NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street N.E., Suite 1140
Washington, D.C. 20002
202/737-0900
Fax: 202/783-3571
www.nasaa.org

February 10, 2011

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

Re: Comments in Response to Release No. IA-3110 (File No.S7-36-10) and Release No.IA-3111 (File No.S7-37-10).

Dear Ms. Murphy:

The North American Securities Administrators Association, Inc. (NASAA)[1] submits the following comments in response to Release No. IA-3110 (File No.S7-36-10) and Release No.IA-3111 (File No. S7-37-10) ("Releases"). These Releases, for the most part, explain how the Securities and Exchange Commission ("SEC" or "Commission") intends to implement various provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") concerning the regulation of investment advisers. NASAA has worked closely with the SEC staff on a number of the issues covered in the Releases, and we look forward to continued collaboration on matters of shared interest.

The following comments are applicable to Release No.IA-3110 (File No. S7-36-10).

1. Transition to state registration: Proposed rule 203A-5.

Proposed rule 203A-5 would require an adviser registered with the SEC to file an amendment on or before August 20, 2011, to report its assets under management for the purpose of confirming that the adviser remains qualified for registration with the SEC. Those advisers whose assets under management fall below the statutory threshold for SEC registration would then be required to file an ADV-W and terminate registration with the SEC no later than October 19, 2011. The SEC would then expect to cancel the registration of advisers that fail to comply with these deadlines. While NASAA supports both the method and timeline for transition contained in the proposed rule, NASAA suggests that it would be prudent to include in the rule the flexibility to extend this

[1] NASAA is the association of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as the forum for these regulators to work with each other in an effort to protect investors at the grassroots level and to promote fair and open capital markets.

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timeline if necessary. There are numerous variables involved in the transition from SEC to state registration of the approximately 4,000 advisers. Including in the rule a provision that allows the SEC to extend the timelines is a meaningful way to address problems that may occur through this transition process.

The Commission notes that reprogramming of IARD will be required in order to implement the transition by advisers from federal to state registration as well as other requirements under the Dodd-Frank Act. If the reprogramming is not completed in time to meet the pertinent deadlines, the Commission suggests that a temporary solution could be the reintroduction of a short-term paper filing system. NASAA would oppose the substitution of paper filings even on a short-term basis and suggest that a better approach would be to delay implementation of the various deadlines. NASAA believes that the benefits of electronic filing, including easy public access to the documents, are significant and would outweigh any disadvantages imposed by a delay in filing deadlines.

On a related issue, advisers have contacted state regulators seeking guidance as to how to proceed with moving from federal to state registration. The states, like the firms, want the switch work as seamlessly as possible. Despite that perspective, there are issues that arise in connection with the "best advice" that states can give to the switching firms. For example, tailoring advice to the current switch timeline, were that timeline to change, could involve extra fees imposed on the switching advisers. Thus, NASAA has modified its recommendation to advise the firms to file applications for state registration, and for states to review and provisionally clear those applications, while leaving the adviser in a "clear pending confirmation of SEC non-eligibility" status. Once that SEC filing is made and the adviser updates its Form ADV to respond to the newly amended sections of the form, the state could register the adviser, which would then allow the adviser to file an ADV-W to withdraw its SEC registration.

2. Relief for state-registered and newly registered advisers.

On page 13 of the Release, the Commission notes that the staff has received questions from state-registered advisers and advisers registering for the first time expressing concern that that they might be required to register with the Commission and then very soon thereafter be required to withdraw their SEC registration as a result of the increase in the statutory threshold required by the Dodd-Frank Act. To avoid this regulatory burden, the SEC proposes to provide relief to this limited category of advisers. Specifically, the SEC will not object if a state-registered or newly registered adviser is not registered with the SEC if, on or after January 1, 2011 until October 19, 2011, the adviser reports on its ADV that is has between $30 million and $100 million in assets under management, provided that the adviser is properly registered in the state in which it maintains its principal office and place of business, and that it has a reasonable belief that it is required to be so registered.

State securities regulators have received similar inquiries and support the Commission's proposed relief for advisers currently registered with a state that may be approaching the $30 million dollar threshold and newly registered advisers with assets under management in excess of $30 million but less than $100 million.

3. Multi-state advisers.

   Currently, under rule 203A-2(e), advisers who, upon registration, would be required to register in 30 or more states would be eligible for registration with the SEC. The adviser remains eligible for SEC registration as long as the number of states in which it must register does not fall below 25. The Commission is proposing an amendment to rule 203A-2(e) that would change the current 30 state threshold to 15.

   NASAA supports this change as an effort to be more consistent in the registration requirements for all advisers when analyzing the thresholds for registration with the SEC or the states.

4. Switching between state and Commission registration: Elimination of the "buffer" contained in rule 203A-1.

   As provided in rule 203A-1, advisers may register with the Commission or remain registered with the state where the adviser maintains its principal office and place of business if the adviser's assets under management are between $25 and $30 million. This "buffer" provides an element of regulatory flexibility important to advisers when determining when they should move their registration from one or more states to the SEC or vice versa. NASAA is opposed to the elimination of the "buffer" as proposed in the Release. NASAA suggests that given the fact that the assets under management threshold increased from $25 million to $100 million the "buffer" should increase from $5 million to $20 million. Therefore, advisers with assets under management of $100 million to $120 million would have the option of registering with the SEC or one or more states.

5. Mid-Sized advisers: Method for determining whether an adviser is subject to state regulation.

   Section 410 of the Dodd-Frank Act amended Section 203A(a) of the Investment Advisers Act to provide that an adviser with assets under management of between $25 million and $100 million is prohibited from registering with the SEC under the following conditions. First, the adviser must be required to be registered with the state securities authority in which it maintains its principal office and place of business. Second, if registered, the adviser would be subject examination.

   The Release explains that the SEC plans to correspond with each state securities commission and request that each such authority advise the Commission whether an investment adviser registered in the state is subject to examination. NASAA supports the process as outlined by the SEC and believes no further steps are necessary for carrying out the statutory directive.

   The plain language of the statute is straightforward – an adviser must be required to be registered and, if registered, subject to examination. The approach described by the SEC complies with the clear and unambiguous language of the statute and nothing further is required. In fact, attempting to define or otherwise interpret terms that are plain and direct is contrary to long-established rules of statutory construction. NASAA would,

however, suggest that the SEC coordinate its outreach to the states through the NASAA corporate office. NASAA can assist the SEC in establishing an orderly process for contacting state and territorial regulators and also provide assistance in gathering the information necessary for the SEC to carry out this process.

6. Exempt reporting advisers and the proposed reporting requirements.

NASAA supports the Commission's proposal to adopt rule 204-4 requiring exempt reporting advisers to submit electronic Form ADV reports through the IARD system. The proposal would also make the most recent report by each exempt reporting adviser publicly available through the Investment Adviser Public Disclosure System ("IAPD").

NASAA strongly supports utilizing the current IARD reporting system over creating an unnecessary new form or system. The proposed reporting process is identical to the process that has been successfully and efficiently utilized by investment advisers reporting to the states and the SEC. The industry is familiar with IARD reporting and investors rely upon the IAPD to gain access to public records. Implementing a new form and system would be unnecessarily costly and confusing as IARD and IAPD need only minor reprogramming to accommodate exempt reporting advisers. Accordingly, NASAA believes that it is in the best interest of investors and industry to continue use of this trusted system.

7. Private fund reporting on Form ADV.

NASAA supports the private fund reporting requirements as proposed by the Commission. We agree that the information required of these advisers will be of critical importance to regulators in identifying practices that may harm investors.

8. Amendments to Form ADV: Disclosure reporting page.

The Commission is proposing to add an option and the related functionality to the ADV whereby a filer may remove a disclosure reporting page simply by checking a box denoting that the filing was made in error. NASAA is concerned with the potential misuse of this functionality. To address this concern, NASAA would suggest the following safeguards.

- Provide instructions clarifying the narrow instances when it is appropriate to remove a DRP "filed in error."
- Regulators should be alerted to the removal of a DRP through an amendment queue or other similar functionality in IARD.

9. Rule 222-2 and counting clients for purposes of the national *de minimis*.

In the Release, the Commission explains that advisers will be required, for purposes of determining regulatory assets under management, to include the assets of clients even if

those clients do not compensate the adviser for advisory services. On the other hand, the Commission proposes a change to rule 222-2 that would instruct advisers not to count as *clients* any person to whom the adviser provides services without compensation. NASAA opposes this confusing and inconsistent approach where, in one instance, an adviser counts the assets of a client who does not compensate the adviser, but yet the very same person is not counted as a *client* for purposes of rule 222-2. In addition to this inconsistent approach, the Commission does not define "compensation" and thereby creates a potential gap whereby advisers may evade registration. NASAA would urge the Commission to clarify that advisers must count all clients for purposes of rule 222-2, including those who do not compensate the adviser for its services.

10. Other business activities and financial industry affiliations.

NASAA generally supports the Commission's proposed changes to Form ADV. In addition to the proposed changes, NASAA suggests that the Commission add the following directive to proposed Item 6C: "*If 'yes,' identify on Section 6.C of Schedule D the products or services other than investment advice that you sell to your advisory clients." This would necessitate a new Section 6.C. on Schedule D to accommodate descriptive text. NASAA believes this follow-up directive will aid regulators in ascertaining which other financial services the registrants conduct, thereby allowing examiners to more easily identify potential conflicts of interest.*

Additionally, NASAA supports the Commission's proposed Item 6 A of Schedule D as drafted, but urges the Commission to consider adding the following items to the list of business a registrant could be engaged in: "Bill payment services"; "Check writing services"; "Check cashing services"; "Personal budgeting services"; and "Issuer of securities."

Moreover, in addition to listing other activities, disclosing the percentage of time spent on other business activity would help examiners understand how much emphasis the adviser puts on activities that result in conflict and how that activity might influence its advisory activities. Accordingly, NASAA suggests that the Commission consider adding functionality such as a radio button, text box, or chart similar to the one utilized in Item 5D to Item 6A of Schedule D to require the registrant to provide such information.

Comments Applicable to Release No.IA-3111; File No.S7-37-10.

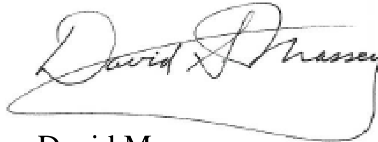
11. Grandfathering.

NASAA is concerned with the broad nature of the "grandfathering provision" in that part of the release dealing with venture capital funds. In short, the grandfathering provision would cover any private fund that 1) represented to investors at the time the fund offered securities that it is a venture capital fund; 2) has sold securities to one or more investors prior to December 31, 2010; and 3) does not sell any securities to, including accepting any additional capital commitments from, any person after July 21, 2011. Therefore, any fund that called itself a "venture capital fund" and sold securities before December 31, 2010, but not after July 21, 2011, would fall under the rule. In short, a private investment vehicle need only to have offered investments during the relevant time period and called

itself a "venture capital fund" to qualify for the relief. This approach seems overly expansive and we urge the Commission to consider imposing additional substantive requirements similar to those that will be in place after adoption of the definition of venture capital fund.

Should you have any questions regarding the comments expressed herein, please feel free to contact Linda Cena, Chair, NASAA Investment Adviser Section; or Joseph Brady, NASAA Deputy General Counsel. Ms. Cena's e-mail address is cenal@michigan.gov and Mr. Brady's e-mail address is jb@nasaa.org.

Sincerely,



David Massey
North Carolina Deputy Securities Administrator
and NASAA President