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VIA EMAIL

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
rule-comments@sec.gov

Re: Registration Under the Advisers Act of Certain Hedge Fund Advisers (File Number S7-30-04)

Ladies and Gentlemen:

This letter is submitted in response to the request for comments from the Securities and Exchange Commission (the "Commission") on its proposed rules and rule amendments under the Investment Advisers Act of 1940 (the "Advisers Act") to require advisers to certain private investment pools to register with the Commission under the Advisers Act (the "Proposed Rules").

I. Application of the Advisers Act

In providing our comments to the Commission, we request confirmation that the application of the Advisers Act will continue to apply only to those persons who are, in fact, investment advisers, and that the Proposed Rules are not intended to, and do not, address the question of when or whether a sponsor, manager, director or general partner of a private investment entity is an investment adviser to such entity.

We note that in the past the Commission has confirmed this position with respect to new rules regarding the Advisers Act.[1] In addition, recently proposed rules have indicated that the Commission has recognized that certain persons should categorically be excluded from the definition of an investment adviser.[2] As such, we assume the Commission will apply the Proposed Rules only to those persons who are, in fact, investment advisers.

[1] See SEC Release No. IA-983 (July 12, 1985).

[2] See SEC Release No. IA-2232 (May 3, 2004) (Certain Thrift Institutions Deemed Not To Be Investment Advisers).

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II. The Commission's Focus on Hedge Funds

According to the proposing Release[3] the Commission's top two concerns were the necessity to gather census information concerning hedge fund activities and early detection of fraud. In our view, neither of these concerns would be appropriately addressed by adoption of the Proposed Rules.

A. Census Information.

The Commission's admitted lack of data regarding the hedge fund industry provides an insufficient rationale to impose substantial compliance on a particular segment of the nation's financial markets. Mere lack of data is improper justification for imposing such regulatory burden and governmental oversight. Furthermore, the Commission's acknowledgement that it lacks important information regarding hedge funds indicates a faulty approach to its rulemaking methodology.[4] The Commission's rulemaking authority should be exercised based on accurate and complete data; here the Commission has done the opposite in demanding registration for the purpose of gathering additional information.[5] Moreover, it appears that the Commission has ignored recent governmental reports that have explicitly recommended against requiring hedge fund managers to register as investment advisers solely to gather additional data on the industry.[6]

B. Deterrence and Early Discovery of Fraud.

In support of the Proposed Rules, the Commission majority stated that over the past five years, 46 cases have been brought against hedge fund advisers. Commissioners Glassman and Atkins determined that in only eight of these 46 cases would the existence of the Proposed Rules have increased the Commission's oversight. The remaining 38 cases were brought against

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[3] SEC Release No. IA-266; File No. S7-30-04.

[4] Note that our comments in this letter assume that the Commission actually possesses the rulemaking authority to implement these Proposed Rules. Given Congressional action in creating section 203(b)(3) as a statutory exemption from registration for investment advisers with fewer than fifteen clients, as well as the Congressional intent to treat an entity which receives advisory services as a single client, we are not necessarily convinced that the Commission has the authority to eliminate this statutory exemption in the absence of Congressional approval.

[5] Commissioners Glassman and Atkins have acknowledged that the Commission should have acquired additional information before proposing these rules. "Before making this proposal, the Commission should have undertaken a study that complements the descriptive overview of hedge funds provided by the 2003 Staff Hedge Fund Report and focuses on identifying the qualitative and quantitative information that would raise red flags and provide systematic data on hedge fund trends and practices….After completing such a study, we could consider whether to require hedge fund advisers to file periodically certain information, which we could then monitor for red flags and trends." Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to Proposing Release No. IA-2266.

[6] In response to a Congressional inquiry, the Commission's staff noted that "the potential need to obtain information from hedge funds for enforcement purposes would not seem to be an adequate reason for registration." *Id* at fn 3. In addition, a 1999 report from the President's Working Group on Financial Markets concluded "requiring hedge fund managers to register as investment advisers would not seem to be an appropriate method to monitor hedge fund activity." *Id.* at n 7.

registered investment advisers, unregistered investment advisers who were already required to register, hedge funds that were too small to be covered by the Proposed Rules or persons who committed frauds which were not hedge fund-specific. These eight relevant cases, when compared to the approximately 2,600 enforcement actions brought by the Commission over the same period, represent a statistically insignificant amount of fraudulent activity.

More importantly, Commissioners Glassman and Atkins indicated that tips from knowledgeable insiders or third parties brought the fraud to the attention of the Commission in seven of these eight cases. There was no indication that Commission oversight would have hastened the detection of fraud in these seven cases. It is evident that a certain level of fraudulent activity will continue to exist among hedge fund advisers, regardless of whether such advisers are required to register with the Commission. The data thus far presented by the Commission does not support the existence of a disproportionate level of fraud by advisers to hedge funds when compared to other registered or unregistered investment advisers. Furthermore, the Commission's findings indicate that investor involvement and education serve as an effective method of detection for fraud.

III. Definition of a "Private Fund"

A. General.

Proposed rule 203(b)(3)-2 attempts to differentiate a hedge fund from other private equity vehicles based three characteristics: (1) reliance on the exception provided by either section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, (2) ability of its beneficial owners to redeem any portion of their ownership interests within two years of the purchase of such interests; (3) offering of interests based on the investment advisory skills, ability or expertise of the investment adviser. Although the foregoing may generally represent certain shared characteristics of hedge funds, such elements may also be found in entities for which are truly free from such regulatory concerns. We request that a 'private fund' be defined more narrowly so as to avoid unintentional inclusion of investment vehicles that are clearly not hedge funds.

B. Additional Clarification.

We request that the Commission provide additional guidance or examples clarifying when an investor would, or would not, be deemed to have made an investment "based on the ongoing investment advisory skills, ability or expertise of the investment adviser." Introduction of such a new, subjective standard, which is based on the rationale of the investor for acquiring such interest, and not the objective actions of the investment adviser, imposes an unnecessary and harmfully ambiguous element into what should be a clearly objective application of Federal law.

In addition, there are sometimes highly-negotiated provisions in a private equity fund agreement that permit the investors to dissolve the fund prior to its stated term. Such an election usually requires a super-majority vote of the fund's investors. We are concerned that the existence of such a right to dissolve a fund could be viewed as a redemption right under the Proposed Rules. We request that the Commission clarify that an investor's right to participate in an election to dissolve a private equity fund would not, in and of itself, cause an investment vehicle to be deemed a "private fund" under the Proposed Rules.

Furthermore, a private equity fund agreement often grants to a particular class of investors the right to withdraw from the fund, and have their interests redeemed, if certain unanticipated events occur. Often, such limited withdrawal rights are triggered only if an investor's continued participation in the fund would cause such investor to violate applicable law or otherwise be subject to additional penalties or taxes. For example, pension funds that are subject to ERISA and private foundations represent typical investors to which such limited withdrawal rights are customarily granted. We request that the Commission specify that the existence of such a limited withdrawal right would not, in and of itself, cause an investment vehicle to be deemed a "private fund" under the Proposed Rules.

Finally, we understand that there is some concern that an investor's right to receive certain mandatory distributions from a private equity fund might be viewed as a redemption right under the Proposed Rules. Private equity fund agreements regularly provide that an investor has the right to receive annual distributions to cover its tax liabilities associated with its investment in the fund. We request that the Commission clarify that the receipt of such mandatory distributions would not be deemed a redemption, and that such a provision would not, in and of itself, cause an investment vehicle to be deemed a "private fund" under the Proposed Rules.

If you have any questions concerning our comments, or if we can be of assistance in connection with this matter, please do not hesitate to contact me at the number indicated above.

Very truly yours,

/s/ Sean M. Caplice

Sean M. Caplice