INVESTMENT COMPANY INSTITUTE

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May 16, 2008

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

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

Dear Ms. Morris:

The Investment Company Institute[1] supports the Securities and Exchange Commission's reproposed amendments to Part 2 of Form ADV and related rules under the Investment Advisers Act of 1940.[2] The amendments would replace the current "check-the-box" format and related disclosure schedules with a plain English, narrative brochure that should provide significant enhancements to the adviser disclosure regime.

The Commission's current proposal is a continuation of its efforts to modernize Form ADV and provide for its electronic filing. It also follows various initiatives to improve disclosure, including the recently proposed concept of a new prospectus delivery option for

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[1] The Investment Company Institute is the national association of the U.S. investment company industry. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. The Institute's investment company members manage total assets of $12.31 trillion and serve almost 90 million shareholders. Many of the Institute's investment adviser members render investment advice to both investment companies and other clients. In addition, the Institute's membership includes 114 associate members, which render investment management services exclusively to non-investment company clients. These Institute members and associate members manage a substantial portion of the total assets managed by registered investment advisers.

[2] *Amendments to Form ADV*, SEC Release No. IA-2711 (March 3, 2008), 73 Fed. Reg. 13958 (March 14, 2008) ("Proposing Release"). The Proposing Release incorporates comments the SEC received, including many from the Institute, on the amendments to Part 2 originally proposed in April 2000 but never adopted. *See Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV*, SEC Release No. IA-1862 (April 5, 2000), 65 Fed. Reg. 20524 (April 17, 2000) ("2000 proposal") and Letter from Amy B.R. Lancellotta, Senior Counsel, Investment Company Institute, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, June 13, 2000.

mutual funds.[3] As with the proposed reform of mutual fund disclosure, we support efforts to ensure that important information is disclosed to clients and prospective clients in a more user-friendly format.

We commend the Commission for amending many aspects of the 2000 proposal based on our comments; however, there are areas of this proposal that should be improved. Specifically, we believe the proposed requirements for annual and interim delivery of an adviser's brochure should be replaced by an approach that takes full advantage of the benefits offered by the Internet. We also recommend that the Commission make various revisions to the brochure supplement delivery requirements. Finally, we believe that in several areas the proposed amendments would require overly detailed and technical information that is inconsistent with the Commission's goal of promoting the delivery of clear, concise, and more easily understandable disclosure. More disclosure, after all, does not necessarily equate with better disclosure. We believe the quality and usefulness of this disclosure to investors can be improved by revising certain items in the form. Our recommendations are discussed in detail below.

I. Delivery Requirements for the Brochure and Brochure Supplement

A. Internet Availability for the Annual and Interim Brochure Delivery Requirements

The proposal would require an adviser to deliver its brochure to a client when it enters into an advisory agreement with that client and annually thereafter. The annual delivery must be made to existing clients no later than 120 days after the end of the adviser's fiscal year, and may be made on paper or electronically.[4] In addition, an adviser must deliver interim amendments to clients if there are certain disciplinary history changes. The annual and interim delivery requirements represent a departure from the current rule, which requires only that after initial delivery an adviser annually *offer* to deliver its brochure to each of its advisory clients upon written request.

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[3] *See Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies*, SEC Release Nos. 33-8861 and IC-28064 (November 21, 2007), 72 Fed. Reg. 67790 (November 30, 2007).

[4] Under the proposal, brochures and brochure supplements could be delivered electronically if such delivery meets guidelines (including notice, access, and evidence of delivery) developed in the Commission's 1996 interpretive guidance on electronic delivery. *See 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,* SEC Release No. IA-1562 (May 9, 1996), 61 Fed. Reg. 24644 (May 15, 1996).

We understand and support the Commission's desire to keep clients apprised of material developments related to their advisers, but believe this can be done effectively, and more efficiently, through a notice and Internet posting approach. Specifically, we recommend that the Commission permit an adviser to satisfy the annual and, if applicable, interim brochure delivery requirements by notifying clients in writing, within the mandated timeframe, that the adviser's updated brochure is available for review on the Commission's public Internet website. This notification also could be required to include a statement that the client may obtain the brochure on paper or by email upon request.[5]

The Commission has embraced a similar disclosure approach in other contexts, including securities offerings and proxy voting.[6] Most recently, the Commission proposed a new, layered approach to disclosure for mutual funds under which fund companies would deliver a summary of key information and make additional information, including the statutory prospectus, available online and on paper or by email upon request.[7] As part of this proposal, a mutual fund that posts its statutory prospectus on the Internet (and meets certain other conditions) is deemed to have delivered the posted prospectus to investors.

Our recommendation is based, in part, on research indicating a high level of Internet access and usage among investors. According to statistics cited by the Commission in the Proxy Voting Release, 80 percent of investors in the United States have access to the Internet in their

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[5] Although under the proposal, brochure supplements would not be filed with the Commission, we recommend that the Commission consider allowing a similar notification and Internet posting option to satisfy an adviser's interim brochure supplement delivery requirements (annual delivery of a brochure supplement is not required under the proposal). Under this approach, an adviser would have the option to post the updated brochure supplement on the adviser's website and send a notice to its clients indicating that the updated supplement is available and explaining how to access the document.

[6] In 2005, the Commission modernized the registration and securities offering rules by providing that a prospectus would be deemed to precede or accompany a security for sale for purposes of Section 5 of the Securities Act of 1933 as long as a prospectus meeting the requirement of Section 10(a) of the Securities Act is filed with the Commission. This allows for the delivery to investors of only the confirmation and no prior or accompanying delivery of a written prospectus. *See Securities Offering Reform*, SEC Release Nos. 33-8591, 34-52056, and IC-26993 (July 19, 2005), 70 Fed. Reg. 44722 (August 3, 2005). More recently, amendments to the proxy rules allow issuers to satisfy delivery requirements by posting proxy materials on a publicly accessible Internet website and sending a timely notice to shareholders indicating that the proxy materials are available and explaining how to access those materials. *See Internet Availability of Proxy Materials*, SEC Release Nos. 34-55146 and IC-27671 (January 22, 2007), 72 Fed. Reg. 4148 (January 29, 2007) ("Proxy Voting Release"); *see also Shareholder Choice Regarding Proxy Materials*, SEC Release Nos. 34-56135 and IC-27911 (July 26, 2007), 72 Fed. Reg. 42222 (August 1, 2007).

[7] *See supra* note 3.

homes.[8] In a more recent Institute survey of mutual fund investors, 95 percent of the investors surveyed reported that they have access to the Internet.[9] Among those who access the Internet, almost 90 percent use it to gather financial information online.[10] We believe our recommended approach would be cost effective and is consistent with Chairman Cox's commitment to regulatory approaches that take advantage of technology for the benefit of investors.

B. Exemption for Qualified Clients from the Brochure Supplement Delivery Requirements

The proposal would require an adviser to deliver to each of its clients a brochure supplement that provides information about the advisory personnel ("supervised persons") on whom the client relies for investment advice. Two exceptions to this delivery requirement include clients who are "qualified purchasers" as defined in Section 2(a)(51)(A) of the Investment Company Act of 1940 and a very narrow group of "qualified clients," as defined in Rule 205-3(d)(1)(iii) under the Advisers Act, who are officers, directors, employees, and other persons related to the adviser.

The Institute agrees that the mandated disclosures about advisory personnel are not necessary for institutional or sophisticated clients, who generally obtain specific and extensive information about an investment adviser's employees through the process of selecting an adviser. The proposed exceptions that would exclude from the brochure supplement delivery requirements both "qualified purchasers" and certain "qualified clients," however, seem overly complex and too narrow.[11] We recommend that the Commission replace these exceptions with an exception from supplement delivery for *all* clients who are "qualified clients" (*e.g.*, high net worth clients) as defined under Rule 205-3(d)(1).[12] The Rule 205-3 standard is very familiar to

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[8] *See* Proxy Voting Release, *supra* note 6.

[9] *See Investor Views on the U.S. Securities and Exchange Commission's Proposed Summary Prospectus*, Investment Company Institute (March 14, 2008) at 18.

[10] *Id.*

[11] A number of different sophistication standards already exist in the federal securities laws (*e.g.*, "accredited investor," "qualified purchaser," "qualified client," "qualified institutional buyer") and the adoption of yet another "grouping" would increase the complexity for registered entities and could have the unintended effect of causing compliance failures. The Institute supports efforts to harmonize the various standards intended for sophisticated investors, and ultimately reduce the number of such standards, provided that investment thresholds remain high and there is no reduction in investor protection. *See, e.g.,* Letter from Paul Schott Stevens, President and CEO, Investment Company Institute, to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, October 9, 2007 (commenting on proposals to amend Regulation D).

[12] The definition of "qualified client" includes a "qualified purchaser" as defined in Section 2(a)(51)(A). *See* Rule 205-3(d)(1)(ii)(B).

advisers, who apply it, for example, in the structuring of performance fee arrangements and in responding to questions in Form ADV, Part 1. Indeed, the Commission has recognized that "because of their wealth, financial knowledge, and experience," high net worth clients are less dependent on the protections provided by the Advisers Act.[13] In light of those characteristics of high net worth clients as previously noted by the Commission, we believe that the general "qualified client" standard is an appropriate exception and that the Commission need not require delivery of the brochure supplement to such clients.

C. Timing of Brochure Supplement Delivery for Supervised Person Changes

The proposal would require an adviser to deliver to a client, including an existing client, a brochure supplement for a supervised person before or at the time that supervised person begins to provide advisory services to the client. We believe that this requirement could prove too inflexible in situations in which an adviser must quickly replace a departed supervised person (*e.g.*, where a supervised person leaves the adviser with minimal advance notice). In the case of a large adviser with thousands of supervised persons, for example, employees may begin or end employment with the adviser, or the staffing needs for a particular client could change on any given day. Accordingly, we recommend the Commission modify the delivery requirement to allow for a transition period if a new supervised person of an adviser begins to provide advisory services to an existing client of the adviser. Specifically, we recommend that an adviser be required to deliver a supplement for the new supervised person to an existing client "promptly" after the date the supervised person begins to provide advisory services to the client.

D. Delivery of Brochure Supplements for Management Teams

The proposal would provide an exception from the requirement to deliver to a client a brochure supplement for a supervised person if that supervised person is part of a team and does not have direct client contact.[14] We believe that this "direct client contact" exception is so narrow as to be of little practical use. We understand that most, if not all, members of adviser

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[13] *See generally Exemption to Allow Investment Advisers to Charge Fees Based Upon a Share of Capital Gains Upon or Capital Appreciation of a Client's Account*, SEC Release No. IA-1731 (July 15, 1998), 63 Fed. Reg. 39022 (July 21, 1998) (among other things, revising the "qualified client" definition under Rule 205-3).

[14] Under the proposal, disclosure is required for each supervised person who (i) formulates investment advice for a particular client and has direct contact with that client, or (ii) makes discretionary decisions for a particular client's assets, even if the supervised person has no direct contact with that client. No supplement is required for a supervised person who has no direct client contact and has discretionary authority over a client's assets only as part of a team.

investment teams have direct client contact from time to time. Thus, an adviser typically would be required to provide a brochure supplement for each team member.[15]

While a requirement to provide disclosure regarding each member of a management team may be appropriate for teams that consist of a relatively small number of members, the disclosure could become lengthy and less meaningful to investors in the case of larger teams, as well as unduly burdensome for advisers. We recommend instead that the Commission pattern the brochure supplement delivery requirements after the disclosure requirements applicable to investment companies regarding their portfolio managers. Under this disclosure regime, funds must provide information in their prospectuses regarding each member of a committee, team, or other group of persons associated with the fund's investment adviser who is jointly and primarily responsible for the day-to-day management of the fund's portfolio.[16] If more than five persons are jointly and primarily responsible for the day-to-day management of a fund's portfolio, the fund need only provide the required information for the five persons with the most significant responsibility.

In the release adopting the rules on portfolio manager disclosure, the Commission reasoned that funds with large numbers of persons that are jointly and primarily responsible for portfolio management should only have to provide information about the key decision-makers, because providing lengthy disclosure about numerous individuals would obscure other important information in the prospectus.[17] We agree, and believe this reasoning is equally persuasive in the context of providing disclosure about an adviser's supervised persons. We also note that separate disclosure standards could lead to situations in which investment advisory clients that invest through separately managed accounts receive more information than investment company shareholders, even though both may be receiving advisory services from the same investment team following a similar strategy. Requiring advisers to adhere to inconsistent disclosure standards without any good reason creates additional, and unnecessary, compliance challenges.

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[15] Alternatively, an adviser could prepare separate supplements for groups of supervised persons, so long as there is information in a separate section for each supervised person. *See* Proposed Instruction 6 to Part 2B.

[16] The disclosure must include the team member's name, title, length of service, business experience, and a description of the member's role relative to others on the team. *See Disclosure Regarding Portfolio Managers of Registered Management Investment Companies*, SEC Release Nos. 33-8458, 34-50227, and IC-26533 (August 23, 2004), 69 Fed. Reg. 52788 (August 27, 2004).

[17] *Id.*

II. Content Requirements of the Firm Brochure

As proposed, Part 2A, the advisory brochure, would contain 19 separate narrative disclosure items that relate to an advisory firm's business. According to the Proposing Release, much of the information that would be required in the brochure concerns conflicts between an adviser's own interests and those of its clients and is disclosure the adviser already makes to clients as a fiduciary. Our recommendations regarding the Commission's proposed revisions to the brochure are set forth below in the order in which these items appear in the form.

A. Material Changes

Proposed Item 2 would require an adviser to provide clients with a summary of any "material changes" to its brochure since the last annual update of the brochure. The summary would appear on the cover page of the brochure or the page immediately thereafter, or could be included in a separate communication that would accompany the brochure.

The Institute is concerned that because the proposal does not define "material," advisers will have a tendency to describe many changes in the brochure that the Commission did not intend to be disclosed. Even if a definition were provided, advisers often have several different types of clients (*e.g.*, hedge fund clients, retail wrap clients), and what constitutes a material change for one type of client may not constitute a material change for another type. As a result, many brochures would begin with a lengthy discussion of the various changes that have been made since the prior update, increasing the likelihood that clients would not read the other parts of the brochure. We also note that similar disclosure is not required in other disclosure regimes, including mutual fund prospectuses. We therefore recommend that the Commission eliminate this proposed requirement.

B. Disciplinary Information

Proposed Item 9 would require an adviser to disclose in its brochure material facts about any legal or disciplinary event that is material to a client's evaluation of the integrity of the adviser or its management. Item 9 sets forth a list of disciplinary events that are deemed presumptively material if they occurred within the past 10 years, but permits advisers to rebut any such presumption, in which case no disclosure to clients would be required. Advisers rebutting a presumptively material legal or disciplinary event would be required to document and retain the rebuttal determination.

The Commission has sought additional comment on whether it should require advisers to disclose arbitration awards or claims. Unlike Commission administrative proceedings, arbitration proceedings do not result in any findings of fact or conclusions of law. Instead, such proceedings merely determine whether to award an aggrieved party monetary relief and often

are concluded without even a writing describing the bases for a decision. Consequently, we question whether the results of these proceedings would provide useful information regarding an adviser's alleged wrongdoing or "integrity" to advisory clients. We urge the Commission instead to focus its disclosure requirements on administrative, civil, or criminal proceedings that result in regulatory sanctions.

C. Codes of Ethics, Participation or Interest in Client Transactions, and Personal Trading

Proposed Item 11 would require an adviser to briefly describe its code of ethics adopted pursuant to Rule 204A-1 under the Advisers Act and, upon request, to furnish clients with a copy of the code (Item 11.A.). This item also would require an adviser to make additional disclosure relating to participation or interest in client transactions (Item 11.B.) and personal trading by the adviser and its personnel (Items 11.C. and 11.D.).

Although we support the general disclosure as proposed under Item 11.A., we do not believe the additional provisions under the Item are necessary or of particular importance to advisory clients. Specifically, we do not believe that most of the information as required under Items 11.B., 11.C., and 11.D. is the type of information advisory clients would consider to be critically important in determining whether to hire or retain an adviser. The code of ethics adopted by the adviser should protect clients from the types of conflicts potentially arising from the activities described in Items 11.B., 11.C., and 11.D. Moreover, advisers must disclose material conflicts of interest in order to avoid liability under the general anti-fraud provisions of the Advisers Act; the proposed amendments, however, go beyond this requirement by requiring disclosure in all cases, not just where there is a material conflict.[18] We therefore recommend that Part 2 of Form ADV, generally, and Item 11, specifically, require disclosure only of activities that involve a material conflict of interest.

Item 11.B. also requires disclosure of "procedures" for disclosing conflicts to clients. This type of disclosure is inconsistent with the Commission's approach throughout the proposed amendments of requiring an adviser to describe the nature of the conflicts it faces and how it addresses these conflicts. As a result, we recommend the Commission eliminate the proposed requirement in Item 11.B. that would require an adviser to disclose procedures for disclosing conflicts.

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[18] We note that we have similar concerns regarding the amount and type of disclosure that would be required by other items to Part 2 of Form ADV, such as proposed Item 6, relating to performance fees and side-by-side management.

D. Brokerage Practices

Proposed Item 12 would require disclosure about an adviser's policies and practices in selecting brokers for client transactions. As part of this disclosure, Item 12.A.1. would require an adviser to disclose its policies and practices regarding "soft dollars." Specifically, an adviser accepting soft dollar benefits would have to, among other things: (i) explain that the adviser benefits because it does not have to produce or pay for the research, other products, or services acquired with soft dollars (Item 12.A.1.a.); (ii) disclose that the adviser may have an incentive to select or recommend a broker-dealer based on the adviser's interest in receiving these benefits, rather than on the client's interest in receiving best execution (Item 12.A.1.b.); (iii) disclose whether the adviser seeks to allocate soft dollar benefits to client accounts proportionately to the soft dollar credits the accounts generate (Item 12.A.1.d.); and (iv) explain the "procedures" the adviser used during its last fiscal year to direct client transactions to a particular broker-dealer in return for the soft dollar benefits the adviser received (Item 12.A.1.f.) and in return for client referrals (Item 12.A.2.b.).

The Institute agrees with the Commission that soft dollar arrangements may create certain conflicts of interest between an adviser and its clients. We also believe that the most appropriate way to address these potential conflicts is through disclosure. We are deeply concerned, however, that the negative connotations of some of the disclosure that Item 12 would require could lead a client to conclude that soft dollar arrangements are harmful, and therefore, adverse to the client's interest. Although these arrangements may present a potential conflict of interest, they can afford advisers the opportunity to obtain valuable research products and services from a wide variety of sources to which they may not otherwise have access and, thus, significantly benefit clients.[19]

Specifically, we are concerned with the proposed disclosure in Item 12.A.1.d. regarding whether the adviser seeks to allocate the benefits to client accounts proportionately to the brokerage credits those accounts generate. In virtually all instances, this item would result in an adviser disclosing that it does not allocate in that manner. Advisers are not required under the federal securities laws to make these types of allocations, and, indeed, such a requirement would be tantamount to amending the soft dollar safe harbor of Section 28(e) of the Securities Exchange Act. Moreover, advisers generally cannot make these allocations. Instead, advisers typically aggregate client trades in order to seek a lower commission or more advantageous net price and to facilitate providing the same price to all client accounts trading on a given day. As a

[19] Recognizing the value of research in managing client accounts, Congress enacted Section 28(e) of the Securities Exchange Act to provide a safe harbor that protects money managers from liability for a breach of fiduciary duty solely on the basis that they paid more than the lowest commission rate in order to receive "brokerage and research services" provided by a broker-dealer, if the managers determined in good faith that the amount of the commission was reasonable in relation to the value of the brokerage and research services received.

result, the requirement as proposed is likely to generate "negative" disclosure that would unduly alarm clients and prospective clients and therefore should be eliminated.

Finally, we are concerned with the requirement in Items 12.A.1.f. and 12.A.2.b. that would require an adviser to explain the "procedures" it used during its last fiscal year to direct client transactions to a particular broker-dealer in return for the soft dollar benefits the adviser received and in return for client referrals. As we noted in our comment relating to Item 11.B. above, this type of disclosure is inconsistent with the Commission's approach throughout the proposed amendments of requiring an adviser to only describe the nature of the conflicts it faces and how it addresses these conflicts. We therefore recommend that the Commission eliminate Items 12.A.1.f. and 12.A.2.b.

E. Custody

Proposed Item 15 would require an adviser that has custody to explain that clients will receive and should carefully review account statements from qualified custodians as defined in Rule 206(4)-2 under the Advisers Act or similar state rules. If a qualified custodian does not send account statements to clients, the adviser must explain that it has custody and explain "the risks that clients will face because of this."

The Proposing Release does not explain the sort of risk disclosure an adviser should make when a qualified custodian does not send account statements to clients, nor does the Release mention that advisers have an obligation to safeguard client assets. Rule 206(4)-2 requires advisers that have custody of client securities or funds to implement a set of controls designed to protect those client assets from being lost, misused, misappropriated, or subject to the advisers' financial hardships. In light of those controls, the potential risks to clients from custody arrangements appear to be quite limited and more theoretical than practical. Disclosure of these mostly theoretical risks would not provide meaningful information to investors and would embed negative connotations in the proposed disclosure. We therefore recommend that an adviser only be required to explain the protections it has in place for safeguarding client assets.

This item also does not address the exceptions provided in Rule 206(4)-2. For example, for mutual fund shares, the rule allows an adviser to use the mutual fund's transfer agent in lieu of a qualified custodian for the fund's shares. In addition, proposed Item 15 does not mention situations in which an adviser complies with the "audit approach" exception for limited partnerships or other private investment funds under Rule 206(4)-2(b)(3) and is not required to provide account statements to clients.[20] We recommend that the Commission revise Item

[20] Specifically, advisers need not comply with the reporting requirements of Rule 206(4)-2 for pooled investment vehicles, such as limited partnerships or limited liability companies, if the pooled investment vehicle (i) is audited at least annually, and (ii) distributes its audited financial statements prepared in accordance with generally

15 to clarify that disclosure under Item 15.A. is not required when the adviser's custody arrangements qualify under any of the exceptions in Rule 206(4)-2.

F. Voting Client Securities

Proposed Item 17 would require an adviser to disclose its proxy voting procedures and how the adviser addresses associated conflicts of interest (Item 17.A.). In addition, an adviser would be required to list any third-party proxy voting services that it uses to make proxy voting decisions and describe how it selects the proxy voting services, how it pays for these services, and whether clients can direct the use of a particular proxy voting service (Item 17.B.).

Although we support the general disclosure proposed by Item 17.A., the information concerning an adviser's use of third-party proxy voting services required under Item 17.B., especially the information about how an adviser selects third-party proxy voting services, is not relevant for most advisory clients and places undue emphasis on proxy voting services. The Commission also should not require disclosure about how an adviser pays for proxy voting services. Many advisers pay for such services out of their own revenues and do not impose on clients an additional charge. Moreover, if an adviser pays for proxy voting services with soft dollars, that information would be required to be disclosed under Item 12.A.1. We recommend that the disclosure regarding third-party proxy voting services be eliminated from Item 17.

G. Index

Proposed Item 19 would require all advisers to include with the filing of their brochure an index of the items required by Part 2A. The index, which is not required to be provided to clients, is intended to help the Commission staff locate where in the brochure the adviser addresses each required item of disclosure. By contrast, Form N-1A does not require this type of an index, even though filings on Form N-1A generally receive more extensive review by Commission staff than filings on Form ADV. We recommend that, inasmuch as each brochure is required by Item 3 to include a table of contents, proposed Item 19 be eliminated.

III. Content Requirements of the Brochure Supplement – Disciplinary Information

As proposed, Part 2B, the brochure supplement, would contain six separate narrative disclosure items about the advisory personnel on whom clients rely for investment advice, including those relating to a supervised person's educational background and business experience, disciplinary information, and other business activities.

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accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of its fiscal year.

Proposed Item 3 of Part 2B of Form ADV would require disclosure in a brochure supplement of any legal or disciplinary event that is material to a client's evaluation of a supervised person's integrity. Similar to Item 9 of Part 2A, Item 3 would list those events that are deemed presumptively material if they occurred within the last 10 years. An adviser would be permitted to rebut these presumptions of materiality, in which case no disclosure would be required, provided that any such rebuttal were documented and retained by the adviser.

The disclosures that would be required by proposed Item 3 of Part 2B are based in part, but are not identical to, the list of disciplinary events that advisers are required to disclose under Advisers Act Rule 206(4)-4. Item 3 also appears to encompass certain concepts within Item 14 of Form U-4, which requires disclosure of a broker-dealer or investment adviser representative's disciplinary history, but in a manner that is inconsistent with the requirements of Form U-4. The Institute believes that the lack of uniformity in the disciplinary disclosures that would be required under Item 3 and either Rule 206(4)-4 or Form U-4 would only complicate compliance with the new disclosure requirements.[21] Because the disciplinary information required by Form U-4 has been determined by federal and state regulators to be a necessary aspect of an investment adviser representative's registration application, we encourage the Commission to reconcile the requirements of proposed Item 3 of Part 2B with the requirements of Item 14 of Form U-4.

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[21] For example, although Item 3 generally follows the disclosure requirements of Rule 206(4)-4, it follows Form U-4 in requiring the disclosure of any felony by a supervised person, as opposed to the disclosure under Rule 206(4)-4 of any felony involving an investment, fraud, or false statement. Similarly, Item 3 would require Rule 206(4)-4's disclosure whenever a supervisory person was the "subject" of an investment related criminal proceeding, while Item 14B.(2) of Form U-4 requires disclosure when a representative has been "charged" with a felony or investment-related misdemeanor. Item 3 also would require disclosure of the imposition of a civil money penalty of more than $2,500 against a supervised person by the SEC, or any other federal, state or foreign regulatory agency. Neither Rule 206(4)-4 under the Advisers Act nor Item 14 of Form U-4 currently requires such disclosure. Rule 206(4)-4 requires similar disclosure of self-regulatory organization orders imposing fines of $2,500 or more.

The Institute appreciates the opportunity to comment on this proposal. If you have any questions about our comments or would like any additional information, please contact me at 202-326-5815 or Jane Heinrichs, Associate Counsel, at 202-371-5410.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan
General Counsel

cc: The Honorable Christopher Cox
The Honorable Paul S. Atkins
The Honorable Kathleen L. Casey

Andrew J. Donohue, Director
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