

American Federation of Labor and Congress of Industrial Organizations



815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

JOHN J. SWEENEY
PRESIDENT

Gerald W. McEntee
Patricia Friend
Robert A. Scardelletti
Michael J. Sullivan
Joseph J. Hunt
Edward C. Sullivan
Ron Gettelfinger
John Gage
William Hite
Gregory J. Junemann
Nancy Wohlforth

EXECUTIVE COUNCIL

RICHARD L. TRUMKA
SECRETARY-TREASURER

Gene Upshaw
Michael Goodwin
John M. Bowers
Capt. Duane Woerth
Cheryl Johnson, R.N.
William Burrus
James Williams
William H. Young
Andrea E. Brooks
Laura Rico
Paul C. Thompson

LINDA CHAVEZ-THOMPSON
EXECUTIVE VICE PRESIDENT

Michael Sacco
William Lucy
R. Thomas Buffenbarger
Harold Schaitberger
Clyde Rivers
Leo W. Gerard
John J. Flynn
Nat LaCour
Larry Cohen
Thomas C. Short
James C. Little
Frank Hurt
Leon Lynch
Elizabeth Bunn
Edwin D. Hill
Cecil Roberts
Edward J. McElroy Jr.
Baxter M. Atkinson
Vincent Giblin
Warren George
Robbie Sparks
Alan Rosenberg

August 2, 2007

Via electronic & U.S. mail

Mr. John White, Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Mr. Andrew Donohue, Director
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Alternative Asset Managers' Initial Public Offerings

Dear Messrs. White and Donohue:

In our May 15, 2007 and June 12, 2007 letters regarding the public offering of The Blackstone Group L.P. ("Blackstone LP"), we expressed serious concerns that it would become a model for other private equity and hedge funds to sell investments to the public without complying with the investor protections provided by the Investment Company Act of 1940 ("1940 Act"). It appears that these concerns were well founded. The proposed public offerings of KKR & Co. L.P. ("KKR LP") and Och-Ziff Capital Management Group LLC ("OZ LLC") utilize structures similar to Blackstone LP's to avoid regulation. These offerings clearly fall within the 1940 Act definition of investment companies, and the SEC is responsible for ensuring the 1940 Act is not evaded or undermined.¹

¹ Congress granted the SEC extensive mechanisms to enforce the 1940 Act. *See e.g.* Investment Company Act of 1940 §§38-49.

Because of distinctions between the business models employed by Blackstone LP, KKR LP and OZ LLC each presents distinct issues for regulators. Despite these differences, investors in each firm would own an indirect interest in the returns from pools of securities. KKR LP's offering presents concerns that are particularly relevant in today's economy because it will have a significant equity stake in KKR Financial, a publicly-traded company that holds \$11.9 billion in mortgage-backed securities.²

Congress enacted the 1940 Act to address the differences between direct investments in public companies and participating in pooled investment vehicles and the resulting necessity that investment companies be subject to enhanced regulation. The growing trend for hedge fund and private equity asset management firms to sell shares to public investors deprives working Americans of the safeguards that they are entitled to under the 1940 Act including provisions to prevent theft, self-dealing, fraud, excessive fees and breach of fiduciary duty.

I. KKR LP

KKR Group is an alternative asset manager that operates private equity funds and "credit strategy" funds that invest mainly in debt.³ KKR Group organized KKR LP to be a publicly-traded limited partnership. KKR LP reports that it had \$53.4 billion under management as of March 31, 2007, with \$44.1 billion in private equity investments and \$9.3 billion in its credit strategy funds.⁴

KKR LP's calculation of assets under management includes "the assets as to which [KKR LP is] entitled to receive a fee or carried interest." These include (1) the fair value of KKR Group's "traditional" private equity investments and the amount investors have promised to invest in the private equity funds; (2) the net asset value of KKR's private equity fund that trades on the Euronext Amsterdam exchange; (3) the net asset value of KKR's credit strategy funds; (4) the firm's equity interest in KKR Financial; and (5) money raised for KKR's structured finance funds.⁵

KKR LP has not disclosed why its calculation of assets under management includes only the equity in KKR Financial even though the other KKR credit strategy funds are accounted for at their full net asset values. KKR Financial is a NYSE-traded "specialty finance company" with \$16.147 billion, including \$11.9 billion in residential mortgage-backed securities.⁶ It is unclear how these holdings might impact KKR LP.⁷

A. KKR LP, like Blackstone LP, appears to have been structured in an attempt to create the appearance that the publicly-traded partnership will actively manage the

² KKR S-1 filed July 3, 2007; page 143.

³ KKR S-1 filed July 3, 2007; page 5.

⁴ KKR S-1 filed July 3, 2007; page 78.

⁵ KKR S-1 filed July 3, 2007; page ii.

⁶ KKR Financial Holdings LLC S-4/A filed April 2, 2007; page 4.

⁷ Assets under management include the equity interest in KKR Financial which was 12.1% of the funds' equity as of March 31, 2007. KKR S-1 filed July 3, 2007; pages i and 143.

KKR funds. However, the economic and legal functions of KKR LP indicate that it is no more than a passive investor.

KKR Group includes the general partnerships and companies that operate the KKR funds and all of their subsidiaries.⁸ Before the public offering, KKR Group will reorganize so that two “Group Partnerships” own (1) controlling and economic interests in the companies that manage the KKR funds; (2) controlling and economic interests in the general partners of KKR’s private equity funds established after 1996; and (3) an economic interest in the general partner of KKR Private Equity Investors master fund, a Euronext Amsterdam listed private equity fund.⁹ KKR LP has not disclosed what portion of the economic interests in these entities will be allocated to the new public partnership.

KKR LP acts through its general partner, KKR Management, but the general partner itself has no meaningful economic interest in KKR LP.¹⁰ KKR Management will be controlled by the same individuals who manage the KKR funds.¹¹ These individuals will have only nominal economic interests in and legal duties to KKR LP but will have substantial economic interests in the returns from the KKR funds through their ownership of KKR Holdings L.P. (“KKR Holdings”), a limited partnership that will hold the equity interests in the Group Partnerships that are not held by KKR LP.¹²

KKR Group’s responsiveness to the interests of KKR LP’s common unitholders’ is likely to be limited by the fact that the common unitholders will lack meaningful voting rights and have almost no authority to influence management decisions related to KKR LP or the KKR funds.¹³ The offering document also makes clear that if conflicts of interest arise, the individuals who control KKR Management are under no obligation to act in the interest of KKR LP.¹⁴ Perhaps most importantly, KKR LP attempts to disclaim its fiduciary duties to investors in the public offering and has restricted the remedies available to investors if there were a breach of fiduciary duty.¹⁵

These facts lead inescapably to the conclusion that it is the individuals associated with the KKR Group, in their personal capacities and through the Group Partnerships, that actually manage the KKR funds, not KKR LP.¹⁶

⁸ KKR S-1 filed July 3, 2007; page i.

⁹ KKR S-1 filed July 3, 2007; pages 15 and 138.

¹⁰ KKR Management will have no economic interest in KKR LP except for 1 Common Unit. KKR S-1 filed July 3, 2007; page 58.

¹¹ KKR S-1 filed July 3, 2007; page i.

¹² KKR S-1 filed July 3, 2007; page 58.

¹³ KKR S-1 filed July 3, 2007; cover.

¹⁴ “Potential conflicts of interest may arise among our Managing Partner, its affiliates and us. Our Managing Partner and its affiliates have limited fiduciary duties to us and our unitholders, which may permit them to favor their own interests to the detriment of us and our unitholders.” KKR S-1 filed July 3, 2007; page 58.

¹⁵ “Our partnership agreement will contain provisions that reduce or eliminate duties (including fiduciary duties) of our Managing Partner and limit remedies available to unitholders for actions that might otherwise constitute a breach of duty.” KKR S-1 filed July 3, 2007; page 43.

¹⁶ Combined financial statements consolidate assets that are controlled directly or through senior principals. KKR S-1 filed July 3, 2007; page F-12.

B. The 1940 Act requires any public company whose unconsolidated assets are more than 40 percent investment securities to register as an investment company. It focuses on economic reality to determine whether an asset is an investment security.

1) KKR LP's assets will be almost entirely made up of its equity interests in the general partners of the Group Partnerships.¹⁷ These general partnership interests appear to represent a combination of the firm's investments in the KKR funds and its carried interests. Carried interest is the economic equivalent of a call option which is an investment security under the 1940 Act.¹⁸

The July 3 Prospectus does not provide enough information to fully assess the nature of the assets held by KKR LP. It discloses that it “will have no material assets other than [its] equity interest as general partner of one of the Group Partnerships and [its] equity interest in a wholly-owned subsidiary, which in turn will have no material assets other than the equity interest as general partner of the other Group Partnership.”¹⁹ These general partnership interests are contracts creating rights to carried interest and management fees from KKR Group's private equity funds and credit strategy funds.

Carried interest entitles the general partners to a portion, generally 20 percent, of the investment returns of the KKR funds.²⁰ Generally, when an investment manager receives carried interest, investment returns must exceed a contractually agreed upon benchmark before the investment manager is entitled to carried interest.

Economically, the carried interests are call options on pools of KKR funds' investments. Since call options are securities under the 1940 Act, KKR LP's general partnership interests are securities.

A portion of the value of these general partnership interests will probably include the general partners' invested capital. These assets are direct interests in the KKR funds, which would be considered an investment security if the KKR funds they are invested in are investment companies under the 1940 Act.

¹⁷ KKR S-1 filed July 3, 2007; page 47.

¹⁸ See Investment Company Act of 1940, §2a-36. “‘Security’ means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, *any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof)*, or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.” [emphasis added]

¹⁹ KKR S-1 filed July 3, 2007; page 47.

²⁰ Amended S-1 filed May 1, 2007. Page 101.

Private equity funds generally rely on exemptions under Sections 3(c)(1) or 3(c)(7) of the 1940 Act that allow would-be investment companies to escape regulation as long as they do not make public offerings and limit their offerings to sophisticated investors. KKR LP's interests in funds relying on exemptions under these sections are considered investment securities when determining whether more than 40 percent of the value of KKR LP's assets are investment securities.²¹

The disclosures do not provide sufficient information to understand how KKR LP's assets relate to its rights to carried interest or its capital interests in each of its business segments. If we assume that KKR LP's capital interests will be proportional to the value of the assets it manages in each of its business segments, more than 80 percent of KKR LP's capital interests will be in its private equity funds and, therefore, included in calculating the value of its investment securities under the 1940 Act.

The remaining 20 percent of the capital interests would be invested in the credit strategy funds which mostly invest in securitized debt. Some of these investment funds are offered to the general public without being regulated as investment companies because more than 40 percent of their assets are securitized debt which may not be considered investment securities for purposes of the 1940 Act asset test.²² Interests in funds that invest in securitized debt may not be classified as investment securities when determining whether more than 40 percent of KKR LP's assets are investment securities. We note, however, that securitized debt presents unique concerns that we have recently witnessed within the subprime mortgage markets.²³ This is particularly relevant to the KKR LP public offering because KKR LP will have a significant equity stake in KKR Financial, a publicly-traded company that holds \$11.9 billion in mortgage-backed securities.²⁴

2) KKR LP asserts that it should not be regulated as an investment company because its assets are almost entirely comprised of its general partnership interests in the Group Partnerships.²⁵ Because KKR LP will be a passive investor, however, these interests are investment securities under the 1940 Act.

The U.S. Court of Appeals for the Fifth Circuit in *Williamson v. Tucker* ("Williamson") explained that a general partnership interest is an investment security if "the partner has irrevocably delegated his powers, or is incapable of exercising them, or is so dependent on the particular expertise of the promoter or manager that he has no reasonable alternative to reliance on that person."²⁶

²¹ Investment Company Act of 1940 §3(a)(2).

²² For example, Investment Company Act of 1940 §3(c)(5)(C) exempts certain companies that invest in mortgage-backed securities and Rule 3a-7 exempts issuers of asset-backed securities.

²³ We would note that the regulatory treatment of asset-backed securities presents additional concerns, generally, and with respect to KKR Financial's recent restructuring from a REIT to a specialty finance company, that we believe must be addressed as well.

²⁴ KKR S-1 filed July 3, 2007; page 143.

²⁵ KKR S-1 filed July 3, 2007; page 47.

²⁶ The decision of the U.S. Court of Appeals for the Fifth Circuit in *Williamson v. Tucker* is often cited for the proposition that all general partnership interests are not securities. However, the Court in *Williamson* clearly states

KKR LP was structured so that KKR Group's partners and existing employees' economic interests and legal obligations are not aligned with KKR LP in any meaningful way. As discussed above, KKR LP will be incapable of acting as an asset manager and will be completely dependent on the expertise of the KKR Group. Therefore, KKR LP's general partnership interests are investment securities.

B. The recent decision from the U.S. Court of Appeals for the Seventh Circuit in SEC v. National Presto reinforces our view that KKR LP must register under the 1940 Act.

To determine whether National Presto was required to register as an investment company, the Court considered “the company's history, the way the company represents itself to the investing public today, the activities of its officers and directors, the nature of its assets, and the sources of its income.”²⁷

KKR Group has a 30-year history and is well known as a company that pools assets from high net worth individuals and institutional investors and invests in private equity and credit strategy funds. The preliminary prospectus KKR LP filed with SEC on July 2, 2007 states that KKR Group has “continued [its] history of innovation by establishing new debt and public equity strategies that leverage the power of [its] brand and the intellectual capital in [its] private equity business.”²⁸

Henry R. Kravis and George R. Roberts co-founded KKR and will serve as Co-Chairmen and Co-Chief Executive Officers of KKR Management. Kravis and Roberts participate in all the investment activities of the KKR funds.²⁹

While KKR LP has not disclosed the value of its assets, it states that its assets are almost entirely comprised of its general partnership interests. As discussed above, these general partnership interests are investment securities.

The vast majority of its income is derived from the performance of these investments. The company has three sources of income—management fees, carried interest, and income from KKR Group's capital commitments to its funds.³⁰

KKR has not yet disclosed how much of its income comes from each of these sources. The prospectus clearly states that management fee income was \$410,329 in 2006.³¹ It also states that the KKR funds generated \$4 billion in total investment income, \$3.026 billion of which

that “the mere fact that an investment takes the form of a general partnership or joint venture does not inevitably insulate it from the reach of the federal securities laws.” *Williamson v. Tucker*, 645 F.2d 404, 419 (5th Cir. 1981).

²⁷ *SEC v. Nat'l Presto Indus.*, 2007 U.S. App. LEXIS 11345 (7th Cir. 2007).

²⁸ KKR S-1 filed July 3, 2007; page 1.

²⁹ KKR S-1 filed July 3, 2007; page 155.

³⁰ KKR S-1 filed July 3, 2007; page F-12.

³¹ KKR S-1 filed July 3, 2007; page F-14.

belongs to the outside investors.³² This means that KKR Group earned \$974 million of this investment income in 2006. This amount includes both carried interest income and the returns on the capital invested by the KKR partners, both of which are income tied to the performance of the pool of investments in the KKR funds. Therefore, \$974 million or 71 percent of KKR's \$1.384 billion of revenue in 2006 was investment related.

C. KKR LP's tax position that it is a passive investor is inconsistent with its assertion that it is entitled to treatment under the 1940 Act as an active manager of operating companies.³³

Current law does not require KKR Group to pay corporate taxes on its income. Instead, partners are taxed when they receive payouts. Most of this income is in the form of carried interest and is taxed at capital gains tax rates. Generally, once a partnership becomes publicly-traded it must pay corporate taxes under §7704 of the Internal Revenue Code.

KKR LP states that it intends to rely on the §7704(c) exception for “partnerships with passive-type income.” This exception allows publicly-traded partnerships that earn at least 90 percent of their net income from dividends, interest, capital gains from the sale or other disposition of stocks and securities, and certain other forms of investment income to maintain pass-through tax treatment.

KKR LP argues, for 1940 Act purposes, that it should not be regulated as an investment company because it actively manages operating companies. If its income was generated by active management activity, claiming an exemption from corporate taxation for “partnerships with passive-type income” would be inappropriate.

II. OZ LLC

Och-Ziff Operating Group (“OZ Group”), an alternative asset management firm with \$26.8 billion under management, is owned by Daniel Och, Ziff Brothers Investments, L.L.C., and 17 other partners.³⁴ OZ Group created OZ LLC as a publicly-traded company that would hold a portion of the equity interest in OZ Group.³⁵

According to OZ LLC's explanation of its activities, the firm is clearly an investment company.

The Company, through its funds, invests in equity securities, convertible securities and debt instruments, including bank debt and high-yield debt, options, futures, forwards, swaps, other derivatives, private securities and assets,

³² “When funds are consolidated, the KKR Group's combined financial statements reflect the assets, liabilities, revenues, expenses and cash flows of the consolidated funds on a gross basis, and the majority of the economic interests in the consolidated funds, which are held by third-party investors, are reflected as non-controlling interests. All inter-company transactions are eliminated in consolidation.” KKR S-1 filed July 3, 2007; page 69.

³³ KKR S-1 filed July 3, 2007; page 186.

³⁴ OZ S-1 filed July 2, 2007; pages i-ii and 9.

³⁵ OZ S-1 filed July 2, 2007; page 9.

real estate entities and other investments. The Company seeks to deliver consistent, positive risk-adjusted returns throughout market cycles, with a focus on risk management and capital preservation. The Company's diversified, multi-strategy approach combines global investment strategies, including merger arbitrage, convertible arbitrage, equity restructuring, credit and distressed credit investments, real estate and private equity.³⁶

The primary test under Section 3(a)(1) of the 1940 Act states that if a company "is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities" it is required to register as an investment company.

A. Structure

OZ LLC will be managed by the same individuals who manage the OZ funds.³⁷ These individuals will have no financial interest in OZ LLC. As part of the public offering, OZ LLC will issue A Shares and B Shares. The A Shares will be sold to outside investors in the public offering and will be entitled to 100 percent of the economic interest in OZ LLC. OZ Group's existing owners will hold all of the B Shares which will give them the right to participate in OZ LLC's shareholder votes but will not entitle them to any economic interest in OZ LLC.³⁸ OZ Group's existing owners will continue to hold direct interests in OZ Group.³⁹

OZ LLC will own interests in two holding companies ("Intermediate Holding Companies") that will act as general partners of the OZ Group operating companies. The Intermediate Holding Companies will not be entitled to any economic interest in OZ Group in their capacity as general partner. Instead, the Intermediate Holding Companies will hold limited partnership interests in OZ Group that entitle them to a portion of the income OZ Group earns from its investment activities.⁴⁰ OZ Group may issue additional limited partnership interests to its employees in the future which would decrease the proportional interest of OZ LLC in the income OZ Group generates.⁴¹

Unlike KKR LP and Blackstone LP, OZ LLC has not disclaimed its fiduciary duties to future investors.⁴² However, the preliminary prospectus filed with the SEC on July 2 states that conflicts of interest may arise among investors in their funds or among investors and the firm's partners and "that all conflicts of interest described in this prospectus are deemed to have been specifically approved by all of our shareholders."⁴³

³⁶ OZ S-1 filed July 2, 2007; page F-7.

³⁷ OZ S-1 filed July 2, 2007; page 15.

³⁸ OZ S-1 filed July 2, 2007; page 16.

³⁹ OZ S-1 filed July 2, 2007; page 15.

⁴⁰ OZ S-1 filed July 2, 2007; page 63.

⁴¹ OZ S-1 filed July 2, 2007; page 62.

⁴² OZ S-1 filed July 2, 2007; page 172.

⁴³ OZ S-1 filed July 2, 2007; page 172.

Despite a handful of corporate governance provisions that will provide limited protection for OZ LLC shareholders—the board of directors will be comprised of a majority of independent directors and there will be independent compensation, nominating, corporate governance and conflicts committees—the disclosures explicitly state that OZ LLC has the right to do away with these protections at its discretion.⁴⁴

While these limited fiduciary duties to investors in OZ LLC create a minimal alignment of interests that does not exist in KKR LP or Blackstone LP, the fact remains that this offering is no more than an indirect way to allow unsophisticated investors to invest in funds that hold illiquid, difficult to value securities, use substantial leverage, are not required to diversify, charge exorbitant fees, and are permitted to engage in self-dealing transactions. Congress explicitly sought to protect investors from these risks when it enacted the 1940 Act and investors are entitled to these protections under current law.

B. The OZ LLC public offering is an indirect way to allow shareholders to invest in unregulated hedge funds.

In connection with the offering, the existing owners will exchange their interests in OZ Group for cash that they will be required to invest in the OZ Global Special Investments funds (“OZ Global”).⁴⁵ While the existing owners will not be able to exchange their OZ Global shares for OZ LLC shares for five years, they will be permitted to transfer their interests into another OZ fund.⁴⁶ OZ LLC will filter the proceeds from the public offering through its existing owners and use the money to fund OZ Global’s investment activities. To the extent that the existing owners transfer their shares of OZ Global into a fund that is publicly traded or otherwise liquid, the public offering will allow the existing owners to cash out.

If this offering is successful, OZ LLC investors will own an interest in the income generated by OZ Group. OZ Group’s income is almost entirely derived from management fees and carried interest from the OZ funds. As discussed above in relation to KKR LP’s general partnership interests in the KKR funds, carried interest is economically equivalent to a call option.

In effect, OZ LLC investors’ assets will be used to grow OZ Global, and they will receive call options on all of OZ Group’s funds in return. The transaction is similar to a mutual fund receiving money from new investors—the fund uses the money to purchase interests in one or

⁴⁴ OZ S-1 filed July 2, 2007; page 140.

⁴⁵ OZ S-1 filed July 2, 2007; page 20.

⁴⁶ “Each of our existing partners will invest all of his after-tax proceeds received in connection with this offering initially into our OZ Global Special Investments funds. These investments may be transferred to other Och-Ziff funds or new opportunities, but will otherwise not be redeemable by them for a period of five years following this offering without the approval of the general partner or board of directors of such funds, as applicable. The Ziffs will invest approximately 50 percent of the after-tax proceeds received by them in connection with this offering into our funds, which investments will be subject to the lock-up period applicable to the funds in which the Ziffs choose to invest.” S-1 filed July 2, 2007; page 73.

more companies but each investor is entitled to the returns from the entire pool, not just the assets his contribution was used to purchase.

Section 48(a) of the 1940 Act provides that “[i]t shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this title or any rule, regulation, or order thereunder.” OZ Group cannot, through OZ LLC, sell interests in unregulated hedge funds to the general public.

C. OZ LLC clearly meets the definition of an investment company under the 1940 Act and has failed to present any reasoned argument for why it should not be regulated as an investment company.

OZ LLC asserts that it should not be regulated as an investment company because “the nature of [its] assets and the sources of [its] income exclude [OZ LLC] from the definition of an investment company under the 1940 Act.”⁴⁷ The disclosures provide no explanation for this conclusion and the remaining information indicates that the nature of OZ LLC’s assets and income clearly bring it within the 1940 Act definition of an investment company.

OZ LLC’s disclosures provide a breakdown of OZ Group’s deconsolidated assets. Of the deconsolidated assets relevant to the 1940 Act test, more than 90 percent are investment securities—well beyond the 40 percent threshold that would bring it within the definition of an investment company.⁴⁸ OZ LLC does indicate that it intends to make adjustments that “have not yet been recorded in the unaudited pro forma financial statements as all of the adjustments related to such columns are not yet determinable.”⁴⁹

While OZ LLC’s financial statements are incomplete, it appears that further disclosures will only add to the portion of its assets that are investment securities. Despite OZ LLC’s purported status as the general partner of the OZ Group, its economic interest in these entities is in the form of limited partner interests which are investment securities.⁵⁰

According to the prospectus, OZ LLC’s “primary assets will be its indirect ownership interest in the Och-Ziff Operating Group,” the value of which is not readily apparent in the current disclosures.⁵¹ OZ LLC will be entitled to a portion of the income generated from OZ

⁴⁷ OZ S-1 filed July 2, 2007; page 49.

⁴⁸ “Cash items” are excluded from the numerator and denominator when determining whether 40 percent of a company’s assets are investment securities. Investment Company Act of 1940 §3(a)(1)(c). OZ Group’s deconsolidated assets are valued at \$2.13 billion. This includes \$1.51 billion of cash items and \$574.1 million in investments.

⁴⁹ OZ S-1 filed July 2, 2007; page 91.

⁵⁰ “Under the test for an investment contract established in *SEC v. W. J. Howey Co.*, 328 U.S. 293, 301, 66, a limited partnership generally is a security, because, by definition, it involves investment in a common enterprise with profits to come solely from the efforts of others.” See *SEC v. Murphy*, 626 F.2d 633, 640-641 (9th Cir. 1980).

⁵¹ OZ S-1 filed July 2, 2007; page 9.

Group's investments as a result of its limited partnership interests in the OZ Group.⁵² It is likely that future adjustments will reflect the estimated fair value of OZ LLC's limited partnership interests in the OZ Group which are investment securities.

As a legal matter, limited partnership interests are investment securities.⁵³ These limited partnership interests will function economically as call options on the income of the OZ funds. As discussed above in the analysis of KKR LP's general partnership interests, call options are within the definition of investment securities under the 1940 Act.

D. OZ LLC, like Blackstone LP and KKR LP, attempts to take advantage of tax treatment only available to passive investors. This is inappropriate if it is true that OZ LLC will actively manage the OZ funds.

OZ LLC intends to rely on the §7704(c) exception that allows publicly-traded partnerships that earn at least 90 percent of their net income from dividends, interest, capital gains from the sale or other disposition of stocks and securities, and certain other forms of investment income to maintain pass-through tax treatment.⁵⁴

OZ LLC's representations that it is passive for tax purposes directly contradict its argument that it should not be regulated as an investment company under the 1940 Act because it actively manages operating companies. If its income was generated by active management activity, claiming an exemption from corporate taxation for "partnerships with passive-type income" would be inappropriate.

As Congress considers the tax treatment of carried interest and publicly-traded asset management firms, we maintain that it is inappropriate to allow firms to access the public markets while their offering documents contain glaring contradictions in the disclosures about the nature and purpose of their businesses.

E. The recent decision from the U.S. Court of Appeals for the Seventh Circuit in SEC v. National Presto confirms that OZ LLC must register under the 1940 Act.

As discussed above, "the company's history, the way the company represents itself to the investing public today, the activities of its officers and directors, the nature of its assets, and the sources of its income"⁵⁵ are considered when determining whether a company is required to register under the 1940 Act.

⁵² "Under the operating group limited partnership agreements, management and control rights will be vested in our intermediate holding companies as the general partners. These general partner interests possess no economic interest in such entities and are not entitled to any allocation of gains or losses of, or any distributions from, the Och-Ziff Operating Group. As a result, Och-Ziff, through these general partner entities, will control the Och-Ziff Operating Group." OZ S-1 filed July 2, 2007; page 63.

⁵³ SEC v. Murphy, 626 F.2d 633, 640-641 (9th Cir. 1980).

⁵⁴ OZ S-1 filed July 2, 2007; page 55.

⁵⁵ SEC v. Nat'l Presto Indus., 2007 U.S. App. LEXIS 11345 (7th Cir. 2007).

Och-Ziff Group has been managing hedge funds and other alternative investments for three years.⁵⁶ Neither the proposed public offering nor any other information available provide any basis to conclude that OZ Group intends to stray from its historic business as a hedge fund manager. The OZ LLC prospectus clearly tells prospective investors that they are buying a right to returns from hedge funds. “Our principal focus is to create long-term value for our fund investors, primarily by generating positive, risk-adjusted returns for our growing base of investors. We believe this philosophy will benefit our public shareholders over time.”⁵⁷

Each of OZ LLC’s officers also has significant responsibilities within the firm’s investment divisions.⁵⁸ Three of these officers will be on the board of directors. In addition, OZ LLC intends to appoint four independent board members.⁵⁹

OZ LLC’s assets and income also indicate that it is an investment company. As discussed above, we believe that OZ LLC’s assets will be almost entirely comprised of investment securities. Last year, 67 percent of OZ Group’s deconsolidated revenue was carried interest, economically the same as a call option, which is an investment security under the 1940 Act. Only 31 percent of its income was management fees.⁶⁰

OZ LLC meets every prong of the National Presto test and must be required to comply with the 1940 Act.

III. Conclusion

In our May 15, 2007 and June 12, 2007 letters regarding the public offering of Blackstone LP, we expressed serious concerns that the Blackstone LP public offering would become a model for other private equity and hedge funds to sell investments to the public without complying with the investor protections provided by 1940 Act. The proposed public offerings of KKR LP and OZ LLC illustrate that these concerns were justified.

In written testimony before the US House of Representatives Subcommittee on Domestic Policy, Mercer Bullard, Assistant Professor at the University of Mississippi School of Law and former Assistant Chief Counsel on the SEC’s Division of Investment Management, wrote, “It will be only a matter of time before a hedge fund manager experiences a dramatic collapse or perpetrates a colossal fraud. What will be different this time is that thousands of unsophisticated investors will incur substantial losses in an investment to which Congress has painstakingly attempted to restrict public access.”

⁵⁶ OZ S-1 filed July 2, 2007; page 125.

⁵⁷ OZ S-1 filed July 2, 2007; page 127.

⁵⁸ OZ S-1 filed July 2, 2007; page 139.

⁵⁹ OZ S-1 filed July 2, 2007; page 140.

⁶⁰ OZ S-1 filed July 2, 2007; page 86.

Letter to John White and Andrew Donohue

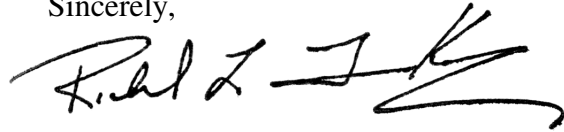
August 2, 2007

Page 13 of 13

We once again ask the Commission Staff to enforce the nation's securities laws. The 1940 Act is intended to protect unsophisticated investors from this occurrence and the Commission has an obligation to ensure that the 1940 Act is not evaded or undermined.

We thank the Commission Staff for the opportunity to present our views. If you have questions about this or our previous letters, please call Damon Silvers in our General Counsel's office at (202) 637-3953. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard L. Trumka". The signature is fluid and cursive, with a long horizontal stroke at the end.

Richard L. Trumka

RLT/me

opeiu #2, afl-cio

cc: Chairman Christopher Cox
Commissioner Paul Atkins
Commissioner Roel Campos
Commissioner Kathleen L. Casey
Commissioner Annette Nazareth
Henry R. Kravis, Co-Chairman and Co-CEO, KKR & Company L.P.
George R. Roberts, Co-Chairman and Co-CEO, KKR & Company L.P.
Daniel Och, Chairman, CEO and CIO, Och-Ziff Capital Management Group LLC