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<u>Via electronic mail to rule-comments@sec.gov</u>
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
USA
Attn: Elizabeth Murphy, Secretary

Dear Ms Murphy,

File Nos. S7-37-10 and S0-36-10
Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less than $150 Million in Assets under Management, and Foreign Private Advisers; *and*
Rules Implementing Amendments to the Advisers Act of 1940

CompliGlobe Ltd. is pleased to provide the US Securities and Exchange Commission and its Staff with comments on the proposals to adopt rules under the Investment Advisers Act of 1940 ("Advisers Act") to implement exemptions from registration as an investment adviser and for other, related matters (Releases IA-3110 and IA-3111, 19 November 2010).

We are providing our comments based on our experiences in offering training and advice to non-US advisers in Europe and Asia, as well as discussions with these firms and other market participants about the extraterritorial application of the US federal securities laws and the issues, costs and time considerations arising from such firms having to comply with two or more sets of regulatory requirements.

<u>General</u>

<u>Effective date</u>

We note that these proposals arise from requirements in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and that the effective date of the amendments to the Advisers Act registration provisions brought about by Dodd-Frank is 21 July 2011. The time frames imposed on the Commission and the Staff are significant, made difficult in light of the current budgetary constraints. These proposals and the efforts behind them are extraordinary and to the credit of every person involved.

Time is an important factor. We believe that it may take 30 or more days from the end of the comment period for the Staff to prepare a comment summary and submit proposals to the Commission for it to consider, schedule and hold an open meeting to act on the exemptions. It would then be the case that the adopting releases must be published in the Federal Register with at least a 30 day effective period. Thus, the final rules may not be known until mid-March. It is usually the case that it takes 30-45 days from the time a Form ADV Part 1 is filed for a registration to become effective. If an adviser is required to be registered or to have claimed an exemption as an exempt private fund adviser by 21 July, it would have to file a Form ADV Part 1 by 6 June. Essentially, advisers that are affected by these proposals would have at most a three month window in which to consider the rules and exemptions as adopted, prepare themselves to operate as an SEC-registered adviser, prepare and file a Form ADV Part 1 and finalise all other documents, controls and procedures to be able to operate in compliance with the Advisers Act. We believe that the timeline presently envisaged would not be sufficient, and so we would ask that the Commission consider bringing into force any final rules on a delayed basis. We suggest that a period of 90 calendar days be used so that the rules would become effective on 21 July but with an implementation date--the date by which an adviser would register or claim an exemption--would be 21 October.

Also, and in terms of time frames, we would ask that the Commission consider a six month transition period from the time a previously-qualifying adviser loses the protection of an exemption to the time it is required to register (Rule 203(m)-1(d)). By analogy, a non-US issuer of securities that is a "foreign private issuer" has a six month transition period from the time that it no longer qualifies for this status vis-à-vis its reporting requirements under the Securities Exchange Act of 1934 ("Exchange Act").

Participating affiliates

We wish to register our concern over the issues raised about "participating affiliates". The concept of participating affiliates, brought about by two seminal no-action letters (and modified by two others), has provided an unusual degree of certainty and clarity with respect to the relationship between SEC-registered advisers and their non-US affiliates. We have seen numerous participating affiliate relationships in use in Europe and Asia and noted their features and controls. The essentials of this regime are that the participating affiliate agrees a number of controls (provide information to be disclosed in Form ADV, satisfy record keeping requirements, treat relevant employees as "associated persons", impose personal account trading requirements, consent to jurisdiction, cooperate in inspections and investigations and sign an enforceable agreement) in return for not having to register as an adviser under the Advisers Act. Also, the SEC-registered adviser would apply a number of controls with respect to its participating affiliate along the lines of those an adviser to a registered investment company would use for its unaffiliated subadvisers. In our view, and in the view of many advisers and market professionals outside the United States, the current participating affiliate regime works well, provides adequate safeguards and should not be modified or curtailed. If anything, experience, coupled with an absence of enforcement actions, suggests that it might be time to consider a relaxation of the regime to permit, subject to appropriate controls, limited purpose contact between the participating affiliate and the US clients of the SEC-registered adviser on a basis similar to that employed in Rule 15a-6 under the Exchange Act. All of this is contingent upon the SEC-registered adviser discharging in a proper manner its obligations under Section 202(a)(17) of the Advisers Act to supervise the activities of its associated persons who are subject to its supervision, and we read this to include participating affiliates and their associated persons. We would be happy to furnish the Staff with proposals to bring about such a change. We also believe that it might be appropriate to codify the participating affiliates regime in an interpretation, as opposed to the current scenario where only no-action letters are available.

We believe that the relevant Dodd-Frank provisions (Title IV) provide for a rescission of certain sections of the Advisers Act and the addition of other provisions that require the Commission to adopt rules to implement new exemptions from registration. We believe that these provisions would not extend to the participating affiliates regime and that it would be against public policy to narrow or even vacate the no-action letters creating this regime, particularly in light of the language and purpose of Dodd-Frank. We note that, in support of the issue of the participating affiliate no-action letters, the

Staff stated that it was doing so "[i]n view of the Staff's flexible approach towards extraterritorial application of the Advisers Act" .[1] The impact on non-US participating affiliates of any change to this regime will be significant. This regime works well, has not experienced serious compliance violations and has not raised problematic issues with non-US regulators. It should be supported and not qualified, curtailed or vacated.

Public disclosure requirements for "private fund advisers"

We applaud the Commission for its clarity in providing details about this important exemption. At the same time, we are apprehensive about the scope of the disclosure requirements imposed on such advisers. In particular, we are concerned about the application of the language in Section 408 of Dodd-Frank that adds new Section 203(m)(2) of the Advisers Act, requiring private fund advisers to provide to the Commission "annual or other reports".[2] We acknowledge and agree that the essence of the Advisers Act is to protect investors, provide for advisers to operate in the proper discharge of their fiduciary duties and act solely in the best interests of their clients in accordance with the Advisers Act and the rules thereunder. It is not clear to us that the providing obligation translates to a public disclosure requirement. We believe that Congress intended an emphasis on the confidentiality of required reports to the Commission. We recognize the importance of gaining information in order to properly regulate advisers, but we are concerned that the interpretation of the providing language to require the filing of a Form ADV Part 1 and the public disclosure of information might result in this provision becoming a registration by disclosure requirement inconsistent with the primary purpose of this provision which is an exemption from registration. For non-US advisers, such public disclosure may be inconsistent with the registration and disclosure requirements imposed on them by their home country regulators. We clearly believe that the "maintain such records" language in Section 203(m)(2) does require the keeping of records.

Accordingly we submit that the Commission should not require public disclosure on a Form ADV Part 1 of information but, and consistent with the systemic risk record keeping requirements in Dodd-Frank, that such information be maintained by an exempt adviser in an appropriate format and provided to the Commission when and as appropriate or provided on a confidential basis. We note that, on 25 January, the Commission will hold an open meeting to consider the proposal of a rule for reporting obligations for advisers to private funds to implement Sections 404 and 406 of Dodd-Frank. We believe that the Commission should not act on the reporting obligations for exempt reporting advisers until it has received and considered all of the comments on the 25 January proposal and is able to take action on these proposals in a consistent, coordinated manner.

Definition of a “Venture Capital Fund”: Exclusion for up to 15% non-qualifying investments or activity

Title IV of Dodd-Frank exempts advisers that advise solely one or more “venture capital funds” from the registration requirements of the Advisers Act and requires the Commission to define venture capital fund (“VCF”). The Commission has labored diligently to provide a definition in Rule 203(l)-1 that characterizes the operations of a majority of these diverse investment vehicles. However, we harbor reservations about the adequacy of the definition as proposed, and are concerned that it may fail to capture a significant number of existing VCFs, thus subjecting their advisers either to registration or forcing them to modify substantially their operations.

In its letter of 13 January 2011, the National Venture Capital Association (“NVCA”) suggested several modifications to Rule 203(1)-1. While we believe there is merit to each of the NVCA’s suggestions, we consider the concept of an exception for a limited amount of permissible non-qualifying investments or activity not to exceed 15% of a VCF's capital commitments to be a critical

[1] *ABN AMRO Bank NV*, no-action letter dated 1 July 1997, citing Chapter 5 of the Staff Report "Protecting Investors: A Half Century of Investment Company Regulation" and other no-action letters.
[2] A similar concern arises for advisers seeking the venture capital fund advisers exemption.

improvement to the proposed definition. Without such a carve-out, the long-established and quotidian processes of many VCFs could and likely would result in their advisers being unable to avail themselves of the exemption. We concur in the NVCA's observation that "all VCFs will be involved in a significant behavior change in order to ensure compliance with the VCF [e]xemption."

In our experience, advisers to VCFs may, from time-to-time in discharging their duties to their clients, permissibly and appropriately employ a variety of investment techniques and engage in other activity which would place them in technical violation of the proposed Rule. It is our observation that such advisers have undertaken similar actions for years without posing any additional risk to the markets or to investors. Congress authorized the VCF exemption in recognition of the important role that venture capital plays in the economy: as a result we lament what we consider to be a too-narrow definition.

Detailed comments

We believe that a non-US adviser should not be required to file for registration where the amount of US person assets exceeds the $25 million and $150 million amounts solely by means of movements in exchange rates. We would suggest that the Commission consider increasing the $25 million threshold for the "foreign private advisers" exemption and suggest that a $150 million figure would be more apposite; moreover, this amount would provide compelling consistency with the private fund adviser exemption.

We concur with the proposed definitions of "US person" and "client". We agree with the proposal to avoid double counting for purposes of the foreign private advisers exemption. However, we would recommend that the Commission not include holders of short term paper and knowledgeable employees in the definition of "investor" in a private fund.

We believe that action on the Form ADV amendments going to the identification of gatekeepers and other information should be delayed until the Commission has had an opportunity to consider the comments arising from the 25 January proposal, discussed above.

Conclusion

We are happy to provide further information to the Commission and Staff for its consideration on these important proposals. You may reach us at Mark Berman, berman@compliglobe.com, or Philip Thomas, thomas@compliglobe.com, tel + 44 208 458 0152.

Very truly yours,

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By: CompliGlobe Ltd.

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