

August 14, 2009

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 2009716179

Your letter of August 13, 2009 requests our assurance that we would not recommend enforcement action to the Securities and Exchange Commission (the "Commission") under Rules 204-2(a)(7), 204-2(b)(3) and 204-2(g) under the Investment Advisers Act of 1940 (the "Advisers Act") against an investment adviser registered under the Advisers Act ("Adviser") that subscribes to a Recordkeeping Service (as defined below) provided by Omgeo LLC ("Omgeo") if trade confirmations are made and kept in the manner described in your letter.

Facts

You state the following: Omgeo's TradeSuite service electronically transmits trade confirmations ("TradeSuite confirmations") to Advisers on behalf of broker-dealers registered under the Securities Exchange Act of 1934 that effect transactions for advisory clients of such Advisers. Omgeo proposes to offer a new recordkeeping service to Advisers (the "Recordkeeping Service") under which each Adviser would rely on Omgeo to make and keep, on behalf of that Adviser, copies of the TradeSuite confirmations supplied to that Adviser. Currently, an Adviser that receives electronically transmitted trade confirmations must download or print a copy of each TradeSuite confirmation it receives in order to comply with Rule 204-2(a)(7) or 204-2(b)(3) under the Advisers Act, as applicable, and must store it consistent with the requirements for electronic storage specified in Rule 204-2(g) and for the retention times specified in Rule 204-2(e) under the Advisers Act.¹

Under Omgeo's proposal, an Adviser subscribing to the Recordkeeping Service ("Adviser Participant") would continue to receive TradeSuite confirmations as they do now, but would not be required to download or print copies of those confirmations to comply with Rules 204-2(a)(7) and 204-2(b)(3) under the Advisers Act, and could rely on Omgeo to assist it with compliance with Rule 204-2(g) under the Advisers Act. You represent that Omgeo, in accordance with the provisions of Rule 204-2(g) under the Advisers Act,² would retain an electronic copy of the TradeSuite confirmation that Omgeo sends to each Adviser Participant for not less than five years from the end of the fiscal year during which the last entry was made on the confirmation, and would make that copy available to the Adviser Participant through computers located in the Adviser Participant's office. You represent that in the event that an Adviser is no longer an Adviser Participant, Omgeo will provide the former Adviser Participant with requested documents within 24 hours of the time of the request. In addition, you represent that if Omgeo ceases operations, it will make arrangements reasonably acceptable to the Commission or its staff to ensure the continued availability of documents for regulatory purposes during the remainder of the applicable recordkeeping period.

Analysis

Rule 204-2(a)(7) under the Advisers Act requires an investment adviser to make and keep originals of all written communications received relating to the placing or execution of any order to purchase or sell any security. Such written communications include trade confirmations. This requirement applies both to advisers who maintain custody of their clients' assets and those who do not. Rule 204-2(b)(3) under the Advisers Act requires an investment adviser that maintains custody of any of its client's assets to make and keep copies of confirmations of all transactions effected by or for the account of any such client.

Rule 204-2(g) under the Advisers Act, in relevant part, permits an investment adviser to maintain and preserve records electronically, provided that: (1) the records are arranged and indexed in a way that permits easy location, access, and retrieval of any particular record; (2) legible, true, and complete copies of the record in the medium and format in which it is stored, printouts of the records and the means to access, view and print the records can be, and are, made available to Commission examiners promptly upon request; (3) a duplicate of the computer storage medium is stored separately from the original; and (4) procedures are implemented for the maintenance and preservation of, and access to, records so as to reasonably safeguard the records from loss, alteration or destruction.

We have previously taken no-action positions under Rules 204-2(a)(7) and 204-2(b)(3) with respect to the maintenance of records available to subscribers through an electronic document delivery system.³ We based our positions, in part, on the existence of certain safeguards designed to protect the records from loss, alteration, or destruction and to ensure that they would be accessible to the Commission staff.⁴ You believe that the following representations, which are similar to those made in the prior letters, similarly satisfy the concerns underlying the Rule. Specifically, you represent that:

1. Omgeo will store at least two electronic copies of all confirmations sent to Adviser Participants for not less than five years from the end of the fiscal year during which the last entry was made on the confirmation. At least one copy of each document will be stored in a secure facility separate from the facility used to store the other copies;
2. During the retention periods specified in the Advisers Act recordkeeping rules, Adviser Participants will be able, at any time, to access confirmations sent through TradeSuite through computers located at the Adviser Participant's office.⁵ Former Adviser Participants may request from Omgeo in writing copies of any TradeSuite confirmation for not less than five years from the end of the fiscal year during which the last entry was made on the TradeSuite confirmation.⁶ In the event that an Adviser Participant ceases operations without making adequate provision for its continued compliance with its recordkeeping obligations in accordance with Rule 204-2(f) under the Advisers Act, Omgeo will provide the Commission within 24 hours of the time of the request, without charge to the Commission, an electronic copy of any record that the Adviser Participant received through TradeSuite for not less than five years after the end of the fiscal year during which the last entry was made on the confirmation;⁷
3. In the event that Omgeo ceases operations, it will make arrangements reasonably acceptable to the Commission or its staff to ensure the continued availability of documents for regulatory purposes during the remainder of the applicable recordkeeping period; and
4. Omgeo's internal systems for making and keeping confirmations on behalf of Adviser Participants meet all of the requirements of Rule 204-2(g) under the Advisers Act.

Accordingly, based on the facts and representations in your letter, we would not recommend enforcement action to the Commission under Rules 204-2(a)(7), 204-2(b)(3) and 204-2(g) under the Advisers Act against an Adviser Participant if Omgeo makes and keeps TradeSuite confirmations on behalf of an Adviser Participant in the manner described in your letter.⁸ Because our position is based on the facts and representations made in your letter, you should note that any different facts or circumstances might require a different conclusion. This letter represents only the Division's position on enforcement action and does not purport to express any legal conclusion on the questions presented.

Endnotes

¹ We have previously agreed not to recommend enforcement action to the Commission under Rule 204-2(a)(7) under the Advisers Act if Advisers treat TradeSuite confirmations as an original communication for purposes of that Rule, and under Rule 204-2(b)(3) under the Advisers Act if Advisers use TradeSuite confirmations to satisfy the requirements under that Rule to make and keep copies of confirmations of all transactions effected by or for the account of a client. See letters to The Depository Trust Company, SEC Staff No-Action Letters (Sept. 4, 1992) and (Apr. 17, 2001).

² You represent that Omgeo's internal systems for maintaining and preserving confirmations on behalf of Adviser Participants meet all of the requirements of Rule 204-2(g) under the Advisers Act.

³ See First Call Corporation, SEC Staff No-Action Letter (Sept. 6, 1995) ("First Call") and Disclosure Incorporated, SEC Staff No-Action Letter (Aug. 22, 1996). We have stated that an investment adviser may delegate certain record creation and retention responsibilities to a third party, but the adviser cannot, by doing so, avoid liability for violating the Advisers Act or the rules thereunder if the third party fails to carry out those responsibilities. See First Call and National Regulatory Services, SEC Staff No-Action Letter (Dec. 2, 1992).

⁴ In addition, the amendments to Rule 204-2 under the Advisers Act and Rule 31a-2 under the Investment Company Act of 1940 expanded the circumstances under which advisers and funds may keep records on electronically stored media, provided that they established and maintained procedures: (i) to safeguard the records from loss, alteration, or destruction; (ii) to limit access to the records to authorized personnel, the Commission, and (in the case of funds) fund directors; and (iii) to ensure that electronic copies of non-electronic originals are complete, true, and legible. See Final Rule: Electronic Recordkeeping by Investment Companies and Investment Advisers, Investment Company Act Rel. No. 24991 (May 24, 2001).

⁵ Rule 204-2(e)(1) under the Advisers Act requires that books and records specified under the rule (except for books and records required to be made under the provisions of paragraphs (a)(11) (relating to, among other things, advertisements), (a)(12)(i), (a)(12)(iii), (a)(13)(ii), (a)(13)(iii) (collectively relating to code of ethics' requirements), (a)(16) (relating to, among other things, the adviser's ability to demonstrate the calculation of its advertised performance or rate of return of its managed accounts or securities recommendations), and (a)(17)(i) (relating to the adviser's compliance policies and procedures) be maintained in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry on the book or record was made, the first two years in an appropriate office of the investment adviser. See also First Call, supra note 3 ("We believe that if an adviser has essentially immediate access to a record (on the adviser's proprietary system or otherwise) through a computer located at an appropriate office of the adviser, then that record is being maintained 'at an appropriate office of the adviser' as required by Rule 204-2(e)(1)").

In addition, Adviser Participants that retain TradeSuite confirmations as part of compliance with Rule 204-2(a)(16) are reminded that they must maintain and preserve these records in accordance with Rule 204-2(e)(3) under the Advisers Act, which requires that the records

described in Rule 204-2(a)(16) be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in an appropriate office of the adviser, from the end of the fiscal year during which the adviser last published or disseminated the communication.

⁶ You represent that Omgeo will provide a former Adviser Participant with requested documents within 24 hours of the time of the request.

⁷ Rule 204-2(f) under the Advisers Act requires that any investment adviser subject to the rule, before discontinuing its investment advisory business or otherwise terminating its advisory activities, shall arrange and be responsible for the preservation of books and records required by the rule for the remainder of the period specified by the rule. Paragraph (f) also requires that the adviser notify the Commission of the address at which such books and records will be maintained. We note that even if Omgeo provides the access described in this representation, an adviser that does not make arrangements with Omgeo, or otherwise make arrangements, for the continued preservation of books and records as required by Rule 204-2(f) would violate the Advisers Act, and the Commission could institute enforcement action against that adviser. See, e.g., J. Baker Tuttle Corp., Initial Decision No. 13 (Dec. 21, 1990).

⁸ You request similar no-action relief for advisers that subscribe to Omgeo's Central Trade Manager Service in which trade confirmations are referred to as "Trade Components Information." See Omgeo LLC, SEC Staff No-Action Letter (Dec. 14, 2006). Based on the facts and representations in your letter, our position with respect to Rules 204-2(a)(7), 204-2(b)(3) and 204-2(g) will also apply to advisers that rely upon Omgeo to make and keep Trade Components Information on their behalf.