

September 7, 2007

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-12-07; Rel. Nos. 33-8814, 34-55980; 39-2446; IC-27878
Electronic Filing and Simplification of Form D

File No. S7-18-07; Rel. Nos. 33-8828; IC-27922
Revisions of Limited Offering Exemptions in Regulation D

Dear Ms. Morris:

The Coalition of Private Investment Companies ("CPIC") is pleased to submit its comments regarding the Securities and Exchange Commission's ("SEC" or "Commission") proposal to implement an electronic filing requirement for Form D and to improve the Form as a source of information for regulators and investors.¹ CPIC also submits these comments in connection with the Commission's proposal to create a new limited offering exemption from the registration requirements of the Securities Act of 1933 ("Securities Act") for "large accredited investors" in Rule 507 under Regulation D.² In addition, as part of the proposed Rule 507 release, the Commission states that it is continuing to seek comments on its earlier proposal to create a new named category of investor in Regulation D, the "accredited natural person," for purposes of private offerings of investments in pooled investment vehicles.³ CPIC previously submitted comments on the accredited natural person proposal and reiterates those comments in this letter as well.

CPIC is a membership organization of 18 private investment companies and other associate members with more than \$60 billion under management. While we recognize that the proposed changes to Form D and Regulation D would affect more industries than our own, the

¹ 72 Fed. Reg. 37376 (Jul. 9, 2007) ("Electronic Filing Release").

² 72 Fed. Reg. 45116 (Aug. 10, 2007) ("Rule 507 Release").

³ *Id.* at 45117. See *Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles*; SEC Rel. No. 33-8766 (Dec. 27, 2006) 72 Fed. Reg. 400 (Jan. 4, 2007) ("Accredited Natural Person Proposal").

opinions expressed in this letter are shaped by our experience as advisers and managers of private investment companies, or "hedge funds."

In brief, we strongly support the Commission's proposal to provide for electronic filing and updating of Form D and to enhance the information contained in Form D. We urge the Commission to use this opportunity to employ its regulatory and exemptive authorities to gather information it says it needs regarding hedge funds, utilizing an enhanced and electronically-filed Form D. However, we object to the Commission's efforts to impose regulatory burdens on private offerings of pooled investment vehicles greater than those on other private offerings.

Electronic Filing and Enhancements to Information Gathered by Form D.

We support the Commission's efforts to enhance the information required in Form D and provide for electronic filing and updates to Form D. Indeed, in the comment letter CPIC submitted March 9, 2007 ("March 9 letter") in connection with the Commission's rulemaking proposal relating to pooled investment vehicles,⁴ CPIC suggested that the Commission require electronic filing of Form D with enhanced information as an approach to enable the Commission to obtain certain basic census data on hedge funds.⁵

In our March 9 letter, CPIC also recommended that the Commission require Form D filers that are private investment pools to identify the exclusion(s) from the definition of "investment company" under the Investment Company Act of 1940 ("1940 Act") upon which they rely. We therefore support the Commission's proposal to include this information in a revised Form D and believe this change alone would significantly expand the available data regarding the numbers and types of hedge funds in the markets. Of course, to the extent the Commission believes it needs data in addition to the information it proposes to be included in the revised Form D, the Commission could further expand the information required, providing for confidentiality where appropriate. As we suggested in our March 9 letter, such information could include, for example, identification of exemptions that the Fund relies on under the Commodity Exchange Act; identities of the Fund's custodians and independent auditors; the identity of the Fund's manager (if the manager is not also listed as an executive officer or director under proposed new Item 3); the Fund's fee structure and expense information; the Fund's general categories of investment strategies and assets; the disciplinary history of the "Related Parties" listed in proposed new Item 3; and the use of "soft dollars" and brokerage allocations. We believe the revised Form D and its public availability through the internet could broaden the understanding of our industry by legislators, regulators, investors, academics, business journalists and the public at large.

⁴ Accredited Natural Person Proposal, n. 3, *supra*.

⁵ See Letter from James Chanos to Nancy M. Morris, SEC (Mar. 9, 2007) (available at <http://www.sec.gov/comments/s7-25-06/s72506-541.pdf>). See also letter from James Chanos to Jonathan Katz, SEC (Sept. 15, 2004) (available at <http://www.sec.gov/rules/proposed/s73004/s73004-52.pdf>) (recommending, in lieu of investment adviser registration, a type of notice filing for managers of hedge funds, to enable the Commission to gather relevant census information.) See also Testimony of James Chanos before the Committee on Financial Services of the United States House of Representatives, Hearing on Hedge Funds and Systemic Risk in the Financial Markets (Mar. 13, 2007) (available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/htchanos031307.pdf).

Electronic filing would greatly facilitate the ability of issuers to plan and proceed with their offerings, because they would be able to verify quickly that the necessary filing has been completed. Measured on an industry-wide basis, removing the paper filing requirement should result in significant cost savings. We also believe the proposed clarification of the triggers and timing of Form D amendments provides helpful guidance to issuers, as well as timely information to investors and regulators. In addition, because the Form D database would be searchable, investors and others would be able to investigate whether a particular investment manager advises or has advised other private investment companies, allowing them to gain a better picture of the fund manager's experience.

Electronic filing also has the potential to ease regulatory burdens on issuers imposed by state laws and regulations, without impairing the ability of states to enforce their securities laws. At present, most states require a privately-offered issuer to file a Form D, a separately signed and notarized Form U-2 (the Uniform Consent to Service of Process) and a filing fee within 15 days of the first sale of the issuer's securities in that state. As investors from new states buy into an offering, the issuer must update the information in the Form D and effect new filings in those states. Thereafter, the Form D filed with the state must be updated on a yearly basis. For these purposes, the current version of Form D features an appendix, which must be separately signed, for filers to provide information as to investors and amounts invested on a state-by-state basis.⁶

An electronic Form D database would help to reduce the number of opportunities for error that result from current filing processes by permitting issuers to direct their filings to specific states. Such directed filings would not only include the Form D, but also a consent to service of process, thus eliminating the need for a separate signed and notarized document.⁷ Moreover, separate state-by-state tabulations of investors and investment amounts would no longer be required, and the Form D appendix for state sales information would be eliminated.⁸

With these changes in mind, we note that the Commission has asked commenters to address several questions relating to state filing requirements. We wish to address one question in particular:

Do issuers and others have an interest in "one-stop" filing with the Commission, in which states would rely on Commission filings as satisfying state law filing requirements ... ? Should such a one-stop filing service include the centralized collection of state filing fees? Would issuers be willing to pay a fee to the Commission or to an organization of state regulators for one-stop filing, if the

⁶ While this is the general pattern, New York presents a special situation and claims its filing requirements for Rule 506 private placements are not preempted by NSMIA. Before any Rule 506 offers are made in New York, state regulators require an issuer to file all of its offering materials, a draft Form D as proposed to be filed with the SEC, a filing fee and a "Form 99" with the State Department of Law. The issuer must also file a Form U-2 and a smaller filing fee, and an instrument called the "State Notice / Further State Notice" with yet another filing fee, with the New York Secretary of State. N.Y. Gen. Bus. Law §§ 359-e(2), (3) and (8).

⁷ 72 Fed. Reg. at 37382.

⁸ 72 Fed. Reg. at 37380.

collection of such a fee were properly authorized? How much would issuers be willing to pay for one-stop filing services?

We believe that a single electronic filing should be sufficient to provide state securities regulators with notice of sales in their jurisdictions -- in fact, a central database would probably provide timelier information than paper filings. Coupled with a web-based central hub for the electronic payment of fees, such a "one-stop" filing system would yield savings for issuers that should be more than sufficient to offset the cost of associated user fees.

The electronic database could also provide significant efficiencies to the Commission and the State securities regulators, by placing the information contained in the Form Ds into an organized, searchable database. Not only would this make the information accessible in a meaningful way to regulators, it would also save on processing and storage costs currently incurred by the states and the SEC.

Full access by states to the database in the new electronic filing and data system should be conditioned on a state's recognition of the preemptive effect of Section 18 of the Securities Act⁹ on state laws requiring any filing with respect to securities offered pursuant to an exemption from registration under Section 4(2) of the Securities Act,¹⁰ or pursuant to Rule 506 there under, other than requirements to file Form D (or a substantially similar form), a consent to service of process, and a fee. This approach could, as a practical matter, serve the statutory purposes of the 1996 National Securities Market Improvement Act ("NSMIA") and achieve the efficiencies sought by the SEC in the rulemaking that it proposed in 2001 relating to preemption of state law for sales of securities to qualified purchasers, as required by NSMIA, without the adverse impact of limiting state access to information on private offerings.¹¹

Further Comments on "Accredited Natural Person" Proposal and Rule 507 Release

The Commission and its Staff for several years have raised concerns about the lack of information upon which to base policy decisions regarding hedge funds. As the Commission Staff stated in its 2003 Report on the *Implications of the Growth of Hedge Funds*:

Despite the growth of the hedge fund industry in the last decade, we do not have accurate information about how many hedge funds operate in the United States, their assets or who controls them. . . . In our view, the Commission is impeded in its ability to formulate public policy that

⁹ 15 U.S.C. § 77r.

¹⁰ 15 U.S.C. § 77d.

¹¹ As amended by NSMIA, Section 18 of the Securities Act, in part, preempts state registration and review of offers or sales of securities to qualified purchasers "as defined by the Commission by Rule." Securities Act § 18(b)(3); 15 U.S.C. § 77r(b)(3). In 2001, the Commission proposed a rule to define the term "qualified purchaser" for this purpose, but has never acted upon it, due in part to objections by state regulators. *Defining the Term "Qualified Purchaser" Under the Securities Act of 1933*, Rel. No. 33-8041 (Dec. 19, 2001), 66 Fed. Reg. 66839 (Dec. 27, 2001); see *Comments of Joseph P. Borg*, President and Director, Alabama Securities Commission, on behalf of the North American Securities Administrators Association, Inc. (Mar. 4, 2002).

appropriately protects the interests of the U.S. investing public unless it also has access to accurate and current information about hedge funds and their advisers.¹²

Four years after the release of the Staff Report, the Commission has yet to form a consistent and well-founded regulatory policy regarding hedge funds. The Commission's earlier proposal to create a new "accredited natural person" category in Regulation D as applied to natural persons investing in pooled investment vehicles and its recent proposal to amend Rule 507 by permitting limited offerings of securities *other than* for funds relying on Sections 3(c)(1) and 3(c)(7) of the 1940 Act are illustrative.

Each of these proposals contemplates more restrictive requirements for private offerings involving hedge funds than for other Regulation D offerings. For example, the Commission's pending proposal to impose a new \$2.5 million in investments criteria for a new named category of investor, the "accredited natural person," would apply to private offerings of investments in pooled investment vehicles that rely on the exclusion from the definition of "investment company" in Section 3(c)(1) of the 1940 Act, except for venture capital funds, and not to other private offerings under Regulation D.¹³ In the release announcing the proposal, the SEC acknowledged that it could only estimate the number of issuers the proposal would affect, because Form D does not contain sufficient information to ascertain whether a filer is an operating company, a 3(c)(1) Fund or another type of Fund.¹⁴

Proposed Rule 507 would allow limited advertising for offerings to "large accredited investors" and, for such offerings, would not require the "substantial pre-existing relationship" between offeror and offeree that currently limits private offerings conducted under Rule 506. The release states that the Commission is proposing Rule 507 under its general exemptive authority under Section 28 of the Securities Act.¹⁵ The release states further that, as a consequence, private investment funds that rely on Sections 3(c)(1) or 3(c)(7) of the 1940 Act would not be able to utilize Rule 507, because such funds are required to sell their securities in transactions not involving a public offering and typically rely on Section 4(2) and Rule 506, which forbid general solicitation and general advertising.¹⁶ We do not believe the Commission's hands are tied here, however. The Commission could exercise its exemptive authority under Section 6 of the 1940 Act to allow Rule 507 offerings by private investment funds, and thus avoid disparate treatment between offerors of private investment funds and other private issuers. Indeed, by linking the new exemption with an electronic Form D filing requirement, the Commission could encourage more private investment funds who may otherwise rely on a statutory Section 4(2) exemption to provide the very type of information that the Commission seeks on hedge funds.

¹² *Implications of the Growth of Hedge Funds, Staff Report to the United States Securities and Exchange Commission*, p. 77-78 (citations omitted) (Sept., 2003) (available at <http://www.sec.gov/spotlight/hedgefunds.htm>).

¹³ 72 Fed. Reg. 403-408.

¹⁴ 72 Fed. Reg. 409, n. 83; 413 n. 105.

¹⁵ 72 Fed. Reg. 45122.

¹⁶ *Id.*

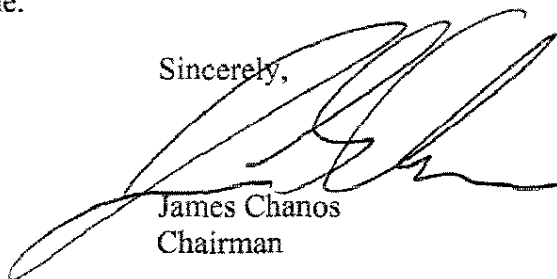
The Commission has not shown that the proposed more restrictive treatment of private investment funds in private offerings would serve any investor protection purpose. Hedge funds and other private investment funds are not inherently more risky than other private offerings, and investors in them are likely to receive benefits from diversification that non-fund offerings cannot provide.

Moreover, the Commission should not miss an important opportunity to use its current proposals as a "carrot" to incent private investment funds voluntarily to provide exactly the type of information that the Commission and other regulators desire about the activities of hedge funds and other private investment funds. If the Commission feels its ability to oversee the markets would benefit from having more information regarding hedge funds, then it should use the ample authority, and opportunity, it has now to obtain it. The Commission's Form D electronic filing proposal, as well as the other two pending Regulation D proposals, with minor revisions, provide the Commission with an excellent opportunity to obtain that information.

Conclusion

We thank the Commission for this opportunity to provide our thoughts with respect to this proposal. We urge the Commission to carefully consider our suggestions, and would be happy to discuss them at any time.

Sincerely,



James Chanos
Chairman

The Honorable Christopher Cox, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel S. Campos, Commissioner
The Honorable Annette L. Nazareth, Commissioner
The Honorable Kathleen L. Casey, Commissioner
John W. White, Director, Division of Corporation Finance,
Gerald J. Laporte, Chief, Office of Small Business Policy