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

Re: Comments of Certain Non-U.S. Insurance Companies
SEC File Nos. S7-36-10 and S7-37-10

Ladies and Gentlemen:

On behalf of certain clients that are non-U.S. insurance companies, 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") intended to implement certain proposed exemptions (the "Exemptive Rules") under the Investment Advisers Act of 1940, as amended (the "Advisers Act") and other provisions of Title IV 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 intended to cause the registration with the SEC of many managers of hedge funds and private equity funds. While the focus of Title IV 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, and in the absence of other available exemptions, such rules will cause the registration with the SEC as investment advisers of the captive asset management subsidiaries of many non-U.S. insurance companies and other companies that establish subsidiaries to manage their proprietary assets. We believe that any such action should be taken only after careful consideration by the Commission and not as a by-product of rules intended to implement legislation primarily focused on private fund managers.

Many non-U.S. insurance companies have subsidiaries located both within and outside the United States whose sole function is to manage assets for these companies and their insurance company subsidiaries and affiliates both in the United States and throughout the world. In accordance with good business practices, such services are provided under the terms of

[1] The proposed Exemptive Rules were published in Release No. IA-3111 (Nov. 19, 2010). The proposed Implementing Rules were published in Release No. IA-3110 (Nov. 19, 2010).

investment management agreements between the investment advisory subsidiary and the other insurance companies in the corporate organization.

Generally, U.S. tax transfer pricing regulations require that compensation for services performed by an entity in the U.S. for an affiliate include an arms-length markup in addition to reimbursement of cost. Therefore, the compensation paid to the investment advisory subsidiaries reflects such an arms-length markup. While the U.S. investment advisers receive such compensation, including the markup over costs, they receive this fee only from affiliates so that there is no overall profit from a corporate group standpoint on these services.

Our comments are directed to the changes in Instruction 5.b.(1) to Form ADV Part 1, which 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.

We urge the Commission to reconsider and clarify the requirement for inclusion of such proprietary assets in "regulatory assets under management" for the following reasons:

1. **Registration would impose an unnecessary burden on entities that manage only proprietary assets without any corresponding benefit to the U.S. public interest or the protection of investors.**

We question whether registration of entities that manage only proprietary assets was the intended consequence of the proposal to include proprietary assets in regulatory assets under management for purposes of Form ADV. We believe it is both unnecessary and inappropriate in the context of a corporate group that does not manage any money for unaffiliated parties.

Registration entails the preparation of extensive disclosures meant to "provide new and prospective advisory clients with clearly written, meaningful, current disclosure of the business practices, conflicts of interest and background of the investment adviser and its advisory personnel."[2] In addition, Rule 206(4)-7 under the Advisers Act requires registered investment advisers to design and maintain compliance policies and procedures to " . . . identify conflicts and other compliance factors creating risk exposure for the firm and its clients in light of the firm's particular operations . . ."[3] The preparation and maintenance of such documents are costly and time-consuming, but their utility is limited where there are no clients to benefit from them. In a relationship among corporate affiliates, the parent and affiliates have access to any and all information concerning each affiliated company in the corporate group and the parent is

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[2] Investment Advisers Act Release No. 3060, July 28, 2010.

[3] Investment Adviser Act. Release No. 2204, Dec. 17, 2003.

ultimately responsible for each subsidiary's operations and controls, so there would be no benefit from such required disclosure and compliance documentation.

The initial costs of registration are substantial, with costs for preparation of the Form ADV and Compliance Manual quoted from $75,000 to $150,000 depending on the size and complexity of the registrant. In addition, we are aware of compliance services firms that are charging $50,000 per year to assist with annual compliance monitoring for the smallest advisers that invest in uncomplicated strategies, and considerably more for larger entities that invest in alternative investments or derivatives. In addition, there are added salary costs for hiring a chief compliance officer. In all, costs could be expected to total hundreds of thousands of dollars and hundreds of hours of personnel time for each new registrant.

As mentioned above, there is no corresponding benefit in terms of investor protection in the corporate group context. Moreover, subjecting numerous captive subsidiaries both within and outside the United States that manage only proprietary insurance company assets to examination by the SEC would strain further the scarce resources of the Commission.[4]

2. Requiring investment advisers that manage assets only 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".

Section 202(a)(11) of the Advisers Act in pertinent part defines as an investment adviser "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of purchasing or selling securities . . . ." There are 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)[5] for "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order."

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 bank or trust company subsidiaries were not "investment advisers" within the intent of Section 202(a)(11) of the Advisers Act.[6]

The Staff took a similar position in connection with the venture capital advisory subsidiary of a bank holding company. In *Bank America Capital Corporation*,[7] a subsidiary providing advice

4 *See* Staff Study, Division of Investment Management, Securities and Exchange Commission, *Study on Enhancing Investment Adviser Examinations,* January 2011, in which the Commission Staff stated its belief that the Commission likely will not have sufficient capacity in the near or long term to conduct effective examinations of registered investment advisers with adequate frequency and proposed alternative arrangements for funding and staffing.

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

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

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

on venture capital investments to other subsidiaries of a bank holding company 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.[8] 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 Investment Company Act of 1940, as amended. 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".

The basis for our position that the investment adviser subsidiaries of non-U.S. insurance companies should not have to register as investment advisers is that they are the investment management arms of their non-U.S. parent insurance companies. The fact that they are housed in separate subsidiaries rather than within the parent corporation reflects administrative and local law considerations, but should not result in the Advisers Act regulatory scheme being applied to a non-U.S. insurance company that is in effect investing for its own account through subsidiaries. While there is "compensation" in its broadest sense, in that there are payments of money from one subsidiary to another, we do not believe that the U.S. investment advisory subsidiary is "engaged in the business" of advising "others", as the investment advisers and their advisees are all components of one corporate organization. The investment advisers do not solicit clients even privately in any jurisdiction.[9]

3. Any proposal to require the registration of managers only of proprietary assets should be subjected to carefully focused regulatory scrutiny of the consequences before adoption.

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

9 *See* 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.

There is no apparent predicate in Dodd-Frank for subjecting entities that manage only the assets of either U.S. or non-U.S. affiliates to regulation in the United States as investment advisers. We urge the Commission to give careful consideration to the impact of the proposed instructions to Form ADV, as they would effect far broader changes than necessary to implement Dodd-Frank.

In terms of substance it is the proposal in the Implementing Rules that "proprietary assets" *must* be included in "regulatory assets under management", a new concept for determining whether an adviser meets the $100 million asset threshold for SEC registration, that creates uncertainty about the position that investment advisory entities managing the assets of non-U.S. insurance companies are not "engaged in the business" of advising "others". We urge the Commission to clarify that entities with only "proprietary assets" under management and no assets from unaffiliated advisees, not be required to consider such assets as "regulatory assets under management".

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.

These 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. 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.

According to the releases related to the Form ADV amendments in 1997 that were 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, although the regulatory history on this point appears limited. In the release 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.[10] The adopting release, however, 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

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10 Advisers Act Release No. 1601 (Dec. 20, 1996).

form stated that advisers "may" include such assets.[11] We have not located further regulatory history on this point, but the instructions have remained in the Form ADV since 1997.

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, even by advisers that manage no assets for third-party advisees. We believe that the permissive inclusion of such assets, solely at the option of the adviser, should continue, as mandatory inclusion of such assets will result in many large foreign institutions with a U.S. presence but no U.S. clients falling subject to SEC regulation.

4. We urge the Commission to use its authority under Section 202(a)(11)(H) to broaden the insurance exemption from registration to include non-U.S. insurance companies.

The Advisers Act reflects recognition that the registration of investment advisers to insurance companies is outside the regulatory interest of the SEC. Section 203(b)(2) of the Advisers Act exempts from registration "any investment adviser whose only clients are insurance companies". However, for purposes of the Advisers Act, "insurance company" is defined as a company whose primary and predominant business is writing insurance or reinsuring risk and which is subject to supervision by state insurance regulators.

The investment management subsidiaries of the insurance companies in question could not avail themselves of this exemption, however, as they advise both domestic U.S. insurance affiliates and their non-U.S. parent and affiliates. Thus, as more fully described below, if the proposed instruction is adopted, these investment management subsidiaries of non-U.S. insurance companies could find themselves in the anomalous position of having to register in the U.S. even though they advise only their non-U.S. parent companies or other subsidiaries of such companies, many of which are non-U.S. entities.

Under these circumstances, we urge the Commission to exercise its authority under Section 202(a)(11)(H) to exclude entities that manage only assets of their U.S.- and non-U.S. insurance affiliates as not within the intent of the definition of "investment adviser".[12]

Alternatively, we request that the Commission exercise its general exemptive authority in Section 206A of the Advisers Act to exempt advisers to both U.S. and non-U.S. insurance companies from the Advisers Act. Non-U.S. insurance companies are subject to prudential regulation in their jurisdictions of formation and operation. In the global economy that has developed since the definition of "insurance company" in Section 202(a)(12) was adopted, advisers to regulated non-U.S. insurance companies, as well as U.S. insurance companies, should

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11 Advisers Act Release No. 1633 (May 15, 1997).

12 *See* notes 6 and 7 above and accompanying text.

be recognized as within the policy of the exemption from registration in Section 203(b)(2) for advisers that manage only insurance company assets.

5. If the Commission deems it necessary in order to monitor systemic risk, we urge it to consider creating a new class of exempt reporting adviser to collect data on the advisory activities of managers that manage only their own and the affiliates' assets, in lieu of requiring registration of such entities.

We recognize the mandate of Title I of Dodd-Frank for the SEC and other agencies to collect data necessary to identify and minimize systemic risk to the financial system. If the Commission deems it necessary, we urge that it create a separate reporting category for entities that manage only proprietary assets that might focus only on information about the amount and type of assets under management that is necessary for the monitoring of systemic risk, but that it not impose the full burden of registration on such entities.

If so, in deciding what information to include, we urge the Commission to consider where possible the information that is already publicly available or required to be disclosed by the managers in question or their parent companies under existing laws, including the Securities Exchange Act of 1934, as amended, and allow reporting by reference to such already filed information.

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We respectfully request that the instruction to include "proprietary assets" be clarified as described above so as not to subject entities that perform investment functions only for corporate affiliates to registration under the Advisers Act.

Please contact either Marybeth Sorady, marybeth.sorady@kattenlaw.com, or Marilyn Selby Okoshi, marilyn.okoshi@kattenlaw.com, if we can provide further information concerning this comment.

Sincerely,

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