



The Association of the Bar of the City of New York

Committee on Futures Regulation

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BY HAND DELIVERY

October 7, 2004

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

Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the NASD Relating to the Implementation Date of Notice to Members 04-50 (Treatment of Commodity Pool Trail Commissions under Rule 2810) Release No. 34-50335; File No. SR-NASD-2004-136 (the "Release")

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 Release, which was published in the Federal Register at *69 Fed. Reg. 55855* (September 16, 2004).

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 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 operators of publicly offered funds, their advisors and brokers. The Committee appreciates the opportunity to comment on the Release and stands ready to assist the Commission and its staff if further clarification is required on any of the points raised in this letter.

The Release seeks comments on the NASD's rescission of its "policy" that has permitted, for nearly 25 years, the payment of trail commissions in publicly offered commodity pools without treating such payments as selling compensation subject to the 10% cap on underwriting compensation generally applicable to direct participation programs ("DPPs") under NASD Rule 2810. Trail commissions are compensation for ongoing commodity-related services paid to CFTC-regulated brokers who place interests in publicly offered commodity pools. The Committee submitted (i) a letter to the NASD, dated March 12, 2004 (the "March Letter"), in response to NASD's request for comments on this matter and (ii) a letter to the Commission, dated August 20, 2004 (the "August Letter," and together with the March Letter, the "Letters"), in response to the NASD's Notice of Filing and Immediate Effectiveness published on July 30, 2004. The Letters, copies of which are attached, included questions and requested clarification so that the consequences of any change in the long-standing policy could be adequately assessed. Our questions have not been adequately addressed. Therefore, we reiterate each of the points made in the Letters including our belief that the proposed "change in policy" is in reality a rule change. In the Committee's opinion, prior to its becoming effective the proposed change should be subject to the notice and comment period requirements of Section 19(b)(1) of the Securities Exchange Act of 1934 with respect to self-regulatory organization rule changes.

In response to comments received, including the August Letter, the NASD submitted a letter to the Commission on August 30, 2004. In that letter, the NASD referred to comments received from the Committee, stating in Footnote 1 that while the August Letter called for abrogation, the March Letter did not oppose the NASD's proposal on specific substantive grounds. We note that the March Letter sought clarification so that meaningful comment could be given. That letter requested that the NASD clarify the basis upon which it was proposing to change its long-standing position and the procedure it was advocating to effect that change. Having understood the NASD's position that NtM 04-50 does not amend any text of Rule 2810 or amend any published statements of the NASD, the Committee concluded and commented in its August 20 letter that the NASD was not pursuing the right process and that the change in policy was tantamount to a rule change subject to the notice and comment period requirements of Section 19(b)(1) of the Exchange Act.

We acknowledge that in response to these and other concerns expressed in the various comment letters referred to in the NASD's letter, the NASD has delayed effectiveness of the change to October 12, 2004. While this addresses the concerns of the commodity

pools in registration on July 13, 2004, the postponement of effectiveness does not address our fundamental concern that the rule change may adversely affect the market for public commodity pools. These pools are fundamentally different from other DPPs and also differ in some respects from commodity managed accounts, the primary alternative to commodity pools available to investors. Unlike such accounts, investors in commodity pools are not subject to unlimited losses. Public commodity pools are one of the few limited liability diversification tools available to retail investors. In addition, Series 3 and 31 registered representatives provide ongoing guidance to investors in commodity pools, which is not available to investors in many other DPPs.

One unintended effect of the changed policy might be that successful pools will decide not to increase the size of their offerings because the broker selling the pool would have to obtain a new "no objections" opinion from the NASD in order to register new units for sale and those new units presumably would be subject to the limitation on the payment of trail commissions. As we noted before, pools typically offer a single class of units for sale at a single net asset value per unit. The accounting complexities involved in having units within the same pool subject to different restrictions would likely make increasing the size of the offering of existing pools an undesirable alternative. Without clarification on this point, a commodity pool sponsor is not likely to go to the expense of attempting to register new units in an existing pool.

As noted in our prior letters and as the Commission knows, operators of commodity pools are subject to substantial regulation by the Commodity Futures Trading Commission under the Commodity Exchange Act. Each investor in a public commodity pool must acknowledge receipt of a disclosure document and prospectus that details, among other things, all of the fees to which the pool will be subject. Public commodity pools provide access to futures and other derivatives markets to investors who often would not have access to those markets because they would not be eligible for individually managed accounts. The change in the treatment of trail commissions in public commodity pools may, in effect, result in unnecessarily different treatment of investors in the commodity futures markets.

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.k.s.

Rita M. Molesworth

Association of the Bar of the City of New York
Committee on Futures Regulation
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Deborah A. Tuchman, Secretary

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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 Steinhauser Φ

ΦMs. Steinhauser and Ms. Dow abstained from participating in this letter of comments.

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COMMITTEE ON FUTURES REGULATION

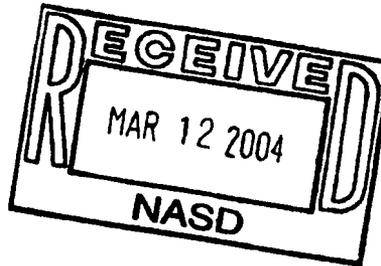
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VIA HAND DELIVERY

March 12, 2004

Ms. Barbara Z. Sweeney
NASD
Office of the Corporate Secretary
1735 K Street, NW
Washington, D.C. 20006-1500



Re: Notice to Members 04-07: Regulation of Compensation, Fees, and Expenses in Public Offerings of Real Estate Investment Trusts; Direct Participation Programs, including Commodity Pools; and Closed-End Funds

Ladies and Gentlemen:

The Committee on Futures Regulation ("Committee") of the Association of the Bar of the City of New York ("Association") is pleased to submit the following comments on the Notice to Members Concerning Regulation of Compensation, Fees, and Expenses in Public Offerings of Real Estate Investment Trusts; Direct Participation Programs, including Commodity Pools; and Closed-End Funds, as issued February, 2004 (the "Notice"). The Committee's comments are limited to Section 2 of the Notice – Commodity Pool Trail Commissions.

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 and it has a history of publishing reports analyzing regulatory issues critical to the futures industry and related activities, including counseling the sponsors and operators of publicly offered funds, their advisors and brokers. The Committee appreciates the opportunity to comment on the Notice and stands ready to assist the NASD and its staff if further clarification is required on any of the points raised in this letter.

The proposed rescission of the unpublished but traditional policy of the Corporate Financing Department (the "Department") concerning the payment of trail commissions in publicly offered commodity funds is a significant change in the Department's and the NASD's approach to the historical treatment of these payments for purposes of the

NASD's rule and interpretations. As the Notice states, the treatment of trail-commissions as commodity-related payments not subject to the 10% cap on underwriting compensation has been the Department's unpublished policy since 1982.

The administrative procedures that will apply to the proposal for rescission are not clear. In the section of the Notice captioned "Request for Comment," it appears that the contents of the Notice will universally be subject to the procedural steps stated there, namely approval by the NASD Regulation Board of Directors, possible review by the NASD Board of Governors, and approval by the Securities and Exchange Commission. However, members of the Committee have learned from staff that, because the policy in question is not a "rule", the proposed rescission might not be subject to such review and approval, and could be implemented directly by staff. The Committee believes that due to the ambiguous treatment of this point in the Notice and the long-standing nature of this policy, staff should treat the Section 2 proposals in the same manner that it treats the other portions of the Notice, and follow the full review and approval procedures outlined under "Request for Comment." We believe that the proposed change in policy is tantamount to a rule change and therefore should be subject to the same procedural requirements.

The Notice states only the proposal to rescind the policy that permits the payment of trail commissions without treating them as selling compensation subject to the 10% cap on underwriting compensation in Rule 2810. No transitional steps are outlined, and it is not clear when the rescission, if adopted, would be effective or how it would be applied to existing publicly offered commodity funds that currently are paying trail commissions without being subject to the 10% cap of Rule 2810.

The payment of trail commissions by publicly offered futures funds are contractual obligations embodied in legally enforceable agreements approved by NASD staff that provide for such payments to be made to qualified recipient firms and their representatives who hold the necessary regulatory qualifications. These agreements created ongoing payment obligations on the part of the funds or their affiliates, and corresponding rights for the recipients. The Committee believes that in order for the NASD member firms and funds potentially affected by the proposed rescission to have an opportunity to assess the consequences of any such rescissions to their respective businesses and to the investors in affected funds, transition periods to allow for compliance with any proposed change to the NASD's long-standing trail commissions policy should be the subject of additional communication to members. Questions that should be addressed in such a communication include:

1. When would the proposed rescission take effect?
2. What is the consequence for the already registered units of existing funds?

3. Would the policy only apply to units registered after the effective date of the rescission?
4. What policy would apply to units registered prior to the effective date of any policy rescission?

The Committee anticipates that the alteration of policy with respect to existing funds could impose significant costs on funds or their sponsors as changes are required in accounting systems and software, as well as in administrative procedures. Funds typically offer a single class of units for sale at a single net asset value per unit. To the extent that units sold prior to the effective date of any policy change are outstanding, dual net asset values are likely to be necessary for some funds, but the ability of funds and their sponsors to accomplish such changes are likely to be limited by the applicable limited partnership agreements and other contracts. Moreover, if limited partner approval is required in order to change material aspects of limited partnership agreements, public funds might be required to engage in a proxy solicitation, requiring filings with the Securities and Exchange Commission, commodity futures regulators and possibly the states where units are offered. Without a detailed proposal covering significant questions related to a transition policy, it is not possible for the Committee or other interested parties to address fully the possible consequences of the proposed rescission.

Although outside the Department's strict concerns with underwriting compensation, the Committee thinks it important to address the issue of the permissibility of paying trail commissions without a cap with an understanding that rescission of the policy will have uncertain consequences on the future offering of public commodity funds. It is generally acknowledged by the investment community and regulators that such funds offer retail investors the most efficient way of accessing derivatives markets for investment purposes. The benefits of investment through a public fund are typically described as access to experienced managers with proven track records at an investment level below that at which such managers will typically accept accounts; limited liability; daily valuations; monthly and in some cases weekly liquidity; and oversight by the staff of a commodity pool operator experienced in evaluating performance as well as managing risk. The alternatives -- privately offered funds and individually managed accounts -- are both subject to significantly less regulatory oversight than are publicly offered funds and are generally not available to retail investors. Moreover, a managed account, unlike an investment in a commodity pool, subjects the owner to an unlimited risk of loss. The practice of paying trail commissions developed from the practices of commodities brokerage firms that paid their associated persons commodity brokerage commissions in connection with accounts they developed. As individually managed accounts came to be seen as having several negative aspects, such as unlimited liability for the investor and high commissions, many brokerage firms closed their individually managed account programs, and provided public funds as the alternative method for accessing these markets, carrying over the practice of paying commodity brokerage to those who sold

Barbara Z. Sweeney
March 12, 2004
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commodity pools and continued to provide services to fund investors with respect to their investments in the commodity pools.

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

Very truly yours,

A handwritten signature in cursive script, appearing to read "Rita M. Molesworth".

Rita M. Molesworth

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Michael Watkins
Adam Wernow
Barbara Wierzynski
Mark Woodall
David Yeres
Edward Zabrocki

* Member of Subcommittee that drafted this letter of comments.

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

Adjunct Members

Carla Colone
Cindy Ma
Stephen J. Obie
Michael Piracci

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

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BY HAND DELIVERY

August 20, 2004

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



**Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change
Relating to the Treatment of Commodity Pool Trail Commissions
Release No. 34-50065; File No. SR-NASD-2004-108
(the "Release")**

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 Release which was published in the Federal Register at 69 FR 45870 (July 30, 2004).

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 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 operators of publicly offered funds, their advisors and brokers. The Committee appreciates the opportunity to comment on the Release and stands ready to assist the Commission and its staff if further clarification is required on any of the points raised in this letter.

The Release seeks comments on the NASD's rescission of its "policy" that permitted the payment of trail commissions in publicly offered commodity pools without treating them as selling compensation subject to the 10% cap on underwriting compensation in NASD Rule 2810. That policy has been in effect since 1982. We believe that the proposed change in policy is tantamount to a rule change. Prior to its becoming effective, therefore, the proposed change should have been subject to the notice and comment

period requirements of Section 19(b)(1) of the Securities Exchange Act of 1934 with respect to self-regulatory organization rule changes. The Committee submitted a letter to the NASD on March 12, 2004 in response to its request for comments on this matter. That letter, a copy of which is attached, included questions and requested clarification so that the consequences of any change could be adequately assessed. Without addressing several of the points raised in our letter, the NASD announced the rescission of its policy in Notice to Members 04-50 on July 13, 2004.

The change in the treatment of trail commissions was made with immediate effect when it was published by the NASD. Immediate effectiveness meant that pools did not have any opportunity to plan for and adjust to the change. The fact that no transition period was incorporated into the change in policy resulted in the disruption of at least two public commodity pool offerings that were in registration at the time Notice to Members 04-50 was published. Such offerings will either have to be revised at additional expense to comply with the new rule or be abandoned.

As the Commission knows, operators of commodity pools are subject to substantial regulation by the Commodity Futures Trading Commission under the Commodity Exchange Act. Each investor in a public commodity pool must acknowledge receipt of a prospectus that discloses, among other things, all of the fees to which the pool will be subject. As we noted in our earlier letter, public commodity pools provide access to futures and other derivatives markets to investors who often would not have access to those markets because they would not be eligible for individually managed accounts. The change in the treatment of trail commissions in public commodity pools may, in effect, result in unnecessarily different treatment of investors in the commodity futures markets.

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