

BARNEGAT FUND MANAGEMENT, INC.
525 Park Avenue
Hoboken, New Jersey 07030
(201) 217-5625

February 27, 2023

Vanessa Countryman, Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: **File No. S7-04-23; Release No. IA-6240**

Dear Ms. Countryman:

Barnegat Fund Management, Inc. (“we”) is registered with the SEC as an investment adviser (SEC File No. 801-74067) and with the U.S. Commodity Futures Trading Commission (“CFTC”) and the National Futures Association (“NFA”) as a Commodity Pool Operator and a Commodity Trading Advisor. We are the investment adviser for two private funds incorporated in Bermuda, a feeder fund named Barnegat Investments Limited and a master fund named Barnegat Fund Limited. I am writing to comment on the SEC’s proposed rules described in Release No. IA-6240, File No. S7-04-23.

Comment 1

As a registered Commodity Pool Operator, we are required by CFTC Regulation 4.22(c) (17 CFR § 4.22(c)) to distribute an Annual Report to each participant in each pool that we operate (i.e., Barnegat Investments Limited and Barnegat Fund Limited) and to submit a copy of the Annual Report to the NFA.

CFTC Regulation 4.22(d)(1) (17 CFR § 4.22(d)(1)) provides that the financial statements in the Annual Report distributed to each pool participant and submitted to the NFA must be presented and computed in accordance with United States generally accepted accounting principles consistently applied and must be audited by an independent public accountant. However, CFTC Regulation 4.22(d)(2)(i) (17 CFR § 4.22(d)(2)(i)) provides that where a commodity pool is organized in a jurisdiction other than the United States, the financial statements in the Annual Report may be presented and computed in accordance with the generally accepted accounting principles, standards or practices followed in such other jurisdiction, provided that:

(A) The other jurisdiction follows accounting principles, standards or practices set forth in CFTC Regulation 4.22(d)(2)(ii) (17 CFR § 4.22(d)(2)(ii)) and the Annual Report presents and computes the financial statements of the pool in accordance with the applicable accounting principles, standards or practices followed by such other jurisdiction;

(B) The Annual Report includes a condensed schedule of investments, or, if required by the applicable accounting principles, standards or practices followed by such other jurisdiction, a full schedule of investments;

(C) The Annual Report reports special allocations of ownership equity in accordance with CFTC Regulation 4.22(e)(2) (17 CFR § 4.22(e)(2));

(D) The Disclosure Document or offering memorandum for the pool identifies the accounting principles, standards or practices of the other jurisdiction pursuant to which the Annual Report presents and computes the financial statements of the pool; and

(E) Where the accounting principles, standards or practices of the other jurisdiction require consolidated financial statements for the pool, such as a feeder fund consolidating with its master fund, all applicable disclosures required by United States generally accepted accounting principles for the feeder fund must be presented with the reporting pool's consolidated financial statements.

CFTC Regulation 4.22(d)(2)(ii) (17 CFR § 4.22(d)(2)(ii)) permits the following alternative accounting principles, standards or practices to be employed in the preparation and computation of the financial statements in the Annual Report of a commodity pool provided such alternative accounting principles, standards or practices are those followed by the jurisdiction other than the United States in which the commodity pool is organized:

- (1) International Financial Reporting Standards;
- (2) Generally Accepted Accounting Practice in the United Kingdom;
- (3) New Irish Generally Accepted Accounting Practice;
- (4) Luxembourg Generally Accepted Accounting Principles; or
- (5) Canadian Generally Accepted Accounting Principles.

The funds we advise, Barnegat Investments Limited and Barnegat Fund Limited, are incorporated in Bermuda. As permitted under CFTC Regulation 4.22(d)(2)(i) and (ii) (17 CFR § 4.22(d)(2)(i) and (ii)), the financial statements in the Annual Report for Barnegat Investments Limited and Barnegat Fund Limited that are distributed to each participant in Barnegat Investments Limited and submitted to the NFA are presented and computed in accordance with International Financial Reporting Standards.

Proposed 17 CFR § 275.223-1(b)(4) provides that an investment adviser is not required to comply with 17 CFR § 275.223-1(a)(1)(i)(B) and (a)(2) and shall be deemed to have complied with 17 CFR § 275.223-1(a)(4) with respect to the account of a limited partnership, limited liability company, another type of pooled investment vehicle or any other entity if it undergoes a financial statement audit at least annually and upon liquidation meeting the requirements of 17 CFR §

275.223-1(b)(4)(i) through (v). Proposed 17 CFR § 275.223-1(b)(4)(iii) provides that audited financial statements of private funds organized under non-U.S. law would have to be (a) prepared in accordance with U.S. Generally Accepted Accounting Principles (“U.S. GAAP”) or (b) contain information substantially similar to statements prepared in accordance with U.S. GAAP and material differences with U.S. GAAP would have to be reconciled.

We are concerned that requiring that the financial statements of the private funds we advise (which are prepared in accordance with International Financial Reporting Standards) contain information substantially similar to statements prepared in accordance with U.S. GAAP and that material differences with U.S. GAAP be reconciled may cause confusion to the participants in the private funds we advise who are not accustomed to the requirement that material differences with U.S. GAAP be reconciled. As a result, we request that proposed 17 CFR § 275.223-1(b)(4)(iii) be modified to reflect that, in the case of a private fund organized under non-U.S. law that is also registered as a commodity pool with the CFTC and the NFA, the private fund’s financial statements may be prepared in accordance with the accounting principles, standards or practices referred to in CFTC Regulation 4.22(d)(2)(ii) (17 CFR § 4.22(d)(2)(ii)) (i.e., International Financial Reporting Standards; Generally Accepted Accounting Practice in the United Kingdom; New Irish Generally Accepted Accounting Practice; Luxembourg Generally Accepted Accounting Principles; or Canadian Generally Accepted Accounting Principles) provided the requirements of CFTC Regulation 4.22(d)(2)(i) (17 CFR § 4.22(d)(2)(i)) referenced above are met.

In the event the SEC is not agreeable to modifying proposed 17 CFR § 275.223-1(b)(4)(iii) as requested above, we request that the SEC clarify the meaning of the terms “substantially similar” and “material differences” in proposed 17 CFR § 275.223-1(b)(4)(iii).

Comment 2

Some of the trades of the master fund we advise are bilateral swap contracts entered into with counterparties pursuant to the terms of ISDA Master Agreements. The master fund posts collateral with counterparties to support those bilateral swap contracts.

Page 28 of the Release includes the following language regarding assets that would be subject to 17 CFR § 275.223-1: “Assets under the rule also would include financial contracts held for investment purposes, collateral posted in connection with a swap contract on behalf of the client, and other assets that may not be clearly funds or securities covered by the current rule.”

If assets that are subject to the proposed safeguarding rule include collateral posted with a counterparty in connection with a swap contract on behalf of the client, we will be required to enter into a written agreement with each one of the bilateral swap counterparties with which the master fund trades that would require that the bilateral swap counterparties act as qualified custodians and comply with the requirements of proposed 17 CFR § 275.223-1. We are concerned that many of our bilateral swap counterparties will not be amenable to being qualified custodians subject to the

requirements of 17 CFR § 275.223-1 and will, therefore, no longer be willing to trade bilateral swap contracts with the master fund we advise.

Comment 3

Proposed 17 CFR § 275.223-1(a)(1)(ii)(E) provides that an investment adviser must obtain reasonable assurances in writing from the qualified custodian that the qualified custodian will not subject client assets to any right, charge, security interest, lien, or claim in favor of the qualified custodian or its related persons or creditors, except to the extent agreed to or authorized in writing by the client.

Some of the trades of the master fund we advise are bilateral swap contracts entered into with counterparties pursuant to the terms of ISDA Master Agreements. The master fund posts collateral with counterparties to support those bilateral swap contracts, subject to the terms of a Credit Support Annex to the ISDA Master Agreement (“ISDA CSA”). Paragraph 6(c)(i) of the ISDA CSA grants the counterparty to whom collateral has been posted the right to “sell, pledge, rehypothecate, assign, invest, use, commingle or otherwise dispose of, or otherwise use in its business any Posted Collateral it holds, free from any claim or right of any nature whatsoever of the Pledgor, including any equity or right of redemption by the Pledgor.”

We would like the SEC to confirm whether proposed 17 CFR § 275.223-1(a)(1)(ii)(E), which prohibits a qualified custodian from subjecting client assets to any right, charge, security interest, lien, or claim in favor of the qualified custodian or its related persons or creditors, except to the extent agreed to or authorized in writing by the client, permits a counterparty to whom collateral has been posted under an ISDA CSA the right to “sell, pledge, rehypothecate, assign, invest, use, commingle or otherwise dispose of, or otherwise use in its business any Posted Collateral it holds, free from any claim or right of any nature whatsoever of the Pledgor, including any equity or right of redemption by the Pledgor” under paragraph 6(c)(i) of the ISDA CSA.

Comment 4

Some of the trades of the master fund we advise are “cleared” swap contracts that are cleared with central counterparties such as the Chicago Mercantile Exchange (“CME”) and LCH Limited (“LCH”). Collateral held at the master fund’s futures commission merchant is posted with CME or LCH to support swap contracts cleared on each exchange.

Page 28 of the Release includes the following language regarding assets that would be subject to 17 CFR § 275.223-1: “Assets under the rule also would include financial contracts held for investment purposes, collateral posted in connection with a swap contract on behalf of the client, and other assets that may not be clearly funds or securities covered by the current rule.”

We would like the SEC to confirm whether central counterparties that are counterparties to "cleared" swap trades and hold collateral that is posted to support cleared swap trades would be "qualified custodians" under and subject to the requirements of proposed 17 CFR § 275.223-1.

Comment 5

17 CFR § 275.223-1(d)(10)(iii) includes in the definition of "qualified custodian" the following: "(iii) A futures commission merchant registered under section 4f(a) of the Commodity Exchange Act (7 U.S.C. 6f(a)), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon."

The futures commission merchant for the master fund we advise holds bonds owned by the master fund. Some of the bonds held by the futures commission merchant are held incidental to cleared swap contracts. As a result, we request that the definition of "qualified custodian" in 17 CFR § 275.223-1(d)(10)(iii) be modified as follows: "(iii) A futures commission merchant registered under section 4f(a) of the Commodity Exchange Act (7 U.S.C. 6f(a)), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon and cleared swap contracts."

Thank you for your attention to the foregoing.

Very truly yours,



BRIAN DAVIS
Chief Compliance Officer