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OF THE CITY OF NEW YORK

COMMITTEE ON FUTURES REGULATION

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VIA E-MAIL

Financial Crimes Enforcement Network
Treasury
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Attention: NPRM – Section 352 Unregistered Investment Company Regulations

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 above-referenced Notice of Proposed Rulemaking ("NPRM") concerning proposed anti-money laundering programs for unregistered investment companies.

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 48 states and 51 countries. The Committee consists of attorneys knowledgeable concerning the regulation of futures contracts and other derivative instruments and has a history of publishing reports analyzing regulatory issues critical to the futures industry and related activities. The Committee appreciates the opportunity to comment on the NPRM and stands ready to assist the Financial Crimes Enforcement Network ("FinCEN") and its staff if further clarification is required on any of the points raised in this letter.

Notice Requirement: Exemption for Commodity Pool Operators. The NPRM specifically seeks comment on the issue of whether commodity pools identified in the database of the National Futures Association ("NFA") should be exempt from the

proposed requirement for a notice filing by unregistered investment companies with FinCEN. Based upon the existing regulatory program for commodity pool operators, the Committee believes that commodity pools should be exempt from this requirement. The notice states that the proposed requirement is designed to remedy a lack of information concerning unregistered investment companies: "Unlike many other financial institutions subject to the anti-money laundering regime in the BSA, such as banks, savings associations, and mutual funds, unregistered investment companies are not necessarily registered with or identifiable by Treasury or another Federal functional regulator." Registered commodity pool operators are already subject, however, to duties to provide information about their operations that are more extensive than those proposed. Registered commodity pool operators are individually registered by firm, and the NFA maintains a listing of all pools operated by each registrant as part of its registration records.[1] Regulations under the Commodity Exchange Act apply to commodity pool operators, and through them, to each pool they operate. The NFA has indicated that it is willing to act as the source of information about registered commodity pool operators for anti-money laundering regulation and enforcement.[2] Registered commodity pool operators are thus not within the group of firms that are not identifiable by regulators, and the NFA's willingness to act as repository for information about these firms and the pools they operate provides assurance of the availability of all relevant information sought by regulators.

Further, the Committee recommends that FinCEN develop its rules in a manner consistent with the existing regulatory approach, under which a registered commodity pool operator can operate several pools pursuant to its registration and the applicable regulatory requirements apply to the commodity pool operator, not the commodity pools operated by the operator. The anti-money laundering requirements also should apply directly to the pool operator and through it to the pools it operates. That would prevent the possible development of inconsistent requirements, as would be the case if certain

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[1] Registration includes identification of all principals (including owners) of a commodity pool operator. Principals and associated persons (who perform essentially sales functions) must file personal information and fingerprints that are the basis for a background investigation conducted by the FBI prior to completion of the registration process. Candidates for registration as associated persons must pass a proficiency examination as a condition of registration. Registered pool operators must file the annual financial reports of each pool that they operate with the Commodity Futures Trading Commission ("CFTC").

[2] The NFA in fact performs more than the role of a repository of information. All commodity pool operator disclosure documents for privately offered pools are reviewed by the NFA before they may be used to solicit subscriptions. (The CFTC reviews prospectuses for publicly offered pools.) Pools that elect an exemption from filing their disclosure documents for review and from the general pool financial reporting requirements because their investors meet specified eligibility requirements must make notice filings with the NFA and identify such pools by name. Registered commodity pool operators are also audited periodically by NFA auditors. Together these regulatory requirements exceed the identification requirements proposed in the NPRM.

anti-money laundering requirements applied at the commodity pool operator level and others at the fund level due to their status as unregistered investment companies.

For the above reasons, the Committee believes that the intended purpose of the proposed notice filing requirement – identification of existing commodity pools – can be accomplished most effectively and economically through the NFA database. In addition to avoiding creation of duplicate filings, that database provides verification that would not exist under the proposed notice registration.

Inspection Authority. The NPRM notes that inspection authority lies with the Department of the Treasury or its designee. 31 C.F.R. § 103.56. Under the default inspection authority provision of the regulation, inspection authority will lie with the Internal Revenue Service. With respect to mutual funds, FinCEN has specifically delegated inspection authority to the Securities and Exchange Commission. The Committee believes that for unregistered investment companies, inspection authority should be lodged with the Commodity Futures Trading Commission or the Securities and Exchange Commission, the agencies with expertise in the relevant industry.

Scope of Information Collection. Given the purpose of the proposed notice requirement, which is to facilitate enforcement of anti-money laundering requirements, the Committee suggests that the scope of the proposed information requirement be reconsidered. Neither the total assets under management nor total number of participants appear to be reasonably related to the goals of the anti-money laundering program.

Unregistered Investment Companies: Not Investment Companies. In its April 2002 interim rule temporarily exempting investment companies other than mutual funds from the anti-money laundering program requirement, FinCEN deferred a determination of the scope of the term "investment company" and treated hedge funds, private equity funds and venture capital funds separately from other financial institutions while advising that they were likely to be subject to an anti-money laundering program requirement in the future. The Committee believes that the definition of "investment company" for anti-money laundering program purposes should be consistent with that of the Investment Company Act of 1940 and should not include hedge funds, private equity funds and venture capital funds, which are *not* investment companies under the Investment Company Act of 1940. The Committee urges FinCEN to clarify this issue in its final rule. Comprehension of and compliance with FinCEN rules will be fostered by establishing definitional terms that accord with other federal laws and industry practice.

Further, FinCEN will preserve for itself greater flexibility in prescribing rules for unregistered investment companies if they are not lumped together with mutual funds and closed-end funds. From an anti-money laundering viewpoint, the characteristics of the mutual fund industry are very different from those of the venture capital industry. If unregistered investment companies are treated as investment companies, they will be subject to the same rules and requirements as investment companies except where FinCEN makes explicit distinctions. We believe the better course is to preserve a

distinction that is fundamental in the Investment Company Act of 1940 and not to include hedge funds, private equity funds, venture capital funds, REITs and commodity pools with investment companies. The Committee recommends that FinCEN confirm this approach in the final rule.

The Committee stands ready to assist FinCEN with further information or other assistance concerning this important issue.

Sincerely yours,

/S/ Susan C. Ervin

Susan C. Ervin

cc: Office of the General Counsel,
Commodity Futures Trading Commission

General Counsel,
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