

B. Russell National School Lunch Act and the Child Nutrition Act of 1966.

## PART 235—STATE ADMINISTRATIVE EXPENSE FUNDS

■ 15. The authority citation for 7 CFR Part 235 continues to read as follows:

**Authority:** Secs. 7 and 10 of the Child Nutrition Act of 1966, 80 Stat. 888, 889, as amended (42 U.S.C. 1776, 1779).

■ 16. Section 235.6 is amended by adding a new paragraph (i) to read as follows:

### § 235.6 Use of funds.

(i) *Full use of Federal funds.* States and State agencies must support the full use of Federal funds provided to State agencies for the administration of Child Nutrition Programs, and exclude such funds from State budget restrictions or limitations including hiring freezes, work furloughs, and travel restrictions.

## PART 246—SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN

■ 17. The authority citation for part 246 continues to read as follows:

**Authority:** 42 U.S.C. 1786.

■ 18. Section 246.3 is amended to add a new paragraph (c)(3), as follows:

### § 246.3 Administration.

(c) \* \* \*

(3) The written agreement must include a statement that supports full use of Federal funds provided to State agencies for the administration of the WIC Program, and excludes such funds from State budget restrictions or limitations including hiring freezes, work furloughs, and travel restrictions.

■ 19. Section 246.26 is amended by adding a new paragraph (k) to read as follows:

### § 246.26 Other provisions.

(k) *Program evaluations.* State and local WIC agencies and contractors must cooperate in studies and evaluations conducted by or on behalf of the Department, related to programs authorized under the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 (42 U.S.C. 1786).

## PART 248—WIC FARMERS' MARKET NUTRITION PROGRAM (FMNP)

■ 20. The authority citation for part 248 continues to read as follows:

**Authority:** 42 U.S.C. 1786.

■ 21. Section 248.3 is amended by redesignating paragraph (c) introductory text as paragraph (c)(1) and adding a new paragraph (c)(2) to read as follows:

### § 248.3 Administration.

(c) \* \* \*

(2) The written agreement must include a statement that supports full use of Federal funds provided to State agencies for the administration of the FMNP, and excludes such funds from State budget restrictions or limitations, including hiring freezes, work furloughs, and travel restrictions.

■ 22. Section 248.24 is amended by adding a new paragraph (d) to read as follows:

### § 248.24 Other provisions.

(d) *Program evaluations.* State and local FMNP agencies and contractors must cooperate in studies and evaluations conducted by or on behalf of the Department, related to programs authorized under the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 (42 U.S.C. 1786).

Dated: June 23, 2011.

**Audrey Rowe,**  
*Administrator, Food and Nutrition Service.*

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**BILLING CODE 3410-30-P**

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 275

[Release No. IA-3220; File No. S7-25-10]

RIN 3235-AK66

### Family Offices

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (the "Commission") is adopting a rule to define "family offices" that will be excluded from the definition of an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act") and thus will not be subject to regulation under the Advisers Act.

**DATES:** *Effective Date:* August 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** Sarah ten Siethoff, Senior Special Counsel, or Vivien Liu, Senior Counsel, at (202) 551-6787 or [IArules@sec.gov](mailto:IArules@sec.gov),

Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-8549.

**SUPPLEMENTARY INFORMATION:** The Securities and Exchange Commission is adopting rule 202(a)(11)(G)-1 [17 CFR 275.202(a)(11)(G)-1] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] (the "Advisers Act" or "Act").<sup>1</sup>

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### I. Background

On October 12, 2010, the Commission issued a release proposing new rule 202(a)(11)(G)-1 that would exempt "family offices" from regulation under the Advisers Act.<sup>2</sup> We proposed this rule in anticipation of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (the "Dodd-Frank Act")<sup>3</sup> repeal of the private adviser exemption from registration contained in section 203(b)(3) of the Advisers Act, effective July 21, 2011, upon which many family offices currently rely.<sup>4</sup>

The Dodd-Frank Act creates in its place a new exclusion from the Advisers Act in section 202(a)(11)(G) under which family offices, as defined by the Commission, are not investment advisers subject to the Advisers Act.<sup>5</sup> Historically, family offices that fell outside the private adviser exemption have sought and obtained from us orders under the Advisers Act declaring those offices not to be investment advisers within the intent of section

<sup>1</sup> 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified.

<sup>2</sup> See *Family Offices*, Investment Advisers Act Release No. 3098 (Oct. 12, 2010) [75 FR 63753 (Oct. 18, 2010)] ("Proposing Release"). "Family offices" are entities established by wealthy families to manage their wealth and provide other services to family members. See section I of the Proposing Release for a discussion of family offices.

<sup>3</sup> Public Law 111-203, 124 Stat. 1376 (2010), at section 403.

<sup>4</sup> 15 U.S.C. 80b-2(b)(3). This provision exempts from registration any adviser that during the course of the preceding 12 months had fewer than 15 clients and neither held itself out to the public as an investment adviser nor advised any registered investment company or business development company.

<sup>5</sup> See section 409 of the Dodd-Frank Act.

202(a)(11) of the Advisers Act.<sup>6</sup> Recognizing this past practice, section 409 of the Dodd-Frank Act instructs that any family office definition the Commission adopts should be “consistent with the previous exemptive policy” of the Commission and recognize “the range of organizational, management, and employment structures and arrangements employed by family offices.”<sup>7</sup>

We received approximately 90 comments on the proposed rule, most of which were submitted by law firms representing family offices.<sup>8</sup> Many urged that we adopt a broader exemption to accommodate typical family office structures that were not reflected in our previous exemptive orders.<sup>9</sup> Some urged us to include exceptions in various aspects of the rule to allow individuals or entities with no family relations to nevertheless receive investment advice from the family office without the protections of the Advisers Act.<sup>10</sup> Some disputed our interpretation of the legislative direction we received to define the term “family office” consistent with our previous exemptive

orders.<sup>11</sup> After careful consideration of these comment letters, we are adopting rule 202(a)(11)(G)–1, with certain modifications from our proposal as further described below.

## II. Discussion

We are adopting new rule 202(a)(11)(G)–1 under the Advisers Act to define the term “family office” for purposes of the Act. Family offices, as so defined, are excluded from the Act’s definition of “investment adviser,” and are thus not subject to any of the provisions of the Act. The scope of the rule is generally consistent with the conditions of exemptive orders that we have issued to family offices. As with the proposal, and as discussed in more detail below, our final rule in some cases has modified those conditions to turn the fact-specific exemptive orders into a rule of general applicability and to take into account the need for certain clarifications and further modifications identified by commenters.

As we discussed in the Proposing Release, our orders have provided an exclusion for family offices because we viewed them as not the sort of arrangement that the Advisers Act was designed to regulate.<sup>12</sup> Disputes among family members concerning the operation of the family office could, as we noted in the Proposing Release, be resolved within the family unit or, if necessary, through state courts under laws designed to govern family disputes. In light of the purpose of the exclusion and the legislative instructions we received, we have not expanded the exclusion, as several commenters suggested, to permit family offices to provide advisory services to multiple families or to clients who are not family members, other than certain key employees.

The failure of a family office to be able to meet the conditions of the rule will not preclude the office from providing advisory services to family members either collectively or individually. Rather, the family office will need to register under the Advisers Act (unless another exemption is available) or seek an exemptive order from the Commission. A number of family offices currently are registered under the Advisers Act.

### A. Family Office Structure and Scope of Activities

As proposed, rule 202(a)(11)(G)–1 contains three general conditions. First,

the exclusion is limited to family offices that provide advice about securities only to certain “family clients.” Second, it requires that family clients wholly own the family office and family members and/or family entities control the family office. Third, it precludes a family office from holding itself out to the public as an investment adviser. In addition to these conditions, we have incorporated into the rule the “grandfathering” provision required by section 409 of the Dodd-Frank Act.<sup>13</sup>

#### 1. Family Clients

A family office excluded from the Act is limited to an office that advises only “family clients.”<sup>14</sup> As discussed in more detail below, family clients include current and former family members, certain employees of the family office (and, under certain circumstances, former employees), charities funded exclusively by family clients, estates of current and former family members or key employees, trusts existing for the sole current benefit of family clients or, if both family clients and charitable and non-profit organizations are the sole current beneficiaries, trusts funded solely by family clients, revocable trusts funded solely by family clients, certain key employee trusts, and companies wholly owned exclusively by, and operated for the sole benefit of, family clients (with certain exceptions).<sup>15</sup>

#### a. Family Member

Under the rule, a “family member” includes all lineal descendants of a common ancestor (who may be living or deceased) as well as current and former spouses or spousal equivalents of those descendants, provided that the common ancestor is no more than 10 generations removed from the youngest generation of family members.<sup>16</sup> All children by adoption and current and former stepchildren also are considered family members.

We have expanded persons who may be considered family members in response to several comments we received. We had proposed to define the term “family member” by reference to

<sup>13</sup> See *supra* note 7 and section II.A.5 of this Release.

<sup>14</sup> Rule 202(a)(11)(G)–1(b)(1).

<sup>15</sup> The term “company” used throughout this Release and rule 202(a)(11)(G)–1 has the same meaning as in section 202(a)(5) of the Advisers Act, which defines “company” as “a corporation, a partnership, an association, a joint-stock company, a trust, or any organized group of persons, whether incorporated or not; or any receiver, trustee in a case under title 11, or similar official, or any liquidating agent for any of the foregoing, in his capacity as such.”

<sup>16</sup> Rule 202(a)(11)(G)–1(d)(6).

<sup>6</sup> See, e.g., *Bear Creek Inc.*, Investment Advisers Act Release Nos. 1931 (Mar. 9, 2001) (notice) [66 FR 15150 (Mar. 15, 2001)] and 1935 (Apr. 4, 2001) (order); *Riverton Management, Inc.*, Investment Advisers Act Release Nos. 2459 (Dec. 9, 2005) [70 FR 74381 (Dec. 15, 2005)] and 2471 (Jan. 6, 2006) (order). We are troubled by comment letters we receive by counsel to some family offices that appear to acknowledge that their clients were operating as unregistered investment advisers, although they were not eligible for the private adviser exemption and had not obtained an exemptive order from us. We note that an adviser may not “rely” on exemptive orders issued to other persons.

<sup>7</sup> Section 409(b) of the Dodd-Frank Act. Section 409 also includes a “grandfathering clause” that precludes us from excluding certain family offices from the definition solely because they provide investment advice to certain clients and had provided investment advice to those clients before January 1, 2010. See section 409(b)(3) of the Dodd-Frank Act.

<sup>8</sup> The public comments we received on the Proposing Release are available on our website at <http://www.sec.gov/comments/s7-25-10/s72510.shtml>.

<sup>9</sup> See, e.g., Comment Letter of the American Bar Association, Section of Business Law and Section of Real Property, Trust and Estate Law (Nov. 18, 2010) (“ABA Letter”); Comment Letter of Perkins Coie/Private Investor Coalition Inc. (Nov. 11, 2010) (“Coalition Letter”); Comment Letter of Tannenbaum, Hearn, Syracuse & Hirschtritt LLP (Nov. 18, 2010) (“Tannenbaum Letter”).

<sup>10</sup> See, e.g., Comment Letter of Miller & Martin PLLC (Nov. 18, 2010) (“Miller Letter”) (recommending that non-family clients be permitted *de minimis* investments in family limited liability companies, partnerships, corporations and other entities and be permitted *de minimis* ownership stakes in the family office itself); Comment Letter of Porter Wright (Nov. 10, 2010) (supporting various forms of non-family client investment through the family office with five percent *de minimis* maximums for each type of exception).

<sup>11</sup> See, e.g., Coalition Letter.

<sup>12</sup> See Proposing Release, *supra* note 2, at sections I and II for a discussion of the rationale for the family office exclusion.

the “founder” of the family office, and generally to include the founder’s spouse (or spousal equivalent), their parents, their lineal descendants, and their siblings and their lineal descendants.<sup>17</sup> Commenters observed that the proposed rule implicitly assumed that the founder of the family office is the initial generator of the family’s wealth and is an individual or couple.<sup>18</sup> They noted that in many cases, however, family offices are established by persons several generations remote from the initial wealth generator.<sup>19</sup> Some commenters also criticized our proposed approach because it would treat who could be a family member differently depending on when the family office was established.<sup>20</sup> For example, one commenter stated that our proposal would have allowed a family office that was formed a long time ago to provide services to persons that are currently third or fourth cousins to each other, but that a family office established today may need to wait at least 40 or 50 years before being able to provide services to equivalent types of family members.<sup>21</sup>

Some commenters recommended that the Commission address these concerns by leaving the term “family member” undefined,<sup>22</sup> while others recommended that the Commission retain the approach of the proposed rule, but expand the rule to treat as family members grandparents, great-grandparents, aunts, uncles, great aunts, and great uncles of the founders and their spouses and children.<sup>23</sup> Leaving

the term family member undefined could allow typical commercial investment advisory businesses to rely on the exclusion (by, for example, designating an extremely remote family member as a common ancestor). On the other hand, attempting to expand the family member definition by ascending up the family tree from the founders would not address the difficulty in identifying the founders of the family office as identified by commenters and would not address the concern, depending on when the family office was founded, that the definition will not capture many family members of family offices established several generations after the initial family wealth was created.

We are adopting, instead, an approach suggested in several comment letters that permits a family to choose a common ancestor (who may be deceased) and define family members by reference to the degree of lineal kinship to the designated relative.<sup>24</sup> This approach avoids any assumptions regarding the source of family wealth and the inconsistent treatment of extended family members compared to the approach we proposed.<sup>25</sup> In order to prevent families from choosing an extremely remote ancestor, which could allow commercial advisory businesses to rely on the rule, we are imposing a 10 generation limit between the oldest and youngest generation of family members. Such a limit, suggested by several commenters, would constrain the scope of persons considered family members while accommodating the

typical number of generations served by most family offices.<sup>26</sup>

Under this approach, the family office will be able to choose the common ancestor and may change that designation over time such that the family office clientele is able to shift over time along with the family members served by the family office. A family office exempt under the rule with a common ancestor several generations up from current family members will be able to serve a greater number of current collateral family members but fewer future lineal members.

For example, G1 (who is deceased) founded a business and placed his fortune into a trust for the benefit of his heirs. G4 founded a family office to manage that wealth for the ever growing number of family members descended from G1 and treated G1 as the common ancestor for purposes of which family members the family office could advise under the exclusion. At the time G4 created the family office, current clients extended as far as G4’s great-grandchildren (or G7). Over time the family grows and additional generations are born. Eventually, to allow the family office to serve later generations that would otherwise extend beyond the 10 generation limit, the family office redesignates its common ancestor to an individual in G3.<sup>27</sup> The family office can do this under rule 202(a)(11)(G)–1 because the rule does not specify which individual the common ancestor is and it does not specify that it always has to be the same common ancestor. As a result of this redesignation, the family office is able to advise clients two generations younger, but would no longer be able to advise certain branches

<sup>17</sup> Proposed rule 202(a)(11)(G)–1(d)(5) (defining the founders as the “natural person and his or her spouse or spousal equivalent for whose benefit the family office was established and any subsequent spouse of such individuals.” Proposed rule 202(a)(11)(G)–1(d)(3) (defining family members as “the founders, their lineal descendants (including by adoption and stepchildren), and such lineal descendants’ spouses or spousal equivalents; the parents of the founders; and the siblings of the founders and such siblings’ spouses or spousal equivalents and their lineal descendants (including by adoption and stepchildren) and such lineal descendants’ spouses or spousal equivalents”).

<sup>18</sup> See, e.g., Comment Letter of Dechert LLP (Nov. 29, 2010) (“Dechert Letter”); Comment Letter of Fried, Frank, Harris, Shriver & Jacobs LLP (Nov. 18, 2010) (“Fried Frank Letter”).

<sup>19</sup> See, e.g., Coalition Letter; Comment Letter of the New York State Bar Association, Business Law Section, Securities Regulation Committee (Dec. 10, 2010) (“NY Bar Letter”).

<sup>20</sup> See, e.g., NY Bar Letter; Comment Letter of Skadden, Arps, Slate, Meagher & Flom LLP (Nov. 17, 2010) (“Skadden Letter”).

<sup>21</sup> Skadden Letter.

<sup>22</sup> See, e.g., Comment Letter of Foley & Lardner LLP (Nov. 18, 2010) (“Foley Letter”); Miller Letter; Comment Letter of Northern Trust (Nov. 18, 2010) (“Northern Trust Letter”).

<sup>23</sup> See, e.g., Comment Letter of the American Institute of Certified Public Accountants (Nov. 16, 2010) (“AICPA Letter”); Comment Letter of The Blum Firm, P.C./Blum (Nov. 18, 2010) (“Blum

Letter”); Comment Letter of Hogan Lovells US LLP (Nov. 18, 2010) (“Hogan Letter”).

<sup>24</sup> See, e.g., ABA Letter; Comment Letter of Duncan Associates (Nov. 18, 2010) (“Duncan Letter”); Comment Letter of Kozusko Harris Vetter Wareh LLP (Nov. 18, 2010) (“Kozusko Letter”).

<sup>25</sup> Moreover, the approach we are adopting has been used in other contexts to delimit members of a family for purposes of special regulatory treatment. See, e.g., Section 1361(c)(1)(B) of the Internal Revenue Code of 1986, as amended (treating members of a family as a single shareholder of an S Corporation and defining family members as “a common ancestor, any lineal descendant of such common ancestor, and any spouse or former spouse of such common ancestor or any such lineal descendant” but providing that an “individual shall not be considered to be a common ancestor if, on the applicable date, the individual is more than 6 generations removed from the youngest generation of shareholders”); Nevada Revised Statutes section 669.042 (defining a family trust company subject to special trust company regulation as having family members within 10 degrees of lineal kinship or 9 degrees of collateral kinship to the designated relative); New Hampshire Revised Statutes section 392-B:1 (defining a family trust company subject to special banking regulation as having family members within 5 degrees of lineal kinship or 9 degrees of collateral kinship to a designated relative).

<sup>26</sup> See, e.g., ABA Letter (suggesting a 9 generation limit); Duncan Letter (recommending that the Commission follow that used for Nevada family trust companies, which allows for 10 degrees of lineal kinship and 9 degrees of collateral kinship and stating that other states’ family trust company laws with fewer degrees of kinship allowed had resulted in some family office clientele being outside the limitations); Kozusko Letter (recommending 10 generations (but not counting minors as a separate generation from their parents) as a size that, based on its experience and client base and on studies of family businesses, would comfortably accommodate most family offices but that would not open up the family office to abuse as a disguised commercial enterprise); Northern Trust Letter (stating that of the over 400 family offices they represent, some are now focused on their fifth through seventh generations). We have determined not to include a separate limit on degrees of permissible collateral kinship because, given our relatively expansive 10 generation lineal limit, a reasonable collateral limit would not in practice expand the range of family members covered by the rule.

<sup>27</sup> No formal documentation or procedure is required for designating or redesignating a common ancestor.

of G1's family tree without registering under the Advisers Act.<sup>28</sup>

The rule, as proposed, treats lineal descendants and their spouses, spousal equivalents, stepchildren, and adopted children as family members.<sup>29</sup> Most commenters generally supported our inclusion of spousal equivalents, stepchildren and children by adoption,<sup>30</sup> but two commenters<sup>31</sup> opposed the inclusion of spousal equivalents, invoking the Defense of Marriage Act ("DOMA").<sup>32</sup> Because the term "spouse" is not defined in the rule and a "spousal equivalent" is identified as a category of person, separate and distinct from a "spouse," that meets the definition of a "family member," we do not believe that the rule violates that Act.

In response to comments we have expanded the definition to include foster children and persons who were minors when another family member became their legal guardian.<sup>33</sup> We are persuaded by the commenters that argued that foster children and children in a guardianship relationship often have familial ties indistinguishable from that of children and stepchildren, and that including such individuals would not cause the family office to resemble a typical commercial investment adviser.<sup>34</sup>

Finally, the rule treats former family members (*i.e.*, former spouses, spousal equivalents and stepchildren) as family members.<sup>35</sup> We had proposed permitting former family members to retain any investments held through the family office at the time they became a former family member, but to limit them from making any new investments

through the family office.<sup>36</sup> Commenters pointed out that a former spouse's financial arrangements often remain intertwined with those of the family, particularly if they provide for children who remain family members.<sup>37</sup> Some argued that stepchildren of a divorced spouse may remain close to the family after the divorce.<sup>38</sup> We are persuaded by these arguments and have modified the definition of former family member to include stepchildren.<sup>39</sup>

#### b. Involuntary Transfers

As proposed, rule 202(a)(11)(G)–1 prevents an involuntary transfer of assets to a person who is not a family client (*e.g.*, a bequest to a friend of assets in a family office-advised private fund) from causing the family office to lose its exclusion. Under the rule, a family office may continue to provide advice with respect to such assets following an involuntary transfer for a transition period of up to one year.<sup>40</sup> The transition period permits the family office to orderly transition that client's assets to another investment adviser or otherwise restructure its activities to comply with the Advisers Act.

We proposed to allow the family office to continue to advise a non-family client for four months following the transfer of assets resulting from the involuntary event.<sup>41</sup> A number of commenters argued that four months is an inadequate period of time to transition investment advice arrangements as a result of an involuntary transfer,<sup>42</sup> particularly for illiquid assets such as investments in private funds.<sup>43</sup> Some suggested that the family office be required to transfer the assets as soon as legally and practically feasible.<sup>44</sup> Others suggested that we treat involuntary transfers in the same manner as we had proposed treating former family members—permitting

their existing investments to remain with the family office but prohibiting new investments.<sup>45</sup> Still others suggested that the transfer period be lengthened to anywhere from one year to three years.<sup>46</sup>

After an involuntary transfer, such as a bequest, the office would no longer be providing advice solely to members of a single family, and after several such bequests the office could cease to operate in any way as a family office. Thus, we believe that relief for involuntary transfers must be temporary. We are persuaded, however, that the four month transition period we proposed would be inadequate and have extended the period to one year.<sup>47</sup>

#### c. Family Trusts and Estates

Rule 202(a)(11)(G)–1 treats as a family client certain family trusts established for testamentary and charitable purposes. We have expanded the types of trusts that may be treated as a family client in response to several comments that our proposal failed to take into account certain aspects of trust and estate planning.<sup>48</sup> As discussed in more detail below, these expansions accommodate common estate planning and charitable giving plans and do not suggest that the family office is engaging in a commercial enterprise.

*Irrevocable trusts.* The rule treats as a family client any irrevocable trust in which one or more family clients are the only current beneficiaries.<sup>49</sup> We proposed including as a family client

<sup>45</sup> See, *e.g.*, Fried Frank Letter; Comment Letter of Sidley Austin LLP (Nov. 18, 2010).

<sup>46</sup> See, *e.g.*, AICPA Letter (1 year); Comment Letter of Bessemer Securities Corporation (Nov. 17, 2010) ("Bessemer Letter") (1 year); Davis Polk Letter (3 years); Dechert Letter (2 years); Hogan Letter (2 years); Comment Letter of Kleinberg, Kaplan, Wolff & Cohen, P.C. (Nov. 17, 2010) ("Kleinberg Letter") (2 years); Kramer Levin Letter (1 year).

<sup>47</sup> The one year period would not begin to run until completion of the transfer of legal title to the assets resulting from the involuntary event. We note also that if the involuntary transferee does not receive investment advice about securities for compensation from the family office, then the availability of rule 202(a)(11)(G)–1 would be unaffected. For a discussion of the Commission's and the staff's views on when investment advice about securities for compensation is provided under the Advisers Act, see *Applicability of the Investment Advisers Act to Financial Planners, Pensions Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services*, Investment Advisers Act Release No. 1092 (Oct. 8, 1987) [52 FR 38400 (Oct. 16, 1987)] ("Release 1092").

<sup>48</sup> See rule 202(a)(11)(G)–1(d)(4). Several commenters questioned whether the identity of the trustee matters under the rule. See, *e.g.*, Comment Letter of SchiffHardin LLP/Debra L. Stetter (Nov. 18, 2010) ("Schiff/Stetter Letter"); Comment Letter of Vinson & Elkins LLP (Nov. 15, 2010). A trust that meets the conditions in the rule for qualifying as a family client is unaffected by whether the trust is managed by an independent trustee.

<sup>49</sup> Rule 202(a)(11)(G)–1(d)(4)(vii).

<sup>28</sup> See Annex A for an illustration of the impact of redesignating the common ancestor.

<sup>29</sup> Rule 202(a)(11)(G)–1(d)(6). As proposed, we are using the definition of spousal equivalent currently used under our auditor independence rules. See *Proposing Release*, *supra* note 2, at n.24.

<sup>30</sup> See, *e.g.*, Coalition Letter; NY Bar Letter.

<sup>31</sup> Comment Letter of Alliance Defense Fund (Nov. 18, 2010); Comment Letter of Thomas V. Cliff (Nov. 1, 2010).

<sup>32</sup> 1 U.S.C. 7. The Act provides that in "determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States \* \* \* the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."

<sup>33</sup> See, *e.g.*, ABA Letter; Dechert Letter; Tannenbaum Letter.

<sup>34</sup> See, *e.g.*, Hogan Letter; Tannenbaum Letter. Guardianship arrangements for adults, however, can raise unique conflicts and issues as compared to guardianships for minors that we believe are more appropriately addressed through an exemptive order process where the Commission can consider the specific facts and circumstances, than through a rule of general applicability.

<sup>35</sup> Rule 202(a)(11)(G)–1(d)(4)(ii).

<sup>36</sup> Proposed rule 202(a)(11)(G)–1(d)(2)(vi), and (d)(4).

<sup>37</sup> See, *e.g.*, Comment Letter of Perkins Coie/Lindquist (Nov. 18, 2010) ("Lindquist Letter"); Comment Letter of Proskauer Rose LLP (Nov. 16, 2010).

<sup>38</sup> See, *e.g.*, Coalition Letter; Comment Letter of Kramer Levin Naftalis & Frankel LLP (Nov. 17, 2010) ("Kramer Levin Letter").

<sup>39</sup> Rule 202(a)(11)(G)–1(d)(7).

<sup>40</sup> Rule 202(a)(11)(G)–1(b)(1).

<sup>41</sup> Proposed rule 202(a)(11)(G)–1(b)(1).

<sup>42</sup> See, *e.g.*, Comment Letter of Davis Polk (Nov. 18, 2010) ("Davis Polk Letter"); Fried Frank Letter.

<sup>43</sup> See, *e.g.*, ABA Letter; Comment Letter of Withers Bergman LLP (Nov. 17, 2010) ("Withers Bergman Letter").

<sup>44</sup> See, *e.g.*, Comment Letter of Barnes & Thornburg LLP ("as soon as legally and reasonably practical, or in the alternative, within one year"); Coalition Letter ("as soon as it is both legally and practically feasible, and in any event would have a grace period of at least one year").

any trust or estate existing for the sole benefit of one or more family clients.<sup>50</sup>

As suggested by commenters, the final rule disregards contingent beneficiaries of trusts, which commenters explained are often named in the event that all family members are deceased to prevent the trust from distributing assets to distant relatives or escheating to the state.<sup>51</sup> If the contingent beneficiary later becomes an actual beneficiary and is not a permitted current beneficiary of a family trust under the exclusion (such as a family friend), the rule's provisions concerning involuntary transfers allow for an orderly transition of investment advice regarding those assets away from the family office.

Also in response to commenters, the rule permits the family office to advise irrevocable trusts funded exclusively by one or more other family clients in which the only current beneficiaries, in addition to other family clients, are non-profit organizations, charitable foundations, charitable trusts, or other charitable organizations.<sup>52</sup> Several commenters noted that families often establish and fund trusts whose sole current beneficiaries are both family clients and public charities.<sup>53</sup> Such an entity may not be a "charitable trust" as a technical manner, but we see no reason for treating them differently under the rule from charitable trusts funded exclusively by family clients.

Other commenters argued that a trust should be permitted to have current beneficiaries that are not family clients and that the rule instead should merely require that the trust be for the primary benefit of one or more family clients.<sup>54</sup> These commenters argued that the family office's provision of investment advice to these kinds of trusts would not change the family office's character and that it is the trust that is the client of the family office, rather than the beneficiary. We disagree. Current beneficiaries of a trust are greatly affected by the nature and quality of investment advice provided to the trust and would be harmed if there were fraud committed by the family office in managing trust assets. Even if in small numbers, these individuals and entities stand to benefit substantially from the protections of the Advisers Act and do

not necessarily have any family ties or investment sophistication to stand in the Act's stead.

**Revocable Trusts.** The rule also treats as a family client a revocable trust of which one or more family clients are the sole grantors.<sup>55</sup> Accordingly, a revocable trust may be advised by a family office relying on the rule regardless of whether the beneficiaries of the trust are family members. We received several comments that argued that revocable trusts should be treated differently than irrevocable trusts, since the grantor of a revocable trust effectively controls the trust and the beneficiaries of the trust have no reasonable expectation of obtaining any benefit from the trust until the trust becomes irrevocable (generally upon the death of the grantor).<sup>56</sup> Therefore, the identity of the beneficiaries of the trust should not matter so long as one or more family clients are the sole grantors of the trust. We agree that in the case of a revocable trust, the contingent nature of any beneficiary's expectation that it will benefit from the trust's assets supports disregarding a revocable trust's beneficiaries under the exclusion, just as other contingent beneficiaries are disregarded.

**Estates.** The final rule treats as a family client an estate of a family member, former family member, key employee or former key employee.<sup>57</sup> As suggested by several commenters, this provision permits a family office to advise the executor of a family member's estate even if that estate will be distributed to (and thus be for the benefit of) non-family members.<sup>58</sup> The executor of an estate is acting in lieu of the deceased family client in managing and distributing the family client's assets. Therefore, advice to the executor is equivalent to providing advice to that family client.<sup>59</sup>

#### d. Non-Profit and Charitable Organizations

The rule treats as a family client any non-profit organization, charitable foundation, charitable trust (including charitable lead trusts and charitable remainder trusts whose only current beneficiaries are other family clients and charitable or non-profit

organizations), or other charitable organization, in each case funded exclusively by one or more other family clients.<sup>60</sup> We understand that some family offices currently advise charitable or non-profit organizations that have accepted funding from non-family clients.<sup>61</sup> So that these family offices have sufficient time to transition such advisory arrangements or restructure the charitable or non-profit organization, we are including a transition period of until December 31, 2013 before family offices have to comply with this aspect of the exclusion.<sup>62</sup>

We had proposed treating as a family client any charitable foundation, charitable organization, or charitable trust established and funded exclusively by one or more family members.<sup>63</sup> Some commenters recommended that the Commission change the requirement that charities be established and funded "by family members" to "by family clients" because they asserted that family charities are often established and funded by family trusts, corporations or estates, and not exclusively by family members.<sup>64</sup> We agree that making this change is consistent with our view of the scope of persons that should be permitted to be served by the family office. Several commenters also believed that we should not require that a charitable organization be established by family members or family clients in order to receive investment advice from the family office under the exclusion because in some cases such charitable organizations may have been originally established by distant relatives that do not currently qualify as "family members."<sup>65</sup> We agree that as long as all the funding currently held by the charitable organization came solely from family clients, the individuals or entities that originally established it are not of import for our policy rationale.<sup>66</sup> We have changed the rule accordingly.

<sup>50</sup> Rule 202(a)(11)(G)-1(d)(4)(v).

<sup>61</sup> See, e.g., Foley Letter; Comment Letter of Morgan, Lewis & Bockius LLP (Nov. 18, 2010) ("Morgan Lewis Letter").

<sup>62</sup> Rule 202(a)(11)(G)-1(e)(1).

<sup>63</sup> Proposed rule 202(a)(11)(G)-1(d)(2)(iii).

<sup>64</sup> See, e.g., Dorsey Letter; Levin Schreder Letter.

<sup>65</sup> See, e.g., Comment Letter of Goodwin Procter LLP (Nov. 17, 2010) ("Goodwin Letter"); Comment Letter of Willkie Farr & Gallagher LLP (Nov. 17, 2010).

<sup>66</sup> We note that only the actual contributions to the non-profit or charitable organization need be examined for this purpose, and not any income, gains or losses relating to those contributions. For purposes of determining whether funding provided by a non-family client to the non-profit or charitable organization is "currently held" by the organization, the non-profit or charitable

<sup>50</sup> Proposed rule 202(a)(11)(G)-1(d)(2)(iv).

<sup>51</sup> See, e.g., Comment Letter of Arnold & Porter LLP (Nov. 11, 2010); Bessemer Letter.

<sup>52</sup> Rule 202(a)(11)(G)-1(d)(4)(viii).

<sup>53</sup> See, e.g., Comment Letter of Jones Day (Nov. 11, 2010) ("Jones Day Letter"); Comment Letter of McDermott Will & Emery/Edwin C. Laurenson (Nov. 18, 2010) ("McDermott/Laurenson Letter").

<sup>54</sup> See, e.g., Comment Letter of Dorsey & Whitney LLP/Bruce A. MacKenzie (Nov. 17, 2010) ("Dorsey Letter"); McDermott/Laurenson Letter.

<sup>55</sup> Rule 202(a)(11)(G)-1(d)(4)(ix).

<sup>56</sup> See, e.g., Davis Polk Letter; Comment Letter of Lee & Stone (Nov. 17, 2010) ("Lee & Stone Letter").

<sup>57</sup> Rule 202(a)(11)(G)-1(d)(4)(vi). For former key employees, the advice is subject to the condition contained in rule 202(a)(11)(G)-1(d)(4)(iv).

<sup>58</sup> See, e.g., ABA Letter; AICPA Letter.

<sup>59</sup> See, e.g., Comment Letter of K&L Gates/Paul T. Metzger (Nov. 17, 2010); Comment Letter of Levin Schreder & Carey Ltd (Nov. 18, 2010) ("Levin Schreder Letter").

A number of commenters stated that “charitable organization” can have varying meanings when considered under trust and estate law versus under tax law.<sup>67</sup> Some of these commenters suggested that we add the term “non-profit organization” to ensure that we capture what is generally considered a charitable organization under both trust and tax law and based on their view that, as long as the non-profit organization is solely funded by family clients, the family office providing it with investment advice under the exclusion should not be of concern as a policy matter.<sup>68</sup> We intended to broadly capture charitable and non-profit organizations as commonly understood under both trust law and tax law and have modified the rule as suggested. Other commenters asked that we clarify that charitable lead trusts and charitable remainder trusts are included as family clients under the exclusion.<sup>69</sup> The rule we are adopting today clarifies that such trusts are included if their sole current beneficiaries are other family clients and charitable or non-profit organizations and if they meet the terms of other charitable organizations that may be advised by the family office—namely that they are funded exclusively by other family clients.<sup>70</sup> We believe this treatment of charitable lead trusts and charitable remainder trusts ensures that they are treated consistently with other trusts and charitable or non-profit organizations under the exclusion.

Finally, several commenters stated that the Commission should permit the family office to provide investment advice under the exclusion to charitable organizations even if funded in part by non-family clients.<sup>71</sup> They argued that because the contributed assets will not be invested for the benefit of the donors, as long as the family controlled the charitable entity or was its substantial contributor, it served no public policy

purpose to preclude third party contributions.<sup>72</sup> We are leaving this aspect of the proposal unchanged because a non-profit or charitable organization that currently holds non-family funding lacks the characteristics necessary to be viewed as a member of a family unit. Permitting such organizations to be advised by a family office would be inconsistent with the exclusion’s underlying rationale that recognizes that the Advisers Act is not designed to regulate families managing their own wealth.

As noted above, however, we do recognize that some non-profit or charitable organizations advised by family offices have accepted non-family client funding. Such organizations may need time to spend the non-family funding so that none of it is “currently held” by the organization or to transition advisory arrangements. The rule provides until December 31, 2013 before this condition to the exclusion becomes applicable to family offices (*i.e.*, if the only reason the family office would not meet the exclusion is because it advises a non-profit or charitable organization that currently holds non-family client funding, the family office generally may nevertheless rely on the exclusion until December 31, 2013).<sup>73</sup> To rely on this transition period, a non-profit or charitable organization advised by the family office must not accept any additional funding from any non-family clients after August 31, 2011, except that during the transition period the non-profit or charitable organization may accept funding provided in fulfillment of any pledge made prior to August 31, 2011.

#### e. Other Family Entities

To allow the family office to structure its activities through typical investment structures, rule 202(a)(11)(G)–1 treats as a family client any company including a pooled investment vehicle, that is wholly owned, directly or indirectly, by one or more family clients and operated for the sole benefit of family clients.<sup>74</sup> Some commenters objected to the requirement in our proposal that these entities be wholly owned and controlled

by, and operated for the sole benefit of, family clients to qualify for the exclusion.<sup>75</sup> These commenters generally suggested modifying this aspect of the family client definition to require only that the entity be majority owned or controlled and operated for the *primary* benefit of family clients or similar variations.<sup>76</sup> One commenter suggested such an expansion to allow employees of the family that do not qualify as “key employees” to have a management role in the entity.<sup>77</sup> Others believed that non-family clients more broadly should be able to have a greater role in family office-advised entities.<sup>78</sup>

We believe that the elements of ownership and benefit are important to ensuring that the policy objectives underlying the family office exclusion are preserved. If non-family clients own a portion of such an entity, they have a vested interest in how the assets of that entity are managed—it is the source of their ownership stake’s value. This is also true of a non-family client who is a beneficiary of that entity. As long as the entity is wholly owned by and for the sole benefit of family clients, however, we agree that, as with family trusts and family charitable organizations, the entity having non-family client control does not change that family clients are the ultimate beneficiaries of the investment advice, and thus we have eliminated the requirement for control by family clients in the final rule.

#### f. Key Employees

The final rule treats certain key employees of the family office, their estates, and certain entities through which key employees may invest as family clients so that they may receive investment advice from, and participate in investment opportunities provided by, the family office. More specifically, the final rule permits the family office to provide investment advice to any natural person (including any key employee’s spouse or spousal equivalent who holds a joint, community property or other similar shared ownership interest with that key employee) who is (i) an executive officer, director, trustee, general partner,

organization may offset any spending by the organization occurring at any time in the year of that non-family client contribution or any subsequent year against the non-family client contribution (*i.e.*, the organization may treat the non-family client contributions as the first funding spent).

<sup>67</sup> See, e.g., Goodwin Letter; Kozusko Letter.

<sup>68</sup> See, e.g., Coalition Letter; Kozusko Letter.

<sup>69</sup> See, e.g., Dechert Letter; Fried Frank Letter. Charitable lead trusts are entities in which a charity receives payments from the trust for a specified period as a current beneficiary, but the remainder of the trust is distributed to specified beneficiaries. Charitable remainder trusts are entities in which specified individuals or entities receive payments from the trust for a specified period as a current beneficiary, but a charity receives the remainder of the trust.

<sup>70</sup> See our discussion about family trusts in section II.A.1.c of this Release.

<sup>71</sup> See, e.g., Foley Letter; Kleinberg Letter.

<sup>72</sup> See, e.g., Ropes & Gray Letter; Skadden Letter.

<sup>73</sup> Rule 202(a)(11)(G)–1(e)(1).

<sup>74</sup> Rule 202(a)(11)(G)–1(d)(4)(xi). Under rule 202(a)(11)(G)–1(d)(2), control is defined as the power to exercise a controlling influence over the management or policies of an entity, unless such power is solely the result of being an officer of such entity. If any of these companies are pooled investment vehicles, they must be exempt from registration as an investment company under the Investment Company Act of 1940 because the Advisers Act requires that an adviser to a registered investment company must register. See 15 U.S.C. 80b–3a(a)(1)(B).

<sup>75</sup> See, e.g., Blum Letter; Kramer Levin Letter (suggesting that the requirement be modified to require only that the entity be controlled and 80% owned by family clients to qualify as a family client).

<sup>76</sup> See, e.g., Coalition Letter; Kramer Levin Letter. See also Levin Schreder Letter (suggesting that the entity be controlled and substantially owned (80%) by family clients); Miller Letter (suggesting that the entity be wholly owned or controlled by and operated for the primary benefit of family clients).

<sup>77</sup> Morgan Lewis Letter.

<sup>78</sup> See, e.g., Kramer Levin Letter; Miller Letter.

or person serving in a similar capacity at the family office or its affiliated family office or (ii) any other employee of the family office or its affiliated family office (other than an employee performing solely clerical, secretarial, or administrative functions) who, in connection with his or her regular functions or duties, participates in the investment activities of the family office or affiliated family office, provided that such employee has been performing such functions or duties for or on behalf of the family office or affiliated family office, or substantially similar functions or duties for or on behalf of another company, for at least twelve months.<sup>79</sup> The final rule also permits the family office to advise certain trusts of key employees, as further described below. Finally, in addition to receiving direct advice from the family office, key employees (because they are “family clients”) may indirectly receive investment advice through the family office by their investment in family office-advised private funds, charitable organizations, and other family entities, as described in previous sections of this Release.

Many commenters supported the inclusion of key employees as family clients.<sup>80</sup> They agreed that permitting investment participation by key employees of family offices would align their interests with those of family members and enable family offices to attract highly skilled investment professionals who may not otherwise be attracted to work at a family office.<sup>81</sup>

Some commenters, however, urged us to include key employees of family entities other than the family office as family clients.<sup>82</sup> Some reasoned that since the definition of key employee is based on the knowledgeable employee standard used in Investment Company Act rule 3c-5,<sup>83</sup> it should be expanded to cover key employees of any entity related to the family office because rule 3c-5 allows knowledgeable employees to be employees of certain affiliated entities.<sup>84</sup> Such an approach would extend Investment Company Act rule 3c-5 beyond its intended scope. That rule permits knowledgeable employees of affiliated entities to count as knowledgeable employees of the covered private fund only if the affiliated entity is participating in the investment activities of the covered

private fund.<sup>85</sup> Because of this role, these individuals could be presumed to have sufficient financial sophistication, experience, and knowledge to evaluate investment risks and to take steps to protect themselves, even without the protection of the Investment Company Act.<sup>86</sup>

Many family entities advised by the family office, however, are not involved in providing investment advisory services to the family office or its clients and rather have principal business activities in a variety of industries unrelated to investment management. There is no reason to expect that their key employees have a level of knowledge and experience in financial matters sufficient to protect themselves without the protections afforded by the Advisers Act.<sup>87</sup> We agree, however, that if a person qualifies as a knowledgeable employee of an affiliated family office, that those employees should be in a position to protect themselves in receiving investment advice from a family office excluded from regulation under the Advisers Act.<sup>88</sup> We have modified the rule to include knowledgeable employees of an affiliated family office in the definition of key employee.<sup>89</sup>

A few commenters suggested that we include as family clients long-term employees of the family, even if they do not meet the knowledgeable employee standard.<sup>90</sup> Expanding the family client

definition in this way would exclude from the Advisers Act’s protections individuals for whom we have no basis on which to conclude that they can protect themselves.<sup>91</sup> We therefore decline to make the change suggested by commenters.

We have made two other changes to definitions relating to key employees in response to recommendations from commenters. First, in response to commenters and to reduce uncertainty identified by commenters we have included a definition of “executive officer,” which is virtually identical to the definition of the same term used in Advisers Act rule 205-3 and Investment Company Act rule 3c-5.<sup>92</sup> Similar to those rules, this definition delineates executive officers that should have enough financial experience and sophistication to invest without the protection of the Advisers Act. Second, the final rule clarifies that family clients include trusts of which the key employee generally is the sole contributor to the trust and the sole person authorized to make decisions with respect to the trust.<sup>93</sup>

Commenters recommended that we permit a trust established by a key employee with his or her lineal descendants or immediate family members as beneficiaries to be a family client, to allow typical estate planning by key employees.<sup>94</sup> We do not believe it is appropriate to broadly permit trusts for which the key employee is not the sole person authorized to make investment decisions to be a family client. Since a non-family client will be

likely to be financially sophisticated and to not need the protections of the Advisers Act.

<sup>79</sup> Exemptive orders issued in the past 10 years generally did not permit family offices to provide investment advice to non-key employees. The two exemptive orders issued to family offices permitting such advice contained grandfathering provisions that restricted these employees’ investments to the existing ones and prohibited the advisers from establishing new advisory relationships with a non-family member. *Adler Management, L.L.C.*, Investment Advisers Act Release Nos. 2500 (Mar. 21, 2006) [71 FR 15498 (Mar. 28, 2006)] (notice) and 2508 (Apr. 14, 2006) (order); *Longview Management Group LLC*, Investment Advisers Act Release Nos. 2008 (Jan. 3, 2002) [67 FR 1251 (Jan. 9, 2002)] (notice) and 2013 (Feb. 7, 2002) (order).

<sup>92</sup> Commenters recommending this change include the Fried Frank Letter and the Skadden Letter. Paragraph (d)(3) of the rule, however, differs from rule 205-3 and section 3c-5 in that it does not include executives in charge of sales because such a function is not applicable to a family office.

<sup>93</sup> Rule 202(a)(11)(G)-1(d)(4)(x). The grantor of the trust could also be a current or former spouse or spousal equivalent of the key employee if, at the time of contribution, the spouse or spousal equivalent held a joint, community property, or other similar shared ownership interest in the trust with the key employee.

<sup>94</sup> See, e.g., Withers Bergman Letter (suggesting lineal descendants); Kleinberg Letter (suggesting immediate family members).

<sup>79</sup> Rule 202(a)(11)(G)-1(d)(8).

<sup>80</sup> See, e.g., ABA Letter; Coalition Letter.

<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., Fried Frank Letter; NY Bar Letter; Skadden Letter.

<sup>83</sup> See Proposing Release, *supra* note 2, at n.46 and accompanying text.

<sup>84</sup> See, e.g., NY Bar Letter; Skadden Letter.

<sup>85</sup> See Section III.B of *Privately Offered Investment Companies*, Investment Company Act Release 22597 (April 3, 1997) [62 FR 17512 (April 7, 1997)] (“3(c)(7) Release”).

<sup>86</sup> See 3(c)(7) Release, *supra* note 85, at Section III.A.2.B.

<sup>87</sup> As we explained when we adopted rule 3c-5, employees who simply “obtain information” but do not “participate in” the investment activities of the fund are not included in the definition of knowledgeable employee because they may not have investment experience. See 3(c)(7) Release, *supra* note 85, at Section III.B.

<sup>88</sup> Some commenters pointed out that a family may establish more than one family office for tax or other structuring reasons and recommended that the definition of key employee include employees of multiple family offices that serve the same family. See, e.g., Davis Polk Letter; Fried Frank Letter.

<sup>89</sup> Rule 202(a)(11)(G)-1(d)(8). “Affiliated family office” is defined as “a family office wholly owned by family clients of another family office and that is controlled (directly or indirectly) by one or more family members of such other family office and/or family entities affiliated with such other family office and has no clients other than family clients of such other family office.” Rule 202(a)(11)(G)-1(d)(1).

<sup>90</sup> See, e.g., NY Bar Letter; Skadden Letter. Similarly, a few commenters suggested that we define key employees using the accredited investor standard from Regulation D under the Securities Act of 1933. See, e.g., Comment Letter of Schulte Roth & Zabel LLP (Dec. 8, 2010); Lee & Stone Letter. We believe the knowledgeable employee standard more accurately encompasses employees that are



making investment decisions for this type of trust, and its beneficiaries are not family members or key employees, this type of trust stands to benefit from the protections of the Advisers Act. However, we are persuaded that it is appropriate to allow the family office to advise trusts for which the key employee is the sole person making investment decisions.<sup>95</sup> Permitting the family office to provide advice to this type of entity tracks a parallel concept included in the definition of “qualified purchaser” under the Investment Company Act<sup>96</sup> and thus creates consistency in entities considered not to need investor protection under our rules because investment decisions are made solely by individuals that we have already concluded should have sufficient financial experience and sophistication to act without the protection provided by our regulations.

Some commenters urged us to even further expand the definition of key employee to include their spouses and spousal equivalents (even if not with respect to joint property) or all of their immediate family members.<sup>97</sup> There is no reason to believe that the key employee’s spouse or immediate family members independently have the financial sophistication and experience to protect themselves when receiving investment advice from the family office. Such individuals are not considered to be knowledgeable employees under Advisers Act rule 205–3 or Investment Company Act rule 3c–5. We see no basis for following a different approach in this context. The premise of the rule is to allow families to manage their own wealth. Key employee receipt of family office advice is permitted because their position and experience should enable them to protect themselves and to allow family offices to attract talented investment professionals as employees. This underlying rationale does not support as a general rule including key employees’ family members unless there is a joint property interest involved.

Several commenters disagreed with the 12-month experience requirement for key employees who are not executive officers, directors, trustees, general partners, or persons serving in similar capacities of the family office, arguing that employees a family office would hire into these roles would presumably possess adequate knowledge and sophistication in financial matters regardless of whether

he or she met the 12-month experience requirement.<sup>98</sup> We believe that the 12-month experience requirement is an important part of limiting employees who receive investment advice without the protections of the Advisers Act (or family membership) to those employees that are likely to be in a position or have a level of knowledge and experience in financial matters sufficient to be able to evaluate the risks and take steps to protect themselves. In addition, commenters’ argument is equally applicable in a private fund or performance fee context, and we see no basis for distinguishing treatment of key employees of family offices from key employees of private funds or qualified client advisers under Investment Company Act rule 3c–5 and Advisers Act rule 205–3, respectively.<sup>99</sup> We therefore adopt this requirement as proposed.

Finally, as proposed, the final rule prohibits key employees (including their trusts and controlled entities) from making additional investments through the family office upon the end of the key employees’ employment by the family office, but will not require former key employees to liquidate or transfer investments held through the family office to avoid imposing possible adverse tax or investment consequences that might otherwise result.<sup>100</sup> While some commenters supported this limitation,<sup>101</sup> one commenter expressed objections to it, asserting that former key employees of family offices often continue to have a close relationship with the family and it should be the family’s decision whether to terminate their family office’s services to them.<sup>102</sup> We are including key employees as family clients because their particular role in the family office causes us to believe that the employee should be in a position to protect him or herself without the need for the protections of the Advisers Act. Once the employee is no longer in that role, this policy rationale no longer holds true to the

same degree. Accordingly, we are adopting this aspect of the rule as proposed.<sup>103</sup>

## 2. Ownership and Control

The final rule requires that, to qualify for the exclusion from regulation under the Advisers Act, the family office must be wholly owned by family clients and exclusively controlled, directly or indirectly, by one or more family members or family entities.<sup>104</sup> Our final rule expands who may own the family office from “family members,” as proposed, to “family clients.” However, the rule continues to require that control of the family office remain, directly or indirectly, with family members and their related entities.

Commenters urged us to expand both who could own the family office and who could control a family office under the rule.<sup>105</sup> Some stated that many family offices are owned by family trusts, and that allowing family members to indirectly own and control the family office did not provide sufficient clarity that such a trust could own and control the family office.<sup>106</sup> Commenters also pointed out that many family offices permit their employees to own equity interest in family offices as an incentive to attract and retain talented employees, and urged us not to prohibit such arrangements.<sup>107</sup> These

<sup>103</sup> A number of commenters requested that we clarify the extent to which a family office could provide investment advice to an employee benefit plan or pension plan sponsored by the family office without registering under the Act. *See, e.g.*, Comment Letter of the American Benefits Council/Committee on the Investment of Employee Benefit Assets (Nov. 18, 2010); Coalition Letter; Withers Bergman Letter. In our view, a family office or other employer that merely establishes an employee benefit plan or pension plan and selects one or more investment advisers for that plan would not be an investment adviser subject to the Advisers Act because it would not be an “investment adviser” within the meaning of section 202(a)(11). A family office (as defined in rule 202(a)(11)(G)–1) thus would not be required to register under the Act if, in addition to providing advice to family clients, its advisory activities are so limited. However, a family office providing additional advisory services to an employee benefit plan all of whose participants are not family clients may be required to register under the Act unless another exemption is available.

<sup>104</sup> Rule 202(a)(11)(G)–1(b)(2). We have added the word “exclusively” to clarify that “control” cannot be shared with individuals or companies that are not family members or family entities. A family entity is defined as any of the trusts, companies or other entities set forth in paragraphs (v), (vi), (vii), (viii), (ix), or (xi) of subsection (d)(4) of rule 202(a)(11)(G)–1, but excluding key employees and their trusts from the definition of family client solely for purposes of this definition.

<sup>105</sup> *See, e.g.*, Coalition Letter; Comment Letter of McDermott Will & Emery/Richard L. Dees (Nov. 18, 2010) (“McDermott Dees Letter”).

<sup>106</sup> *See, e.g.*, Dorsey Letter; Comment Letter of McGuire Woods LLP (Nov. 18, 2010).

<sup>107</sup> *See, e.g.*, AICPA Letter; Davis Polk Letter; Dechert Letter.

<sup>98</sup> *See, e.g.*, ABA Letter; Comment Letter of Cadwalader, Wickersham & Taft LLP (Nov. 18, 2010) (“Cadwalader Letter”).

<sup>99</sup> This analysis is consistent with our analysis in the 3(c)(7) Release where we stated that the 12-month experience requirement was designed to limit investments to employees that have the requisite experience to appreciate the risks of investing in the fund. 3(c)(7) Release, *supra* note 85, at Section III.B. As is the case under rule 3c–5, an employee need not work for a particular family office for the entire 12-month period. The time performing substantially similar functions or duties by that employee for or on behalf of another company may be counted toward the 12 month requirement. *See* 3(c)(7) Release, *supra* note 85.

<sup>100</sup> Rule 202(a)(11)(G)–1(d)(4)(iv).

<sup>101</sup> *See, e.g.*, ABA Letter; Coalition Letter.

<sup>102</sup> Schiff/Stetter Letter.

<sup>95</sup> Rule 202(a)(11)(G)–1(d)(4)(x).

<sup>96</sup> Section 2(a)(51)(A)(iii) of the Investment Company Act.

<sup>97</sup> *See, e.g.*, Kleinberg Letter; Kramer Levin Letter.



commenters asked us to explicitly broaden the ownership requirement from “family members” to “family clients” to permit these types of arrangements. Other commenters argued more broadly that the “wholly owned and controlled” aspect of the proposed definition does not adequately reflect the variety of organizational arrangements already in place at family offices and that the Commission should focus as a policy matter solely on whether the family office is being operated for the benefit of members of a single family.<sup>108</sup>

Commenters persuaded us to expand who may own the family office from “family members” to “family clients.” This change is consistent with the intent behind our proposed language (which contemplated that the family could own the family office indirectly) and more clearly allows family members to structure their ownership of the family office for tax or other reasons. We also agree with suggestions that the rule permit key employees to own a non-controlling stake in the family office to serve as part of an incentive compensation package for key employees. We remain convinced, however, that for our core policy rationale to be fulfilled—that a family office is essentially a family managing its own wealth—the family, directly or indirectly, should control the family office. Accordingly, the final rule provides that while family clients may own the family office, family members and family entities (*i.e.*, their wholly owned companies or family trusts) must control the family office.<sup>109</sup>

### 3. Holding Out

As proposed, the final rule prohibits a family office relying on the rule from holding itself out to the public as an investment adviser.<sup>110</sup> Commenters

supported this prohibition.<sup>111</sup> Holding itself out to the public as an investment adviser suggests that the family office is seeking to enter into typical advisory relationships with non-family clients, and thus is inconsistent with the basis on which we have provided exemptive orders and are adopting this rule.<sup>112</sup>

### 4. Multifamily Offices

The exclusion we are adopting today does not extend to family offices serving multiple families, as urged by several commenters.<sup>113</sup> Comments we received did not persuade us that the rule could be drafted to distinguish in any meaningful way between such offices and family-owned commercial advisory firms that offer their services to other families.<sup>114</sup> Moreover, they did not persuade us that the protections of the Advisers Act, including the application of the anti-fraud provisions of the Act, would not be relevant to a family obtaining services from an office established by another family with which it could have conflicts of interest. Families, of course, may have conflicts among members leading to disputes. But, as discussed in our Proposing Release, the premise of the exclusion is that such disputes could be worked out within the family unit or, if necessary, by state courts under laws that facilitate resolution of family disputes. In a multifamily office, these clients would be without the protections of the Advisers Act or family relationships for preventing or handling any discriminatory or fraudulent treatment of different families.

provides investment advice to family clients and does not hold itself out to the public as an investment adviser.

<sup>111</sup> See, *e.g.*, Coalition Letter; ABA letter.

<sup>112</sup> See footnote 56 of the Proposing Release, *supra* note 2. In response to one commenter's request, we clarify that a family office that is currently registered as an investment adviser and expects to de-register in reliance on rule 202(a)(11)(G)–1, will not be prohibited from relying on the rule solely because it held itself out to the public as an investment adviser while it was registered under the Advisers Act. See Dechert Letter.

<sup>113</sup> See, *e.g.*, Cadwalader Letter; Comment Letter of Lowenstein Sandler PC (Nov. 12, 2010); Comment Letter of Stradling Yocca Carlson & Rauth (Nov. 16, 2010).

<sup>114</sup> We note that under section 208(d) of the Advisers Act, it is unlawful for any person indirectly to do anything that would be unlawful for such person to do directly under the Advisers Act or rules thereunder. Therefore, if several families that are unrelated through a common ancestor within 10 generations have established a separate family office for each of the families, but have staffed these family offices with the same or substantially the same employees such employees are managing a *de facto* multifamily office. As a result, these family offices may not claim the family office exclusion.

### B. Grandfathering Provisions, Transition Period and Effect of Rule on Previously Issued Exemptive Orders

The Dodd-Frank Act prohibits us from excluding from our definition of family office persons not registered or required to be registered on January 1, 2010 that would meet all of the required conditions under rule 202(a)(11)(G)–1 but for their provision of investment advice to certain clients specified in section 409(b)(3) of the Dodd-Frank Act.<sup>115</sup> We have incorporated this required grandfathering into paragraph (c) of our rule.<sup>116</sup> We received two comments on such incorporation. One commenter suggested that we incorporate the grandfathering provision only by reference to section 409(b)(3) of the Dodd-Frank Act.<sup>117</sup> We believe that incorporating the grandfathering provision of Dodd-Frank Act is a more user friendly approach for those attempting to comply with the Advisers Act compared to directing them to look up the grandfathering provision in a separate statute. Another commenter requested clarification of the Dodd-Frank grandfathering provision.<sup>118</sup> We believe clarification or interpretation of this provision would involve applying the provision to specific facts, and this release is not an appropriate means to provide such a clarification. Therefore, we are adopting paragraph (c) of the rule as proposed.

Several commenters suggested that we provide a transition period to allow family offices time to determine whether they meet the exclusion or to restructure or register under the Advisers Act if they do not.<sup>119</sup> We recognize that the time period between the adoption of this rule and the repeal of the private adviser exemption from registration contained in section 203(b)(3) of the Advisers Act, effective July 21, 2011, may not be sufficient for every family office to conduct such an evaluation, restructure or register. Accordingly, the rule provides that family offices currently exempt from

<sup>115</sup> See section 409(b)(3) and (c) of the Dodd-Frank Act.

<sup>116</sup> We note that section 409(c) of the Dodd-Frank Act provides that “a family office that would not be a family office, but for section 409(b)(3) of the Dodd-Frank Act, shall be deemed to be an investment adviser for the purposes of paragraphs (1), (2) and (4) of section 206 of the Advisers Act.” This provision is reflected in paragraph (3) of rule 202(a)(11)(G)–1(c).

<sup>117</sup> Coalition Letter.

<sup>118</sup> AICPA Letter.

<sup>119</sup> See, *e.g.*, Lee & Stone Letter (to provide time to restructure certain “club deals” in which clients of the family office may have engaged); Comment Letter of Paul, Hastings, Janofsky & Walker LLP (Nov. 17, 2010) (requesting an expanded grandfather provision to allow more time for an orderly restructuring); Ropes & Gray Letter.

<sup>108</sup> See, *e.g.*, Coalition Letter; Levin Schreder Letter; McDermott Dees Letter.

<sup>109</sup> We note that, as proposed, we are not limiting the exclusion to a family office that is not operated for the purpose of generating a profit. We also note that some family offices may be structured such that all or a portion of family client investment gains are distributed as dividends from the family office (when family clients own the family office) and that a not-for-profit requirement would preclude this family office structure. We were persuaded by several commenters who cautioned against limiting the exclusion for family offices to those that operate on a not-for-profit basis, arguing that it would be difficult to administer and is unnecessary given the limited clientele that a family office may advise and rely on the exclusion. See, *e.g.*, AICPA Letter; Davis Polk Letter; Kozusko Letter.

<sup>110</sup> Rule 202(a)(11)(G)–1(b)(3). For purposes of this rule, despite language under rule 203(b)(3)–1(c) regarding holding out, a family office could not market non-public offerings to persons or entities that are not family clients since such activity would not be consistent with a family office that only

registration under the Advisers Act in reliance on the private adviser exemption and that do not meet the new family office exclusion are not required to register with the Commission as investment advisers until March 30, 2012.<sup>120</sup> We believe that this aspect of the rule is necessary or appropriate in the public interest and is consistent with the protection of investors, and the purposes fairly intended by the policy and provisions of the Advisers Act.

We have determined not to rescind exemptive orders previously issued to family offices under section 202(a)(11)(G) of the Advisers Act. As discussed above, the Commission has issued orders under section 202(a)(11)(G) of the Advisers Act to certain family offices declaring them and their employees acting within the scope of their employment to not be investment advisers within the intent of the Act. In some areas these exemptive orders may be slightly broader than the rule we are adopting today, and in other areas they may be narrower. We proposed not to rescind these exemptive orders and requested comment. All commenters addressing this subject supported our proposal. Thus, family offices currently operating under these orders may continue to rely on them.

### III. Paperwork Reduction Act

Rule 202(a)(11)(G)–1 does not contain a “collection of information” requirement within the meaning of the Paperwork Reduction Act of 1995.<sup>121</sup> Accordingly, the Paperwork Reduction Act is not applicable.

### IV. Economic Analysis

We are adopting rule 202(a)(11)(G)–1 in anticipation of the Dodd-Frank Act’s repeal of section 203(b)(3) of the Advisers Act, which provides an exemption from registration for certain private fund advisers, and in light of the Dodd-Frank Act’s directive that the Commission define family offices that will be excluded from regulation under

the Advisers Act.<sup>122</sup> The rule we are adopting today defines a family office as a company that, with limited exceptions, has only family clients, is wholly owned by family clients and controlled by family members and/or family entities, and does not hold itself out to the public as an investment adviser. The definition of family office provided in the rule is designed to limit the exclusion from Advisers Act regulation solely to those private advisory offices that we believe the Advisers Act was not designed to regulate and to prevent circumvention of the Adviser Act’s protections by firms that are operating as commercial investment advisory firms.

As a preliminary matter, and as discussed earlier, as a result of the repeal of section 203(b)(3) of the Advisers Act a number of private advisory offices that may consider themselves to be family offices and that are not currently registered as investment advisers in reliance on that provision will be required to register under the Advisers Act after July 21, 2011 unless those advisers are eligible for a new exemption. The benefits and costs associated with the elimination of section 203(b)(3) are attributable to the Dodd-Frank Act. However, while Congress also adopted a family office exclusion, it directed the Commission to adopt rules defining the terms of that exclusion, subject to the terms of section 409 of the Dodd-Frank Act, and thus we discuss below the costs and benefits of our determination of which private advisory offices are deemed family offices and therefore excluded from regulation.

In proposing the rule, we requested comment on all aspects of our cost benefit analysis, including the accuracy of our estimates of costs and benefits, identification and assessment of any costs and benefits not discussed in our analysis, and data relevant to these costs and benefits.<sup>123</sup> While some commenters predicted that many private advisory offices would have to restructure or apply for an exemptive order and thus incur substantial costs if the definition of family office were not expanded,<sup>124</sup> no estimates of such costs were provided. We discuss these comments more specifically below.

#### A. Benefits

As discussed in the Proposing Release, we expect that rule 202(a)(11)(G)–1 will result in several

important benefits. First, family offices, as defined by this rule, will not be subject to the mandatory costs of registering with the Commission as an investment adviser and the associated compliance costs. Some investment advisers currently registered with us may qualify as family offices under the rule and have the choice to deregister. These reduced regulatory costs should result in direct cost savings to these family offices, and thus to their family clients.

Second, the rule will benefit family offices, as defined by the rule, and their clients by eliminating the costs of seeking (and considering) individual exemptive orders. Without rule 202(a)(11)(G)–1, the repeal of the exemption contained in section 203(b)(3) would result in a great number of family offices having to apply for exemptive relief and thus incurring significant costs for these family offices and their clients. We estimate that a typical family office will incur legal fees of \$200,000 on average to engage in the exemptive order application process, including preparation and revision of an application and consultations with Commission staff.<sup>125</sup> The rule will benefit family offices and their family clients by eliminating the costs of applying to the Commission for an exemptive order that the Commission would grant and the associated uncertainty that they might not obtain such an order. Estimates of the number of family offices in the United States vary widely—ranging from less than 1,000 to 5,000.<sup>126</sup> If all of these family offices qualify for the new exclusion and otherwise would have applied for an exemptive order, the rule will provide a benefit ranging from \$200 million to \$1 billion by eliminating the costs of applying for those exemptive orders.<sup>127</sup>

Finally, the rule also will benefit the Commission by freeing staff resources from reviewing and processing large

<sup>125</sup> We included the same estimate in the Proposing Release. We received no comments on this estimate.

<sup>126</sup> See, e.g., Pamela J. Black, *The Rise of the Multi-Family Office*, Financial Planning (Apr. 27, 2010) (estimating 2,500 to 3,000 single family offices); Robert Frank, *Minding the Money—‘Family Office’ Chiefs Get Plied with Perks; Club Membership, Jets*, The Wall Street Journal (Sept. 7, 2007), at W2 (estimating 3,000 to 5,000 family offices in the United States); Second Annual Single-Family Office Study, the Family Wealth Alliance (2010) (estimating 2,500 U.S.-based single family offices); *Creating a Single Family Office for Wealth Creation and Family Legacy Sustainability*, Family Office Association (2009) (estimating 1,000 single family offices worldwide).

<sup>127</sup> \$200,000 cost of applying for an exemptive order multiplied by a range of 1,000 family offices to 5,000 family offices.

<sup>120</sup> Rule 202(a)(11)(G)–1(e)(2). See also Letter from Robert E. Plaze, Associate Director, Division of Investment Management, U.S. Securities and Exchange Commission, to David Massey, Deputy Securities Administrator, North Carolina Securities Division and President, NASAA (Apr. 8, 2011) available at <http://www.sec.gov/rules/proposed/2010/ia-3110-letter-to-nasaa.pdf> (stating that the Commission would potentially consider extending the date by which these advisers must register and come into compliance with the obligations of a registered adviser until the first quarter of 2012). Because initial applications for registration can take up to 45 days to be approved, family offices that determine they will need to register with the Commission should file a complete application, both Part 1 and a brochure(s) meeting the requirements of Part 2 of Form ADV, at least by February 14, 2012.

<sup>121</sup> 44 U.S.C. 3501 *et seq.*

<sup>122</sup> See section 409 of the Dodd-Frank Act.

<sup>123</sup> Section V of the Proposing Release.

<sup>124</sup> See, e.g., Jones Day Letter; Withers Bergman Letter.

numbers of family office exemptive applications resulting from the repeal of section 203(b)(3) of the Advisers Act that the Commission would grant and allowing the staff to target its work more efficiently, and thus will indirectly benefit public investors.

#### B. Costs

We recognize that some private advisory offices that today consider themselves to be family offices likely will incur expenses to evaluate whether they meet the terms of the exclusion. One commenter estimated that such an office would incur expenses of \$25,000 to \$35,000 to hire a consulting firm or law firm to determine if it meets the exclusion provided by the rule.<sup>128</sup> If all family offices estimated to exist in the United States noted above<sup>129</sup> hire a consulting firm or law firm to determine if they meet the exclusion at such a cost, they would incur an aggregate cost ranging from \$25 million to \$175 million for this evaluation.<sup>130</sup>

Some of these private advisory offices may decide to restructure their businesses to meet the conditions imposed by rule 202(a)(11)(G)–1. Many commenters stated that the proposed definition of family office was too narrow, and that if it was adopted without changes, absent an exemptive order, many such advisory offices would be required to restructure themselves in order to qualify as family offices.<sup>131</sup> Restructuring or obtaining an exemptive order, some commenters asserted, would result in substantial costs to the advisory office and its clients.<sup>132</sup> We expect that each such office will weigh the costs of such restructuring under its particular circumstances against the costs and burdens of registration or seeking an exemptive order.

Our final rule broadens the definition of “family client” and “family office” from that proposed, particularly concerning permissible clients of the family office and ownership of the family office.<sup>133</sup> As a result, we expect that substantially fewer private advisory offices will need to confront these trade-offs than would have been the case under our proposal. Nevertheless, we recognize that some offices may decide to restructure their businesses in order

to meet even the expanded family office definition under the final rule, rather than register or seek an exemptive order. The costs of any such restructuring will be highly dependent on the nature and extent of the restructuring, which we understand may vary significantly from office to office. No commenters provided an estimate of the costs to carry out any necessary restructuring.

We do not expect that the rule will impose any significant costs on family offices currently operating under a Commission exemptive order. We are permitting these family offices to continue to rely on their exemptive orders. They may choose, of course, to qualify for exclusion under the rule. We expect that most of these family offices will satisfy all the conditions of the rule without changing their structure or operations. However, these family offices may incur one-time “learning costs” in determining the differences between their orders and the rule. We estimate that such costs will be no more than \$5,000 on average for a family office if it hires an external consulting firm or law firm to assist in determining the differences. Because the terms of these advisers’ exemptive orders were similar to rule 202(a)(11)(G)–1, these family offices should incur significantly lower costs to evaluate the new rule than family offices that do not have an exemptive order. There are 13 family offices that have obtained exemptive orders. Accordingly, we estimate that these family offices collectively would incur outside consulting or legal expenses of \$65,000 to discern the differences between their orders and the rule.

Finally, if there were any family offices that previously registered with the Commission, but now may de-register in reliance on the new family office exclusion in the Advisers Act, the rule may have competitive effects on investment advisers that may compete with the family office for the provision of investment management services to family clients since these third party investment advisers would bear the regulatory costs associated with compliance with the Advisers Act or state investment adviser regulatory requirements. We do not expect that the rule will impact capital formation.

#### V. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis (“FRFA”) regarding rule 202(a)(11)(G)–1 in accordance with section 604 of the Regulatory Flexibility Act.<sup>134</sup> We prepared an Initial

Regulatory Flexibility Analysis (“IRFA”) in conjunction with the Proposing Release in October 2010.<sup>135</sup>

#### A. Need for the Rule

We are adopting rule 202(a)(11)(G)–1 defining family offices excluded from regulation under the Advisers Act because we are required to do so under section 409 of the Dodd-Frank Act.

#### B. Significant Issues Raised by Public Comment

In the Proposing Release, we requested comment on the IRFA. None of the comment letters we received specifically addressed the IRFA. None of the comment letters made specific comments about the proposed rule’s impact on smaller family offices.

#### C. Small Entities Subject to the Rule

Under Commission rules, for purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than \$25 million; (ii) did not have total assets of \$5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of \$25 million or more, or any person (other than a natural person) that had \$5 million or more on the last day of its most recent fiscal year.<sup>136</sup>

We do not have data and are not aware of any databases that compile information regarding how many family offices will be a small entity under this definition, but since family offices only are established for the very wealthy and given the statistics included in the Proposing Release showing that they generally serve families with at least \$100 million or more of investable assets and have an average net worth of \$517 million, we believe it is unlikely that any family offices would be small entities.<sup>137</sup>

<sup>135</sup> See Proposing Release, *supra* note 2, at Section VI.

<sup>136</sup> 17 CFR 275.0–7(a).

<sup>137</sup> See Proposing Release, *supra* note 2, at n.2 and accompanying text. One commenter (Comment Letter of Robert Stenson (Oct. 18, 2010)) cited a 1999 survey which estimated that 32% of family offices had investment assets of less than \$100 million. However, this commenter did not indicate how many family offices had assets under management of less than \$25 million and thus qualified as “small entities” as defined in Advisers Act rule 0–7, *supra* note 136 and accompanying text.

<sup>128</sup> Lindquist Letter.

<sup>129</sup> See *supra* note 126 and accompanying text.

<sup>130</sup> (\$25,000 evaluation cost) × (1,000 family offices) = \$25 million. (\$35,000 evaluation cost) × (5,000 family offices) = \$175 million.

<sup>131</sup> See, e.g., Lindquist Letter; Lee & Stone Letter; Withers Bergman Letter.

<sup>132</sup> See, e.g., Coalition Letter; Lee & Stone Letter.

<sup>133</sup> See Section II of this Release for discussion of these expansions.

<sup>134</sup> 5 U.S.C. 604(a).

#### *D. Projected Reporting, Recordkeeping, and Other Compliance Requirements*

Rule 202(a)(11)(G)–1 imposes no reporting, recordkeeping or other compliance requirements.

#### *E. Agency Action To Minimize Effect on Smaller Entities*

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant impact on small entities. In connection with the rule, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rule, or any part thereof, for small entities.

Rule 202(a)(11)(G)–1 is exemptive and compliance with the rule is voluntary. We therefore do not believe that different or simplified compliance, timetable, or reporting requirements, or an exemption from coverage of the rule for small entities, is appropriate. The conditions in the rule are designed to ensure that family offices operating under the rule provide advice only to the family itself and not the general public and, accordingly, the protections of the Advisers Act are not warranted. Reducing these conditions for smaller family offices would be inconsistent with the policy underlying the exclusion and would harm investor protection.

Our prior exemptive orders have not made any differentiation based on the size of the family office. In addition, as discussed above, we expect that very few, if any, family offices are small entities. The Commission also believes that rule 202(a)(11)(G)–1 will decrease burdens on small entities by making it unnecessary for most of them to seek an exemptive order from the Commission to operate without registration under the Advisers Act. As a result, we do not anticipate that the potential impact of the rule on small entities will be significant.

The rule specifies broad conditions with which a family office must comply to rely on the exclusion; the rule leaves to each family office how to structure its specific operations to meet these conditions. The rule thus already incorporates performance rather than design standards. For these reasons,

alternatives to the rule appear unnecessary and in any event are unlikely to minimize any impact that the rule might have on small entities.

#### **VI. Statutory Authority**

We are adopting rule 202(a)(11)(G)–1 [17 CFR 275.202(a)(11)(G)–1] pursuant to our authority set forth in sections 202(a)(11)(G) and 206A of the Advisers Act [15 U.S.C. 80b–2(a)(11)(G) and 80b–6A].

#### **List of Subjects in 17 CFR Part 275**

Reporting and recordkeeping requirements, Securities.

#### **Text of Rule**

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows.

#### **PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940**

■ 1. The authority citation for Part 275 continues to read in part as follows:

**Authority:** 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

\* \* \* \* \*

■ 2. Section 275.202(a)(11)(G)–1 is added to read as follows:

#### **§ 275.202(a)(11)(G)–1 Family offices.**

(a) *Exclusion.* A family office, as defined in this section, shall not be considered to be an investment adviser for purpose of the Act.

(b) *Family office.* A family office is a company (including its directors, partners, members, managers, trustees, and employees acting within the scope of their position or employment) that:

(1) Has no clients other than family clients; provided that if a person that is not a family client becomes a client of the family office as a result of the death of a family member or key employee or other involuntary transfer from a family member or key employee, that person shall be deemed to be a family client for purposes of this section for one year following the completion of the transfer of legal title to the assets resulting from the involuntary event;

(2) Is wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities; and

(3) Does not hold itself out to the public as an investment adviser.

(c) *Grandfathering.* A family office as defined in paragraph (a) of this section shall not exclude any person, who was not registered or required to be registered under the Act on January 1,

2010, solely because such person provides investment advice to, and was engaged before January 1, 2010 in providing investment advice to:

(1) Natural persons who, at the time of their applicable investment, are officers, directors, or employees of the family office who have invested with the family office before January 1, 2010 and are accredited investors, as defined in Regulation D under the Securities Act of 1933;

(2) Any company owned exclusively and controlled by one or more family members; or

(3) Any investment adviser registered under the Act that provides investment advice to the family office and who identifies investment opportunities to the family office, and invests in such transactions on substantially the same terms as the family office invests, but does not invest in other funds advised by the family office, and whose assets as to which the family office directly or indirectly provides investment advice represents, in the aggregate, not more than 5 percent of the value of the total assets as to which the family office provides investment advice; provided that a family office that would not be a family office but for this paragraph (c) shall be deemed to be an investment adviser for purposes of paragraphs (1), (2) and (4) of section 206 of the Act.

(d) *Definitions.* For purposes of this section:

(1) *Affiliated family office* means a family office wholly owned by family clients of another family office and that is controlled (directly or indirectly) by one or more family members of such other family office and/or family entities affiliated with such other family office and has no clients other than family clients of such other family office.

(2) *Control* means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of being an officer of such company.

(3) *Executive officer* means the president, any vice president in charge of a principal business unit, division or function (such as administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions, for the family office.

(4) *Family client* means:

(i) Any family member;

(ii) Any former family member;

(iii) Any key employee;

(iv) Any former key employee,

provided that upon the end of such individual's employment by the family office, the former key employee shall not receive investment advice from the family office (or invest additional assets

with a family office-advised trust, foundation or entity) other than with respect to assets advised (directly or indirectly) by the family office immediately prior to the end of such individual's employment, except that a former key employee shall be permitted to receive investment advice from the family office with respect to additional investments that the former key employee was contractually obligated to make, and that relate to a family-office advised investment existing, in each case prior to the time the person became a former key employee.

(v) Any non-profit organization, charitable foundation, charitable trust (including charitable lead trusts and charitable remainder trusts whose only current beneficiaries are other family clients and charitable or non-profit organizations), or other charitable organization, in each case for which all the funding such foundation, trust or organization holds came exclusively from one or more other family clients;

(vi) Any estate of a family member, former family member, key employee, or, subject to the condition contained in paragraph (d)(4)(iv) of this section, former key employee;

(vii) Any irrevocable trust in which one or more other family clients are the only current beneficiaries;

(viii) Any irrevocable trust funded exclusively by one or more other family clients in which other family clients and non-profit organizations, charitable foundations, charitable trusts, or other charitable organizations are the only current beneficiaries;

(ix) Any revocable trust of which one or more other family clients are the sole grantor;

(x) Any trust of which: Each trustee or other person authorized to make decisions with respect to the trust is a key employee; and each settlor or other person who has contributed assets to the trust is a key employee or the key employee's current and/or former spouse or spousal equivalent who, at the time of contribution, holds a joint, community property, or other similar shared ownership interest with the key employee; or

(xi) Any company wholly owned (directly or indirectly) exclusively by, and operated for the sole benefit of, one or more other family clients; provided that if any such entity is a pooled investment vehicle, it is excepted from the definition of "investment company" under the Investment Company Act of 1940.

(5) *Family entity* means any of the trusts, estates, companies or other

entities set forth in paragraphs (d)(4)(v), (vi), (vii), (viii), (ix), or (xi) of this section, but excluding key employees and their trusts from the definition of family client solely for purposes of this definition.

(6) *Family member* means all lineal descendants (including by adoption, stepchildren, foster children, and individuals that were a minor when another family member became a legal guardian of that individual) of a common ancestor (who may be living or deceased), and such lineal descendants' spouses or spousal equivalents; provided that the common ancestor is no more than 10 generations removed from the youngest generation of family members.

(7) *Former family member* means a spouse, spousal equivalent, or stepchild that was a family member but is no longer a family member due to a divorce or other similar event.

(8) *Key employee* means any natural person (including any key employee's spouse or spouse equivalent who holds a joint, community property, or other similar shared ownership interest with that key employee) who is an executive officer, director, trustee, general partner, or person serving in a similar capacity of the family office or its affiliated family office or any employee of the family office or its affiliated family office (other than an employee performing solely clerical, secretarial, or administrative functions with regard to the family office) who, in connection with his or her regular functions or duties, participates in the investment activities of the family office or affiliated family office, provided that such employee has been performing such functions and duties for or on behalf of the family office or affiliated family office, or substantially similar functions or duties for or on behalf of another company, for at least 12 months.

(9) *Spousal equivalent* means a cohabitant occupying a relationship generally equivalent to that of a spouse.

(e) *Transition.* (1) Any company existing on July 21, 2011 that would qualify as a family office under this section but for it having as a client one or more non-profit organizations, charitable foundations, charitable trusts, or other charitable organizations that have received funding from one or more individuals or companies that are not family clients shall be deemed to be a family office under this section until December 31, 2013, provided that such non-profit or charitable organization(s) do not accept any additional funding

from any non-family client after August 31, 2011 (other than funding received prior to December 31, 2013 and provided in fulfillment of any pledge made prior to August 31, 2011).

(2) Any company engaged in the business of providing investment advice, directly or indirectly, primarily to members of a single family on July 21, 2011, and that is not registered under the Act in reliance on section 203(b)(3) of this title on July 20, 2011, is exempt from registration as an investment adviser under this title until March 30, 2012, provided that the company:

(i) During the course of the preceding twelve months, has had fewer than fifteen clients; and

(ii) Neither holds itself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a), or a company which has elected to be a business development company pursuant to section 54 of that Act (15 U.S.C. 80a-54) and has not withdrawn its election.

Dated: June 22, 2011.

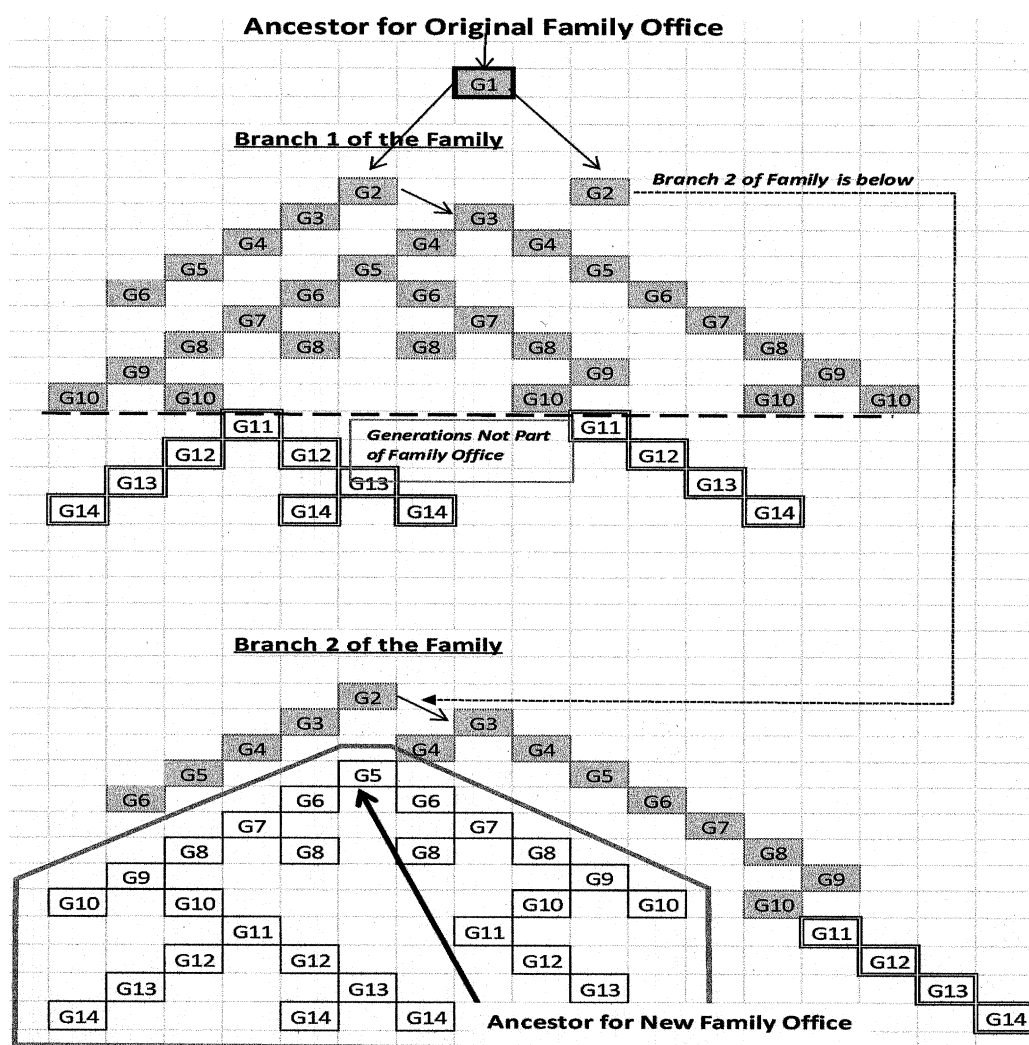
By the Commission.

**Elizabeth M. Murphy,**  
*Secretary.*

**Note:** The following Annex will not appear in the Code of Federal Regulations.

#### **Annex A**

The following diagram illustrates the effect of a family office redesignating its common ancestor. In the first chart, the shaded boxes indicate persons in various generations that are "family members" of the family office. The double-outlined boxes indicate persons in various generations that are outside the 10-generation limit and thus may not be advised by the family office under the exclusion. The lower diagram shows the impact of redesignating the common ancestor from an individual in generation 1 to an individual in generation 5. The single-outlined boxes indicate the new group of family clients that the family office may advise and maintain its exclusion. The shaded boxes indicate individuals that previously the family office could advise, but that are no longer "family members" due to the redesignation. The double-outlined boxes indicate individuals that were too remote from the common ancestor in both cases to be considered "family members."



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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 948

[WV-117-FOR; OSM-2011-0006]

#### West Virginia Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Interim rule with public comment period and opportunity for public hearing.

**SUMMARY:** We are announcing receipt of a proposed amendment to the West Virginia permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). On May 2, 2011, the West Virginia Department of Environmental Protection

(WVDEP) submitted a program amendment to OSM that includes both statutory and regulatory revisions. West Virginia submitted proposed permit fee revisions to the Code of West Virginia as authorized by House Bill 2955 that passed during the State's regular 2011 legislative session. In addition, West Virginia is amending its Code of State Regulations (CSR) to provide for the establishment of a minimum incremental bonding rate as authorized by Senate Bill 121. The changes, due to the passage of House Bill 2995, will increase the filing fee for the State's surface mining permit to \$3,500 and establish various fees for other permitting actions. Senate Bill 121 authorizes regulatory revisions which includes, among other things, the establishment of a minimum incremental bonding rate of \$10,000 per increment at CSR 38-2-11.4.a.2. Because these revisions have an effective date of June 16, 2011, we are approving the permit fees and the minimum incremental bonding rate on

an interim basis, with our approval taking effect upon publication of this interim rule. This rule also requests public comments and provides an opportunity for a public hearing on the proposed statutory and regulatory revisions described herein. The other State regulatory revisions submitted by WVDEP with this amendment will be announced in another **Federal Register** notice and follow our normal program amendment procedures.

**DATES:** We will accept written comments on this amendment until 4 p.m. EDT, on July 29, 2011. If requested, we will hold a public hearing on the amendment on July 25, 2011. We will accept requests to speak until 4 p.m. EDT, on July 14, 2011.

**ADDRESSES:** You may submit comments, identified by "WV-117-FOR; Docket ID: OSM-2011-0006" by any of the following two methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. The rule has been assigned Docket ID OSM-2011-0006. If you would like to submit comments