" in these sentences is problematic. One might read the word "sales" to refer to sales of securities (or insurance products), an interpretation that makes little sense since sales of securities trigger broker-dealer regulation and are regulated under the Securities Exchange Act and FINRA rules (and sales of insurance trigger insurance agent licensing laws and are regulated under state insurance law). The Firms request that the term "sales" be stricken from the instructions. A disclosure document required under the Advisers Act is not the proper venue to disclose details of broker-dealer or insurance compensation.

[20] The Firms also recommend narrowing the category of supervised persons for whom information would be required to only those IARs who have discretion to make investment decisions for clients. By including persons who merely formulate investment advice for a client and have direct client contact, the Commission would mandate that clients receive information about persons who merely make investment recommendations. However, where a supervised person does not have discretion and merely makes a recommendation, the client makes the ultimate

Supervision - Part 2B: Item 6. The Firms believe that the disclosure on supervision proposed in Item 6 would not benefit clients and would require disclosure that is not typically deemed relevant in a disclosure document. The requirements regarding supervision are already substantively and effectively addressed by Section 203(e)(6) of the Advisers Act and proposed Item 6 will not enhance this regulatory scheme or afford more investor protection by requiring disclosure. Under Section 203(e)(6), advisory firms and their supervising persons have a very strong incentive to develop and manage a supervisory system because it protects them from liability in the event a subordinate violates the Advisers Act. It is quite possible that clients will be confused by this information since they have little reason to be familiar with the supervisory structures of advisory firms. It may take a fair bit of disclosure to give a client a proper context of what is being addressed by this disclosure.

The supervision disclosure proposal also presents many practical concerns. Advisory personnel often are supervised by *multiple* persons. Therefore, an advisory firm with hundreds or thousands of supervised persons will have to monitor and track each such person's supervisor(s) and ensure that the disclosure accurately reflects the supervisory structure for each individual supervised person (or IAR, as recommended above). This challenge will be compounded by the fact that the supervisory structure of large advisers is constantly in flux as persons are promoted, hired, terminated or demoted both at the supervised person level and the supervisor level. Thus, this requirement will unduly impact large organizations that have many advisory personnel that are spread out in many different locations. A better way to address the intent of the supervised person disclosure would be to require client statements and reports (or the Brochure) to include contact information for an individual at the adviser whose role is to respond to client concerns or complaints.

D. Disciplinary Information - Part 2A: Item 9: The Proposal Should Leverage FINRA's BrokerCheck System

Similar to the discussion above at the supervised-person level, the Commission should make disciplinary information about investment advisers available to clients via FINRA's BrokerCheck system and simply require the Brochure to inform clients on how to access the online information in the BrokerCheck depository. This system should function as the depository to disclose disciplinary information about Commission-registered advisers. Under this approach, the system would be expanded to provide disciplinary information about IARs who are not also registered as RRs.[21]

Since FINRA already administers both the IARD and BrokerCheck systems, it should not be difficult to enhance BrokerCheck so that it contains the relevant information about advisers.

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investment decision. In the Firms' view, there is a critical difference between making investment recommendations and having the discretionary authority to buy or sell securities for a client. This distinction has been recognized by the Commission in proposing and adopting Rule 202(a)(11)-1 and in a subsequent proposed rule interpretation (Interpretive Rule Under the Advisers Act Affecting Broker-Dealers, Release No. IA-2652 (Sept. 24, 2007).

[21] If the Commission determines that BrokerCheck does not capture certain disciplinary disclosures of relevance to advisory clients, it should expand the content of the system.

The Brochure would point clients to BrokerCheck in case they are interested in obtaining disciplinary information. Clients could then review the disciplinary information at their leisure. Such an approach would free advisers from the enormous burden of updating and/or delivering Brochures to incorporate updated disciplinary information while ensuring that accurate and timely information is available to clients.

Under proposed Item 9 of Part 2A, each adviser would be required to disclose in its Brochure material facts about any legal or disciplinary event that is material to a client's evaluation of the integrity of the adviser or its management. The Commission proposes for the first time to explicitly require investment advisers to provide disciplinary information in the disclosure document delivered to clients. This proposal would result in a lengthy, unwieldy document for large financial institutions such as the Firms. In fact, given the broad scope of the item, it is very possible that such disclosure might exceed all of the rest of the disclosure in the Brochure combined. For example, there are a number of cases where large financial institutions have over 300 pages of DRPs in their Form ADV on file on the IARD.

Many investment advisers, including the Firms, have hundreds or thousands of IARs and numerous affiliates. In the aggregate, many presumptively disclosable events under the proposed item will be years old, will have occurred at firms other than the investment adviser making the disclosure, will involve IARs no longer with an adviser, will involve IARs who have contact with only a handful of a Firm's clients (which generally run in the thousands) or will not involve investment advisory services. To cite just one example, it appears that certain regulatory actions taken by a state insurance regulatory authority in connection with fixed insurance products could be required to be disclosed. It is hard to fathom why advisory clients would benefit from wading through page after page of this type of disciplinary history. The result will be that clients will not read through the Brochure.

Item 9 essentially would require an adviser to extract all of the information from its DRPs and insert this information in the Brochure. Such a result would be a big step backwards in terms of effective disclosure and communication with clients. Given the broad scope of proposed Item 9 and that so much information would be disclosed by dual registrants and other advisers that provide investment-related, non-advisory services to clients, the impact of the proposed item would be to ensure that the purposes and goals of the Proposal as stated in the Release are never met.[22]

The Commission should also re-examine the dollar threshold for reportable disciplinary actions. Under its proposal, an investment adviser would have to report certain orders or findings by an agency, authority or self-regulatory organization ("SRO") involving penalties or fines of more than $2,500 on the firm or certain associated persons. In a large investment adviser, a reportable item threshold of $2,500 will result in *numerous* events being reported. A $2,500 threshold is too low and will capture administrative or SRO actions that are of little interest to advisory clients. The Firms submit that actions involving a penalty or fine less than

[22] Furthermore, the Brochure would have to be updated when there is a material change in disciplinary information. This updating requirement will necessitate a significant investment to develop systems to track the current versions of the Brochure and to replace or sticker them when changes are mandated.

$10,000 generally will be immaterial to advisory clients. Having the threshold at $10,000 will result in meaningful disclosure to clients regarding an advisory firm's disciplinary history. On the other hand, requiring descriptions of numerous, small disciplinary events only will obfuscate disclosure of the more important events and lengthen the disclosure considerably.

The Proposal seeks comment on whether the Commission should require advisers subject to a Commission administrative order to provide clients with a copy of that order. The Firms urge the Commission not to require advisers to deliver copies of Commission administrative orders to clients. Not all orders would be material to clients. Rather than imposing a blanket requirement, delivery of orders should remain a subject of settlement negotiation. The Commission may require, where appropriate, delivery of orders in individual proceedings. The Commission should not require disclosure of arbitration awards or claims, settlements, or damages in civil proceedings. These should not be included in the list of disciplinary events because the results often are not tied to the merits of a claim and are not indicative of any wrongdoing. It would penalize large investment advisers that often are the subject of litigation when they are not at fault (*e.g.*, where they are the only "deep pocket" involved in a claim).

Lastly, Item 9 would require the disclosure of "material" facts about disciplinary events that are "material" to a client's or prospective client's evaluation of an adviser's business or the integrity of its management. More guidance is needed regarding what constitutes "materiality" in both instances. Without clear guidance, a large number of investment advisers will disclose more disciplinary events than the Commission may have intended and disclose those events in greater detail than the Commission may have intended. Such disclosure will lengthen the disclosure, while providing prospective clients with information that does little to help them evaluate advisers.

E. Specific Disclosure Items

The specific items in the Proposal follow an attempt in April 2000 to require each adviser registered with the Commission to provide clients with a narrative Brochure that describes the adviser's business, conflicts of interest, disciplinary history, and other important information necessary to make an informed decision about whether to rely on the adviser for advice.[23] The Original Proposal was designed to require advisers to disclose this information in a clearer, more meaningful format than the current check-the-box approach in Form ADV Part II.

Many aspects of the Proposal are unworkable or would require disclosure of matters that will have little or no value to clients that are deciding whether to retain an adviser. The Proposal will result in a tremendous amount of clutter or "disclosure creep" that will force clients to wade through volumes of insignificant disclosure to find a few nuggets of valuable information. Furthermore, the Proposal contains a number of items that are unclear and will invariably result in inconsistent disclosures practices in the industry and will impede an "apple to apples" comparison of advisers by clients and prospective clients.

[23] Electronic Filing by Investment Advisers; Proposal to Form ADV, Release No. IA-1862 (Apr. 5, 2000) (the "Original Proposal").

Our recommendations set forth in the tables below are in the order in which these items appear in Part 2A.

Part 2A: Item 2 - Material Changes
Requirement: An adviser must provide clients with a summary of any "material changes" to its Brochure since the last annual update of the Brochure. The summary would appear on the cover page of the Brochure or the page immediately thereafter, or could be included in a separate communication that would accompany the Brochure.
Comment: The Firms strongly recommend that the Commission eliminate this disclosure item for the following reasons: it will not in fact provide information that clients want or need, it will lengthen the Brochure (especially absent clear Commission guidance on what changes would be "material"), it will distract advisory clients from potentially more important information disclosed elsewhere in the Brochure, and it is not required under analogous Commission disclosure regimes. Proposed Part 2A does not define "material." If past experience is any guide, many advisers will err on the side of caution and describe many changes in the Brochure that the Commission did not intend to be disclosed. As a result, there is a significant possibility that many Brochures will begin with a lengthy and awkward discussion of the various changes that have been made since the prior update. By requiring this disclosure to appear at the front of the Brochure, the Commission increases the likelihood that clients will not read the other parts of the Brochure. The Commission failed to explain adequately in the Release why it believes disclosure of material changes to advisers' Brochures is necessary or desirable and the Firms are not aware of any expression of concern on this score by Commission staff. This is particularly noteworthy since such disclosure is not required for filers of mutual fund prospectuses or under other disclosure regimes. As discussed above, the Commission has moved aggressively and progressively in a very different direction with mutual funds and proposed a layered disclosure approach under which fund companies would deliver a short-form summary document to investors and make available the lengthier prospectus on the Internet. The Commission did not propose to require mutual funds to disclose material changes in any of these documents.

Part 2A: Item 4 - Advisory Business
Requirement: An adviser must describe its advisory business, including the types of advisory services it offers, and whether it holds itself out as specializing in a particular type of advisory service.
Comment: The Commission does not provide adequate guidance as to what is meant by "specialization." Item 4 lists financial planning, quantitative analysis and market timing as examples of specializations. This list is confusing. For instance, few advisers would consider the use of quantitative analysis to be a "specialty." This Item should be revised to delete references to "specializations" or at a minimum to explain what the Commission considers to be a specialization. The Commission should further clarify whether the disclosure is required if an investment adviser holds itself out as offering several specialties. For example, one unit of an investment adviser may use quantitative analysis in selecting investments for clients and another unit may provide financial planning services to clients, a portion of which involves investment recommendations selected by the unit using quantitative analysis. It is unclear whether such an adviser would have to provide "specialization" disclosure about both areas, or whether it would not be deemed to be a specialist because it offers multiple advisory services. The Commission should also delete "financial planning" from its list of examples of specializations. Financial planning is a type of advisory service but is not generally considered to be a specialization. The Firms also note that the information required by Item 4 would cover the same ground as certain information required by Item 8 (discussed below), which would require, among other things, investment advisers to describe the methods of analysis and investment strategies they use in formulating investment advice or managing assets. Advisers that "primarily" use a particular method of analysis, strategy, or type of security must explain the specific material risks involved. More detail would be required if those risks are significant or unusual. These proposed disclosure requirements appear to address some of the same issues underlying what is proposed by Item 4.

Part 2A: Item 5 - Fees and Compensation
Requirement: An adviser must describe how it is compensated for providing advisory services and describe the types of other costs, such as brokerage, custody fees, and fund expenses that clients may pay in connection with the advisory services provided to them by the adviser.
Comment: This Item suggests that an adviser's receipt of commissions is counter to that adviser being able to act in the client's best interests. The Firms disagree and urge that the Commission rewrite the Item's disclosure requirements to better account for the value provided in the "fee plus commission" adviser model. The Firms believe that instead of endorsing one compensation structure over another, Item 5 should be revised with a view to ensuring that clients understand the ways in which their adviser is compensated. In particular, the Item should seek to reinforce clients' understanding that advisory services are distinct from broker-dealer services and that as such, clients are assessed commissions with respect to the purchase and sale of securities through the broker-dealer. The Commission concludes in Item 5.E that advisers receiving compensation for the sale of securities or other investment products must explain that this practice presents a conflict of interest and gives them an incentive to recommend investment products based on the compensation received, rather than on a client's needs. The Firms recommend that Item 5.E. be clarified so that it does not require detailed disclosure of compensation received in connection with the sale of securities or insurance, even if such compensation is related in some fashion to the investment advice provided. The Firms note that the conflict of interest at issue arises when an adviser acts in a different (*i.e.* non-advisory) capacity, such as a broker-dealer or insurance agency. These activities are subject to separate regulatory regimes. [24]

[24] In this respect, the Firms note that the term "Investment-Related" is defined in the Glossary of Terms for Form ADV, Part 1, to include activities that pertain to insurance. It therefore appears that sales of fixed insurance products that are not securities would trigger the disclosure required by proposed Item 5.E. It also appears that the disclosure item would cover sales of investment products that occur after an advisory relationship has been terminated, which broadens the scope of the disclosure item considerably.

Part 2A: Items 6 & 11 - Conflicts of Interest
Requirement: An adviser must disclose various situations that give rise to conflicts of interest.
Comment: The Brochure would be much more readable and user-friendly if there were a single disclosure item covering all types of conflicts of interest. Conflicts of interest arise in a variety of circumstances. The extent of a given conflict depends on a host of factors. Accordingly, the Firms believe that it does not make sense for the Proposal to focus only on a select group of conflicts of interest. As an example, there may be a number of reasons, besides earning a performance fee, that would create an incentive for an investment adviser to favor one client over another client (*e.g.*, accounts with a higher advisory fee than other accounts, large accounts vs. small accounts, clients that also pay compensation to an affiliate of the adviser for non-advisory services or products, proprietary accounts vs. client accounts, *etc.*). Singling out performance fees over other factors that may create similar conflicts of interest places undue emphasis on one type of conflict. Rather than having an item that focuses on performance fees and side-by-side management, it would be more useful to clients to have a general conflict of interest section. Such a section could include discussion, where applicable, of the following: • Performance Fees and Side-by-Side Management; • Allocation of Investment and Trading Opportunities; • Amounts of Advisory Fees; • Sizes of Accounts; • Proprietary Accounts; • Soft Dollars and research, products or services (*e.g.* referrals) received from third parties in connection with advice provided to clients; • Brokerage Practices; • Proxy Voting; and • Participation in Client Transactions and Personal Trading. In addition to expanding the type of information regarding conflicts of interest that advisers must disclose, the Proposal would require information about the compliance policies and procedures that advisers utilize to manage their conflicts. There is no reason to believe clients would be interested in or benefit from this type of information.[25]

[25] For instance, Item 5.E would require advisers to disclose their procedures for disclosing conflicts created by the receipt of compensation for the sale of investments to clients. The Firms submit that this proposal adds no value to clients or advisers. If a conflict exists and is disclosed there is no value provided by disclosing the procedures used to disclose the conflict.

Part 2A: Items 6 & 11 - Conflicts of Interest

Disclosure of internal compliance procedures contributes little to a prospective client's evaluation of an investment adviser. Because advisers' policies and procedures are tailored to the structures, systems and processes that investment advisers have employed, disclosure of firms' policies and procedures would not be meaningful to clients in many cases and would reflect various internal factors that are not relevant to the decision of whether to hire or retain an adviser. Furthermore, unless an adviser provides a detailed description of its compliance procedures, the disclosure will be "boilerplate," which will not provide useful information to clients and will lengthen the Brochure. As the recent RAND Study demonstrated, clients often do not read disclosure documents. Inclusion of compliance procedures will increase the likelihood that this will be the case with the Brochure as well.

Disclosing the nature and import of conflicts of interest in a clear and direct manner and suggesting that clients should speak to the adviser if they have questions regarding, or are interested in learning more about, the adviser's policies and procedures should satisfy the disclosure requirement in Form ADV, Part 2 on conflicts of interest.

As another example, Item 17.A. would direct an adviser to "briefly describe" its proxy voting policies and procedures. In the experience of the Firms, it would be very difficult to cover the numerous topics raised in Item 17 in a "brief" description. Many types of people and departments may be involved in proxy voting at a large adviser, including investment personnel, compliance personnel, operational personnel and third-party vendors. Describing the roles played by the various sets of persons and firms would require a fair amount of space. Advisers may use an entirely different set of procedures when conflicts of interest arise, which would add to the length of the disclosure. In addition, proxies are typically voted pursuant to guidelines, which generally have numerous sections and sub-sections that address different voting subjects (*e.g.*, directors, executive compensation and social issues). Describing the guidelines will add more space to the disclosures. In total, the breadth of disclosure proposed by Item 17 would result in a lengthy discussion that could add multiple pages to the Brochure.

Item 17.B. would request specific information about relationships with third-party proxy voting vendors. Again, such disclosure would add to the length to the Brochure. In this respect, the Firms note that Form N-1A (the registration form for open-end investment companies) requires similar information to be included in a mutual fund's Statement of Additional Information and not the prospectus and that such disclosure often is several pages in length.

The Firms therefore recommend that Item 17 be revised to require an adviser to explain how clients may obtain a copy of the firm's voting policies and procedures. The other parts of proposed Item 17 (*e.g.*, information about whether an adviser votes client proxies and, if so, how it votes proxies) should be preserved.

Part 2A: Item 7 - Types of Clients
Requirement: Advisers must describe the types of advisory clients to whom they generally provide advice, as well as their requirements for opening or maintaining accounts, such as minimum account size.
Comment: The Firms respectfully submit that this information is not material to the decision of whether to hire or retain an investment adviser. Any benefit that is gained by disclosing the types of clients an adviser has experience in servicing is outweighed by the resulting increase in the length of the Brochure and the boilerplate nature of the disclosure that will result. Furthermore, such information is available in Part 1 of the Form ADV. With respect to the account opening and minimum account size information disclosure requirement, such disclosure is unnecessary because this process is ministerial and is typically found in an adviser's client agreement and/or account application form. Accordingly, the Firms recommend that the Commission eliminate this disclosure item; an adviser could still add such disclosure in the Brochure if it felt the Brochure was a good place to communicate such information to clients and prospective clients.

Part 2A: Item 8 – Methods of Analysis, Investment Strategies and Risk of Loss
Requirement: Advisers must disclose their methods of analysis and investment strategies. Advisers that "primarily" use a particular method of analysis, strategy, or type of security would be required to explain the specific material risks involved, and provide more detail if those risks are significant or unusual.
Comment: Many, if not most, large investment advisers, such as the Firms, use multiple investment strategies since they have multiple types of clients and offer multiple types of advisory services. Item 8 would require such advisers to disclose the methods of analysis and investment techniques for each of those strategies. If such disclosure is actually required to be provided in the Brochure, the result will be a lengthy document with considerable disclosure that might not be relevant to many clients. For example, detailed disclosure about how an adviser invests in currency futures to hedge currency risks may be very important to an institutional client but not relevant to other sets of clients that cannot use such strategies because of the small account sizes, investment objectives of those accounts or restrictions on those accounts. The Commission should provide guidance regarding the level of detail that will be required to disclose the adviser's methods of analysis and investment strategies. One option the Commission should consider is requiring a limited amount of information

**Part 2A: Item 8 –
Methods of Analysis, Investment Strategies and Risk of Loss**

regarding analysis and strategies, but giving advisers the discretion to add more details in the Brochure. For example, it may not be necessary for advisers that primarily recommend mutual funds to clients to have detailed disclosure regarding strategies and related risks (except at the asset allocation level) because their clients will receive prospectuses from the underlying mutual funds that contain such disclosure in detail.

With respect to risk disclosure, Item 8 by negative inference does not require a multi-strategy firm to disclose risks associated with its investment strategies. Only advisers that "primarily" use a particular strategy must explain the risks involved with the strategy primarily used. The Commission in the Release confirms this interpretation of Item 8 by stating "we would not require [multi-strategy advisers] to list in the Brochure the risks involved in each type of security or strategy." However, the Release then states that multi-strategy advisers "must already disclose the risks associated with strategies that they recommend to clients, but the Brochure may not be the best place to make that disclosure." The Firms request that the Commission clarify what it meant by this statement and what it had in mind in stating advisers "must already disclose" these risks.

As a result of the above language, the Commission suggests that multi-strategy advisers must disclose in one place the risks associated with such strategies. However, neither the Release nor Part 2A states where and how such disclosure should be made. Instead, the Release only states that "required risk disclosure with respect to particular strategies could be made separately to those clients to whom such disclosure is relevant." The Firms seek clarification as to what this statement means.

Based on past industry practices, it is reasonable to expect that many, if not most, investment advisers will choose a risk averse path from a legal perspective and include lengthy risk disclosure about all of their methods of analysis and investment strategies in their Brochures absent guidance from the Commission.

Part 2A: Item 10 - Other Financial Industry Activities and Affiliations
Requirement: Advisers that recommend or select other investment advisers for clients and receive compensation directly or indirectly from those advisers (or that have other business relationships with those advisers), must describe these practices and discuss the conflicts of interest these practices create and how advisers address them.
Comment: The Firms believe the Commission should clarify that (1) fee-sharing arrangements between advisers and other advisers (such as sub-advisers) and (2) "paymaster" arrangements where client fees are collected by one adviser and paid to other advisers in co-advisory or sub-advisory relationships do not trigger the need for disclosure under Item 10.D. In such arrangements, the adviser-payor is merely acting in an administrative and ministerial capacity in collecting compensation from the client and distributing it, pursuant to an agreement (*e.g.*, a client agreement, co-advisory agreement, or a sub-advisory agreement) to other advisers who provide services to the client and/or the adviser-payor. These arrangements allow the parties to avoid having to ask the client to cut several checks/wire separate funds for the various advisers involved in an advisory program and do not raise the sort of concerns that Item 10.D appears to be targeting. The Firms also note that Item 10.D could be read to encompass solicitation arrangements in which an adviser recommends a third party adviser and receives a solicitation fee for such efforts. Since such arrangements are subject to Rule 206(4)-3 under the Advisers Act (the "Solicitation Rule") and give rise to the requirement to disclose the arrangement and related conflicts of interest in a separate solicitor disclosure statement, there is no added customer protection afforded by repeating the disclosure in the Brochure. Accordingly, the Firms seek clarification that arrangements subject to the Solicitation Rule do not trigger Item 10.D.

Part 2A: Item 12 - Brokerage Practices
Requirement: An adviser must describe its brokerage practices including whether, and under what conditions, it "bunches" trades.
Comment: The Commission states in the Release that "[c]lients engaging an adviser can benefit when the adviser negotiates lower commissions or 'bunches' trades to obtain volume discounts on execution costs." Whether bunched or individual trades result in lower transaction costs for a given client will depend on the facts and circumstances of the particular trade. Small advisers often do not have the opportunity to earn lower commissions by bunching client trades because the trades in aggregate are not of sufficient size to be rewarded a discount. There may be a number of reasons why large advisers do not bunch trades. For instance, some clients may have placed investment restrictions on their account or implemented a directed brokerage arrangement. In addition, individualized trading strategies may be beneficial for certain clients, depending on their investment objectives and risk profiles, among other things. Thus, it may be beneficial in a variety of situations for an adviser not to bunch client trades. The Firms believe that requiring advisers to describe the costs to clients of not bunching trades could therefore confuse and possibly mislead clients. Accordingly, Item 12.B. should be modified. If an adviser's bunching practices or failure to bunch would have a material impact on clients, then it should be disclosed as part of the adviser's description of its brokerage practices. By modifying Item 12.B, the Commission would avoid the situation of forcing disclosure about a particular brokerage practice that may not be relevant. Avoiding a "one size fits all" approach to disclosure on brokerage practices will help advisers ensure that their disclosure is tailored to their practices and to their clients (and does not contain irrelevant language), which will encourage clients to read their Brochures.

Part 2A: Item 13 - Review of Accounts
Requirement: An adviser must disclose: (a) whether, and how often, it reviews clients' accounts or financial plans, and describe the title of the employees who conduct the reviews; (b) the factors that trigger a client account review if the adviser reviews accounts on other than a periodic basis; and (c) the content of reports sent to clients and the frequency they are provided to clients.
Comment: In the Firms' view, the disclosure required by these items would provide little useful information to clients and prospective clients. Its elimination would advance the goal of having a shorter, more user-friendly disclosure document.

Part 2A: Item 13 - Review of Accounts

With respect to (a), it is not clear why the title of the person who reviews client accounts would be of great interest to clients. Furthermore, advisory programs are structured in numerous ways within large investment advisers and there are often different review structures for different programs. For example, the immediate supervisor of a supervised person may perform the review for one type of program. In another type of program, a committee of employees with various titles may perform the same type of review. The Firms believe that the disclosures that would be required by Item 13.A. are unnecessary and would not provide meaningful information to clients.

With respect to (b), investment advisers review client accounts on a non-periodic basis for a host of business, compliance and other reasons. There is a laundry list of factors that potentially might require an investment adviser to review a client account. The Firms see little value to clients in disclosing this laundry list. Given the nature of the disclosure item, many advisers are likely to respond to the proposed item by drafting boilerplate language that will not be helpful to clients.

With respect to (c), a client who receives a report will clearly be familiar with its content and how frequently he or she receives the report. Thus, existing clients will not benefit from this disclosure item. Prospective clients would likely not consider this information as being significant to the decision of whether to retain an investment adviser.

Part 2A: Item 14 - Payment for Client Referrals

Requirement: An adviser must describe any cash or other payment that it or a related person makes for client referrals and whether it receives any economic benefit, including sales awards or prizes, from a non-client "for providing investment advice or other advisory services to your clients."

Comment: The Firms believe the Commission should clarify that the proposed item would not require disclosure of compensation received from an issuer or broker-dealer in connection with the sale of securities by a Firm that is a dual registrant and is acting in its capacity as a broker-dealer (or by an IAR of a Firm that is also registered as an RR of a broker-dealer and is acting in its capacity as an RR) even if such compensation is related in some fashion to investment advice (*e.g.*, the Firm receives securities commissions from an issuer in connection with the sale of securities that occurs when an investment advisory client decides to implement a financial plan by, among other things, buying

Part 2A: Item 14 - Payment for Client Referrals

securities from a Firm after it has terminated the advisory relationship, "switched hats," and begun to act solely as a broker-dealer).[26]
Similarly, the Firms request that the Commission clarify that the proposed item would not require disclosure of compensation received in connection with the sale of insurance products by a Firm that is also licensed as, and acts in its capacity as, an insurance agency (or by an IAR of a Firm that is also licensed as, and acts in its capacity as, an insurance agent) even if such compensation is related in some fashion to investment advice (*e.g.*, the Firm receives insurance commissions from an insurance company in connection with the sale of insurance that occurs when an investment advisory client decides to implement a financial plan by, among other things, buying an insurance product from a Firm after it has terminated the advisory relationship, "switched hats," and begun to act solely as an insurance agency).

The note to Item 14 references the Solicitation Rule, which mandates a separate disclosure scheme for third party solicitation arrangements. The Solicitation Rule regulates the payment of cash by a Commission-registered adviser to persons who refer clients to the adviser. Among the requirements of this rule, an adviser engaging in third party referral arrangements must provide referred clients a separate written disclosure document that discloses: the name of the solicitor; the name of the adviser; the nature of the relationship between the solicitor and the adviser; that the solicitor will be compensated by the investment adviser for the referral; the terms of such compensation arrangement including a description of the fees paid or to be paid to the solicitor; and the additional amount, if any, that will be added to the advisory fee as a result of the solicitation arrangement. Proposed Item 14.B. would similarly require disclosure of "the arrangement and the compensation."

The Release does not explain why the Commission believes that having two separate disclosure documents discussing solicitation arrangements and the compensation paid with respect to such arrangements is necessary, appropriate or beneficial. The Proposal would result in a significant amount of duplication between the Brochure and the separate solicitation disclosure statement required under the Solicitation Rule. The Firms submit that no benefit will emanate from requiring advisers to hand out two disclosure

[26] The instructions to Item 14 state "[i]f someone who is not a *client* provides an economic benefit to you for providing investment advice or other advisory services to your *clients*, generally describe the arrangement. For purposes of this Item, economic benefits include any sales awards or other prizes." The word "sales" in the last sentence is problematic. Whereas the first sentence is limited to economic benefits that are received "for providing investment advice or other advisory services," the latter sentence more broadly discusses "sales" awards or other prizes. One might read the word "sales" to refer to sales of securities (or insurance products), an interpretation that makes little sense in Form ADV since sales of securities would trigger broker-dealer registration and are regulated under the Exchange Act and FINRA rules (and sales of insurance trigger insurance agent licensing laws and are regulated under state insurance law). The Firms request that the term "sales" be stricken from the instructions to Item 14. The Form ADV is not the proper venue to disclose details of broker-dealer or insurance compensation.

Part 2A: Item 14 - Payment for Client Referrals
documents covering solicitation arrangements and therefore request that Item 14.B. be deleted.[27]

Part 2A: Item 16 - Investment Discretion
Requirement: Advisers with discretionary authority over client accounts must disclose such arrangements and any limitations clients may place on this authority.
Comment: The Firms recommend the deletion of this item. As a matter of course, advisers that have investment discretion over client assets would disclose this fact when describing their investment program and strategies pursuant to Item 8. If the Commission deems it necessary to disclose whether an adviser has discretion, it is not necessary for advisers to further describe the procedures they follow before assuming such authority. Advisers typically obtain discretionary authority through executed client agreements or separate legal agreements such as a power of attorney. Such procedures are set forth in advisers' account opening documentation and are generally ministerial in nature. The Firms do not see any benefit to clients from describing these procedures in the Brochure. A better approach would be to give advisers the flexibility of making this disclosure in the most appropriate document which could be the account opening documents, Brochure or some other document.

Part 2A: Item 19 – Index
Requirement: An adviser must create an index that shows where in the Brochure it responded to required disclosure items or did not respond.
Comment: The Firms recommend the elimination of the index requirement. Advisers will have to engage in a time-consuming exercise to describe the particular places in the Brochure where it complied with the disclosure requirements of particular items. The Index might inadvertently cause advisers to structure their brochure in the same order that appears in Part 2B, possibly resulting in important information being placed at the end of the Brochure.

[27] It would not be unduly duplicative for the Brochure to cross reference the Solicitation Rule and the separate written disclosure statement that is required thereunder for third party referrals.

Global Comment
Requirement: Part 2A has 19 items of disclosure that, if applicable, must be addressed.
Comment: The requirement that 19 items of disclosure be addressed in a narrative document will potentially result in a voluminous Brochure that is not user-friendly to clients and not helpful to their evaluation of advisers. The Proposal calls for increasing the amount of information in the disclosure document, which the Firms believe is the wrong direction. The RAND Study noted that investment advisers and broker-dealers found "that many investors do not take the necessary time and effort to fully read and understand disclosures."[28] Furthermore, many of the requirements have the potential to undermine the Commission's goal of creating plain English disclosure documents. Having a cluttered Brochure runs counter to the goal of providing clients with a "reader-friendly" document that provides the public with the information necessary to decide whether to hire an adviser.

Global Comment
Requirement: Advisers must respond to many duplicate items in Parts 1A and 2A.
Comment: The Commission should eliminate the duplication in Part 1 of Form ADV and in the proposed Brochure. When the Commission proposed changes to the Form ADV in 2000, only the changes proposed in Part I were adopted - conforming changes to Part II were not. As a result, there is currently a fair amount of duplication in Parts 1A and Part II of Form ADV. The Proposal would continue this duplication since it would reiterate questions that are currently asked in Part IA.

III. CONCLUSION

The Firms very much appreciate the opportunity to comment on this proposal. If you have any questions regarding this letter or related matters, please contact Clifford Kirsch at (212) 389-5052, Michael Koffler at (202) 383-0106 or Bibb Strench at (202) 383-0509. We would also be very happy to meet with you to discuss these comments and provide you with any additional background information that you would find useful in connection with your consideration of our comments.

[28] RAND Study, *supra* n.2, at 19.

Respectfully Submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: Clifford E. Kirsch
Michael B. Koffler
Bibb L. Strench

FOR THE CLIENTS LISTED IN THE APPENDIX

cc: The Honorable Christopher Cox, Chairman
The Honorable Paul S. Atkins
The Honorable Kathleen L. Casey
Andrew J. Donohue, Director, Division of Investment Management
Robert E. Plaze, Associate Director, Division of Investment Management

APPENDIX

AXA Advisors, LLC
Eagle Strategies LLC
Great American Financial Resources
Signator Investors, Inc.
MassMutual Financial Group
Metropolitan Life Insurance Company
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Prudential Insurance Company of America
Securian Financial Group
Woodbury Financial Services, Inc.