

LAMP TECHNOLOGIES, INC.

**Investment Advisers Act of 1940 -- Section 203(b)(3)
Securities Act of 1933 -- Rule 502(c)
Investment Company Act of 1940 -- Section 3(c)(1), 3(c)(7)**

May 29, 1997

TOTAL NUMBER OF LETTERS: 2

**SEC-REPLY-1:
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549**

**May 29, 1997
RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT**

**Re: Our Ref. No. 97-243-CC
Lamp Technologies, Inc.
File No. 132-3**

By letter dated May 6, 1997, you request assurance that the staff would not recommend that the Commission take enforcement action if certain information concerning private investment companies is posted on a web site administered by Lamp Technologies, Inc. ("Lamp"), under the circumstances described below. Specifically, you request assurance that the posting of information on the web site will not (i) involve any form of general solicitation or general advertising on behalf of a participating fund within the meaning of rule 502(c) of Regulation D under the Securities Act of 1933 ("Securities Act"), (ii) constitute a public offering of securities by a participating fund within the meaning of Section 3(c)(1) or section 3(c)(7) of the Investment Company Act of 1940 ("Investment Company Act"), or (iii) cause any investment adviser to a participating fund to be deemed to be holding itself out generally to the public as an investment adviser within the meaning of Section 203(b)(3) of the Investment Advisers Act of 1940 ("Advisers Act").

Facts

Lamp is engaged in the business of data processing, software development and the creation and maintenance of web sites. Lamp proposes to establish and administer a web site that will contain information concerning funds excluded from regulation as investment companies pursuant to Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act and privately offered pursuant to Regulation D under the Securities Act ("private funds"). n1 You represent that neither Lamp nor any of its affiliates will operate or provide investment advisory services to any of the private funds listed on the site. n2 The investment advisers of the private funds listed on the web site may be registered under the Advisers Act or they may be exempt from registration pursuant to section 203(b)(3) of the Advisers Act. n3 You anticipate that managers of the private funds will post both descriptive information (for example, offering memoranda) and performance information relating to the funds on the web site. You state that the web site is designed to streamline and economize the transmission of private fund information among a select group of industry professionals that in many cases already may have access to such information.

In order to obtain access to the private fund information available on the web site, a potential subscriber will be required to (i) complete a questionnaire designed to allow Lamp to form a reasonable basis for determining that the subscriber is an "accredited investor" within the meaning of Securities Act Regulation D who has at least a \$ 2 million investment portfolio, and (ii) pay a subscription fee of approximately \$ 500 per month. You represent that Lamp will not be an agent of any subscriber to the web site. Subscribers who have pre-qualified as accredited investors and who have paid the subscription fee will receive a password permitting them access to the private fund information posted on the web site. n4 You also represent that Lamp will require subscribers to agree not to invest in any posted fund (other than funds in which the subscriber or its affiliates already invests, has already been solicited for

or is already actively considering an investment in) for 30 days following the subscriber's qualification. You maintain that this waiting period, together with the subscription fee and the fact that most private funds are only available to take subscriptions on a quarterly or annual basis, ensure that subscribers do not join to invest in any particular fund and that the qualification by Lamp of the subscriber, therefore, is not deemed a solicitation for any particular fund.

Analysis

The Commission has indicated that the placement of private offering materials on a web site, without sufficient procedures to limit access to accredited investors, would be inconsistent with the prohibition against general solicitation or advertising in rule 502(c) of Regulation D. n5 In a no-action letter to IPOnet (pub. avail. July 26, 1996), however, the staff of the Division of Corporation Finance stated that the posting of a notice of a private offering on a web site would not be deemed a "general solicitation" or "general advertising" within the meaning of Regulation D when pre-qualification and password-protection procedures designed to limit access to the web site were in place. n6

You maintain that the posting of private fund information on the web site and the accessing of such information by pre-qualified subscribers on a password-protected basis would not constitute "general solicitation" or "general advertising" by any participating fund within the meaning of Regulation D. You further maintain that the posting of private fund related information on the web site, subject to the same procedures, would not constitute a public offering of securities of any participating fund for purposes of section 3(c)(1) or section 3(c)(7) of the Investment Company Act. You note that, as a general matter, if an offer is public for purposes of the Securities Act, it also would be public for purposes of section 3(c)(1) and, presumably, section 3(c)(7). n7

In addition, you assert that an investment adviser exempt from registration under section 203(b)(3) of the Advisers Act should not, by virtue of posting private fund information on the web site subject to the procedures described above, be deemed to be "holding itself out generally to the public as an investment adviser." n8 You maintain that the web site information will not be "publicly available," because access to such information will be limited to a select group of accredited investors through the pre-qualification procedures and password-protection system. You represent that Lamp will require private fund managers to agree to post only private fund related information on the web site and to not offer other services (such as advisory services) or products on the site. n9 You also maintain that the use of the site by unregistered investment advisers is consistent with the safe harbor created by rule 203(b)(3)-1 under the Advisers Act, because the information listed on the site will exclusively concern funds structured as limited partnerships that are privately offered in compliance with Regulation D. n10

Based on the use of procedures designed to limit access to the web site information to a select group of accredited investors, we do not believe that the proposed posting of private fund information on the web site would constitute a public offering of securities by a participating fund within the meaning of section 3(c)(1) or section 3(c)(7) of the Investment Company Act. n11 In addition, based on the use of procedures designed to limit access to the web site information to a select group of accredited investors and your representation that Lamp will require private fund managers to agree to post only private fund related information on the web site and to not offer other services or products on the site, we do not believe that an investment adviser who posts only private fund information on the web site would be "holding itself out generally to the public" as an investment adviser within the meaning of section 203(b)(3) of the Advisers Act.

We therefore would not recommend that the Commission take enforcement action if Lamp posts information concerning private funds on a web site that is password-protected and accessible only to subscribers who are predetermined by Lamp to be accredited investors. n12

The Division of Corporation Finance has asked us to inform you that the qualification of accredited investors in the manner described and the posting of a notice concerning a private fund on a web site that is password-protected and accessible only to subscribers who are predetermined by Lamp to be accredited investors would not involve a "general solicitation" or "general advertising" within the meaning of rule 502(c) of Securities Act Regulation D. In reaching this conclusion, the Division notes that (i) both the invitation to complete the questionnaire used to determine whether an investor is accredited and the questionnaire itself will be generic in nature and will not reference any specific funds

posted or to be posted on the password-protected web site; (ii) the password-protected web site will be available to a particular investor only after Lamp has made the determination that the particular potential investor is accredited; and (iii) a potential investor may purchase securities only after the waiting period described in your letter. In this regard, the Division takes no position as to whether the information obtained by Lamp is sufficient to form a reasonable basis for believing an investor to be accredited.

These positions are based on the facts and circumstances set forth in your letter. Any different facts or circumstances may require a different conclusion. n13

Natalie S. Bej
Special Counsel

Footnotes

n1 Section 3(c)(1) excepts from the definition of investment company any issuer (i) whose outstanding securities (other than short-term paper) are beneficially owned by not more than 100 persons, and (ii) that is not making and does not presently propose to make a public offering of its securities. Section 3(c)(7) excepts from the definition of investment company any issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are "qualified purchasers" (as defined in Section 2(a)(51) of the Act), and which is not making and does not at that time propose to make a public offering of such securities.

n2 You also represent that Lamp is not a broker-dealer or affiliated with a broker-dealer, no employee of Lamp is a registered representative of a broker-dealer, and Lamp, its affiliates and their employees will not in connection with the web site be involved in effecting transactions in securities or assisting participants by negotiating transactions in securities. You are not seeking assurance as to whether Lamp is required to be registered as an investment adviser or broker-dealer in relation to the site. Because Lamp's activities could raise issues concerning broker-dealer registration, the Division of Market Regulation has asked us to inform you that the representations made in Venture Listing Services, Inc. (pub. avail. June 15, 1994) appear to be relevant to the proposed activities.

n3 Section 203(b)(3), in relevant part, provides an exemption from registration for any investment adviser who during the preceding 12 months had fewer than 15 clients, and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any registered investment company.

n4 You represent that private funds posted on the web site and their managers will not be given automatic access to the site by virtue of being included in the database, but will be required to follow the normal subscription procedure and pay the subscription fee. Moreover, subscribers must agree not to deliver private fund information posted on the web site to anyone other than the subscriber's authorized personnel and its professional advisers.

n5 See Use of Electronic Media for Delivery Purposes, Securities Act Release No. 7233 (Oct. 6, 1995). The Commission has requested comment whether the general solicitation prohibitions should be relaxed for certain Regulation D offerings or sales to qualified purchasers. See Securities Act Concepts and Their Effects on Capital Formation, Securities Act Release No. 7314 (July 31, 1996) at text accompanying note 66.

n6 You note that, to ensure that the qualification of a subscriber would not be deemed a solicitation for a particular offering, the IPOnet letter required that subscribers not be permitted to participate in an offering that was posted on the web site prior to the investor's qualification. You maintain that this procedure is not practical in the case of private fund offerings, which are made on a semi-continuous basis (quarterly or annually). You therefore propose the 30-day waiting period described above to ensure that subscribers do not join to invest in any particular private fund.

n7 See, e.g., Gerard Rizzuti (pub. avail. June 7, 1983).

n8 The Commission has stated that an adviser who uses a publicly available electronic medium such as

a web site to provide information about its services would not qualify for the exemption from registration provided by section 203(b)(3) of the Advisers Act. See Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, Securities Act Release No. 7288 (May 9, 1996), at text following note 32 (an investment adviser that advertises using electronic media will be deemed to have offered its services to the public).

n9 Cf. Munder Capital Management (pub. avail. May 17, 1996) (mutual fund related documents available on a web site are not advertisements for the adviser's advisory services unless they are "designed to maintain existing clients or solicit new clients for the adviser").

n10 Rule 203(b)(3)-1(c) provides that an investment adviser relying on the rule shall not be deemed to be holding itself out generally to the public as an investment adviser, within the meaning of section 203(b)(3), solely because it participates in a non-public offering of limited partnership interests under the Securities Act.

n11 We note that, while access to the web site would be limited to accredited investors, section 3(c)(7) funds would be required to limit sales of securities to "qualified purchasers," as defined in section 2(a)(51) of the Act.

n12 We note that there may be other, equally effective, procedures designed to restrict access to web site information that would not cause a private fund to be unable to rely on section 3(c)(1) or section 3(c)(7) of the Investment Company Act or a private fund manager to be unable to rely on section 203(b)(3) of the Advisers Act.

n13 We take this opportunity to express our view that we also would not object if similar screening procedures were used by the publisher of a private fund directory distributed in paper, rather than electronic, format.

INQUIRY-1:

**1933 Act - Rule 502(c)
1940 ICA - Section 3(c)(1)
1940 ICA - Section 3(c)(7)
1940 IAA - Section 203(b)(3)**

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May 6, 1997

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**Re: Lamp Technologies, Inc.
No-Action Request**

Gentlemen:

On behalf of this firm's client, Lamp Technologies, Inc. ("Lamp"), we are writing to request that the Division of Investment Management and the Division of Corporation Finance confirm to us that they will not recommend that the Securities and Exchange Commission (the "SEC") take any enforcement action against Lamp or any participating hedge fund manager or investment adviser if certain information concerning hedge funds is posted on a World Wide Web site administered by Lamp, which site will be password-protected and accessible only to subscribers who have been pre-qualified by Lamp as accredited investors as defined in SEC Rule 501(a) and qualified eligible participants as defined in Commodity Futures Trading Commission ("CFTC") Rule 4.7. We seek assurance that the proposed activity will not (a) involve any form of general solicitation or general advertising on behalf of any hedge fund within the meaning of Rule 502(c) under the Securities Act of 1933 (the "Securities Act"), (b) constitute a public offering of securities by any hedge fund within the meaning of Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940 (the "Company Act"), or (c) cause any investment adviser to a participating hedge fund to be deemed to be holding itself out generally to the public within the meaning of Section 203(b)(3) of the Investment Advisers Act of 1940 (the "Advisers Act").

Facts

Lamp is engaged in the businesses of data processing, software development and the creation and maintenance of web sites. n1 Lamp proposes to establish and administer a home page and other linked pages (collectively, the "Site") on the World Wide Web which will contain regularly updated information concerning hedge funds. Neither Lamp nor any of its affiliates will operate or provide investment advisory services to any of the hedge funds listed on the Site. Further, Lamp will not be an agent of any posted hedge fund or hedge fund manager, nor will Lamp be an agent of any subscriber to the Site. Lamp anticipates that the Site will be of value primarily to investment and financial professionals, such as fund-of-funds managers (including an affiliate of Lamp), hedge fund managers, broker-dealers, large family investment offices, fund administrators and accounting firms. These investment and financial professionals currently expend significant resources compiling and maintaining hedge fund information internally and the Site is primarily intended to give such professionals an outside alternative that will improve the quality and timeliness of hedge fund information in a cost-effective manner. At the same time, because of the centralizing function of the Site, the managers of the posted hedge funds will be spared the inefficiency of transmitting the same information to all such professionals individually.

The hedge funds listed on the Site will be exempt from registration as investment companies pursuant to Section 3(c)(1) or Section 3(c)(7) of the Company Act and will be privately offered pursuant to SEC Regulation D under the Securities Act. The participating hedge funds will include funds closed to new capital and funds currently accepting new capital. The investment advisers of the listed hedge funds may be either registered as investment advisers under the Advisers Act or exempt from registration pursuant to Section 203(b)(3) of the Advisers Act. Each hedge fund (or its manager or adviser) will pay Lamp a nominal fee to administer the Site, primarily for the convenience of providing a central clearing point for information which the hedge fund managers would otherwise send individually to numerous entities. The fee paid by a hedge fund will be unrelated to whether a fund is open or closed to new investment or to the performance of or sales of interests by a fund. Each hedge fund manager will have exclusive control over the content of information regarding its hedge fund downloaded to the Site, although hedge fund managers may delegate the mechanical data entry function to Lamp or another service provider. Lamp anticipates that hedge fund managers will post both descriptive information (possibly including the fund's offering memorandum) and performance-related information. Lamp will require participating hedge fund managers to agree to post only hedge fund related information on the Site and not to offer other services or products on the Site. The Site is not generally intended as a mechanism for distributing required documents (e.g., Form ADV Part II) and notices under the Advisers Act, but each hedge fund manager will undertake to make any deliveries of such required documents in accordance with SEC Release No. 33-7289, dated May 9, 1996. The Site will also have an interactive capability designed to allow subscribers to conduct searches of the hedge fund data using user-selected criteria (e.g., all equity managers with over \$ 100 million under management and a five-year record). To facilitate user searches, Lamp will organize the posted data in logical form and will perform certain mathematical functions, such as computing return and volatility statistics, for all hedge funds.

Because the hedge fund managers themselves will be responsible for all posted information concerning the hedge funds, a legend substantially as follows will also be prominently displayed:

THE INFORMATION INCLUDED IN THIS REPOSITORY IS THE RESPONSIBILITY OF THE RESPECTIVE HEDGE FUND MANAGERS. LAMP TECHNOLOGIES, INC. HAS NOT TAKEN ANY STEPS TO VERIFY THE ADEQUACY, ACCURACY OR COMPLETENESS OF ANY INFORMATION. NEITHER LAMP TECHNOLOGIES, INC., ITS AFFILIATES NOR THEIR RESPECTIVE OFFICERS, DIRECTORS, AGENTS AND EMPLOYEES MAKES ANY WARRANTY, EXPRESS OR IMPLIED, OF ANY KIND WHATSOEVER, AND NONE OF THESE PARTIES SHALL BE LIABLE FOR ANY LOSSES, DAMAGES, COSTS OR EXPENSES, OF EVERY KIND AND DESCRIPTION, RELATING TO THE ADEQUACY, ACCURACY OR COMPLETENESS OF ANY INFORMATION ON THIS REPOSITORY OR THE USE OF INFORMATION ON THIS REPOSITORY.

The entities Lamp intends to solicit to become subscribers to the Site primarily constitute a select group of financially sophisticated investment and financial professionals which may already monitor and gather information from a wide range of hedge funds. Each subscriber will be pre-qualified by Lamp as an "accredited investor" under SEC Rule 501(a) and a "qualified eligible participant" ("QEP") under CFTC Rule 4.7 (essentially an accredited investor which has at least a \$ 2 million investment portfolio). In order to be pre-qualified, a potential subscriber must complete a questionnaire designed to enable Lamp

to form a reasonable basis for believing that such potential subscriber is both an accredited investor and a QEP. The questionnaire will be generic in nature (i.e., it will not reference any of the particular hedge funds included on the Site). After review of the questionnaire by Lamp, an eligible entity will receive the opportunity to become a subscriber to the Site at a substantial fee (currently anticipated at approximately \$ 500 per month). Each subscriber will receive a password permitting such subscriber continuous access to the hedge fund information contained on the Site. Access to the non-generic information posted on the Site, including the names of the posted hedge funds and their advisers, will be restricted to such subscribers. Each subscriber will agree not to deliver hedge fund information posted on the Site to anyone other than the subscriber's authorized personnel and its professional advisers.

Legal Analysis

Rule 502(c) under the Securities Act

We believe that the posting of hedge fund information on the Site and the accessing of such information by qualified subscribers on a password-protected basis will not constitute "any form of general solicitation or general advertising" by any participating hedge fund under SEC Rule 502(c). This conclusion follows from the primary purpose of the Site (i.e., efficient information transmission rather than marketing), the pre-qualification of all subscribers and the limited number and type of subscribers (i.e., those market professionals willing to pay the substantial fee).

In reaching this conclusion, we have also relied upon the IPONET no-action letter (pub. avail. July 26, 1996) ("IPONET"), in which the Division of Corporation Finance expressed its opinion that the operation of a World Wide Web site which posted private offerings for a fee would not be deemed a general solicitation or general advertising. The Site, as proposed by Lamp, will operate in a manner similar to the site proposed in IPONET, as investors will be pre-qualified prior to gaining access to a password-protected page on which information concerning privately-offered hedge funds will be posted. In the present instance, as in IPONET, (i) both the invitation to complete the pre-qualifying questionnaire and the questionnaire itself will be generic in nature and will not reference any specific funds posted or to be posted, (ii) the password protected pages containing non-generic information will be available to a prospective subscriber only after Lamp has determined that the prospective investor is qualified and (iii) there will be a waiting period prior to the time that a new subscriber may purchase securities of a posted hedge fund. On the last point, IPONET investors were only granted access to transactions posted after the investor's qualification. That procedure is not practical here given the open-ended (i.e., continuous quarterly or annual sales) nature of many hedge funds, so instead Lamp will require subscribers to agree not to invest in any posted hedge fund (other than funds the subscriber or its affiliates already invests in, has already been solicited for or is already actively considering an investment in) for thirty days after the subscriber's qualification. This waiting period (together with the substantial fee and the fact that most hedge funds are only available to take subscriptions on a quarterly or annual basis) should be sufficient to insure that subscribers do not join to invest in any particular hedge fund (and thus that the qualification by Lamp of such subscriber is not deemed a solicitation for any particular hedge fund).

Section 3(c)(1) and Section 3(c)(7) of the Company Act

We further believe that the posting of certain hedge fund information on the Site, as described above, will not constitute a public offering for any participating hedge fund for purposes of Section 3(c)(1) or Section 3(c)(7) of the Company Act. The basis of this belief is the same as that set forth above for Securities Act purposes, and we note that the Division of Investment Management has generally interpreted the non-public offering requirement of Section 3(c)(1) as consistent with the "private offering" restrictions of Regulation D (see, e.g., C. Evans Patterson no-action letter (pub. avail. May 8, 1988)).

Section 203(b)(3) of the Advisers Act

Certain of the investment advisers to hedge funds that utilize the Site will be registered with the SEC under the Advisers Act. However, Lamp would prefer to also allow participation by unregistered advisers relying upon the exemption provided by Section 203(b)(3) of the Advisers Act. In that regard, we

believe that such an adviser should not be deemed to be "holding itself out generally to the public as an investment adviser" by virtue of posting hedge fund information on the Site.

We believe this conclusion follows from the primary purpose of the Site and the nature, limited number and pre-qualification of potential subscribers. We understand that an adviser holds itself out to the public through the indiscriminate use of business cards or telephone listings. We are also aware that the SEC has recently declared in Release No. 33-7288 that "if an adviser uses a publicly available electronic medium such as a World Wide Web site to provide information about its services, the adviser would not qualify for the exemption from registration in section 203(b)(3) of the Advisers Act." The Site information, however, will not be "publicly available." Access to the Site will be strictly limited through a password-protection system to financially sophisticated subscribers who have been pre-qualified by Lamp as accredited investors and QEPs. Lamp anticipates that the subscribers to the Site will be investment and financial professionals such as fund-of-funds managers, hedge fund managers, broker-dealers, large family investment offices, fund administrators and accountants which may already have access to most, if not all, of the hedge funds listed on the Site. The Site is simply designed to streamline and economize the transmission of information among a select group of industry professionals which may already have access to such information. Furthermore, the managers/investment advisers of the hedge funds posted on the Site will generally manage only one or a few hedge funds and will generally not be seeking new investment advisory clients.

We also believe that the use of the Site by an unregistered investment adviser is within the safe harbor created by SEC Rule 203(b)(3)-1, which provides, in relevant part, that "any person relying on this rule shall not be deemed to be holding itself out generally to the public as an investment adviser, within the meaning of section 203(b)(3), solely because it participates in a non-public offering of limited partnership interests under the Securities Act of 1933." The information listed on the Site will exclusively concern hedge funds, which are structured as limited partnerships or other collective investment vehicles. Each hedge fund manager will be required to represent to Lamp that the fund will be privately offered in strict compliance with SEC Regulation D. The subscribers to the Site will all be accredited investors eligible to participate in Regulation D private placements. Finally, as discussed above, the subscriber qualification process and the password-protection feature will be designed to satisfy Regulation D requirements (as illustrated in IPONET). Consequently, it is our belief that the unregistered advisers which post hedge fund information on the Site are covered by Rule 203(b)(3)-1, and thus will not be deemed to be holding themselves out generally to the public as investment advisers solely by virtue of such activity.

Conclusion

Because access to the Site will be restricted to a select group of subscribers who have been pre-qualified through the use of a generic questionnaire as accredited investors and QEPs, we believe that the posting of information concerning hedge funds on the Site will not (a) involve any form of general solicitation or general advertising within the meaning of Rule 502(c) under the Securities Act, (b) constitute a public offering of securities within the meaning of Section 3(c)(1) or Section 3(c)(7) of the Company Act, or (c) cause any unregistered investment adviser to hold itself out generally to the public within the meaning of Section 203(b)(3) of the Advisers Act. We respectfully request your confirmation that you will not recommend that the SEC take any enforcement action on the foregoing basis if the Site is established and operated as described above.

Pursuant to SEC Release No. 33-6269, we herewith enclose seven copies of this no-action request.

Please contact the undersigned at (312) 853-2140 with any comments or questions you may have.

Sincerely,
William D. Kerr

Footnotes

n1 Lamp currently is not registered with the SEC or CFTC in any capacity. Lamp is not a broker-dealer or affiliated with a broker-dealer, no Lamp employee is a registered representative of a broker-dealer, and

Lamp, its affiliates and their employees will not in connection with the Site be involved in effecting transactions in securities or assisting participants by negotiating transactions in securities. We are not seeking assurance from the SEC as to whether Lamp needs to be registered as an investment adviser or broker-dealer in relation to the Site.

n2 Posted hedge funds and their managers will not be given access to the Site by virtue of such posting. Instead, they must follow the normal subscription procedure and pay the subscription fee.