



MANAGED FUNDS ASSOCIATION

VIA ELECTRONIC MAIL: rule-comments@sec.gov

October 12, 2004

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Registration Under the Advisers Act of Certain
Hedge Fund Advisers — File No. S7-30-04

Dear Mr. Katz:

Managed Funds Association (“MFA”) is submitting this letter as a supplement to its letter to the Securities and Exchange Commission (the “SEC”) on September 15, 2004 (the “MFA Comment Letter”) relating to the proposed rule and rule amendments to require registration of certain hedge fund advisers under the Investment Advisers Act of 1940.¹ Since submitting the MFA Comment Letter, it has come to our attention that Chairman Donaldson responded to a request made by Senator Corzine to describe the SEC’s authority to engage in the rulemaking contemplated by the Release.² To the extent that the SEC may rely on the analysis in the SEC Memorandum for its authority to adopt a final rule and rule amendments, MFA writes this letter to address the serious flaws in that analysis.

Discussion

The SEC Memorandum does not provide statutory authority, either explicit or implicit, for the rulemaking it now proposes. In presenting the background for

¹ Proposed Rule: Registration Under the Advisers Act of Certain Hedge Fund Advisers, Rel. No. IA-2266, 69 Fed. Reg. 45172 (July 28, 2004) (the “Release”).

² Letter from William H Donaldson, Chairman of the SEC, dated June 29, 2004, including memorandum from the General Counsel of the SEC attached thereto, in response to the request of Senator Jon S. Corzine at *Review of Current Investigations and Regulatory Actions Regarding the Mutual Fund Industry*, Hearing Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, 108th Congress, April 8, 2004 (the “SEC Memorandum”).

the private adviser exemption from registration under the Investment Advisers Act of 1940 (the “Advisers Act”), the SEC Memorandum makes a note of the safe harbor adopted in 1985, which allows an adviser to count a corporation, general partnership, limited partnership, or other legal organization as a single client. In doing so, the SEC Memorandum omits a discussion of the rest of the history of the Advisers Act, thereby failing to fully describe the long-standing recognition by Congress and the SEC, dating back to the enactment of the Advisers Act in 1940, that any hedge fund or other legal organization, rather than the individual clients of the hedge fund or organization, is treated as the client of the adviser.³ In addition, the SEC fails to note the basis for adopting the safe harbor in 1985. In the proposing release relating to the safe harbor, the SEC stated that “where an adviser to an investment pool manages the assets of the pool [on] the basis of the investment objectives of participants as a group, it appears appropriate to view the pool -- rather than each participant -- as a client of the adviser.”⁴ In failing to discuss the history, including the basis for the interpretation of the term client in the safe harbor, the SEC Memorandum turns it back on the long standing interpretation of the term client under the Advisers Act, an interpretation which is directly contrary to the position the SEC now advances.

MFA contends that the SEC Memorandum’s reliance on *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*⁵ to provide it the authority to adopt rules to fill any gap left, implicitly or explicitly by Congress, misreads *Chevron*. *Chevron* clearly states that the first step in evaluating an agency’s interpretation of a statute is “whether Congress has directly spoken to the precise question at issue.”⁶ As described in the MFA Comment Letter, as well as in detail in the Wilmer Comment Letter, Congress has made clear since adoption of the Advisers Act that a hedge fund counts as a single client for the purposes of the private adviser exemption. As the Supreme Court stated in *Chevron*, “if the intent of Congress is clear, that is the end of the matter.”⁷

³ See Letter of Wilmer Cutler Pickering Hale and Dorr LLP, dated September 8, 2004 (the “Wilmer Comment Letter”). The MFA concurs with the description in the Wilmer Comment Letter of the consistent treatment of the term “client” as the entity to which advice is being given, not the passive investors in the entity who are not being advised individually.

⁴ Proposing Release: Definition of “Client” of an Investment Adviser for Certain Purposes Relating to Limited Partnerships, Rel. No. IA-956, 50 Fed. Reg. 8740 (March 5, 1985).

⁵ 467 U.S. 837, 843 (1984).

⁶ Id. at 842.

⁷ Id.

Jonathan G. Katz, Secretary
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Page 3 of 3

The SEC Memorandum also notes that the SEC can be expected to review the question of its authority at the time of final adoption of any rule relating to the regulation of hedge fund advisers. MFA believes that when the SEC undertakes to review the question of its authority, as it has committed to Senator Corzine, the SEC will conclude after examining the entire rulemaking record and applicable legal authority, as MFA has, that it is without authority to engage in the rulemaking contemplated by the Release.

* * *

We appreciate this opportunity to supplement the MFA's Comment Letter and we would be happy to discuss any questions the SEC or its staff may have with respect to this letter. Please feel free to reach me at 202.367.1140.

Very truly yours,

/s/ John G. Gaine

John G. Gaine
President

cc: Chairman William H. Donaldson
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