DLA PIPER

January 24, 2011

Via email to: rule-comments@sec.gov
U. S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Attn: Elizabeth M. Murphy, Secretary

Re: SEC Release IA-3111, File No. S7-36-10
SEC Release IA-3110, File No. S7-37-10

Ladies and Gentlemen:

We appreciate the opportunity to express our comments on the Exemption Release and the Implementing Release, both issued on November 19, 2010 to propose rules implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). As partners of the law firm of DLA Piper LLP (US), we represent a number of persons engaged in the real estate business as sponsors of real estate investment funds, typically through special purpose entities organized to manage such funds. We also represent a number of private equity funds of varying sizes and business interests that take an active role in the management of their portfolio companies. The proposed rules embodied in SEC Release IA-3111 (the "Exemptions Release") and in Release No. IA-3110 (the "Implementation Release") will affect many of our real estate fund sponsor and private equity fund sponsor clients.

We believe that the provisions of the Dodd Frank Act amending the Investment Advisers Act of 1940, as amended (the "Advisers Act"), which were intended to bring hedge funds within the purview of the Advisers Act, have inadvertently cast a wide net over the sponsors of real estate investment funds and sponsors of active management private equity funds, which differ in many ways from hedge funds. With this in mind, we urge the Commission to expand and clarify the proposed rules in the Exemptions Release and in the Implementation Release to better distinguish sponsors of real estate investment funds and sponsors of active management private equity funds from hedge funds and other investment advisers required to register, report, maintain records and be subject to examination under the Advisers Act or comparable provisions of the various states' securities laws. In this regard, we offer the following:

1. Sponsors of Real Estate Investment Funds.

If a sponsor advises funds that only invest in real estate, such sponsor is clearly not an "Investment Adviser" within the meaning of the Advisers Act. Today, however, many real estate funds invest in real estate through instruments that may technically be viewed as "securities" under the Advisers Act, including limited partnership interests, mortgage notes and mezzanine debt, as part of their investment strategy. Funds that hold interests in real estate typically hold their properties through wholly owned or substantially owned and controlled special purpose subsidiaries. Those subsidiaries sometimes serve as the direct title-holder to the property and sometimes hold interests in limited partnerships, limited liability companies, and joint ventures that, in turn, hold title to the property. Real estate is often held this way to accommodate side-by-side investing by investors in the fund and by sister funds, and to prevent comingling of liabilities, and to arrange high level property management.

With the elimination of this Section 203(b)(3) exemption real estate fund sponsors that invest in real estate by utilizing co-ownership entities could become subject to the Advisers Act, which would not be to the advantage of real estate fund investors or further the Commission's efforts to regulate hedge funds as discuss herein.. Many of such real estate funds do not meet the definition of an "investment company" as set forth in Section 3(a)(1) of the Investment Company Act of 1940, as amended (the "Investment Company Act"). In certain instances, interests in co-ownership entities equal or exceed 40% of the funds' assets and the sponsors attempt to qualify for exemptions from the Investment Company Act by virtue of Sections 3(c)(1), 3(c)(5)(C) or 3(c)(7). The sponsors of such real estate funds have generally relied upon the Section 203(b)(3) exemption from registration under the Advisers Act. By exempting a fund that invests primarily in assets that are qualifying assets and real estate related assets within the meaning of Section 3(c)(5)(C), Congress has indicated that it did not believe that such real estate funds should be treated as investing in securities for purposes of the Investment Company Act. Following this logic, we believe Congress did not intend to require that the sponsors of such real estate investment funds would be required to register under the Advisers Act. Accordingly, we believe the Commission should make clear in the final rules implementing the Dodd-Frank Act that a sponsor of such a real estate fund is not an "Investment Adviser" within the meaning of the Advisers Act provided the sponsor meets the conditions set forth below.

We believe that Instruction 5.b.2 to Form ADV should be expanded to make clear that "real estate" includes assets which are "real estate related" within the staff's interpretations of Section 3(c)(5)(C) of the Investment Company Act, thus enabling real estate fund sponsors who are within the Private Fund definition to get full benefit from the exclusion of real estate in calculating assets under management. In this regard, the SEC rules should make clear that an advisor that has zero assets under management, as determined under Instruction 5.b.2 to Form ADV, is not an investment advisor subject to the Advisers Act (including the state registration alternatives). This would enable sponsors of real estate funds to structure their interests in real estate in manners most favorable to their clients without concern for their having to register, report and be subject to examination as investment advisers.

We also believe that subjecting sponsors of real estate investment funds to investment adviser registration and regulation would increase costs of the real estate investments to investors (thereby diluting their returns) without a corresponding benefit to investors. Also, requiring real estate funds buy real estate through instruments technically viewed as securities to register under the Advisers Act would unfairly handicap such funds from competition with real estate funds that limit themselves to direct property ownership in obtaining capital and operating results.

Also, requiring registration of sponsors of real estate investment funds would divert the resources of the Commission from regulating the type of investment fund managers that the Dodd Frank Act was clearly intended to bring with the scope of the Act. Registration of real estate fund advisers may also require a substantive review of various Commission examination procedures as a review of the records of a real estate fund and its underlying assets is far different than the review of the records of a typical investment adviser or a hedge fund adviser.

We suggest that any exclusion for real estate investment fund sponsors could be further conditioned on the following:

1. the sponsor does not hold itself out to the public as an Investment Adviser with respect to Securities (as defined in the Act);

2. that at least eighty percent (80%) or more of the assets under management of each real estate fund managed by the sponsor consist of assets that are qualified or real estate related assets for purposes of 3(c)(5)(C) of the Investment Company Act.

3. The sponsor does not advise any persons individually with respect to the investment in Securities. Side-by-side investments by investors in the real estate fund, by parallel investment vehicles, or by key employees of the sponsor or their family members would not constitute persons receiving individual investment advice.

4. No fund sponsored by the sponsor is required to be registered under the Investment Company Act.

5. No fund sponsored by the sponsor invests five percent or more of its assets in securities traded on a national securities exchange.

2. Active Management Private Equity Funds – Assets under Management.

With the exception of Venture Capital Fund advisers, the Exemption Release and the Implementing Release do not distinguish private fund advisers based upon their business or investment activities. Hedge fund managers, buy-out fund managers, secondary fund managers, and PIPE fund managers are treated alike. This is inequitable in that it subjects private fund advisers that demand active management rights and positions in their portfolio companies ("Active Management Private Fund Managers" herein) to the same stringent registration and regulation as hedge fund managers and other advisers that take a passive role in the management of their portfolio companies. In this regard, a number of private equity funds take majority ownership or voting control positions in their portfolio companies, have representation on the board of directors and/or executive committees of their portfolio companies and otherwise provide active guidance to their portfolio companies. However, the vehicle for the investment in portfolio companies is most often capital stock and mezzanine debt, which are securities.

Instruction 5.b.2 of the Form ADV Instructions to Part 1A, allows a private fund adviser to exclude from assets under management businesses whose operations the adviser "manages" on behalf of a client but not as an investment. We encourage the Commission to clarify that for purposes of determining businesses whose operations the adviser manages on behalf of a client, any business in which a partner or senior officer of the adviser holds a position on the board of directors (or similar governing body) or is an executive officer, or of which the private equity fund holds immediately after making its investment in the portfolio company greater than 50% of the voting control of the portfolio company. Alternatively, the concept of "significant guidance and counsel" used in the venture capital fund exemption could be embodied in the Instruction to help define what constitutes management of the operation of a business for a client.

3. Other Comments.

As referenced above, it is common practice in the private equity fund universe for significant investors, including institutional investors, to invest side by side with the private equity fund in select investments. Similarly, it is not unusual, particularly in the case of real estate fund investments, for the management or key employees of the private fund advisers and their respective immediate family members to, directly or indirectly, invest along with the private equity fund. The opportunity to invest side by side is made available by the private fund adviser, but the decision to invest is left to the discretion of the investor. Among the criteria for a Private Fund Adviser to avail itself of the $150 million or less exemption from Advisers Act registration is that the adviser provides services solely to Private Funds. The Commission should clarify that allowing side-by-side investments, by itself, does not render the beneficiary of the side-by-side investment right a client of the adviser.

DLA PIPER

The views expressed in this letter are those of the undersigned and not of the law firm of DLA Piper LLP (US) or any specific client of such law firm.

Thank you for considering our comments and concerns.

Respectfully submitted,

Hal M. Brown   John H. Heuberger