

MEMO# 17947

September 7, 2004

INSTITUTE DRAFT COMMENT LETTER ON SEC PROPOSAL REQUIRING HEDGE FUND ADVISERS TO REGISTER UNDER THE INVESTMENT ADVISERS ACT

[17947] September 7, 2004 TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 35-04 INTERNATIONAL COMMITTEE No. 42-04 INVESTMENT ADVISERS COMMITTEE No. 14-04 SEC RULES COMMITTEE No. 75-04 RE: INSTITUTE DRAFT COMMENT LETTER ON SEC PROPOSAL REQUIRING HEDGE FUND ADVISERS TO REGISTER UNDER THE INVESTMENT ADVISERS ACT As we previously informed you,* the Securities and Exchange Commission has published for comment a new rule and rule amendments under the Investment Advisers Act of 1940 that would require advisers to hedge funds to register with the Commission under the Advisers Act. As a result, these advisers would be required to comply with the Advisers Act and the rules thereunder and would be subject to inspection by Commission examiners. SEC Commissioners Cynthia A. Glassman and Paul S. Atkins dissented from the majority's proposal. The Institute has prepared a draft comment letter on the Commission's proposal, which is attached. Comments on the proposal must be filed with the Commission no later than September 15, 2004. We encourage members to submit their own comment letters to the Commission, particularly members that advise hedge funds. We ask that you provide us a copy of any comment letters filed. Please provide your comments on the draft letter to the undersigned by phone (202-371-5410), fax (202-326-5827), or e-mail (jheinrichs@ici.org) or to Dorothy Donohue by phone (202-218-3563), fax (202-326-5827) or e-mail ddonohue@ici.org by Monday, September 13th. The most significant aspects of the draft letter are summarized below. • The draft letter supports requiring hedge fund advisers to register with the Commission, because registration will provide the Commission with meaningful information about this significant and growing segment of the securities markets, without adversely impacting the legitimate operations of hedge fund advisers. The * See Memorandum to Closed-End Investment Company Committee No. 31-04, International Committee No. 41-04, Investment Advisers Committee No. 11-04, and SEC Rules Committee No. 65-04, dated July 28, 2004 [17829]. 2 letter also points out that registration will enable the Commission to proactively address potentially fraudulent activities in the hedge fund industry. • The draft letter disagrees with the dissent's recommendation to delay Commission action by further study of the hedge fund industry. • The draft letter opposes, as an alternative to registration, requiring hedge fund advisers to file notices and periodic reports with the Commission, because this approach does not provide the Commission with examination authority. • The draft letter notes the importance of the requirement that advisers keep records to support their performance claims and our recognition that excepting hedge fund advisers from this

requirement is an accommodation to permit them to communicate their performance history to clients. • The draft letter supports the Commission's proposal to limit the extraterritorial application of the Advisers Act by not applying the substantive provisions of the Advisers Act to offshore advisers to offshore funds; however, the letter urges the Commission to monitor this exception to ensure that there are not any unintended consequences. • The draft letter also recommends that the Commission clarify that it will have access to certain records of offshore advisers to offshore funds to enable it to enforce a registered foreign adviser's performance of its obligations to its U.S. clients and to ensure the integrity of U.S. markets. • The draft letter supports not requiring advisers of regulated, publicly-offered offshore funds to register with the Commission, but urges the Commission to interpret the exception narrowly and monitor its use so that it cannot be used by advisers to hedge funds to avoid registering with the Commission. • The draft letter supports permitting a hedge fund's current investors who are not qualified clients to retain their existing investment in that fund, and to add to their accounts. Jane G. Heinrichs
Assistant Counsel Attachment (in .pdf format)

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