

Mr Jonathan G. KATZ
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609
United States of America

15 September 2004

Our/ref. 04-1153
Your/ref: **S7-30-04**
In advance by e-mail: rule-comments@sec.gov

Dear Mr Katz,

It is with pleasure that I submit to your attention the European investment management industry's response to your proposed rule regarding possible registration under the Advisers Act of certain hedge fund advisers.

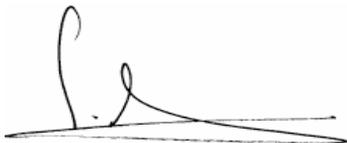
FEFSI regularly follows legislative and regulatory developments in the United States, and we have a particular interest in the proposed initiative. We have focussed our reaction on a more general appreciation of Section C on the Proposed Rule 203(b)(3)-2 as well as on a few of the policy questions that the SEC has formulated in that same section.

As we have been in touch with the relevant services within the European Commission and the Committee of European Securities Regulators (CESR) since the publication of the SEC Staff Report on Hedge Funds, we have sent copies of the present comments to them, for information purposes.

I have also taken the liberty of forwarding a copy of our comments directly to Mr Paul Roye, SEC Director for mutual funds, with whom we regularly deal with issues concerning investment funds on either side of the Atlantic.

Should you have any further questions do not hesitate to contact us.

Sincerely yours,



Steffen Matthias
Secretary General

cc. *David Wright, Director, DG Markt*
Niall Bohan, Head of Unit G.3, DG Markt
Fabrice Demarigny, CESR Secretary General
Jarkko Syyrilä, CESR



04-4033

15 September 2004

Registration under the Advisers Act of certain Hedge Fund Advisers

FEFSI COMMENTS ON THE PROPOSED RULE BY THE SECURITIES AND EXCHANGE COMMISSION (FILE N° S7-30-04)

The European investment management industry represented by FEFSI¹ welcomes the opportunity that the Securities and Exchange Commission (SEC) accords to interested parties to comment on the proposed rule (Release N° IA-2266) whereby a requirement is proposed to oblige investment advisers to certain private investment pools, otherwise also known as hedge funds, to register with the SEC under the Investment Advisers Act.

FEFSI regularly follows legislative and regulatory developments in the United States, and we have a particular interest in the proposed initiative. We have focussed our reaction on a more general discussion of Section II.C of the proposing release for the Proposed Rule 203(b)(3)-2 as well as on a few of the policy questions that the SEC has formulated in that section of the release.

Since the publication of the Staff Report on the “Implications of the Growth of Hedge Funds” in September 2003, FEFSI has been concerned about the potential -- and, we believe, unintended -- impact on the European investment fund industry.

We are pleased to see that these types of concerns have been taken into account when drafting the proposed rule on which comments have been solicited, which seeks to limit the extraterritorial effects from the Staff Report proposals for a very significant category of investment managers, i.e. those of publicly offered funds authorised (i.e. registered) outside the United States. We understand that an exemption has been proposed to the effect that regulated, publicly offered non-US funds fall outside the definition of a ‘private fund’. Thus funds/collective investment schemes² that have the following characteristics are not considered ‘private funds’ and thus their advisers need not register with the SEC:

- i. Have their principal office and place of business outside the United States; and
- ii. are publicly offered outside the United States; and
- iii. are regulated as a public investment company elsewhere than the United States.

¹ FEFSI, the European Fund and Asset Management Association, represents the interests of the European investment management industry (collective and individual portfolio management). Through its member associations from 19 EU Member States, Liechtenstein, Norway, Switzerland and Turkey, FEFSI represents the European asset and fund management industry, which counts some 41,100 investment funds with EUR 4.7 trillion in net assets under management. For more information, please visit www.fefsi.org.

² “Collective investment scheme” is often used outside of the United States to refer to investment funds, which may or may not be deemed to be separate legal persons under local law.

For the vast majority of funds in Europe this is good news, and appropriate from a regulatory perspective since these funds are by no means “hedge funds”. However, there remains some ambiguity resulting from the fact that in the US mutual funds are organised as investment companies (i.e. a corporation or business trust, generally being a separate legal person), whereas in Europe collective investment schemes can be organised as corporate funds (e.g. Sicavs) but also as contractual funds (e.g. FCPs). FEFSI understands the SEC’s proposed exemption of public funds is intended to apply to all non-US public funds, if they meet the criteria regardless of their form of organisation. Contractual funds in Europe are organised by way of the regulation of its management company, which constitutes an indispensable part of the fund (since contractual funds do not have legal personality). It is the management company itself that is subject to regulatory scrutiny and supervision that is required for the fund to be permitted for public offering of its interests.

Both corporate and contractual collective investment schemes, as common in Europe, should be eligible for the exception from being a ‘private fund’ contained in Section (d)(3) of proposed Rule 203(b)(3)-2. However, since it is the management company that is regulated instead of the fund itself in the case of an FCP or similar funds and the terminology of the rule may raise some concerns regarding its application to FCPs, these points should be clarified in the release adopting the final version of the Rule.

On ‘public’ hedge funds

You have asked for comment whether “hedge” funds offered publicly in some countries would be exempted from your definition of “private fund” and, if so, should they be (the fourth bullet point of Section II, Subsection C.3(b)). Yes, some funds that would generally be considered “hedge” funds would be exempted from your definition of “private fund”. Where hedge funds or funds-of-hedge-funds are regulated and offered to the public in Europe the exception created under Rule 203(b)(3)-2(d)(3) should apply, since the criteria will often be met. The fact that such funds are authorised, regulated and sold to the public offshore, i.e. outside the United States remains the key consideration. As the proposing release states, offshore funds with few connections to the US other than the circumstance that they happen to have US investors is not sufficient grounds to intervene given that “US investors in such a fund would not have reasons to expect the full protection of US securities laws” in those cases where funds are regulated and offered publicly outside the United States.

Counting US Clients and Regulated Management Companies

We are less clear on the consequences of the proposed rule as applied to collective investment schemes that are not publicly offered. Section II, Subsection C.3 (a) seems to introduce a requirement to ascertain the number of US resident investors, which may trigger the necessity to register with the SEC. If managers are forced to ‘look through’ any client that is an institutional investor to determine the number of US residents among their client base, this will have made the chance of crossing the threshold, even unwittingly, highly probable for many EU-based managers.

This would lead to considerable uncertainty in the market as investment managers do not always have the details from their individual client base to conduct this extensive look-through and it

may lead to the undesired effect of forcing an EU-based and regulated manager without ever having placed its product(s) into the United States or to US resident investors. As a result, beyond private funds, we believe that advisers to non-US funds should not have to look-through institutional investors and should instead be able to rely on the common definitions of “US person” used by offshore funds (such as Regulation S).

In addition, if a management company is regulated with respect to its funds that are publicly offered, we believe it should also not have to register with the SEC due to having US residents in its private funds. As noted above, in Europe it is often the management company that is regulated. While the Proposed Rule contemplates that publicly offered funds will not be subject to the look-through, we believe this should be extended to any non-US fund of the management company, if the management company is regulated with respect to one or more other funds that are publicly offered, on the basis that this management company is already supervised by the competent authorities of an EU Member State.

Should you or your staff have any questions or require any additional information, please do not hesitate to contact Mr Steffen Matthias at the FEFSI Secretariat at the following tel. n°: +32 2 / 513 39 69.

Brussels, 15 September 2004