EUROPEAN COMMISSION
Internal Market DG

FINANCIAL MARKETS

Brussels,
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Mr Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609
United States of America

Dear Sir,

SEC Proposed Rule: Registration under the Advisers Act of Certain Fund Advisers – File N° S7-30-04

I have pleasure in submitting the response of my services to the Securities and Exchange Commission's invitation to comment on its proposed rule on "Registration under the Advisers Act of Certain Fund Advisers" (the "Proposed Rule").

The Securities and Exchange Commission may already be familiar with the role of the European Commission in the field of securities and fund legislation. Since its inception, the European Union has aimed to create a single internal market, where goods, people and services can move freely. The European Commission's mission concerning investment funds is to develop a legislative framework at European level which enables the asset management industry to take full advantage of such internal market. My services are responsible, notably, for improving the functioning of the internal market for investment funds complying with standards set out by European legislation. While legislation at European Union level is limited to open ended, publicly offered investment funds complying with strict investment limits and limits on use of leverage ("UCITS"), the European Commission is also concerned by the efficient and orderly functioning of cross-border business for other, non harmonized funds at European level, including privately placed funds.

In this context, we have reviewed the contents of the Proposed Rule and we are keen to follow the unfolding debate in the United States on the Proposed Rule and the evolving policy for privately placed investments and hedge funds. At this stage, we wish to focus our observations on ensuring that the new requirements regarding authorisation and application of the new "look-through" approach do not have unforeseen and unnecessary consequences for EU domiciled managers or advisers of EU constituted funds which may, in the past, have been offered on an incidental or restricted basis to a limited number of US residents qualified clients.

We very much welcome the SEC proposal to limit unnecessary extraterritorial effects the Proposed Rule may have on offshore advisers. Avoiding unnecessary burdens on entities

which are already highly regulated in their home jurisdiction is indeed a desirable move. We agree with the SEC that advisers of offshore investment funds should not be subject to the Proposed Rule provided they fulfil certain conditions (the "Proposed Exemption").

We are thus keen to ensure that the Proposed Exemption reaches its aims with regard to advisers to European investment funds, in particular through clarifying (i) the scope and the meaning of the US legal concepts and terminology referred to in the Proposed Exemption, (ii) how certain categories of advisers to European investment funds which may be offered on a private or restricted basis in the United States would be dealt with under the Proposed Exemption and (iii) the adjustments mentioned by the SEC to the application of the Investment Advisers Act (IAA) to advisers to offshore funds.

We would like to stress that these comments, which mainly consist of requests for clarification of certain provisions of the Proposed Rule and their impact, are of a preliminary character and without prejudice to further comments we may wish to make at a later stage.

We understand that the Proposed Exemption aims at excluding from registration requirements offshore advisers to private funds which (i) have their principal office and place of business outside the United States (ii) are publicly offered outside the United States (iii) are regulated as a public investment company under a country other than the United States and (iv) are placed on a private or restricted basis in the United States under the terms of traditional US rules on public offers to qualified investors.

We understand from the SEC presentation that there should no attempt to screen the form or content of the authorization obtained in another country: once the "company" is authorised as a "public investment company" to publicly offer funds under the law of its country of origin, the SEC will not review the content of such authorization. However, we should be grateful if the notions of "public" used in "public investment company" and of "principal office and place of business" could be clarified.

Indeed, reasons of our uncertainty over possible implications of the Proposed Rule for advisers to EU domiciled investment funds arise largely from the fact that it is couched in terms of publicly/ privately placed funds. We appreciate that these are concepts which are clearly established in the US law on funds. However, rules governing authorization and supervision within the EU are not predicated on the same classification. Within the EU we can distinguish the following situations:

(i) UCITS funds subject to harmonised EU rules on management companies, investment limits, use of leverage, disclosure and prospectus and which can be offered to investors across the EU on the basis of authorization and registration requirements (i.e public offer). However in the area of EU funds law, there is no direct equivalent to "publicly offered funds";

(ii) funds which do no fall within the scope of harmonised EU rules on UCITS, but which are offered to the public under the laws of individual Member States; and

(iii) negotiated investments and other placements which are placed with sophisticated investors. However, there is no common definition for such funds.

Moreover, it should be noted that investment funds in the EU can take a corporate form, a contractual form or a trust form. We should be grateful if you could confirm whether

the Proposed Exemption should apply to advisers to any of these funds, irrespective of their legal form.

Based on this brief presentation, we would appreciate your guidance on the following possible scenarios.

1. INVESTMENT FUNDS WHICH ARE OFFERED TO THE PUBLIC IN THE EU AS UCITS OR UNDER INDIVIDUAL EU MEMBER STATE LAWS

We should be grateful to receive confirmation of the impact of the Proposed Exemption in respect of advisers to funds which (i) meet the conditions of the Proposed Exemption and (ii) which have been offered privately under the "old" rule in the United States, i.e. to less than 14 US investors without the requirement to "look through".

We would also like to emphasize the need for confidence that the Proposed Exemption should encompass all publicly offered funds under EU- or individual member state authorization in the EU. This should include not only UCITS, i.e. funds meeting the requirements of EU legislation, but also publicly offered closed end funds, funds of hedge funds and other publicly offered collective investments under EU individual member state law supervised by the relevant national authority, whether they are subject to contract law, trust law or company law.

We understand that any adviser to EU publicly offered investment fund that benefits from this exemption will not have to apply the Proposed Rule for counting US investors. Consequently, they will not have to comply with the registration or information requirements of the IAA until such time as the fund they advise triggers the 'public offer' criteria for registration under the IAA. Thus, an adviser to an EU-based fund of hedge funds which is publicly offered under the laws of an individual EU Member State and which is regulated as a public investment company would not have to apply the new 'look through' rule for counting US investors: instead it could continue to count a US resident institutional investor as a single client. We should be grateful if you could confirm whether this interpretation is correct.

2. EU PRIVATELY PLACED INVESTMENT FUNDS WHICH HAVE US RESIDENT INVESTORS

We should also be grateful if you could clarify the situation regarding advisers to EU privately placed funds which have US resident investors and which are subject to supervision in their home country. According to the Proposed Rule, advisers to these entities will be required to apply the new rules for counting US resident clients. They would then (see section C.3.A of the "Background" section of the presentation of the Proposed Rule) "generally'" be required to register with the SEC under the IAA, i.e. unless they benefit from some other exemption from registration.

This could result in a situation in which an adviser to an EU-based, pooled investment structure which has a small/minority number of US resident investors, who are in principle qualified investors (as defined under US law) capable of investing in "negotiated" investments would now be subject to SEC registration and oversight as well as that in its country of establishment.

This situation needs to be examined from the perspective of extra-territoriality and conflicts of law which might have the result that such structures would feel unable to offer investments to US resident investors. We believe the parallel made by the SEC with foreign advisors already registered with the SEC (see second question under section C.3.A) covers a different situation: these latter are entities which are likely to have submitted themselves to sole US jurisdiction in order to run United States-domiciled investment structures; the question of extra-territoriality/conflicts of law does not arise from a legal or commercial point of view for such entities.

As a possible submission, we would invite the SEC to consider whether the additional minimum threshold of USD 25 millions under management triggering the applicability of the Proposed Rule should not be available to adviser to offshore investment funds (see footnote 126). We should be grateful if you could give further consideration to this point.

3. COMMENTS ON INDIVIDUAL PROVISIONS OF THE IAA

We understand that the Proposed Rule envisages adjustments to limit the extraterritorial consequences of the SEC registration on offshore advisers (section C.3.C of the "Background" section of the presentation) so that the "substantive" provisions of the IAA are not applied to non-US clients of the offshore advisers. We welcome this initiative. However, the nature and the extent of such adjustments is not always clear, taking into account the fact that the presentation refers, notably, to no-action letters[1] which, by definition, are being issued on a case by case basis and to the non-application of *substantive* provisions of the Investment Advisers Act.

The presentation mentions that an EU private equity/fund manager would be able to treat its non-US domiciled fund as its client for all other purposes other than determining whether it needs to register as a private fund with SEC and compliance with US anti-fraud rules. The consequence of this would be that the IAA would not be applicable to the dealings of the adviser with the fund itself or its non-US clients, the fund not being deemed an US client. US law would only be applicable to dealings with US clients. Other parts of the presentation suggest that the SEC could pursue its approach based on "conduct and effects"[2] with offshore advisers. Under such approach, for instance, EU domiciled fund could be subject to US antifraud rules even if it would have no US domiciled clients and say only EU domiciled clients, should dealing with such EU clients have effects on other clients of the adviser domiciled in the US, or on US markets. In this respect, we should be grateful if the impact of the applicability of the antifraud provisions of Sections 206 (1) and 206 (2) of the IAA could be clarified.

Furthermore, the Proposed Rule recognises that if an adviser to an EU private fund were to be required to register with the SEC, then US custody rules would apply de facto to all assets of a pooled structure (thereby increasing the chances that such investment opportunities would not be offered to US investors). We should be grateful for a confirmation whether this interpretation is correct and for a clarification of its intent and implications.

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[1] Such as *Uniao de Banco de Brasileiros S.A.*, SEC Staff No-Action Letter (July 28, 1992)

[2] See footnote n°1.

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The services of the European Commission remain entirely at your disposal for any further information you might need (Niall Bohan, + 32 296 30 07) . These issues could also be discussed on the occasion of future meetings between European and US authorities or, possibly, in the context of the United States/ European Union Financial Markets Regulatory Dialogue. We thank you for your consideration in this matter.

Yours sincerely,

David Wright
DIRECTOR

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