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April 12, 2011

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Mr. David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

*Re: Request for Comment on Proposed Rules Under the Commodity Exchange Act and the Investment Advisers Act of 1940 to implement provisions of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act; File No. S7-05-11*

Dear Ms. Murphy and Mr. Stawick:

We submit this letter in response to the request of the U.S. Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC") in Release No. IA-3145 (the "Release")<sup>1</sup> for comment on proposed Rule 204(b)-1 and Form PF under the Investment Advisers Act of 1940 (the "Advisers Act"),<sup>2</sup> and proposed Rule 4.27(d) under the Commodity Exchange Act<sup>3</sup> (collectively, the "Proposal"). The Proposal is designed to implement provisions of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

Seward & Kissel LLP has a substantial number of clients who would be affected by the adoption of the Proposal. We respectfully submit the following comments and request that the SEC consider them before adopting the Proposal. The views we express in this letter, however, are our own and do not necessarily reflect those of our clients.

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<sup>1</sup> Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Investment Advisers Act Release No. IA-3145, 76 Fed. Reg. 8068 (February 11, 2011).

<sup>2</sup> Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 et seq.

<sup>3</sup> Commodity Exchange Act, 7 U.S.C. 1 et seq.

## **I. Reporting by Private Fund Advisers on Form PF**

The SEC has proposed Rule 204(b)-1, which would require an SEC-registered investment adviser that advises one or more “Private Funds”<sup>4</sup> (“Reporting Private Fund Adviser”) to file Form PF at least annually with the SEC. A Reporting Private Fund Adviser would be required to file Form PF within 90 days of the end of its fiscal year, and a Reporting Private Fund Adviser managing in excess of \$1 billion in “hedge fund assets under management”<sup>5</sup> as of any day within a calendar quarter (“Large Private Fund Adviser”) would be required to make a more extensive version of the filing within 15 days of the end of such calendar quarter. The proposed Form PF would require a Reporting Private Fund Adviser to disclose certain information including: assets under management, amounts borrowed, creditors, counterparties, monthly hedge fund performance and investment strategies. In addition to this information, proposed Form PF would require a Large Private Fund Adviser to disclose information such as monthly portfolio exposures (both in the aggregate and per hedge fund advised), turnover rates, geographical breakdown of investments in the portfolio, portfolio liquidity, investor concentration, investor liquidity and risk management. Furthermore, under the Proposal, a Reporting Private Fund Adviser that is also registered with the CFTC as a commodity pool operator (“CPO”) or a commodity trading adviser (“CTA”), would be required to file proposed Form PF and a portion of the CFTC's proposed systemic risk reporting forms, Form CPO-PQR and Form CTA-PR.

### **A. The SEC Should Ensure That the Information Disclosed on Form PF Remains Confidential**

Proposed Form PF will require a Reporting Private Fund Adviser to disclose significant amounts of highly sensitive, current information, which, if made publicly available, would compromise advisers and their clients.<sup>6</sup> We recommend that the SEC develop policies that take into consideration the significant harm that may result from the unintentional release of confidential information.

The SEC will share the information obtained from Form PF filings with the Financial Stability Oversight Council (the “Council”).<sup>7</sup> The Council and the SEC intend to work with foreign regulators by coordinating the monitoring and sharing of information obtained through systemic risk filings, such as Form PF. We request that the SEC address how the information

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<sup>4</sup> A “private fund” is defined in Section 202(a)(29) of the Advisers Act as any issuer that would be an investment company as defined in Section 3 of the Investment Company Act of 1940 but for sections 3(c)(1) or 3(c)(7) of that Act.

<sup>5</sup> “Hedge fund assets under management” is defined in the form as, with respect to any adviser, the “portion of such adviser’s regulatory assets under management that are attributable to hedge funds that it advises.” 76 Fed. Reg. at 8147. Under certain circumstances, Reporting Private Fund Advisers will be required to aggregate assets, including assets held in managed accounts pursuing substantially the same investment objectives and strategies as the Private Funds advised by the Reporting Private Fund Adviser.

<sup>6</sup> In light of the extensive disclosure required on proposed Form PF, which is intended to remain confidential, we request the SEC re-evaluate the information requested in Item 7 of proposed Form ADV Part 1A (which will be publicly available). The sensitive information requested in Item 7 of proposed Form ADV Part 1A is more consistent with the goal of Form PF, which is to assess systemic risk, than the goals of Form ADV.

<sup>7</sup> 76 Fed. Reg. at 8090.

will be protected as it is shared with other regulators, both domestic and foreign, that may not be subject to the same confidentiality regulations as the SEC or the Council. We recommend that any information shared with foreign regulators be in an anonymous form.

The Release states that the SEC “does not intend to make public Form PF information identifiable to any particular adviser or private fund.”<sup>8</sup> The SEC should provide clarity on what Form PF information it intends to make public and how it intends to keep any information that is disclosed to the public from being identifiable to an adviser or fund. To ensure that information identifiable to any particular adviser or Private Fund is not inadvertently made public, we propose that the SEC revise the form to remove all identifying information. In lieu of providing identifying information directly on the form, such information could be provided on an addendum which assigns an anonymous identifier to the adviser (and the addendum could be separately updated if any of the identifying information becomes incorrect or out-of-date). The anonymous identifier would be the sole identifier on Form PF. At a minimum, this would ensure that any leaked information would not be as easily identifiable to any particular adviser or Private Fund.

**B. The SEC Should Consider Making Form PF a Voluntary Filing for an Initial Pilot Period**

The Release describes the SEC's consultations with foreign regulators, including the United Kingdom's Financial Services Authority (the “FSA”). Since October 2009, the FSA has conducted a survey similar to Form PF on a semi-annual basis to further identical goals of understanding the potential systemic risk posed by hedge funds. Unlike proposed Form PF, the FSA's survey is voluntary. The most recent report from the FSA's survey was released in February 2011 and was based on responses from approximately 50 investment advisers managing approximately \$380 billion. The FSA estimated that the survey captured approximately 20% of the global hedge fund industry.<sup>9</sup> Additionally, after having conducted the survey for over a year, the FSA plans to continue conducting the survey on a semi-annual and voluntary basis. In contrast, although Form PF is partially modeled after the FSA's semi-annual hedge fund survey,<sup>10</sup> the SEC proposes that Form PF be a compulsory filing required on a more frequent basis.

In light of the significant burden imposed on Reporting Private Fund Advisers by proposed Form PF, and the fact that "systemic risk" remains undefined, the SEC should consider requesting that Form PF be filed on a voluntary basis, at least during an initial implementation period (i.e., for the first two years). Under such a "pilot program," the SEC, the CFTC and the Council would be able to gauge the usefulness of Form PF in evaluating systemic risk, the effectiveness of the new Form PF filing system and the burden to the SEC of reviewing and processing the information received on Form PF.

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<sup>8</sup> 76 Fed. Reg. at 8071.

<sup>9</sup> FSA, Assessing the possible sources of systemic risk from hedge funds (Feb. 2011), available at: [http://www.fsa.gov.uk/pubs/other/hf\\_survey.pdf](http://www.fsa.gov.uk/pubs/other/hf_survey.pdf).

<sup>10</sup> 76 Fed. Reg. at 8080.

**C. Form PF Imposes Significant Burdens**

Under the Proposal, each SEC-registered investment adviser that advises one or more Private Funds would be required to complete Form PF, regardless of size. Furthermore, under the Proposal, a Large Private Fund Adviser would be required to complete Form PF on a quarterly basis no later than 15 days after the end of each calendar quarter. This imposes an unnecessary burden on smaller advisers (which are less likely to pose systemic risk) and an unwieldy burden on Large Private Fund Advisers (which will likely be unable to gather the required information in 15 days).

*To reduce the unnecessary burden on smaller advisers, the SEC should establish a minimum threshold for filing Form PF and increase the minimum threshold for a Large Private Fund Adviser.*

Due to the significant burden imposed by Form PF, SEC registration should not be the sole factor used for determining whether an adviser is required to file Form PF. Depending on the requirements imposed by the state in which an adviser principally does business, an adviser that manages client assets and one Private Fund with aggregate assets of as little as \$26 million could be required to register with the SEC and, consequently, would have to file Form PF. The SEC should therefore establish a minimum threshold for filing Form PF. We believe that setting a minimum threshold for reporting is consistent with the Dodd-Frank Act's mandate to monitor systemic risk, yet strikes a balance between the cost and benefit of such a reporting system. We further recommend that the threshold for determining Large Private Fund Adviser status be increased to at least \$5 billion.

*The SEC should provide Large Private Fund Advisers with significantly more time to calculate their assets and prepare their Form PF filings.*

Under the Proposal, a Reporting Private Fund Adviser is deemed a Large Private Fund Adviser (and a hedge fund would be deemed a "qualifying fund") if the manager or fund exceeds the applicable threshold (i.e., \$1 billion in hedge fund assets under management for a manager, and for a fund, a net asset value of \$500 million) as of the close of business on any day during the most recent calendar quarter. To assess whether a Reporting Private Fund Adviser (or fund) exceeds this threshold, a Reporting Private Fund Adviser would be required to calculate and monitor its hedge fund assets under management on a daily basis. Requiring daily calculations of an adviser's assets under management is unreasonable. Many advisers invest client portfolios in illiquid assets, which are difficult to value and, consequently, may be valued on a significantly less frequent basis. In addition, many advisers manage funds-of-funds which invest in underlying Private Funds that neither calculate nor provide to their investors their net asset value on a daily basis. We recommend that the SEC re-evaluate the proposed daily calculation requirement. For example, a calculation based on the last trading day of each month would be more aligned with the current practices of most advisers and would be more consistent with the current requirements of other SEC filings, such as Form 13F. Form 13F requires filers to make a similar calculation on the last trading day of each month.

The SEC also requests comment on whether 15 days would be sufficient for Large Private Fund Advisers to prepare and file Form PF.<sup>11</sup> The Release proposes that a Reporting Private Fund Adviser (other than a Large Private Fund Adviser) complete and file Form PF on an annual basis, and a Large Private Fund Adviser complete and file Form PF no later than 15 days after the end of each calendar quarter. We believe the proposed time period is not sufficient because a significant portion of the information required by Form PF is not easily obtainable in such a short amount of time.

We note that the SEC's burden estimate for quarterly reporting by a Large Private Fund Adviser is approximately 75 hours for the initial filing.<sup>12</sup> Although we believe that the SEC underestimates the actual amount of time a Large Private Fund Adviser will require to prepare the initial filing, it also demonstrates that 15 days is an inadequate amount of time. Assuming that one full-time employee is tasked specifically and solely with preparing Form PF, and that such employee spends every hour of each consecutive work-day preparing Form PF, it will take such employee slightly longer than two full weeks to complete the initial filing, which exceeds the 15-day time period allotted by the SEC. It also assumes that all of the required information will be available the day on which the reporting period ends (which is not likely to be the case). This is in stark contrast with the 45 days Form 13F filers are given to complete Form 13F, which has an estimated burden of 23.5 hours and is a much less comprehensive form. We suggest that Large Private Fund Advisers be given at least 120 days to aggregate this information and make the required quarterly filings.

**D. Information Disclosed on a Good Faith Basis on Form PF Should Not be Used in a Prejudicial Manner**

The Release states that the SEC may use the information disclosed on Form PF in an enforcement action and the SEC's other regulatory programs, including examinations and investor protection efforts. As discussed above, significant portions of the information requested on Form PF may be difficult to obtain quickly, and in many cases, may be forward-looking or estimated. For example, Form PF requests information regarding the percentage of portfolio holdings that can be liquidated within a certain number of days, the percentage of the NAV that can be returned to the investors within a certain number of days, and how the portfolio would be affected by various market movements, including changes in interest rates, default rates and commodity prices. Many of the responses to these questions will be subjective and will be based on available information that is likely to change on a day to day basis. Some of the responses will necessarily be either estimates or based on unaudited data. The SEC should confirm that it will not use the forward-looking or estimated information disclosed on Form PF in a manner that would prejudice a Reporting Private Fund Adviser, provided that such information is disclosed on a good faith basis.

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<sup>11</sup> 76 Fed. Reg. at 8078.

<sup>12</sup> 76 Fed. Reg. at 8085.

**E. The Proposed Definition of Hedge Fund Should be Revised**

The SEC requests comment on the hedge fund definition proposed on Form PF.<sup>13</sup> Under the Release, "hedge fund" is defined as any Private Fund that: (a) has a performance fee or allocation calculated by taking into account unrealized gains; (b) may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including committed capital); or (c) may sell securities or other assets short.

We believe that the proposed definition is overly broad. Simply having the authority to sell short or borrow in excess of a certain amount should not make an entity a "hedge fund." The Release states, "we are not aware of any standard definition of a hedge fund, although we note that our proposed definition is broadly based on those used in the FSA survey and the International Organization of Securities Commissions ("IOSCO") report and thus generally would promote international consistency in hedge fund reporting." However, both the FSA survey and the IOSCO report generally consider as a hedge fund, investments which display a combination of characteristics, including those in the SEC's proposed definition of a "hedge fund." The FSA and IOSCO consider, among other factors, the investment strategies used, the pursuit of absolute returns, the fee structures, the minimum investment limit, borrowing and leverage restrictions, and redemption frequency. The SEC definition is overly broad and will have implications beyond the scope of Form PF, as it will likely become a general definition of the term and will be widely used within the industry. We therefore recommend that the SEC revise its proposed definition to include a Private Fund that satisfies a combination of the criteria currently described in the Release.

**F. The SEC should continually assess the effectiveness of Form PF in accomplishing the goals mandated by the Dodd-Frank Act**

As discussed in the Release, in enacting Sections 404 and 406 of the Dodd-Frank Act, Congress determined to require that Private Fund advisers file reports with the SEC and specified certain types of information that should be subject to reporting and/or recordkeeping requirements, but left to the SEC the determination of the specific information to be maintained or reported.<sup>14</sup> In particular, the SEC is charged with determining the form and content of such reports and may require that reports be filed "as necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk". We believe that the information required by the current form proposed by the SEC is overly broad and could be revised to be less intrusive, while meeting the statutory requirements of Sections 404 and 406 of the Dodd-Frank Act. In light of the significant costs that would be imposed by proposed Form PF, we recommend that the SEC continually evaluate the effectiveness of the form as a tool in monitoring systemic risk.

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<sup>13</sup> 76 Fed. Reg. at 8076.

<sup>14</sup> 76 Fed. Reg. at 8087.

Ms. Murphy and Mr. Stawick  
U.S. Securities and Exchange Commission  
April 12, 2011

## **II. Reporting by Private Fund Advisers Also Registered With the CFTC**

Under the Proposal, a Reporting Private Fund Adviser also registered with the CFTC as a CPO and/or a CTA will be required to make an additional filing for purposes of monitoring systemic risk with the National Futures Association. Under the Proposal, the additional filing will be Schedule A of either Form CPO-PQR and/or CTA-PR, as applicable, under CFTC Proposed Rule 4.27. This requirement is duplicative. For example, Schedule A of Form CPO-PQR requests, in addition to many other items, current assets under management calculations, monthly returns, total long and short equity exposure broken down by sector, fixed income investments, alternative investment exposure and derivative exposure. Schedule A of Form CPO-PQR also requests detailed information regarding subscriptions and redemptions. All of this requested information is already required on proposed Form PF.

We recommend the SEC arrange for the relevant portions of Form PF be provided to the CFTC on an as needed basis. We see no reason that a Reporting Private Fund Adviser should be required to submit duplicative forms which are meant to satisfy the same purpose.

We appreciate the opportunity to comment on the Release. If you have any questions regarding this letter, please contact the undersigned.

Very truly yours,

/s/ Patricia A. Poglinco  
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and

/s/ Robert Van Grover  
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