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**VIA E-mail to: rule-comments@sec.gov**

Elizabeth M. Murphy,
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF* (File No. S7-05-11)

Dear Ms. Murphy:

On behalf of an insurance company client ("Client"), we appreciate the opportunity to comment on the recent proposal referenced above (the "Proposal") by the Securities and Exchange Commission ("SEC") to implement various provisions of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[1] Among other things, the Proposal proposed new Rule 204(b)-1 under the Investment Advisers Act of 1940, as amended (the "Advisers Act") which would require any investment adviser registered or required to be registered under the Advisers Act and that advises one or more private funds to file Form PF with the SEC. Rule 204(b)-1 would require investment advisers to file on Form PF various types of information about the private funds they manage depending on the amount of private fund assets under management.

Client, like many insurance companies, has formed various wholly-owned subsidiaries solely to hold certain of Client's investments ("Captive Subs"). These Captive Subs own securities and other investments and, consequently, could fall within the statutory definition of "investment company" but for the exceptions in Sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, as amended (the "1940 Act"). Client also has formed certain other wholly-owned operating subsidiaries to manage the investments of Client and the Captive Subs. While one of these wholly-owned subsidiaries has registered under the Advisers Act due in part to the fact that it serves as an investment adviser to a registered investment company ("Advisory Sub"), others have not registered with the SEC based on Client's view that they either do not fall

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[1] *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF*, SEC Rel. No. IA-3145 (Jan. 26, 2011) ("Proposing Release").

within the statutory definition of "investment adviser" or are exempt from registration ("Management Subs").[2]

As more fully discussed below, Client is concerned that the Dodd-Frank Act and the Proposal may inadvertently call into question the Advisers Act status of the Management Subs and obligate them and the Advisory Sub to file Form PF in connection with their management of the investments held by the Captive Subs. We, therefore, request on Client's behalf that the SEC clarify through interpretation or rulemaking that the Management Subs are not investment advisers required to be registered under the Advisers Act and, thus, not subject to the requirements of proposed Rule 204(b)-1. In addition, we hereby request on Client's behalf that the SEC revise the Proposal to clarify that the Captive Subs are not "private funds" for purposes of proposed Rule 204(b)-1.

The first section of this comment letter provides factual background information on how the Captive Subs, the Management Subs, and the Advisory Sub are owned and operated. The second section discusses the current status of the Captive Subs under the 1940 Act and the status of the Management Subs and the Advisory Sub under the Advisers Act. The third section analyzes how the Dodd-Frank Act may inadvertently call into question the status of the Management Subs and thereby obligate them to register under the Advisers Act and comply with proposed Rule 204(b)-1. This section also discusses how the Proposal would subject both the Management Subs and the Advisory Sub to file reports on Form PF with respect to the Captive Subs they manage. The fourth and final section is divided into two parts. The first part explains why Client believes that the Management Subs continue to fall outside the scope of the statutory definition of investment adviser or remain exempt from registration and thus should not be subject to proposed Rule 204(b)-1. It then provides some specific suggestions on how the SEC can make this clear. The second part explains why the Captive Subs should not be treated as "private funds" under the Proposal.

## I. Background

### A. Captive Subs

In the ordinary course of business, Client establishes and maintains the Captive Subs for the sole purpose of holding certain of its investments. The Captive Subs are generally utilized by Client to manage its internal financial affairs, including but not limited to tax, liability and accounting matters, or to deal with regulatory requirements, but in any case, for reasons unrelated to the federal securities laws. These Captive Subs are not operating entities and have no employees. Typically, the directors and officers of the Captive Subs are employees of Client, the Advisory Sub, or the Management Subs. All administrative duties relating to the maintenance of the Captive Subs (*e.g.*, corporate recordkeeping, filing of tax returns, compliance with any applicable laws) are also provided by Client, the Advisory Sub, or the Management Subs. All of the equity interests in the Captive Subs are held directly, or indirectly through other

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[2] Although this letter is submitted on Client's behalf, we believe many insurance companies have similar corporate structures and have comparable issues. Consequently, the SEC should not consider the issues raised in this letter as unique to Client.

Captive Subs, by Client, and the Captive Subs do not issue any other securities. Client capitalizes, directly or indirectly, the Captive Subs.

### B. Management Subs

The Management Subs manage assets of Client and its Captive Subs. Client has determined that the Management Subs are not required to register with the SEC under the Advisers Act because Client believes that the Management Subs either do not fall within the statutory definition of investment adviser under the Advisers Act or are exempt from registration. The Management Subs do not manage assets of the Captive Subs pursuant to a separate advisory contract. Rather, the assets of the Captive Subs are managed pursuant to a written agreement between Client and the applicable Management Sub. All of the management fees paid to the Management Subs are paid directly by Client.

### C. Advisory Sub

Like the Management Subs, the Advisory Sub manages the assets of Client and its Captive Subs. However, Client has registered the Advisory Sub under the Advisers Act because it manages assets of registered investment companies or unaffiliated clients thereby requiring registration. The Advisory Sub manages the assets of the Captive Subs pursuant to arrangements similar to those of the Management Subs described above.

## II. Current Regulatory Status of the Captive Subs and Management Subs

### A. Captive Subs

As noted above, the Captive Subs may fall within the statutory definition of investment company because they hold securities and other investments. However, they have not registered as investment companies in reliance on the exceptions in Sections 3(c)(1) or 3(c)(7) of the 1940 Act.

### B. Management Subs

Currently, Client has not required the Management Subs to register in reliance on two commonly used exemptions, the "private adviser exemption" and "insurance company exemption." In addition, Client has taken the position that the Management Subs should not be registered under the Advisers Act because they fall outside the definition of investment adviser. As discussed more fully below, although Client believes that the Management Subs should not be considered investment advisers within the meaning of the Advisers Act, Client nonetheless took comfort in the clarity provided by the two exemptions, and in particular, the private adviser exemption.

#### 1. The Private Adviser Exemption - Section 203(b)(3) of the Advisers Act

Section 203(b)(3) of the Advisers Act exempts from registration any investment adviser who: (i) has had fewer than fifteen clients during the past twelve months; (ii) does not hold itself

out generally to the public as an investment adviser; and (iii) does not act as an investment adviser to a registered investment company. Rule 203(b)(3)-1 under the Advisers Act defines the term "client" for purposes of Section 203(b)(3). Rule 203(b)(3)-1(a)(2) provides that two or more legal organizations, such as a corporation or limited liability company, that have "identical owners," may be counted as one client. Consequently, Client has treated the Management Subs as exempt under Section 203(b)(3) because they only have one client, do not hold themselves out generally to the public as investment advisers, and do not act as investment advisers to registered investment companies.

### 2. Insurance Company Exemption – Section 203(b)(2) of the Advisers Act

Section 203(b)(2) of the Advisers Act exempts from investment adviser registration "any investment adviser whose only clients are insurance companies." Section 202(a)(12) of the Advisers Act states that the term "insurance company" has the same meaning as in the 1940 Act, which defines the term "insurance company" as a company that is organized as an insurance company, that is engaged primarily and predominantly in the business of writing insurance or the reinsuring of risks, and which is subject to supervision by a state insurance commissioner or regulator. Client is an insurance company within the meaning of this definition.

Section 203(b)(2) does not define the term "client," and the SEC staff has not provided guidance as to whether the term "insurance company" includes an insurance company's wholly-owned subsidiaries. However, Rule 203(b)(3)-1(a)(2) provides analogous support for the notion that the term "client" includes not just an insurance company but also its wholly-owned subsidiaries. Consequently, Client believes that Section 203(b)(2) should apply in circumstances where a Management Sub provides services to a Captive Sub, which may not itself engage directly in the insurance business.

### 3. Statutory Definition of "Investment Adviser"

Section 202(a)(11) of the Advisers Act defines "investment adviser" as any person who is in the business of advising ***others*** as to the advisability of investing in, purchasing or selling securities for compensation. The Advisers Act does not define the term "others." However, the SEC and the SEC staff have indicated in various circumstances that a person who provides advice about securities to a parent or affiliate may not be providing advice to others.

Former Rule 202-1 under the Advisers Act generally prohibited persons who served as in-house investment managers of employee benefit plans from registering as investment advisers under the Advisers Act. In its 1983 release proposing the rescission of Rule 202-1 under the Advisers Act, the SEC implied that an entity's advice to affiliate employee benefit plans might not cause the entity to fall within the definition of investment adviser.[3] The SEC then noted that other bases for excluding such employees and affiliates from SEC regulation may exist, depending on the facts and circumstances:

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[3] *Proposed Rescission of a Rule Excluding from Registration as Investment Adviser Certain Persons Who Offer Investment Advice to Employee Benefit Plans Sponsored by Their Employers*, SEC Rel. No. IA-870 (Jul. 15, 1983).

For example, in some cases such persons might not be deemed to be engaged in the business of providing investment advice to others and, therefore, would not be investment advisers under the Section 202(a)(11) definition.[4]

The SEC staff also appears to have taken the position that a wholly-owned subsidiary of a company created solely to provide advisory services to the parent company and other wholly-owned subsidiaries does not advise "others." For example, the SEC staff previously permitted a wholly-owned subsidiary of a company formed for the sole purpose of providing advisory services to various employee benefit plans and trusts of the company to not register as an investment adviser under the Advisers Act.[5]

Accordingly, Client believes that the Management Subs' management of the assets of the Captive Subs should not constitute advising "others" for purposes of Section 202(a)(11).

## III. Potential Impact of the Dodd-Frank Act and the Proposal

The Dodd-Frank Act eliminates the private adviser exemption. As amended, the Advisers Act will require the registration of any investment adviser with assets under management of more than $100 million. Consequently, Client is concerned that elimination of the private adviser exemption may result in the Management Subs having to register because they manage the assets of the Captive Subs, which may exceed $100 million. As discussed more fully below, the SEC should clarify that the Management Subs may remain unregistered in reliance on the insurance company exemption or on the basis that such Management Subs do not meet the definition of investment adviser under the Advisers Act.[6]

In addition, as noted above, proposed Rule 204(b)-1 would require any investment adviser registered or required to register under the Advisers Act and that advises one or more private funds to file certain information about the private funds in Form PF. Client is concerned that the Management Subs, if required to register, and the Advisory Sub would be required to file Form PF with respect to the Captive Subs. Therefore, as discussed more fully below, the SEC should clarify that the Captive Subs are not private funds and not subject to the requirements of proposed Rule 204(b)-1 and Form PF.

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4 *Id.* at n. 2.

5 *Lockheed Martin Investment Management Co.*, SEC No-Action Letter (June 5, 2006).

6 *See Comment Letter from the American Insurance Association*, regarding File No. S7-36-10 and S7-37-10 (Jan. 24, 2011) (commenting that an investment adviser that is only offering services to its related group of companies (none of which is a registered investment company) and not to the public in general, should be excluded from the registration and reporting requirements).

## IV. Recommendations

### A. *The SEC should clarify by rulemaking or interpretation that the Management Subs are not investment advisers or are exempt from registration.*

Despite the repeal of the private adviser exemption, Client continues to believe that, for the reasons discussed above, the Management Subs do not fall within the statutory definition of investment adviser, or are otherwise exempt from such registration pursuant to Section 203(b)(2) of the Advisers Act. Therefore, we request on behalf of Client that the SEC clarify that the Management Subs are not investment advisers for purposes of Section 202(a)(11) and/or are exempt from registration pursuant to Section 203(b)(2). This can be done in one of three ways. First, the SEC could clarify this formally in a release, such as the release adopting proposed Rule 204(b)-1 and Form PF, or informally through SEC staff interpretation or no-action relief. Second, the SEC could exercise its rulemaking authority and adopt a rule that clarifies that the Management Subs (and other similarly situated subsidiaries of insurance companies) do not fall within the statutory definition of investment adviser. Third, the SEC could exercise its rulemaking authority to define the term "insurance company" under Section 203(b)(2) of the Advisers Act to include any issuer all of the outstanding securities of which are directly or indirectly owned by a single parent insurer.

### B. *The SEC should clarify that the Captive Subs are not private funds for purposes of proposed Rule 204(b)-1.*

The SEC should revise the Proposal to clarify that the Captive Subs are not private funds for purposes of proposed Rule 204(b)-1. As discussed more fully below, the Dodd-Frank Act legislative history and SEC statements regarding the purposes for which the private adviser exemption was repealed support the determination that the Captive Funds should not be deemed to be private funds for purposes of the proposed rule.

Client believes that the Dodd-Frank Act legislative history evidences Congress's intent to exclude wholly-owned subsidiaries or other corporate vehicles used for the management of a company's investments from the definition of private funds. For example, the intended scope of private fund regulation was discussed on the floor of the House of Representatives during the Dodd-Frank Act debates in the analogous context of the "Volcker Rule."[7] Representative Himes entered into the following colloquy with Representative Frank, Chairman of the House Financial Services Committee and a primary sponsor of the Dodd-Frank Act:

> Mr. HIMES. Madam Speaker, I rise to enter into a colloquy with Chairman Frank. I want to clarify a couple of important issues under section 619 of the bill, the Volcker Rule. The bill would prohibit firms from investing in traditional private equity funds and hedge funds. Because the bill uses the very broad Investment Company Act approach to define private equity and hedge funds, it could technically apply to lots of corporate structures, and not just the hedge funds and

[7] The Volcker Rule would broadly restrict banking organizations from engaging in private fund sponsorship, management and investment activities.

private equity funds. ***I want to confirm that when firms own or control subsidiaries or joint ventures that are used to hold other investments, that the Volcker Rule won't deem those things to be private equity or hedge funds and disrupt the way the firms structure their normal investment holdings.***

Mr. FRANK of Massachusetts. If the gentleman would yield, let me say, first, you know, there has been some mockery because this bill has a large number of pages, although our bills are smaller, especially on the page. We do that-by the way, there are also other people who complain sometimes that we've left too much discretion to the regulators. It's a complex bill dealing with a lot of subjects, and we want to make sure we get it right, and we want to make sure it's interpreted correctly. ***The point the gentleman makes is absolutely correct. We do not want these overdone. We don't want there to be excessive regulation. And the distinction the gentleman draws is very much in this bill, and we are confident that the regulators will appreciate that distinction, maintain it, and we will be there to make sure that they do.*** (emphasis added).[8]

While the colloquy was in the context of the Volcker Rule, it reflects the intent of Congress to limit the scope of increased regulation to traditional private equity and hedge funds and to protect against excessive regulation that might disrupt the manner in which firms manage their investment holdings. Client's use of the Captive Subs is largely the product of risk and financial management, and not an effort to evade regulation. The colloquy clearly admonishes regulators, such as the SEC, to draw distinctions between traditional private funds and investment subsidiaries.

In addition, according to the SEC, the primary purpose of the repeal of the private adviser exemption was to require the registration of investment advisers to "hedge funds, private equity funds and other types of ***pooled investment vehicles*** that are excluded from the definition of 'Investment Company' under the Investment Company Act of 1940. (emphasis added)."[9] The Captive Subs are not pooled investment vehicles through which multiple investors collectively invest. Rather, the Captive Subs were created solely to hold certain investments of Client. Accordingly, the SEC should revise the Proposal to clarify that the Captive Subs are not private funds for purposes of proposed new Rule 204(b)-1.

## V. Conclusion

As discussed above, Client is concerned that the Dodd-Frank Act and the Proposal may inadvertently call into question the Advisers Act status of the Management Subs and obligate them and the Advisory Sub to file Form PF in connection with their management of the Captive Subs. We, therefore, request on Client's behalf that the SEC clarify through interpretation or rulemaking that the Management Subs do not need to comply with proposed Rule 204(b)-1

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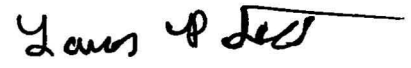
[8] 156 Cong. Rec. H5223-02, 2010 WL 2605433 (June 30, 2010).

[9] *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less than $150 Million in Assets Under Management, and Foreign Private Advisers*, SEC Rel. No. IA-3111, (Nov. 19, 2010).

because they fall outside the definition of investment adviser or are exempt from registration pursuant to Section 203(b)(2) of the Advisers Act. In addition, we hereby request on Client's behalf that the SEC revise the Proposal to clarify that the Captive Subs are not private funds for purposes of proposed Rule 204(b)-1 so that the Management Subs, even if required to register under the Advisory Act, and the Advisory Sub would not have to file information about the Captive Subs they manage on Form PF.

We would welcome the opportunity to discuss these comments further with you. If you have any questions or would like to further discuss these comments, please contact me at (202) 419-8407 or, in my absence, my partner Peter M. Hong at (202) 419-8429.

Sincerely,



Lawrence P. Stadulis, Esq.