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March 8, 2008

Nancy Morris, Secretary
Securities Exchange Commission
100 F Street NW
Washington, DC 20549-1090

Subject: File Number S7-10-00 | Proposed Amendments to Form ADV

Dear Ms. Morris and SEC:

While reading the document Release Number IA-2711 titled, Amendments to Form ADV which is published on the SEC website I noticed a statement which causes me great concern.

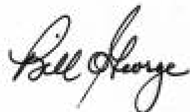
In, Item 12 Brokerage Practices at the bottom of page 33 and the top of page 34, it states that the SEC has ". . . omitted the requirement that advisors disclose in their brochures whether they negotiate commissions. Commenters informed us that few advisors negotiate commission rates in the 'literal' sense proposed in the Proposing Release."

In the context of this statement I have three questions: Can an advisor which claims that it does not negotiate commission rates "in the literal sense proposed in the Proposing Release" claim that it has fulfilled its fiduciary obligation to its clients? And, can an advisor claiming that it does not negotiate commission rates 'in a literal sense' claim that they are in compliance with the Federal Trade Commission mandate requiring "fully-negotiated commission rates" implemented on May 1, 1975? And can such an advisor claim the protection of the safe harbor of Section 28(e) which provides that an advisor shall not be deemed to have breached its fiduciary duty if it uses commissions "paid-up" above its fully-negotiated execution only commission rate , to purchase research which qualifies for the safe harbor of Section 28(e)?

Why do I ask the above questions? During the early seventies I was a retail registered representative (broker) so I remember the securities industry's trepidation about fully negotiated commissions and I remember the full-service brokerage industry's attempts to restructure and separately price non-execution related services as we approached May 1, 1975. Then, in the early 1980's, I became an institutional third-party brokerage services and independent research salesperson (broker). The numerous regulatory investigations and audits specifically targeting fully disclosed third-party brokerage firms caused me to become even more sensitive to fiduciary duty and to the regulatory history and details of Section 28(e) compliance.

For those who still wonder about my reasons for asking the (above) questions I am including a bit more historic background on fully-negotiated brokerage commissions and Section 28(e) – as pages two and three of this comment letter.

Thank you,



Bill George

More Information on Fully-Negotiated Commissions and Section 28(e)

Leading up to May Day 1975 it was very clearly understood that the Federal Trade Commission and the U.S. Congress mandated that, as of May 1, 1975 *all* U.S. brokerage commissions were to be "fully negotiated".

For several months prior to May 1, 1975 the brokerage industry and the mutual fund and institutional advisory industry lobbied Congress hoping to receive some form of exception to "fully-negotiated" execution only commissions so that brokers and advisors could continue to exchange non-execution related services for institutional clients' brokerage commissions.

Several weeks after May 1, 1975 the U.S. Congress yielded to the lobbying efforts of the securities industry and passed an amendment to the Securities Exchange Act of 1934. This amendment to the Securities Exchange Act of 1934 is Section 28(e). Section 28(e) provides a regulatory safe harbor for advisors to "pay-up" from their "fully-negotiated execution only commission rate" and in exchange for the client commissions "paid-up" receive certain non-execution related (qualifying) research services.

In spite of the mandate to fully-negotiate brokerage commissions the institutional advisory community and full-service brokers continued to operate on the basis of a flat cents-per-share commission rate without any identification of the services exchanged for client commissions "paid-up" above the costs of execution. This has led some observers to wonder how regulators have actually enforced Section 28(e) in undisclosed bundled institutional full-service brokerage arrangements.

In fact, even some regulators have openly questioned if this tradition of bundled undisclosed brokerage commissions has provided opportunities for advisors to use institutional clients' brokerage commissions to pay for favors and 'services' that don't accrue to the direct benefit of the institutional clients' accounts. A good example of a highly placed regulator openly questioning such industry practices can be seen in Arthur Levitt's November 9, 2000 speech* at the Securities Industry Association's 60th Annual Meeting in Boca Raton, Florida. The then Chairman of the SEC said:

"'Sticky' Brokerage Commissions

Among the most significant costs of investing today are brokerage commissions. The good news for investors is that retail commissions have dropped to only a fraction of what they were just a few years ago. Faster electronic engines now match buyers and sellers virtually instantaneously. Dramatic increases in bandwidth make the transmission of enormous amounts of data possible. Some mutual fund managers now obtain immediate executions on electronic markets for less than a penny a share. According to data from one fund, such costs were over twice that only four years ago.

* See, Speech by Chairman: Remarks Before the 2000 Annual Meeting, Securities Industry Association by Chairman Arthur Levitt U.S. Securities Exchange Commission Boca Raton, FL - November 9, 2000 at: http://www.sec.gov/news/speech/spch420.htm

But some investors might be stunned to know that "full-service" commissions paid by mutual funds to traditional brokers to fill their orders have remained steady at five to six cents a share for nearly a decade. These facts point to an unavoidable question: Are portfolio managers bringing to bear the pressure they should on brokerage rates today?

Now, I am aware that Congress has granted statutory protection to "soft dollar" arrangements – that is, where fund managers use brokers who charge relatively high commissions but in return provide research and other services for the fund. I also know there is a lot more to execution quality than commissions; the market impact of a poorly executed trade will almost certainly dwarf the commissions charged by most firms.

Yet, when I think about today's soft dollar arrangements and their impact for investors, I keep coming back to the notion that fund advisers are paying their expenses with other people's money. Let's face it – extraordinary increases in volume over the last few years have generated revenues that are just as impressive for most brokers. So why haven't these increases produced more competition in full-service commission rates? Why hasn't the emergence of electronic markets – which offer execution five times cheaper – driven these commissions lower?

Part of the reason, I fear, is a perception among portfolio managers and independent directors that six cents is safe – or rather, fund managers can pay up to six cent commissions and not raise any red flags. But what's "safe" for these market professionals may not be what's best for investors. Managers have a duty to seek best execution and directors have a duty to inquire about the process.

To this point, a recent Commission examination of independent director oversight of soft dollar arrangements has turned up findings that are troublesome. Some directors, it appears, pay little or no meaningful attention to the brokerage costs of mutual funds. Directors must ask the tough questions of fund advisors. Our study showed that independent directors need to put more pressure on managers to drive hard-bargains with their brokers."

In this speech Chairman Levitt continued by identifying some of the favors that are sometimes purchased, inappropriately, by advisors using institutional clients' brokerage commissions.

It should be noted that reliable estimates of commissions "paid-up" in excess of the costs of execution put the current cost to institutional investors at above ten billion dollars per year.