January 24, 2011

VIA ELECTRONIC DELIVERY

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

Re: Comments on:

File Number S7-37-10 (Release No. IA-3111: *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than $150 Million in Assets Under Management, and Foreign Private Advisers*); and

File No. S7-36-10 (Release No. IA-3110: *Rules Implementing Amendments to the Investment Advisers Act of 1940*)

Dear Ms. Murphy:

This letter is respectfully submitted by the European Fund and Asset Management Association ("EFAMA") in response to a request by the U.S. Securities and Exchange Commission (the "Commission" or "SEC") for comments regarding the above-referenced releases implementing Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act, known as the "Private Fund Investment Advisers Registration Act of 2010" ("Advisers Registration Act").[1]

EFAMA is the representative trade association for the European investment management industry at large. EFAMA was founded in 1974 under the name "European Federation of Investment Funds and Companies" ("FEFSI" was its French acronym) and changed its name to EFAMA in 2004 in order to reflect a focus on representing the interests of European investment funds and asset management firms as well as those of national industry trade associations.

Today, EFAMA represents 27 member associations and 46 corporate members who collectively manage over EUR14 trillion in assets. The contributing national associations are located in Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Poland, Portugal,

1 The proposed rules were presented in the two above-referenced releases. Release No. IA-3110 (File No. S7-36-10; *Rules Implementing Amendments to the Investment Advisers Act of 1940*) is referenced herein as the "Implementing Release"; and Release No. IA-3111 (File No. S7-37-10; *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers*) is referenced herein as the "Exemptions Release."

Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom, with Malta being an observer. EFAMA's corporate members include large and mid-sized asset managers located in Europe, including European affiliates of a number of major U.S. asset management groups.

OBSERVATIONS

EFAMA would like to thank the SEC and its Staff for giving non-U.S. asset managers the opportunity to comment on the proposed rules. EFAMA hopes that the SEC and its Staff will find this submission helpful in developing a regulatory framework that both is consistent with the mandates set forth by the U.S. Congress in the Advisers Registration Act and effectively protects U.S. investors. It is equally important that as new regulation is implemented, the U.S. investment adviser and private fund regulatory regime does not seek to regulate external business and conduct that are covered under local regulation and do not in a meaningful way impact U.S. markets and U.S. investors.

The Advisers Registration Act has far-reaching implications for European asset managers (including subsidiaries of U.S. groups). It requires asset managers to consider the application of the new U.S. requirements to each entity within their group, even if that entity has very limited contacts with U.S. investors. In reviewing the proposed regulations, European asset managers have considered the additional compliance and legal burdens imposed by the Advisers Registration Act and the proposed rules, and possible approaches to harmonize the U.S. regulatory framework with the regulatory regimes that apply to European asset managers under the laws of the European Union ("EU") and the adviser's home jurisdictions.

Unless implemented in a manner that recognizes the differing circumstances of non-U.S. advisers, the Advisers Registration Act may subject these advisers to duplicative (and possibly inconsistent) regulation. This may cause certain non-U.S. advisers to reevaluate whether to participate in the U.S. market, and result in less foreign investment and fewer options for U.S. investors.

EFAMA and its members strongly believe that the Commission should carefully consider the application of its proposed rules to non-U.S. investment advisers in order to give meaningful effect to the exemptions from registration under the U.S. Investment Advisers Act of 1940 ("Advisers Act") included in the Advisers Registration Act for non-U.S. advisers that do not seek U.S. clients or investors.

EFAMA respectfully submits that an approach that places rational limits on the reach of the Advisers Act over asset management firms having limited U.S. contacts (and limited effects on U.S. investors or U.S. markets) will not only save those firms from being subject to a duplicative regulatory burden, but also preserve Commission resources, allowing the Commission and its Staff to devote more attention to overseeing those advisers that present a risk to U.S. investors and U.S. markets.

EFAMA and its members also believe that the Commission should ensure that its final rules do not unnecessarily require non-U.S. asset management groups to restructure their current businesses in order to avoid or minimize the application of the final rules. Most importantly, EFAMA notes that global asset management groups often structure their U.S. businesses based on pragmatic guidance provided by the Commission Staff in the context of no-action letters often referred to as the "participating affiliate letters."[2] These letters permit a distinct entity within a global asset management group to register with the SEC and obtain investment management resources from affiliates within the group - subject to a number of undertakings designed to ensure that U.S. rules apply to the activities of the affiliates to the extent necessary to assure that U.S. clients of the SEC-registered entity are protected - without requiring the affiliates to also register with the SEC or to apply U.S. rules to their non-U.S. clients.[3]

This guidance also permits each entity within the group to look at its own SEC-registration obligations separately. EFAMA and its members strongly believe that the guidance set forth in the participating affiliate letters is fully consistent with the provisions of the Advisers Registration Act and thus strongly urge the Commission explicitly to endorse the participating affiliate guidance and the principle that distinct entities formed for *bona fide* purposes ought to be able to consider their SEC registration obligations separately.

EFAMA and its members note that various provisions of the proposed rules do not take into consideration the situation of non-U.S. investment advisers. EFAMA recommends that the differing circumstances of non-U.S. advisers be taken into consideration in order to avoid unnecessarily burdening non-U.S. advisers with the costs of complying with such rules.

Based on the foregoing observations, EFAMA discusses in more detail below the following comments:

1. The Commission should explicitly endorse participating affiliate arrangements and confirm that distinct entities within a non-U.S. asset management group should consider their registration obligations separately.

2. The Commission should adopt final rules that protect an exempt non-U.S. adviser from losing its exemption as a result of actions, not within the control of the adviser, taken by investors in foreign investment funds.

3. The Commission should use the authority granted by Congress to create a meaningful foreign private adviser exemption by raising the level of assets permitted from $25 million to $100 million.

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2 Most notably: *Royal Bank of Canada* (pub. avail. June 3, 1998) ("*RBC*"); *ABN AMRO Bank, N.V.* (pub. avail. Jul. 7, 1997); *Murray Johnstone Holdings Limited*, (pub. avail. Oct. 7, 1994); *Kleinwort Benson Investment Management Limited*, (pub. avail. Dec. 15, 1993); *Mercury Asset Management plc*, (pub. avail. Apr. 16, 1993); and *Uniao de Bancos de Brasileiros S.A.*, (pub. avail. Jul. 28, 1992). These no-action letters have struck the right balance. They permit non-U.S. asset management groups to offer the full depth of their global asset management expertise to U.S. clients while at the same time providing these clients with the protections afforded by the Advisers Act and rules thereunder without unduly subjecting non-U.S. activities to U.S. rules.

4. EFAMA believes that the territorial approach that is included in the "private fund adviser" rule should be refined.

5. The Commission should consider limiting the application of the final rules to non-U.S. asset managers where the assertion of regulatory authority is inconsistent with the Commission's mission and the interests of U.S. investors.

6. The Commission should expand the definition of "venture capital fund."

EFAMA recognizes the Commission's challenge with adopting rules implementing the provisions of the Advisers Registration Act in the required timeframe and in a manner that protects the interests of U.S. investors and U.S. markets while respecting the interests of the global asset management industry. EFAMA also acknowledges that the Commission and its Staff have proposed rules that seek to avoid unnecessary overreaching of the U.S. regulatory framework to non-U.S. parties and conduct, and it fully acknowledges and supports these efforts.

SPECIFIC COMMENTS

1. The Commission should explicitly endorse participating affiliate arrangements and confirm that distinct entities within a non-U.S. asset management group should consider their registration obligations separately.

European asset managers often have several entities within their group that provide investment advice. These entities usually are already subject to regulation and oversight by the EU or their own national regulator. It is important to them to be able to consider the application of the Advisers Registration Act to each entity separately in order to avoid applying the U.S. regulatory framework to their entire organization and to non-U.S. clients, and to minimize burdens when U.S. rules (procedural requirements notably) differ significantly with those of the home regulator.

The proposed rules do not appear to anticipate a need to integrate *bona fide* separate advisory affiliates within a group. However some industry observers have stated that, absent clarification when the final rules are adopted, the non-integration principle inherent in the participating affiliate guidance could be called into question.

This concern may be based on the reference in the Exemptions Release to the often-criticized *Richard Ellis* letter.[4] This approach would set the clock back to the days when integration was presumed absent compliance with the unrealistic conditions of the *Richard Ellis* letter. As

[4] *Richard Ellis* (pub. avail. Sept. 17, 1981). Under *Richard Ellis*, an advisory entity would avoid integration with its parent company only where the subsidiary: (1) is adequately capitalized; (2) has a board the majority of the members of which are independent of the parent; (3) has advisory personnel who are not engaged in the parent's advisory business; (4) makes investment decisions independent from the parent and does not rely solely on information provided by the parent; and (5) keeps its investment advice confidential until communicated with the client. EFAMA strongly believes that the *Richard Ellis* conditions are no longer adapted to the structure of today's global asset management groups.

discussed below, EFAMA strongly believes that the final rules should confirm that each advisory affiliate of a registered adviser be permitted to examine its position and determine its need to register (or file as an "exempt reporting adviser") based on its individual facts and circumstances.[5]

EFAMA would like to emphasize that the ability to treat affiliates within a global asset management group separately and, in particular, in a manner that is consistent with the participating affiliate letters, is not only important to its members, but will impact the quality of the services which may be provided to U.S. clients. For many global asset management groups, a return to the *Richard Ellis* conditions or any general integration presumption could result in some of the best personnel of a registered adviser's non-U.S. affiliates no longer being available to U.S. persons.

A. Continued reliance on the participating affiliate letters benefits the investing public.

As noted above, many EFAMA members have, over the years, successfully relied on the participating affiliate guidance by registering with the Commission those entities within their groups that provide investment advice to U.S. clients while drawing upon certain investment management resources from group entities that are not registered with the Commission. Through these arrangements, our members (and, more importantly, their clients) benefit from the ability to access the best available personnel and investment advice while subjecting the group only to those elements of U.S. regulation that the Staff has deemed to be necessary and appropriate for the protection of U.S. markets and investors after detailed analysis and scrutiny.

Such protection is provided in the structure of arrangements that authorize the Commission and its Staff to inspect participating affiliates to verify compliance and investigate and prosecute potential frauds. At the same time, the limited application of U.S. rules to these arrangements results in substantial costs savings (ultimately to the benefit of clients and investors) and avoids potential conflicts with the regulatory regimes that apply to non-U.S. investment advisers in their respective jurisdictions.

Thus, while reiterating that participating affiliate arrangements are not inconsistent with the Advisers Registration Act or the proposed rules, EFAMA urges the Commission explicitly to endorse the participating affiliate guidance when the final rules are announced. If the final rules fail to make clear that such arrangements remain permissible, many non-U.S. asset management groups may be forced to consider abandoning existing business structures and exiting the U.S. market rather than face duplicative regulation and uncertainty. Such a result would deprive U.S. investors of access to valuable resources and expertise, and subject large global groups which include U.S. registered advisers to an undue regulatory burden. Competition for advisory mandates in the United States would also suffer and, absent such competition, advisory fees could increase while service decreases.

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[5] Such an approach would be consistent with the Commission's plain statement, in Footnote 271 of the Exemptions Release, that "determinations [as to the extent to which prior Staff positions apply] will depend on the particular facts and circumstances [and that a]dvisers should consider whether they may avail themselves of either [of] the exemption[s] proposed."

B. Each entity within an asset management group should have the flexibility to rely on applicable exemptions (or register).

When asset managers render investment advisory services through separate and distinct entities, it is often the case that each entity has a particular specialty or focuses on different client types or different regions of the world. Depending on each entity's location, and the nature of its clients and activities (*i.e.*, the conduct and effects of its advisory business), each has to comply with one or more regulatory regimes.

As a general matter, each advisory entity within an asset management group currently considers its registration obligations (including the availability of statutory or regulatory exemptions) based on its particular facts and circumstances.[6] The Commission should make explicit that, under the final rules, so long as an asset management group does not operate in a manner intended to circumvent the Advisers Act,[7] each entity within the group must and can continue separately to determine its status under the Advisers Act.

2. The Commission should adopt final rules that protect an exempt non-U.S. adviser from losing its exemption as a result of actions, not within the control of the adviser, taken by investors in foreign investment funds.

Section 202(a)(29) defines the term "Private Fund" as "an issuer that would be an investment company, as defined in . . . the Investment Company Act of 1940, but for section 3(c)(1) or 3(c)(7) of that Act." As the Commission has noted, the application of this definition introduces uncertainty with respect to certain foreign investment funds (and notably non-U.S. retail funds such as EU Undertakings for Collective Investments in Transferable Securities ("UCITS funds")) and the Commission has invited related comments on this issue.

EFAMA does not believe that the Advisers Registration Act was intended to subject a non-U.S. manager to regulation merely because it advises non-U.S. retail funds, which may have a very limited number of U.S. investors who likely have bought shares outside the United States. Nonetheless, this could be an unintended result of the proposed rules. To avoid this consequence, the final rules should establish that foreign investment funds (*i.e.*, funds organized and offered outside the United States), and notably non-U.S. retail funds such as UCITS funds, which are conservatively and effectively regulated under EU and/or national laws will not be deemed to be "private funds" for this purpose if U.S. persons invest in the funds as a result of actions neither sought by, nor within the control of, the fund's adviser and in offerings otherwise in compliance with U.S. rules.

To fail to establish such an exclusion could result in a very large number of non-U.S. advisers involuntarily losing the availability of the "foreign private adviser exemption" or becoming

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6 In addition, as explained in section 4 below, EFAMA also believes that an adviser's "place of business" should be determined based on an entity by entity basis.

7 Section 208(d) of the Advisers Act prevents circumvention.

"exempt reporting advisers" through no action of their own. This result would undoubtedly stretch the limited resources of the Commission and its Staff[8] for no counterbalancing benefit to U.S. investors or U.S. markets. Accordingly, EFAMA strongly recommends that the Commission revise its rules and provide explicit guidance to avoid this unintended (and undesirable) extension of the Advisers Registration Act. Such revisions and guidance should apply to all the exemptions discussed in the Exemptions Release (*i.e.*, the "foreign private adviser exemption," the "private fund adviser exemption" and the "venture capital fund exemption").

Further to illustrate this comment, the Commission should be aware that even where investment fund documentation includes a prohibition on U.S. investments, it remains possible that, without the knowledge or acquiescence of a non-U.S. investment adviser, (i) some U.S. investors could invest through a stock exchange or non-U.S. retail distribution channel,[9] or (ii) non-U.S. investors could move into the United States and make additional investments in non-U.S. funds they already own. If the final rules do not recognize that the unintended, independent actions of investors should not jeopardize the availability of exemptions, a substantial number of foreign investment funds that have no intent to engage with U.S. investors, such as non-U.S. retail funds (*e.g.*, UCITS funds), could become "private funds" for all purposes under the proposed rules.

This would cause many non-U.S. advisers that expect to be able to rely on the foreign private adviser exemption to be required to register under the Advisers Act or to become "exempt reporting advisers." EFAMA believes that such a result is contrary to public policy and the intent of the Advisers Registration Act.

To allay this concern, EFAMA believes that an adviser whose principal office and place of business is outside the United States should not be required to look-through any foreign investment fund that it manages for purposes of counting U.S. investors or assets in circumstances where: (i) the adviser does not knowingly sell within the United States or to a U.S. person using jurisdictional means that would require the fund to rely on section 3(c)(1) or 3(c)(7) of the 1940 Act;[10] (ii) any such sales are limited to unsolicited fund investments by investors that are not U.S.

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8 EFAMA notes that if the Commission takes into account managers who would inadvertently be captured by the Advisers Act if the proposed rules are adopted in their current form, it will need substantially to increase the costs associated with the rules both as they relate to the industry, in the United States and abroad, and to the Commission (spreading even thinner the Commission's limited resources for monitoring advisers).

9 EFAMA recognizes that some foreign investment funds affirmatively sell into the United States. through private placements in accordance with prior Staff guidance under the Investment Company Act of 1940. *See*, *e.g.*, *Investment Funds Institute of Canada* (pub. avail. March 4, 1996). EFAMA believes that a broader scope than that contemplated by this guidance is necessary in the context of the Advisers Registration Act.

10 It would add significantly to the costs and burdens associated with advising or administering foreign investment funds for non-U.S. advisers to vet each investor at the time of the initial investment and to track each investor on a going-forward basis (assuming that it even is technically feasible, which is not certain due to the complexities of current fund distribution channels) to assure that none later become U.S. persons and then invest in a fund – particularly when the initial offering does not involve U.S. jurisdictional means or target a class of U.S. persons abroad. These costs would be averted if a manager to a foreign investment fund that does not affirmatively use U.S.

persons at the time they initially determined to invest in the fund; or (iii) the fund's U.S. investors are limited to persons who first acquired their interests in the fund on or before July 21, 2011, even if such investors were U.S. persons at such time.[11]

A. The Commission should treat non-U.S. fund investors in the same manner as separate account clients for purposes of the foreign private adviser exemption.

Consistent with the foregoing comment, managers that seek to rely on the foreign private adviser exemption as proposed would be required to establish each investor's U.S. person status "at the time the investor acquires the securities issued by the fund." EFAMA is concerned that, if the rule is adopted as proposed, a manager could arguably lose its ability to rely on the foreign private adviser exemption if: (i) a U.S. person invests without the knowledge or consent of the adviser through purchases on a stock exchange or through non-U.S. retail distribution channels; or (ii) a non-U.S. person who invested in the foreign investment fund subsequently becomes a U.S. person and thereafter makes additional investments in the fund.

By contrast, the proposed rules would allow a separate account client who was not a U.S. person at the time that the account was established to continue to add to the account, even after later becoming a U.S. person. EFAMA believes that additional investments in a fund by an investor who later becomes a U.S. person are substantially identical to subsequent contributions to an account by a separate account client after becoming a U.S. person, and thus additional investments made should not cause the adviser to lose the exemption. Treating funds consistently with accounts, for this purpose, would alleviate many of the concerns associated with investor migration.

As discussed above, this principle also should apply to the "private fund adviser exemption" and the "venture capital fund exemption."

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jurisdictional means to make offerings to U.S. persons were absolved from the requirement to look-through the foreign investment fund (subject to the anti-circumvention rules of Section 208(d) of the Advisers Act).

11 As noted above, there are several channels through which a U.S. person could hold or invest in interests issued by a foreign investment fund without the knowledge, consent or assistance of the manager and even in contradiction to the fund's governing documents. Foreign investment funds may not have gathered, or be willing or able to provide to the adviser, sufficient information to make the U.S. person determination with respect to subsequent, unsolicited investments. Moreover, even if such information is available, the manager may be unable to take affirmative action to eject an investor or forestall additional, unsolicited investments. EFAMA, therefore, suggests that the Commission provide grandfathering for all investors whose initial investment was made prior to July 21, 2011. Similarly, EFAMA believes that a non-U.S. adviser should be permitted to treat as being outside the United States any person who established a separate account relationship with the adviser prior to, and was outside the United States as of, July 21, 2011, even if that person was in the United States at the time that the account was established and subsequently returns to the United States after July 21, 2011.

B. The final rules should not mandate a look-through of bona fide master/feeder, swap or similar arrangements.

EFAMA cautions that the possible inclusion in the final rules of a mandatory look-through in these circumstances imposes undue burdens on non-U.S. advisers without providing significant benefits in the light of Section 208(d) and market practices.[12]

- As to master/feeder arrangements, it is often the case that the adviser to the master fund is also adviser to the feeder funds, in which case all relevant investors would already be counted and all relevant assets already considered. Where the adviser to the master fund does not advise one or more of the feeders, it is common to receive from the feeder funds confirmation of investment eligibility but not identification of investors. Requiring an adviser to obtain this information from feeder funds, which may have no obligation to provide it, is inappropriate.

- The Exemptions Release indicates that an investment adviser would need to count as an investor any holder of an instrument (such as a total return swap) that effectively transfers the risk of investing in the private fund from the record owner. This is unnecessary and unduly burdensome, as such swaps could be created without the assistance or knowledge of the investment adviser. An investment adviser who takes reasonable precautions to avoid such transfer of risk (through inserting language prohibiting such practice in private fund documents, for example) should not have an obligation to look-through such possible arrangements. Section 208(d) already would prevent such investment advisers from creating arrangements that circumvent the "investor" definition. Even where the adviser has knowledge that a third party is creating a structured product which references a fund, a look-through should not be required where the adviser is not involved in structuring the product and the structure is not created for avoidance purposes. EFAMA recommends that the Commission, instead, require look-through only when necessary to satisfy Section 208(d). In adopting such an approach, the Commission should offer a safe harbor allowing the adviser to avoid a look-through if it does not participate in the structuring of the indirect interest and takes reasonable steps to be informed of indirect participants or prohibit them (*e.g.*, by requiring investors to represent that their investment is not for the purpose of creating an indirect interest in the fund).

3. The Commission should create a more meaningful foreign private adviser exemption.

The foreign private adviser exemption was adopted to exclude from registration and significant regulation under the Advisers Act those advisers whose business: is not conducted in, and has limited effects on, the United States; has fewer than 15 U.S. clients and fund investors; does not advise U.S. registered investment companies or business development companies; and has aggregate assets under management ("AUM") attributable to U.S. clients or investors of less than $25 million. Unless modified, EFAMA believes that non-U.S. advisers may actually not use this exemption.

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[12] Section 208(d) prevents circumvention of the Advisers Act's provisions.

EFAMA believes that the grant of authority to the SEC to increase the asset threshold "as [it] may, by rule, deem appropriate in accordance with the provisions of this title" indicates that Congress intended the foreign private adviser exemption to be more meaningful. An increased threshold will not result in a substantial risk to the United States because of the exemption's limit on the number of U.S. clients. Also, EFAMA notes that European advisers (as well as other non-U.S. advisers) are already subject to regulation and oversight at home and that causing all advisers with only very limited U.S. contacts to register with the Commission unnecessarily expands the extra-territorial reach of the U.S regulatory regime.

It also would avoid a flood of newly registered advisers (or "exempt reporting advisers") that present minimal risk to U.S. investors and U.S. markets, saving precious Commission resources. Under the Advisers Registration Act, a U.S.-based investment adviser is not required or permitted to register with the SEC unless it has $100 million AUM, if the adviser is required to register with its home state and is subject to state regulatory examination. Similarly, the Commission should exercise its authority to exempt from registration a non-U.S. investment adviser if it has AUM of less than $100 million attributable to U.S. clients and investors and is required to register with its home country and is subject to regulatory supervision in its home country.[13]

4. EFAMA believes that the territorial approach that is included in the "private fund adviser" rule should be refined.

Under proposed rule 203(m)-1, all the private fund assets of an adviser with a "principal office and place of business in the United States" would be considered to be "assets under management in the United States." Conversely, a non-U.S. adviser would need to count only private fund assets that it manages "from a place of business in the United States" toward the $150 million exemption. The SEC requests general comments about this approach.

EFAMA acknowledges the efforts of the SEC and its Staff to provide pragmatic limits to the application of U.S. rules to non-U.S. advisers and believes that the proposed rules are consistent with the corresponding statutory provisions and the intent of Congress. Also, the application of this principle to non-U.S. parties is generally respectful of the fact that these parties already are subject to regulation in their home jurisdictions. It also is generally consistent with the guidance provided by the Commission Staff in the participating affiliate letters (which EFAMA strongly supports – see discussion above).

EFAMA, however, respectfully submits the following comments, which it believes are consistent with the Advisers Registration Act and would further enable the SEC and its Staff to avoid an unnecessary extension of U.S. rules to non-U.S. advisory firms that have only limited contacts with, and effects on, U.S. investors:

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[13] This new language (or accompanying guidance) should be broad enough to recognize that regulatory supervision may take various forms. For example, in certain countries (*e.g.* Switzerland), regulatory supervision may take place through prudential regulation and self-regulatory organizations subject to a regulator's supervision.

- European asset management firms may have offices in the United States that are used only for limited purposes (*e.g.*, research, due diligence) and are not used to meet potential U.S. clients or to give discretionary advice to U.S. persons. EFAMA does not believe that it would be consistent with the terms of the Advisers Registration Act, or that it would protect U.S. markets or U.S. investors, to cause these offices to be treated as "places of business" for purposes of applying the asset limits in the "private fund adviser exemption" to a non-U.S. adviser. Accordingly, EFAMA respectfully requests that the SEC clarify this situation in the final rules, and/or accompanying guidance. Also, EFAMA recommends that the SEC create a safe harbor whereby a non-U.S. adviser will not be deemed to be providing investment advisory services from the United States if the advice is provided solely to a non-U.S. adviser for its non-U.S. clients and funds. In each case, if the investment adviser solicits clients, meets with clients in the United States, or holds itself out, the non-U.S. adviser would be outside the safe harbor.

- In addition, the "place of business" of an investment adviser should be determined on an entity by entity basis. The final rules and/or accompanying guidance should explicitly recognize that the presence of an affiliated adviser in the United States does not create any presumption of a "place of business" for the non-U.S. affiliate, even if the two entities share a common "brand" name. Similarly, to the extent that employees of a participating affiliate periodically visit or work at the offices of a U.S. SEC-registered affiliate, the presence in the United States of employees of the participating affiliate should not cause the participating affiliate to have a place of business in the United States.

5. The Commission should consider limiting the application of the final rules to non-U.S. asset managers where the assertion of regulatory authority is inconsistent with the Commission's mission and the interests of U.S. investors.

Various provisions either do not appear to take into consideration the situation of non-U.S. investment advisers or unnecessarily burden them with requirements that are not necessary or appropriate in the public interest or for the protection of U.S. investors. EFAMA respectfully submits the following:

- EFAMA believes that recordkeeping and reporting requirements would be overly costly and burdensome for non-U.S. advisers. Notably:

    - Non-U.S. advisers which can rely on the "private fund adviser exemptions" or the "venture capital fund exemption" ought not to be subject to record keeping and reporting requirements if they are subject to such requirements with non-U.S. regulatory authorities. The Commission has well-established arrangements with the non-U.S. authorities to share information through bilateral memoranda of understanding or the IOSCO framework. Moreover, requesting records and reports from non-U.S. parties which would force non-U.S. advisers to provide information about non-U.S. funds already subject to regulation and reporting requirements (see discussion above), or simply to maintain records and provide reports redundant with those required locally, would not be consistent with the requirements of the Advisers Registration Act, which requires reports when "necessary or appropriate in the public interest or for the protection of investors." (See sections 203(l) and (m) of the Advisers Act). Accordingly, EFAMA believes that non-U.S. advisers relying on the exemptions should not be subject to recordkeeping or reporting requirements if they are already subject to recordkeeping and reporting requirements with a non-U.S. regulator.

  - Similarly, non-U.S. registered and exempt reporting advisers also should not be required to report on foreign investment funds that are not actively marketed into the United States, or that are regulated and subject to similar reporting requirements in another jurisdiction with which the SEC maintains cooperation or information sharing arrangements.

- In addition, while EFAMA appreciates the Commission's desire for consistency in calculating "Regulatory AUM" (as this term is used in the proposed rules), EFAMA believes that the use of this measure to determine compliance with the asset tests for non-U.S. advisers seeking to rely on the foreign private adviser exemption or the private fund adviser exemption may be inefficient, not tailored to non-U.S. advisers and the nature of the exemptions, and unduly burdensome. Notably:

  - AUM should exclude proprietary, affiliate and knowledgeable employee assets, or assets for which the adviser receives no fee, in the case of non-U.S. advisers.

  - Regulatory AUM should be calculated on an annual basis, rather than quarterly, to avoid non-U.S. advisers being required to calculate and value assets on a particular date solely for purposes of completing Form ADV.

  - To avoid frequent changes in status based on temporary aberrational changes in Regulatory AUM, assets under management should be calculated on an average or rolling 12-month basis.

  - Regulatory AUM reporting requirements for "exempt reporting advisers" should be clarified with specific instructions in the rules or forms.

  - Regulatory AUM should be calculated in accordance with local accounting principles (and not U.S. GAAP).

- Finally, the Commission should make clear when it adopts the final rules that any examinations of non-U.S. investment advisers will be conducted in cooperation with non-U.S. regulators, in accordance with the cooperation and information sharing arrangements which the Commission maintains with those regulators. By doing so, the Commission will establish an important cooperative standard which should result in reciprocal treatment for U.S. investment advisers conducting business outside the United States.

6. The Commission should expand the definition of "venture capital fund."

EFAMA believes that the venture capital fund adviser exemption should be available to non-U.S. managers whose only U.S. person clients are venture capital funds within the meaning of the Rule and to U.S. managers who manage non-U.S. venture capital funds. EFAMA believes that the exemption will not be available, as a practical matter, to either of these unless the exemption is based on what venture capital funds are commonly understood to be and the SEC removes conditions in the rule that are inconsistent with practices common to such funds in the relevant home jurisdiction. For example, the proposed limitation on cash management and short term investments imposes undue burdens on a non-U.S. venture fund by allowing investment in U.S. Treasuries but not equivalent securities issued in the fund's home jurisdiction.

The SEC noted in the Exemptions Release that venture capital funds were exempt partially due to Congress recognizing that they did not trigger systemic risk issues. In line with this rationale, there should be a broad exemption for non-U.S. advisers to venture capital funds, particularly venture capital funds that do not invest a significant portion of their assets in the U.S. economy, as those funds arguably do not cause any systemic risk to the U.S.

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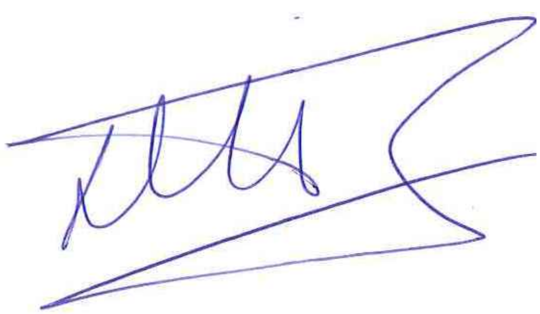
We thank you for the opportunity to comment on the proposed rules. Please do not hesitate to contact the undersigned at +32.2.513.39.69 or peter.deproft@efama.org, if you have any questions about the foregoing comments. Upon request, we would be happy to further assist the SEC and its Staff with regard to these matters.



Peter De Proft
Director General

CC: Mary L. Schapiro, Chairman
Kathleen L. Casey, Commissioner
Elisse B. Walter, Commissioner
Luis A. Aguilar, Commissioner
Troy A. Paredes, Commissioner
Jennifer B. McHugh, Acting Director, Division of Investment Management
Ethiopis Tafara, Director, Office of International Affairs