MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

May 16, 2008

Via Electronic Mail: rule-comments@sec.gov

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-10-00; Amendments to Form ADV

Dear Ms. Morris:

Managed Funds Association ("MFA")[1] appreciates the opportunity to comment on IA Release No. 2711 (the "Release"), issued by the Securities and Exchange Commission regarding proposed amendments to Part 2 of Form ADV (the "brochure") and related rules under the Investment Advisers Act of 1940.

We generally support the Commission's efforts to amend the brochure to provide clearer and more meaningful disclosure to advisory clients. Notwithstanding our general support of the Release, however, we believe that some clarifications and revisions to certain proposed amendments in the Release, as discussed in greater detail below, will help achieve the Commission's goals without placing undue or unnecessary burdens on registered investment advisers.

In April of 2000, the SEC proposed to amend the brochure to require, among other things, a more narrative format for disclosure.[2] The Release reproposes amendments to the brochure, which sets out required disclosures to be provided to investment adviser clients about the adviser's business practices, conflicts of interest, and background of the adviser and its advisory personnel. The Release incorporates many of the proposals in the Original Release, with certain modifications. In general, the proposed amendments in the Release would require the same narrative format for disclosure contemplated by the Original Release.

[1] MFA is the voice of the global alternative investment industry. Our members include professionals in hedge funds, funds of funds and managed futures funds. Established in 1991, MFA is the primary source of information for policymakers and the media and the leading advocate for sound business practices and industry growth. MFA members represent the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately $2 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.

[2] *Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV*, IA Release No. 1862 (April 5, 2000) (the "Original Release").

Our comments on the Release have been arranged into three categories. First, is a set of general comments regarding the Release. The second category of comments is requests for clarification relating to certain of the proposed amendments. Finally, we propose revisions to certain of the proposed amendments in the Release.

I. GENERAL COMMENTS

A. Exemption of brochure delivery to hedge fund clients

The Release notes that registered investment advisers currently are not required to deliver their brochure to clients that are registered as investment companies under the Investment Company Act of 1940. The Release proposes to extend the exception from delivery of the brochure to clients that have elected to be governed as business development companies under the Investment Company Act. The Release does not, however, propose to extend that exception to advisory clients that are other types of pooled investment vehicles. For the reasons discussed below, we believe that registered investment advisers to privately-offered investment pools which rely on the exclusion from the definition of "investment company" under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act ("hedge funds") should be provided a similar exception.

The Release properly addresses the required delivery of a brochure to clients of an investment adviser. With respect to investment advisers to hedge funds, it is the hedge funds, and not the investors in the funds that are properly viewed as the clients of the adviser for purposes of Rule 204-3 under the Advisers Act.[3] As such, the brochure would be required to be delivered by the investment adviser to the hedge fund client, and not to the investors in the hedge fund. As a practical matter, delivery of a brochure to a hedge fund client would typically mean that the hedge fund's investment adviser would provide the brochure to the general partner of the hedge fund.[4] For most hedge funds, the key personnel of the investment adviser are the same as the key personnel of the general partner. Absent an exception for delivery to hedge fund clients, therefore, investment advisers to hedge funds would be required to spend considerable resources to prepare a brochure to deliver to themselves. Because the brochure is only required to be delivered to hedge fund clients, and not to investors in hedge funds, the delivery requirement does not provide any benefit of disclosure to hedge fund investors. In these circumstances, requiring delivery of a brochure to hedge fund clients provides no benefit to the hedge fund client (or its investors), though there is a real, and likely significant, cost to the investment adviser.

It is important to note that providing such an exception from delivery of a brochure to hedge fund clients would not materially affect the disclosure of material information to hedge fund investors. All material information about an investment in the hedge fund, which would include much of the information that would be required in the brochure under the Release, is already required to be disclosed to hedge fund investors in the fund's private placement

[3] We believe this is the proper analysis following the federal court decision in *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006).

[4] We note that there are other advisory relationships, such as when a hedge fund manager acts as a sub-adviser to another investment adviser, in which the hedge fund manager's requirement to deliver a brochure applies only to the adviser that is the client of the hedge fund sub-adviser, and not to any underlying fund or other client of the adviser. We believe this provides further support for the argument that the requirement to deliver a brochure extends only to an adviser's client and not to other parties, such as investors in pooled investment products including hedge funds.

memorandum. In considering an exception from requiring the delivery of a brochure, it is also important to consider the sophisticated nature of hedge fund investors, who are capable of requesting, and often do request, information that they deem material from a hedge fund adviser prior to investing in a hedge fund. In light of these protections and the lack of any real benefit from a brochure being delivered to the hedge fund client itself, we request that the Commission extend the exception from delivery of a brochure to include hedge fund clients.

B. Length of brochure

We support the Commission's proposal to require plain English disclosure in the brochure. We recognize that voluminous and detailed disclosure often acts as a deterrent to meaningful disclosure, as clients are likely not to read a brochure if it is too long. We believe that the nature of narrative disclosure, however, particularly in light of the extensive number of items that must be addressed in the brochure, makes it likely that the brochures produced by investment advisers will often be of considerable detail and length. As such, there is a tension between the extensive nature of the disclosures and narrative format called for by the Release on the one hand, and the Commission's goal of plain English disclosure on the other. Exacerbating this tension is the likelihood that concerns about potential liability will encourage hedge fund advisers to draft the disclosures in their brochures more akin to the lengthy and detailed disclosures found in an offering memorandum, rather than the plain English format contemplated by the Commission.[5]

We recognize that there is no easy or bright line test that can determine when a disclosure document has become so long as to discourage clients from reviewing the document. We encourage the Commission, however, in considering the disclosures to be required in the brochure (e.g., disclosure of arbitration awards, cease and desist orders, specialized advisory services),[6] to consider the effect on the overall length of the brochure and the potentially adverse effect of overly long brochures.

C. Posting the brochure on the Commission's website

We recognize and understand the Commission's goal of making the information in advisers' brochures generally available to the public. We are concerned, however, that there are a number of potential legal and policy issues with making the brochure publicly available, and we believe those issues should be resolved before the Commission requires advisers to post their brochures on its website. For example, given the lack of certainty regarding what information in the brochure should be considered material, the public availability of the brochure may expose investment advisers to heightened legal risk if any of the information in the brochure becomes stale or inaccurate. To reduce this potential risk, investment advisers would be forced to continually review and update their brochures throughout the year, which would place an enormous burden on advisers, particularly smaller advisers. We encourage the Commission to further consider the issues related to making the brochure publicly available, particularly

[5] The May 2, 2008 comment letter from Fried, Frank, Harris, Shriver & Jacobson LLP, which discusses an SEC enforcement action citing an adviser's Form ADV Part 2 as being deficient for failing to provide disclosure related to the receipt of travel, entertainment and gifts, provides a good example of how this concern is likely to lead to lengthier, more detailed brochures. The application of Rule 206(4)-8 under the Advisers Act is likely to have the same effect on the brochures of hedge fund advisers.

[6] This list merely contains examples of proposed disclosures that the Commission has specifically sought comment on, and is not meant to be an exhaustive or illustrative list of disclosures to be considered in light of the length of the brochure.

concerns about the increased risk of liability and the resultant compliance burdens on advisers, prior to requiring advisers to post their brochures on the Commission's website.

D. Public availability of the brochure and private offerings

In addition to the potentially negative effect of an overly long brochure on the effectiveness of the brochure as a disclosure document, there is also a concern about the potential effect that making the brochure a publicly available document could have on private offerings of hedge funds. As noted above, many of the disclosures required in the brochure are also provided in a hedge fund's private offering memorandum. In light of the extensive nature of the disclosures that would be required in the brochure under the Release, and the significant overlap between the brochure and the private offering memorandum, many investment advisers to hedge funds may elect to synchronize the brochure and the private placement memorandum into substantively identical documents. A significant reason why advisers may take this approach is that it would help reduce exposure to potential litigation risks, as it would minimize the possibility of the brochure and the private placement memorandum containing materially different (or arguably materially different) disclosures. This approach would help the adviser to ensure consistency between its documents, which, in addition to reducing the adviser's risk of liability, would help ensure consistent disclosure to clients and reduce the compliance burden on the adviser.

Taking such an approach, however, raises the potential issue that having a publicly available brochure, which is substantively identical to a private offering memorandum, could jeopardize the private offering status of a hedge fund. We believe that this result is not intended by the Commission in its proposal to make the brochure publicly available. Further, an adviser's good faith effort to respond to the required disclosures in the brochure should not be viewed as advertising or soliciting investors, nor should such disclosure be considered an offering of interests in a hedge fund, even if the adviser's brochure is substantively identical to the private offering memorandum for a hedge fund client. If the Commission elects to require the brochure be made publicly available on its website, then we believe that the Commission should provide clear guidance that the private offering status of hedge funds would not be affected by disclosures in the publicly available brochure.

In other contexts, the SEC staff has noted that when disclosure is made for purposes of complying with a statute or SEC rule a person should not be subject to liability under other statutes or SEC rules for making such disclosure.[7] Consistent with these staff no-action positions, disclosure which is made for purposes of complying with Form ADV, and not for purposes of advertising or soliciting for a hedge fund, should not implicate the validity of a hedge fund's private offering exemption.

With respect to the proposed brochure, however, many of the disclosure requirements are not specific as to their content, and require an adviser to use its judgment in determining the content of its disclosure. This flexibility, while necessary to ensure adequate disclosure by

[7] See, *e.g.*, *Munder Capital Management*, SEC No-Act, May 17, 1996 (in which the staff agreed that documents relating specifically to a mutual fund are not advertisements for advisory services under Rule 206(4)-1 if they are not designed to maintain existing clients or solicit new clients for the adviser). See, also, *Nicholas-Applegate Mutual Funds*, SEC No-Act, August 6, 1996 (in which the staff stated that a mutual fund prospectus that included an adviser's private account performance would not constitute an advertisement for advisory services).

advisers, creates some uncertainty as to the potential liability of a hedge fund if an adviser were to determine that it would comply with the disclosure requirements of the brochure by synchronizing its private placement memorandum and its brochure into substantively identical documents. In light of this uncertainty, we request that the Commission clearly state as part of the adopting release for amendments to Form ADV that a good faith effort by an investment adviser to comply with the disclosure obligations in the brochure will not subject any hedge fund client of that adviser to potential liability with respect to the private placement of the hedge fund's securities, even if the disclosure in the brochure is substantively identical to the disclosure in the private placement memorandum of the adviser's hedge fund client.

E. Cost Benefit Analysis

In the Release, the Commission staff estimates that the average time burden in the first year for an investment adviser to respond to the proposed changes would be 22.25 hours.[8] We believe that this substantially underestimates the amount of time that would be required to respond to the proposed changes. In particular, we believe that the staff's estimate of the time burdens for smaller advisers (those with fewer than 10 employees) dramatically underestimates the time, and therefore cost, of complying with the revised Form ADV. We request that the staff, in adopting final amendments to Form ADV, and the timing of implementing such changes, reconsider its estimates of the time and cost to investment advisers to implement the changes. To the extent that MFA can be of assistance to the staff in reconsidering the estimated time and cost of implementing the proposed amendments, we would be pleased to provide such assistance.

II. CLARIFICATION ON SPECIFIC PROPOSALS

A. Summary of material brochure amendments

Proposed Item 2 would require an adviser to provide clients with a summary of any material changes to the brochure since the last annual update. We are not aware of any other SEC-registered entity that is required to produce a document for disclosure to the public that summarizes changes to their SEC filings. As such, this requirement appears to place a heightened standard for investment advisers as compared to other entities registered with the SEC. We believe that other alternatives better address the Commission's goal of providing clients with notice of material changes to the brochure. We request, therefore, that the Commission eliminate the requirement to provide a document summarizing the material changes to the brochure.

In lieu of providing a summary of the material changes to the brochure, we believe that an adviser could disclose to clients those Items in the brochure that have been materially revised since the last annual update. This would permit clients to review only those sections with material changes and not the entire brochure. This approach has the benefit of encouraging clients to review new or changed disclosure in context with other relevant disclosure and not as stand alone disclosure, as they might do if there were a separate document summarizing the changes. We believe that such an approach would allow greater understanding of the disclosure by clients and that reviewing only the new or changed disclosure could provide a client with an incomplete understanding of the disclosure. In addition, clients who want further explanation of the changes to the brochure could request that additional information from the adviser.

[8] Release, page 78.

As an alternative to eliminating the requirement to provide a document with a summary of material changes to the brochure, the Commission should provide guidance clarifying the types of changes that would be required to be included in a summary document. The Release does not provide any guidance as to what types of changes should be considered material. In the absence of such guidance, advisers may elect to take a conservative approach and deem most, if not all, changes to be material. Such an approach could dramatically lengthen the summary, which would increase the likelihood of the summary document not being read by clients, thereby eliminating the benefit of having a document that summarizes the changes in the brochure.

B. Specialized advisory services

Proposed Item 4 of the brochure would require an investment adviser that holds itself out as specializing in a particular type of advisory service to provide additional disclosure about the specialized advisory service provided. It is not clear from the Release what types of investment advisers should be deemed to be providing specialized advisory services. We request that the Commission provide clarification on the types of services it deems to be specialized advisory services. We further request that the Commission clarify that a multi-strategy hedge fund manager will not be deemed to be providing a specialized advisory service for purposes of the brochure. We believe this approach is consistent with the distinction made by the staff with respect to Item 8 of the brochure.[9]

C. Fee Schedule

Proposed Item 5 would require an investment adviser to disclose its fee schedule in the brochure. It is unclear, however, what level of specificity would be required in the proposed fee schedule. We do not believe that the fee schedule should be required to include the specific fees charged to clients, as this level of disclosure would make the fee schedule unnecessarily complex and confusing to clients. We encourage the SEC to engage in discussions with industry participants to determine the appropriate level of specificity to be included in the fee schedule. MFA would be pleased to engage in dialogue with the staff on this issue.

D. Conformity with state obligations

In footnote 8 of the Release,[10] the Commission notes that Form ADV is used by advisers to register both with the SEC and with state regulatory authorities. The footnote states that, with respect to the proposed changes to Form ADV, the SEC understands that, "state securities authorities intend to make similar changes that affect advisers registered with the states." We note that currently there is a lack of uniformity among states as to when an SEC-registered adviser is required to make a notice filing in a state. The lack of consistency among state regulators with respect to filing obligations is a significant cause of uncertainty and cost to the industry, which is a competitive disadvantage for U.S.-based investment advisers. We encourage the Commission to work closely with state regulators to ensure a consistent approach to state filing obligations, both for SEC-registered advisers and state registered advisers.

[9] See, Item 8, Methods of Analysis, Investment Strategies and Risk of Loss. Release, pages 21, 22.
[10] Release, page 6.

III. PROPOSED REVISIONS

A. Delivery of brochure supplement

Proposed Part 2B would require investment advisers to deliver a brochure supplement to clients, with the exception of certain types of clients identified in the Release. The brochure supplement would include information about certain of the adviser's investment personnel. The Release states that investment advisers would not be required to deliver a brochure supplement to "clients to whom an adviser is not required to deliver a firm brochure."[11] Consistent with our comment in Section I.A. above, if investment advisers are not required to provide a brochure to their hedge fund clients, they would also be excepted from delivering a brochure supplement to those clients.

Even if investment advisers to hedge funds are not excepted from delivering a brochure to their hedge fund clients, we believe they should be excepted from delivering a brochure supplement to such clients. As proposed in the Release, investment advisers would not be required to deliver brochure supplements to clients that are "qualified purchasers." Many hedge funds would fit within this exception. The Release states that the qualified purchaser exception was added to the categories of excepted clients that were included in the Original Release in response to arguments that "certain institutional and sophisticated clients do not need the protections of the brochure supplement requirement because they are in a position to obtain, and frequently do obtain, information about the advisory personnel on whom they rely for investment advice."[12]

We agree with this argument, and believe that it is applicable to all hedge fund clients, regardless of whether the hedge fund meets the definition of "qualified purchaser." Hedge fund clients themselves are not in need of the protections of the brochure supplement requirement because, as noted with respect to the delivery of the brochure, the client recipient of the brochure supplement with respect to hedge funds typically would be a general partner comprised of the same key personnel as the investment adviser. Further, because all hedge fund investors are highly sophisticated investors (to whom there is no requirement to deliver the brochure supplement), they do not need the protections of the brochure supplement and the information disclosed therein. As with qualified purchasers, these sophisticated investors are in a position to obtain, and frequently do obtain, information about the adviser's personnel that they consider to be material. As such, we request that the Commission amend the exception for delivery of the brochure supplement to include all hedge fund clients, and not just those that meet the definition of "qualified purchaser."

If the Commission elects not to exempt delivery of the brochure supplement to all hedge fund clients, we request the Commission narrow the scope of supervised persons for whom a brochure supplement must be prepared with respect to hedge fund clients. As currently drafted, we believe the Release could require brochure supplements to be prepared for a significant number of personnel at a hedge fund adviser, beyond the key personnel about whom information should be considered material. Further, the attempt to limit the application of the brochure supplement by reference to client contact does not adequately address hedge fund advisers, as it is unclear what client contact means with respect to a hedge fund client. Given the sophisticated nature of hedge fund clients and the investors in hedge funds, we believe that a more narrowly

[11] Release, page 56.
[12] Release, pages 57-58.

tailored approach is appropriate for hedge fund advisers, as hedge funds and their investors are capable of requesting additional information if they believe it to be material. We request that, with respect to hedge fund advisers, the Commission narrow the scope of supervised persons for whom brochure supplements need to be prepared to senior portfolio managers who have final investment decision making authority, as we believe information about other personnel at a hedge fund manager is not likely to be material.

B. Statement of adviser qualification

Footnote 24 of the Release would require a registered investment adviser to include on the cover page of its brochure an explanation that, "registration with the SEC does not imply that the adviser possesses a certain level of skill or training."[13] The footnote notes that Section 208(a) of the Investment Advisers Act prohibits an investment adviser from representing or implying that registration with the SEC means that the adviser "has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or any officer thereof."[14]

The proposed requirement in footnote 24, however, goes beyond this statutory prohibition by requiring an adviser to affirmatively state that its registration does not imply that the adviser possesses a certain level of skill or training. Moreover, we are not aware of any other SEC-registered entity that is required to make an affirmative statement of this nature. We believe that requiring investment advisers to make such affirmative statements is unnecessary and not required under the Investment Advisers Act. As such, we request the Commission remove this requirement from Item 1 of the brochure.

IV. CONCLUSION

MFA appreciates the opportunity to provide comments to the Release. We support the Commission in its efforts to provide clearer and more meaningful disclosure to clients. Notwithstanding our general support of the Release, however, we believe that the proposed clarifications and revisions discussed above will help achieve the Commission's goals without placing undue or unnecessary burdens on registered investment advisers. We welcome an opportunity to meet with Commissioners and staff if it would provide assistance to your rulemaking efforts. Please do not hesitate to contact me or Benjamin Allensworth with any questions at (202) 367-1140.

Respectfully submitted,

Richard H. Baker
President and Chief Executive Officer

[13] Release, page 11.
[14] Investment Advisers Act §208(a).