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June 18, 2008

United States Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Attn: Nancy M. Morris, Secretary

Re: Amendments to Form ADV: Proposed Rule: File No. S7-10-00.

Ladies and Gentlemen:

We submit this letter in response to a request for comment by the Securities and Exchange Commission ("Commission") in proposing amendments (the "Rule Amendments") to Form ADV and to the delivery requirements for the completed Part 2 of Form ADV or the "brochure rule."[1] We appreciate the opportunity to comment on the Rule Amendments as per the Proposing Release. All terms used in this letter which are not specifically defined herein are as defined in the Proposing Release.

These comments have been prepared by members of the Committee on Federal Regulation of Securities and the Committee on State Regulation of Securities (the "Committees"), Section of Business Law of the American Bar Association ("ABA"). The comments expressed in this letter represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committees.

As an initial matter, we commend the Commission for proposing the Rule Amendments that generally would affect registered investment advisers,[2] and for working with state regulators through the North American Securities Administrators

Association in agreeing to a single form to be used by investment advisers registered with the Commission and those registered with the individual states. Uniformity will make the progression from a state investment adviser to a federally registered adviser, and vice versa, a more predictable process with the use of standard definitions and reporting requirements. The Committees also encourage the adoption of a uniform brochure format, because of its potential to provide clients with more useful and better organized information than under the current structure. Therefore, the Committees strongly support the Commission's objective, as stated in the Release, of providing advisory clients and prospective clients with access to meaningful and up-to-date disclosure, as well as to provide for filing of this disclosure with the Commission.[3]

The Proposing Release poses a great number and wide variety of questions, many of which are better addressed by those with more business, economic, or operational expertise than we have. Accordingly, we have limited our comments to those legal issues that we believe are applicable to the Rule Amendments and their implementation. We believe that the following clarifications or modifications will assist the Commission in achieving its goals.

A. Brief History of Adviser Registration and Background of Rule Amendments

Each applicant for federal registration as an investment adviser must file and maintain with the Commission a completed Form ADV through the electronic Investment Advisers Registration Depositary (IARD). Form ADV is also generally used as a template by the states for adviser registration. The Commission, since 1979, has required a registered investment adviser to provide clients and prospective clients with a "brochure" in a "check-the-box" format, which must include at least the information contained in the Part II of Form ADV, including information about itself, its business practices, the fees it charges, any conflicts of interest, disciplinary history, and other important information necessary for prospective and existing clients to make an informed decision about whether to rely on the adviser for advice.[4] In practice, although rule 204-3 has come to be known as the "brochure rule," many advisers simply mail Part II of their Form ADV to clients.

In April 2000, the Commission proposed to require that each registered adviser give clients a brochure that contains much of the same information as contained in the existing Part II brochure but in a narrative, rather than in a "check-the-box" format.[5] In September 2000, the Commission adopted amendments to Part 1A and related rules but deferred adoption of amendments to Part 2 to consider more fully the many comments the Commission received on Part 2.[6] The Rule Amendments take into account the comments made on the earlier proposal and provide all who are currently interested in this matter an opportunity to comment on the re-proposal.[7]

B. Comments

1. *Brochure Delivery Requirement*

We request that the Commission resolve an apparent contradiction between statements in the Release that a satisfactory response to Part 2 of Form ADV will be required for an investment adviser to become (or continue to be) registered under the Advisers Act[8] and that preparation of a brochure will not be required when the adviser's only clients are persons to

whom a brochure need not be delivered.[9] We suggest that the Commission clarify in the instructions to Form ADV and in the adopting release that, when all of an adviser's clients are in the no-delivery category, the adviser may complete Part 2 in full by simply stating that the adviser is not required to prepare or deliver a brochure.

2. *Advisers to Private Funds*

The Release does not discuss a registered adviser's brochure delivery requirements, if any, for its private fund clients. As a result of *Goldstein*,[10] a fund, and not the fund's investors, is considered an investment adviser's client. As a result, we believe that no purpose would be served by requiring the preparation and delivery of a brochure if private funds of which a registered investment adviser is the promoter are the adviser's only clients, including but not limited to funds in which such a registered adviser or one of its affiliates is the general partner of a limited partnership or the managing member of a limited liability company. (Such a private fund adviser could, of course, also advise other clients to which no brochure delivery is required, such as registered investment companies, without being required to prepare a brochure.) The Committees suggest that delivery of a brochure to such a private fund will, in most cases, be the equivalent of the adviser delivering a brochure to itself, and in those rare instances in which that is not the case, it will be because the fund is managed by another highly sophisticated entity (e.g., under subadvisory arrangements). Accordingly, the Committees believe that such an adviser should be exempted from the requirement either to prepare or deliver a Part 2 brochure.

We believe that advisers who would qualify for such an exemption should be identified as "promoters" because master-feeder private fund structures frequently utilize private offshore corporate vehicles either as the master fund, the offshore feeder fund that is taxed as a corporation, or both, but such vehicles are organized for the sole purpose of serving as funds managed by an investment adviser that is the moving force behind their establishment. As a result, confining the requested treatment to private funds with an investment adviser or its affiliates as general partners or managing members would not, as a practical matter, serve the purpose of such an exemption. We suggest that such treatment should extend to advisers of private funds that are exempt from registration as investment companies under sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940, as well as those funds that are exempt under Sections 3(c)(5) and 3(c)(9) of that Act.

3. *Annual Update*

The Release requests comment on the best way to ensure that clients are made aware of important changes to an adviser's brochure from one year to the next.[11] The Commission has proposed a requirement that advisers provide clients with a summary of any material changes to their brochures since the last annual update, as well as a copy of the updated brochures.[12] While the Committees recognize the need for the initial delivery to clients of an adviser's brochure in hard copy, we do not believe that the delivery of updated brochures on an annual basis is likely to be effective.

Rather, we recommend the use of an "access equals delivery" approach to satisfy the annual re-delivery requirement, similar to the model now used to make available most kinds of

prospectuses under the Securities Act of 1933.[13] Under this effective approach, the Commission would permit advisers, after initial delivery of the brochure, to utilize an electronic alternative (paper delivery would still be permitted as the other option) to make available their annually updated brochure on the adviser's website for examination by clients at any time. Advisers would also annually deliver a notice to clients, pointing out the relevant changes to the brochure, if any, and where to access the complete brochure online.

4. *Custodial Fees*

Proposed Item 5(c) would require a description of custodial fees that clients may pay "in connection with" advisory services, apparently on the grounds that the adviser is in some way responsible for charging such fees and for such disclosure. In view of the fact that many advisory clients enter into custodial agreements on their own and, in any event, frequently do so with custodians that are unaffiliated with the clients' investment advisers, we ask that the adopting release provide additional guidance on this Item. We believe that in such circumstances, an adviser's client readily knows the fees that it pays to its custodian, and indeed, that the adviser may not know the amount of the custodial fee. Accordingly, we suggest that the adopting release confine any required custodial fee disclosure to affiliated custodians and/or to circumstances in which the adviser has discretionary authority to hire the custodian.

5. *Adviser's Custody of Client Funds*

The instruction to Item 15A requires disclosure of certain additional risks if an adviser has custody of a client's funds, as defined in amended Advisers Act rule 206(4)-2, and sends account statements to its clients rather than relying on the custodian to send such statements. We believe this additional disclosure requirement is unnecessary in view of the structure of rule 206(4)-2.

If a registered adviser has custody, the rule requires that the adviser place client assets in a segregated account with a qualified custodian and that the adviser notify its client of the identity of the custodian and the manner in which the client's assets are held. In addition, the rule requires either that the custodian send defined account information on a quarterly basis or that the adviser send the information on the same schedule, with the additional safeguard that, if the adviser sends such statements, it must arrange for an annual surprise examination by an independent public accountant. In turn, the examining accountant is required to file a certificate that it has performed such an examination with the Commission and to inform the Commission within one business day if the accountant finds any material discrepancies in its examination.

Thus, when it amended rule 206(4)-2, the Commission decided that the safeguard of a surprise audit examination is adequate for the protection of clients when the adviser, as opposed to the custodian, provides the required client reports.[14] The proposed instruction, however, apparently assumes that rule 206(4)-2 does not go far enough in protecting client assets under such circumstances and requires further disclosure of the presumed risks that are involved.[15] The Committees respectfully request the deletion of this proposed disclosure.

6. *Disciplinary Information*

Proposed Item 9 in large part follows, but clarifies, the current requirements of rule 206(4)-4 for the disclosure of disciplinary information. The proposed Item 9 instructions make it clearer than the current rule that the list of disciplinary events that must be considered is not exclusive and that the 10-year cut-off is not a safe harbor. Any legal or disciplinary event that is material must be disclosed. Given this requirement, the distinction the instructions appear to draw between items that are within 10 years but not "material" and items that are outside the 10-year period and not "currently material" is not clear to us. Is there a difference between "material" and "currently material"? The difference in language at least raises the possibilities that some events are so serious that they must be disclosed indefinitely, regardless of the passage of time and the non-occurrence of intervening events, and that somehow a different standard might apply to events depending on when they occurred in relationship to the 10-year period.

We believe that the appropriate test is whether an event is material to a client or prospective client's evaluation of the adviser, whether or not that event is on the list and whether or not it occurred within the prior 10 years. If the Commission has a view as to which items should be considered "conclusively material" for an unlimited period of time, it would be helpful to have that specified either in the form or the adopting release. If, on the other hand, the underlying concept is that events that would normally cease to be material by the time 10 years have passed may remain material because intervening events arguably indicate a pattern or practice of legal or disciplinary violations, we believe the Commission should make it clear that those are the kinds of considerations that would be expected to give rise to the disclosure of events that occurred more than 10 year previously. In any case, we would ask the Commission to consider deleting the term "currently" in the final Item 9 instructions.

Separately, the "date" for calculating the 10-year disclosure period would be from the date that a final order, judgment, or decree was entered, or the date that any rights of appeal from preliminary orders, judgments or decrees have lapsed. However, disclosure can be required of the institution of proceedings that have not culminated in a final order, judgment or decree. While the Committees believe that it is unlikely that circumstances may arise in which a 10-year period passes since the institution of a proceeding that must be disclosed without the entry of a final order, judgment or decree, we believe that clarification should be provided that, if such a case arose, the 10-year period would be deemed to have commenced at the inception of the proceedings.

7. *Rule 206(4)-4*

The Release proposes that, if the Part 2, Item 9 disclosure requirements are adopted as proposed, the Commission would rescind Advisers Act rule 206(4)-4, on the grounds that that the rule will no longer be necessary. While the Committees commend the Commission for its intent to eliminate duplicative disclosures, the Committees believe that rule 206(4)-4 should be amended to continue to require only the delivery of disciplinary information to clients for whom the brochure delivery requirements do not apply.

C. Conclusion

The Committees respectfully request that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Respectfully Submitted,

Chair, Committee on Federal Regulation of Securities
Keith F. Higgins

Respectfully Submitted,

Chair, Committee on State Regulation of Securities
Ellen Lieberman

Drafting Committee:
Jay G. Baris
Christine A Bruenn
Edwin C. Laurenson

cc: The Honorable Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Kathleen L. Casey
Andrew Donohue, Director, Division of Investment Management

Endnotes

[1] Proposing Release Nos. IA-2711; 34-57419 (March 3, 2008) ("Proposing Release"). The Commission is re-proposing amendments to Part 2 of Form ADV, and related rules under the Investment Advisers Act, to require registered investment advisers to deliver to clients and prospective clients a brochure written in plain English. Advisers would file their brochures electronically, and the Commission would make them available to the public through our Web site. The Commission also is proposing to withdraw, as duplicative, the Advisers Act rule requiring advisers to disclose certain disciplinary and financial information (the "Rule Amendments").
[2] Footnote 8 of the Proposing Release.
[3] Proposing Release at p. 105.
[4] Footnote 3 of the Proposing Release, *citing Investment Adviser Requirements Concerning Disclosure, Recordkeeping, Applications for Registration and Annual Filings*, Investment Advisers Act Release No. 664 (Jan. 30, 1979) (adopting Advisers Act rule 204-3 requiring brochure delivery to advisory clients and prospective clients).
[5] Footnote 5 of the Proposing Release, *citing Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV*, Investment Advisers Act Release No. 1862 (Apr. 5, 2000) at Section II.D.2.
[6] Footnote 6 of the Proposing Release, *citing Electronic Filing by Investment Advisers; Amendments to Form ADV*, Investment Advisers Act Release No. 1897 (Sept. 12, 2000).
[7] Proposing Release at p. 6.
[8] Footnote 4 of the Proposing Release and at p. 4.
[9] Footnote 139 of the Proposing Release and at p. 48.
[10] *Goldstein v. SEC*, 451 F.3d 873, 877 (D.C. Cir. 2006) ("*Goldstein*").
[11] Proposing Release at p. 12.
[12] Footnote 29 of the Proposing Release and at p. 12.
[13] *E.g., Securities Offering Reform*, IC-26993 (July 19, 2005).
[14] *See Adoption of Reg. §275.206(4)-2 under Investment Advisers Act*, Investment Advisers Act Release No. 123 (Feb. 27, 1962).
[15] *See* Proposing Release at p. 40.