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December 8, 2003

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

Re: Hedge Fund Report of the Staff of the Securities and Exchange Commission

Dear Mr. Katz:

The Committee on Private Investment Funds of the Association of the Bar of The City of New York (the *"Committee")* is composed of lawyers with diverse perspectives on investment advisory issues, including members of law firms and counsel to private advisory and financial services firms. The Committee focuses on, among other things, the issues, trends and regulations relating to a wide variety of private investment funds, including hedge funds, buyout funds, venture capital funds, mezzanine funds, distressed funds and funds of funds. *(A list of our current members is attached.)*

The Committee is pleased to provide some initial comments on the report of the Staff of the Securities and Exchange Commission (the *"Commission"),* entitled *"Implications of the Growth of Hedge Funds"* (the *"Report").* The recommendations included in the Report have generated some initial comments and observations from our members. We expect to have additional suggestions should a rulemaking process follow. We do not express any opinions in the area of futures regulation.

I. *Summary.*

In general terms, the comments of the Committee are as follows:

- We believe that the definition of a "hedge fund" should contain unambiguous and objective standards. In the absence of a clear standard, we believe that many private advisory firms -- not otherwise intended to be captured -- could be required to register under the Investment Advisers Act of 1940, as amended (the *"Advisers Act").* In this regard, we propose the following definition of "hedge fund":

> *A hedge fund is a pooled investment fund, collective investment scheme or similar entity: (i) whose interests are not offered or sold in a public offering; (ii) which is not registered, or required to register or seek an exemption, under the Investment Company Act of 1940, as amended; (iii) which is engaged primarily in the business of investing, reinvesting or trading in liquid or otherwise readily marketable securities or instruments; (iv) which provides for a performance-based payment or allocation to the general partner or manager of such entity based on the periodic net realized and unrealized appreciation of such entity's assets; and (v) which provides an investor in such entity with rights of redemption or withdrawal within two years of the purchase of the ownership interests by the investor in such entity (other than redemptions or withdrawals due to legal, regulatory or similar reasons).*

- To the extent that the Commission decides to require registration of hedge fund advisers, it may consider limiting the scope of the requirement to a more manageable group of advisers. For example, the Commission could consider only requiring registration of advisers to hedge funds that rely on the exemption provided by Section 3(c)(1) ("*3(c)(1) Funds"*) of the Investment Company Act of 1940, as amended (the *"Investment Company Act')*. Furthermore, the Commission could consider not counting "qualified purchasers" as defined under the Investment Company Act as separate clients of the adviser. The Commission should also "grandfather" existing "accredited investors" who are not "qualified clients" for purposes of the restriction under Section 205 of the Advisers Act on charging a fee based on capital gains or capital appreciation.

- The Committee is concerned about the potential extra-territorial reach of the recommendations in the Report.. By requiring advisers to "look through" hedge funds and count each U.S. investor as a separate client, we believe that many non-U.S. advisers may unnecessarily be captured by the recommendations and required to register under the Advisers Act.

- The Committee believes that the removal of the prohibition on general solicitations in the case of private investment funds that rely exclusively on the exemption provided by Section 3(c)(7) ("*3(c)(7) Funds")* of the Investment Company Act is a positive development and we urge the Commission to accept this recommendation for all types of private investment funds.

II. *Defining a Hedge Fund.*

The Staff acknowledges in the Report that the term "hedge fund" has "no universally accepted definition."[1] The term is broadly referred to in the Report as "an entity that holds a pool of securities and perhaps other assets, whose interests are not sold in a registered public offering and which is not registered as an investment company under the Investment Company Act."[2] Given that many other types of investment funds could be similarly described, the Committee is concerned about these other funds being inadvertently captured within the scope of the Staffs recommendation. Consequently, we believe that the Commission should provide a definition of "hedge fund" that contains unambiguous and objective standards. Importantly, we believe that any final rules should define a hedge fund by what it is rather than by what it is not.

By exploring briefly the nature of hedge funds versus many other types of private investment funds, we believe that it is possible to identify areas of definitional distinction.

A. *Nature of Hedge Funds.*

The Report describes the following characteristics relating to the trading activities of hedge funds:

> Today, in addition to trading equities, hedge funds may trade fixed income securities, convertible securities, currencies, exchange-traded futures, over-the-counter derivatives, futures contracts, commodity options and other non-securities investments. Furthermore, hedge funds today may or may not utilize the hedging and arbitrage strategies that hedge funds historically employed, and many engage in relatively traditional, long-only equity strategies.[3]

As a result of these types of activities and other factors, over a number of years the hedge fund market place has developed customary contractual terms for hedge funds. As noted by the Staff, these terms include: (i) "[h]edge fund advisers typically receive; as compensation, a management fee based on the amount of hedge fund assets (commonly 1-2 percent), plus a share of the capital gains and capital appreciation (commonly 20 percent) or some other allocation based on the fund's investment performance;"[4] (ii) "[h]edge funds generally do not have limited time horizons;"[5] and

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1 SECURITIES AND EXCHANGE COMMISSION, IMPLICATIONS OF THE GROWTH OF HEDGE FUNDS, September 2003 (hereinafter, the ***"Report")*** at 3.

2 *Id.*

3 Report at 3-4.

4 Report at **ix.**

5 *Id.*

(iii) "[h]edge funds typically agree to repurchase their own interests from investors on a limited, periodic basis, such as quarterly, often following an initial 'lock-up period' during which time investors are not permitted to liquidate their investments."[6]

B. *Nature of Other Private Funds*.

Although we do not disagree with the Staffs approach of trying to identify certain distinguishing characteristics of private equity and venture capital funds, the Committee is concerned that the Report does not give expression to the landscape and diversity of private investment funds and products. Importantly, we believe that the recommendation should not capture, among others, private equity funds (including buyout funds,[7] venture capital funds' and mezzanine funds'), crossover funds,[10] merchant banking funds," real estate and other asset-backed funds," infrastructure funds,[13] sponsorship funds,[14] collateralized debt obligations[15] and funds of funds (including

6 *Id*.

7 Buyout funds are a form of private equity fund that typically acquire control positions in companies with reasonably predictable cash flows. These funds seek to build value through operating improvements that increase cash flow, acquisitions that increase market share or joint ventures with corporate partners that enhance revenue growth.

8 Venture capital funds are a form of private equity fund that generally focus on companies with high projected growth rates looking to eventually go public or be sold to another company. These companies may be early-stage companies that are in the research and development or early commercialization stage. Venture capital funds may also focus on later-stage companies that have several years of sales but are attempting to grow rapidly.

9 Mezzanine funds are a form of private equity fund that typically make investments in debt securities or preferred stock with equity kickers that are junior to bank debt but senior to common equity. These funds seek investments that provide current coupons and equity-like total returns through the provision of mezzanine capital. Mezzanine capital earns a current return from regular interest or dividend payments with the possibility of achieving capital gains through the exercise of warrants if the company performs well.

10 Crossover funds are a variation of buyout funds that undertake the activities of buyout funds as well as making to a lesser degree public, non-control investments.

11 Merchant banking funds are buyout funds that are typically sponsored by or affiliated with investment banks.

12 Real estate and other asset-backed funds typically focus on purchasing or developing real estate assets or natural resources, such as timber, agricultural land and oil and gas properties. These funds pursue strategies depending in part on whether buying the asset is cheaper than developing it.

13 Infrastructure funds are generally international funds that invest for capital appreciation in the equity, quasi-equity and convertible debt issued to finance infrastructure projects and infrastructure-related industries, including power plants, telecommunications systems, airport and port facilities, roads, water systems and oil and mining operations.

14 Sponsorship funds are venture-type funds that typically invest in fund management companies (or otherwise participate in their fee income or economics) as well as their underlying investment funds. These funds generally sponsor or incubate emerging managers by offering them working capital,

secondary funds) aimed at each of the foregoing types of funds.[16] Many of these private investment funds include the differentiating characteristics noted by the Staff in its discussion of private equity and venture capital funds.[17] The Committee believes that the policy considerations of the Staff relating to hedge funds should not apply to the other types of private investment funds identified in this letter.

The distinguishing features of private equity and venture capital funds identified by the Staff include: (i) "investors typically commit to invest a certain amount of money with the fund over the life of the fund, and make their contributions in response to 'capital calls' from the fund's general partner;"[18] (ii) they make long-term investments that provide for liquidation at the end of the fund's life, with little, if any, opportunity for liquidity through redemption or withdrawal during the life of the fund; (iii) they distribute cash to their investors when they sell portfolio investments, or may distribute the securities of a portfolio company to their investors; and (iv) they often invest in unregistered (and typically illiquid) securities, including securities of start-up or early-stage companies.[19]

The Committee believes that the three most common distinguishing features of these other funds are:

- the types of investments that they make (*i.e.*, they are generally not "trading" funds with a significant turnover of investments and accordingly they invest for the long-term primarily in illiquid investments);

- the type of mechanism for an investor to realize its investment (*i.e.*, investors are committed or "locked-up" for the life of the fund and generally receive distributions during the term only out of realized proceeds); and

- the type of distribution methodology that they utilize to compensate the adviser (*i.e.*, distributions are generally based on available cash

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"locked-up" capital and advice and expertise relating to service providers, including prime brokers and administrators.

15 Collateralized debt obligations (CDOs) are leveraged structured investment vehicles that customarily invest in high yield securities and/or bank loans (which, frequently, are liquid or otherwise readily marketable). CDOs may also invest in mezzanine debt or special situations within prescribed limits. The investments acquired by CDOs serve as collateral for investors in these investment vehicles.

16 Some investment funds, such as hybrid or "side pocket" funds, combine the features of hedge funds and the many other private investment funds identified in this letter. *See* Report at 65.

17 *See generally* Report at 5-9 (distinguishing these and other funds from hedge funds).

18 Report at 7.

19 *See* Report at 7-8.

> proceeds rather than the value of the underlying investments and accordingly any performance allocation to the adviser is distributed out of the realized proceeds from investments'').

Based on a comparison of the characteristics of a hedge fund versus those of the other private investment funds identified in this letter, we believe that an appropriate definition of a hedge fund should reflect each of these three distinguishing features. At the very least, we believe that a focus on regular redemptions of the interests of investors would in some measure indirectly capture each of these areas. For example, a redemption of interests is only practical if the fund is invested in a significant amount of liquid investments. As such, redemptions are tied to the market valuation of the ownership interests in the fund based on the liquid investments (as opposed to realization events). Because these funds value the ownership interests in the fund, they typically compensate the advisor based on a marked to market methodology (as opposed to out of only realized proceeds[2]').

We propose the following definition of a hedge fund:

> ***A hedge fund is a pooled investment fund, collective investment scheme or similar entity: (i) whose interests are not offered or sold in a public offering; (ii) which is not registered, or required to register or seek an exemption, under the Investment Company Act of 1940, as amended; (iii) which is engaged primarily[22] in the business of investing, reinvesting or trading in liquid or otherwise readily marketable securities or instruments; (iv) which provides for a performance-based payment or allocation to the general partner or manager of such entity based on the periodic net realized and unrealized appreciation of such entity's assets; and (v) which provides an investor in such entity with rights of redemption or withdrawal within two years of the purchase of the ownership interests by the investor in such entity***

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20 The "value" of the underlying portfolio has limited relevance in many of these types of investment funds. In certain private equity funds, unrealized losses may need to be returned through distributions before the general partner or manager receives its 20% performance allocation. Moreover, in certain venture capital funds, the general partner or manager is precluded from receiving its 20% performance allocation until the fund has satisfied a so-called "net asset value" test. In all of these cases, any valuations are only necessary to preserve the ultimate allocations based on realizations.

21 In proposing a rule requiring hedge funds to adopt anti-money laundering procedures, we believe that the U.S. Treasury is heading in the right direction by defining a captured fund as including those funds that permit owners to redeem ownership interests within two years of purchase. See FINANCIAL CRIMES ENFORCEMENT NETWORK; ANTI-MONEY LAUNDERING PROGRAMS FOR UNREGISTERED INVESTMENT COMPANIES, 67 Fed. Reg. 60617 (Sept. 26, 2002). *See also* Report at 30. The Staff appears to hint at this approach in Footnote 315 of the Report. ***See*** Report at 96 n.315.

22 We believe that an appropriate threshold for determining whether an entity is "engaged primarily" in the business of investing, reinvesting or trading in liquid or otherwise readily marketable securities or instruments would be if at least *55%* of its total assets were invested in such securities or instruments.

(other than redemptions or withdrawals due to legal, regulatory or similar reasons[23]).

111. *Registration of Hedge Fund Advisers.*

The Report is a reflection of the recent focus on the hedge fund industry caused by its significant growth and the surge of investments in hedge funds by institutions. The concerns about hedge funds expressed by the Staff include the recent increase in the number of hedge fund enforcement cases, the role that hedge funds play in the financial markets and the implications of the Commission's limited ability to obtain basic information about hedge funds whose advisers are not registered under the Advisers Act. Due to the lack of information about hedge funds, the Staff believes that the Commission has been hampered in its ability to develop effective regulatory policy as hedge funds have become more important participants in the financial markets.[24]

Based on its concerns, the Staff recommends the registration of hedge fund advisers under the Advisers Act. Registration of hedge fund advisers would be accomplished by amending Rule 203(b)(3)-1 under the Advisers Act to require hedge fund advisers to "look through" hedge funds and count each investor in a hedge fund (as opposed to each fund) as a separate client of the adviser.[25]

Although we do not express a position in this letter on the relative merits of registration under the Advisers Act, we are concerned that requiring most hedge fund advisers to register will be a burden for many advisory firms whose activities are otherwise subject to the antifraud provisions of the federal securities laws, who maintain effective compliance controls and whose clients are financially sophisticated. To the extent that the Commission believes that registration is appropriate, we intend rather to focus in this letter on suggesting ways to limit registration to a more manageable group of hedge fund advisers. We believe that such an approach would appropriately balance the policy objectives of the Commission (such as investor protection) with the desire to maximize the use of the resources of the Commission.

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23 We believe that there should be an appropriate exception for withdrawals that are caused by legal, regulatory or similar reasons. For example, it is not uncommon in many private equity funds to allow withdrawals of foundation limited partners if their participation in a fund gives rise to a change in tax status.

24 ***See*** Report at x-xi, **76-79.**

25 The Committee believes that the implications of adopting a "look through" analysis need to be explored more fully. For example, we believe that "looking through" an investment fund should not alter the duties owed by an investment adviser to its client. By currently counting the investment fund as a single client, the investment adviser responds to the collective objectives and needs of each particular fund. Will the adoption of the recommendation mean that an investment adviser would instead need to consider the diverse and specific investment objectives and needs of each individual investor as its client, notwithstanding that it is participating in a collective investment vehicle? The Committee does not believe this result would further the policy goals set out in the Report.

Accordingly, the Commission could consider only requiring the registration of advisers to 3(c)(1) Funds.[26] Furthermore, the Commission could consider not counting "qualified purchasers" as defined under the Investment Company Act as separate clients of the hedge fund adviser. The Commission should also "grandfather" existing "accredited investors" who are not "qualified clients" for purposes of the restriction under Section 205 of the Advisers Act on charging a fee based on capital gains or capital appreciation. This could avoid the market disruption caused by hedge fund advisers forcing the withdrawal of investors who are not currently "qualified clients." By limiting the scope of registration along the lines we suggest in this letter, we do not believe that the Commission would compromise its policy concerns set forth in the Report.

In making its recommendations, the Staff reviewed documents from 65 hedge fund advisers (both registered and unregistered) managing more than 650 different hedge funds with more than $160 billion of assets. Among other things, the Staff held a hedge fund roundtable in May 2003, and invited a broad spectrum of industry participants and interested persons. Considering the information that the Staff acquired from a diverse group of registered and unregistered advisers, we believe it should have sufficient information about the hedge fund industry in order to develop an effective regulatory policy. Moreover, based on the Staff's own information, approximately half of the largest hedge fund advisers are already registered under the Advisers Act.[27] We believe that these advisers primarily manage the assets of the more financially sophisticated investors in the market place, namely "qualified purchasers" under the Investment Company Act. These registrations of advisers to 3(c)(7) Funds should provide a sufficient proxy for the Staff to monitor the activities of the largest hedge fund advisers.[28]

The investors identified by the Staff as being primarily responsible for the growth in the hedge fund industry are "institutional investors such as pension plans,

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26 The Committee's suggestion would entail "looking through' 3(c)(1) Funds but not 3(c)(7) Funds. Each 3(c)(7) Fund would continue to count as one client for purposes of Rule 203(b)(3)-1. Nevertheless, hedge fund advisers who offer tandem 3(c)(1)/3(c)(7) Funds may, as a practical matter, be required to register under the Advisers Act.

27 ***See*** Report at ***22*** n.74. In addition, we understand that more than half of the largest hedge fund advisers are registered with the Commodity Futures Trading Commission *("CFTC')* as commodity pool operators ("*CPOs*") and/or commodity trading advisors and are, therefore, subject to regulation by another federal agency. We recommend that the Commission coordinate its efforts with the CFTC in order to avoid duplicative and possibly conflicting regulatory requirements.

28 An option for the Commission to consider would be to take an approach similar to that of the CFTC, which requires CPOs that are not required *to* register with the CFTC pursuant to certain exemptions to submit a notice to the National Futures Association providing certain information with respect to each fund operated by the CPO that is permitted to trade futures, including the fund's name, manager, address and the exemption from registration on which it relies. If the Commission decides to exempt advisers to 3(c)(7) Funds from registration, the Commission could require these funds to provide it with similar identifying information. Such an option would provide the Commission with additional information about hedge funds, thus satisfying a stated policy objective, while simultaneously conserving its resources and creating uniformity with CFTC regulations.

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endowments and foundations seeking to diversify their portfolios"[29] (in almost all cases, "qualified purchasers"). We believe that these investors should be well-positioned to safeguard their own interests. Many of the concerns identified by the Staff, such as identifying and addressing misconduct, providing disclosure regarding conflicts of interest and asset valuation, are issues that institutional investors can (and typically do) address themselves by agreement or side letter.

The Committee believes that it is the smaller investor who typically participates in 3(c)(1) Funds who would benefit most from increased regulation of hedge fund advisers. Requiring only advisers to 3(c)(1) Funds to register may still address the Staffs concern "about the lack of applicable regulatory measures necessary.. .to assist investors in making fully informed investment decisions."[30] Smaller investors who do not have the size to insist that hedge fund advisers be responsive to information requests would have the regulatory framework of adviser registration to rely on.

We note that our suggestions in this letter are consistent with the new regulatory relief adopted by the CFTC.[31] The Staff: is making a recommendation requiring registration almost simultaneously with the CFTC's adoption of new Rule 4.13(a)(4) exempting from registration CPOs of pools that privately place interests to "qualified purchasers" (*i.e.*, 3(c)(7) Funds).[32]

IV. *Extra-territorial Reach of Recommendation Requiring Registration.*

By requiring hedge fund advisers to "look through" hedge funds under their management and count each U.S. investor as a separate client, many non-U.S. advisers will be captured by the recommendation of the Staff. Accordingly, the Committee is concerned about the potential extra-territorial reach of the recommendation.

As noted in the Report, implementing an adviser registration obligation by simply modifying Rule 203(b)(3)-1(a)(2) to impose a "look through" requirement would have broad extra-territorial implications. Many non-U.S. advisers potentially would become subject to regulation by the Commission, despite a limited interest from a policy perspective in subjecting such advisers to regulation in the United States.

Under Rule 203(b)(3)-1(b)(5), in determining whether the'fifteen or more client threshold has been exceeded, an investment adviser that has its principal office and place of business outside of the United States must count only clients that are United States residents. Indeed, footnote 301 of the Report correctly points out that non-U.S. managers would be required to register as investment advisers in the United States if

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29 Report at vii.

30 Report at x.

31 *See* Report at 24.

32 17 CFR § 4.13 (2003).

more than fourteen U.S. investors owned interests in the hedge fund advised by the manager.

Many of the advisers who are located outside of the United States are already subject to supervision by an appropriate regulatory authority. Subjecting these advisers to U.S. regulation would impose an additional layer of regulation. At best, this would be duplicative and create additional costs. At worst, it might result in subjecting advisers to different and possibly conflicting rules with respect to their management of the same fund.

Rule 203(b)(3)-1(b)(5) presents a distinctly different approach to regulation than is followed in many other jurisdictions. In the United Kingdom, for example, the jurisdiction of the Financial Services Authority ("*FSA*") is premised on where the activity is carried out rather than where the client is based.[33] As such, a U.S.-based investment manager can have an unlimited number of UK resident retail or institutional clients and not be subject to regulation by the FSA. Indeed there is no restriction on U.S. managers visiting their UK clients and providing advice to them in meetings, provided they have no place of business in the UK and undertake no investment management in the UK. Of course, the usual UK marketing restrictions would apply.

The Report appropriately points out that the available resources of the Commission should be considered in determining whether to require hedge fund advisers to register as investment advisers. For example, the Staff observed that the number of advisers that might become subject to regulation by the Commission could be reduced based upon the assets under the management threshold that would be used to trigger a registration requirement. We propose that the location of the adviser would also be an appropriate consideration in assessing 'the adequacy of staff resources. Arguably, it would be an inefficient use of scarce resources to send staff to London to examine an adviser who is already subject to FSA regulation.

The Report correctly observes that the United States stands out among countries with developed markets and regulatory systems as being virtually the only jurisdiction which does not impose mandatory regulation on any hedge fund manager operating within its borders. It would be unfortunate if, in addressing this issue, the Commission sought to regulate both advisers operating within the United States and those who have operated under considerable regulation for some time in other countries.

We recognize that a bright line test in which managers would only be required to register if they maintain a place of business in the United States would not be workable because of the potential for abuse. Clearly, the Commission should be legitimately concerned about advisers simply moving offshore to avoid regulation while continuing to market their funds to U.S. investors. There are two possible means to address this issue. First, a registration exemption might be available to investment

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[33] ***See*** Financial Services and Markets **Act,** 2000, c.8, §§ 19, 418 (Eng.); Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001 No. **544.**

advisers who do not maintain a place of business in the United States and who are subject to regulation by a regulator in the jurisdiction in which the adviser is located, provided the regulatory scheme is comparable to U.S. regulation.

Second, if the Commission does not want to be in the position of assessing whether another country's regulatory scheme is adequate or comparable to the United States, the test might be based on whether the investment vehicle is organized primarily to facilitate investment by U.S. persons. The definition of a "foreign private issuer" under Rule 3b-4 of the Securities Exchange Act of 1934 is instructive in this regard. We propose that a hedge fund adviser should not be required to register if it manages a fund organized in a jurisdiction outside of the United States, provided that: (i) more than 50% of the fund's equity interests (whether in number or value) are held by non-U.S. persons; (ii) a majority of the directors are non-U.S. persons; and (iii) the adviser does not maintain a place of business in the United States and is subject to meaningful regulation in the jurisdiction in which it maintains its principal office.

V. *General Solicitations bv 3(c)(7) Funds*.

Seeing little compelling policy justification for prohibiting general solicitation or advertising in offerings by 3(c)(7) Funds, the Staff recommends eliminating this prohibition. The Report notes that permitting hedge funds that limit their investors to this high standard of sophistication to engage in a general solicitation could facilitate capital formation without raising significant investor protection concerns. We believe that the removal of the prohibition on general solicitations is an important development and we urge the Commission to accept this recommendation for all types of private investment funds. In addition, we believe that the Commission may want to consider creating a related exemption so that an investment adviser that is exempted from registering as an investment adviser because it does not have the required number and type of clients to require registration will not, in any case, be required to register if it engages in a general solicitation for a 3(c)(7) Fund because it will be holding itself out to the public as an investment adviser.

* * *

We very much hope that these comments and observations contribute to the important work of the Commission in the area of hedge funds. The comments and observations set forth in this letter by the Committee do not necessarily represent the views of the firms or companies with whom the Committee members are associated or the clients that they represent.

Very truly yours,

MV Masotti

Marco V. Masotti, Chair
Committee on Private Investment Funds

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* Member of the Committee on Investment Management Regulation of the Association of the Bar of The City of New York.

** Chair of the Committee on Futures Regulation **of** the Association of the Bar of The City of New York.

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