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January 24, 2011

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

Re: Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Release No. IA-3111, File No. S7-37-10; Rules Implementing Amendments to the Investment Advisers Act of 1940, Release No. IA-3110, File No. S7-36-10

Dear Ms. Murphy:

We are submitting this letter in response to Release No. IA-3111 (the "Proposing Release"),[1] in which the Securities and Exchange Commission (the "Commission") has requested comment on various proposed rules to implement new exemptions from the registration requirements of the Investment Advisers Act of 1940 (the "Advisers Act") that were enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Our comments focus principally on the Commission's proposed Rule 203(m)-1, which would provide an exemption from registration to any investment adviser that solely advises private funds if the adviser "has assets under management in the United States" of less than $150 million (we refer to the proposed rule as the "Private Fund Adviser Exemption").

We are also submitting comments on certain matters contained in Release No. IA-13110 (the "Implementing Release")[2] that are designed to give effect to other aspects of the Dodd-Frank Act, including elements of the Private Fund Adviser Exemption.

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1 Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, SEC Release No. IA-3111 (Nov. 19, 2010).

2 Rules Implementing Amendments to the Investment Advisers Act of 1940, SEC Release No. IA-3110 (Nov. 19, 2010).

Debevoise & Plimpton LLP is an international law firm, representing a wide range of clients around the world. Our clients include private equity funds and hedge funds, and their managers, sponsors and advisers, both U.S. and non-U.S., that may be affected by proposed Rule 203(m)-1. These comments, while informed by our experience in representing these clients, represent our own views and are not intended to reflect the views of the clients of the firm.

Assets Under Management in the United States

We commend the Commission and the staff of the Commission (the "Staff") for the thorough analysis of the issues related to the Private Fund Adviser Exemption contained in the Proposing Release. In particular, it is our view that the discussion of the proposed definition of the term "assets under management in the United States" is a fair reflection of the policy underlying Section 203(m) of the Advisers Act (as amended by the Dodd-Frank Act)[3] and is consistent with prior Commission and Staff statements concerning the territorial scope of the Advisers Act.[4] To that end, the term "assets under management in the United States" is defined in proposed Rule 203(m)-1 to mean assets managed from a "place of business in the United States." We agree that the focus on the jurisdiction where the business of the non-U.S. adviser is located and conducted is warranted and supports the Commission's approach of crafting the Private Fund Adviser Exemption in a manner that avoids imposing registration on advisers with a principal office and place of business outside of the United States (a "Non-U.S. Adviser") because such advisers are less likely to "implicate U.S. regulatory interests and in consideration of general principles of international comity."[5]

An important benefit of this approach is that it looks at the location where the assets are managed and not the jurisdiction in which the private funds managed by an investment adviser are organized. Thus, a Non-U.S. Adviser may properly rely on the exemption even if it advises a private fund organized under Delaware law for regulatory or tax reasons. The jurisdiction of organization of a private fund does not, in our view, in and of itself implicate U.S. regulatory interests for purposes of the Private Fund Adviser Exemption.

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3 *See* Proposing Release at p. 59.

4 *See, e.g.*, Registration Under the Advisers Act of Certain Hedge Fund Advisers, SEC Release No. IA-2333 (Dec. 2, 2004) (the "Hedge Fund Adviser Release"); Royal Bank of Canada, SEC No-Action Letter (June 3, 1998); Uniao de Bancos de Brasileiros S.A., SEC No-Action Letter (July 28, 1992) ("Unibanco").

5 Proposing Release at p. 59.

The Commission has previously recognized that when U.S. investors acquire interests in non-U.S. funds, "the laws governing such a fund would likely be those of the country in which it is organized or those of the country in which the adviser has its principal place of business" and that "U.S. investors in such a fund generally would not have reasons to expect the full protection of the U.S. securities laws."[6] There is nothing in Section 203(m) or Title IV of the Dodd-Frank Act that suggests that the Commission should modify this approach.

We also agree with the Commission's conclusion that the Private Fund Adviser Exemption should be available to a Non-U.S. Adviser if it has non-private fund clients that are not U.S. persons. Consistent with the Commission's overall territorial approach to Advisers Act regulation and the statements in the immediately preceding paragraph, we do not believe that non-U.S. persons have any expectation that they would be protected by the Advisers Act if they receive advice from a Non-U.S. Adviser relying on an exemption from registration with the Commission.

We believe that it would be helpful for the Commission to confirm that an exempt Non-U.S. Adviser (a "Non-U.S. Affiliate") that is affiliated with an adviser that has its principal office and place of business in the United States (a "U.S. Adviser") would not be treated as a "place of business" or "office" of the U.S. Adviser and that the private fund assets under management of the Non-U.S. Affiliate would not have to be aggregated with those of the U.S. Adviser for purposes of determining the eligibility of the Non-U.S. Affiliate to rely on the Private Fund Adviser Exemption. As discussed below, we believe that it would be consistent with the Commission's overall approach to the Private Fund Adviser Exemption to treat such affiliates on a stand-alone basis in analyzing the availability of the Private Fund Adviser Exemption or any reporting obligations.

Sub-Advisory and Adviser Affiliate Relationships

The Commission devoted a section of the Proposing Release to an analysis of sub-advisory relationships and advisory affiliates. The Commission observed that "[a]lthough both the private fund and the fund's primary adviser may be viewed as clients of the sub-adviser, we would consider a sub-adviser eligible to rely on section 203(m) if the sub-adviser's services to the primary adviser relate solely to private funds and the other conditions of the exemptions are met."[7] We agree that this approach would address the regulatory objectives of the Private Fund Adviser Exemption in many circumstances.

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6 *See* Hedge Fund Adviser Release, *supra* note 4, at n. 213.

7 Proposing Release at p. 87.

The Commission also requested comment on whether "any proposed rule should provide that an adviser must take into account the activities of its advisory affiliates when determining eligibility for an exemption."[8]

As noted above, we strongly believe that any rule should clearly provide that the activities of advisory affiliates (whether registered or not) should not be taken into account when determining whether an investment adviser can rely on the Private Fund Adviser Exemption. Section 203(m) clearly contemplates that a Non-U.S. Adviser may rely on the Private Fund Adviser Exemption and conflating this exemption with the activities of other advisory affiliates will, in our view, muddy otherwise clear waters. Moreover, with respect to the Private Fund Adviser Exemption, the Commission has the tools to determine if an adviser's assertion of the exemption is *bona fide*. Any adviser relying on the Private Fund Adviser Exemption will be required to file a modified Form ADV with the Commission.[9] This filing will contain enough information to provide the Commission with a basis for determining whether the adviser's reliance on the exemption is appropriate. Moreover, if a Non-U.S. Adviser has an affiliate that is a registered investment adviser, the Commission will also have access to the more fulsome disclosure contained in the Form ADV of the registered investment adviser, including information about advisory affiliates.[10]

In contrast, there may be situations where a Non-U.S. Affiliate may in fact operate as an integrated part of a registered investment adviser's business because its personnel provide research or investment advice principally used by the registered investment adviser, including for advice provided to U.S. non-private fund clients. In these circumstances, consistent with the Staff's prior views, an unregistered Non-U.S. Affiliate (for example, one relying on the Private Fund Adviser Exemption) need not register provided that any overlapping operations and personnel involved in U.S. non-private fund client advice are subject to the registered investment adviser's compliance

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8 Proposing Release at p. 87.

9 We address certain aspects of this filing below.

10 For the same reasons, we do not believe that the ability of a Non-U.S. Affiliate of a registered investment adviser to rely on the Private Fund Adviser Exemption should be premised on any specified set of non-integration criteria. Given the Commission's receipt of information on Form ADV concerning an adviser that relies on the Private Fund Adviser Exemption, including the location of its principal office and place of business and information about its advisory affiliates, it is not necessary for a Non-U.S. Affiliate to maintain separate operations meeting the criteria set forth in Richard Ellis, SEC No-Action Letter (Sept. 17, 1981) in order to claim the Private Fund Adviser Exemption.

policies and the unregistered Non-U.S. Affiliate maintains the books and records required by the rules under the Advisers Act.[11]

Definition of U.S. Person

The Commission proposed to define the term "U.S. person" by reference to the definition contained in Regulation S. As a general matter, we agree that this is an appropriate approach for the reasons set forth in the Proposing Release.[12] As noted in the Proposing Release, however, the Commission has previously stated that, in the case of a corporation and other business entity, an adviser could look to its principal office and place of business.[13] In certain instances, this approach may better achieve the Commission's regulatory objectives. For example, a private fund, or an entity that is organized as part of a private fund, may be organized under Delaware law to meet certain regulatory and tax objectives, but the fund's principal office and place of business in fact may be outside the United States. Such an entity should not be viewed as a U.S. person (and, therefore, a U.S. client) for purposes of determining an adviser's eligibility to rely on the Private Fund Adviser Exemption or other exemptions addressed in the Proposing Release (including the foreign private adviser exemption). As suggested by the Hedge Fund Adviser Release, Regulation S was "designed for use in transactions, not ongoing advisory relationships."[14]

Moreover, such an approach would not be inconsistent with Regulation S itself, which treats a partnership or corporation organized under the laws of a foreign jurisdiction as a U.S. person if it was "[f]ormed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors . . . who are not natural persons, estates or trusts." Similarly, an entity organized under U.S. law should not necessarily be treated

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11 In *Unibanco* and subsequent no-action letters, the staff of the Commission's Division of Investment Management concluded that affiliates of registered investment advisers would not be required to register based on assurances that the advisory activities of the participating affiliates, which affect U.S. clients or markets, were subject to the Advisers Act and certain rules thereunder and the Commission's regulatory oversight. We believe that the Commission or the staff of the Division of Investment Management should confirm that the *Unibanco* approach would continue to be applied in appropriate circumstances.

12 See discussion in the Proposing Release at p. 69 *et seq*.

13 Proposing Release at n. 218.

14 Hedge Fund Adviser Release, *supra* note 4, at n. 201.

as a U.S. person if it was formed by a non-U.S. person to pursue the entity's investment objectives.

Private Fund Reporting

The Commission has proposed several amendments to Part 1A of Form ADV that would require, among other things, extensive information about private funds that are clients of the adviser (whether such adviser is registered under the Advisers Act or filing in connection with the Private Fund Advisers Exemption).

As a general matter, many of the matters that would be required to be reported in response to proposed Item 7.B. would best be addressed in the contemplated rulemaking related to private fund reporting and recordkeeping. It is difficult to assess the burdens that will be imposed on registered investment advisers and exempt reporting advisers without a complete understanding of the proposed reporting and recordkeeping obligations.

Moreover, while this may appear to be heretical in the current environment, we do not believe that Form ADV should be used as a means to provide investors with greater transparency concerning private funds.[15] Private funds are, by their nature, private, and investors in such funds have ample opportunity to engage in due diligence concerning the fund and to receive periodic information and reports from the fund's sponsor or managers. While we understand why the Commission might desire access to the requested information for its own purposes, it should not be necessary to make this information publicly available.

In addition, proposed Item 7.B. and Section 7.B.1. of Schedule D would request information about the private fund that is either unnecessary or unnecessarily burdensome to collect. For example, it is not entirely clear why the exemptions that the fund relies upon under the Securities Act of 1933 need to be identified in response to Item 7.B. Since it is implicit in the definition of the term "private fund" that the fund relies on an exemption from registration under the Securities Act of 1933, such reliance should be self-evident. Similarly, if the Staff desires to review the Form D relating to the private fund's offering, there are likely other means that it can use to locate the form.

Item 7.B. would require disclosure of specific information that may be unnecessarily detailed to achieve the Commission's objectives. For example, sub-item 11 of Item 7.B. would require disclosure of the precise amount of the private fund's gross asset value and net asset value. Presumably, the objective of this sub-item is to provide the Commission with some idea of the size of the private fund. This could be achieved by asking whether the private fund's total assets fall within specified ranges.

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[15] Implementation Release at n. 149.

Similarly, the amended Form would require information concerning fund service providers that goes beyond what is necessary for the Commission to achieve its regulatory objectives. For example, sub-item 27 of Section 7.B.1. of Schedule D requests the adviser to provide **both** the legal name of the custodian as well as the custodian's primary business name. It should be sufficient for the adviser to provide the name that the custodian uses in connection with its relationship with the adviser.

Finally, identifying the precise nature and status of the investors in the fund may be more complex than the Commission contemplates. Information of the type listed in the "Ownership" section of Schedule D is not necessarily requested on the questionnaires that are used by fund sponsors in determining whether a fund investor is eligible to invest in a private fund; the typical focus of these investor questionnaires is providing a basis for concluding that the investor is a "qualified purchaser," an "accredited investor" and, where applicable, a "qualified client." Moreover, it appears that private funds will be required to collect this information from investors in already existing private funds. This process will impose costs that may not have been taken into account in the Commission's Cost Benefit of Paperwork Reduction Act analysis since it was assumed that this information would be on-hand.[16]

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We appreciate the opportunity to comment on the proposed rule and would be pleased to answer any questions you might have regarding our comments. Please contact Kenneth J. Berman at (202) 383-8050, Erica Berthou at (212) 909-6134 or Marcia L. MacHarg at (49 69) 2097 5000.

Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

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16 Implementing Release at p. 106.