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MEMORANDUM

TO: Clients of Tannenbaum Helpern Syracuse & Hirschtritt LLP

FROM: Tannenbaum Helpern Syracuse & Hirschtritt LLP

DATE: December 3, 2002

RE: Changes to the New York Investment Advisory Act - Your Potential Obligations¹

Amendments to the New York Investment Advisory Act (the "Act"²) were signed into law by Governor George F. Pataki on September 17, 2002.³ **The revised version of the Act goes into effect on January 1, 2003.** The revised Act affects investment advisers⁴ operating in New York and investment advisers registered with the Securities and Exchange Commission (the "SEC") that have New York clients. Under the revised Act, an investment adviser may be required to register or file notice with New York State. Furthermore, individuals who are acting as investment advisers or who represent an investment adviser or who solicit business for an investment adviser may be required to take certain examinations. To determine whether you are required to comply with the provisions under the Act, please consult the chart in the appendix to this Memorandum.

The main changes to the Act are the following:

¹ This Memorandum provides general information on the subject matter described, and it should not be relied on for legal advice on any matter, which may turn on specific facts. You should seek specific legal advice before acting with regard to the subjects treated here.

² Note that references to specific sections in the Act refer to new and/or redesignated sections that go into effect on January 1, 2003.

³ See New York State bill number A07907.

⁴ The Act defines "investment adviser" to mean "any person who, for compensation, engages in the business of advising members of the public, either directly or through publications or writings within or from the State of New York, as to the value of securities or as to the advisability of investing in, purchasing, or selling or holding securities or as to the advisability of investing in, purchasing, or selling or holding securities, or who, for compensation and as part of a regular business issues or promulgates analyses or reports concerning securities of members of the public within or from the State of New York." See Section 11.12(f) of the Act.

New York State Investment Advisers

- An investment adviser operating in New York that is not registered with the Securities and Exchange Commission (the “SEC”) and has six (6) or more “New York clients”⁵

⁵ The term “client” means (1) a natural person, and: (1) any minor child of the natural person; (ii) any relative, spouse, or relative of the spouse of the natural persons who has the same principal residence; (iii) all accounts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries; and (iv) all trusts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries; and (2)(i) a corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in paragraph (a)(1)(iv) of this section), or other legal organization (any of which are referred to hereinafter as a “legal organization”) that receives investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members or beneficiaries (any of which are referred to hereinafter as an “owner”); and (ii) two (2) or more legal organizations referred to in paragraph (a)(2)(i) of this section that have identical owners.

The calculation to determine the number of clients does **not** include “financial institutions” and “institutional buyers.” See Section 11.13(5) of the Act. The term “financial institution” means (i) a bank as defined under General Business Law Section 359-e; or (ii) a credit union, or similar institution that is organized or chartered under the laws of a State or of the United States, authorized to receive deposits, and unsupervised and examined by an official or agency of a State of the United States if its deposits or share accounts are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law but does not include an insurance company or other organization primarily engaged in the business of insurance, a Morris Plan bank, or an industrial loan company. See Section 11.12(c) of the Act. The term “institutional buyer” means (i) a depository institution or international banking institution; (ii) an insurance company; (iii) a separate account of an insurance company; (iv) an investment company as defined in the Investment Company Act of 1940, as amended; (v) a broker-dealer registered under the Securities Exchange Act of 1934, as amended (the “Exchange Act”); (vi) an employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of \$10,000,000 or its investment decisions are made by a named fiduciary as defined in the Employee Retirement Income Security Act of 1974 (“ERISA”), that is a registered broker-dealer, an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, as amended (the “Advisers Act”), an investment adviser registered under the Act, a depository institution, or an insurance company; (vii) a plan established and maintained by a State, political subdivision of a State, or an agency or instrumentality of a State or political subdivisions of a State for the benefit of its employees, if the plan has total assets in excess of \$10,000,000 or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in ERISA, that is a broker-dealer registered under the Exchange Act, an investment adviser registered or exempt from registration under the Advisers Act, an investment adviser registered under this Act, a depository institution, or an insurance company; (viii) a trust, if it has total assets in excess of \$10,000,000, its trustee is a depository institution, and its participants are exclusively plans of the types identified in (vi) or (vii), regardless of size of assets, except a trust that includes as participants self-directed individual retirement accounts or similar self-directed plans; (ix) an organization described in Section 501(c)(3) of the Internal Revenue Code, a corporation, Massachusetts or similar business trust, limited liability or partnership, not formed for the specific purposes of acquiring the securities offered, with total assets in excess of \$10,000,000; (x) a small business investment company licensed by the Small Business Administration under Section 301(c) of the Small Business Investment Act of 1958 with total assets in excess of \$10,000,000; (xi) a private business development company as defined in Section 202(a)(22) of the Advisers Act with total assets in excess of \$10,000,000; (xii) an investment adviser registered with the SEC acting for its own account; (xiii) a “qualified institutional buyer” as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(H), adopted under the Securities Act of 1933, as amended; and (xiv) a “major United States institutional investor” as defined in Rule 15a-6(b)(4)(I) adopted under the Exchange Act. See Section 11.12(e) of the Act.

must register with the Investment Protection Bureau of the Department of Law of New York State (formerly the Securities Bureau of the Department of Law).⁶

- Registration as well as amendments, annual renewal registration, reports, notices and related filings with the Investment Protection Bureau must be filed electronically through the Investment Adviser Registration Depository (the “IARD”).⁷

- Part II of Form ADV⁸ is to be filed directly in paper form with the Investment Protection Bureau.⁹

- If you are required to file an initial registration, you must submit a balance sheet and an income statement as of the close of the last fiscal or calendar year as prepared by your accountant or by management.¹⁰

- If you are required to file an initial registration, the deadline is January 31, 2003.**¹¹

- The fees for initial and annual renewal registration are \$200 and are filed directly with the Investment Protection Bureau.¹²

- Amendments to the Form ADV must be filed within thirty (30) days of the event that required the filing of the amendment.¹³

- Within ninety (90) days after the end of the investment adviser’s fiscal year, an investment adviser must file with IARD, an updated Form ADV.¹⁴

Federal Covered Advisers

- Any investment adviser registered with the SEC (defined as a “federal covered adviser” under the Act) that has six (6) or more New York clients¹⁵ must file notice with New York State. The filing of notice is satisfied when the fee required and Part I of the Form ADV are filed with and accepted by IARD.¹⁶

⁶ See Section 11.4(c) of the Act. Previously, an investment adviser operating in New York was exempt from registration with New York State if the investment adviser has forty (40) or less New York clients. As such, only if the investment adviser has forty-one (41) or more New York clients was registration required. Further note that voluntarily filing notice with New York State if an investment adviser operating in New York has between sixteen (16) and forty (40) New York clients has been eliminated.

⁷ See Sections 11.2(a) and 11.4(a) of the Act.

⁸ The term “Form ADV” refers to the Uniform Application for Investment Adviser Registration.

⁹ See Section 11.4(a)(1) of the Act.

¹⁰ See Section 11.14(b) of the Act.

¹¹ See Section 11.16 of the Act.

¹² See Section 11.8 of the Act.

¹³ See Section 11.4(f)(2) of the Act.

¹⁴ See Section 11.4(f)(3) of the Act.

¹⁵ See *supra* note 5 regarding the calculation of New York clients.

¹⁶ See Section 11.5(a) of the Act. The new obligation to require federally registered investment advisers with six or more New York clients to file notice with New York State puts New York’s Investment

- Part II of Form ADV of the federal covered adviser must be filed directly in paper form with the Investment Protection Bureau.¹⁷

- If you are required to **file notice, the deadline is January 31, 2003.**¹⁸

Investment Advisers Relying on Section 203(b)(3) of the Advisers Act

- An investment adviser operating in New York that is exempt from registration with the SEC because it is relying on Section 203(b)(3) of the Advisers Act is neither required to register nor to file notice with the Investment Protection Bureau.¹⁹

Obligations Imposed on Individuals of New York State Registered Investment Advisers

- Individuals who are required to register as an investment adviser with the Investment Protection Bureau or who represent a New York State registered investment adviser or who solicit business for a New York State registered investment adviser must take the following tests and receive a passing grade within two (2) years:

- The Uniform Investment Adviser Law Examination (Series 65 examination); *or*

- The General Securities Representative Examination (Series 7 examination) **and** the Uniform Combined State Law Examination (Series 66 examination).²⁰

- An individual required to take the Series 65 examination or the Series 7 and the Series 66 examinations must do so beginning June 30, 2003.²¹

- Waivers from the examinations are available depending on whether an individual is previously registered²² or holds certain professional designations.²³ All requests for waivers must be made on Form NY-IAQ (New York Investment Adviser Qualification).

Advisory Act in line with the changes made pursuant to the Investment Advisers Supervision Coordination Act (implementing amendments under the National Securities Markets Improvement Act of 1996) which amended the Advisers Act and “makes state investment adviser statutes inapplicable to advisers that do not have a place of business in the state and have fewer than six clients who are residents of that state (the “national de minimis standard”).” See Release No. IA-1633 (May 15, 1997) (“Release No. IA-1633”).

¹⁷ See Section 11.5(a)(1) of the Act.

¹⁸ See Section 11.16 of the Act.

¹⁹ Under Section 203(b)(3) of the Advisers Act, an investment adviser that is otherwise required to register as an investment adviser with the SEC is exempt from registration if during the preceding 12 months the investment adviser has had fewer than 15 clients and 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 Advisers Act or a business development company.

²⁰ See Section 11.6 of the Act.

²¹ See Section 11.16 of the Act.

²² A request for a waiver from the Series 65 examination or the Series 7 and 66 examinations may be made by (i) an individual or a business engaged in advising members of the public as defined in Section 11.12(e)

Other Obligations

- The revised Act imposes recordkeeping requirements on New York State registered investment advisers similar to the recordkeeping requirements in Rule 204-2 of the Advisers Act.²⁴
- Financial statements of New York State registered investment advisers must be prepared in accordance with generally accepted accounting principals and include reserves or liabilities for unfulfilled subscriptions. If such financial statements are unaudited by an independent, a certification by management is required attesting the accuracy of such statements.²⁵
- Annually, a New York State registered investment adviser must submit directly to the Investment Protection Bureau a balance sheet and an income statement as of the close of its last fiscal or calendar year within ninety (90) days after completion of its fiscal or calendar year end.²⁶
- The revised Act requires New York State registered investment advisers and federal covered advisers that have filed notice with the Investment Protection Bureau to distribute on an annual basis a statement indicating that New York State clients may obtain a copy of the investment adviser's Form ADV.²⁷ Form ADV must be furnished to clients who request it in writing within seven (7) days of the receipt of the request.²⁸
- Finally, note that both New York State and the SEC retain anti-fraud authority with respect to *all* investment advisers operating in New York.²⁹

of the Act that has been *continuously registered in New York for a period of five years* without any regulatory action or arbitration; or (ii) an individual who represents an investment adviser in doing any of the acts which make that person an investment adviser, or solicits business for an investment adviser who has been *continuously registered in any jurisdiction for a period of two years* without any regulatory action or arbitration. See Sections 11.7(a) and (b) of the Act (emphasis added).

²³ A request for a waiver from the Series 65 examination or the Series 7 and 66 examinations may be made by any individual who currently holds one of the following professional designations in good standing: (i) Certified Financial Planner awarded by the Certified Financial Planner Board of Standards, Inc.; (ii) Chartered Financial Consultant awarded by the American College, Bryn Mawr, Pennsylvania; (iii) Personal Financial Specialist awarded by the American Institute of Certified Public Accountants; (iv) Chartered Financial Analyst awarded by the Association for Investment Management Research; or (v) Chartered Investment Counselor awarded by the Investment Counsel Association of America, Inc. See Section 11.7(c) of the Act.

²⁴ See Section 11.9 of the Act.

²⁵ See Section 11.14(a) of the Act.

²⁶ See Section 11.14(c) of the Act.

²⁷ See Section 11.15 of the Act.

²⁸ See Section 11.15 of the Act.

²⁹ See Release No. IA-1633, note 154. "Both the [SEC] and the states [e.g. New York] will be able to continue bringing anti-fraud actions against investment advisers *regardless* of whether the investment adviser is registered with the state [e.g. New York] or the SEC." See Release No. IA-1633, note 154 (emphasis added).

If you have questions or comments regarding the amended New York Investment Advisory Act or need assistance in filing the required forms, please feel free to contact:

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APPENDIX

Status	Obligation
Investment adviser managing under \$30 million of assets and having six (6) or more New York clients. ^Ψ	Register with New York State. Certain individuals must take the Series 65 exam <i>or</i> the Series 7 and 66 exams.●●
Investment adviser managing under \$30 million of assets and having five (5) or less New York clients. ^Ψ	No registration with New York State. No filing of notice with New York State.
Federal covered adviser [†] having six (6) or more New York clients.	File notice with New York State.
Federal covered adviser [†] having five (5) or less New York clients.	No filing of notice with New York State.
Investment adviser relying on exemption pursuant to Section 203(b)(3) of the Investment Advisers Act of 1940.##	No registration with New York State. No filing of notice with New York State.

^Ψ In the calculation to determine the number of New York clients, the term “client” means (1) a natural person, and: (1) any minor child of the natural person; (ii) any relative, spouse, or relative of the spouse of the natural persons who has the same principal residence; (iii) all accounts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries; and (iv) all trusts of which the natural person and/or the persons referred to in this paragraph (a)(1) are the only primary beneficiaries; and (2)(i) a corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in paragraph (a)(1)(iv) of this section), or other legal organization (any of which are referred to hereinafter as a “legal organization”) that receives investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members or beneficiaries (any of which are referred to hereinafter as an “owner”); and (ii) two (2) or more legal organizations referred to in paragraph (a)(2)(i) of this section that have identical owners. The calculation to determine the number of clients does **not** include “financial institutions” and “institutional buyers.” See Sections 11.12(c) and (e) of the Act for the specific entities that fall under the terms “financial institutions” and “institutional buyers.” See also *supra* note 5 of this Memorandum.

●● Individuals who are required to register as an investment adviser or who represent a New York State registered investment adviser or who solicit business for a New York State registered investment adviser must take and pass the Series 65 examination *or* the Series 7 **and** Series 66 examinations.

[†] The term “federal covered adviser” refers to an investment adviser registered with the SEC.

Implies that the investment adviser has \$30 million or more assets under management and would otherwise be required to register with the SEC but during the preceding 12 months has had fewer than 15 clients and who 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 Advisers Act or a business development company.