



The Association of the Bar of the City of New York

Committee on Futures Regulation

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BY HAND DELIVERY

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Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
Attention: Mr. Jonathan G. Katz, Secretary



Re: Release No. IA-2266 (File No. S7-30-04): Registration under the Advisers Act of Certain Hedge Fund Advisers (the "Proposal")

Ladies and Gentlemen:

The Committee on Futures Regulation (the "Committee") of the Association of the Bar of the City of New York (the "Association") is pleased to submit the following comments on the Proposal which was published in the Federal Register at *69 Fed. Reg. 45172* (July 28, 2004). If the Proposal is adopted as written, a substantial number of sponsors and advisors of hedge funds would be required to register with the Securities and Exchange Commission (the "Commission") under the Investment Advisers Act of 1940 (the "Advisers Act").

The Association is an organization of over 22,000 lawyers. Most of its members practice in the New York City area. However, the Association also has members in nearly every state and over 50 countries. The Committee consists of attorneys knowledgeable in the regulation of futures contracts and other derivative instruments often utilized by hedge funds and it has a history of publishing reports analyzing regulatory issues critical to the futures industry and related activities, including those affecting the sponsors and advisors of privately offered hedge funds. The Committee appreciates the opportunity to comment on the Proposal and stands ready to assist the Commission and its staff if further clarification is required on any of the points raised in this letter.

I. The Committee recommends that the Commission work closely with the Commodity Futures Trading Commission ("CFTC") in developing any new regulatory structure applicable to advisors of hedge funds.

The Commission should coordinate any oversight of hedge fund advisors with the CFTC.¹ The CFTC has had a regulatory interest in hedge funds for more than twenty years. Hedge funds that trade futures are commodity pools, the sponsors of which are deemed to be commodity pool operators ("CPOs") under the Commodity Exchange Act ("CEA"). Advisors that trade futures on behalf of hedge funds are commodity trading advisors ("CTAs") under the CEA. CPOs and CTAs are required to register with the CFTC unless an exclusion or exemption from registration is available. CPO and CTA registrants are also generally required to be members of the National Futures Association ("NFA"), a self-regulatory membership organization. The CFTC and the NFA have extensive experience auditing hedge fund sponsors and advisors. The Commission, the CFTC and the NFA should work cooperatively to develop audit programs that will address their respective regulatory and compliance concerns and make use of the accumulated expertise of each agency.

II. The Committee recommends that the Commission provide a carve-out from the Advisers Act registration requirement for CFTC registrants.

If the Commission adopts the Proposal, advisors to hedge funds that are registered with the CFTC as CPOs or CTAs should be exempt from registration under the Advisers Act. Federal financial regulators already have information with respect to anyone registered with the CFTC. The CFTC can share with the Commission information about its registrants, thereby allowing advisors to hedge funds that trade both futures and securities to avoid being subject to duplicative and potentially conflicting regulation. Two federal agencies working together and sharing information is a simpler and less costly solution for advisors to such hedge funds. Providing a carve-out from Advisers Act registration for CFTC registrants would comport with the Advisers Act exclusions for otherwise regulated entities such as banks and bank holding companies and with the Commission's pending proposal to exclude thrift institutions from the Advisers Act.²

¹ In the Proposal, the Commission noted that a large percentage of hedge fund advisors are CFTC registrants but that the CFTC had recently expanded its exemptions from registration. Our proposal would not exempt from Advisers Act registration CTAs and CPOs that opt for exemption from CFTC registration. Only those advisors registered with the CFTC and therefore subject to CFTC rules and audits would be exempted from registration with the Commission.

² Commission Release Nos. 34-49639, IA-2232; File No. S7-20-04, April 30, 2004.

III. Other Suggestions

In response to some of the other questions raised by Commissioners Atkins and Glassman in their dissent to the Proposal, we suggest that a more tailored approach to addressing the regulatory concerns raised in the Proposal might be developed by, among other things:

- (i) prohibiting nonaccredited investors from investing in hedge funds (perhaps excluding family members, employees, etc. from that restriction);
- (ii) reevaluating the levels of investor income, net worth or assets required to invest in a hedge fund; and
- (iii) requiring advisors that are sponsors of hedge funds to file a Form D (or a similar notice filing) with the Commission to identify the hedge fund as such and include any other information the Commission deems relevant.

The above are brief suggestions, the scope of which would need to be further developed prior to being implemented.

IV. Transition Period

Should the Commission adopt the registration requirement, a transition period of at least twelve months should be provided so that advisors that are required to register have sufficient time to ensure that their compliance programs are in place.

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The Committee stands ready to assist the Commission with further information or other assistance regarding this important matter.

Very truly yours,

Rita M. Molesworth /s.e.s.

Rita M. Molesworth

Association of the Bar of the City of New York
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* Member of Subcommittee that drafted this letter of comments.

** Chair of Subcommittee that drafted this letter of comments.

Adjunct Members

Joyce M. Hansen
Cindy Ma
Stephen J. Obie
Michael Piracci
Lore SteinhauserΦ

Φ Ms. Steinhauser abstained from participating in this letter of comments.