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Via e-mail to: rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Reference: S7-05-11

March 23, 2011

Dear Ms. Murphy,

This comment letter is submitted in addition to my comment letter dated February 22, 2011 and to comment on the comment letter of my former employer Akina Ltd. (formerly known as LODH Private Equity Ltd.).

1. Treatment of funds of funds and of investments in private funds for purposes of form PF

Unavailability of exemption for funds of funds with direct investments in portfolio companies

At the moment General Instruction 7 of Form PF only seems to exempt a fund of private equity funds if the fund invests exclusively in private equity funds from completing section 4 of Form PF. As a consequence, funds of private equity funds that invest a minority of their assets directly in underlying portfolio companies would be required to complete section 4 of form PF. However, with the exception of questions 56 and 57, all other questions in section 4 of form PF request information about the underlying portfolio companies. The information about a fund of funds' borrowings at the fund of funds level in question 57 of section 4 of form PF is substantially similar to the information that is already provided in response to questions 9 and 10 of section 1b of form PF.

I agree with Akina that the Commission should provide more clarifications about the reporting obligations of *funds of funds*. The Commission should take into account that many funds of private equity funds also make direct investments in underlying portfolio companies. Often those direct investments are co-investments together with the fund manager of one of the underlying private equity funds with the fund of funds only holding a minority stake in the underlying portfolio company. When fund managers of underlying private equity funds do not have sufficient uncalled capital commitments to fund the acquisition of a portfolio company alone or when they only can fund a part of the amount in order to maintain a minimum diversification of the investments in portfolio companies for the underlying fund, they ask funds of private equity funds that are their investors whether they want to directly co-invest in the underlying portfolio company.

Inability to obtain information on directly held portfolio companies

However, private equity funds and funds of private equity funds that directly only hold a minority stake in an underlying portfolio company may not be able to get all of the information about underlying portfolio companies that is required by section 4 of form PF as part of the regular reporting of the portfolio company. The lack of control that is associated with holding a minority stake in an underlying portfolio company may not allow a fund of private equity funds to force the portfolio company to provide this information.

Inability to obtain information from underlying funds about their portfolio companies

Similarly, funds of private equity funds may not be able to get all of the information about underlying portfolio companies that are held by the underlying private equity funds (i.e. indirect investments in portfolio companies through investments in underlying private equity funds) that is required by section 4 of form PF as part of the regular reporting of the underlying private equity fund about its portfolio companies. The lack of control that is associated with holding a minority interest in an underlying private equity fund that has delegated managerial power to a fund manager (e.g. a general partner) may not allow a fund of private equity funds to force the underlying private equity fund to provide this information about its underlying portfolio companies. Private Equity funds do not always report the current levels of debt and equity financing of the portfolio companies during the holding period after the initial investment, the nature of the debt, the maturity structure of the debt and about defaults on debt. In addition, foreign and domestic private equity funds may use other industry sector codes than the NAICS code and may not provide sufficient information about the industry sectors of the portfolio companies to assign them to NAICS codes.

Underlying funds that are not required to file a form PF

Some of the underlying private equity funds in which a large fund of private equity funds is invested in, may not be required to report information about the fund and its portfolio companies to the Commission because the advisers to those underlying private equity funds had less than 1 billion private equity fund assets under management. This may be the case for venture capital funds and for small and mid-market buyout funds. Since those funds provide smaller amounts of capital to smaller underlying portfolio companies they also tend to have smaller fund sizes. Since the Commission has decided not to collect information on the underlying portfolio companies from exempt advisers to venture capital funds and small private equity funds that are managed from a place of business in the U.S. on form ADV, it would seem odd if a fund of funds that is invested in those underlying venture capital funds and small private equity funds would be required to report information on the portfolio companies held by those underlying funds.

Recommendations

If the Commission shares this view, it should amend general instruction 3 to form PF to specify investments in private funds should be disregarded in the calculation of private equity fund assets under management for purposes of determining the requirement to complete section 4 of form PF.

In addition, I recommend that private fund advisers that do not have the ability to control an underlying portfolio company in which they are directly invested, should only be required to make a good faith effort to obtain the information and should not be required to file the

information on form PF if they are unable to obtain it. This will not only help funds of private equity funds with direct minority co-investments in underlying portfolio companies, but will also help normal private equity funds that only have direct minority investments in underlying portfolio companies because they invested together with other private equity funds or because of other reasons (e.g. the current definition of private equity fund would also apply to mezzanine funds).

1. Akina not acting as a (co-)lead investor in underlying portfolio companies

I am somewhat surprised to hear Akina claims that all of the direct investments (in underlying portfolio companies) that Akina advises involve at least one additional co-investor as lead investor. Maybe some of the direct investments are no longer part of the current portfolio due to *bankruptcies* of leveraged underlying portfolio companies. It may be worthwhile to review information in the last few private placement memorandums for funds of funds that were advised by Akina, whether Akina acted as a co-lead investor for certain direct investments with identical ownership and voting percentages as the other co-lead investor and whether it acted as the lead investor for direct investments with the majority of the ownership and voting rights.

2. Collecting information on portfolio company debt from bank regulators

Akina's recommendation no. 6 to collect information about portfolio company debt from bank regulators rather than from private equity funds does not seem feasible for multiple reasons. Debt may be provided to portfolio companies from foreign banks or from non-bank financial companies (e.g. hedge funds) that are not regulated by U.S. (and maybe not even by foreign) financial market regulators. As a consequence, this information may not be available to U.S. regulators in the absence of bilateral information exchange agreements with foreign financial market regulators. In addition, different investors in the same underlying portfolio company may have different leverage ratios if individual investors use additional layers of debt at holding companies that are only held by some of the investors.

3. Collecting information from pension funds, foundations, endowments or family offices

As a former employee of the Division of Investment Management of the SEC, the compliance officer of Akina, Mr. Balitsos, should know that the SEC does not have the statutory authority to require pension funds, foundations, endowments of family offices to report information about direct investments in underlying portfolio companies on form PF. Domestic corporate pension plans are regulated by the U.S. Department of Labor. Foundations and endowments are usually not deemed to be investment advisers and are thus not registered with the SEC. The Dodd-Frank Wall Street Reform and Consumer Protection Act expressly excludes family offices from the definition of an investment adviser. In addition, as mentioned previously, different investors in the same underlying portfolio company may have different leverage ratios.

I appreciate the opportunity to comment on these matters and hope that my comments are useful in the rulemaking process. Please do not hesitate to contact me by e-mail if you have any follow-up questions.

Respectfully submitted,

Georg Merkl