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Office of the Corporate Secretary
NASD
1735 K Street, N.W.
Washington D.C. 20006-1506

Attn: Barbara Z. Sweeney, Senior Vice President and Corporate Secretary
Email Address: pubcom@nasd.com

Re: Notice to Members 07-27: Member Private Offerings

Dear Ms. Sweeney:

The Committee on Futures and Derivatives Regulation (the "Committee") of the New York City Bar Association (the "Association") is pleased to provide comments on National Association of Securities Dealers Notice to Members 07-27 regarding "Member Private Offerings" (the "Proposal").

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 commodity pool operators. The Committee's interest in the Proposal arises from its potential

effect on privately offered commodity pools. The Committee appreciates the opportunity to comment on the Proposal.

Intended Scope of Proposal

The Committee's initial concern is with the intended scope of the Proposal. The definition of "Member Private Offerings" and "Control Entity" could be read to include not only offerings by members of their securities, but also, without limitation, all offerings of securities by entities that control or are under common control with a member, or are controlled by a member, with "control" determined by a standard of greater than 50% beneficial ownership.

The Committee is concerned about the potential application of the Proposal to situations such as the following. Privately offered commodity funds are generally organized as limited partnerships, trusts or limited liability companies. The general partner, managing owner, managing member, or similar entity is the commodity pool operator of the fund. Such a pool operator may be under common control with a member, under the Proposal's definitions. The member distributes pool interests. Privately offered commodity pools are offered pursuant to SEC Regulation D and comparable exemptions from securities registration at the state level. The investment interest of the pool operator and of any affiliate acting as the initial investor generally would not exceed 50%. Under partnership, trust, or limited liability company law, however, control over the fund and its operations is effectively exercised by the pool operator. Moreover, fund sponsors will often contribute a substantial amount as seed capital in order to allow their funds to meet the minimum investment amount to begin trading immediately, and avoid the need to hold investor funds in escrow or otherwise delay investment of subscription proceeds. In such cases, we recommend that the Proposal contain an exclusion for situations where the affiliate of a member makes contributions to a fund that exceed 50% of capital for the limited purpose of meeting the minimum contribution requirements as long as the limited duration of such an investment is disclosed to potential investors.

Section 1.A of the Proposal states that the power to direct the management or policies of a corporation or partnership alone would not constitute "control" for purposes of the control entity defined in the Proposal. Section F of the Proposal states that it would not apply to private offerings such as "investment partnerships, direct participation programs, and other private funds that the member might organize." However, the text of proposed rule 2721 does not contain any similar limiting language. We believe that the intent is to exclude an investment fund affiliated with a member (as described in the example above) from the coverage of the Proposal, but believe that that should be stated definitely in the language of the rule. With respect to the Proposal's specific request for comment on whether it should apply to investment partnerships and similar entities, the Committee believes that such regulation is unnecessary for the reasons stated below.

Potential Application to Privately Offered Commodity Funds

The Committee believes that privately offered commodity funds are already subject to comprehensive regulation that obviates the need for the additional regulation contained in the Proposal. If privately offered commodity pools are intended to be covered by the Proposal, the

Committee has a concern that the Proposal would impose duplicative regulation on privately offered commodity pools. Such pools are regulated by the Commodity Futures Trading Commission (CFTC) and the National Futures Association (NFA) under the Commodity Exchange Act. Specifically, the CFTC's Part 4 rules govern in detail the contents of commodity pool operator disclosure documents, which must be provided to investors in such pools no later than the time the pool operator delivers a subscription agreement to a potential investor. Pool disclosure documents must be submitted to the NFA prior to use, and are reviewed by NFA staff for compliance with CFTC disclosure document regulations.

Commodity pool operators and their associated persons must be registered under the Commodity Exchange Act in those capacities, and are subject to fitness screenings and testing requirements administered by the NFA. Commodity pool operators are subject to record-keeping requirements regarding their pools, and must prepare and submit periodic reports to pool investors; annual reports are required to be filed with the NFA. The NFA conducts periodic onsite audits of commodity pool operators.

The Proposal would establish an additional set of disclosure requirements and filing requirements for Member Private Offerings. While the Proposal provides only general statements about the disclosure requirements that would be imposed, the Committee is concerned that, either through future development of proposed rule 2721 or through staff interpretations applying it to filed documents, privately offered commodity pools will be subject to disclosure requirements that conflict with or are applied differently than those applied to such pools under the CFTC Part 4 rules.

Note 8 of the Proposal states that the NASD would not issue a no objections letter in connection with offering memorandum filings. The Proposal therefore leaves open the risk to offerings that there would be a subsequent determination that disclosures are "incomplete, inaccurate or misleading." Given the absence of any specific guidance as to the type of disclosures that would satisfy the general disclosure standards outlined in the Proposal, the issuer and the offering would remain exposed to the risk that such findings could be made after an offering has been completed or substantially completed. In contrast, the commodity pool disclosure document review process applied by the NFA involves review of the filed disclosure document for compliance with the Part 4 rules, and notification by NFA staff that the review has been completed. If there are deficiencies noted, in that requirements of the CFTC part 4 rules are not met, the pool operator must make the necessary corrections to the disclosure document and then refile it for review by the NFA. We submit that this process provides superior regulation of pool disclosure material content than that contained in the Proposal. If the intent of the Proposal is to apply to the offering memoranda of privately offered commodity funds, the Committee advocates that privately offered commodity pools be exempted from both disclosure requirements and filing requirements because they are already subject to a well-established regulatory regime under the Commodity Exchange Act.

General Issues

The Committee also has general questions about the intended application of the terms of the Proposal.

First, in its discussion of the use of offering proceeds, the Proposal establishes a requirement that at least 85% of the offering proceeds be applied to the business purposes identified in the offering memorandum. How would such a numerical limit be applied to offering proceeds if an offering were to have multiple closings? Presumably the standard would apply to the total amount raised. It would be helpful to clarify this point.

Second, the Proposal does not contain any implementation schedule or prospective effective date. It is not clear how the Proposal would be applied to current or ongoing offerings. Would such offerings be grandfathered from the requirements of the Proposal, or would they be required to restructure their terms to comply with it? This point should also be clarified.

Third, the Proposal states in section (b) that the private placement memorandum of an offering subject to the rule must be filed with the Corporate Financing Department. We believe that the Proposal should be clarified to state whether marketing materials used in subject private offerings must also be filed. Given the purposes of the filing requirement, and the absence of any prior review of filed documents, we do not see any need for marketing materials to be filed, but believe that the Proposal should address this point directly.

Fourth, note 7 to the Proposal states that performance and management fees earned by a general partner would not be included in the determination of partnership profit or loss percentages. We believe that this point should be stated directly in the rule.

The Committee welcomes any questions about these comments.

Very truly yours,

Michael Sackheim,
Chairman

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* Chair and Member of Subcommittee that drafted this comment letter.
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¶ This member of the Committee did not participate in this comment letter.

¶ These Adjunct Members did not participant in this comment letter.