May 9, 2008

VIA EMAIL

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Comments on Release Nos. IA-2711; 34-57419; File No. S7-10-00

Dear Secretary Morris:

I appreciate this opportunity to submit comments on the SEC's proposed Amendments to Form ADV (the "Proposal") described in Release Nos. IA-2711; 34-57419; File No. S7-10-00 (the "Proposing Release"). I offer my comments on the Proposal both from my personal perspective as an investor who has sought the services of registered investment advisers, as well as from my professional perspective as an investment management attorney with over 20 years of experience assisting advisers in meeting SEC regulatory requirements, including responding to Form ADV. As such, my comments reflect my experience of both having to draft, and having to read, numerous Form ADVs. Please note, however, that the comments I offer are my own and do not necessarily reflect the views of any of my clients.

In general, I support the idea of requiring advisers to prepare a disclosure brochure that is more likely to be read than the current Part II, and more likely to convey effectively key information that clients and prospective clients should know about their adviser and the advisory relationship. However, I have a number of comments about re-proposed Part 2, which are outlined below in the first part of my letter. In addition, I have comments on Part 1 of Form ADV and on Form ADV generally, which are outlined in the second part of my letter. Those stem from the fact that, after being deferred for some 8 years, the Proposing Release did not go as far as I had expected it to toward harmonizing Parts 1 and 2 and realizing the full potential of Form ADV as a disclosure document in an electronic age. In my view, achieving those goals at this point will likely require tearing up Form ADV from its roots and starting from scratch.

As a result, some of my comments may be too far-reaching to implement without yet another round of notice and comment. However, I am not urging you to re-start the process again at this stage, given that the proposal to amend Part II has been deferred for so long now. Rather, I would urge you to finalize the pending Proposal as soon as possible, with as many fixes and changes as can be made as part of the current rulemaking, and with the intention of undertaking a more complete overhaul of Form ADV soon, hopefully before another 8 years goes by.

With that in mind, I offer the following comments and would request, to the extent they are not or cannot be implemented as part of the currently pending Proposal, that they be revisited again whenever a broader revamping of Form ADV is back under consideration.

COMMENTS ON PART 2

1) Adopt An "Access Equals Delivery" Approach. I strongly urge the Commission to adopt an "access equals delivery" approach in the Proposal, allowing advisers to satisfy their brochure delivery requirements by posting their firm brochure on IARD. A lot has changed in the 8 years since amendments to Part 2 were last considered, including the continued advancement of technology and the Commission's adoption of an "access equals delivery" approach (or variations of it) for disclosure delivery in a number of other contexts.[1] This Proposal is another perfect

[1] See Securities Offering Reform, Release Nos. 33-8591; 34-52056; IC-26993; File No. S7-38-04 (July 19, 2005) at http://www.sec.gov/rules/final/33-8591.pdf for an "access equals delivery" approach to prospectus delivery. See Internet

opportunity for that approach. Advisers too should be allowed to satisfy their brochure delivery obligations by posting their brochures on the Internet. Indeed, advisers should be permitted to rely on their IARD filings to suffice for that purpose, given the widespread use of the Internet today and two other compelling factors:

- First, IARD[2] is a simple, user-friendly Web interface that even less computer-oriented clients should find manageable to look up an adviser's brochure.[3]

- Second, typical advisory clients are more sophisticated than average investors -- because they have the wealth and/or understanding of financial matters that make it worthwhile for them to seek advisory services – and are therefore more likely to be capable of protecting themselves by seeking out information from the IARD site.

For these reasons, this Proposal is particularly well-suited to an "access equals delivery" model, as much if not more so than in the other contexts where that model (or a variation on it) has already been adopted.

Of course, using the Internet to deliver adviser brochures has several advantages. It avoids the burden, annoyance and confusion for clients that accompany document clutter, particularly for a document like Form ADV Part 2, which clients have clearly demonstrated they do not want or need by rarely requesting a copy when it is offered to them each year. It also allows advisers a more streamlined and economical way to satisfy their regulatory obligations. Last, but not least, it is a more environmentally sound alternative that will reduce wasted paper.

Following is one concrete example of how "access equals delivery" might work for advisers:

Ø At the inception of an advisory relationship, advisers would be required to deliver to prospective clients in writing (on paper or electronically) a legend similar to the legend proposed for the mutual fund Summary Prospectus.[4] The legend would alert clients to the availability of the firm's brochure on IARD, apprise clients of the Web address (URL) for the IARD adviser look-up home page, impress on clients the important nature of the information in the brochure and urge them to read it. Here is a possible example:

> "Before you enter into an advisory relationship with us, you should read our firm brochure, which contains other important information about our investment strategies, fees, management and conflicts of interest we may face while serving you. You can find our brochure and other information about us in our Form ADV, available online on the

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Availability of Proxy Materials, Release Nos. 34-55146; IC-27671; File No. S7-10-05 (January 22, 2007) at http://www.sec.gov/rules/final/2007/34-55146.pdf for a similar, "notice and access" model for proxies. See also Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Investment Companies, Release Nos. 33-8861; IC-28064; File No. S7-28-07 at http://www.sec.gov/rules/proposed/2007/33-8861.pdf proposing a variation on the "access equals delivery" model for delivery of mutual fund prospectuses.

[2] By IARD, I mean the Investment Adviser Public Disclosure website at http://www.adviserinfo.sec.gov/IAPD/Content/IapdMain/iapd_SiteMap.aspx, the publicly accessible adviser look-up component of the Investment Adviser Registration Depository system.

[3] In this regard, IARD contrasts with EDGAR, where it is still very difficult for anyone – let alone the average investor – to find specific fund documents. For that reason, I supported the mutual fund Summary Prospectus proposal to the extent it required funds to post their disclosure documents on their own website (or another non-EDGAR website) in order to satisfy their prospectus delivery obligations. Here, however, an adviser's filings via IARD should suffice. Of course, advisers should be permitted to post their brochures on their own websites too should they choose to do so.

[4] I also considered whether advisers should be required or permitted to deliver to clients a "summary brochure" instead of the full brochure, parallel in concept to the Summary Prospectus for mutual funds. While I would not be adverse to that idea, it did not seem that most of the disclosures on Part 2 of Form ADV are as susceptible to an itemized tabular and summary presentation as are the disclosures called for in the Summary Prospectus. Moreover, it seems that a summary brochure should not be necessary at all, given the ready accessibility of the full brochure via IARD and the greater sophistication of the typical advisory client.

Investment Adviser Public Disclosure website at http://www.adviserinfo.sec.gov. You can also get our brochure at no cost by calling us at [toll-free phone number]."[5]

- Ø Clients would be required to specifically acknowledge receipt of this legend information by their signature, initials or other appropriate means, evidencing that they indeed were made aware of the availability of the brochure. This would satisfy the adviser's obligation to deliver a brochure at the inception of the relationship.

- Ø Annually thereafter, advisers would be required to deliver to continuing clients (on paper or electronically) a summary of any material changes to their brochures made since the last annual update, as currently envisioned under the Proposal. This would be required to be accompanied by information apprising the client of how they can go about getting the amended brochure via the IARD website if they so choose. This would satisfy the adviser's obligation to deliver a brochure annually.

- Ø Advisers would be permitted to use a similar approach to satisfy any interim update requirements, such as when there is a material change to or addition of a disciplinary event. In that case, advisers would be required to simply deliver to clients (on paper or electronically) a summary (or "sticker") of the changed or new information and explain to them how to get the full amended brochure via IARD.

- Ø Of course, advisers could choose to satisfy their brochure delivery obligations by directly delivering the full brochure to clients (on paper or electronically) instead of using the "access equals delivery" approach if they prefer.

- Ø Clients would also be permitted to "opt out" of electronic delivery via IARD and have paper copies of the full brochure furnished to them if they prefer.

A variation on this approach would be requiring advisers to directly deliver the brochure (on paper or electronically) at the inception of the advisory relationship, but then allowing advisers to satisfy the annual and any interim delivery requirement by delivering the summary of changes only, accompanied by information on how clients can access the full amended brochure on IARD. This would be somewhat less efficient but would still afford the advantages of "access equals delivery" with respect to a significant number of deliveries.

Hand-in-hand with authorizing an "access equals delivery" approach,[6] I would urge the Commission to take whatever steps are necessary to ensure advisers using that approach in accordance with your rules are adequately protected under the anti-fraud provisions of the Advisers Act and other securities laws. In other words, the Commission should take steps to ensure that access also equals "conveyance" or "disclosure" for anti-fraud purposes.[7] To me, it is just logical that steps sufficient for delivery purposes should also be sufficient for anti-fraud purposes, since presumably the brochure is required to be delivered so that the information contained in the brochure will be disclosed.[8]

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[5] See my comments below regarding incorporation by reference.

[6] A similar "access equals delivery" approach could be used for brochure supplements too, so long as they are posted on an Internet website, perhaps under conditions similar to those proposed for mutual fund Summary Prospectuses.

[7] What I mean by this is taking the steps necessary to ensure that advisers will not be subject to anti-fraud claims alleging material omissions in required disclosures just because disclosure appeared in a brochure filed on IARD that was not directly delivered to the client. I outlined some concrete steps the Commission should take for this purpose in my February 26, 2008 comment letter to the Commission on the mutual fund Summary Prospectus proposal.

[8] In my view, advisers should be afforded this protection whether or not they "incorporate by reference" the IARD-filed brochure into any materials directly delivered to the client, so long as they meet the legend requirement and other conditions spelled out in applicable rules. Indeed, having to use the magic words "incorporated by reference" to get this anti-fraud protection seems superfluous and at odds with the spirit of the Plain English requirement. However, given the history of that phrase under the securities laws and the legal uncertainty surrounding these issues, you should consider permitting "incorporation by reference" in this context as well.

In short, I was perplexed that the Commission did not propose an "access equals delivery" approach for adviser brochures after it had made so much progress adopting a similar approach in other contexts. Indeed, rather than pushing advisers forward in this respect, it seems that the Proposal pushes advisers backward, requiring numerous deliveries that the Commission has never required before without offering the option of using readily available technology to effect delivery. Certainly, advisers may be able to ease some of the burden of these new requirements by delivering disclosures electronically rather than on paper, assuming they can adequately overcome the attendant E-SIGN issues (see my next comment). But there should be no need to make any direct deliveries of documents readily accessible on IARD, and I would urge the Commission to revise the Proposal to reflect that.

2) Address E-SIGN. Under prior Commission guidance, advisers must typically have affirmative consent from clients before delivering to them legally required documents via electronic means.[9] The Commission's prior guidance on when and how advisers must go about obtaining and documenting that consent was impacted by the Electronic Signatures in Global and National Commerce (E-SIGN) Act enacted by Congress in 2000, which contains its own, different requirements for obtaining consent in certain circumstances. The Commission said it would address at a later time how E-SIGN may have impacted its previous guidance,[10] but to my knowledge has never addressed this issue again,[11] leaving it unclear how much of the Commission's earlier guidance on consent is still intact and which standards should be followed.

I urge the Commission to address E-SIGN again now because of the importance and widespread use of electronic communications in the industry today, which will likely only increase as advisers attempt to satisfy all their new delivery obligations under the Proposal. Not only would it be beneficial if the Commission clarified the interplay of its earlier guidance and E-SIGN, but if "access equals delivery" is adopted for adviser brochures, the Commission should consider whether it also needs to adopt a rule -- similar to Rule 160 under the 1933 Act – to exempt the adviser's brochure filed on IARD from the consent provision in Section 101(c)(1) of E-SIGN.[12] In that context, the question would be this: If an adviser is required by law to deliver clients a written brochure, must the adviser obtain client consent under E-SIGN before an electronic brochure filed on IARD can satisfy that delivery requirement?[13]

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[9] See, among others, Use Of Electronic Media For Delivery Purposes, Release No. 33-7233; 34-36345; IC-21399 (October 6, 1995) at http://www.sec.gov/rules/interp/33-7233.txt, 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, Release No. 33-7288; 34-37182; IC-21945; IA-1562; (May 9, 1996) at http://www.sec.gov/rules/interp/33-7288.txt and Use of Electronic Media, Release Nos. 33-7856, 34-42728, IC-24426 (April 28, 2000) at http://www.sec.gov/rules/interp/34-42728.htm.

[10] See text surrounding footnote 52 in Release Nos. 33-7912, 34-43487, IC-24715 (October 27, 2000) at http://www.sec.gov/rules/final/33-7912.htm.

[11] The Commission's 2001 releases addressing E-SIGN in the context of electronic records storage does not address the issues raised here with regard to delivery and consent. See, e.g., Electronic Recordkeeping by Investment Companies and Investment Advisers, Release Nos. IC-24991 and IA-1945; File No. S7-06-01 (May 24, 2001) at http://www.sec.gov/rules/final/ic-24991.htm.

[12] Section 104(d)(1) of E-SIGN authorizes such exemptive rules.

[13] A similar question comes up under other contexts in which the Commission has adopted an "access equals delivery" approach or a variation of it. However, whether E-SIGN would apply at all in those other contexts is questionable since it is not clear that the documents involved there are legally required to be delivered "in writing" as that phrase is used in E-SIGN, triggering the E-SIGN consent requirements. For a discussion of this issue in a similar context, see Letter of ICI to the FTC (dated March 16, 2001) at http://www.ici.org/statements/cmltr/01_ftc_esign_study_com.html. In contrast, adviser brochures are expressly required by SEC rules to be in writing. See Rule 204-3(a) under the Advisers Act.

As you know, E-SIGN's "reasonable demonstration" consent requirement[14] goes significantly beyond the consent requirements contemplated by the Commission's earlier guidance. This leaves advisers in a quandary about how to reconcile the two. Moreover, if IARD access is adopted as the equivalent of delivery for adviser brochures, it is unclear as a practical matter how an adviser could obtain consent -- or confirmation of consent -- from clients in a way that reasonably demonstrates their ability to access the adviser's brochure available on someone else's website (i.e., IARD). In any event, the Commission's own consent procedures are sufficient for adviser clients to be protected adequately and, in light of that, the more extensive E-SIGN consent procedures constitute an unwarranted, substantial burden on electronic commerce. Accordingly, I would urge the Commission to clarify the applicability of E-SIGN's consent requirement generally to Commission-required deliveries and, more specifically, to adviser brochure delivery, in such a way as to favor the Commission's prior guidance over the later-adopted E-SIGN.[15] Lastly, if E-SIGN's consent requirement is determined to apply to any "access equals delivery" approach adopted for adviser brochures, I would urge the Commission to also adopt a rule exempting brochures from that requirement.

3) Avoid Redundancies and Inconsistencies Between Parts 1 and 2. In my experience representing adviser clients, the redundancies and inconsistencies between Parts 1 and 2 of Form ADV have been a perpetual source of frustration, confusion and unnecessary burden for advisers. Even in the re-proposed Part 2, there are still areas of overlap with Part 1 and areas where seemingly inexplicable differences exist between the two parts. These will continue to plague advisers and create unwarranted exposure to regulatory liability for advisers who are simply attempting to meet their filing obligations in good faith.[16]

In light of this, I would urge you generally to avoid areas of overlapping disclosure everywhere possible in Parts 1 and 2[17] and to avoid inconsistencies in the applicable definitions, methodologies and wording used in the various parts of the form. Certainly, Parts 1 and 2 have different purposes, Part 1 being more oriented toward information that is useful to the Staff in the regulatory process and Part 2 being more of a disclosure brochure for clients.[18] However, that

[14] Section 101(c)(1)(C)(ii) of E-SIGN specifically provides that a client's consent is valid only if the client "consents electronically or confirms his or her consent electronically, in a manner that reasonably demonstrates that the [client] can access information in the electronic form that will be used to provide the information that is the subject of the consent."

[15] If the Commission takes the position that its earlier interpretive releases on the use of electronic media – and its post-E-SIGN references to those releases confirming they are still valid – constitute permitted agency "guidance" interpreting E-SIGN with the result that satisfying the Commission's consent requirements will also satisfy (or in some other fashion override) the E-SIGN consent requirements, then I would urge you to clarify that publicly so that this now 8-year-old issue is put to rest. Otherwise, I question whether the Proposing Release should reference, as it does in several places, the Commission's 2000 release on electronic media without also referencing E-SIGN since that reference could lead advisers to believe that the consent procedures outlined in the 2000 release are adequate when, in fact, it is currently not clear they would be adequate if E-SIGN is determined to apply.

[16] I have heard the SEC Staff remark at public seminars about how inconsistencies between an adviser's Part 1 and Part II are a deficiency that the Staff looks for and often finds upon inspection. I cannot help but think what a profound waste of tax dollars it is for the Staff to have to spend any time looking for inconsistencies in information duplicated between Parts 1 and II, which could be avoided altogether if Form ADV were simply drafted to eliminate the overlaps.

[17] No doubt, eliminating duplicative information from Part 1 could create problems with the Commission getting certain ADV information at all from the relatively few advisers who are proposed to be entirely exempt from preparing a Part 2 brochure (such as advisers with only investment company or BDC clients). However, it would seem truly ill-conceived if avoiding that problem for a very few advisers served to justify having every other adviser provide you with that information twice. If anything, this underscores the logic of completely revamping Form ADV (see my comments below) so as to avoid overlaps between the two parts of the form and allow filing on IARD to suffice for both SEC and client disclosure purposes.

[18] I recognize that eliminating duplication between Parts 1 and 2 might make the Staff's task of assigning an adviser's initial IARD risk rating more time-consuming than it currently is, if the Staff has to read through Part 2 narrative disclosures to determine an adviser's risk relevant practices, which today could be determined by simply looking at a duplicative check-the-box answer on Part 1. However, reading through an adviser's Part 2 might actually make the risk rating more accurate and offer the Staff a better understanding of the adviser's practices than can be gleaned from check-the-box answers on Part 1.

should not serve to justify unnecessary overlaps and inconsistencies. Therefore, everywhere there is an overlap, I would urge you to consider whether you really need to ask for the same information twice in two different places of the form and, if so, whether there is sufficient justification for varying any applicable definitions, methodologies or wording in those two places to warrant the problems that will inevitably result.

While there are many examples of these types of overlaps and inconsistencies, I would urge you specifically to consider these areas:

- "Assets under management" in Part 1A vs. Part 2A --

  Is it necessary to ask for AUM information in Item 5.F. of Part 1A at all, to the extent it duplicates the AUM disclosure proposed to be required in the adviser's Part 2 brochure? Moreover, Part 1A, Item 5.F. requires disclosure of "assets under management" while proposed Part 2A, Item 4.E requires disclosure of "client assets you manage." Why are these different? Why are proprietary (non-client) assets managed by an adviser any less relevant for describing the size and nature of an adviser's business in Part 2 than they are for NSMIA jurisdictional purposes in Part 1? Unless there is a compelling reason for the difference, I would urge you to make the two consistent (with the Part 1 wording). AUM disclosure is going to be confusing enough with the complex instructions that apply to determining what constitutes a "securities portfolio" and with advisers being allowed to choose different methodologies for calculating AUM for purposes of Parts 1 and 2. It seems unnecessary to add yet another point of potential confusion.

- Disciplinary events in Part 1A, Item 11 vs. Part 2A, Item 9 and Part 2B, Item 3 --

  The instructions for the disciplinary disclosures in both Parts 1 and proposed Part 2 are long and complex, filled with detailed definitions, yet the wording of the questions in the two parts is "sliced and diced" in an entirely different manner, even when apparently seeking the same information. It would help to avoid unnecessary burden for advisers if the various disciplinary disclosure items were at least harmonized in their wording.

  Further, is it necessary to have disciplinary events already disclosed in Part 2 repeated in Part 1 at all? If there are additional disciplinary disclosures the Staff believes it should have for regulatory purposes beyond those called for in Part 2, it would be far less burdensome if Part 1 were simply pared back to request those additional disclosures.

- Brochure vs. supplement delivery requirements for clients receiving impersonal advice –

  As proposed, brochures need not be delivered to clients who receive only impersonal advice if they are charged less than $500 per year. In contrast, supplements need not be delivered to any clients who receive only impersonal advice. I would urge you to make these consistent and not require brochures to be delivered to any client receiving only impersonal advice. It is difficult to believe that any clients receiving impersonal advice will be interested in the adviser's brochure, given how few clients – even those receiving personalized advice – request brochures when they are offered to them now. Besides, if any client receiving impersonal advice is interested in an adviser's brochure, they will not be left in the dark. They can always look it up on IARD.[19]

- Financial industry affiliations in Part 1A, Item 7 vs. Part 2A, Item 10 –

  These two items request information about affiliations with basically the same list of financial industry participants, but the wording between the two is different. Is there a reason for this

[19] At most, then, advisers should be required to simply notify clients receiving impersonal advice about the availability of the brochure on IARD, similar to the legend requirement I suggested for the "access equals delivery" approach described in my earlier comments.

difference? If not, I would urge you to make them consistent (with the Part 2A version) or, better yet, to eliminate the duplication between the two parts altogether.

4) Avoid Rigid, Prescriptive Disclosure Requirements. In various areas of Part 2, the Commission has proposed disclosure requirements using rigid, prescriptive wording that would appear to be required without alteration.[20] I have commented specifically on some of these items elsewhere in my letter but would also urge the Commission to avoid this type of prescriptive language in general. Instead, I would urge the Commission to allow advisers the flexibility to formulate for themselves the best wording to make the required disclosure. A prescriptive, "one-size-fits-all" approach to wording in the context of an industry as diverse as investment management is unlikely to result in the best disclosure. Moreover, rigid, prescriptive disclosure is inconsistent with the Commission's historical approach to disclosure, with the "principles based" regulation that underpins the Advisers Act and with other aspects of the Proposal that profess to be aimed at providing advisers with appropriate flexibility in preparing Form ADV. Securities disclosures are already criticized for containing too much "boilerplate." Prescribing specific wording for Part 2 disclosures will only exacerbate that problem.

Accordingly, throughout Part 2, I would urge the Commission to modify the areas where it has called for prescriptive disclosure by instead formulating instructions calling for disclosure of relevant adviser practices, conflicts of interest and measures used to address conflicts. If for some reason the Commission is intent on giving advisers specific wording to consider, you should do so by providing non-prescriptive examples of possible disclosures or by providing lists of disclosures that advisers should consider and include if applicable, modified as may be appropriate to them.[21] In any event, to the extent prescriptive language survives in the final instructions, I would urge you to include a general instruction to Form ADV allowing advisers to omit or modify any prescribed language appearing in an item applicable to them, as may be necessary in order to avoid disclosure that would be inaccurate or misleading in their case.

5) Avoid Unnecessary Statements of "the Law" Not Supported by Definitive Authority. I would suggest that the first sentence of General Instruction 3 in Part 2A be amended to read to the following effect:

> In order to fulfill your fiduciary or other disclosure obligations under federal or state law, you may be required to disclose to *clients* information not specifically called for by Part 2 of Form ADV, including other conflicts of interest or other material information that a *client* ought to know when evaluating you as an adviser. You may disclose this additional information to *clients* in your *brochure* or through other means.

This avoids purporting to be a definitive statement about an adviser's disclosure obligations under federal, state and fiduciary law, but still conveys the heart of the general proposition that advisers may need to disclose other "material" information even if not specifically called for by the form. As worded in the Proposing Release, the instruction appears to be a definitive statement of settled law as in existence at the federal level and in all 50 states, when in fact there may not even be law addressing, let alone settling, those issues in many jurisdictions. While one could debate the accuracy and merits of the proposed instruction, it is completely unnecessary to make such a broad, seemingly definitive statement in order to accomplish the apparent goal – to let advisers know that responding to the specific items called for by Form ADV Part 2 may not fully discharge their disclosure obligations.

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[20] See, for example, Part 2A, Item 5.E.2., which says: "Explain that clients have the option to purchase investment products that you recommend through other brokers or agents that are not affiliated with you." As noted in my comments below, this disclosure is not even necessarily accurate in some cases.

[21] Better yet, if the Commission believes clients should receive standardized disclosures about particular practices and the conflicts of interest they raise, you should include them in the Commission's online publication entitled "Investment Advisers: What You Need to Know Before Choosing One," which I have suggested elsewhere in my comments all advisers should be required to reference on the cover of their firm brochure.

For the same reason, I would suggest that the Note included in Instruction 2 in the Instructions for Part 2A (and the similar notes in the Instructions for Part 2A, Appendix 1 and the Instructions for Part 2B) be revised to the following effect:

> **Note:** Your disclosure obligations as an adviser may require you to disclose to *clients* material changes in between *annual updating amendments*, even if those changes do not trigger delivery of an interim amendment under these instructions. See Instruction 3 in the General Instructions to Part 2 of Form ADV. Those changes may be disclosed to *clients* through your *brochure* or through other means.

6) Eliminate "Other Business Activities" Disclosure in Supplements. I generally support the supplement disclosure called for in Part 2B, Item 4.A. concerning investment-related activities and registrations of supervised persons since it is logically linked to evaluating the professional competence and potential conflicts of interest faced by those persons.[22] However, I am strongly opposed to the disclosure requirement in proposed Part 2B, Item 4.B. requiring supervised persons to disclose any other business or occupation for compensation if it provides a "substantial" source of income or involves a "substantial"[23] amount of time. This information is arbitrary, intrusive and unnecessary to meet any legitimate disclosure goals. In light of that, I urge you to eliminate it entirely.

If you believe the proposed disclosure will help clients evaluate an adviser's competence or potential conflicts, consider the following points which support the opposite viewpoint:

- Whether a person spends a "substantial" amount of time in another business or occupation is not a good measure of their competence as an adviser when you consider that they could still be spending the equivalent of full time advising. For example, a person might have a full-time job as an investment adviser but spend a "substantial" amount of time helping a family-run business during evenings and weekends. How would that person's outside activities indicate any difference in competence as compared to the full-time adviser who does not have any outside business activities and therefore would not need to respond to this item at all?

- Even if you accept the proposition that time spent in an activity is some measure of competence, how does a person advising only on Saturday mornings and spending the rest of the week in an unrelated full-time job compare to a person advising only on Saturday mornings and spending the rest of the week engaged in non-paying work or leisure activities? One might think there should be no difference between those two, yet the first adviser would have to disclose their full-time job as an "other business activity" (which might imply they are less competent or committed as a part-time adviser), whereas the second adviser would not have to disclose anything at all (which might imply that advising is their full-time occupation).

- If the concern behind the proposed disclosure is that a person with "substantial" outside business activities might not have sufficient time to devote to their advisory clients, I would point out that both full-time and part-time advisers with no outside business activities can also have time conflict issues that impact their ability to serve clients properly. The disclosure as proposed completely misses the mark to address that potential concern.

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[22] I would suggest, however, that the phrase "to *clients*" be added to Item 4.A.2. following the phrase "or other investment products," to clarify that those disclosures are only required if the compensation arrangement poses conflicts with the supervised person's advisory clients.

[23] Because I am suggesting that this disclosure be eliminated altogether, I am not focusing my comments on the term "substantial," which is poorly defined and vague as used here. If this disclosure is not eliminated entirely, the Commission certainly should address that definition as well.

- Hinging disclosure on an adviser's sources of income is equally off-the-mark, if not more so. An adviser might have a "substantial" source of income from another business, regardless of how much time they devote to that business or whether that business poses any conflict with their advisory business whatsoever. Consider for example the highly competent, full-time adviser for whom a "substantial" source of income is an unrelated business they are involved in, perhaps serving as an owner, director, consultant or other participant but only spending a minimal amount of time. Why would that activity be any more material to advisory clients than if the business represented an "insubstantial" source of income for the adviser? Indeed, why would it be material to advisory clients at all?

Of course, if an adviser or its personnel face material conflicts of interest in their advisory business as a result of outside activities (whether they are "business" activities or not), they should be required to disclose that. But a simple instruction to that effect would be sufficient.

7) Eliminate Naming of "Supervisors." Item 6 of Part 2B calls for disclosure of the person responsible for supervising the person covered by the supplement. This assumes that there is a person responsible for supervising and, indeed, implies that there is only one, which may not be the case in many advisory firms.[24] Moreover, an individual's supervisor may not be the person the firm wishes clients to contact if they have a concern or complaint. Firms may have client relationship managers or "quality control" specialists or others who would be more suited for fielding client issues.

Accordingly, I would suggest that instead of naming a supervisor, advisers be required to provide contact information for another person at the firm (by name or title, and telephone number) who is an appropriate person for clients to contact in the event of a concern or complaint about the supervised person covered by the supplement, the advice they are receiving or other aspects of the advisory relationship that the supervised person has not addressed or cannot address. That way, advisers that prefer to name a supervisor can do so, but firms with other preferences can name another appropriate person instead.

Sole proprietorships should be exempt from this item.

8) Ramp Up Efforts to Educate Clients. At the same time that the Proposal offers the prospect of better disclosure for advisory clients, it does not address the more difficult problem of clients who simply do not read disclosures no matter how well they are drafted, and those who simply do not have the background necessary to understand or appreciate the disclosures they do read. Those problems, in my view, are best addressed by improving investor education, and I urge the Commission and others to continue their efforts in that area.

One concrete idea the Commission should consider toward that end is requiring advisers to include a reference in every firm brochure (Form ADV Part 2) alerting clients to the educational materials available free of charge on the Commission's website, especially the publications at http://www.sec.gov/investor/pubs.shtml and, in particular, the publication entitled "Investment Advisers: What You Need to Know Before Choosing One" at http://www.sec.gov/investor/pubs/invadvisers.htm. This could be done logically on the front cover of the firm brochure, in the same area where advisers are already required to make note of the availability of more information about the adviser on the IARD website. (See proposed Part 2A, Item 1.B.)

This would be just one small step aimed at better educating investors. As necessary, the Commission could also adopt provisions ensuring that advisers would not bear liability for including such a standardized reference in their brochures, or for the content of the referenced

[24] In larger firms, there may be many persons who -- at various levels and in various ways -- are responsible for supervising an individual. In smaller firms, there may be none, depending on the size of the firm and the individual's position. Moreover, in a firm of any size, there may be no one responsible for "supervising" the firm's President or other senior partners or principals either.

information. Advisers that have them should be permitted to refer to the availability of their own educational materials as well.

9) <u>Other Suggested Revisions</u>. In addition to the foregoing comments, I would also urge you to adopt the following specific revisions to the form and instructions as proposed:

General Instructions	
General Instruction 2	Add the phrase "or notice-file" after the word "Register" in the second bullet point, to encompass state notice-filings required by federally registered advisers.

Glossary of Terms	
#4 "Brochure Supplement"	I would suggest calling the "brochure supplement" something other than a "brochure supplement" since the term "supplement" in industry-speak is generally understood to mean (and is therefore likely to be confused with) a "sticker." As such, a "brochure supplement" would normally be thought of as a sticker that amends or updates information appearing in the brochure itself, similar to the way one would refer to a prospectus supplement (or sticker).[25] Instead of "brochure supplement," I would suggest using a term like "supervised person addendum," "employee background statement," "individual adviser info page," "account manager bio," "adviser rep data sheet," "client adviser disclosure statement," or some similar combination of words to indicate that the disclosure relates to a specific individual.
#20 Investment Adviser Represen-tative	I would suggest adding a reference to Rule 204A-3 in this definition, similar to the rule references included in other definitions in the Glossary (see, for example, Glossary entries #3, 4 and 8). Because of the potential significance of falling within the IAR definition, it would be beneficial for Glossary users to know about the connection between the Glossary definition and the regulatory definition found in Rule 204A-3.

Instructions for Part 2A	
Instructions 1 and 2	I would suggest changing the word "give" to "deliver" (or "furnish") in order to remain consistent with the wording of an adviser's obligations in Rule 204-3.
Instruction 2	I would suggest that you add the following at the end of the first sentence in the third bullet point describing circumstances in which an adviser must deliver an interim amendment to clients: "or in response to Item 18.B. of Part 2A (financial information)". In my view, that is another situation that could potentially affect a client's trust and confidence in their adviser and should therefore be treated the same as disciplinary disclosures for purposes of interim amendment deliveries.

Part 2A	
Item 1.C.	I would suggest deleting this item entirely and substituting the following as a Note to Item 1: You are reminded that under Section 208(a) of the Investment Advisers Act of 1940 it is unlawful to describe yourself as "registered" or as a "registered investment adviser" in your brochure or elsewhere in any manner that represents or implies you have been sponsored, recommended or approved by the SEC or that your abilities or

[25] Indeed, even the Commission has used the term "brochure supplement" to mean a document updating a Form ADV brochure, in the context of Schedule H. See Disclosure by Investment Advisers Regarding Wrap Fee Programs, Release No. IA-1401 (January 13, 1994), 59 FR 3033 (January 20, 1994) ("Therefore, the Commission is proposing to permit sponsors to update wrap fee brochures by using a brochure supplement or 'sticker'….")

	qualifications have in any respect been passed on by the SEC. This would allow advisers to continue to refer to themselves as "registered" -- without tacking on the qualification contemplated by the Proposing Release – in their brochures and everywhere else they customarily do, where there is no suggestion of official imprimatur or other inappropriate implication. At the same time, those advisers that the SEC Staff has observed using problematic marketing materials will be alerted to the legal parameters imposed by Section 208(a).
Item 5.E.	I would suggest revising the lead-in as follows: If you or any of your *supervised persons* accepts compensation for the sale of securities or other investment products <u>to *clients,*</u> including distribution<u>, 12b-1</u> or service ("trail") fees from the sale of <u>or relating to</u> mutual funds, disclose this practice and respond to Items 5.E.1, 5.E.2, 5.E.3 and 5.E.4. These changes are intended to clarify that the disclosure is required only if the compensation is accepted in connection with sales to <u>advisory clients</u> (which raises a potentially relevant conflict of interest), and not if the compensation is paid on sales to <u>other</u> clients, such as brokerage, banking or other clients of the adviser, or clients of another entity that a supervised person of the adviser may be associated with also. The changes also clarify that "12b-1 fees" are among those that trigger the disclosure, even if they are paid for shareholder servicing "relating to" (and not necessarily "for the sale of") mutual funds.
Item 5.E.1.	I would suggest revising the first sentence to read as follows: 1. Describe conflicts of interest that this practice presents and the nature of the conflict. This provides advisers the flexibility to describe more accurately and in their own words conflicts presented by sales compensation in their particular case. The wording called for in the Proposing Release – in this instruction and other instructions that use similar wording -- could be read as describing an exaggerated or "worst-case" scenario where an adviser makes a recommendation based merely on its own conflicted self-interest, "<u>rather than</u>" (using the words in the proposed instruction) based on the needs of the client. In my view, that does not describe in an accurate or balanced manner the <u>typical</u> conflict of interest faced by advisers, where the adviser's recommendation may indeed be "based on" the client's needs, but may nonetheless be influenced by a conflict in more subtle ways.[26] For these reasons, I would reiterate my earlier comment urging you to avoid prescribing specific wording for disclosure and allow advisers the flexibility to formulate their own wording suited to their particular circumstances.
Item 5.E.2.	As mentioned in my earlier comments, this proposed disclosure may not be accurate in all cases, for example where the adviser recommends only proprietary products or unique types of products that indeed may only be available through that adviser or its affiliates. Accordingly, I would suggest that

[26] One example might be where the line-up of investments available for the adviser to choose from to meet the client's needs is limited to only affiliated products or unaffiliated products that pay the adviser compensation for invested clients. Other equally suitable but lower-priced products may not even be considered for the adviser's line-up because they are not affiliated products or because they do not pay compensation.

	this item be dropped altogether or, at a minimum, be qualified to require the disclosure only "where applicable" (or similar qualification).
Item 5.E.3.	Are you intending to cover here 12b-1 fees that are paid for shareholder servicing and not from the "sale" of mutual funds? If so, I would suggest revising the wording accordingly.
Item 5.E.4.	Are you intending to cover here only advisers that charge commissions in addition to advisory fees, or also advisers that accept commissions (and perhaps other compensation such as shareholder servicing fees) in addition to charging advisory fees? If the latter, I would suggest revising the wording accordingly.
Item 6.	In general, I am not opposed to the types of disclosures contemplated by this item. However, I do not share the view that the conflicts arising in the performance fee/side-by-side scenario are so specific or unique that it warrants its own separate item and I would therefore urge the Commission to consider eliminating it.[27] In support of my position, I would point out that all the conflicts referenced in the Proposing Release as potentially applicable to the performance fee/side-by-side scenario also apply to other scenarios. For example: • The Proposing Release notes that advisers managing performance-fee accounts side-by-side with accounts charged non-performance fees may have an incentive to direct the best investments to, or allocate or sequence trades in favor of, the performance-fee accounts. Even assuming that is the case, advisers may also have those incentives when they manage any account paying a higher fee side-by-side with accounts paying a lower fee, whether or not either is a performance-based fee. Moreover, advisers may have those incentives when they manage accounts in which they have a proprietary interest side-by-side with accounts in which they do not, even if the fees imposed are identical and neither involves a performance-based fee. • Similarly, conflicts among accounts stemming from differing investment strategies (for example, accounts selling securities short that other accounts hold long) may arise regardless of whether either account pays a performance fee. The Proposing Release acknowledges that these conflicts are not limited only to hedge fund advisers. I would note that they are not limited only to the performance fee/side-by-side scenario either. Moreover, it would seem that disclosure of these conflicts would already be required in response to other items, such as Items 8, 11 and 12, so that eliminating Item 6 should not result in loss of substantive disclosure.
Item 8.B.	Item 8 of Part 2A should only require disclosure of "material" risks.[28] Accordingly, I suggest changing the first sentence of this item to read: "If you primarily use a particular method of analysis or strategy, explain the ~~specific~~ material risks involved in using that method or strategy." Having to identify which risks are "significant" (how is that different from "material"?) or "unusual" is too poorly defined and I would therefore urge you to drop the second sentence of that item.

[27] I acknowledge that a performance fee could heighten some of the conflicts that exist as compared to other scenarios, but it does not make any of the conflicts specific or unique.

[28] Notably, the discussion of Item 8 on page 21 of the Proposing Release contemplates that these disclosures would be geared to "material" risks, but the word "material" does not appear in the actual proposed instructions.

Item 8.C.	For the same reasons, I suggest changing the first sentence of this item to read: "If you recommend or invest client accounts in primarily a particular type of security, explain the ~~specific~~ material risks involved with investing in that type of security." Again, having to identify which risks are "significant" (how is that different from "material"?) or "unusual" is too poorly defined and I would therefore urge you to drop the second sentence of that item.
Item 12.A.1.f.	This item calls for advisers to "explain the procedures" the adviser uses to direct brokerage to a particular broker-dealer in exchange for soft dollar benefits. Like similar "procedures" disclosure the Commission already concluded should be eliminated, an explanation of these procedures holds the prospect of being lengthy, detailed and ultimately unhelpful in helping clients understand how advisers address their conflicts. Instead, I would urge you to change the instruction to read: "Describe generally how you address conflicts of interest that arise with your soft dollar practices." This complements the already required soft dollars disclosure calling for practices to be disclosed and conflicts of interest to be discussed and is consistent with the approach taken in similar instructions elsewhere in Part 2A.
Item 12.A.2.b	Same comment as above.
Item 12.A.3.a	The second sentence of this item requires disclosure to the effect that not all advisers require their clients to direct brokerage. I would urge you to eliminate that sentence altogether. It is simply not illuminating to say that not all advisers require directed brokerage.[29] Instead, the disclosure should focus on describing the adviser's practice and disclosing material conflicts, which are already called for by the third sentence in that instruction. As for the last sentence of this instruction, I would note that similar disclosure is sometimes included as a precautionary measure in ADVs of advisers that request or require (or permit) directed brokerage. However, as I have mentioned in my prior comments, this type of wording is overly prescriptive and I would urge you to allow advisers the flexibility to formulate their own disclosure to describe the conflicts and effects of directed brokerage in their particular circumstances. Moreover, I would note that it is not necessarily inconsistent for an adviser requiring directed brokerage to be nonetheless fully discharging its best execution obligations and, in that case, the implication of the last sentence in that item could be potentially inaccurate and misleading. I would therefore suggest that, if retained, the sentence be qualified to require that disclosure only "if applicable" or "where applicable" or qualified in some other way to indicate that advisers should include it only in cases where it applies or modify it as may be appropriate in their circumstance.
Item 12.B.	I would suggest revising the first sentence of that item to delete the words "in quantities sufficient to obtain reduced transaction costs," since there are circumstances in which an adviser may bunch client trades other than to lower transaction costs.[30] Ostensibly, the consequences of bunching should be disclosed regardless of whether it is undertaken to lower transaction costs or for

[29] Of course not all advisers require directed brokerage, since there is probably no single industry practice that all advisers engage in. Not all advisers use soft dollars either, or accept commission compensation, etc., etc., but (wisely) the proposed instructions do not call for similar wording with regard to those practices.

[30] For example, bunching may undertaken to seek more favorable execution in other respects (not just to lower transaction costs), to ensure that potentially market-impacting trades are handled fairly relative to one another, or for administrative efficiency when consistent with the clients' best interest.

	other reasons. In addition, it is unclear what is intended by the phrase "explain your practice" in that instruction in the case of advisers that do not bunch. Is it sufficient to state that the adviser does not bunch? Or are you expecting an explanation of how unbunched trades are sequenced for execution? Neither the instructions nor the Proposing Release address that. If that is the expectation, I would recommend that this be clarified in the instructions themselves or, at a minimum, in the adopting release. It is also unclear what is intended by the proposed instruction "describe the costs" to clients of not bunching. I would suggest that this be changed to read "describe the potential consequences" of not bunching (or something similar), to clarify that the disclosure should include impacts that are not necessarily susceptible to being boiled down to dollars-and-cents "costs."
Item 13.A.	I would suggest changing the word "*employee*" to "*supervised person*."
Items 13.B. and C.	I would suggest adding the phrase "or financial plans" after the word "accounts."
Item 14.	I would suggest labeling this item something like "Other Compensation Arrangements" or "Additional Compensation" or something <u>other than</u> "Payments for Client Referrals" since Item 14.A seems to have nothing to do with payments for client referrals. Rather, it seems to be calling for information about compensation (or benefits) <u>received</u> by an adviser in connection with client advice, and not compensation (or benefits) <u>paid</u> by an adviser for clients referrals.
Item 14.A.	I would suggest changing the phrase "for providing investment advice…" in the first line to read "in connection with providing investment advice…." since third parties (such as brokers or custodians) may not offer advisers benefits <u>for providing advice</u> to clients, but for doing something else <u>in connection with</u> providing advice to clients that has value to them (such as recommending them as broker or custodian).
Item 14.B.	I would suggest adding the following sentence at the end of this item: "You do not need to repeat any information you provided in response to Item 12.A.2 of Part 2A." I would also suggest that both Items 14.A. and B. be amended to require the disclosure of any conflicts of interest posed by those arrangements.
Item 17.B.	I would suggest changing the last sentence of that item to read as follows: "~~Described whether~~ <u>If</u> you pay for proxy voting services with soft dollars or pass the cost on to your *clients* through a supplement to your advisory fee<u>, disclose this practice</u>."
Item 20.B.	I oppose this disclosure for state-registered advisers for the same reasons (described above in my earlier comments) that I oppose disclosure of outside business activities for SEC-registered advisers. At a minimum, this item should be modified to require disclosure of outside business activities only if the activity or amount of time spent on it is material to an adviser's clients.
Item 20.E.	This item is unclear as worded. Is the last phrase "that is not listed in Item 10.C. of Part 2A" intended to modify <u>relationships</u> or <u>issuers</u>? In other words, is this item intended to require disclosure of <u>relationships</u> not listed in Item 10.C., such as relationships with any related person on the list in 10.C. that are not described

	in response to 10.C., presumably because the relationships are not material to the adviser's advisory business or clients? If so, I would oppose the item as requiring disclosure of relationships that are not material. Or, alternatively, is this item intended to require disclosure of relationships with any issuer of securities not listed in Item 10.C., meaning relationships with any issuer who is not a related person listed in 10.C.? If so, this item is way overly broad to meet any legitimate disclosure purpose[31] and, at a minimum, I would urge that it be narrowed to only require disclosure of relationships or arrangements that are material to an adviser's clients. In any event, the item should be reworded to clarify its intended scope.

Instructions for Part 2A, Appendix 1 and Part 2A, Appendix 1	
Throughout	I would repeat my comments from Part 2A to the extent applicable to the Wrap Brochure.

Instructions for Part 2B and Part 2B	
Throughout	I would repeat my comments from Part 2A to the extent applicable to the brochure supplement.

Part 2B	
Item 4.A.2.	As mentioned in my comments earlier, I would suggest that the phrase "to *clients*" be added following the phrase "or other investment products," to clarify that those disclosures are only needed if the compensation arrangement poses conflicts with the supervised person's advisory clients.

10) Retain Rule 206(4)-4. While I am sympathetic to the Commission's desire to eliminate duplicative regulations, Rule 206(4)-4 should be retained for the following reasons:

- The rule is not duplicative when applied to advisers with no brochure delivery obligation.
- Clients of advisers with no brochure delivery obligation are better protected when disclosures of this significance are called for by specific SEC rules, rather than merely by vague and unsettled principles of "full and fair disclosure."
- Rule 206(4)-4 is not any different than other SEC disclosure rules that will become "duplicative" in light of revised Part 2, which you are not proposing to rescind.[32]
- Contrary to the implication in the Proposing Release, Rule 206(4)-4 does specify a means of conveying the required disclosures, given that the Note at the end of the rule says advisers may disclose the information in their brochures.

If you are truly committed to eliminating duplicative provisions, I would urge you to start with Form ADV itself, eliminating redundancies between Parts 1 and 2, as indicated in my earlier comments.

[31] For example, if read this way, the item would ostensibly require disclosure of an adviser's "relationships or arrangements" with "any issuer of securities," which could include its landlord, employee benefit plan provider, insurers, equipment leasing companies, utility companies, etc., etc., etc. It could also be read to reach the personal banking, insurance, mortgage and other "relationships or arrangements" that the adviser's management persons have with banks, lenders, insurance companies or any other "issuers of securities" – all without regard to whether any of these relationships or arrangements are material to the adviser's clients.

[32] For example, most of Rules 206(4)-6(b) and (c) will become "duplicative" in light of Item 17.A. of Part 2A.

Lastly, if Rule 206(4)-4 is retained, I would urge you to ensure that the wording in the rule and the wording in the various places in Form ADV that call for the same disclosures are as identical as possible, to ease the burden on advisers having to comply with both.

11) Make PDF Conversion Software Available. As far as I am aware, PDF reader software is widely available and typically free, but PDF converter software that converts other formats (like Word) to PDF is not as widely available and is typically not free. Accordingly, if Part 2 is required to be filed on IARD in PDF format, I would strongly urge the Commission to find a way – as the Proposing Release indicates you are exploring – to make conversion software available to those advisers who do not currently have it. Having to find, buy, install, train on, support and continually upgrade PDF converter software would likely be a significant cost for many advisers, particularly many small advisers who are less likely to have conversion software already available.

12) Rethink Time and Cost Burdens. Section VI.D. of the Proposing Release specifically requests comment pertinent to these issues:

(i) whether the information to be collected under the Proposal is necessary for the proper function of the agency;
(ii) the accuracy of the estimates of burdens of information to be collected;
(iii) whether there are better ways to collect the information; and
(iv) whether there are less burdensome ways to collect the information, including through electronic means.

Comments throughout my letter, in particular those aimed at urging the Commission to adopt an "access equals delivery" approach and eliminating duplication between Parts 1 and 2, are pertinent to issues (i), (iii) and (iv) on this list.

As to issue (ii), it is my view that the Proposing Release grossly underestimates the time burden to advisers of preparing their Form ADV, as well as the burden to advisers who seek assistance of outside counsel in that process. Among other things, the Proposing Release fails to take into consideration that whenever an adviser seeks assistance from outside counsel, the adviser would likely incur not only added burden in the form of counsel fees, but added time burden as well, given that it will be necessary for the adviser to devote extra time to interacting with counsel and responding to counsel's questions, comments and suggestions.

In short, I believe the real burden for advisers will be far greater than estimated in the Proposing Release and will depend more on the complexity of the adviser's business than on its size measured by number of employees. In support of my belief, I would note that on the last five matters where I served as outside counsel to assist advisers in preparing ADVs (all within the last year or two), I spent approximately 20 hours for one small adviser with a single line of business, an average of 46 hours for each of two small advisers with more complex businesses, about 52 hours for a medium-sized adviser that offers multiple advisory services and about 43 hours for another medium-sized adviser that is a dual-registered IA/BD.[33] Note that these figures are substantially higher than the outside counsel time estimates used in the Proposing Release, of 3 hours for small advisers and 11 hours for medium-sized advisers. Moreover, they represent only my time spent on the ADVs as counsel and do not take into account the many hours that the advisers' personnel also spent working on the ADVs. Lastly, I would note that although these figures pertain to advisers preparing their ADVs under the current format, I anticipate the figures would be as large, if not larger, for advisers preparing Part 2 in a narrative format for the first time, particularly if the adviser is also having its ADV reviewed by outside counsel for the first time.

[33] I am using here the same definitions of small, medium and large sized advisers that the Commission set out on page 80 of the Proposing Release.

Accordingly, I urge the Commission to take this additional burden information into account when thinking through the Cost-Benefit Analysis of the Proposal, as well as anywhere else pertinent to the Commission's final rule decision-making.[34]

GENERAL COMMENTS AND COMMENTS ON PART 1

In addition to my foregoing comments on Part 2, I have the following comments on Part 1 and on Form ADV generally:

13) <u>Reorganize and Revamp Entire Form</u>. In my view, Form ADV should be reorganized in its entirety since it is replete with redundancies, cumbersome to navigate and difficult for all except those "in the know" to understand the patchwork of relationships between the various items, parts, schedules and reporting pages. There are probably many ways the form could be reorganized to be more manageable than it currently is, but here is one possibility to consider that would involve only a minimum of reorganization and relabeling:

Suggested New Name	**Current Name (assuming pending proposed Part 2 changes are adopted)**	**Comments**
FAQs About Form ADV	General Instructions	
Glossary	Glossary of Terms	
General Section	Instructions for Part 1A and Part 1A	Completed by all advisers.
State Section	Instructions for Part 1B and Part 1B	Completed only by state-registered advisers.
Management Persons Section	Part 1, Schedule A	Ideally, this section would be eliminated altogether and simply integrated into the body of the General Section at Item 10.
Indirect Owners Section	Part 1, Schedule B	Same comment as above.
Change Form Section	Part 1, Schedule C	Ideally, a separate "change form" for this information would be eliminated entirely when the information it relates to is integrated into the body of the form.
Additional Information Section	Part 1, Schedule D	Ideally, this section would be eliminated altogether and this information integrated into the appropriate items in the body of the General Section itself.
Firm Brochure	General Instructions for Part 2, Instructions for Part 2A and Part 2A	Filed on IARD and delivered to clients ideally through an "access equals delivery" approach.
Supervised Person Addendum	Instructions for Part 2B and Part 2B	Ideally permitted to be directly delivered to clients or delivered via posting on the adviser's website through an "access equals delivery" approach.
Wrap Program Brochure	Instructions for Preparing Part 2A, Appendix 1 of Form ADV and Part 2A, Appendix 1	Filed on IARD and delivered to clients ideally through an "access equals delivery" approach. Even more ideally, the requirement for this separate brochure would be eliminated entirely (as explained in my comments below).
Criminal Disclosure Section	Criminal Disclosure Reporting Page	Required only when applicable.
Regulatory Action Disclosure Section	Regulatory Action Disclosure Reporting Page	Required only when applicable.
Civil Judicial Action Disclosure Section	Civil Judicial Action Disclosure Reporting Page	Required only when applicable.
Bond Disclosure Section	Bond Disclosure Reporting Page	Required only when applicable.
Judgment/Lien Disclosure Section	Judgment/Lien Disclosure Reporting Page	Required only when applicable.
Arbitration Disclosure Section	Arbitration Disclosure Reporting Page	Required only when applicable.
Signatures Section	Domestic IA Execution Page, State-	

[34] I am also sending a copy of this letter to the Office of Management and Budget, as directed in the Proposing Release, so my comments can be considered to the extent relevant to "collections of information" for Paperwork Reduction Act purposes.

	Registered IA Execution Page, Non-Resident IA Execution Page	

While even this minimal amount of reorganization would be helpful, it would be far better if the entire Form ADV were completely revamped, keeping in mind its multiple purposes and with the goal of making it less burdensome for advisers to complete, easier for clients to understand and more useful for the Commission in gathering information for regulatory purposes. This revamping should also take full advantage of technology available today, recognizing that the form will be prepared, filed and publicly accessible in an electronic environment. Although it would take longer than the currently available comment period for me to propose an entirely new form in detail, I have laid out a few guiding principles I believe should be considered in that effort:

- Take full advantage of an "access equals delivery" approach. At its core, this would recognize that everything disclosed on the form is posted publicly on the IARD website, accessible not only to the SEC but also accessible (and therefore "delivered") to clients as well. Among other things, this should eliminate the need for asking for any information twice in two different parts of the form.

- Use contemporary website design and display techniques to allow readers to follow detailed disclosures concerning items of interest to them, but skim through items not of interest to them without being disrupted or distracted by lengthy disclosures interposed for each one. A very basic example showing the gist of this for Part 1A, Item 9, on Custody might be:

  > **Custody.** We (or our *related persons*) **[X] have [ ] do not have** custody of our advisory *clients'* cash, bank accounts or securities. Click here for more information about our custody arrangements and risks or conflicts of interest they may pose.

  The underscored wording would include an embedded hyperlink to narrative disclosure about custody as called for by proposed Part 2A, Item 15, or that the adviser might otherwise choose to provide about custody. Clients who want to read about custody can click through to that disclosure. Clients who do not can read on. A similar technique could be used to eliminate entirely the need for all schedules attached to the form.[35]

- Recognize that the most important part of Form ADV to clients is the "firm brochure." Logically, that means the information called for in the "firm brochure" should appear at the beginning of the form (rather than in Part 2), immediately following a basic cover page that identifies the adviser. This would be analogous to the organization of, say, Form N-1A for mutual funds.

- Any portions of Form ADV requested primarily for the SEC's regulatory information[36] should be relegated to the back of the form, again analogous to Form N-1A, which places in "Part C" at the back of the form additional information that may be useful to the Staff but which is not delivered to investors. Indeed, this type of information should not be displayed on IARD at all, other than perhaps through a link at the back of the form that would allow users to display "additional regulatory information" (or similar name). That way, clients could concentrate on the disclosures that are pertinent to them and the other regulatory information, while still conveniently available, would not clutter or obscure the important information in the rest of the form.

[35] Undoubtedly, knowledgeable Web designers could find many other ways to improve the current layout as well as the IARD/user interface.

[36] This would include questions like what is the adviser's form and jurisdiction of organization and fiscal year end, whether the adviser is also registered with any foreign regulatory authority, whether the adviser is filing as a successor, whether the adviser maintains any books and records at another location, and so on.

- Ø Similarly revamp and harmonize Form U-4 so that information could be filed once for registered/licensed individuals and not have to be repeated in brochure supplements. This effort, too, should focus on what is important for clients/users to know (which should be pulled to the front of the form and laid out in a reader-friendly format) vs. that information that is primarily useful for regulatory purposes (which should be relegated to the back of the form).

- Ø On IARD, maintain the download function and a "Printer Friendly Format" option that allows users to download and/or conveniently print all or any part of Form ADV that they may desire.

Please also consider the following comments to the extent these items or issues survive in the process of revamping the form….

14) Change Wrap Program Disclosures. I would urge you -- as is currently proposed for Part 2 -- to eliminate the need for advisers to list in Part 1 all the wrap programs they participate in other than as sponsors. As you know, this information can change frequently and become inaccurate shortly after the form is filed. It adds nothing to the Staff's understanding of the adviser to have these programs listed in Part 1[37] but can add significantly to the adviser's burden in responding to the form. This burden is particularly acute in cases where the adviser is not sure whether the programs they participate in as a portfolio manager meet the technical definition of a "wrap fee program" since there are such a wide variety of arrangements available today and since the technical definition hinges on the fee arrangement between the sponsor and the client.[38] In that case, the adviser must first track down and verify whether or not each of their arrangements meets the technical definition of a "wrap fee program" in order to appropriately respond to the form. And for what benefit? The Staff can easily make a request (and typically does) for documents relating to the adviser's participation in wrap/SMA and similar arrangements to review upon inspection, at which time the adviser can provide the relevant documents for all their program arrangements, whether or not they are technically "wrap fee programs." Accordingly, I urge you to eliminate the list requirement from Part 1 as well.

More fundamentally on the issue of wrap program disclosures, I would urge the Commission to consider whether it is still necessary to require a separate Wrap Brochure at all.[39] In my view, arrangements meeting the "wrap fee program" definition do not pose sufficiently unique conflicts, risks or disclosure issues to justify requiring a separate brochure. Indeed, all of the disclosures called for by the Wrap Brochure could be pertinent to other non-wrap programs or services the adviser might offer and might describe in a general firm brochure.[40] Accordingly, I would urge you to eliminate the Wrap Brochure altogether and add any disclosure items from Appendix 1 not already called for by Part 2A to the general firm brochure.[41]

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[37] If the Staff finds it useful in preparing for an inspection to know whether an adviser participates in a wrap program (or any other type of program) as a portfolio manager, a question along the lines of Item 5.I.(2) of Part 1A should suffice. For that matter, disclosures in the adviser's Part 2 firm brochure should suffice.

[38] The adviser might be taking appropriate steps with regard to its own fee as portfolio manager and with regard to delivery of its own Form ADV, etc., but it may not be involved in all the details about charges at the sponsor/client level.

[39] To me, it would make sense to consider this question as part of a broader review of Investment Company Act Rule 3a-4, a review which the Staff has indicated on a couple of occasions should be undertaken. See, for example, Remarks before the IA Week and the Investment Adviser Association 10th Annual IA Compliance Best Practices Summit 2008 by Andrew J. Donohue, Division of Investment Management, SEC (March 21, 2008) at http://www.sec.gov/news/speech/2008/spch032108ajd.htm.

[40] For example, disclosures called for in Item 6 (portfolio manager selection and evaluation information), Item 7 (client information given to portfolio managers), and Item 8 (client contact with portfolio manager) of Appendix 1 could be pertinent to any subadviser selection or manager-of-managers service the adviser offers, even if it does not meet the "wrap fee program" definition. Similarly, the disclosure called for by Item 4.B. (that wrap programs may cost clients more than purchasing the services separately) could be pertinent to any services the adviser offers on a "bundled" basis, even if not part of a "wrap fee program." Indeed, why these disclosures are called for by Appendix 1 when applied to a wrap fee program but not called for by Part 2A when applicable to a non-wrap program or service is unclear.

[41] Of course, as is already the case, advisers would not need to respond to any of these added items if they are inapplicable to them or their advisory services.

I recognize that putting wrap program information in the general firm brochure raises the risk that the information could get obscured, a principal concern that led to the adoption of a separate Wrap Brochure in the first place. However, that concern would not be raised for the first time if the separate Wrap Brochure were eliminated as I am suggesting. Even today under current rules, advisers offering more than one advisory service or program must decide how to describe those in their general firm brochure so that information will not be obscured and ultimately whether they should prepare more than one brochure to achieve that aim.[42]

Rather than require a separate Wrap Brochure, I would suggest that you amend proposed Instruction 6 in the Instructions to Part 2A, which says advisers may use more than one brochure if they offer substantially different advisory services or programs, to say advisers should use more than one brochure in those circumstances if covering all the different services or programs in one brochure would cause information to be obscured.[43] The instruction would then apply to every service or program the adviser offers, not just wrap fee programs, and would be aimed at ensuring that the presentation is clear regardless of whether the adviser chooses to use one or multiple brochures. In my view, that would be far more logical and likely to result in effective disclosure than the current approach requiring a separate brochure only for sponsors' wrap fee programs, given the wide variety of programs and services offered by advisers today.

15) Move Instructions Near Applicable Items. Without doubt, one of the most frequently overlooked and misunderstood instructions I find on Form ADV is the instruction that appears below Item 5.D.(10) of Part 1A, which instructs advisers to include certain accounts under the "individual" category. To address this (and assuming I understand the instruction correctly as it now reads), I would strongly recommend that you move the instruction to immediately below Item 5.D.(1) and revise it to read as follows:

> Include in the "individuals" category any individuals [other than *high net worth individuals*] that are your *clients*, even if the account you advise for them is a pension, profit-sharing or other type of retirement account (such as an IRA or 401(k) account). Also include any personal trusts or estates of individuals. Do not include businesses organized as sole proprietorships.

If you intend (as I presume you do) the foregoing types of clients to be included in the "high net worth individuals" category (rather than the "individuals" category) if they meet the high net worth individuals definition, then include the language I have shown in brackets above and embed an analogous instruction immediately below Item 5.D.(2), which might read as follows:

> Include in the "*high net worth individuals*" category any *high net worth individuals* that are your *clients*, even if the account you advise for them is a pension, profit-sharing or other type of retirement account (such as an IRA or 401(k) account). Also include any personal trusts or estates of *high net worth individuals*. Do not include businesses organized as sole proprietorships.

For the same reason, I would suggest moving to directly below Item 5.D.(4) the instruction that now appears at the very bottom of Item 5.D., which instructs advisers to check "None" in response to Item 5.D.(4) if they do not advise a registered investment company. In addition to moving the instruction, I would suggest adding words that clarify that this category could include subadvising a registered investment company, perhaps by inserting the phrase "or subadvisory" after the word "advisory" in the instruction.

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[42] Advisers, too, that sponsor more than one wrap program must decide under current rules whether to present those programs in one or multiple Wrap Brochures.

[43] Based on historical experience with Part II, Schedule F, I would not envision this resulting in separate brochures much more often, if any more often, than under current rules, since advisers can -- and today often do -- describe a number of substantially different services and programs in one brochure without information being obscured, by simply using appropriate organization and headings.

Lastly, I would suggest deleting the parenthetical next to Item 5.D.(5) which reads "other than plan participants" and (assuming I am interpreting the form correctly) clarifying this entire item with an instruction inserted immediately below it to the following effect:

> Include in the "pension and profit-sharing plan" category any pension, profit-sharing or other retirement plans (including any plan trustees or plan investment committees) that are your *clients*, but do not include any individual plan participants, even if you advise with respect to their plan accounts. Individual plan participants that are your *clients* should be counted as appropriate in the individuals or *high net worth individuals* category.

16) Clarify Firm vs. Employee Disclosures. Another consistent source of confusion among advisers in responding to Form ADV is whether or not particular questions are asking for information about just the firm or also about its employees. This is particularly problematic in Part 1A, Items 6 and 7. Very often advisers question whether they should check Item 6.A.(3) if they have employees who are registered representatives of a broker-dealer. Similarly, they question checking Item 6.A.(5) if they have employees who are insurance agents. Accordingly, I would suggest modifying the instructions to Item 6 to clarify that this item is asking for information only about the adviser itself. One possibility is clarifying the lead-in instruction as follows:

> ~~In~~ This item~~, we~~ request**s** information about other business activities of your firm. It does not request information about the business activities of your *employees* or other *related persons*, which to the extent required are covered in other items.

For the same reasons, I would suggest modifying the instruction in Item 7[44] as follows:

> Item 7 requires you to provide information about you ~~and~~ or your *related persons*. Your *related persons* are all of your *advisory affiliates* (including *employees*, other than those performing only clerical, administrative, support or similar functions) and any *person* that is under common *control* with you.

And by adding an instruction immediately underneath Item 7.A.(1) as follows:

> Item 7.A.(1) is requesting information about your *related persons* who are one of the listed types of brokers or dealers. It is not requesting information about your *employees* or other *related persons* who are simply registered representatives of a broker or dealer. Note that *employees* who are registered representatives of a broker or dealer should be included under Item 5.B.(2).

17) Address Definition of "Control". The definition of "control" used in the instructions to Form ADV is completely unique.[45] One could take the view that this is merely an inconvenience that advisers have to deal with when filling out Form ADV. However, that inconvenience takes on another dimension when advisers are asked to specify whether each officer and owner listed on Schedule A is a "control" person or not ('yes' or 'no'), using the unique definition imposed in the instructions. Unfortunately, advisers are faced with a built-in inducement to designate everyone on Schedule A as a control person as a result of presumptions embedded in the definition and the lack of clarity about whether those presumptions are rebuttable and, if so, how one goes about establishing a rebuttal. That is particularly unfortunate in light of the legal sensitivity commonly associated with being deemed a "control" person and in light of the fact that the question of

[44] Advisers often also question whether they must check Item 7.A.(6) or (7) when they simply have lawyers or accountants working for them in-house in normal employment arrangements that pose no conflict of interest for the adviser vis-à-vis its clients. It would be helpful if the form, instructions or relevant releases eliminated that confusion as well.

[45] It does not track the definition of "control" found in the Advisers Act, the Investment Company Act, or regulations promulgated under the 1933 Act or 1934 Act.

"control" (under standard, recognized definitions) is often a complex, fact-intensive matter not susceptible to being captured by a "yes or no" response on Schedule A.

Therefore, I would urge the Commission to ask, what is the regulatory purpose of creating a unique definition of control, with built-in presumptions, and then asking advisers to designate which persons are control persons on Schedule A? How does this serve to assist the Staff in preparing for an inspection or in discharging their oversight responsibilities? If the definition presumes a person's control status under a unique definition -- whether or not that status accords with reality or with the person's status under any other legally applicable definition -- what purpose is served by asking for the designation on Schedule A?

I would submit that the designation is not helpful and, indeed, is potentially misleading when handled in that fashion. Accordingly, I would strongly urge the Commission to adopt for ADV purposes the Advisers Act definition of "control" and then drop from Schedule A any need to designate listed persons as "control" persons or not. To the extent necessary, then, various items on the form can be broadened or narrowed to elicit any specific information about individuals and others that the Commission believes it needs for legitimate regulatory purposes. That approach would:

- avoid the burden advisers face having to apply a completely unique definition of control for no apparent purpose;
- avoid the risk individuals take by being designated as "control" persons merely as a result of presumptions or unique aspects of that definition that would not apply under any other legal definition of control;
- avoid advisers having to boil down complex, fact-intensive determinations of "control" (under any definition) to a black-or-white "yes" or "no" answer on a form with no apparent regulatory benefit; yet
- still allow the Commission to meet its needs to request information for regulatory purposes.

18) Eliminate Minor and Passive Owner Information on Schedules A and B. Schedule A should be amended to eliminate owners who hold less than 25% of the adviser's voting securities. Assuming the intent is to use ownership on Schedule A as a proxy for the ability to influence or "control," then listing owners below the 25% level is unnecessary. Ownership below 25%,[46] all the way down to 5%, would typically not convey any greater ability to influence or control than ownership at levels below 5%, which are not required to be listed.[47] As such, the percentage cut-offs are arbitrary. Moreover, listing owners below 25% is intrusive and burdensome for advisers, often calling for public disclosure of sensitive information that is more pertinent to the owners' estate planning arrangements than to an understanding of who controls the adviser. Lastly, listing only direct owners over 25% on Schedule A would be consistent with the approach used for listing indirect owners on Schedule B.

In addition, Schedule A should be amended to eliminate limited partners, non-managing LLC members and similar "passive" owners who, by virtue of that ownership, do not have voting rights or similar rights to manage or control. For the reasons discussed above, listing this type of owner is merely intrusive and burdensome and adds nothing to an understanding of who is in charge. Schedule B should be amended in the same respect for the same reasons.

[46] Indeed, in the context of most legal entities, owners of less than a majority (50%) of the voting securities would not be deemed to have control. Nonetheless, at least ownership at the 25+% level has precedence in the control definition found in the Investment Company Act, which used to be applicable to the Advisers Act.

[47] Typically, only in the context of a public company would ownership all the way down to 5% be considered to potentially implicate control and, ironically, it is only in the context of a public company that advisers are NOT required to list 5% owners on Schedule A, and indeed are not required to list any owners at all, according to Instruction 2.(b) of Schedule A.

Importantly, these suggested amendments would not allow advisers to avoid disclosing any "control persons" because Item 10 of Part 1A specifically calls for advisers to disclose on Schedule D any person who controls the adviser and who is not already listed on Schedule A or B. Moreover, the Staff is free to ask in an inspection – as it typically does – for a copy of the adviser's organization chart, list of employees and list of affiliated entities, which should provide the information they need to understand potentially influential employee and ownership relationships. This makes the listing of minor and passive owners on Form ADV even more superfluous. As such, it should be eliminated.

* * *

I hope these comments and suggestions are helpful to your consideration of this important Proposal. If you have any questions or would like any further clarification about these or related points, please contact me at the phone number referenced below.

Sincerely,

L. A. Schnase
Individual Investor and Attorney at Law
713-741-8821

cc: Office of Management and Budget