SEWARD & KISSEL LLP

May 1, 2008

Memorandum to Our Registered Investment Adviser Clients and Friends

SEC Re-Proposes Amendments to Part 2 of Form ADV

Introduction

The Securities and Exchange Commission (the "SEC") recently re-proposed amendments to Part 2 of Form ADV and related rules under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). The proposals would eliminate the current check-the-box, fill-in-the-blank form of Part II, which most advisers use as their brochures, and replace it with a new plain English, narrative form. The new narrative form of the brochure would have to be delivered to a registered adviser's clients initially and annually. In addition, the new brochure would have to be filed electronically with the SEC. Comments on the proposals must be submitted to the SEC on or before May 16, 2008.

Discussion of the Proposals

The proposals would require a registered adviser to develop a new firm brochure (the "Firm Brochure") as well as new advisory personnel supplements (each, a "Personnel Supplement").

A. Firm Brochure Disclosure Requirements

The proposals would require that the Firm Brochure describe an adviser's services, fees, business practices and conflicts of interest with its advisory clients. Although many of the proposed disclosure requirements are substantially similar to the existing requirements, there are several significant proposed changes, which are highlighted below:

- <u>Summary of Material Changes.</u> The proposals would require that an adviser provide an annual summary of the material changes to its Firm Brochure since the last annual update. The summary could appear on the cover page of the Firm Brochure (or immediately thereafter) or could be included in a separate letter accompanying the Firm Brochure. Any annual summary provided in a separate letter would not need to be filed with the SEC.

- <u>Performance Fees and Side-By-Side Management.</u> The proposals would require an adviser that charges performance fees to disclose that fact and, if the adviser also manages accounts that are not charged a performance fee, to describe the conflicts of interest and how the adviser addresses those conflicts arising from the side-by-side management of performance-based fee accounts and the other accounts.

- <u>Methods of Analysis, Investment Strategies and Risk of Loss</u>. The proposals would require an adviser to describe its investment strategies. If it uses specific strategies, the adviser would be required to explain the specific material risks involved with the strategies.

- Adviser Disciplinary Information. The proposals would require an adviser to disclose in the Firm Brochure any legal or disciplinary event that is material to a client in evaluating the integrity of the adviser or its management. Certain disciplinary events would be presumed to be material. Firm Brochure disclosure of disciplinary information would be in addition to the disciplinary information that is currently required in Part 1 of Form ADV. The SEC also proposed to rescind Rule 206(4)-4, which requires disclosure of certain disciplinary information.

B. Personnel Supplement Disclosure Requirements

The proposals would require an adviser to develop a Personnel Supplement for each supervised person (e.g., a partner, officer, director or employee of the adviser) who (i) formulates investment advice for a client and has direct client contact, or (ii) makes discretionary investment decisions for client assets. The adviser could prepare a Personnel Supplement for each supervised person, or alternatively, it could prepare separate Personnel Supplements for different groups of supervised persons (e.g., small cap group). In either case, the Personnel Supplement would have to contain the following information for each supervised person described in the Personnel Supplement:

- educational background and business experience;
- disciplinary history;
- other business activities;
- additional compensation; and
- how the adviser monitors the advice provided by the supervised person.

C. Delivery, Updating and SEC Filing

The proposals would require an adviser to deliver the Firm Brochure before or at the time it enters into an advisory contract with a client.[1] The proposals would also require an adviser to deliver the Firm Brochure to existing clients at least once each year no later than 120 days after the end of its fiscal year. This would represent a significant change to the current practice of most advisers of *offering* the brochure to their existing clients annually.[2]

The proposals would require that an adviser deliver the applicable Personnel Supplements to a client at or before the time advisory services are provided by the supervised

1 Currently, an adviser can provide the brochure 48 hours before entering into the advisory agreement or at the time of entering into the agreement, if the client has the right to terminate the agreement without penalty within five business days thereafter.

2 Interim updates to clients would be required to be delivered only when the adviser amends the Firm Brochure to add a disciplinary event, or to materially change information previously disclosed with respect to its disciplinary information.

person to the client. In most cases, the delivery would occur initially at the time the adviser provides the Firm Brochure to the client. Under the proposals, an adviser would not be required to deliver Personnel Supplements to certain clients, including clients to whom the adviser is not required to deliver a Firm Brochure and clients who are "qualified purchasers." Unlike the delivery requirements for their Firm Brochures, advisers would not have to deliver Personnel Supplements to existing clients annually.[3] Rather, an updated Personnel Supplement would only have to be delivered to existing clients when new disclosure of a disciplinary event is included in the Personnel Supplement, or a material change to existing disciplinary disclosure is made.

Finally, as noted above, the proposals would require that Firm Brochures be filed electronically with the SEC.[4] Annual updates and updates when any information contained in the Brochures becomes materially inaccurate would also be filed electronically with the SEC.

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If you have any questions or need more information, please contact an attorney in our Investment Management Group.

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3 As with the Firm Brochure, an adviser would be required to amend each Personnel Supplement promptly if information contained in the brochure supplement becomes materially inaccurate.

4 Advisers would not, however, be required to file their Personnel Supplements electronically with the SEC, but they would need to maintain copies of the Personnel Supplements in their records.