IFIC
THE INVESTMENT FUNDS INSTITUTE OF CANADA
L'INSTITUT DES FONDS D'INVESTISSEMENT DU CANADA

January 24, 2011

DELIVERED BY EMAIL rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C.
20549-1090

Attention: Elizabeth M. Murphy, Secretary

Dear Sirs/Mesdames:

RE : Rules Implementing Amendments to Investment Advisers Act of 1940 - Release No. IA 3110; File No. S7-36-10

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

(collectively, the "Proposals")

We are writing to provide comments on the Proposals, specifically as relates to their potential impact on, and to seek clarification concerning their application to, Canadian-domiciled investment advisers and their funds[1].

The Investment Funds Institute of Canada ("IFIC") is the voice of the Canadian investment funds industry, with members including fund managers, distributors and industry service organizations.

The relationship between the United States and Canada is unique. The overwhelming majority of IFIC members do not offer or sell units/shares of their funds in the U.S., although some funds may offer securities in private placements to a limited number of U.S. investors. Due to the shared border between Canada and the U.S. it is quite common for "snowbirds" and other Canadian residents, who are unitholders/shareholders of Canadian funds, to move to the U.S. on a temporary or more permanent basis. For this reason, qualifying Canadian advisers, the Canadian funds that they manage and the shares of those funds have relied for many years on the existing

[1] In Canada, the equivalent of a U.S. investment company is generally referred to as an "investment fund".

statutory exemptions from registration and related no-action relief from the SEC to be exempted from additional registration in the U.S.

We acknowledge the SEC's recognition in the Proposals of the existing line of exemptions and no-action letters which have enabled investors to enjoy such mobility without having to divest themselves of their Canadian fund shares, and without triggering a registration requirement in the U.S. for Canadian advisers and their Canadian funds. We are requesting that the SEC interpret the new rules in the Proposals in a manner consistent with the existing letters and practice, and so as not to prejudice the *status quo*.

History

Prior to its repeal by Title IV of the Dodd-Frank Act, section 203(b)(3) of the Investment Advisers Act of 1940 ("Advisers Act") provided non-U.S. advisers with an exemption from the requirement to register with the SEC as investment advisers in the U.S., if they met certain tests, namely the adviser must not advise fifteen or more U.S. clients and the adviser must not hold itself out to the U.S. public as an investment adviser (the "Private Adviser Exemption"). For purposes of the fifteen client test, Canadian-domiciled investment advisers were allowed to treat a Canadian mutual fund as one client.

In addition to the Private Adviser Exemption, Canadian mutual funds have been able to rely on a series of SEC no-action letters and exemptive rules so that registration of their shares has not been required under the Securities Act of 1933 ("1933 Act") and registration of the funds themselves has not been required under the Investment Company Act of 1940 ("1940 Act"), to the extent that U.S. residents with Canadian retirement accounts are shareholders of Canadian mutual funds[2]. Rule 12g3-2(b) under the Securities Exchange Act of 1934 (the "1934 Act") provides relief to foreign private issuers (including Canadian funds) from the reporting obligations under that Act.

For non-retirement accounts, Canadian funds (like other foreign private funds) have relied on Rule 506 of the 1933 Act as well as sections 3(c)(7) and 3(c)(1) of the 1940 Act, to avoid registration in the U.S of shares of a Canadian fund that are sold to Canadian investors that may relocate to the U.S., and such treatment has been noted in the SEC No-Action letter received by IFIC on March 4, 1996 (the "IFIC Letter"). The IFIC Letter essentially held that on certain conditions registration of a Canadian fund would not be required simply because the fund exceeds the maximum number of U.S. resident shareholders due only to the relocation to the United States of beneficial owners who bought shares while residing outside of the U.S.

The above rules and exemptions are very important for the Canadian fund industry. They avoid the forced redemption of Canadian fund shares by shareholders who acquired them while outside

[2] Rule 237 under the 1933 Act and Rule 7d-2 of the 1940 Act.

the U.S. and who have since relocated to the U.S., and they permit Canadian advisers to provide continuing administrative services to those shareholders without the need to register in the U.S.

Private Fund Investment Advisers Registration Act of 2010 (Title IV of Dodd-Frank)

In place of the Private Adviser Exemption, The Dodd-Frank Act enacts a "foreign private adviser" exemption. A "foreign private adviser" is defined as an investment adviser that: (i) has no place of business in the U.S.; and (ii) has, in total, less than 15 U.S. clients and U.S. investors in private funds advised by the investment adviser (collectively, "U.S. Persons"); (iii) has aggregate assets under management attributable to U.S. Persons of less than $25 million; and neither (a) holds itself out generally to the public in the U.S. as an investment adviser nor (b) advises investment companies or business development companies (definition to be codified as section 202(a)(30)). Section 402 of Title IV of the Dodd-Frank Act, defines 'private fund' to mean an issuer that would be an investment company, as defined in section 3 of the 1940 Act, but for section 3(c)(1) or 3(c)(7) of that Act.

With respect to these provisions of the Dodd-Frank Act, please confirm that certain Canadian mutual funds are not "private funds" for purposes of the Dodd-Frank Act and thus they can be excluded from the calculation of both the (i) 15 U.S. client limit and (ii) the $25 million threshold for U.S. "clients" for purposes of the new foreign private adviser exemption since they are not deemed private funds because they do not rely on Section 3(c)(1) or Section 3(c)(7).

We contend that a Canadian mutual fund with only Canadian retirement accounts is not a "private fund" since it is not an issuer that would be an investment company, as defined in section 3 of the 1940 Act, but for Section 3(c)(1) or 3(c)(7) of that Act. Since a Canadian mutual fund with only retirement accounts relies on Rule 7d-2 of the 1940 Act (to avoid registration under the 1940 Act) as well as Section 237 of the 1933 Act (to avoid registration under the 1933 Act), it is not a "private fund" for purposes of the new foreign private adviser exemption.

The SEC was very deliberate at the time that it promulgated Rule 7d-2 and Rule 237 to afford a comprehensive exemption for Canadian mutual funds with registered accounts. It has worked well for Canadian funds. We urge the SEC to continue that comprehensive treatment in the context of the new Dodd-Frank rules.

A Canadian mutual fund with shareholders who are U.S. Persons (other than those exempted under Rule 7d-2 and Rule 237) would seem to be a "private fund" under the Dodd-Frank Act. Nevertheless, we believe the SEC, in its proposed rule issued November 19, 2010 to implement the foreign private adviser exemption, has preserved the status quo for Canadian advisers.

Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers (the "Exemptions Proposal")

The SEC's Exemptions Proposal seeks to implement new exemptions from the registration

requirements of the Advisers Act for advisers to certain privately offered investment funds that were enacted as part of the Dodd-Frank Act.
Rule 202(a)(30)-1 of the Exemptions Proposal contains definitions of some of the key terms used in the proposed definition of "foreign private adviser". One of these terms is "in the United States" in several contexts including: (i) limiting the number of, and assets under management attributable to an adviser's "clients" "in the United States" and "investors" "in the United States" in private funds advised by the adviser; (ii) exempting only those advisers without a place of business "in the United States;" and (iii) exempting only those advisers that do not hold themselves out to the public "in the United States" as an investment adviser.

The phrase "in the United States" is defined using existing concepts and related definitions, which eliminates any potential misinterpretation. We are pleased that the SEC is proposing to add a clarifying note specifying that for purposes of this definition, a person that is "in the United States" may be treated as not being "in the United States" if such person was not "in the United States" at the time of becoming a client or, in the case of an investor in a private fund, at the time the investor acquires the securities issued by the fund.

We support the SEC's approach as reflected in this clarifying note, because this new language suggests that Canadian fund managers will not be required to count those Canadian clients who purchase shares of a Canadian mutual fund in Canada and then move to the United States (and would otherwise be a U.S. Person by definition under Regulation S). This reflects and is consistent with the current interpretations on which Canadian advisers have relied for many years, and will ensure continuity and certainty in their business operations.

It is our understanding that if Canadian mutual funds (which only rely on Rule 7d-2 under the 1940 Act and Rule 237 under the 1933 Act (and not on Section 3(c)(1) or 3(c)(7)) are in fact "private funds" for purposes of the Dodd-Frank Act, then shareholders who purchased shares of such Canadian mutual funds and subsequently moved to the United States would be excluded under the new note to paragraph (c)(2)(i) for purposes of determining Advisers Act registration.

If excluded, we would understand that this new category of investors (excluded from the definition of U.S. Persons) be allowed to transact in shares of such Canadian mutual funds under current SEC No-Action precedent and regulations under the 1933 Act and 1940 Act as such currently apply to the Canadian mutual fund industry.

We would suggest that the note be expanded to include additional acquisitions of securities by such investors in Canadian funds, including reinvestment of dividends, exchanges and purchases. We believe that this expansion would be consistent with the portion of the note as it relates to "clients" who, as a result of the note, may continue to be serviced by a foreign adviser without causing the adviser to be subject to registration, even after they move to the United States.

We ask for clarification from the SEC as to whether it will apply the note in other contexts for purposes of compliance with the U.S. federal securities laws, including compliance with Rule 12g3-2(b) of the 1934 Act.

We would be pleased to provide you with any additional information you may require, and to discuss our comments with you in more detail at your convenience. Please contact Ralf Hensel, General Counsel and Director, Policy – Manager Issues at rhensel@ific.ca or at 416-309-2314.

Yours very truly

Joanne De Laurentiis
President and CEO