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June 15, 2011

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

Re: 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

Dear Ms. Murphy:

We respectfully submit this letter on behalf of a large asset manager organized under German law and located and headquartered in Germany (the "German Asset Manager")[1] in response to Release No. IA-3111, in which the Securities and Exchange Commission (the "Commission") requested comment on various proposed rules that implement new exemptions from the registration requirements of the Investment Advisers Act of 1940, as amended (the "Advisers Act"), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). As further detailed below, our comments specifically address:

- the Commission's proposed Rule 203(m)-1, which would provide an exemption from registration to any investment adviser that solely advises private funds if the adviser has assets under management in the United States of less than $150 million (hereafter referred to as the "Private Fund Adviser Exemption"); and

- the Commission's proposed Rule 202(a)(30)-1, which would provide an exemption from registration to any investment adviser that (i) has no place of business in the United States, (ii) has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the investment adviser, (iii) has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than $25 million and (iv) does not hold itself out generally to the public in the United States as an investment adviser (hereafter referred to as the "Foreign Private Adviser Exemption",

[1] Fulbright & Jaworski L.L.P. is a full-service international law firm, with seventeen offices worldwide, that serves the needs of businesses, governments, non-profit organizations and individual clients around the world. Fulbright is counsel to the German Asset Manager with regard to the matters discussed in this comment letter, and the views expressed in this letter are views expressed on behalf of our client. This letter does not necessarily reflect the views of Fulbright or its other clients.

and together with the Private Fund Adviser Exemption, referred to as the "Proposed Rules").

While we submit this comment letter on behalf of the German Asset Manager, many German investment advisers operate their businesses in a manner very similar to that of the German Asset Manager, with similarly limited contact with the United States. The Dodd-Frank Act's amendments to the Advisers Act will therefore broadly and adversely impact the German investment adviser and fund industry unless measures are taken to avoid the unnecessary extraterritorial application of the Advisers Act.

The German Asset Manager is concerned that under the regulatory regime currently contemplated by the Proposed Rules, the German Asset Manager and many other similarly situated German investment advisers will be forced to comply with the burdensome and costly requirements of the Advisers Act and face the difficult task of harmonizing the regulatory regime they are currently subject to in Germany with that of the Advisers Act, as amended by the Dodd-Frank Act, even though the operations of the German Asset Manager and similarly situated German investment advisers pose no threat to investors in the United States and do not create systemic risk in the United States. The German Asset Manager's proposal strikes a fair balance between Congress' intent of protecting U.S. investors and markets and avoiding excessive and unnecessary extraterritorial application of the Advisers Act in cases that do not pose a threat to either U.S. investors or markets.

I) Background Information

The German Asset Manager, a German stock corporation (*Aktiengesellschaft*), is based in Germany and is one of the largest asset managers in Germany. The German Asset Manager sponsors and syndicates a variety of investment funds, and provides certain investment advisory and asset management services to these funds. The German Asset Manager has only very limited contact with the United States. None of the funds it sponsors and advises or products or services it provides are available for investment to U.S. Persons (as such term is defined under Regulation S of the Securities Act of 1933, as amended (the "Securities Act")) and none of the funds it advises are offered for sale in the United States. The German Asset Manager does not have any place of business in the United States, and does not hold itself out to the public in the United States as an investment adviser.

All of the funds sponsored and advised by the German Asset Manager are organized under German law except for two non-German funds that are organized under U.S. law solely for tax structuring purposes.[2] Every fund sponsored, managed or advised by the German Asset

[2] We would note that the current tax structure subjects the funds to U.S. taxes, and is not designed to avoid them. The German Asset Manager chose to organize the two funds in the U.S. because the U.S. taxes payable by the German investors in the funds are less than the taxes that would be payable if the funds were organized under German law. Many other German investment advisers similarly sponsor funds that are organized in the U.S. but that are restricted to German investors. Should the German Asset Manager become subject to the Commission's regulation as a result of the Proposed Rules, the German Asset Manager and many similarly situated foreign

Manager, including the two U.S. funds, are offered and sold solely to German investors[3], and are not available for investment by any U.S. Persons.[4]. The German Asset Manager does not otherwise advise any U.S. Persons other than the two U.S. funds, which do not qualify as "private funds" as such term is defined in the Dodd-Frank Act.

Both the German Asset Manager and the funds it advises are subject to comprehensive and sophisticated regulation in Germany, principally by the German Financial Supervisory Authority ("BaFin")[5], the Federal Ministry of Finance and the German state regulators. The German Asset Manager, as a German stock corporation, is subject to corporate governance and financial reporting obligations comparable to those applicable to U.S. public companies. The German Asset Manager will also be subject to a new regulatory regime to be enacted by the German government in response to the Directive on Alternative Investment Funds Managers ("AIFM"), a directive of the European Union that will require regulation of managers of alternative investment funds such as the German Asset Manager. Meanwhile, the funds advised by the German Asset Manager largely consist of the following two types: (1) certain open-ended funds referred to as Special Funds (*Spezialfonds*) that are subject to German investment law and (2) close-ended funds that are subject to the German Commercial Code (*Handelsgesetzbuch*) and the German Law on Limited Liability Companies (*GmbH-Gesetz*), as well as the statutes described below.[6] The two U.S. funds are treated as close-ended funds for purposes of German law. Each of these regulatory regimes is discussed in greater detail below.

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investment advisers will likely need to weigh whether the additional burdens imposed by U.S. regulation outweigh the benefits of conducting their business in the current manner.

[3] For purposes of this comment letter, "German investor" refers to an investor that is a German resident or entity that does not fall under the definition of a U.S. Person as such term is defined in Regulation S of the Securities Act. Similarly, a "U.S. investor" refers to a investor that is a U.S. Person for purposes of Regulation S of the Securities Act.

[4] The funds subscription documentation requires an affirmation that the potential investor is not a U.S. person, its prospectus affirmatively states that it is restricted to non-U.S. Persons, and interests in the funds cannot be transferred without the consent of the fund's management (i.e., the managing limited partner of the fund), making it unlikely that interests in the funds can fall into the hands of U.S. investors.

[5] BaFin is the primary regulator of the German financial sector. Established on May 1, 2002, BaFin was created by consolidating the German securities regulator (*Bundesaufsichtsamt für den Wertpapierhandel*), banking regulator (*Bundesaufsichtsamt für das Kreditwesen*) and insurance regulator (*Bundesaufsichtsamt für das Versicherungswesen*). BaFin is the principal enforcement agency for laws regulating these areas, including the Securities Trading Act, the Securities Acquisition and Takeover Act, the German Prospectus Act, the Banking Act and the Investment Act. As a result, BaFin's supervisory authority includes both close-ended funds and Special Funds. The Chairman of the Commission at the time, Christopher Cox, in a speech given on April 26, 2007, observed that the Commission and BaFin share the same goals and objectives, remarking that "the [Commission] and BaFin share a commitment to keeping our markets open, fair and transparent in an ever-changing and increasingly global marketplace". http://www.sec.gov/news/press/2007/2007-76.htm.

[6] Similar to the United States, German "close-ended funds" are distinguishable from open-ended funds by virtue of the inability of investors to freely redeem their shares at their discretion. Generally, a close-ended fund has a limited subscription period followed by very limited or no ability to redeem shares prior to the end of the fund's life (in Germany, usually a period of 10-15 years). Although a secondary market for close-ended fund shares exists, any transfer requires the consent of the investment fund, making secondary transactions relatively rare.

Close-ended funds are required to issue prospectuses under the German Prospectus Act (*VerkProspG*), the German Investment Prospectus Ordinance (*VermVerkProspV*) and the Investor Protection Improvement Act of July 1, 2005 (*Anlegerschutzverbesserungsgesetz - AnSVG*). Prospectuses are reviewed and audited by BaFin before they are published to ensure they provide all required information and that they are clear and comprehensible (i.e., no contradictory statements within the prospectus).[7] BaFin does not review the veracity of the statements made in the prospectuses, though investors in such funds have a direct legal basis for redress in the event the offering document omits any material information or contains any misleading or false information. After BaFin approves of the prospectus, it is filed with BaFin, and only then may be made available to the public. In the case of the German Asset Manager, each prospectus is provided to syndication partners (i.e. German banks) and then the syndication partners distribute the prospectuses to interested German private and institutional investors. The German Asset Manager does not provide investment advice to any investors in the funds advised by the German Asset Manager. Violations of the German Prospectus Act can result in civil penalties of up to EUR 500,000.00 per offense. The two U.S. funds are required to comply with all such rules and regulations applicable to close-ended funds.

In addition to these existing rules and regulations, the German regulators intend to introduce new, more stringent laws that will apply to close-ended funds that will, among other things, require additional information in the funds' prospectus and amendments and supplements to be provided to investors after they receive the initial prospectus to update them with more current information. These additional rules and regulations are expected to be enacted the summer of 2011 and to become effective January 1, 2012, and will apply to offering materials the German Asset Manager is required to issue in connection with the two U.S. funds.

Special Funds are only available to institutional investors (e.g., German pension funds and German insurance companies) and must be managed by a German government-licensed management company. Each Special Fund must have a depositary bank that is responsible for ensuring that the fund is managed in accordance with German law and the contractual terms and conditions of its fund documents. Additionally, managers of Special Funds (such as the German Asset Manager) are required to provide to investors audited annual reports for every Special Fund they manage. Violations of the German investment law may result in criminal penalties of up to three years imprisonment per violation and civil penalties of up to EUR 100,000 per violation.

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[7] The German Prospectus Act details what items of information the prospectus must contain, including information about the securities (i.e., the nature, number and aggregate face value of the securities offered, a description of the markets on which the securities are to be traded, transfer restrictions, etc.), the issuer (i.e., the name and registered office, date of incorporation, the registration court where the issuer is registered), the capital of the issuer (i.e., the amount of the capital and capital structure, exchange or subscription rights held on issuer), the business activity of the issuer (i.e. court or arbitration proceedings, current investments), the assets and liabilities, the financial position and the profits and losses of the issuer, the audit of the annual accounts of the issuer, the management and supervisory bodies of the issuer and the recent development and prospects of the issuer. Under the German Exchange Act (*Börsengesetz*), material information in any such prospectus may not be false or incomplete.

German stock corporations, such as the German Asset Manager, are required to comply with rules regarding the composition of its management (i.e., oversight is shared between both a supervisory board and a management board). The supervisory board of a German corporation consists of representatives of the stockholders and employees of the corporation, who each elect half of the members of the supervisory board. The supervisory board appoints and supervises the members of the management board. The management board oversees the overall management of the corporation's business operations and typically consists of the corporation's executive officers. However, major business decisions require the approval of the supervisory board. German stock corporations are also required to have an independent audit committee responsible for handling issues of accounting, risk management and compliance. German corporate law also requires German stock corporations to comply with an array of reporting and disclosure obligations, including the obligation to provide reports regarding their financial statements and the beneficial ownership of their shares.

In addition to German rules and regulations, the German Asset Manager and the funds it advises, including its two U.S. funds, are required to comply with laws passed in accordance with the directives of the European Union. In particular, on November 11, 2010, the European Parliament passed the AIFM, a measure the website of the European Commission describes as having objectives and approaches consistent with those of the Dodd-Frank Act's amendments to the Advisers Act.[8] The AIFM is set to become effective on or about June 16, 2011, with a two-year transition period. As a result of Germany's implementation of AIFM, entities engaged in the management and administration of alternative investment funds, including the German Asset Manager, will be required to register with the German authorities (the implementing German law will identify which German agency will oversee the AIFM), comply with minimum capital requirements and fee restrictions, periodically submit reports and financial statements and provide the following information to investors in the funds that they manage:

(a) a description of the investment strategy and objectives of the alternative investment fund ("AIF") in which the investors intend to invest (each of the German Asset Manager's two U.S. funds are AIFs), the assets which the AIF can invest in, the techniques it may employ and the associated risks, any applicable investment restrictions, the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks and any restrictions to the use of leverage;

(b) a description of the procedures by which the AIF may change its investment strategy or investment policy;

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[8] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/572&format=HTML&aged=0&language=EN&guiLanguage=en. The AIFM will become effective on the date occurring twenty days after the English version of the AIFM is translated into each of the 23 official EU languages. The translations were completed on May 27, 2011, and the effective date will be on or about June 16, 2011. Each EU member then has two years to fully implement the AIFM into its own laws and regulations.

(c) a description of the legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, applicable law and the existence of any legal instruments providing for the recognition and enforcement of judgments on the territory where the AIF is domiciled;

(d) the identity of the AIF's depositary, valuator, auditor and any other service providers and a description of their duties and the investors' rights should any failure arise;

(e) a description of any delegated management or depositary function and the identity of the third party to whom the function has been delegated;

(f) a description of the AIF's valuation procedure and, where applicable, of the pricing models for valuing assets, including the methods used in valuing hard to-value assets;

(g) a description of the AIF's liquidity risk management, including the redemption rights both in normal and exceptional circumstances, existing redemption arrangements with investors, and how the AIFM ensures a fair treatment of investors;

(h) a description of all fees, charges and expenses and the maximum amounts thereof which are directly or indirectly borne by investors;

(i) whenever an investor obtains a preferential treatment or the right to obtain preferential treatment, the identity of the investor and a description of that preferential treatment;

(j) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;

(k) any new arrangements for managing the liquidity of the AIF; and

(l) the current risk profile of the AIF and the risk management systems employed by the manager to manage these risks.

This information is comparable to that required to be disclosed by investment advisers in respect of any "private funds" they advise under new Section 204(b)(3) under the Advisers Act.[9] Entities subject to the AIFM will also be required to appoint an independent asset valuator[10], adopt risk and liquidity management measures[11] and utilize an independent depository to (a) receive all payments made by investors when subscribing units or shares of an AIF and book

[9] For example, both reporting obligations require information about the fund's assets and use of leverage (*compare* Section 204(b)(3)(A)&(E) of the Advisers Act and Article 20(1)(a) of AIFM), counterparty risk exposure (*compare* Section 204(b)(3)(B) of the Advisers Act and Article 20(1)(l) of AIFM), trading and investment positions (*compare* Section 204(b)(3)(C) of the Advisers Act and Article 20(1)(b) of AIFM) and valuation policies and practices (*compare* Section 204(b)(3)(D) of the Advisers Act and Article 20(1)(f) of AIFM).
[10] Article 16 of the AIFM.
[11] Articles 11 & 12 of the AIFM.

them in a segregated account; (b) safe-keep any financial instruments which belong to the AIF; and (c) verify that the AIF has properly obtained ownership in its investments[12]. A manager regulated under the AIFM is further obligated to obtain government approval before it may delegate any of its functions to any other entity.[13]

Germany will have two years to implement the AIFM by statute into its own laws and regulations. Even though the German Asset Manager will not be required to register and comply with the AIFM until Germany's implementing laws become effective, the German Asset Manager has already taken steps to comply with the AIFM now. The AIFM requires member states to provide for criminal and civil sanctions for violations of laws passed pursuant to the directive, but does not specify them.

II) Foreign Regulation of German Advisers to Funds with No U.S. Investors

The German Asset Manger is particularly concerned with the significant difficulties and costs it will face if required to comply with both the provisions of the Advisers Act and the extensive requirements applicable under German law. These costs and difficulties appear particularly excessive given the (i) German Asset Manager's very limited contact with the United States and (ii) degree of regulation faced by the German Asset Manager and German funds under German law. The German Asset Manager believes that the German regulatory environment in the German fund and fund adviser industry differs significantly from the lack of regulation in the U.S. fund industry that inspired Congress to enact the Dodd-Frank Act's amendments to the Advisers Act. Adding an additional layer of U.S. regulation to that already faced by German advisers will cause German advisers to bear unnecessary increased compliance costs or withdraw from the U.S. markets entirely. That result appears particularly unwarranted where there is only very limited contact to the United States and where no U.S. investors are involved, as is the case with the German Asset Manager.

The staff of the Commission has previously taken the position that a foreign investment adviser need not comply with the Advisers Act with respect to its foreign clients. [14] That conclusion appears to be based, at least in part, upon what the staff of the Commission considers to be the reasonable expectations of foreign clients advised by foreign advisers regarding applicable law. [15] In *Mercury Asset Management*, the staff provided assurance to an investment manager organized under English law that it would not recommend enforcement action to the

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[12] Article 17 of the AIFM.
[13] Article 18 of the AIFM.
[14] Mercury Asset Management plc, SEC No-Action Letter (pub. avail. April 16, 1993); *see also* ABA Subcommittee on Private Investment Entities, SEC No-Action Letter (pub. avail. Aug. 10, 2006) ("the substantive provisions of the [Advisers Act] do not apply to offshore advisers with respect to such advisers' dealings with offshore funds and other offshore clients to the extent described in [prior staff guidance and letters]") and Uniao de Bancos de Brasileiros S.A., SEC No-Action Letter (pub. avail. July 28, 1992) (providing that the Advisers Act's substantive provisions generally do not apply to a non-U.S. adviser's non-U.S. clients).
[15] "Protecting Investors: A Half Century of Investment Company Regulation", Division of Investment Management United States Securities and Exchange Commission, ("Protecting Investors") 229, 553 (May 1992).

Commission if the English asset manager registered as an investment adviser under the Advisers Act but did not comply with the Advisers Act with respect to clients who were not United States persons. The staff separately wrote less than one year prior to issuing the *Mercury Asset Management* No-Action Letter that, unless a non-U.S. adviser holds itself out as being registered under the Advisers Act, there is no apparent reason for a foreign investor to expect to be protected by United States law.[16] A German investor in a fund only available for investment by only non-U.S. investors that is advised by a German investment adviser located only in Germany should not reasonably expect that it can rely upon the protections provided under the Advisers Act in addition to the panoply of rules and regulations available under German law. When all investors in funds advised by a German investment adviser are German investors and none is a U.S. investor, there is no need for U.S. regulation, and the comprehensive and sophisticated regulation offered under German law is sufficient to protect the affected investors and markets. German investment advisers that advise funds with no U.S. investors should not be forced to bear the expensive (and unnecessary) burden of complying with two separate regulatory regimes when there is no threat to U.S. investors or markets.[17]

III) Comments

Under the Proposed Rules, the German Asset Manager would likely not qualify for an exemption from registration. In particular, the German Asset Manager would not qualify for the Private Fund Adviser Exemption because the German Asset Manager does not solely advise "qualifying private funds" (i.e., neither U.S. fund satisfies the Advisers Act's definition, as amended by the Dodd Frank Act, of a "private fund"). It would also not qualify for the Foreign Private Adviser Exemption because each of the German Asset Manager's sole U.S. clients—the two U.S. funds—has more than USD $25 million attributable to it. The Proposed Rules, as currently drafted, will force many German advisers, including the German Asset Manager, to register with the Commission and bear the significant costs of complying with yet another regulatory regime despite the very limited contact with the U.S. and the fact that no U.S. Persons have invested or are permitted to invest in any fund advised by such German advisers, including the two U.S. funds advised by the German Asset Manager. The German Asset Manager does not believe this result is consistent with the intent of Congress nor the narrow approach to extraterritoriality previously advocated by the staff of the Commission's Division of Investment

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[16] *See id.*

[17] The Commission's deference to BaFin with respect to German investment advisers is also consistent with the spirit of the Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight and the Supervision of Financial Service Firms between the Commission and BaFin that the two agencies signed on April 26, 2007. For example, pursuant to this information-sharing arrangement, the Commission can request from BaFin information that German investment advisers report to BaFin under German law, making a dual-reporting system that requires German investment advisers to file reports with both the Commission and BaFin unnecessary and duplicative.

Management.[18] The German Asset Manager therefore respectfully offers the following comments on the Proposed Rules.

1) Private Fund Adviser Exemption

The Private Fund Adviser Exemption is limited to investment advisers that advise solely "qualifying private funds", which are "private funds" that are not registered under Section 8 of the Investment Company Act of 1940, as amended (the "Investment Company Act"), and that have not elected to be treated as business development companies pursuant to Section 54 of the Investment Company Act. The Advisers Act, as amended by the Dodd-Frank Act, defines "private fund" as any issuer that would be an investment company for purposes of the Investment Company Act of 1940 but for Sections 3(c)(1) or 3(c)(7) thereunder.

Under the Proposed Rules, an adviser with a principal office and place of business outside the United States (a "non-U.S. adviser") is allowed to disregard its non-U.S. clients for purposes of the Private Fund Adviser Exemption. In determining whether all its clients are "qualifying private funds", a non-U.S. adviser is required to include only its U.S. clients, all of whom must be "qualifying private funds" to qualify for the exemption. The Commission explains that allowing a non-U.S. adviser to disregard their non-U.S. clients is based on the idea that a non-U.S. adviser should not lose the Private Fund Adviser Exemption as a result of the non-U.S. adviser's business activities outside the United States.[19] The Commission appropriately recognizes that the "non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests" and that the Commission's approach to allowing non-U.S. advisers to disregard non-U.S. clients in the Private Fund Adviser Exemption is consistent with approaches previously taken by the Commission that disregarded non-U.S. clients "in consideration of general principles of international comity".[20]

The same reasoning also applies in the context of a non-U.S. adviser (such as the German Asset Manager) whose sole U.S. clients are funds that are organized under U.S. law but whose securities are exclusively offered and sold to and held by non-U.S. Persons. In this scenario, the countries in which the investors in such funds reside and where the non-U.S. adviser is located have a greater interest in regulating the activities of the investment adviser than does the United States. To the extent the United States does have a regulatory interest, those interests are addressed because the funds organized under U.S. law are still subject to U.S. securities laws, including anti-fraud rules, state blue sky laws and state corporate governance laws. In the German Asset Manager's view, the Commission does not have a comparable interest in

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[18] Protecting Investors at 229 ("[u]nder general principles of comity, nations recognize legislative and judicial acts of other nations, having due regard for the rights of their own citizens. Comity suggests that the Advisers Act should not apply to a foreign registered adviser's relationship with its non-United States clients outside the United States, just as the Commission would not expect the laws and regulations of a foreign country to apply to a United States adviser's relationship with its United States clients."). Because the ultimate clients in the German Asset Manager's structure are the German investors in the funds, German law rather than U.S. law should apply.
[19] Proposed Rules at 59.
[20] *Id.*

regulating a German adviser that has no place of business in the U.S., does not offer or sell interests in the U.S. funds to U.S. investors and whose sole U.S. clients are funds whose owners are all non-U.S. investors, and that, in addition, is subject to substantial regulation in Germany, the jurisdiction of its organization, operations and clients.

The German Asset Manager therefore respectfully proposes that the definition of "qualifying private fund" be broadened to include funds that do not have any U.S. Persons as beneficial owners and that are not offered or sold to persons in the United States.

2) Foreign Private Adviser Exemption

The Foreign Private Adviser Exemption is restricted to advisers with no place of business in the U.S. that have fewer than 15 U.S. clients and less than USD $25 million attributable to such U.S. clients. The German Asset Manager respectfully proposes two changes to the Foreign Private Adviser Exemption.

First, the German Asset Manager proposes that, for purposes of the Foreign Private Adviser Exemption, the definition of "client" exclude any U.S. entity that is not beneficially owned by any U.S. Person and that does not offer or sell its securities to persons in the United States. This definition of "client" is consistent with our comment to the definition of "qualifying private fund" in respect of the Private Fund Adviser Exemption. When an investment adviser's sole U.S. customers are entities that are not beneficially owned by any U.S. Person and do not direct any offers or sales, or permit transfers, of their securities to U.S. Persons and do not engage in advisory activity or solicit clients or investors in the United States, there is no threat to actual U.S. investors and no need for regulation of the investment adviser under the Advisers Act.

Secondly, while Congress provided for a threshold of $25 million in the Dodd-Frank Act, it also provided the Commission with the ability to raise the threshold to such higher amount as the Commission deems appropriate. In the German Asset Manager's view, the limitation of USD $25 million is so low as to render the exemption meaningless. The German Asset Manager would propose that the dollar limitation be increased to a more meaningful level of USD $500 million.

The threshold of USD $500 million would harmonize the Advisers Act with the AIFM, which regulates managers of alternative investment funds in a manner similar to the regulation of investment advisers in the United States under the Advisers Act. The AIFM provides an exemption from most of its obligations for managers with assets under management of less than EUR 500 million that do not utilize leverage and have a five year lock-in period for their investors. Using a single threshold would provide the added benefit of a consistent regulatory approach across these two major markets in the funds industry.

3) Grandfathering

In the event the Commission does not incorporate changes to the Proposed Rules that would excuse the German Asset Manager and other, similarly situated German advisers from registration under the Advisers Act, they should be grandfathered; a provision that the Commission has proposed in other instances.[21]. The U.S. funds have raised and invested all of their equity well before the current date; have ceased raising capital, and have specific termination dates in the near term. German Asset Manager and many other German advisers may choose to discontinue providing investment advisory services to those of their clients that are organized under U.S. law even though they have no beneficial owners that are U.S. Persons in which case the advisers may be forced to take steps that could harm investors, including the early termination of any U.S. funds they advise, which may result in additional costs and expenses that ultimately fall upon investors in these funds.

The German Asset Manager believes that if it and other German advisers were to decide to discontinue providing U.S. advisory services, the German Asset Manager and other similarly situated German advisers should not be required to register with the Commission as "investment advisers" following the effective date of the final rules solely on account of their past and discontinued advisory services (i.e. to the two U.S. funds), which were then and are currently permissible without registration under Section 203(b)(3) of the Advisers Act. Moreover, grandfathering the German advisers' previous advisory activities and excusing such German advisers from registration so long as they discontinue providing investment advisory services to U.S. clients following the effective date would be consistent with the general presumption against retroactivity in U.S. legislation and provide greater certainty to German advisers.

We thank the Commission for the opportunity to comment on the Proposed Rules. Please contact Craig T. Redinger, +49 89 242 930, credinger@fulbright.com if you have any questions or would like to discuss these comments further.

Very truly yours,

Craig T. Redinger

[21] *See e.g.* Release No. IA-3110 at 74 (describing proposed amendment to Rule 204-2 of the Advisers Act which will introduce a grandfathering provision to the books and records obligations of the Advisers Act) and the Proposed Rules at 55-58 (proposing to grandfather certain funds previously represented as being "venture capital funds" even though such funds will likely not satisfy the definition of a "venture capital fund" under the Proposed Rules.).