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September 15, 2004

Jonathan G. Katz, Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

RE: File No. S7-30-04: Proposed Registration Under the Advisers Act of Certain Hedge Fund Advisers

Dear Mr. Katz:

I appreciate the opportunity to comment on Release No. IA-2266 which would require certain hedge fund managers to register with the Commission as investment advisers. Specifically, I would like to comment on proposed new rule 204-2(e)(3)(ii) (the "Transition Rule") under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). This comment letter does not express an opinion as to the other proposed provisions in the release. The Transition Rule, as proposed, would "grandfather" certain hedge fund managers from the Advisers Act's requirement to maintain books and internal working papers and other documents necessary to form the basis for performance calculations used in advertisements and other communications. This proposed rule represents the Commission's recognition that many hedge fund managers, in reliance on the current regulatory scheme, may not have retained these records for past performance periods.

While I appreciate the Commission's recognition of the need for a transition period, I believe that as proposed, the Transition Rule is too narrow to accomplish its intended purpose in certain circumstances. The proposed Transition Rule's applicability is limited to hedge fund managers that "were exempt from registration under section 203(b)(3) of the [Advisers] Act prior to [the effective date of the final rule]." By limiting the rule to managers exempt pursuant to 203(b)(3) prior to the effective date, the Commission would be precluding other persons from advertising performance they otherwise would be permitted to use under staff interpretations and general anti-fraud principles. For instance, the staff of the Commission has recognized that, given appropriate safeguards, portfolio managers that have exclusive responsibility for the management of an account may use that account's performance in advertisements or communications relating to a substantially similar account managed at a new employer or a newly formed management entity.[1] The Proposed Transition Rule would not allow such a portfolio manager to use such prior performance if his or her former employer was a private fund manager exempt under 203(b)(3)-1 that did not maintain the requisite books and records, while that same

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[1] See Bramwell Growth Fund, SEC No-Action Letter (Aug. 7, 1986).

employer would be exempt from having those records for other accounts with respect to its own performance advertising.

Additionally, as proposed, the Transition Rule would apply only to hedge fund managers that have assets of at least $25,000,000 on the effective date of the final rule. Because managers with less than that amount are not exempt from registration pursuant to section 203(b)(3) (they are, in fact, precluded from registering with the Commission), such managers would not technically be able to avail themselves of the Transition Rule. Smaller managers that are not maintaining the requisite records prior to the rule enactment will face the choice of either not increasing their assets under management, or losing the ability to advertise past performance periods.

There is an effective way to ensure that the Transition Rule allows all persons who were relying upon current rule 203(b)(3)-1, or who planned to rely on the rule upon achieving an asset base of $25 million, (or, in the case of individual portfolio managers, whose employers were relying upon the current rule) to continue to advertise past performance for periods prior to enactment of a final rule. I believe Rule 204-2(e)(3)(ii) should be modified to apply to all persons required to register with the Commission as investment advisers by reason of the enactment of rule 203(b)(3)-2, regardless of when they are required to register. By limiting the rule's exemption to performance records for periods ended prior to the effective date, the Transition Rule would still serve only as a grandfather provision, requiring anyone relying on it (or their employers) to maintain the requisite records from the effective date forward. Additionally, the Transition Rule's requirement that those relying on it preserve any books and records that are in their possession would prevent any potential for abuse.

Finally, I request that you clarify that the exemption provided by the Transition Rule for the "books and records [that] pertain to the performance or rate of return of [a] private fund" includes those records that pertain to the prior performance of accounts other than the private fund itself that are being used (consistent with the staff's prior interpretations) in advertisements for the private fund (so-called "model performance").[2] The requirements imposed by existing staff guidance with respect to such model performance would ensure that it is presented in a non-misleading manner.

[2] See Clover Capital Mgmt., SEC No-Action Letter (Oct. 28, 1986).

I appreciate the opportunity to comment on this important proposal and welcome any opportunity to discuss these issues further with the Commission or the staff.

Sincerely yours,

/s/ Audrey C. Talley
Audrey C. Talley
Partner, Drinker Biddle & Reath LLP