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VIA ELECTRONIC DELIVERY

Daniele Marchesani
Assistant Chief Counsel
Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Request for No-Action Assurance under Sections 202(a)(30) and 203(b)(3) of the Investment Advisers Act of 1940, as amended (the “Advisers Act”) and Rule 202(a)(30)-1 thereunder regarding certain trusts as non-U.S. persons

Dear Mr. Marchesani:

On behalf of the Alliance Trust Company of Nevada (“**Alliance Trust**”),¹ we request your assurance that the staff of the Division of Investment Management (the “**Staff**”) would not recommend that the Securities and Exchange Commission (“**SEC**” or the “**Commission**”) take enforcement action under Section 203(a) of the Advisers Act² against a non-U.S. adviser relying on the “foreign private adviser exemption” in Section 203(b)(3) of the Advisers Act,³ when the exemption would not be available but for treating a Reserved Powers Trust (as

¹ First licensed in 2005, Alliance Trust Company, LLC is one of the largest employee-owned trust companies in the State of Nevada.

² We seek relief only under the indicated sections of the Advisers Act and not under Regulation S of the Securities Act of 1933 (“**Regulation S**” under the “**Securities Act**”) or any other provision of, or rule under, the federal securities laws. Except as otherwise noted, references to statutory provisions or rules are to sections of and rules under the Advisers Act.

³ Section 203(b)(3) excepts foreign private advisers, as defined in Section 202(a)(30), from the registration requirements of Section 203(a). Section 202(a)(30) defines a “**foreign private adviser**” as an investment adviser with: (A) no place of business in the United States; (B) fewer than 15 clients in the United States and investors in the United States in private funds; (C) less than \$25,000,000 in aggregate assets under management attributable to such clients and investors in private funds; and (D) neither (i) holds itself out generally to the public in the United States as an adviser nor (ii) advises any registered investment company or business development company as defined by the Investment Company Act of 1940 (“**Investment Company Act**”).

described and defined below) as a Non-U.S. Person (as defined below), in determining the number of clients and private fund investors in the United States, or the amount of its assets under management attributable to such clients and investors in the United States, for purposes of the thresholds set forth in such exemption, under the circumstances described herein. This letter requests relief only under the Advisers Act and is not intended to alter the status of a Reserved Powers Trust under Regulation S.

I. BACKGROUND

Reserved Powers Trusts are increasingly popular⁴ with Non-U.S. Persons⁵ to hold assets advised by non-U.S. advisers,⁶ some of which are not registered with the SEC. For a variety of reasons, Non-U.S. Persons may choose to establish a Reserved Powers Trust in the United States for additional tax or estate planning opportunities, enhanced privacy and lower expenses as compared to their home jurisdiction. Of particular value to settlors, the Reserved Powers

⁴ In the United States, a Reserved Powers Trust is also referred to as a “directed trust” due to the ability to direct who controls (and performs) certain powers. While forming trusts in the United States was once only popular for persons with ties to the United States (*e.g.*, U.S. property owners, U.S. green card holders or U.S. family member(s)), trusts established in the United States by international families have been growing in popularity for numerous reasons, including the changing international landscape, modern evolution in trust laws in certain U.S. states, and that the United States provides political stability, protection of property and is non-blacklisted by many foreign jurisdictions as a jurisdiction for establishing an offshore trust. *See* King, AI W. and Brister, Jack, *Powerful Domestic Trust Strategies for International and Cross-Border Families*, New York State Society of Certified Public Accountants (May 1, 2018), *available at* <https://www.nysscpa.org/news/publications/the-trusted-professional/article/powerful-domestic-trust-strategies-for-international-and-cross-border-families>.

⁵ In some cases, a person may be treated as a U.S. person for tax law purposes but not for securities law purposes. With respect to treatment under the U.S. securities laws, a U.S. person as defined in Rule 902(k) of Regulation S is referred to herein as a “**Rule 902(k) U.S. Person**” (and conversely, anyone who is not a U.S. person for purposes of Regulation S is a “**Rule 902(k) Non-U.S. Person**”). With respect to treatment under the U.S. tax laws, a U.S. person as defined in Section 7701(a)(30) of the U.S. Internal Revenue Code of 1986, as amended (“**Code**”) is referred to herein as a “**Code U.S. Person**” (and conversely, anyone who is not a U.S. person for purposes of the Code is a “**Code Non-U.S. Person**”). As Rule 902(k) U.S. Person includes “[a]ny natural person resident in the United States” and a Code U.S. Person includes “a citizen or resident of the United States”, any natural person who is a Code U.S. Person is also a Rule 902(k) U.S. Person and referred to herein as a “**U.S. Person**” (*i.e.*, U.S. residents and U.S. citizens) and conversely, any natural person who is neither a Rule 902(k) U.S. Person nor a Code U.S. Person is referred to herein as a “**Non-U.S. Person**” (*i.e.*, neither a U.S. resident nor a U.S. citizen). For further discussion of these respective definitions, please see note 17.

⁶ Rule 202(a)(30)-1 defines “place of business” by reference to Rule 222-1, where the place of business of an “adviser means: (1) [a]n office at which the investment adviser regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients; and (2) [a]ny other location that is held out to the general public as a location at which the investment adviser provides investment advisory services, solicits, meets with, or otherwise communicates with clients.” For purposes of this request, a “**non-U.S. adviser**” is one with no place of business in the U.S.

Trust typically allows for more flexibility to delineate trust powers than does a trust with a traditional discretionary trustee exercising full trustee powers. The trustee of an ordinary trust with full powers typically would have all the power and responsibility to manage trust assets, distribute income and perform other duties (*e.g.*, make certain changes to or dissolve the trust). By contrast, a Reserved Powers Trust allows the settlor to retain or allocate trust powers specifically related to the investment management of trust assets to an adviser of their choosing⁷ and to engage experts (which may very well be separate entities) to administer the trust and distribute trust assets.⁸ Further, in a Reserved Powers Trust, the intent of the settlor is that the Administrative Trustee be permitted to perform only limited, administrative functions and for

⁷ As a result, a Reserved Powers Trust allows a settlor to choose an independent investment manager to manage trust assets. Typically, the settlor and non-U.S. adviser have a pre-existing relationship and seek a trust company's services in much the same way that any client and adviser may seek custodial services or other administrative services for a separately managed account.

⁸ We respectfully note that this type of trust appeals to, and can be established by, a variety of grantors (including Non-U.S. Persons), who seek to engage service providers that they believe are best suited to exercise each power (*e.g.*, administration, distribution and investment management).

even those functions to be subject to the approval of a Non-U.S. Person such as the settlor, Investment Manager,⁹ Protector¹⁰ or Distribution Gatekeeper.¹¹

The United States, and certain states (including Nevada), are popular jurisdictions for Reserved Powers Trusts. The United States offers political and regulatory stability, and strong rule of law in protection of personal property. Nevada offers tax laws in respect of a Reserved Powers Trust (among other trusts) for Non-U.S. Persons that are tax neutral.¹² Pairing the attractiveness

⁹ The trust instrument will generally provide, in substance, that the “**Investment Manager**” shall, in its sole and absolute discretion, have the power to direct investments including the investment or reinvestment in any kind of property; power to direct sale or exchange of property; power to direct accounts including opening any type of account in any jurisdiction; and power to direct property management with respect to real property including its subdivision and development. The written consent of the Investment Manager is also required for the appropriation and division of assets including any partition and valuation; appointment of a custodian; appointment of a custodian trustee; and in certain dealings with beneficiaries with respect to certain trust properties (*e.g.*, occupation, sale, lease, lending or licensing to any beneficiary). Further, the “authority of the Investment Manager is conferred in a fiduciary capacity.” The Investment Manager may only be appointed or removed by the settlor (as applicable) or Protector.

¹⁰ The trust instrument will generally provide, in substance, that the “**Protector**” must maintain and manage the trust, including by providing written consent or direction to the following actions: dissolve the trust; appoint or remove beneficiaries (*e.g.*, settlor, beneficiaries, children of any beneficiary); resettle all or any part of the trust assets; distribute the trust assets on the dissolution day; change the governing law; and amend the trust instrument. Additionally, the Protector will appoint their replacement, however, in the absence of the protector (*e.g.*, due to death, incapacity or resignation), the Administrative Trustee may appoint a replacement but may not act as the Protector.

Notably, the Administrative Trustee cannot appoint a replacement Protector unless there remains no Non-U.S. Person attached to the Reserved Powers Trust with the power to make a “substantial decision” (*e.g.*, settlor, Distribution Gatekeeper or Investment Manager). It is not anticipated that there will be situations where the Reserved Powers Trust lacks an Investment Manager.

We believe the capacity of the Administrative Trustee to appoint a replacement Protector in these limited circumstances does not alter the character of the role because the Administrative Trustee cannot step into the role of Protector to preserve the foreign tax status of the trust, instead the Administrative Trustee is merely acting to administer the ongoing function of the trust. Importantly, this safeguard does not confer the ability for the Administrative Trustee to make any investment-related decisions or give effect to any additional investment-related decisions. For further discussion, please see note 19.

¹¹ The trust instrument will generally provide, in substance, that the “**Distribution Gatekeeper**” must, subject to the settlor’s power to direct income (as applicable), consent in writing to any distribution, application, or appropriation of any part of the income of the trust assets, including payments to parents or guardians of any beneficiary. Additionally, the Distribution Gatekeeper may only be appointed or removed by the settlor or Protector.

¹² A Reserved Powers Trust in Nevada (or jurisdictions with similar tax regimes) is considered to be “tax neutral” as establishing and holding assets through a Reserved Powers Trust would not impact the total amount of taxes paid relative to holding the assets directly as: (1) at the state level, Nevada (and other states with similar trust and tax regimes) do not charge an income tax on the trust itself; (2) at the federal level, a Non-U.S. Person is only taxed on U.S.-domiciled assets, whether or not

of the Reserved Powers Trust (*e.g.*, estate planning, privacy and cost savings) with the benefits of U.S. law (*e.g.*, political stability, strong rule of law and tax neutral state laws) means that Reserved Powers Trusts are an increasingly attractive structure for Non-U.S. Persons to hold assets managed by non-U.S. advisers, so long as the adviser is registered, or is willing to register, in the United States. However, some non-U.S. advisers have been unwilling to advise such trusts due to concerns about their ability to rely on the foreign private adviser exemption. In particular, non-U.S. advisers express concern that a Reserved Powers Trust with a U.S. Person serving as an Administrative Trustee would be deemed “in the United States” for purposes of such exemption’s conditions on the permissible maximum number of clients and private fund investors “in the United States”, and related assets under management, as further discussed below. We are requesting this no-enforcement position under Sections 203(a) and 203(b)(3) of the Advisers Act to allay any such concerns.¹³

A. Reserved Powers Trust

Each Reserved Powers Trust will have a trust instrument providing in substance that the Reserved Powers Trust: (1) is formed as a trust¹⁴ under state law (*e.g.*, Nevada, South Dakota, Delaware); (2) is intended to be a Non-U.S. Person for tax law purposes;¹⁵ (3) vests all investment, distribution and other substantive powers in (or subjects such powers to the consent of) Non-U.S. Persons acting outside of the United States;¹⁶ (4) requires the settlor and each

held through a trust; and (3) from the foreign tax perspective, taxpayers are generally subject to taxation based on their country of residence.

¹³ As noted above, this letter requests relief only under the Advisers Act and is not intended to alter the status of a Reserved Powers Trust under Regulation S.

¹⁴ The settlor can choose to form either a revocable or irrevocable trust. A trust requires a settlor, trustee, beneficiary and property to be properly formed. A trust that a settlor establishes in their lifetime, where the settlor moves trust assets to the trust with a change in title of ownership (and names a trustee and beneficiaries) and can amend and terminate the agreement at any time, is a “revocable” trust. Once a settlor of a revocable trust dies, the trust becomes irrevocable. A trust where the settlor permanently moves assets into a trust (and names a trustee and beneficiaries), where the settlor cannot amend or terminate the agreement once made, is an “irrevocable” trust. In the former, assets are not protected from creditors, while in the latter, assets can be protected from creditors.

¹⁵ For U.S. tax purposes, the Reserved Powers Trust would be considered a foreign taxpayer because “one or more United States persons” do not “have the authority to control all substantial decisions of the trust.” According to the Code, a “United States person” means – “(A) a citizen or resident of the United States, (B) a domestic partnership, (C) a domestic corporation, . . . (E) any trust if— (i) a court within the United States is able to exercise primary supervision over the administration of the trust, and (ii) one or more United States persons have the authority to control all substantial decisions of the trust.” Code Section 7701(a)(30).

¹⁶ The “Investment Manager”, “Distribution Gatekeeper” and “Protector” will at no time be a U.S. Person. Should any person who is an “Investment Manager”, “Distribution Gatekeeper” or “Protector” subsequently become a U.S. Person, that person would immediately cease to be considered a Non-U.S. Person for purposes of relying on the requested relief.

beneficiary be a Non-U.S. Person;¹⁷ and (5) limits any U.S. Person to the role of Administrative Trustee, whose powers are narrowly circumscribed and expressly limited by the trust instrument (each a “**Reserved Powers Trust**”).

Additionally, the trust instrument will provide for the following:

- The Protector must consent or direct changes to, and dissolution of, the trust.¹⁸
- The Distribution Gatekeeper (and settlor, where applicable) must consent to initiating the distribution process, making income distributions to beneficiaries and distributing capital before dissolution of the trust.
- The Investment Manager has sole and absolute investment discretion, and is responsible for exercising all investment decisions, voting and management powers concerning the trust property and oversight of any investment-related transactions, including investment (and disposition) of trust assets, the timing of such decisions and negotiating any terms specific thereto.

The trust instrument will provide for an “**Administrative Trustee**”, which will be a U.S. Person. The Administrative Trustee may be appointed or removed only by the Protector or by the settlor (or their legal representative), each of whom are Non-U.S. Persons. The scope of the Administrative Trustee’s powers and duties will be limited by the trust instrument as follows:

- *Investment-Related Duties.* Solely as directed by the Investment Manager and in accordance with the trust instrument, the Administrative Trustee’s role with respect to investments is solely ministerial, and include: dealing with any property including execution of a sale or exchange, property management and certain dealings with beneficiaries with respect to certain trust properties; incorporating any company in any non-U.S. jurisdiction and related transfers for the purposes of investment; executing instructions related to the investments; and administratively maintaining positions previously determined by the Investment Manager (and at the specific direction of the Investment Manager). For example, the Administrative Trustee acts only in a ministerial capacity (*i.e.*, activities are carried out under the

¹⁷ As the trust will be used for tax and estate planning, the trust instrument for a Reserved Powers Trust will require the settlor and each beneficiary to be a Code Non-U.S. Person, meaning any person or entity that is not a U.S. person as that term is defined in Code Section 7701(a)(30). According to the Code, a “United States person” means – “(A) a citizen or resident of the United States, (B) a domestic partnership, (C) a domestic corporation, . . . (E) any trust if— (i) a court within the United States is able to exercise primary supervision over the administration of the trust, and (ii) one or more United States persons have the authority to control all substantial decisions of the trust.” Code Section 7701(a)(30). As discussed in note 5, as a Reserved Powers Trust will effectively prohibit any Code U.S. Person (*i.e.*, U.S. residents and U.S. citizens) from being a settlor or beneficiary, each relevant person would also be a Rule 902(k) Non-U.S. Person.

¹⁸ The Administrative Trustee will act on any signed notice from the Protector with respect to any direction, consent, appointment or removal.

direction of, and some require the written consent of, the Investment Manager) by executing the purchase of a security, handling lease payments, property management and posting collateral in a derivatives transaction. The Administrative Trustee is not required to and will not inquire into or monitor the investment of the trust assets (including the performance of a specific investment or of the portfolio) or the directions of the Investment Manager;

- *Distribution-Related Duties.* Subject to the consent of the Distribution Gatekeeper, the Administrative Trustee's role with respect to distributions is solely ministerial;
- *Maintenance of Tax Status.* The Administrative Trustee must maintain the trust as a Code Non-U.S. Person;¹⁹ and
- *Rule of Construction.* Any interpretations in cases of doubt must be resolved in favor of limiting the powers of the Administrative Trustee.

The role of the Administrative Trustee in a Reserved Powers Trust is strictly ministerial and does not involve rendering investment advice to the Reserved Powers Trust.

III. RELEVANT LAW

A. Sections 202(a)(30) and 203(b)(3) of the Advisers Act and Rule 202(a)(30)-1 thereunder

Section 203(a) requires advisers that meet the eligibility criteria under Section 203A to register with the SEC unless “specifically exempted” under Section 203(b).²⁰ An adviser exempted from registration by Section 203(b)(3) is referred to as a “foreign private adviser”. Section 202(a)(30) defines a “foreign private adviser” as an investment adviser that, among other requirements, has fewer than 15 clients in the United States and investors in the United States

¹⁹ The residual power to appoint a Code Non-U.S. Person to make a “substantial decision” related to the trust and the power to amend the trust instrument as necessary to maintain the foreign tax status of the trust, are intended to be safeguards and do not change the character of the Administrative Trustee. If no Non-U.S. Person has the power to make a “substantial decision” for the trust, as defined in U.S. Treasury Regulation §301.7701-7, that trust could cease to be a Code Non-U.S. Person. This could occur if there was a sudden resignation, death or incapacity of a Protector or Distribution Gatekeeper. However, such circumstances are expected to be exceedingly rare, and vacancies are generally intended to be filled in an orderly manner and by the Non-U.S. Persons connected to the Reserved Powers Trust in accordance with the trust instrument.

Therefore, and as pertinent here, the appointment power does not confer the ability for the Administrative Trustee to make any investment-related decisions. For additional discussion, please see note 10.

²⁰ Section 203(a). Sections 203(l) and 203(m) provide separate registration exemptions that are not relevant here.

in private funds advised by the adviser and less than \$25 million in aggregate assets under management from such clients and investors.²¹

Rule 202(a)(30)-1 defines the term “in the United States” with respect to clients and investors by reference to the definitions of “U.S. person” and “United States” in Regulation S.²² Whether a person is “in the United States” is determined at the time the person becomes an advisory client or with respect to private fund investors, each time the person acquires securities issued by the private fund.²³

B. Rule 902(k) of Regulation S

As noted above, Rule 202(a)(30)-1 defines “in the United States” primarily through reference to the definition of “U.S. Person” in Rule 902(k) of Regulation S. Rule 902(k) of Regulation S provides that “[a]ny natural person resident in the United States” is a U.S. Person; thus, their accounts would typically be in the United States for purposes of the foreign private adviser exemption.²⁴ For most entities, the determination centers on the location of the organization or its operations.²⁵ With respect to trusts, “[a]ny trust of which any trustee is a U.S. person” is considered to be in the United States under Regulation S; however, Regulation S also provides that, “[a]ny trust of which any professional fiduciary acting as trustee is a U.S. person,” is not a U.S. Person so long as “a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the

²¹ A foreign private adviser cannot (i) have a place of business in the United States; (ii) generally hold itself out as an adviser to the public in the United States; or (iii) advise an investment company registered under, or a business development company pursuant to, the Investment Company Act. Section 202(a)(30)(D). We respectfully note that these elements are not relevant to the requested relief and that the non-U.S. client has engaged the non-U.S. adviser outside of the United States, and the Investment Manager will direct the Administrative Trustee through interactions that are not expected to result in the non-U.S. adviser holding itself out to the public in the United States as an adviser.

²² Rule 202(a)(30)-1(c)(3)(i) (defining “in the United States” with respect to a client or investor as a U.S. person as defined in 902(k) of Regulation S and with respect to a place of business and the public as defined in 902(l) of Regulation S). In Final Rule Release IA-3222 (as defined below), the SEC noted that the application of the definitions from Regulation S to the foreign private adviser exemption provides “more specific legal rules when applied to various types of legal structures”, and is familiar and consistent for advisers that apply Regulation S for other purposes. Final Rule Release IA-3222 at 116-117.

²³ Rule 202(a)(30)-1(c)(3)(i) at note to paragraph (c)(3)(i).

²⁴ Regulation S Rule 902(k)(1)(i) and (vi)-(vii). We note that this relief is requested solely with respect to U.S. accounts of Non-U.S. Persons as non-U.S. advisers would not require this relief for the non-U.S. accounts of Non-U.S. Persons. Such an account (*e.g.*, a non-U.S. adviser to a Non-U.S. Person whose account is established outside of the United States) would be governed by any relevant laws of the foreign jurisdiction of the non-U.S. adviser and/or the Non-U.S. Person, not the Advisers Act, and would not count towards the number of clients or amount of assets thresholds for purposes of the foreign private adviser exemption.

²⁵ *See* Regulation S Rule 902(k)(1).

trust is revocable) is a U.S. person”. Such a trust would not be considered to be in the United States for purposes of determining the number of clients or amount of assets thresholds set forth in the foreign private adviser exemption.²⁶

The definition of a trust for purposes of Regulation S is initially discussed in the 1988 Regulation S proposing release, which states that “[w]ith respect to trusts and other fiduciary accounts, the proposed definition would treat the entity or person with the fiduciary obligation to invest as the buyer; therefore the status of that person would govern.”²⁷ In that release, the Commission also requested comment as to circumstances where there are several fiduciaries and “the non-U.S. fiduciaries, without the participation of the U.S. fiduciary, purchase securities, should the existence of a U.S. fiduciary be disregarded?”²⁸ In the related 1990 Regulation S adopting release, the Commission stated that “[t]rusts and estates generally are U.S. persons for purposes of the Regulation if any trustee, executor or administrator is a U.S. person. In response to commenters’ concerns with respect to the competitive effects on U.S. professional fiduciaries, the definition of U.S. person has been revised so that an . . . exclusion from the definition of U.S. person is provided for a trust with a U.S. professional fiduciary acting as trustee, provided a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary (and no settlor if the trust is revocable) is a U.S. person.”²⁹

IV. DISCUSSION

A. Policy Rationale for the Foreign Private Adviser Exemption

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “**Dodd-Frank Act**”), which became effective on July 21, 2011, removed the registration exemption relied upon by many advisers to private funds and thus, extended to their clients all of the protections of the Advisers Act. However, the Dodd-Frank Act also provided for the private fund adviser exemption and the foreign private adviser exemption, “both of which focus on an adviser’s activities in, or contacts with, the United States” according to the adopting release related to such exemptions.³⁰ Further, in defining the foreign private adviser exemption, the Commission

²⁶ Rule 202(a)(30)-1(c)(3)(i).

²⁷ Offshore Offers and Sales, SEC Proposed Rule, SEC Rel. No. 33-6779 (June 17, 1988).

²⁸ *Id.*

²⁹ Offshore Offers and Sales, SEC Final Rule, SEC Rel. Nos. 33-6863, 34-27942, IC-17458, Int’l Series Rel. No. 122 (May 2, 1990).

³⁰ Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers, SEC Final Rule, SEC Rel. No. IA-3222 (June 22, 2011) (“**Final Rule Release IA-3222**”) at 126-127 at n.510 (citing “section 408 of the Dodd-Frank Act (directing the Commission to exempt private fund advisers with less than —\$150 million in assets under management *in the United States*) (emphasis added); sections 402 and 403 of the Dodd-Frank Act (exempting from registration foreign private advisers with no *place of business in the United States* that have a limited number of *clients in the United States* and

states in the same release that “[w]e note that section 203(a) of the Advisers Act provides that an adviser may not, unless registered, make use of any means or instrumentality of interstate commerce in connection with its business as an investment adviser. Hence, whether a non-U.S. adviser with no place of business in the United States and no U.S. clients would be subject to registration depends on whether there is sufficient use of U.S. jurisdictional means.”³¹ It follows that the foreign private adviser exemption identifies circumstances where an adviser has limited contacts with the United States, and adviser registration would not be necessary for the protection of U.S. investors.³² In the same release, the Commission recognized that there is limited regulatory interest in imposing restrictions and other requirements on a non-U.S. adviser’s relationships with its non-U.S. clients, particularly where such relationships do not involve conduct or effects in the United States.³³

These principles are reflected in the definition of foreign private adviser, which is available only when an adviser has a certain limited number of clients and private fund investors (and related assets under management) in the United States. For Rule 202(a)(30)-1, which indicates how an adviser should determine whether clients, investors and related assets are “in the United States”, the SEC looked to the definition of U.S. Person in Rule 902(k) of Regulation S as a basis for defining this critical term.

B. The Reserved Powers Trust Should Not be Deemed a U.S. Person for Purposes of the Foreign Private Adviser Exemption

As none of the Non-U.S. Persons who exercise discretion with respect to a Reserved Powers Trust’s investments are formally designated as “trustees” in the trust instrument, certain non-U.S. advisers have expressed concern that (1) a Reserved Powers Trust would be within the general definition of a U.S. Person under Rule 902(k)(1)(iv) of Regulation S (since the Administrative Trustee is a U.S. Person) and (2) though the Administrative Trustee is a U.S. professional fiduciary trustee and Non-U.S. Persons have sole or shared discretion with respect to trust assets as contemplated by Rule 902(k)(2)(iii) of Regulation S, the exclusion from the

investors in the United States in private funds and a limited amount of assets attributable to these clients and investors, among other conditions”).

³¹ Final Rule Release IA-3222 at 102-103 n.415.

³² Section 203(b)(3) of the Advisers Act excepts foreign private advisers, as defined in Section 202(a)(30) of the Advisers Act, from the registration requirements of Section 203(a) of the Advisers Act. Sections 203(b)(3) and 202(a)(30). Foreign private advisers are within the definition of “investment adviser”; therefore, clients of foreign private advisers continue to benefit from the antifraud protections of the Advisers Act and those sections of and rules under the Advisers Act that Congress and the SEC have considered appropriate to apply to advisers that are not required to be registered.

³³ See Final Rule Release IA-3222 at 76-78 (in defining the private adviser exemption and a non-U.S. adviser, the “rule reflects our long-held view that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and that this territorial approach is in keeping with general principles of international comity”).

definition of U.S. Person would not be available to a Reserved Powers Trust in absence of such Non-U.S. Persons bearing a “trustee” title.

In determining whether a person is a Rule 902(k) U.S. Person, Regulation S looks to whether that person is a natural person or entity and then to that person’s ties to the United States.³⁴ As noted above, with respect to a trust, Rule 902(k)(1)(iv) includes, as a U.S. Person, “[a]ny trust of which *any trustee* is a U.S. person”; however, Rule 902(k)(2)(iii) provides an exception to this general rule for “[a]ny trust of which any professional fiduciary acting as trustee is a U.S. person, if *a trustee* who is not a U.S. person has sole or shared investment discretion with respect to the trust assets”.³⁵ Here, the Administrative Trustee is a U.S. professional fiduciary but substantive decisions (including exercising investment discretion) with respect to Reserved Powers Trust assets are shared among Non-U.S. Persons (*e.g.*, Protector, Distribution Gatekeeper, settlor, Investment Manager). Their powers are substantively similar to those of a named trustee with sole or shared investment discretion with respect to trust assets, but none bears the title “trustee”.

Because all substantive powers (including those related to investment management of trust assets such as retaining or dismissing an adviser), which might suggest that the trust itself should be treated as a U.S. Person for purposes of the Advisers Act, will be exercised only by Non-U.S. Persons acting outside of the United States, treating a Reserved Powers Trust as a U.S. Person simply because the Administrative Trustee has a title that includes the word “trustee” while the Non-U.S. Persons exercising discretion do not, appears inconsistent with the purpose of the foreign private adviser exemption. In particular, the limited activities of the Administrative Trustee on behalf of a Reserved Powers Trust, would not give rise to use of U.S. jurisdictional means by the Investment Manager to a Reserved Powers Trust sufficient enough to justify the non-U.S. adviser’s registration as an investment adviser.

Therefore, for the reasons set forth above and in light of the purposes of the foreign private adviser exemption, we believe that a Reserved Powers Trust should not be treated as a U.S. Person under Rule 202(a)(30)-1, notwithstanding its treatment under Rule 902(k). Even if the Administrative Trustee’s status would make such a trust a U.S. Person for purposes of Regulation S, a Reserved Powers Trust should not be considered a U.S. client or investor for purposes of the foreign private adviser exemption. We respectfully submit that (A) the limited role of the Administrative Trustee in a Reserved Powers Trust is insufficient to constitute a use of jurisdictional means in the United States significant enough for such trust to be considered a U.S. client or investor, and (B) as a result, any interactions between the Administrative

³⁴ Ties to the United States include, for example, residence of an individual, incorporation or organization of a partnership or corporation, residence of the fiduciary to a discretionary account. Rule 902(k)(1)-(2). While trusts are formed under the laws of one of the several states, Rule 902(k) looks to the residence of the trustee in determining whether a trust is a Rule 902(k) U.S. Person, rather than to the state of formation of the trust.

³⁵ Emphases added. Rule 902(k)(2)(iii) also requires that the settlor (if applicable) and beneficiaries are Rule 902(k) Non-U.S. Persons. As discussed elsewhere in this request, the settlor and beneficiaries are Non-U.S. Persons.

Trustee and the Investment Manager are not sufficient use of U.S. jurisdictional means to justify registration of a non-U.S. adviser.

1. **No substantive “trustee” powers in a Reserved Powers Trust are exercised by the Administrative Trustee, rather relevant authority is vested in Non-U.S. Persons**

Except for the U.S.-based Administrative Trustee, all relevant parties (*i.e.*, settlor, beneficiaries, Investment Manager, Protector and Distribution Gatekeeper) are required to be Non-U.S. Persons and all meaningful decisions are required to be made outside of the United States by persons other than the Administrative Trustee under the trust instrument governing the Reserved Powers Trust. The intent of a Reserved Powers Trust is to assign the investment-related trust powers that would ordinarily be vested in a “trustee” in a typical domestic trust to an independent investment manager to manage trust assets (*i.e.*, the Investment Manager), and for the other powers (*e.g.*, duties related to trust maintenance, distribution of income) to be handled by persons suited to those functions (*i.e.*, Protector, Distribution Gatekeeper). The roles of each of these constituents is set forth clearly in the trust instrument.

2. **A non-U.S. adviser with fiduciary duties has sole and absolute investment discretion with respect to trust assets, and other Non-U.S. Persons exercise all substantial powers with respect to the trust**

While the Reserved Powers Trust has an Administrative Trustee that is a professional entity that is a U.S. Person, the Administrative Trustee, for the reasons discussed above, is better viewed as serving only in a ministerial capacity – to give effect to decisions that can, under the trust instrument, be made only by Non-U.S. Persons acting outside of the United States. Here, the Investment Manager (a Non-U.S. Person) has sole and absolute discretion of investment-related decisions; subject to the Investment Manager’s direction and in accordance with the trust instrument, the Administrative Trustee acts in a ministerial capacity to administer and give effect to the Investment Manager’s investment-related decisions. Further, the persons performing the other substantive powers in a Reserved Powers Trust (*i.e.*, Protector, Distribution Gatekeeper), and all other relevant parties (*i.e.*, settlor and beneficiaries) are also required to be Non-U.S. Persons.

The limited activities of the Administrative Trustee do not give rise to a use of jurisdictional means in the United States such that the trust should be considered a U.S. client or investor, and as such, a Reserved Powers Trust’s use of a U.S.-based Administrative Trustee should not affect whether there is sufficient use of U.S. jurisdictional means by their Investment Manager that should require the Investment Manager to eschew the foreign private adviser exemption and register under the Advisers Act.

V. **RELIEF REQUESTED**

Subject to the facts and circumstances set forth in this letter, we request the Staff to advise us that it will not recommend enforcement action to the Commission under Section 203(a) of the Advisers Act against a non-U.S. adviser relying on the foreign private adviser exemption in

Section 203(b)(3) of the Advisers Act, when the exemption would not be available but for treating a Reserved Powers Trust as a Non-U.S. Person, in determining the number of clients and private fund investors in the United States, or the amount of its assets under management attributable to clients and investors in the United States, for purposes of the thresholds set forth in such exemption.

* * *

We appreciate your consideration of this request. If you have any questions or comments regarding this letter, please feel free to call me at (202) 261-3449 or Ashley N. Rodriguez at (202) 261-3446.

Very truly yours,

/s/ Michael L. Sherman

Michael L. Sherman

cc: Daniele Marchesani
Trace Rakestraw
Hae-Sung Lee
Gregory E. Crawford
Ashley N. Rodriguez