

JONES DAY

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September 15, 2004

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

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

Re: File Number S7-30-04

Dear Mr. Katz:

On behalf of Jones Day the following are our comments with respect to the Securities and Exchange Commission (the "SEC") proposed new rule and rule amendments under the Investment Advisers Act (Release No. IA-2266, July 20, 2004) (the "Proposal") which would require advisers to certain private investment pools ("funds") to register with the Commission under the Investment Advisers Act of 1940 (the "Advisers Act").

Under the Proposal if a private investment pool meets the definition of a "private fund" it triggers the look-through rule under the Proposal, which may result in the exemption contained in Section 203(b)(3) of the Advisers Act not being available. Under the Proposal a private investment pool is a "private fund" if "...owners are permitted to redeem any portion of their ownership interests within two years of the purchase of such interests..." The Proposal as stated does not make clear whether redemption rights given to certain owners of interests in a private fund, but not others, would meet this condition for being a private fund. If, for example, a particular investor, but not other investors in a private fund, were to negotiate a right to redeem its interest prior to the expiration of the second anniversary of the purchase of such interest, does this then cause the private investment pool to be a private fund for purposes of the Proposal and cause a look-through with regard to all holders of interests in the private investment pool? If the answer is yes, the result is that one special arrangement with a fund investor may cause an investment adviser who might otherwise be exempt from registration under the Advisers Act to be required to register as an investment adviser. It would seem more appropriate for the look-through rule to apply if redemption rights are available to substantially all owners of the fund in order for a private investment pool to be considered a "private fund". There may be instances in which an individual investor for regulatory or other reasons requires that it have the ability to redeem its interest. Those instances may be investor specific requirements, such as changes in its business or its regulatory environment. For example, certain state pension funds

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may be required to discontinue their investment in alternative investment strategies because of the changing dictates of state legislatures or broader investment policy guidelines established by the trustees of those pension funds. As a result such investors often negotiate withdrawal rights when they decide to invest in private funds.

The Proposal broadens the categories of investors with respect to whom the look-through rule applies. Currently Rule 203(b)(3)-1(a)(2)(i) states that there will be a look-through if investment advice is received by the “shareholders, partners, limited partners, members or beneficiaries (any of which is referred to herein as an owner)”. Under the Proposal the phrase “other securityholders” has been added. In the Release explaining the Proposal there is no discussion of why this addition has been made. Is it intended that securityholders include holders of debt securities of a private investment fund? There are circumstances, particularly in funds organized in offshore jurisdictions where securities which are characterized in the local jurisdiction as debt securities effectively have an equity interest in the fund in question. For example, offshore investment funds may issue “capital notes” and “income notes”, which entitle holders to receive a portion of the yield on the fund’s underlying portfolio. Such instruments are generally treated as equity securities for U.S. income tax purposes. Is the proposed change in the Proposal intended to include such capital notes and income notes as interests of “other securityholders”? Does this change also mean that holders of commercial paper, medium term notes and long term bonds issued by the private investment fund, which do not entitle holders thereof to receive any upside profit or yield with regard to the private investment fund or entitle them to prematurely tender their debt securities for payment, should be included as owners for purposes of the look-through provisions under the Proposal?

The Proposal should clarify whether holders of certain debt instruments are deemed to have redemption rights which might trigger the look-through rule. For example, if a private investment fund were to issue debt instruments which enabled investors to extend the maturity date of those debt instruments (so-called extendable notes), does that mean that these debt securities are deemed to have a maturity on the last possible extended maturity date and would be entitled to “redeem” their interest prior to that final extended maturity date? We would argue that with respect to a debt instrument which has an extended maturity date no such redemption rights should be deemed to be given to such holders because holders by extending the maturity date of their debt instruments are merely exercising their right to continue with their investment and should not be deemed to have redeemed their interest prior to a latest maturity date if they do not extend the initial maturity date.

Under the Proposal a company is not a “private fund” if its owners are entitled to redeem their interests within two years in the case of events that the company after reasonable inquiry finds to be extraordinary and unforeseen at the time the interest was issued. The Proposal should clarify that an investor does not have redemption rights if that investor has negotiated with a private investment fund for the right to redeem its interest if certain conditions have not been met

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even though the failure to meet such conditions may not be deemed to be an unforeseen and extraordinary event. For example, ERISA plans often negotiate with private equity funds for the right to redeem their interests if the fund has not, by the time that it makes its first portfolio company investment, met the definition of a “venture capital operating company” under the ERISA plan asset regulations. ERISA investors negotiate for these rights because they do not want to be investors in funds which do not meet the “venture capital operating company” exemption under the ERISA plan provisions because that would impact the fiduciary responsibilities of both the administrators of the ERISA plan and the manager or general partner of the private equity fund. We believe that making an exception to permit investors to a return of their investment only on extraordinary and unforeseeable circumstances is too limiting. Rather, that if investors for regulatory and other specifically stated purposes are entitled to redeem their interests they should not be deemed to be owners of redeemable interests.

The Proposal should make clear whether an owner of a private fund has a right of redemption if there is significant penalty imposed upon that investor’s exercise its redemption right. Such penalties are often used as a disincentive for investors to exercise their redemption rights. Managers of investment funds recognize that investors may need to redeem their interests, but in order to discourage them from doing so on a regular basis impose significant penalties on redemption. Does the existence of a penalty in any way alter the circumstance that an investor has redemption rights that would cause it to not be viewed as being a private fund for purposes of the Proposal?

If a private fund is organized outside the U.S. and interests are sold both to U.S. persons and foreign persons does it make any difference for purposes of the definition of a “private fund” under the Proposal if redemption rights are offered to foreign investors, but not to U.S. persons? Under existing precedents a foreign organized fund generally looks to its U.S. investors solely for purposes of determining whether it is an investment company subject to registration under the Investment Company Act. In other words, to meet the definition of a private fund do you look to the conditions of that definition solely with respect to its U.S. investors or do you look to the rights of any of its investors including non-U.S. investors.

We appreciate the opportunity to provide comments on the Proposal. If you wish to discuss our comments please contact David Mahle in our New York office at 212-326-3417

Yours very truly,

JONES DAY