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April 10, 2008

**FOIA CONFIDENTIAL TREATMENT REQUESTED BY  
FRIED FRANK HARRIS SHRIVER & JACOBSON LLP  
ON BEHALF OF  
D.B. ZWIRN & Co., L.P.  
PURSUANT TO 17 CFR § 200.83**

**By Federal Express**

Peter Altenbach, Esq.  
Northeast Regional Office  
United States Securities and Exchange Commission  
3 World Financial Center  
New York, NY 10281

**Re: NY-7696**

Dear Mr. Altenbach:

We submit this letter on behalf of our client, D.B. Zwirn & Co., L.P. ("DBZ"). The purpose of this letter is to (1) respond to the Staff's request that we provide a written explanation of why the attorney work product protection applies to a legal opinion that the law firm of Clifford Chance provided to DBZ, and (2) confirm our response to the Staff's request for notes of interviews conducted by the law firm of Gibson, Dunn & Crutcher.

**Applicability of Work Product to the Clifford Chance Legal Opinion**

During our telephone call on April 1, 2008, we explained why work product applied to a legal opinion that Clifford Chance prepared for DBZ and that DBZ subsequently provided to PricewaterhouseCoopers ("PwC"). The Staff requested that we put our position in writing, which we are doing by submitting this letter.

Item 2 of the Staff's March 4, 2008 subpoena to our client requests:

All documents, including but not limited to the opinion referenced in footnote nine to the LTD Fund's consolidated financial statements on DBZ 0036186, concerning the engagement of counsel by D.B. Zwirn and/or the LTD Fund to provide an opinion as to whether it is more likely than not that the transfers

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from the LTD Fund to the LP Fund and other accounts management by D.B. Zwirn will not cause the LTD Fund to be treated as engaged in a U.S. federal or state and local trade or business activity.

DBZ retained Clifford Chance to provide the above-referenced opinion. One of the primary reasons that DBZ sought the opinion was to help defend itself in the event of government investigations and/or potential litigation, including potential litigation with investors, related to tax issues. Because the opinion was prepared by a law firm in anticipation of potential litigation, the opinion is protected from disclosure to the Staff by the attorney work product doctrine.

In connection with the audit of the LTD Fund's financial statements for the year ended December 31, 2006, DBZ provided a copy of the opinion to PwC, the LTD Fund's outside auditors. DBZ provided the opinion to PwC with the explicit understanding that PwC would continue to maintain the confidentiality of the opinion.

Providing work product materials to a third party does not waive that protection unless the disclosure substantially increases the likelihood that the information will be provided to potential adversaries. *In re Pfizer Inc. Sec. Litig.*, 1993 U.S. Dist. Lexis 18215, \*20 (SDNY 1993) ("The work product privilege is not automatically waived by any disclosure to third persons. Rather, the courts generally find a waiver of the work product privilege only if the disclosure 'substantially increases the opportunity for potential adversaries to obtain the information.'" (citations omitted)). Thus, providing work product materials to third parties with common interests does not waive the protection. *Id.* at \*21 ("Disclosure of work product to a party sharing common interests is not inconsistent with the policy of privacy protection underlying the doctrine.").

A growing number of courts, including courts in the Southern District of New York, have taken the position that a company's provision of documents protected by work product to outside auditors does not waive the work product protection because a company and its auditors often share common interests in the information. *See, e.g., International Design Concepts, Inc. v. Saks Inc.*, 2006 U.S. Dist. Lexis 36695, \*8 (SDNY 2006) ("Here, allowing the outside auditor, retained by the client, to know the content of the attorney's confidential threat assessment does not, in this Court's view, destroy the protection. A confidential oral or written report by an attorney to the company's auditors of the results of his or her investigation permits the auditor to assess whether the financial statements of the company should receive a qualified or unqualified opinion."); *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 448 (SDNY 2004) ("Thus, any tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine. Nor should it be. A business and its auditor can and should be aligned insofar as they both seek to prevent, detect, and root out corporate fraud."); *Pfizer* at \*21-22 ("Likewise, in this case, Pfizer and Peat Marwick obviously shared common interests in the information, and Peat Marwick is

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not reasonably viewed as a conduit to a potential adversary. Therefore, no waiver of work product protection occurred by the provision of these documents to Peat Marwick.”).

Based on the foregoing, DBZ’s disclosure of the Clifford Chance opinion to PwC did not waive the work product protection that applied to the legal opinion. Nor did the reference to the opinion’s conclusion in the LTD Fund’s financial statements waive the work product protection. *In re Initial Public Offering Sec. Litig.*, 2008 U.S. Dist. Lexis 11058, \*26 (SDNY 2008) (Defendant’s “willingness to report the findings of the investigation is not the equivalent of disclosing the contents of the [interview memoranda] themselves.”). Consequently, the Clifford Chance opinion continues to be protected by work product, and DBZ’s assertion of work product with respect to the opinion is proper. We will be providing a privilege log related to the March 4<sup>th</sup> subpoena that reflects our position with respect to the applicability of the work product protection to the Clifford Chance opinion.

#### **The Staff’s Request for Interview Notes**

This letter also confirms our position with respect to the Staff’s request for the notes of interviews conducted by the law firm of Gibson, Dunn & Crutcher. Those materials are covered by the attorney-client privilege and the attorney work product protection. As we explained to the Staff during our April 1, 2008 telephone call, after careful consideration of the Staff’s request, we concluded that DBZ could not risk a subsequent finding that it had waived privilege or work product by providing those materials to the Staff. In reaching that decision, we evaluated applicable law and other considerations, including: (1) SEC Commissioner and Staff statements regarding waiver of privilege not being a prerequisite to receiving *Seaboard* cooperation credit; (2) the Department of Justice’s policy shift on waiver requests, as reflected in the McNulty Memo; and (3) the impact that providing the requested material could have on subsequent litigation in light of Judge Scheindlin’s *In re Initial Public Offering Sec. Litig.* opinion in which she declined to adopt the theory of selective waiver for privileged materials provided to the government, including the SEC. However, in the spirit of continued full cooperation, if the Staff can demonstrate a “legitimate need” for specific witness interview statements, we will consider providing the Staff with oral summaries of those interviews.

Please feel free to contact me with any questions you may have.

\* \* \*

This production is not intended to, and does not, waive any applicable privilege or protection, including the attorney-client privilege or work product protection. If any information that would be protected by the attorney-client privilege or work product doctrine was produced,

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such production was inadvertent and was not intended to be a waiver of any applicable privilege or protection and we respectfully request the return of such privileged material.

On behalf of our client, we hereby claim that all materials provided to the Staff during the course of its investigation, including this letter (Bates-stamped DBZ 0039424 - DBZ 0039427), are entitled to confidential treatment pursuant to the Freedom of Information Act. Each document has been appropriately labeled to indicate the intention to maintain the confidential status of the enclosed materials. This claim of confidentiality shall continue indefinitely unless we advise you otherwise. Should the Commission receive any request for these documents pursuant to the Freedom of Information Act or pursuant to a third-party subpoena or document demand (from a party other than a federal, state, local or foreign law enforcement agency, or a governmental entity, or a self-regulatory organization), we expect that we will be given notice and an opportunity to object to such disclosure. In such event, we request that the Staff telephone the undersigned rather than rely upon the United States mail for such notice. We request the Staff also provide a written copy of such notice to our client, addressed as follows: Lawrence Cutler, Chief Compliance Officer and Chief Operating Officer, D.B. Zwirn & Co., L.P., 745 Fifth Avenue - 18th Floor, New York, NY 10151. Our request that the Staff provide a written copy of such notice to our client does not constitute authorization for the Staff to provide such notice to our client in lieu of us.

We further request that these materials be returned to us once the Staff has concluded its investigation.

If you have any questions regarding this matter, please call me at 202.639.7054.

Sincerely,



Kevin J. Harnisch

cc: FOIA Officer (redacted)

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DBZ 0039427

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