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January 21, 2011

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

Re: Comments of APG Asset Management US Inc.
SEC File Nos. S7-36-10 and S7-37-10

Ladies and Gentlemen:

On behalf of our client, APG Asset Management US Inc. ("APG US"), we respectfully submit the following comments on the proposal by the Securities and Exchange Commission (the "SEC" or "Commission") of certain rules (the "Implementing Rules") under the Investment Advisers Act of 1940, as amended (the "Advisers Act") that are intended to implement certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), enacted on July 21, 2010. [1]

Title IV of Dodd-Frank, the "Private Fund Investment Advisers Registration Act of 2010", was enacted to cause the registration with the SEC of many managers of hedge funds and private equity funds. To effect this result, Dodd-Frank repealed, effective July 21, 2011, the exemption from registration under Section 203(b)(3) of the Advisers Act for investment advisers who (i) have had fewer than 15 clients in the preceding 12 months; (ii) do not generally hold themselves out to the public as investment advisers; and (iii) do not act as advisers to registered investment companies or business development companies. Although it repealed Section 203(b)(3), Congress expressly directed the SEC to promulgate rules exempting, among others: advisers managing only private funds with less than $150 million in assets under management in the United States; "foreign private advisers"; and venture capital funds. In addition, Congress raised the assets under management ("AUM") threshold for federal regulation of advisers from $25 million to $100 million.

While the focus of Title IV of Dodd-Frank was stated to be on advisers to private funds, we believe that the proposed Implementing Rules have far broader effect and if adopted, would result in substantial consequences to investment managers and their affiliates that are not private fund managers. In brief, if adopted as proposed, such rules will require asset management subsidiaries of foreign financial institutions to register as investment advisers with the SEC even

1 Investment Advisers Act Release No. 3110, November 19, 2010 (the "Implementing Rules Release"). On the same date, the SEC proposed rules to implement these exemptions. Investment Advisers Act Release No. 3111, Nov. 19, 2010 (the "Exemptive Rules Release").

if they do not have a single U.S. client. We believe that any such action should be taken only after careful consideration by Congress and the Commission of such extra-territorial application of the Advisers Act.

Our comments are directed to the changes in Instruction 5.b.(1) to Form ADV Part 1 that would require, for the first time, that advisers include in their "regulatory assets under management", for purposes of determining whether they meet the threshold for required SEC registration: (i) proprietary assets, (ii) assets managed without the adviser receiving compensation, and (iii) assets of foreign clients, all of which an adviser currently may, but is not required to, include in such determination.

Investment Activities of APG US

APG US is not currently registered in the United States as an investment adviser. It has offices in New York, from which it provides investment sub-advisory services exclusively to its parent company, APG Algemene Pensioengroep N.V. ("APG NL"). APG NL is located in Amsterdam in the Netherlands and has no clients in the United States. APG NL is wholly owned by the largest Dutch pension fund, Stichting Pensioenfonds ABP ("ABP"), in which all Dutch civil servants participate. APG US has discretion to make investments decisions in accordance with investment guidelines and policies promulgated by APG NL and/or its clients.

Until 2009, APG NL managed only the proprietary assets of its parent organization, ABP, and thus APG US provided sub-advisory services only to Dutch proprietary assets. In 2009, APG NL began also to advise certain funds (the "Pools")[2] in which other Dutch pension funds, in addition to ABP, have invested.[3] With respect to the funds, the role of APG US is to carry out the investment policy[4] established by APG NL and select investments in the United States and abroad.

APG US invests Pool assets under a sub-advisory agreement with APG NL. The compensation paid to APG US reflects reimbursement for costs plus a mark-up determined on an arm's-length basis for transfer pricing purposes. Because APG US receives its fee from its parent company, earning a profit is not its primary aim.

Neither APG US nor APG NL has U.S. clients. Neither entity has any intention of seeking U.S. clients, and neither holds itself out to the U.S. public as an investment adviser.

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2 APG NL serves as investment adviser to various commingled investment vehicles organized under the laws of the Netherlands as "fonds voor gemene reconing" ("FGRs"), i.e. funds for the joint account of the participants, which are similar in form to business trusts in the United States.

3 ABP owns a substantial majority of the interests in the Pools.

4 The funds are managed in a conservative manner, in accordance with Dutch pension law requirements.

It is important to note that the situation of APG US is not unique. We are aware of a number of non-U.S. financial institutions (certain insurance companies, for example) that have investment entities established as controlled wholly owned subsidiaries for tax and administrative reasons to trade foreign proprietary assets or assets of non-U.S. persons in U.S. markets. Similarly, we are aware of several European banks with investment operations for offshore clients that maintain separately organized subsidiaries for trading in the United States that would be subjected to U.S. registration under the proposed approach described in the Exemptive Rules Release. We urge the Commission to consider whether imposing additional regulatory burdens could make the United States a less attractive investment market for these types of firms, which provide substantial benefits to the U.S. economy through their investment activities and employment of U.S. citizens.[5]

We believe requiring APG US and other such entities to register as investment advisers is not in the U.S. public interest or necessary for the protection of investors because their clients, none of which are U.S. persons, are already protected by the laws of their home countries. In this case, all Dutch pension plans (and APG NL as a subsidiary of a pension plan) are regulated by the Dutch Central Bank and the Netherlands Authority for the Financials Markets ("AFM"). Moreover, requiring that such advisers register with the Commission would divert resources that would otherwise be available for the protection of investors and the public interest in the United States.

Proposed Amendment to Form ADV Instructions Requiring Inclusion of Foreign Assets

APG US, with the assistance of outside counsel, previously determined that it was not required to register as an investment adviser because it did not have U.S. client assets under management.[6]

Item 5.b.(1) of the instructions to Form ADV as currently in effect state that an investment adviser "*may include*" securities portfolios that are:

(a) family or proprietary accounts;

(b) accounts for which the adviser receives no compensation for its services; and

(c) accounts of *clients* who are not U.S. residents.

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5 APG US and APG NL collectively invest over $100 billion in the U.S. securities and commodities markets. APG US has offices in New York and employs 104 people, at least 90% of which are U.S. nationals. Thus, while APG US is a part of and controlled by APG NL and exists to invest and trade assets of non-U.S. persons, its presence here provides a benefit to the U.S. economy.

6 We note also that APG US has never made investments for "clients" other than the Pools, all of which are domiciled outside the United States and contain only assets of non-U.S. persons and therefore is able to rely on Section 203(b)(3) until July 21, 2011. (Under current law and rules, the assets of APG US' parent pension fund are proprietary and not "client" assets.)

APG US determined not to include either proprietary assets or the assets of the foreign entities in calculating the amount of its assets under management, with the result that it did not have assets under management for purposes of Form ADV and therefore did not have to register.

The instructions set forth above were added to the Form ADV in 1997, when the SEC reconfigured the form after Congress bifurcated investment adviser regulation between the SEC and the states based on AUM. In 1996, Congress enacted the National Securities Markets Improvement Act of 1996 (the "1996 Act"). Title III of the 1996 Act, the Investment Advisers Supervision Coordination Act (the "Coordination Act"), amended the Advisers Act by generally prohibiting an investment adviser from registering with the Commission unless it had more than $25 million of assets under management or was an adviser to a registered investment company.[7]

We believe it is important to contrast the different purpose that supports a decision to allow advisers to include such assets to become eligible for SEC registration, with the effect of mandating inclusion of such assets, which would put the SEC in the position of regulating entities in which there is no U.S. interest and for which registration serves no regulatory purpose. We believe that the permissive inclusion of such assets, solely at the option of the adviser, should continue.

The proposed approach of the Implementing Rules to determining "regulatory assets under management", when applied to subsidiaries of non-U.S.-based entities with no U.S. clients, leads to the anomalous result that a subsidiary of a non-U.S. financial institution or pension fund, established as a separate entity for tax and administrative reasons to trade at the direction of that non-U.S. institution, would have to register with and have its investment management functions regulated under U.S. law when there are no U.S. clients involved.

It has long been the position of the SEC Staff that a foreign adviser to foreign clients may use U.S. jurisdictional means to acquire information about the securities of U.S. issuers and effect transactions in the securities of U.S. issuers through U.S. broker-dealers for the benefit of the adviser's clients without registering.[8]

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7 According to the releases related to the Form ADV amendments in 1997 necessitated by the Coordination Act, the Commission originally proposed to require the inclusion of the three categories of assets listed above, but apparently determined not to do so. In Advisers Act Release No. 1601 (Dec. 20, 1996), announcing the proposal of rules and forms to implement the Coordination Act, the Commission stated that these assets "should" be included in assets under management. The adopting release, however, Advisers Act Release No. 1633 (May 15, 1997), without discussing the issue, stated that assets under management were to be calculated in accordance with the Instructions for Schedule I to Form ADV-T, a one-time transitional form by which advisers established their continued eligibility for SEC registration. Instruction 7(a) to Schedule I of that form stated that advisers "may" include such assets.

8 Paul Vogele, SEC No-Action Letter, pub. avail. April 9, 1990.

We are aware that the Staff has also taken the position that advisers located in the United States but with only foreign clients must register.[9] In this case, however, although APG US is located in the United States for the convenience of trading in U.S. markets without a time differential and is a separate corporate entity for tax, legal and administrative reasons, it is more analogous to a non-U.S. entity that is merely trading here than to a U.S.-based adviser that is performing investment management functions under contract with foreign clients as a fiduciary.

"Engaged in the Business" Requirement

Under Advisers Act definitions, the proprietary and foreign assets invested by APG US could be deemed "assets under management".[10] However, we believe there is a threshold question that must be met before the requirement to register attaches.

Section 202(a)(11) of the Advisers Act defines an investment adviser as "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing or selling securities . . . ."[11] We would suggest that a wholly owned subsidiary of a foreign financial institution or foreign pension plan (such as APG US' ultimate parent) that is carrying out investment policy directed by that institution by selecting investments and effecting trades in the United States is not "engaged in the business" of providing advisory services in the United States. Requiring investment advisers that manage assets for corporate affiliates to register would change long-standing interpretations issued since 1940 that such advisers are not within the intent of the definition of "investment adviser". We urge the Commission to address the question of whether and how an entity managing proprietary assets meets the threshold requirement that it is "engaged in the business" of providing investment advice.

Section 202(a)(11) contains various exclusions from the definition for specified categories of legal persons (e.g., banks, publishers, broker-dealers and others), and a residual exclusion in Section 202(a)(11)(H)[12] for "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order."

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9 Gim Seong Seow, SEC no action letter, pub. avail. Nov. 30, 1987.

10 Section 203A(a)(2) of the Advisers Act defines "assets under management" to mean "the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services." Instruction 5.b(3) to Part 1A of Form ADV states that a person provides "continuous and regular supervisory or management services with respect to an account" if that person: (a) has discretionary authority over and provides ongoing supervisory or management services with respect to the account; or (b) does not have discretionary authority over the account, but has ongoing responsibility to select or make recommendations, based upon the needs of the client, as to specific securities or other investments that the account may purchase or sell and, if such recommendations are accepted by the client, the person is responsible for arranging or effecting the purchase or sale.

11 Section 202(a)(11) of the Advisers Act.

12 Prior to the passage of Dodd-Frank, this was subparagraph (F) of Section 202(a)(11).

In 1940 the Commission in two cases found that the investment advisory subsidiaries of bank holding companies that provided advisory services to the holding companies and their subsidiaries were not "investment advisers" within the intent of Section 202(a)(11) of the Advisers Act.[13]

The Staff took a similar position in connection with the venture capital advisory subsidiary of a bank holding company. In *Bank America Capital Corporation*,[14] a subsidiary providing advice on venture capital investments to other subsidiaries of Bank America was not required to register as an investment adviser. The company asserted that under these circumstances the subsidiary and its affiliates together must be viewed as a single economic entity, the affiliates should not be counted as 'clients' for the purposes of the Advisers Act and, viewed in the context of the statutory definition, the subsidiary was not acting as an 'investment adviser' within the meaning of the initial clause of Section 202(a)(11) with respect to the affiliates, for it was not 'advising others'.

Similarly, in *Lockheed Martin Investment Management Company,* the Staff took a no-action position that the investment management subsidiary of Lockheed Martin Corporation that managed 24 pension plans for that company did not have to be registered as an investment adviser.[15] In that case, the Staff stated that its position was based particularly on the following facts: the subsidiary was wholly owned by Lockheed Martin and was established and operated, for the sole purpose of providing investment advisory services to the company's plans; the plans were established solely for the benefit of employees of the company and its affiliates, and comprised employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), foreign employee benefit plans, and plans that consist solely of Lockheed assets; the only amounts received by the company and the subsidiary in connection with the plans were reimbursements that are subject to the restrictions imposed by ERISA; and none of the plans was required to register as an investment company under the Company Act. Lockheed Martin had argued in its letter requesting the no action position that it was not, by virtue of managing the assets of the plans, "engaged in the business of advising others".[16]

We urge the Commission to clarify that, if as a threshold matter, an entity does not meet the definition of "investment adviser" with respect to its proprietary assets, it should not be subject

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13 In re Marine Midland Group, 8 S.E.C. 154 (1940); In re First Service Corporation, 8 S.E.C. 152 (1940).

14 SEC Staff No-action Letter, pub. avail. April 27, 1978.

15 SEC No-action Letter, pub. avail. June 6, 2006.

16 *See also* Investment Advisers Act Release No. 1092 (Oct. 8, 1987), in which the Commission stated that a person may be deemed to be "in the business" of providing advice if the person holds himself (or itself) out as an investment adviser.

to registration as a result of those assets being considered "regulatory assets under management" for U.S. purposes.

The assets of the funds are the responsibility of APG NL and, because all fund assets are pension plan assets, are under regulatory supervision of the Dutch Central Bank and AFM. These are assets of non-U.S. clients with a non-U.S. asset manager that should not directly or indirectly be subject to U.S. regulation. We believe that these assets also should be considered outside U.S. jurisdiction, as there is no contractual privity between the entity present in the United States and the clients.

Moreover, if the SEC were to have concerns about the activities of APG US in investing such regulated Dutch assets from its place of business in the United States, it has a means for addressing them through Dutch authorities. The United States and the Kingdom of the Netherlands entered into an Agreement on Mutual Administrative Assistance in the Exchange of Information in Securities Matters dated December 11, 1989 (the "Mutual Assistance Agreement"). Under the Mutual Assistance Agreement, the SEC and the Netherlands Ministry of Finance have agreed to provide each other with the "greatest possible measure of mutual administrative assistance in obtaining and exchanging information relating to the administration and enforcement of the other's securities laws and regulations." This may include examinations of a regulated entity or the taking of statements in one jurisdiction with representatives of the regulatory authority of the other jurisdiction present.

Finally, we recognize the mandate of Title I of Dodd-Frank that the SEC and other agencies collect data necessary to identify and minimize systemic risk to the U.S. financial system. As an alternative to registration of advisers that are located in the United States but do not have U.S. clients, the Commission may wish to consider requiring such advisers to report assets under management and such other information as would be deemed pertinent to an understanding of their size and participation in U.S. markets, although not necessarily the same information mandated of exempt reporting advisers under Sections 407 and 408 of Dodd-Frank, as the same U.S. investor protection concerns are not present.

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Please contact either Marybeth Sorady (Marybeth.Sorady@kattenlaw.com) or Marilyn Selby Okoshi (Marilyn.Okoshi@kattenlaw.com) if you would like further information concerning these comments.

Sincerely,

Katten Muchin Rosenman L.L.P.

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