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Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-1090

Re: Your Ref.: File Number S7-25-06 Proposed Rule Dealing with Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles

Dear Ms. Munro:

We appreciate the opportunity to provide comments to the Commission with respect to the two rules proposed on December 22, 2006 in Investment Adviser Act Release No. 1A-2576 (the "Proposing Release"). We have the following comments.:

I. Definition of "Investors". In proposed Rule 206(4)-8 (the "Proposed Anti-Fraud Rule") under the Investor Advisers Act of 1940 (the "Advisers Act") it would constitute a fraudulent, deceptive or manipulative act, practice or course of business for an investment adviser to a "pooled investment vehicle" to make any untrue statement of a material fact or to omit to state a material fact necessary to make a statement made, in the light of the circumstances in which they were made, not misleading to any "investor" or prospective "investor" in the pooled investment vehicle, or otherwise engage in an act, practice or course of business that is fraudulent, deceptive or manipulative with respect to any "investor" or prospective "investor" in the pooled investment vehicle. The Proposed Anti-Fraud Rule does not define the term "investor" and the Proposing Release does not discuss the meaning of that term.

In certain offshore private investment companies and in certain collateralized debt obligation pools there are often several tranches of debt that are issued at the same time that equity interests are issued for the pooled investment vehicle. The Proposed Anti-Fraud Rule does not discuss whether it is applicable with respect to debt issued by a pooled investment vehicle. Clearly the Proposed Anti-Fraud Rule should apply with respect to equity holders as investors in the pooled investment vehicle. There should be some clarification as to whether the Proposed Anti-Fraud Rule would impose anti-fraud obligations on an investment adviser with respect to debt holders of such funds, even if they are not required to be registered investment advisers. Information that is normally provided to holders of debt of pooled investment vehicles is significantly different from information that is normally provided to holders of equity interests of pooled investment vehicles since the equity interest takes the residual risk with regard to the investment vehicle's program. Holders of debt want information that helps them to assess the risk of

payment default. Holders of equity interests want information to help them assess the risks and potential rewards of their investment. For example, is it important for a senior debt holder with a high rating from a rating agency to be given information with regard to side arrangements that are made among equity holders with respect to fund reporting and other related matters. We note that in the rule that required hedge fund advisers to register as investment advisers, which was overturned in Goldstein v. Securities and Exchange Commission, 451 F3d 873 (D.C. Cir. 2006) for purposes of determining whether or not an investment adviser was required to be registered there was a counting of the "owners" of the fund, thus indicating that holders of debt instruments were not "owners" and were not therefore to be counted for purposes of determining whether or not whether an investment adviser needed to be registered. There should be some clarification as to whether or not that same result holds true in the Proposed Anti-Fraud Rule.

II. Foreign Investment Funds. The Proposed Anti-Fraud Rule defines a "pooled investment vehicle" to mean any investment company defined in Section 3(a) of the Investment Company Act of 1940 (the "1940 Act") or any company that would but for the exemptions contained in Section 3(c)(1) or Section 3(c)(7) of the 1940 Act fit within the definition of an investment company. For purposes of the Proposed Anti-Fraud Rule Non-U.S. organized pooled investment vehicles which would otherwise be exempt under Section 7(d) have historically been considered to be exempt under Section 3(c)(1) and Section 3(c)(7) with respect to their U.S. investors. The SEC staff has for a variety of policy reasons imposed the requirements of Section 3(c)(1) and Section 3(c)(7) on foreign organized investment companies at least with respect to their U.S. investors for purposes of requiring them to meet the same legal standards as U.S. organized private investment funds. See Goodwin, Procter & Hoar (available February 28, 1997). Is it intended under the Proposed Anti-Fraud Rule that an investment adviser with respect to a foreign organized fund that includes U.S. investors have an obligation to provide the same type of information to its foreign investors that the Proposed Anti-Fraud Rule would require it to provide to its U.S. investors, or does the Proposed Anti-Fraud Rule deal only with information supplied to its U.S. investors? For example, is a foreign investment adviser required to disclose to its U.S. investors any side arrangements that it may have with respect to certain foreign investors? We note in the adopting release with regard to the hedge fund adviser registration rule, Release Number IA-2333 (at footnote 213) it is stated that foreign investment funds and foreign investment advisers to those funds generally would be governed by the law where the fund is organized and U.S. investors should have no reason to expect the full protection of the U.S securities laws with regard to those funds. In addition, the adopting release to the hedge fund adviser registration rule indicated that with certain exceptions the provisions of the Investment Advisers Act generally would not apply to Non-U.S. investment advisers dealings with the offshore fund with respect to its Non-U.S. clients. Under the Proposed Anti-Fraud Rule may Non-U.S. advisers to Non-U.S. organized funds communicate with and act

regarding their Non-U.S. investors in a manner different from the way the Proposed Rule would require them to act with respect to U.S. investors?

III. Definition of Pooled Investment Vehicles. The Proposed Anti-Fraud Rule defines a pooled investment vehicle to mean any investment company defined in Section 3(a) of the 1940 Act or any company that would be an investment company under Section 3(a) but for the exemptions provided under Section 3(c)(1) or Section 3(c)(7). There are any number of investment arrangements, including those that rely on the exemptions contained in Section 3(c)(1) or Section 3(c)(7), that should not be required to be subject to the antifraud provisions under the Proposed Anti-Fraud Rule. For example, employee stock ownership plans, which invest exclusively in employer stock, including those plans offered by foreign employers to their U.S. employees, typically rely on the exemption provided in Section 3(c)(1). Employees are normally given information with respect to their employer, whose stock is being purchased for their benefit in these employee stock ownership plan. What other information does the Proposed Anti-Fraud Rule, if applicable, require to be provided to these employee investors other than information with regard to the underlying issuer whose stock is being purchased by the plan? Does it matter that certain groups employees have interests in company stock acquired pursuant to terms different from those offered to other employees employee stock ownership plans and do these differences need to be disclosed?

Asset securitization arrangements that rely on the provisions of Rule 3a-7 otherwise meet the definition of what is a pooled investment vehicle except they rely on Rule 3a-7 rather than on Section 3(c)(1) or Section 3(c)(7). Are they not "pooled investment vehicles" for purposes of the Proposed Anti-Fraud Rule?

Additionally, are employee securities companies that obtain exemptive orders under Section 6(b) and 6(e) of the 1940 Act deemed to be pooled investment vehicles for purposes of the Proposed Anti-Fraud Rule? Employee securities companies have been deliberately designed to provide additional compensation to valued employees but are subject to certain of the investor protective provisions of the 1940 Act. Generally the exemptive orders require periodic information to be supplied to investors. Generally, they would otherwise rely on Section 3(c)(1) or 3(c)(7) but for the exemptive orders granted under Section 6(b) and 6(e) and should not be treated as "pooled investment vehicles" for purposes of the Proposed Anti-Fraud Rule.

Do real estate investment funds fall outside of the definition of a "pooled investment vehicle" under the Proposed Anti-Fraud Rule if they rely on the exemptions contained in Section 3(c)(5)(C), rather than either Section 3(c)(1) or 3(c)(7)?

IV. Content of Information to be Supplied by Investment Advisers. The Proposed Anti-Fraud Rule imposes an obligation on investment advisers, whether registered or not,

to not make an untrue statement or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading. It would seem that a representative list of what may be relevant in the view of the staff for purposes of complying with the Proposed Anti-Fraud Rule would be constructive. For example, are disclosure of side letters with certain investors relevant where they deal with matters such as reporting obligations, fee arrangements, key man provisions, minimum adviser investment requirements or notice of adviser withdrawal of capital from the fund. Do such matters have to be stated with specificity or can the investment adviser in its offering materials merely state that it will negotiate with investors for different fee arrangements, reporting and other obligations. Is it relevant for this purpose that investors may receive differing report and information with regard to the pooled investment vehicle and the amount of its performance data? Is it required that the investment adviser provide all investors and potential investors the information which may otherwise be available to certain investors but not all investors? Does the investment adviser for a pooled investment vehicle have to provide the same past performance information to all of its investors or may it provide past performance information with regard to other investment vehicles managed by the adviser only to those investors who ask for that information, but not to other investors who do not ask for that information. For example, certain CDO funds that rely on Section 3(c)(7) provide to sophisticated investors projections of what the potential performance of the fund may be, given certain criteria and certain enumerated assumptions. Is the supplying of this information to some but not all investors contrary to the provisions of the Proposed Anti-Fraud Rule. Is it the intent of the Proposed Anti-Fraud Rule that information with regard to performance related matters be consistent with the more restrictive provisions of the Investment Company Act dealing with performance related matters, including those contained in Rule 156 promulgated under the Securities Act of 1933.

For example, in many of these pooled investment vehicles sophisticated investors as part of their due diligence require performance information with respect to funds managed by the investment adviser even if these other funds have different investment strategies. Sophisticated investors will often ask for this information so that they can determine the overall competency and experience of the investment adviser.

V. Changes in "Accredited Investor Definitions" in the Proposed Amendments to Regulation D. In the proposed revised regulation D as it relates to "private investment vehicles" which are exempt from the provisions of the 1940 Act under Section 3(c)(1) there is no provision which would permit an exception from the definition of an "accredited investor" for persons who otherwise meet the definition of a "knowledgeable employee" as that provision is defined in Rule 3c-5 of the 1940 Act. Many private investment vehicles permit knowledgeable employees to invest in the fund to enable them to participate with the other investors and to motivate them. The proposed revision to Reg D would preclude such investments in many cases. As drafted the proposed rule would

exclude many knowledgeable employees from participating in the investment returns of the fund except as they may make arrangements with the investment adviser to participate as a contractual matter in all or a portion of the management fee or performance fee of the fund. This would be a significant change in how these funds, particularly private equity funds, operate.

Yours very truly,

David M. Mahle

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cc: Jennifer Sawin