November 18, 2010

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F. Street, NE.,
Washington, DC 20549-1090

Re: File Number S7-25-10 – Proposed Rule Defining "Family Offices"

The American Benefits Council (the "Council") and the Committee on the Investment of Employee Benefit Assets ("CIEBA") appreciate this opportunity to comment to the Securities Exchange Commission (the "Commission") on the proposed rule to define "family offices" that would be excluded from the definition of an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act").[1]

The Council and CIEBA

The Council is a public policy organization principally representing Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans. CIEBA represents more than 100 of the country's largest pension funds. Its members manage $1.4 trillion of defined benefit and defined contribution plan assets, on behalf of 17 million plan participants and beneficiaries. CIEBA members are the senior corporate financial officers who individually manage and administer corporate retirement plan assets, primarily those governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Summary of Request

The Council and CIEBA, as representatives of the plan sponsor community request that in crafting the final rule excluding "family offices" from the from the definition of an investment adviser for purposes of the Advisers Act, the Commission be mindful of the role that plan sponsors play in advising employee benefit plans and plan participants. Specifically, we ask the Commission to clarify that a family office otherwise exempt from registration under the rule, or an individual employee or officer of such a family office, will not be required to register as an

[1] 75 Fed. Reg. 63753, 63754 (Oct. 18, 2010) ("Proposed Rule").

investment adviser merely by reason of advising an employee benefit plan sponsored by the family office for its own employees.

Legal Background

Section 403 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") will repeal the 15-client exemption contained in section 203(b)(3) of the Advisers Act, effective July 21, 2011. As noted in the proposed rule, the primary purpose of section 403 was to require advisers to private funds, such as hedge funds, to register under the Advisers Act.[2] Because Dodd-Frank's repeal of the 15-client exemption would have also resulted in traditional family offices being required to register as investment advisers or seek an exemption from the Commission, Congress included section 409 of the Dodd-Frank Act, creating an exemption from the Adviser's Act registration requirement for "family offices" as defined by the Commission.[3] Dodd Frank further requires the Commission's definition of "family offices" exempted from Advisers Act registration to recognize "the range of organizational, management, and employment structures and arrangements employed by family offices."[4]

ERISA provides a comprehensive regulatory scheme governing the investment of private pension plan assets and subjecting "fiduciaries" of ERISA plans to exacting standards of loyalty and prudence, described as "the highest known to law."[5] A person will be considered an ERISA "fiduciary" if he is named as a fiduciary in the document governing the plan, if he serves as the trustee or the administrator of the plan, or if he functions as a fiduciary by reason of exercising discretionary authority or control over the management of a plan or any authority or control with respect to its assets, has discretion over the administration of a plan, or renders investment advice to the plan for a fee.[6]

The Commission has previously recognized ERISA's comprehensive regulatory regime in finding that employers providing advice in the context of the employee benefit plans made available by the employer to its employees and their beneficiaries are generally not required to register under the Advisers Act.

Specifically, in a letter to Olena Berg, Assistant Secretary, Pension and Welfare Benefits Administration from Jack Murphy, Associate Director, SEC Division of Investment Management (Dec. 5, 1995) the Commission staff recognized that "the employer-employee relationship is unlike the commercial relationship between an investment adviser and its client that the Advisers Act was intended to regulate." The letter also notes that employers are typically not "in the business" of providing investment advice to their employees.

More recently, the Commission staff issued a no-action letter to a LMIMCO, a wholly-owned subsidiary of an employer sponsor of several employee benefit plans, confirming that the

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[2] Proposed Rule at 63754.
[3] Dodd-Frank Act, § 409.
[4] Dodd-Frank Act, § 409)(b).
[5] Donvan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982).
[6] ERISA § 3(21).

staff would not recommend enforcement action if the wholly-owned subsidiary withdrew its registration as an investment adviser under the Advisers Act.[7] In the LMIMCO letter, the staff addressed advice provided to the employer's *plan* rather than to plan participants. Noting that LMIMCO had more than 15 clients and received reimbursement for the direct costs and expenses of its advisory services, the staff nevertheless determined that LMIMCO need not register. The staff's position was based in part on representations that LMIMCO did not hold itself out to the public as an investment adviser and advised only plans established solely for employees of LMIMCO's parent and affiliates. The request letter noted that most of the plans advised by LMIMCO were subject to ERISA and therefore that LMIMCO was subject to ERISA's strict fiduciary standards.

Support for Request

The Commission should confirm in the family office rule that advice to an employee benefit plan sponsored by the family office will not, by itself, necessitate registration under the Advisers Act. This confirmation would be appropriate in light of section 409(b) of Dodd-Frank, and would be consistent with the Commission's prior guidance regarding advice to employee benefit plans.

Notably, section 409(b) of Dodd-Frank specifically requires the Commission to take into account the "employment structures and arrangements" used by family offices. It would be inconceivable for this reference not to include the employee benefit plans sponsored by the family office for its employees. Thus, to exempt family offices from Advisers Act registration without acknowledging the role of employee benefit plans as employment structures and arrangements would be inconsistent with the statutory mandate in Dodd-Frank section 409(b).

It is also the view of the Council and CIEBA that the family office rule should be consistent with the Commission's prior guidance relating to employer sponsors advising employee benefit plans. Specifically, that employers are generally not "in the business" of advising the plans that they sponsor or their employees as plan participants, and that merely advising an employee benefit plan or participant should not cause an entity not otherwise required to register as an investment adviser, to be required to register. This guidance is particularly necessary given the repeal of the 15-client exemption contained in section 403 of Dodd-Frank.

We appreciate the opportunity to comment on this proposed rule. If you have questions, please do not hesitate to contact Lynn Dudley (202-289-6700, the Council) or Judy Schub (301-961-8682, CIEBA).

Sincerely,

American Benefits Council Committee on the Investment of Employee Benefit Assets

[7] Lockheed Martin Investment Management Company (SEC Staff Letter avail. Jun. 5, 2006).