ACT ICA, IAA
SECTION 3(c)(1), 3(c)(7), 203(b)(3)
RULE
PUBLIC AVAILABILITY 5/29/98

May 29, 1998
Our Ref. No. 98-123
Lamp Technologies, Inc.
File No. 132-3

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

By letter dated April 27, 1998, you request assurance that the staff would not recommend that the Commission take any enforcement action if certain information concerning privately offered investment companies ("private funds") is posted on a web site administered by Lamp Technologies, Inc. ("Lamp") that is operated as described in your May 6, 1997 letter (the "Original Letter") and the response of the Division of Investment Management dated May 29, 1997 (the "Original Response"), with the modifications described below. Specifically, you request assurance that the posting of information on the web site would not (i) involve any form of general solicitation or general advertising on behalf of a private fund within the meaning of Rule 502(c) of Regulation D under the Securities Act of 1933 ("Securities Act"); (ii) constitute a public offering of securities by a private fund within the meaning of Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940 ("Investment Company Act"); or (iii) cause any investment adviser to a private fund to be deemed to be holding itself out generally to the public within the meaning of Section 203(b)(3) of the Investment Advisers Act of 1940 ("Advisers Act").

Facts

Lamp is engaged in the business of data processing, software development, and the creation and maintenance of web sites. Lamp currently operates a web site that contains information concerning private funds, i.e., funds that are excluded from the definition of investment company under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act and that are privately offered under Regulation D under the Securities Act.[1] The operation of the web site is described in greater detail in the Original Letter.

In the Original Letter, you stated that each subscriber would pay a subscription fee. You also stated that each subscriber would be a "qualified eligible participant" as defined in Rule 4.7 under the Commodity Exchange Act ("QEP") and, as a QEP, would have an investment portfolio of at least $2 million. Further, you stated that the private

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[1] Section 3(c)(1) excepts from the definition of investment company any issuer (i) whose outstanding securities (other than short-term paper) are beneficially owned by not more than 100 persons, and (ii) that is not making and does not presently propose to make a public offering of its securities. Section 3(c)(7) excepts from the definition of investment company any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are "qualified purchasers" (as defined in Section 2(a)(51) of the Act), and which is not making and does not at that time propose to make a public offering of such securities.

funds would be structured as limited partnerships or other collective investment vehicles, and that these funds would be privately offered in compliance with Regulation D.

You now propose to eliminate the requirements that subscribers pay any set subscription fee and qualify as a QEP. You also now state that the private funds may be structured as domestic or foreign partnerships, limited liability companies, trusts or other entities.

Analysis

The Commission has indicated that the placement of private offering materials on an Internet web site, without sufficient procedures to limit access to accredited investors, would be inconsistent with the prohibition against general solicitation or advertising in rule 502(c) of Regulation D.[2] In an interpretive letter issued to IPOnet (pub. avail. July 26, 1996), the staff of the Division of Corporation Finance stated that the posting of a notice of a private offering on a web site would not be deemed a "general solicitation" or "general advertising" within the meaning of Regulation D when pre-qualification and password-protection procedures designed to limit access to the web site to accredited investors were in place. As a general matter, if an offer is public for purposes of the Securities Act, then it also would be public for purposes of Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act.[3]

In the Original Response, we stated that, based on the use of procedures designed to limit access to the information on the web site to a select group of accredited investors, we believed that the posting of private fund information on the web site would not constitute a public offering of securities by a private fund within the meaning of Section 3(c)(1) or Section 3(c)(7).[4] You argue that, in IPOnet, it was only necessary that each subscriber be an accredited investor. It was not necessary that each subscriber pay a

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[2] See Use of Electronic Media for Delivery Purposes, Securities Act Release No. 7233 (Oct. 6, 1995).

[3] See, e.g., Gerard Rizzuti (pub. avail. June 7, 1983) (staff stated that, if an offer is public for purposes of the Securities Act, it also would be public for purposes of the Investment Company Act).

[4] As noted in the Original Response, however, while access to the web site must be predicated upon satisfying the definition of an accredited investor, private funds that are structured in reliance on Section 3(c)(7) would be required to limit sales of securities to "qualified purchasers," as defined in Section 2(a)(51) of the Investment Company Act. Qualified purchasers generally must own very substantial investments. See, e.g., Section 2(a)(51)(i) (defining "qualified purchaser" to include a natural person who owns "not less than $5,000,000 in investments, as defined by the Commission").

subscription fee or be a QEP, which you state includes having a $2 million investment portfolio.[5] You therefore believe that the elimination of these requirements should not affect the staff's position in the Original Response.

We agree that the elimination of these requirements would not affect our position regarding whether the posting of information about private funds on the web site would constitute a public offering of securities by these funds within the meaning of Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act. On this basis, we would not recommend that the Commission take any enforcement action under Section 7 of the Investment Company Act if Lamp posts information concerning private funds on the web site in the manner described in the Original Letter and your letter dated April 27, 1998.

The Division of Corporation Finance has asked us to inform you that, provided that access to the web site continues to be limited exclusively to "accredited investors" within the meaning of Rule 501 of Regulation D, the Division will not object to the proposed modifications. More specifically, based on the description of such modifications set forth in your letter dated April 27, 1998, the Division sees no reason to alter its previous grant of no-action relief pursuant to the Original Response.[6]

In the Original Response, we also stated that an investment adviser that posted only information about private funds on the web site would not be "holding itself out generally to the public" as an investment adviser within the meaning of Section 203(b)(3) of the Advisers Act.[7] This position was based on Lamp's use of procedures designed to limit access to the web site information to a select group of accredited investors and its requirement that managers of the private funds agree to post only information related to these funds on the web site and not to offer other services or products on the site. You ask that we clarify that this position would not be affected if the private funds were structured as domestic or foreign partnerships, limited liability companies, trusts or other entities. We agree that our position would not be affected if the private funds were so structured.

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[5] We note that the size of a subscriber's investment portfolio may be relevant to determining whether the subscriber is an accredited investor. See, e.g., Rule 501(a)(5) (defining "accredited investor" to include a natural person whose individual net worth, or joint net worth with that person's spouse, at the time of purchase exceeds $1 million).

[6] In reaffirming the positions taken in the Original Response, the Divisions express no view regarding the applicability of the Commodity Exchange Act to the posting of information about private funds on the web site.

[7] Section 203(b)(3), in pertinent part, provides an exemption from registration for any investment adviser that during the preceding 12 months had fewer than 15 clients, and that neither holds itself out generally to the public as an investment adviser nor acts as an investment adviser to any registered investment company.

Please note that these positions are based on the facts and representations set forth in the Original Letter and your letter dated April 27, 1998. Any different facts or representations may require a different conclusion.

Martin Kimel
Senior Counsel

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April 27, 1998

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Re. Lamp Technologies, Inc.
Revised No-Action Request

Gentlemen:

On behalf of this firm's client, Lamp Technologies, L.L.C. ("Lamp"), we are writing to request that the Division of Investment Management and the Division of Corporation Finance confirm to us that they will not recommend that the Securities and Exchange Commission (the "SEC") take any enforcement action against Lamp or any participating hedge fund manager or investment adviser if certain information concerning hedge funds is posted on a World Wide Web site named HedgeScan administered by Lamp, which site will be operated in the manner described in our May 6, 1997 no-action request (the "Original Request") and the response of the Division of Investment Management dated May 29, 1997 (the "Original Response"), with the modifications described herein. Specifically, we seek assurance that the proposed activity will not (a) involve any form of general solicitation or general advertising on behalf of any hedge fund within the meaning of Rule 502(c) under the Securities Act of 1933 (the "Securities Act"), (b) constitute a public offering of securities by any hedge fund within the meaning of Section 3(c)(1)

or Section 3(c)(7) of the Investment Company Act of 1940 (the "Company Act"), or (c) cause any investment adviser to a participating hedge fund to be deemed to be holding itself out generally to the public within the meaning of Section 203(b)(3) of the Investment Advisers Act of 1940 (the "Advisers Act").

Lamp has advised us that it is currently operating HedgeScan in all material respects in the manner described in the Original Request and the Original Response. As discussed recently with Mr. Kimel and Mr. Romanek, Lamp would now like to change two features of HedgeScan. Lamp also would like to clarify one point in the Original Response.

First, Lamp would like to eliminate the requirement that a specific subscription fee be payable by HedgeScan subscribers (stated as approximately $500/month in the Original Response) Lamp would like the ability to charge whatever fees it deems appropriate for HedgeScan. This change is driven by marketing concerns, namely that Lamp needs more pricing flexibility to properly market HedgeScan. This pricing change does not reflect any change in the types of subscribers being solicited by Lamp or the purposes of HedgeScan.

The fee requirement was included in the Original Request as an additional factor in restricting the subscriber base to a limited number of market professionals and ensuring that subscribers did not join HedgeScan to invest in any particular hedge fund (and thus that qualification of subscribers by Lamp would not be deemed a solicitation for any particular fund). However, we believe that there are compensating factors that make the fee requirement unnecessary. Specifically, the accredited investor requirement and 30-day waiting period will limit the number and type of subscribers and the waiting period and periodic (e.g., quarterly or annual) availability of most hedge funds for subscription should ensure that subscribers to HedgeScan do not subscribe to invest in any particular fund. We would also note that (1) SEC Rule 506 (under which almost all hedge fund sales are made in the United States) does not limit the number of accredited investors that may invest in a Rule 506 private offering, (2) the Division of Corporation Finance did not impose any specific fee requirement in the IPOnet letter (publ. avail. July 26, 1996) and (3) the "Analysis" section of the Original Response (which section specifies the basis for each Division's position) does not mention or appear to rely on the fee requirement.

Second, Lamp would like to eliminate the requirement that each subscriber be a "qualified eligible participant" ("QEP") as defined in Commodity Futures Trading Commission Rule 4.7 (which includes, among other things, a $2 million investment portfolio requirement). This requirement was included in the Original Request because it was contemplated that many participating hedge funds would be exempt commodity pools permitted only to accept QEPs as investors. In fact, however, the participating hedge funds consist in large part of hedge funds which either are not commodity pools at all (since they don't use futures contracts) or are non-

exempt commodity pools (which are not subject to the QEP requirement). Hence, the QEP threshold is not necessary to accomplish Lamp's objectives. We would also note that the "accredited investor" threshold was deemed sufficient by the Division of Corporation Finance in the IPOnet letter (publ. avail. July 26, 1996).

Third, Lamp would like to clarify that the participating hedge funds may be structured as domestic or foreign limited partnerships, limited liability companies, trusts or other entities. This issue arises because the Original Response on page four noted that HedgeScan "will exclusively concern funds structured as limited partnerships." As a practical matter, hedge funds utilize many forms of organization, the limited partnership only being one such form (albeit the most popular structure for domestic hedge funds). The form of organization should have no impact on the legal analysis, so long as the funds otherwise fall within the description of hedge funds in the Original Request and Original Response.

Because access to HedgeScan will be restricted to a select group of subscribers who have been pre-qualified through the use of a generic questionnaire as accredited investors, and for the other reasons noted in our Original Request, we believe that the posting of information concerning hedge funds on HedgeScan will not (a) involve any form of general solicitation or general advertising within the meaning of Rule 502(c) under the Securities Act, (b) constitute a public offering of securities within the meaning of Section 3(c)(1) or Section 3(c)(7) of the Company Act, or (c) cause any unregistered investment adviser to hold itself out generally to the public within the meaning of Section 203(b)(3) of the Advisers Act. We respectfully request your reconfirmation that you will not recommend that the SEC take any enforcement action on the foregoing basis if HedgeScan is operated as described in the Original Request, as modified herein.

Pursuant to SEC Release No. 33-6269, we herewith enclose seven copies of this no-action request. We also enclose herewith copies of the Original Request and Original Response.

Please contact the undersigned at (312) 853-2140 with any comments or questions you may have

Sincerely,

William D. Kerr

William D. Kerr

WDK:jlg
Enclosures

cc: Mr. Aladin Abughazaleh
Lamp Technologies, L.L.C.