

NEW YORK
CITY BAR

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May 9, 2008

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

Re: SEC Release Nos. 33-8901; IC-28193 (File No. S7-07-08)

Dear Ms. Morris:

The Committee on Private Investment Funds of The Association of the Bar of The City of New York (the "Committee") is composed of lawyers with diverse perspectives on investment advisory issues, including members of law firms and counsel to private advisory and financial services firms. The Committee focuses on, among other things, the issues, trends and regulations relating to a wide variety of private investment funds, including hedge funds, buyout funds, venture capital funds, mezzanine funds, distressed funds and funds of funds. (*A list of our current members is attached.*)

The Committee is pleased to submit this letter in response to a request by the Securities and Exchange Commission (the "Commission") to provide comments on the proposed rules and amendments entitled "Exchange-Traded Funds", Securities Act Release No. 8901; Investment Company Act Release No. 28193 (Mar. 11, 2008) (the "Release"). Specifically, we urge the Commission to extend its proposed new rule that would allow mutual funds (and other types of investment companies) to invest in exchange-traded funds ("ETFs") to a greater extent than currently permitted under the Investment Company Act of 1940, as amended (the "1940 Act"), to unregistered funds as well.

Proposed Rule 12d1-4 under the 1940 Act (the "Proposed Rule") would permit open-end and closed-end management companies (including business development companies ("BDCs")) and unit investment trusts ("UITs") that comply with the rule's conditions to invest in ETFs beyond the limits of Section 12(d)(1) of the 1940 Act, which currently precludes a fund (and companies or funds it controls) from, *inter alia*, acquiring more than three percent of an ETF.

The Release notes that the four conditions included in the Proposed Rule are designed to address the historical abuses that result from pyramiding and the threat of large-scale redemptions that may arise in connection with investments in ETFs. Briefly, these conditions are that:

1. the acquiring fund (and any entity in a control relationship with the acquiring fund) does not "control" (as defined in the Proposed Rule) the ETF;
2. an acquiring fund that relies upon the Proposed Rule to acquire more than three percent of an ETF's shares may not redeem those shares directly from the ETF (but would be free to sell those shares in a secondary market transaction), and similarly, an ETF relying on the Proposed Rule to sell more than three percent of its shares to an acquiring fund may not redeem those shares;
3. the acquired ETF may not itself be a fund of funds (to prevent the formation of the overly complex multi-tiered structures that Section 12(d)(1) was designed to prevent); and
4. any sales charge and service fees charged by the acquiring fund would be limited to those set forth in the Financial Industry Regulatory Authority's sales charge rule, to prevent duplicative fees at the acquiring and acquired fund levels.

The Release notes that both registered and unregistered funds are subject to the limits of Section 12(d)(1)(A)¹, but the Commission has limited the scope of the Proposed Rule to open-end and closed-end management companies (including BDCs) and UITs without explanation or discussion, other than to state that it has had the opportunity to consider a request for individual exemptive orders only from registered management funds and UITs, and that it does not anticipate that providing a similar exemption for BDCs "would raise particular concerns that Section 12(d)(1) was designed to address."²

It is our understanding that unregistered funds, *i.e.*, funds that are excepted from the definition of "investment company" pursuant to Section 3(c)(1) or Section 3(c)(7) of the 1940 Act, often invest in ETFs in pursuing their investment objectives and strategies, as ETFs may afford exposure to one or more markets or market segments on a cost-effective and liquid basis. We have been informed, however, that on occasion such funds have been constrained as to the amount of ETF shares they may acquire due to the limits imposed by Section 12(d)(1)(A).

We believe that the conditions that the Commission has included in the Proposed Rule properly address the concerns underlying Section 12(d)(1)(A), and that so long as those conditions are observed the intent of that Section will not be frustrated, regardless of whether the acquiring fund is a mutual fund, a closed-end fund, a BDC, a UIT or an unregistered fund. Furthermore, by extending the proposed relief to unregistered funds, which as the Commission has recognized have become major participants in the U.S. securities markets³, the depth and liquidity of the market for ETF shares may be substantially enhanced. Accordingly, in the absence of any stated policy concerns, we respectfully request that the Commission extend the Proposed Rule to include

¹ Release at n.194.

² Release at page 79. See also Release at n.238.

³ See Staff Report to the United States Securities and Exchange Commission, Implications of the Growth of Hedge Funds (Sept. 2003).

unregistered funds, subject to the first three conditions noted above. The fourth condition, i.e., that any sales charge and service fees charged by the acquiring fund be limited to those set forth in the Financial Industry Regulatory Authority's sales charge rule, should not apply to unregistered funds, since that rule applies only to sales activities in connection with securities of registered investment companies. Furthermore, since the investors in unregistered funds are generally limited to sophisticated, high net worth individuals or institutional investors who are fully capable of understanding the direct and indirect fees and other charges to which they are subject, we do not believe any analogous condition needs to be imposed.

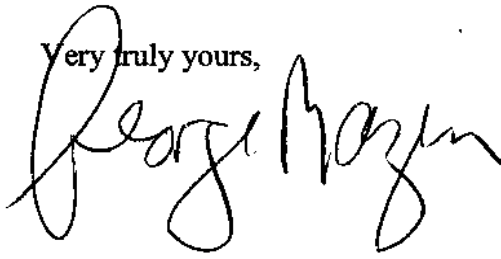
On a separate point, we note that private investment funds are subject only to the limits in Section 12(d)(1)(A)(i) that preclude them from acquiring more than three percent of a registered fund's voting securities and Section 12(d)(1)(B)(i) that preclude a registered fund from selling more than three percent of its voting securities to such a private investment fund, and are not limited by Section 12(d)(1)(A) as to the amount of their own securities that may be sold to a registered investment company.⁴ To the extent that footnote 194 of the Release indicates that registered funds are limited by Section 12(d)(1)(A) as to the amount of securities of an unregistered fund they may acquire, or that an unregistered fund is also subject to the 5% and 10% limits of Sections 12(d)(1)(A)(ii) and 12(d)(1)(A) (iii),⁵ we respectfully request that the Commission clarify in any subsequent proposing or adopting release the more limited applicability of Section 12(d)(1)(A) to unregistered funds.

We hope that these comments provide assistance to the Commission. Please note that the comments set forth in this letter by the Committee do not necessarily represent the views of the firms or companies with whom the Committee members are associated or the clients that they represent.

4 Section 3(c)(1) and Section 3(c)(7) each provides that an issuer operating under that exemption is deemed to be an investment company "for purposes of the limitations of subparagraphs (A)(i) and (B)(i) of Section 12(d)(1) governing the purchase or other acquisition by such issuer of any security issued by any registered investment company and the sale of any security issued by any registered open-end investment company to any such issuer" (emphasis added).

5 Footnote 194 of the Release states as follows: "Both registered and unregistered funds are subject to [the Section 12(d)(1)(A)] limits with respect to their investments in a registered fund. Registered funds are also subject to these same limits with respect to their investments in an unregistered fund. Unregistered funds are not subject to limits on their investments in another unregistered fund. ETFs are registered funds and therefore both registered and unregistered funds are subject to section 12(d)(1)(A)'s limits with respect to investments in ETFs. Section 12(d)(1)(B) prohibits a registered open-end fund from selling any security issued by the fund to any other fund (including unregistered funds) if, after the sale, the acquiring fund would: (i) together with companies and funds it controls, own more than three percent of the acquired fund's voting securities; or (ii) together with other funds (and companies they control) own more than ten percent of the acquired fund's voting securities" (emphasis added)."

Very truly yours,

A handwritten signature in black ink, reading "George J. Mazin". The signature is written in a cursive style with a large, looping initial "G".

George J. Mazin, Chair
Committee on Private Investment Funds

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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