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Via Electronic Mail (rule-comments@sec.gov)

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

Re: File Number S7-30-04: Proposed Registration Under the Advisers Act of Certain Hedge Fund Advisers (the "Proposed Rule")[1]

Dear Mr. Katz:

We are submitting our comments to the Securities and Exchange Commission (the "Commission") Proposed Rule that would require advisers to certain private investment pools ("hedge funds") to register with the Commission under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). We regularly advise participants in the financial services arena, including hedge funds, funds-of-funds and other pooled investment vehicles and their managers.[2]

In general, we concur with the observations of dissenting Commissioners Glassman and Atkins with respect to the Proposed Rule.[3] For the reasons stated by the Dissenting Commissioners, we echo their concerns that the mandatory registration of hedge fund advisors under the Advisers Act will significantly increase industry and Commission burdens without necessarily addressing the regulatory concerns raised in the Proposed Rule (*i.e.*, protection of investors).[4] Thus, we concur with the Dissenting Commissioners' position that the Commission should not rush to

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1 Registration Under the Advisers Act of Certain Hedge Fund Advisers, 69 Fed. Reg. 45172 (July 28, 2004).

2 The opinions and views expressed herein represent those of Katten Muchin Zavis Rosenman and not necessarily those of our clients.

3 69 Fed. Reg. 45172, at 45197.

4 We also note that many of the concerns raised by the Dissenting Commissioners with respect to the Proposed Rule are analyzed and addressed by the Managed Funds Association ("MFA"), the hedge fund industry's primary representative. *See* (i) the Written Statement of the MFA for the U.S. Senate Committee on Banking, Housing and Urban Affairs dated July 15, 2004; and (ii) the Statement of Adam C. Cooper, Chairman, Managed Funds Association before the Greenwich Roundtable, Stamford, Connecticut, August 19, 2004.

adopt the Proposed Rule "as is" – but rather it should consider alternative approaches to address the concerns expressed by the Commission in a more effective, less burdensome manner.

For example, in order to avoid duplicative regulation, we recommend that the Commission coordinate closely with the Commodity Futures Trading Commission ("CFTC") with respect to oversight of hedge fund advisors. As noted in the Proposed Rule, many hedge fund advisors are already registered with the CFTC and are members of the National Futures Association ("NFA") as commodity pool operators ("CPOs") and/or commodity trading advisors ("CTAs").[5] Such CFTC registration and NFA membership imposes reporting and recordkeeping requirements, as well as periodic on-site audits. The CFTC and the NFA have extensive experience auditing hedge fund advisors which should be shared with the Commission in order to address their respective regulatory and compliance concerns. In addition, given the CFTC's many years of experience in regulating such hedge fund advisors, we also recommend that advisors to hedge funds that are required to register with the CFTC as CPOs or CTAs, and who are so registered,[6] be exempt from registration under the Advisers Act. As noted above, any such exemption would need to be based on close cooperation and information sharing between the Commission and the CFTC.

Further, in lieu of mandatory registration under the Advisers Act, the Commission may also wish to consider more targeted rules that would, *e.g.*, amend the levels of income, net worth and assets required to qualify as an accredited investor for purposes of investing in a hedge fund and/or require sponsors of hedge funds to file a Form D with the Commission in order to identify the hedge fund as such. Given the variety of comment letters received by the Commission to date,[7] it is apparent that there is a myriad of concerns and proposed alternative approaches to the Proposed Rule. Accordingly, we respectfully ask that the Commission undertake further study and coordination with the CFTC and other relevant agencies, policymakers and industry representatives to consider all such alternatives to the Proposed Rule.

Lastly, we would like to make the following "technical" observations and comments regarding the Proposed Rule:

First, in the event the Proposed Rule is adopted, it is not clear how current hedge funds having varying redemption periods would be "transitioned." In particular, we are requesting clarification that the determination of whether a fund falls within the Proposed Rule's definition of a "private fund" be made on a prospective basis. For example, an existing hedge fund that is closed to new investors and that has not accepted new investors for at least two years should not be treated as a "private fund." As a second example, an existing hedge fund that amends its redemption provisions to preclude redemptions during the first two years after an investor first

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[5] 69 Fed. Reg. 45172, at 45181.

[6] *I.e.*, our recommendation would not apply to CPOs and CTAs that opt for exemption from CFTC registration.

[7] As posted on the SEC's website at www.sec.gov/rules/proposed/s73004.shtml as of September 14, 2004.

made (or first makes) an investment in the hedge fund also should not be a "private fund." The transition rule with the greatest simplicity would provide that the determination of whether a hedge fund is a "private fund" is made on a prospective basis from and after the effective date of the new rule (pursuant to reasoning similar to that with respect to which the determination of "qualified client" is made under the Proposed Rule), so that any hedge fund that immediately amends its redemption terms to provide for a minimum of a two-year lock-up would not be a "private fund." In the absence of the foregoing clarification, a hedge fund might be required to liquidate and solicit its investors anew in a newly-organized hedge fund entity that, because it is newly-organized, would satisfy the "private fund" definition by having the two-year lock-up since inception.

Second, with respect to the specific proposal under the Proposed Rule to amend Advisers Act Rule 206(4)-2 to extend the period for pooled investment vehicles to distribute their audited financial statements to their investors from 120 days to 180 days, we believe that such extension should only apply to funds which have a material amount of their assets invested in other funds ("funds-of-funds"). Applying the extended time period to funds-of-funds rather than the trading funds in which they invest, will provide the funds-of-funds with at least a 60 day time period in which to incorporate the trading funds' financial statements thus allowing the funds-of-funds to timely complete their own audits and distribute their financial statements.

If you have any questions or comments or would like to further discuss this comment letter, please contact Wes Nissen, Partner, in Chicago (312-902-5365) or Fred Santo, Partner, in New York (212-940-8720).

Very truly yours,

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