

March 12, 2001

BY U.S. MAIL AND FACSIMILE

Jonathan G. Katz, Secretary  
Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, DC 20549-0609

Re: Hearing Request

Dear Mr. Katz:

On behalf of Fund Democracy, LLC, I am writing regarding counsel's response ("Response") dated March 7 to the hearing request filed by Fund Democracy on the application ("Application") of Hillview Investment Trust II and Hillview Capital Advisors, LLC ("Applicants" or "Hillview") for an exemption from Section 15(a) of the Investment Company Act ("Act") and Rule 18f-2 under the Act.

In its hearing request and Memorandum in Support of Hearing Request ("Memorandum"), Fund Democracy presented substantial evidence – entirely un rebutted by counsel – demonstrating that the standard conditions of multimanager exemptive relief have failed to protect investors by ensuring the funds obtaining relief are *bona fide* multimanager funds. Because Applicants have proposed the same standard multimanager conditions, there is nothing to prevent the Hillview funds from operating, like dozens of other multimanager funds, in a manner that is inconsistent with the basis for multimanager relief.

Counsel entirely ignores the record of abuse presented by Fund Democracy, preferring instead to argue that Applicants' current intentions are sufficient to ensure that their funds will operate as *bona fide* multimanager funds. Counsel apparently believes that conditions of exemptive relief are never needed to ensure the protection of investors, for the Commission should always be satisfied with nothing more than bald assertions of current intent, and should simply ignore how funds relying on past exemptions have operated in fact.

As the Commission and its staff are aware, the conditions of exemptive relief are the backbone of the exemptive process under the Act and are critical to ensuring that the way that funds operate under exemptions is consistent with the basis of the exemptions, the protection of investors, and the policies and purposes of the Act. The substantial evidence that the standard conditions of multimanager exemptive relief are inadequate makes it necessary in the public interest and for the protection of investors – each an independent trigger of the hearing request requirement under SEC Rule 0-5(c) -- to hold a hearing on the Application.

Counsel's Response needs further correction in a number of other respects.

### 1. Relevance of Hearing Request

Counsel claims that the hearing request "fails to raise a single issue relevant to the Application" and that the Memorandum "is wholly irrelevant to the Application."

The hearing request and Memorandum provide substantial evidence that dozens of "multimanager" funds have operated in ways that flatly contradict the basis for multimanager relief. This is relevant to the Application because the funds that have operated contrary to the basis for multimanager relief have done so subject to conditions of relief that are virtually identical to those proposed by Applicants. These conditions have been ineffective in preventing funds from including the name of the fund's subadviser in the name of the fund, using a single subadviser for years on end, increasing the manager's fee without shareholder approval, and providing disclosure that belies the purportedly "multimanager" nature of the funds.

Applicants' proposed conditions of relief would leave the Hillview funds free to engage in these same practices, thereby undermining key shareholder protections under the Act.

Counsel argues that the mere assertion of Applicants' current intention to operate the Hillview funds as *bona fide* multimanager funds precludes the possibility that the funds will operate contrary to the basis for multimanager relief. But this argument simply begs the central questions raised by the hearing request:

- If Applicants intend not to include the name of a subadviser in the name of a Hillview fund, then why do they object to a condition of relief requiring that a subadviser's name not be included in the name of any Hillview fund?
- If Applicants intend always to provide disclosure in Hillview fund documents that is consistent with the funds' operation as *bona fide* multimanager funds, then why do they object to a condition of relief requiring such disclosure?
- If Applicants intend not to operate a single-subadviser fund in the guise of a multimanager fund, then why do they object to a condition of relief requiring that each Hillview fund retain multiple subadvisers?
- If Applicants intend not to raise the manager's fee unless the increase has been approved by a shareholder vote, then why do they object to a condition of relief requiring shareholder approval of any increase in the manager's fee?

If Applicants truly intend to operate *bona fide* multimanager funds, then they should have no objection to conditions that would prevent the abuses described in the Memorandum and against which Applicants' proposed conditions have proven wholly

ineffective. If Applicants do not intend to operate as they claim, it is their exemptive request – not the hearing request -- that should be denied.

Fund Democracy believes that the Commission should evaluate the conditions of multimanager relief on the basis of the facts -- not Applicants' current intentions. And the facts, as demonstrated in the Memorandum, are that the multimanager conditions have failed in a number of respects to ensure that "multimanager" funds operate as *bona fide* multimanager funds.

## 2. Basis of Hearing Request

Counsel asserts that arguments in the hearing request "reflect an absolute ignorance of the facts in the Application" and that Fund Democracy is "uninformed about the Application."

Actually, Fund Democracy carefully reviewed the Application, as well as the Hillview funds' registration statement, before filing the hearing request, and was fully aware of how Applicants claimed that the Hillview funds would operate. The Application contains none of the conditions, however, that are necessary to ensure that Applicants' funds will in the future operate as they claim, *i.e.*, as *bona fide* multimanager funds.

## 3. Accuracy of Certain Statements

Counsel characterizes as "patently false" the statement in the hearing request that "Applicants propose to operate a multimanager fund that would hire subadvisers and increase Hillview Capital Advisors' fees without obtaining shareholder approval." In fact, this statement is based on representations contained in the Application.

On pages 2 to 3 of the Application, Applicants state that they "request an exemption from the provisions of Section 15(a) . . . to permit Adviser to select certain investment sub-advisers . . . to serve as portfolio managers . . . without the necessity of obtaining shareholder approval." Thus, Applicants state unambiguously that they plan to hire subadvisers without obtaining shareholder approval.

Pages 2 and 3 of the Application also state that Applicants "request an exemption from the provisions of Section 15(a) . . . to permit Adviser . . . to materially amend investment sub-advisory agreements . . . without the necessity of obtaining shareholder approval." Page 6 of the Application states that the funds "may or may not directly pay the sub-advisory fee of any Future Fund that relies on the requested order," and that, "if the Adviser paid the Sub-Advisers' fees, the Adviser would be in a position where the fee paid to different potential new Sub-Advisers *would directly affect the Adviser's fee*" (emphasis added).<sup>1</sup>

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<sup>1</sup> Notwithstanding these statements in the Application, counsel asserts in the Response that "Hillview Capital *cannot increase* its management fee by reducing the funds' subadvisory fees. The funds pay the subadvisers' fee directly. Hillview Capital Advisors' management is separate and *not impacted* by the fees

Again, the Application expressly contemplates that changes in the amount of fees paid by Hillview to subadvisers for future funds that would “directly affect [Hillview’s] fee.” Further, there is nothing (i.e., no condition of relief) to prevent the existing funds from changing their fee structure so that Hillview paid the fee directly to the subadvisers for those funds and thereby directly affected (e.g., increased) its fee without obtaining shareholder approval.

#### 4. Delay of Issuance of Order

Counsel claims that Fund Democracy’s hearing request “serves only to delay the issuance of the order.” In fact, all of the issues raised by the hearing request could be resolved immediately by Applicants’ agreement to conditions of relief – consistent with their claimed intentions – that would ensure that their funds operated in fact as *bona fide* multimanager funds.

Indeed, hearing requests filed by Fund Democracy and the Consumer Federation of America on an application last year were resolved in less than a week when the applicants agreed to conditions that resolved the issues raised in the requests and the requests were withdrawn.<sup>2</sup>

Counsel’s claim also is suspect in view of counsel’s own role in the ten-month delay between the initial filing and the issuance of the notice. The Application was filed on April 14, 2000, but the notice of the Application was not issued until February 6, 2001, apparently as a result of deficiencies in the Application. An SEC staff letter to counsel regarding Applicants’ initial filing, obtained through a Freedom of Information

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paid to the subadvisers” (emphasis added). One might argue that these statements are “patently false,” but it suffices for this purpose to note their apparent inconsistency with the Application.

<sup>2</sup> See Fund Democracy Hearing Request on Application by Barclays Global Fund Advisers, et al. (May 4, 2000) (<http://www.funddemocracy.com/Hearing%20Request.pdf>); Consumer Federation of America Hearing Request on Application by Barclays Global Fund Advisers, et al. (May 4, 2000) (<http://www.funddemocracy.com/CFA%20Request.pdf>); In the Matter of Barclays Global Fund Advisers, et al., Investment Company Act Release No. 24394 (Apr. 17, 2000) (notice setting May 5 as deadline for hearing requests); In the Matter of Barclays Global Fund Advisers, et al., Investment Company Act Release No. 24452 (May 12, 2000) (order issued only six days after earliest date on which Commission could have granted relief)

In contrast, the most recent hearing request that was denied by the Commission delayed the issuance of the order by six weeks, and this delay would be been extended further had the requestor appealed the Commission’s decision. In the Matter of Vanguard Index Funds, Investment Company Act Release No. 24680 (Oct. 6, 2000)(notice setting Oct. 31 as deadline for hearing requests); In the Matter of Vanguard Index Funds, Investment Company Act Release No. 24789(Dec. 12, 2000)(order issued 42 days after earliest date on which Commission could have granted exemption). See generally Mercer Bullard, SEC Rejects S&P Move to Stall Vanguard’s Vipers, *TheStreet.com* (Dec. 14, 2000) (<http://www.thestreet.com/funds/mercerbullard/1213470.html>); Mercer Bullard, S&P Asks SEC to Block New Vanguard Viper Fund, *TheStreet.com* (Nov. 1, 2000) (<http://www.thestreet.com/funds/funds/1152940.html>).

Act request, provided 34 comments identifying errors, omissions and misstatements in the Application – an unusually high number considering that the preparation of multimanager applications has long been considered routine.<sup>3</sup>

After receiving these comments, counsel took 34 days to amend the Application on November 15, 2001. Even then, more SEC staff comments were needed, to which counsel was unable to file a response until February 21, 2001, fifteen days after the notice was issued.

For counsel to blame delay on Fund Democracy's hearing request, which could be resolved in one day, after counsel's apparent repeated failure to submit a well-drafted application has already delayed the issuance of the order by ten months, is plain hypocrisy.

## 5. Public Interest Agenda

Counsel claims that the Commission's consideration of Fund Democracy's hearing request will result in Applicants being "held hostage to FD's agenda." Counsel presumably means by this that the hearing request merely reflects some personal purpose that is unrelated to the public interest, although counsel provides no facts to support its claim.

As noted in the hearing request, Fund Democracy was created to serve as an advocate and information resource for mutual fund shareholders, and its activities, as briefly described in the hearing request, demonstrate an unswerving commitment to that purpose.<sup>4</sup> Neither Fund Democracy nor any person affiliated with Fund Democracy has any direct or indirect financial interest in the outcome of the hearing request. As discussed above, the hearing request and the Memorandum provide substantial evidence that the public interest is not being served by the conditions heretofore require for multimanager exemptions.

Further, counsel conveniently ignores the fact that Institutional Shareholder Services ("ISS") also has asked the Commission to hold a hearing on the Application.<sup>5</sup>

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<sup>3</sup> Letter from Jean E. Minarick, Senior Counsel, SEC to Allison W. Harrison, Kirkpatrick & Lockhart LLP (Oct. 13, 2000). In contrast, a multimanager application submitted by a different lawyer at counsel's firm recently obtained an order after receiving only 9 written comments from SEC staff and amending the application only once. Letter from Emerson S. Davis, Senior Counsel, SEC to Courtney S. Thornton, Kirkpatrick & Lockhart LLP; In the Matter of The Wachovia Funds, et al., Investment Company Act Release No. 24253 (Jan. 14, 2000) (notice stating that application was filed on August 17, 1999 and would be amended during notice period).

<sup>4</sup> Cf. In the Matter of Chase Manhattan Bank, et al., Investment Company Act Release No. 23186 (May 14, 1998)(order granting exemption and denying hearing request by the Inner City Press/Community on the Move in part because the organization's purpose of ensuring that banks provide adequate services to the poor was not "related the interests the organization seeks to protect").

<sup>5</sup> The ISS letter is available at <http://www.funddemocracy.com/ISS%20Request.pdf>.

The ISS is the world's leading provider of proxy voting and corporate governance services. Its 185-person staff serves more than 700 institutional and corporate clients worldwide. ISS analysts research and recommend votes for 20,000 shareholder meetings each year on behalf of 9,000 U.S. and 10,000 non-U.S. institutional shareholders.<sup>6</sup>

The request submitted by the ISS states:

As a proxy advisory service, Institutional Shareholder Services (ISS) believes the issues raised by Fund Democracy warrant a hearing request. In particular, ISS is concerned about the Commission's current practice of granting the exemption to fund companies that do not implement a *bona fide* multimanager advisory structure. While we are not committed to a specific outcome from the Commission if a hearing is granted, we do believe that the exemption, as it is currently structured, raises serious concerns regarding the rights of mutual fund shareholders.

Thus, it appears that "FD's agenda" is shared by the world's largest proxy advisory firm, which, like Fund Democracy has as its primary "agenda" the active representation of shareholders' interests.

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In short, counsel makes no attempt to address the substance of Fund Democracy's and the ISS's hearing requests. As stated by the ISS, the Application "raises serious concerns regarding the rights of mutual fund shareholders." Dozens of multimanager funds, which are subject to the same standard multimanager conditions proposed by Applicants, have operated in ways that directly contradict the basis for multimanager relief. More effective conditions are needed to ensure that the Hillview funds do what they say they intend to do -- operate as *bona fide* multimanager funds. Rather than address this issue, however, counsel assiduously avoids any reference to the need to strengthen the conditions of relief.

The weakness of counsel's position is further exposed by its resort to the empty slights and insinuations used so often to cloak the absence of any legal or factual analysis. Counsel's characterizations of the hearing request as "ignorant," "uninformed," "inaccurate except in its citation of Applicants' request for relief," an attempt to hold Hillview "hostage to FD's agenda," and an "attack on the past actions of the Commission and its staff" are nothing more than transparent falsehoods intended to divert the Commission's attention from the central question raised by the hearing request: Why are

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<sup>6</sup> More information about the ISS is available at <http://www.isstf.com>.

Applicants opposed to conditions of relief that would ensure that the Hillview funds operate as *bona fide* multimanager funds?

I believe that Fund Democracy's and the ISS's hearing requests raise issues that the Commission and its staff take very seriously, notwithstanding counsel's bombastic rhetoric. The historical operation of multimanager funds demonstrates that the standard conditions for multimanager relief have failed to protect shareholders' interests and need to be strengthened. Applicants' refusal to agree to conditions designed to ensure that the Hillview funds operate as *bona fide* multimanager funds suggests that Applicants' want to retain the flexibility to engage in the same abusive practices that are described in the Memorandum and that are inconsistent the basis for multimanager relief and the protection of investors.

In view of counsel's Response, it appears that resolution of the issues raised by the hearing request and Memorandum will not be possible without a hearing. Fund Democracy therefore requests that the Commission promptly order a hearing on the Application.

Sincerely,

Mercer E. Bullard  
Founder & CEO

cc: The Honorable Laura S. Unger  
The Honorable Isaac C. Hunt, Jr.  
The Honorable Paul R. Carey  
Paul F. Roye, Esq.  
David B. Smith, Esq.  
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