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January 24, 2011

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

File#S7-37-10: Release No. 3111 (Exemptions for Certain Advisors—Title IV Provisions of the Dodd-Frank Act)

Dear Ms. Murphy:

Reference is made to the Release IA-3111 (the "Proposing Release"), proposing rules pursuant to the Private Fund Investment Adviser Registration Act of 2010, including an exemption from registration for advisers to certain private funds and rules relating to the exemption for foreign private advisers in Section 203(b)(3) of the Investment Advisers Act of 1940, as amended (the "Advisers Act"). We are writing to respond to the Commission's request for comment on whether investment advisers should be required to take into account the activities of their advisory affiliates when determining eligibility for any exemption under proposed Rule 203(m)-1 or the foreign private adviser exemption under new Section 203(b)(3) of the Advisers Act, and also to request that the Commission clarify the status of U.S. persons who acquire private fund interests other than in an original issuance (*i.e.*, in a secondary market transaction) for purposes of the foreign private adviser exemption.

Our comments are prompted by the concerns of several of our clients who are foreign-based multinational advisory organizations that sponsor and advise private funds. Some of our clients, while primarily based abroad, have affiliates with offices in the United States. Due to the fact that under proposed Rule 203(m)-1, investment advisers with a principal place of business outside the United States are not required to take into account assets managed from places of business outside the United States in determining assets under management for purposes of Rule 203(m)-1, the issue of whether the operations of their U.S. affiliates will be integrated with their foreign operations takes on considerable importance.

We are concerned with situations in which a foreign investment adviser has a principal place of business abroad and affiliates with offices in other cities around the world, including one or more in the United States. The center of control of the organization is the adviser's foreign home office, but each affiliated office may have advisory personnel who are responsible for sourcing transactions and making investment recommendations for the private fund clients.

Generally, the foreign parent adviser serves as the investment adviser of the private funds managed by the group. However, employees in other jurisdictions may also have input into the decision making process, sometimes through subadvisory agreements or through membership on committees of the foreign parent's governing body or investment committee which is formally charged with making investment decisions. In some cases, as a result of the historical development of the group or for other reasons, the process works in reverse with respect to portion of the organization's business, with a subsidiary of the foreign parent serving as the investment adviser to one or more private funds and advisory personnel of the parent and other affiliated advisers providing input into to decisions made by the fund adviser.

Multinational advisory structures built along this general pattern have been established and in existence over the last twenty or so years. Prior to 1992, it was not possible to create such a structure if for some reason an investment adviser within the group needed to register under the Advisers Act. This was because it was then believed that Section 208(d) of the Advisers Act required the operations of foreign unregistered affiliates of registered advisers to be integrated with the registered affiliates if the entities were not functionally independent from each other. This position was codified in proposed Rule 202-1 (which was never adopted, but nevertheless followed in practice), and the Staff no-action letter issued to Richard Ellis Inc. (September 24, 1981), requiring foreign unregistered advisers to satisfy several independence tests in order to avoid being integrated with its registered affiliates.[1] Generally, these tests would not be satisfied by the structures outlined above.

In its 1991 Report Protecting Investors: A Half Century of Investment Company Regulation, Chapter 5, the Division of Investment Management acknowledged the limitations of the Richard Ellis integration doctrine and adopted instead a "conducts and effects" approach intended to regulate the conduct and effects of unregistered foreign affiliates, although not requiring registration of the foreign affiliates themselves. As part of this approach, the Division reconsidered the circumstances under which affiliates would be integrated, adopting less stringent separation criteria. These criteria were spelled out initially in the Staff's no-action letter issued to Uniao de Bancos de Brasileiros S.A. (July 28, 1992) and refined in a series of subsequent no-action letters. Under these no-action letters, an unregistered investment adviser is considered separate from its registered affiliate, and the two are not be integrated, if: (i) each is separately organized and staffed with personnel who are capable of providing investment advice; (ii) all personnel of the unregistered adviser involved in managing accounts of U.S. clients through the registered affiliate are treated as "supervised persons" of the registered adviser; and (iii) the Commission has access to trading and other records of each such unregistered affiliated adviser, and its personnel, to the extent necessary to monitor and police the conduct that could harm U.S. investors and U.S. markets.

[1] Under Richard Ellis, a subsidiary may be regarded as having a separate, independent existence and to be functioning independently of its parent if: (1) it is adequately capitalized; (2) it has a buffer, such as a board of directors a majority of whose members are independent of the parent, between the subsidiary's personnel and the parent; (3) it has employees, officers and directors who if engaged in providing advice in the day-to-day business of the subsidiary entity, are not otherwise engaged in an investment advisory business of the parent; (4) it makes the decisions as to what investment advice is to be communicated to, or is to be used on behalf of, its clients and has and uses sources of investment information not limited to its parent; and (5) it keeps its investment advice confidential until communicated to its clients.

As a result, after the implementation of the conducts and effects approach, where multinational complexes have found registration under the Advisers Act to be necessary, the Unibanco analysis has afforded flexibility in structuring advisory relationships, without requiring all members of the advisory group to be registered under the Advisers Act. This is accomplished under the Unibanco analysis by treating certain employees of the unregistered advisers as "supervised persons" of the registered adviser and having the unregistered affiliates agree to submit to the Commission's jurisdiction and agree to maintain records and provide certain information and testimony to the Commission upon request. If, as proposed, foreign investment advisers remain eligible for the exemption provided by proposed Rule 203(m)-1 despite the fact that they advise non-U.S. clients other than private funds, having Unibanco available to foreign advisers in these situations will be a considerable advantage in structuring their U.S. operations.

We believe that the Unibanco approach to integration questions can and should govern the extent to which registered investment advisers, and investment advisers exempt under Rule 203(m)-1, should be required to take into account the activities of its advisory affiliates. The alternative, alluded to in footnote 270 of the Proposing Release, would be to return to the Richard Ellis regime and require multinational advisory groups with U.S. operations to establish multiple teams covering the same areas in order to avoid having to register their foreign advisory affiliates who service foreign clients.

Our recommendation to the Commission is to answer the integration issue raised in Section II. D. of the Proposing Release by making the following points in the final Rule or the final Release:

1. That the Commission endorses the approach taken in Unibanco toward the integration of foreign advisers with their affiliates who are either registered under the Advisers Act or exempt from registration, and the Richard Ellis integration analysis will not be applied to require integration of foreign advisers and their registered or exempt U.S.-based affiliates if they are separately organized and operated in accordance with the Unibanco line of no-action letters.

2. For purposes of proposed Rule 203(m)-1 and amended Section 203(b)(3) of the Advisers Act, an investment adviser with a principal place of business outside the United States will not be deemed to be managing assets from a place of business in the United States merely because the foreign adviser, or employees of the foreign adviser, provide advice to or receive advice from a registered or exempt affiliate located in the United States, or employees of the foreign adviser serve as dual employees of the U.S.-based affiliate.[2] As a result, in cases in which the foreign adviser serves as investment adviser to a private fund, the fact that a U.S.-based affiliate provides investment advice or shares employees with the foreign adviser should not preclude the foreign adviser from relying on proposed Rule 203(m)-1 or amended Section 203(b)(3) of the Advisers Act.

In addition, we would also encourage the Commission to confirm that, for purposes of the foreign private adviser exemption under amended Section 203(b)(3) of the Advisers Act, the

[2] If an adviser were registered under the Advisers Act, it would be required to adhere to the requirements of Unibanco with respect to affiliates and employees of affiliates who provide advice to or through the registered adviser.

principles for determining U.S. investors set forth in the Staff's no-action letter issued to Investment Funds Institute of Canada (February 6, 1996) apply such that U.S. investors who acquire their interests in a private fund (from a U.S. perspective) in offshore secondary transactions are not treated as "being in the United States."

We appreciate this opportunity to assist in the development of these Rules and hope you find our comments helpful.

Very truly yours,

Bryan Chegwidden
Cameron Fairall
Mark Tannenbaum