MARKETCOUNSEL®

April 25, 2012

VIA INTERNET COMMENT FORM

Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

RE: Identity Theft Red Flags Rules
File Number S7-02-12

Dear Ms. Murphy,

Please accept our comments to the U.S. Securities and Exchange Commission's (the "Commission's") proposed rule regarding Identity Theft Red Flags Rules (the "Proposed Rule"). MarketCounsel supports the Commission's attempt to help protect individuals from the risk of theft, loss, and abuse of their personal information through the Proposed Rule. We agree with the majority of the provisions of the Proposed Rule, but seek clarification on a few items that impact independent investment advisers.

MarketCounsel is a business and regulatory compliance consulting firm to some of the country's preeminent entrepreneurial investment advisers. From the startup of an investment adviser through our RIA Incubator program to the outsourced compliance capabilities of the RIA Institute for Compliance Management, MarketCounsel's platform consistently delivers extraordinary service and trusted counsel throughout an adviser's lifecycle, whether they are small advisers or they have billions of dollars under management. In addition, our affiliated law firm, the Hamburger Law Firm, renders legal counsel to over 1,000 entrepreneurial companies, investment advisers, broker-dealers, hedge funds, family offices, and registered securities personnel.

FINANCIAL INSTITUTIONS AND CREDITORS REQUIRED TO HAVE A PROGRAM

We were pleased to see that the Staff of the Commission (the "Staff") acknowledged that the Proposed Rule would commonly only impact entities which are already subject to the final rules and guidelines adopted by a number of agencies under the FACT Act. After numerous changes to interpretations by those agencies, it is now generally accepted that the vast majority of independent investment advisers are not covered by the Red Flags Rules.

The scope of the Proposed Rule includes investment advisers registered with the Commission. You requested comment on whether the Commission should specifically list all of the entities that would be covered by the Proposed Rule if they were to qualify as financial institutions or creditors. It is our opinion that the scope need not mention the specific types of regulated entities subject to the Proposed Rule, especially considering that the Staff acknowledges that most investment advisers will not be covered by the Proposed Rule. We feel that it may confuse investment advisers and the general public,

resulting in many believing that investment advisers are covered by the Proposed Rule regardless of the financial institution or creditor qualification.

DEFINITION OF FINANCIAL INSTITUTION

The Proposed Rule defines a financial institution to include "any other person that, directly or indirectly, holds a transaction account … belonging to a consumer." The Commission specifically recognized that most registered investment advisers are unlikely to hold transaction accounts and thus would not qualify as financial institutions. The Staff requested comment on a number of areas regarding the definition of Financial Institution.

MarketCounsel does not believe that investment advisers (nor any other type of firm) should be omitted from the Proposed Rule. We are, however, concerned that the term "indirectly" remains without further guidance. There are instances when an investment adviser has *access* to client transaction accounts. For example, many investment advisers have power-of-attorney over client bank accounts, allowing them to pay bills on behalf of those clients. The investment adviser is deemed to have custody over such assets and must engage an accountant to do a surprise inspection of those assets. MarketCounsel requests additional clarification in the Proposed Rule to make it clear that an investment adviser will not be deemed to *indirectly* hold a transaction account simply because it has control over, or access to, the transaction account.

DEFINITION OF CREDITOR

The Staff pointed out that the legislative history of the Clarification Act excludes from the definition of "creditor" those that "advance[] funds on behalf of a person for expenses incidental to a service …." In addition, the Staff stated that the Clarification Act was intended to ensure that businesses that issue bills in arrears should not be considered creditors. MarketCounsel wholeheartedly agrees with these two interpretations. We request clarification, however, on a comment the Staff made on page 18 of the Rule Proposal that says "[t]he proposed definition of 'creditor' would not include, however, CTAs or investment advisers because they bill in arrears … if they do not 'advance' funds to investors and clients." MarketCounsel believes that an entity should not be deemed a "creditor" simply because it both bills in arrears and occasionally advances funds for clients incidental to its service. Investment advisers should enjoy the same exclusion for incidental advances even where they bill in arrears.

CONCLUSION

MarketCounsel hopes that our comments, made on behalf of us and our entrepreneurial, closely held investment adviser clients are beneficial to this process. Thank you for the opportunity to provide input and should you have any questions or require any additional information regarding any of the foregoing, we remain available at your convenience.

Best regards,
MARKETCOUNSEL, LLC

By: Brian S. Hamburger, JD, CRCP, AIFA
Managing Director

Daniel A. Bernstein, JD
Director, Research + Development