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November 3, 2010

**Via e-mail to: rule-comments@sec.gov**

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

**Re: Dodd-Frank Wall Street Reform and Consumer Protection Act Rulemaking and the Investment Advisers Act of 1940**
**(*Reference: DF Title IV Exemptions*)**

Ladies and Gentlemen:

We are responding to the invitation of the Commission for comment on matters before the Commission arising from the Dodd-Frank Wall Street Reform and Consumer Protection Act. While we may wish to offer our views as to other matters affecting investment advisers and other financial institutions as Commission rulemaking proceeds, we focus in this letter on the extraterritorial impact of the registration provisions of the Investment Advisers Act of 1940 that were amended by the Dodd-Frank Act.

In particular, we respectfully recommend that the Commission, acting under the authority extended to it by Congress, consider raising the assets under management (AUM) threshold governing registration of non-US investment advisers in the manner we suggest below. A higher threshold lessens the potential that a non-US business might have to register with the Commission as a result of its having a relationship with even a single US institutional client or investor – an outcome that the present $25 million threshold makes a realistic possibility and that we believe presents significant practical and policy concerns.

As brief background to our interest in these matters, Shearman & Sterling LLP is a global law firm with offices in twenty financial centers worldwide. The firm's clients include a wide variety of US and non-US financial institutions and financial market participants. We have been counseling clients for more than a year on the legislative initiatives that ultimately were signed into law as the Dodd-Frank Act in July.

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*Overview*

Section 402(a) of the Dodd-Frank Act defines a "foreign private adviser" as an investment adviser exempted from registration under the Advisers Act so long as the adviser meets several requirements that show limited US contacts, among them that the adviser have:

- no place of business in the United States,
- fewer than 15 clients and investors in the United States in private funds advised by the adviser, and
- aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the adviser of less than $25 million, or such higher amount as the Commission may, by rule, deem appropriate.

We believe that $25 million threshold should be raised to a level more closely calibrated to the Commission's regulatory interests outside the United States. We also believe that, in the case of assets of a non-US fund, the fund's assets attributable to US investors, those US-attributable assets should represent a more than *de minimis* (we would suggest more than 10%) portion of the overall fund before those assets would be applied towards the fund adviser's statutory AUM threshold. Assuming the Commission ultimately agrees that the AUM threshold should be raised, whether for the reasons we outline below or on other grounds, we recommend the Commission consider setting it at $150 million.

*Our concerns*

We understand that for advisers servicing institutional or high net worth clients a $25 million single client mandate is not at all unusual. If so, setting the new exemption's threshold at that level effectively would "write out of the exemption" everything except its AUM test and, at least for these advisers, make the number of US contacts irrelevant. As perspective, a non-US adviser would not qualify for an exemption that includes only this AUM test if the adviser has even one US client of sufficient size or, as a still more attenuated relationship, even one US investor of sufficient size in a non-US private fund advised by the adviser. As the AUM test currently stands, that is the case even if the US-attributable fund assets represent a very small portion of a larger non-US fund with a preponderance of non-US investors; for example, a $25 million investment in a $1 billion fund accounts for only 2.5% of fund assets. Such an outcome is, in our view, clearly at odds with Congress's otherwise three-pronged approach under Section 402(a)(3) that considers US contacts in a more nuanced manner, giving weight to the location of the adviser and the number of US clients (or US fund investors) as well as AUM.

Requiring SEC registration of a non-US firm under the facts described in the preceding paragraph is sure to be viewed by many audiences around the world as a case of the tail (the firm's lone US contact) wagging the dog (the firm's much larger non-US business). Indeed, the scope of registration for non-US firms contemplated by the present $25 million threshold is so broad, and takes such an all-or-nothing approach to the question of jurisdiction, that we are concerned that it would sap confidence in the equity of the registration regime. Just as worrying is a "race to the bottom" in which similarly overbroad, "jurisdiction-blind" regulatory initiatives are embraced worldwide. The result, we fear, would be negative competitive implications for the US businesses that will be the targets of those initiatives. Moreover, with an inappropriately low AUM threshold it is likely that at least some, and perhaps many, non-US investment advisers will pull back from servicing US investors altogether (even those US investors that affirmatively seek out the non-US firm), with a resulting reduction in the choice of asset management services available to sophisticated US investors.

Lastly, we note that Title IV of the Dodd-Frank Act references three separate AUM-based thresholds that govern investment adviser registration rules, these thresholds being at $150 million (Section 408, which establishes an exemption from registration), $100 million (Section 410, which establishes which firms must register with the SEC versus the states) and, potentially, $25 million (Section 402 for foreign private advisers). While each serves a different purpose, it appears to us that any steps that might be taken in the way of harmonization will facilitate both compliance with the requirements by the industry and their administration by the Commission and its Staff. It is in part on this basis that we suggest that the foreign private adviser's AUM threshold be set at $150 million. The $150 million number also has an obvious equitable appeal in that it closes the disparity of treatment that otherwise results between the different Dodd-Frank Act exemptions and, in doing so, mitigates the potential for the wide range between them to be viewed as arbitrary or, perhaps, discriminatory against non-US investment advisers.

That said, we recognize that empirical analysis of the appropriate level by the Commission (e.g., to test our view that the current $25 million level in fact will result in registrations by firms with minimal US contacts) certainly might arrive at another threshold number. Whatever the number, we believe it appropriate – and firmly within the expressed interest of Congress – that the threshold be at a level that the Commission finds gives real weight to the number of US clients or US investors serviced by a firm rather than default solely to an AUM-based analysis.

*Conclusion*

Turning to the Commission for its expertise, Congress explicitly authorized the agency to tailor the new foreign private adviser exemption's AUM threshold. We respectfully encourage the Commission to do so and to begin the process with fact finding towards a threshold that divides out limited US contacts from those that suggest – as we read Section 402(a)to intend – a more regularized effort to develop US business. To the same end, we encourage the Commission to incorporate into any foreign private adviser AUM threshold the type of limitation that we outlined above under which more than *de minimis* portions of a non-US fund that are attributable to US investors would be required before applying those assets to the fund adviser's AUM threshold.

As a final note, we respectfully submit that, if a higher threshold is ever to be considered, the time to set the higher threshold is now, at the inception of the new exemption, rather than defaulting to the floor set by Congress and then waiting to determine whether unintended consequences warrant raising it later. To do otherwise allocates undue (and avoidable) uncertainty, expense and administrative difficulty to the non-US investment advisory community.

* * *

We appreciate the opportunity to comment on these matters and respectfully request that the Commission consider the comments and recommendations set forth above. We are available to discuss these comments and recommendations should the Commission or the Staff so desire. Nathan Greene is at 212-848-4668 or ngreene@shearman.com and Paul Schreiber is at 212-848-8920 or pschreiber@shearman.com.

As a final note, our comments and recommendations represent the views of the attorneys of the firm named above and should not be ascribed to any current or former client of Shearman & Sterling LLP.

Respectfully submitted,

Shearman & Sterling LLP / NJG

Shearman & Sterling LLP

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