

# ALSTON & BIRD LLP

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July 20, 2007

VIA E-MAIL [[pubcom@nasd.com](mailto:pubcom@nasd.com)]

Office of the Corporate Secretary  
NASD  
1735 K Street, NW  
Washington, D.C. 20006-1506  
**Attn: Barbara Z. Sweeney**

Re: Notice to Members 07-27 - Member Private Offerings

Dear Ms. Sweeney:

Alston & Bird LLP appreciates the opportunity to provide comments to the National Association of Securities Dealers, Inc. ("NASD") on Notice to Members 07-27 ("Notice 07-27") on proposed NASD Rule 2721 regarding the regulation of Member Private Offerings ("Proposed Rule 2721").

Alston & Bird, founded in 1893, is a major U.S. law firm of more than 750 attorneys with offices in five major U.S. cities, and has an extensive national and international practice. Our Financial Services and Products Group represents major financial services companies, comprising some of the largest U.S. banks and investment firms, a number of which will be adversely impacted if Proposed Rule 2721 is adopted.

We appreciate NASD's intent to protect investors from abuse and fraud in private offerings by NASD members. However, we are concerned that Proposed Rule 2721 is an attempt by the NASD to expand its jurisdictional reach beyond the activities of NASD members. If adopted, Proposed Rule 2721 will subject the affiliates of NASD members to an additional layer of regulation to which they would not be subject but for their affiliated status, placing them at a competitive disadvantage to other alternative investment firms that are not similarly affiliated with an NASD member.

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### **Control Entity Definition**

Proposed Rule 2721 should be clarified to ensure that it does not inadvertently apply to new privately-offered alternative investment funds through the "Control Entity" definition. As you know, alternative investment funds are typically organized as limited partnerships, limited liability companies or trusts that are offered privately under Regulation D pursuant to the Securities Act of 1933, as amended. A general partner, managing member or managing owner will be responsible for the overall management of the fund and, as a matter of corporate governance, deemed to control the fund.

In addition, it is common for an affiliate of an NASD member firm to initially make an investment in a new fund and, as a result, it will initially own greater than 50% of the beneficial interest of the fund. Although, Proposed Rule 2721 states that it will not apply to "investment partnerships, direct participation programs, and other private funds that the member might organize," the text of proposed Rule 2721 should explicitly exclude the ownership interest of an affiliated member from the definition of "Control Entity."

### **Commodity Pool Exemption**

Proposed Rule 2721 should explicitly exempt commodity pools from its scope because commodity pools are subject to a pervasive regulatory scheme under the Commodity Exchange Act, administered by the Commodity Futures Exchange Commission ("CFTC") and the National Futures Association ("NFA"). Commodity pools are operated by a commodity pool operator, which must generally be registered as such with the CFTC and be a member of the NFA. Unless otherwise exempt, all commodity pool operators must comply with the CFTC's and NFA's disclosure, reporting and record-keeping requirements.<sup>1</sup> This includes a requirement that all disclosure documents for commodity pools be reviewed and approved by the NFA before their first use. The requirements of Proposed Rule 2721 duplicate those of the CFTC with respect to the content of such disclosure documents. It is worth highlighting that commodity pool operators are also required to provide participants with monthly account statements and a certified annual report. In addition, the NFA conducts oversight examinations of its members, including commodity pool operators.

We believe that in light of the comprehensive regulatory scheme that applies to commodity pools and commodity pool operators, and in order to avoid unnecessary regulatory duplication and potential inconsistent interpretations of similar regulatory requirements, commodity pools should be exempt from the application of Proposed Rule 2721.

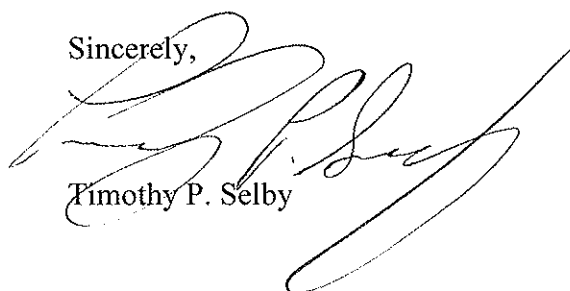
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<sup>1</sup> The CFTC exempts from certain of its disclosure and reporting requirements commodity pools which are offered only to specified types of investors, the most common of which is a "qualified purchaser" under the Investment Company Act of 1940, as amended. The NASD also has proposed to exempt offerings to such qualified purchasers under Proposed Rule 2721.

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Thank you for this opportunity to comment on Notice 07-27 and Proposed Rule 2721. Please feel free to contact me at (212) 210-9494 if you would like to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy P. Selby", written over the printed name.

Timothy P. Selby

TPS:mwm

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