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VIA ELECTRONIC MAIL (rule-comments@sec.gov)

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

RE: Release No. IA-3111 (File No. S7-37-10, Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less than $150 Million in Assets Under Management, and Foreign Private Advisers)

Dear Ms. Murphy:

This letter is being sent by attorneys representing the Emerging Growth and Venture Capital group of DLA Piper LLP.[1] We appreciate the opportunity to comment on the proposed rules (the *Proposed Rules*") prepared by the Securities and Exchange Commission (the "*SEC*") to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "*Dodd-Frank Act*").

NVCA Letter

We are in possession of a copy of a letter sent to you and the SEC by the National Venture Capital Association (the "*NVCA*") dated January 13, 2011. By this letter, we wish to express our full support for the matters raised in the NVCA's letter. We also would like to highlight certain matters that we believe are critical to the long term viability of the venture capital industry, as set forth below.

General Allowance for Non-Qualifying Activities

The venture capital industry is an important piece of our nation's economy that must be fostered. The "venture capital fund" exemption in the Dodd-Frank Act evidences that venture capital funds are beneficial to the economy but do not pose a systemic risk to our financial system and, accordingly, should not be subject to unnecessary regulation. Simply complying with the new exemption will require additional effort and expense on the part of venture capital funds. Reiterating the NVCA's note on this topic, even though the SEC's proposed rules under the Dodd-Frank Act are designed to allow venture capital funds to continue their current practices, going forward, all fund managers (including those that are exempt) will

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[1] DLA Piper is one of the largest law firms in the world, comprised of 3500 attorneys in 67 countries, including 1500 lawyers in the US. DLA Piper's Emerging Growth and Venture Capital group has more than 120 lawyers in the US and we have a long history of representing emerging technology companies, beginning in 1969 in Silicon Valley, through our predecessor firm Gray Cary Ware & Freidenrich. DLA Piper has a material presence in all of the influential technology markets in the US, including Silicon Valley, Southern California, Austin, Boston and Seattle. DLA Piper regularly earns high rankings within the emerging growth and venture capital industry. For instance, in 2009 we ranked 3rd in the world in venture capital and private equity by volume of deals, according to Dow Jones *Private Equity Analyst*.

expend a significant amount of time, effort and resources ensuring the their fund(s) do not inadvertently run afoul of the Dodd-Frank Act and suddenly become subject to federal regulation.

In order to reduce this new burden, a generalized allowance for non-qualifying activity is both necessary and appropriate. We recommend that this allowance be 20%-25% of a venture capital fund's size (based on its aggregate capital commitments). Non-qualifying activities would include traditional secured or asset-backed lending, fund-to-fund investments, private equity style investments where invested dollars are paid to existing shareholders (as opposed to being retained as working capital) and public company investments. Such an allowance is in line with the investment restriction thresholds generally used within venture capital funds' partnership agreements. Such an allowance also should be sufficient leeway to allow venture capital fund managers to operate their funds consistent with their historical practice, without fear that their venture capital funds will incur a technical violation of the rules that cannot be cured. Furthermore, setting the threshold at 20%-25% of the fund size will allow venture capital funds necessary long-term flexibility in structuring portfolio company investments, allowing for flexibility as markets change and adapt based on the new regulations and in the ordinary course of events.

Founder Liquidity

Although venture capital funds typically acquire newly issued securities in a portfolio company, there are instances where the founders or other existing investors of a company desire to sell some of their own securities as part of an investment round. We agree with the NVCA that such transactions should continue to be permitted, up to a maximum amount of 50% of the amount invested by the venture capital fund (inclusive of milestone based closings set forth as part of the same financing). Similarly, companies should be permitted to use a portion of the proceeds of a venture capital fund's investments to redeem stock from existing shareholders. In addition, venture capital funds should be entitled to acquire stock of founders or other existing investors periodically in secondary transactions after an investment is made. We suggest that such secondary purchases would be included as part of the 50% threshold described above.

Making such additional purchases and providing this additional shareholder liquidity is appropriate, particularly in the emerging market and technology space where liquidity transactions (mergers and acquisition and initial public offerings) have been delayed due to market conditions and founders face substantial liquidity pressures. In our experience, providing some form of limited liquidity builds entrepreneurial loyalty and can be in the best interest of the company and its shareholders. Furthermore, these activities do not pose systemic risk to the financial system.

Public Company Investments

Venture capital fund managers should retain the flexibility to make follow-on investments in all of their portfolio companies, including portfolio companies that have become public reporting companies. Making investments in public companies in which the venture capital fund has a preexisting investment is consistent with funds' investment strategy to build value for its investors. Usually, the venture capital fund has one or more principals that remain as directors of the public company and they remain very intimately involved with the affairs and operations of the company. These investments are therefore not speculative and are based on historical and close working relationships with the company. As discussed above, such investments do not pose systemic risk to the financial system and, accordingly, fund managers should

continue to have the flexibility in structuring financings in a manner that they believe is most appropriate for their investors.

Definition of "Equity Securities" in Venture Capital Fund Definition

Recently, we have also seen the establishment of new asset or revenue-based investment funds. In response to tighter debt and equity markets, companies with strong balance sheets and/or revenue potential are obtaining financing through hybrid instruments that participate in a percentage of revenue from all or selected assets of a company. These instruments have traditional venture capital components—targeting emerging companies, equity style governance and controls, long term investment horizons and financial returns commensurate with the substantial entrepreneurial risks. Such hybrid style investments fit within no prescribed definition under the Proposed Rules but, given their investment mandate, also should be grandfathered under these rules.

We also propose that the term "equity security" in the definition of "venture capital fund" should be expanded to allow for investments whose returns are measured based on a percentage of revenues attributable to one or more assets of the company are treated as equity investments if they have all of the following additional characteristics: (a) the investment is convertible into traditional equity on prescribed terms; (b) the investment entitles the holder to participation or observance of internal company governance similar to the management rights often used by venture capital funds qualifying as venture capital operating companies; and (c) the investment has the ability to generate returns for investors above traditional lending rates.

In addition, on occasion venture capital funds make non-convertible bridge loans, which are, in almost all cases, actually converted by mutual consent in a subsequent financing. These types of non-convertible loans should continue to be permitted as they are a prevalent practice in the industry and do not pose a systemic risk to the financial system.

Foreign Fund Managers

The Proposed Rules' exemption for fund managers with less than $150M under management in the US should be clarified to provide that foreign fund managers with no US office also qualify for the exemption. Some practitioners have read the Proposed Rules to require a foreign fund with under $150 million of assets under management in the US to also have a US office in order to so qualify, which seems contrary to the intent of this exemption, which focuses on the US financial system.

More importantly, we recommend that the SEC increase the Foreign Private Adviser Exemption from $25M to $250M, which we believe is still sufficiently low so as to not pose a systemic risk to the financial system but sufficiently large enough to ease the regulatory burden currently contemplated. The existing $25M threshold is of very limited utility.

Grandfathering Rules

We believe that the Proposed Rules' grandfather requirement that funds had to have been held out to investors as "venture capital funds" is too restrictive. Fund managers in recent years have marketed many venture capital like funds using different monikers, based on the style of venture capital investment being made or the market in which they invest, in an effort to differentiate themselves among fund

investors. Accordingly, we have represented “growth” oriented funds based on their investment focus in later stage emerging companies that have established revenues and profitability, industry based funds (*e.g.*, health care, energy, telecommunications) making investments targeted primarily in a focused area, and geographic based funds that may make a broad array of investments in companies within a prescribed region. The commonality of these funds relates to the type of investments they make rather than the name on which they are marketed or “held out” to their investors.

Accordingly, we recommend that the grandfathering rules be revised to not focus on the marketed name or style of the fund but on the type and style of investments marketed as being made by the fund. Specifically, we recommend that all private investment funds that marketed themselves as being formed to invest primarily in private equity based securities issued by emerging companies be grandfathered under the Proposed Rules.

Conclusion

The SEC has done an admirable job in the Proposed Rules of capturing the venture capital industry’s market and methods. Given the apparent consensus that venture capital type funds do not pose a systemic risk to the financial system, the increased flexibility requested above would be appropriate under the Dodd-Frank Act so that fund managers may continue their current practices and avoid the undue risk of inadvertently becoming subject to registration under the Adviser’s Act, which appears to have been intended under the Dodd-Frank Act.

Very truly yours,

DLA Piper LLP (US)