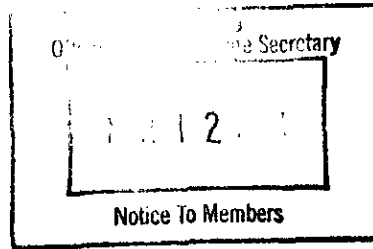


THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK, NY 10036-6689

COMMITTEE ON FUTURES REGULATION

RITA M. MOLESWORTH
CHAIR
787 SEVENTH AVENUE
NEW YORK, NY 10019
(212) 728-8727
FAX: (212) 728-8111
rmolesworth@willkie.com

DEBORAH A. TUCHMAN
SECRETARY
787 SEVENTH AVENUE
NEW YORK, NY 10019
(212) 728-8491
FAX: (212) 728-8111
dtuchman@willkie.com



VIA HAND DELIVERY

March 12, 2004

Ms. Barbara Z. Sweeney
NASD
Office of the Corporate Secretary
1735 K Street, NW
Washington, D.C. 20006-1500

Re: Notice to Members 04-07: Regulation of Compensation, Fees, and Expenses in Public Offerings of Real Estate Investment Trusts; Direct Participation Programs, including Commodity Pools; and Closed-End Funds

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 Notice to Members Concerning Regulation of Compensation, Fees, and Expenses in Public Offerings of Real Estate Investment Trusts; Direct Participation Programs, including Commodity Pools; and Closed-End Funds, as issued February, 2004 (the "Notice"). The Committee's comments are limited to Section 2 of the Notice – Commodity Pool Trail Commissions.

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 counseling the sponsors and operators of publicly offered funds, their advisors and brokers. The Committee appreciates the opportunity to comment on the Notice and stands ready to assist the NASD and its staff if further clarification is required on any of the points raised in this letter.

The proposed rescission of the unpublished but traditional policy of the Corporate Financing Department (the "Department") concerning the payment of trail commissions in publicly offered commodity funds is a significant change in the Department's and the NASD's approach to the historical treatment of these payments for purposes of the

NASD's rule and interpretations. As the Notice states, the treatment of trail commissions as commodity-related payments not subject to the 10% cap on underwriting compensation has been the Department's unpublished policy since 1982.

The administrative procedures that will apply to the proposal for rescission are not clear. In the section of the Notice captioned "Request for Comment," it appears that the contents of the Notice will universally be subject to the procedural steps stated there, namely approval by the NASD Regulation Board of Directors, possible review by the NASD Board of Governors, and approval by the Securities and Exchange Commission. However, members of the Committee have learned from staff that, because the policy in question is not a "rule", the proposed rescission might not be subject to such review and approval, and could be implemented directly by staff. The Committee believes that due to the ambiguous treatment of this point in the Notice and the long-standing nature of this policy, staff should treat the Section 2 proposals in the same manner that it treats the other portions of the Notice, and follow the full review and approval procedures outlined under "Request for Comment." We believe that the proposed change in policy is tantamount to a rule change and therefore should be subject to the same procedural requirements.

The Notice states only the proposal to rescind the policy that permits the payment of trail commissions without treating them as selling compensation subject to the 10% cap on underwriting compensation in Rule 2810. No transitional steps are outlined, and it is not clear when the rescission, if adopted, would be effective or how it would be applied to existing publicly offered commodity funds that currently are paying trail commissions without being subject to the 10% cap of Rule 2810.

The payment of trail commissions by publicly offered futures funds are contractual obligations embodied in legally enforceable agreements approved by NASD staff that provide for such payments to be made to qualified recipient firms and their representatives who hold the necessary regulatory qualifications. These agreements created ongoing payment obligations on the part of the funds or their affiliates, and corresponding rights for the recipients. The Committee believes that in order for the NASD member firms and funds potentially affected by the proposed rescission to have an opportunity to assess the consequences of any such rescissions to their respective businesses and to the investors in affected funds, transition periods to allow for compliance with any proposed change to the NASD's long-standing trail commissions policy should be the subject of additional communication to members. Questions that should be addressed in such a communication include:

1. When would the proposed rescission take effect?
2. What is the consequence for the already registered units of existing funds?

3. Would the policy only apply to units **registered** after the effective date of the rescission?
4. What policy would apply to units **registered** prior to the effective date of any policy rescission?

The Committee anticipates that the alteration of policy with respect to existing funds could impose significant costs on funds or their sponsors as changes are required in accounting systems and software, as well as in administrative procedures. Funds typically offer a single class of units for sale at a single net asset value per unit. To the extent that units sold prior to the effective date of any policy change are outstanding, dual net asset values are likely to be necessary for some funds, but the ability of funds and their sponsors to accomplish such changes are likely to be limited by the applicable limited partnership agreements and other contracts. Moreover, if limited partner approval is required in order to change material aspects of limited partnership agreements, public funds might be required to engage in a proxy solicitation, requiring filings with the Securities and Exchange Commission, commodity futures regulators and possibly the states where units are offered. Without a detailed proposal covering significant questions related to a transition policy, it is not possible for the Committee or other interested parties to address fully the possible consequences of the proposed rescission.

Although outside the Department's strict concerns with underwriting compensation, the Committee thinks it important to address the issue of the permissibility of paying trail commissions without a cap with an understanding that rescission of the policy will have uncertain consequences on the future offering of public commodity funds. It is generally acknowledged by the investment community and regulators that such funds offer retail investors the most efficient way of accessing derivatives markets for investment purposes. The benefits of investment through a public fund are typically described as access to experienced managers with proven track records at an investment level below that at which such managers will typically accept accounts; limited liability; daily valuations; monthly and in some cases weekly liquidity; and oversight by the staff of a commodity pool operator experienced in evaluating performance as well as managing risk. The alternatives -- privately offered funds and individually managed accounts -- are both subject to significantly less regulatory oversight than are publicly offered funds and are generally not available to retail investors. Moreover, a managed account, unlike an investment in a commodity pool, subjects the owner to an unlimited risk of loss. The practice of paying trail commissions developed from the practices of commodities brokerage firms that paid their associated persons commodity brokerage commissions in connection with accounts they developed. As individually managed accounts came to be seen as having several negative aspects, such as unlimited liability for the investor and high commissions, many brokerage firms closed their individually managed account programs, and provided public funds as the alternative method for accessing these markets, carrying over the practice of paying commodity brokerage to those who sold

Barbara Z. Sweeney

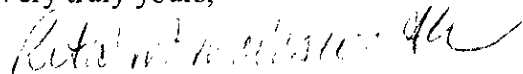
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commodity pools and continued to provide services to fund investors with respect to their investments in the commodity pools.

The Committee stands ready to assist the Department with further information or other assistance regarding this important matter.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Rita M. Molesworth".

Rita M. Molesworth

Association of the Bar of the City of New York
Committee on Futures Regulation
Rita M. Molesworth, Chair*
Deborah A. Tuchman, Secretary

Samuel F. Abernethy
Joao Lauro Amaral
Conrad Bahlke
Maryann Canfield*
Gregory Collett
De'Ana DowΦ
Lawrence Eckert*
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Frank Ochsenfeld
Ronald Oppenheimer
Nikki Poulos
Brian Regan
Michael Sackheim
James Sanders
Edmund Schroeder
Stephen Selig
Gary Stumpp
Michael Watkins
Adam Wernow
Barbara Wierzynski
Mark Woodall
David Yeres
Edward Zabrocki

* Member of Subcommittee that drafted this letter of comments.

** Chair of Subcommittee that drafted this letter of comments.

Adjunct Members

Carla Colone
Cindy Ma
Stephen J. Obie
Michael Piracci

Φ Ms. Dow abstained from participating in this letter of comments.