PRIVATE EQUITY GROWTH CAPITAL COUNCIL™

AVCAL

The AUSTRALIAN PRIVATE EQUITY & VENTURE CAPITAL ASSOCIATION Limited

SUBMITTED BY COURIER AND E-MAIL

February 25, 2011

H.E. Engineer Sultan Bin Saeed Al-Mansoori
The Chairman
Emirates Securities and Commodities Authority
Hamdan Street
Al Gaith Tower, 13th Floor
P.O. Box 33733
Abu Dhabi, United Arab Emirates

Re: Draft Investment Fund Regulation in the United Arab Emirates

Dear Sir:

The Private Equity Growth Capital Council (the "PEGCC") and The Australian Private Equity & Venture Capital Association Limited ("AVCAL") appreciate the opportunity to submit comments on the draft Investment Fund Regulation (the "Regulation") published on the website of the Emirates Securities and Commodities Authority ("ESCA") on January 6, 2011. The PEGCC and AVCAL are also grateful for the time that ESCA took to meet with one of the PEGCC's members to discuss the impact of the Regulation. We hope that this comment letter is responsive to the matters that were discussed.

The PEGCC is an advocacy, communications and research organization and resource center established to develop, analyze and distribute information about the private equity and growth capital investment industry and its contributions to the national and global economy. Established in 2007 and formerly known as the Private Equity Council, the PEGCC is based in Washington, D.C. The members of the PEGCC are 33 of the world's leading private equity and growth capital firms, united by their commitment to growing and strengthening the businesses in which they invest.[1]

AVCAL is a national association that represents the private equity and venture capital industries of Australia. AVCAL's members comprise more than 70 fund managers who represent most of the active private equity and venture capital firms in Australia. These firms provide capital for early stage companies, later stage expansion capital, and capital for management buyouts of established companies.

Because the membership of our two groups consists of international private equity fund sponsors whose interests would be affected most significantly by the Regulation's potential role in regulating Foreign Investment Funds (as defined in the Regulation) in the United Arab Emirates (the "UAE"), PEGCC and AVCAL's comments are focused on the portions of the Regulation applicable to such funds.

Capitalized terms herein without definition shall have the same meaning as set forth in the Regulation.

I. Summary

We would like to commend ESCA for advancing the Regulation's overarching policy of shielding UAE investors from the perils of unregulated promotions of fund interests. Indeed, investment regulatory regimes exist in many countries around the world, often increasing accountability of fund sponsors to certain groups of investors. We support ESCA's actions to protect retail investors that may lack a full understanding of the characteristics of Foreign Investment Funds and the ability to bear the financial risks associated therewith. As discussed with ESCA, the Regulation of Foreign Investment Funds is in many ways tailored towards retail investors and liquid investment funds that are publicly offered in the UAE. We understand that ESCA also has a desire to protect certain high-net-worth individuals who, despite their wealth, may lack the sophistication required to appreciate the risks associated with certain Foreign Investment Funds.

Even in light of ESCA's express desire to protect such investors, however, we believe the Regulation casts too wide a net, in that it also restricts the offering of interests in Foreign Investment Funds to sophisticated investors (*e.g.*, institutional and governmental investors) that have a thorough understanding of the financial product

[1] The members of the PEGCC are: American Securities, Apax Partners, Apollo Global Management LLC, Avista Capital Partners, The Blackstone Group, Brockway Moran & Partners, The Carlyle Group, Crestview Partners, Francisco Partners, Genstar Capital, Global Environment Fund, GTCR, Hellman & Friedman LLC, The Jordan Company, Kelso & Company, Kohlberg Kravis Roberts & Co., KPS Capital Partners, Levine Leichtman Capital Partners, Madison Dearborn Partners, MidOcean Partners, New Mountain Capital, Permira, Providence Equity Partners, The Riverside Company, Silver Lake, Sterling Partners, Sun Capital Partners, TA Associates, Thoma Bravo, Thomas H. Lee Partners, TPG Capital (formerly Texas Pacific Group), Vector Capital, Welsh, Carson, Anderson & Stowe.

being offered and the means to bear the full risks associated therewith. In addition, private equity funds will be largely unable to comply with the Regulation due to their illiquid portfolios and their exempt status in their home jurisdictions. As further addressed in Section IV below, to address these concerns while preserving the protective nature of the Regulation for discerning investors, we suggest an exemption from the Regulation for Foreign Investment Funds offered on a private placement basis to non-retail investors. We also outline several suggestions we believe are more appropriately tailored to address ESCA's specific objective of protecting certain of the UAE's high-net-worth individuals from being misled into making investments that may exceed their risk tolerance.

II. Impact on Foreign Investment Funds

Part Five of the draft Regulation sets forth the requirements applicable to the promotion of Foreign Investment Funds in the UAE, a number of which would be difficult or impossible for many private equity funds to comply with.

1. Fund Licensing in Home Jurisdiction. Article 36(1)(A) of the Regulation requires that the Foreign Investment Fund be established and licensed in a foreign State and subject to supervision of an authority similar to ESCA (a "Foreign Authority"). As described in further detail in Section IV below, Foreign Investment Funds (such as private equity funds) offering interests on a private placement basis solely to certain eligible investors often are not subjected to licensing requirements in their home states and as a result arguably are not subject to the supervision of an authority similar to ESCA. This is true, for example, for funds established in the Cayman Islands, the United Kingdom and Delaware, which are among the most popular jurisdictions of formation for private equity funds. It should be noted, however, that even though private equity funds may not themselves be subject to licensing requirements in their respective home jurisdictions, they are not without regulatory scrutiny—many persons managing such funds are subject to regulatory supervision. In addition, the recent regulatory reform undertaken in the United States has significantly expanded the universe of private equity fund advisers that will need to register with the U.S. Securities and Exchange Commission (the "SEC") and the activities of these advisers will thus be subject to the supervision of the SEC. Because of the proposed fund-licensing requirements, the vast majority of foreign private equity funds would be precluded from marketing interests to investors in the UAE.

2. Related Party Licensing in Home Jurisdiction. Article 36(1)(B) of the Regulation provides that the "related parties" involved in and responsible for a Foreign Investment Fund must be both licensed to conduct their activities in their home states and subject to the supervision of a Foreign Authority. Related parties are defined as "the founding company of the investment Fund, its board of directors and any entity contracted to provide services to the Fund." Most private equity funds would not satisfy this requirement. For example, many private equity funds are structured as closed-ended limited partnerships; once one fund is fully invested, another fund is generally raised, so that any one fund product will eventually comprise a series of funds. The investors in

each of the funds generally will vary and the general partners typically have unlimited liability in respect of the debts and obligations of the fund. For these and other reasons, a special purpose limited partnership is established for each fund, which will have a separate, dedicated entity serve as general partner. The general partner and its directors are rarely formally licensed in their home jurisdiction. However, the general partner often delegates responsibility for managing the fund to a manager or receives advice from an investment adviser that is shared by all funds in a series of funds. The managers and advisers in turn may rely on sub-managers and sub-advisers. The license requirements for these entities vary according to the regulations promulgated in their relevant home jurisdictions. Many fund sponsors have or are moving towards a situation where at least one manager or investment adviser is licensed (as discussed in connection with subsection 1 above, this will now typically be the case in the United States). A requirement that all related persons of a private equity fund be licensed, effectively requiring that several different entities and persons in the fund structure be separately licensed (many of which are special purpose vehicles with limited life spans), would not only be incompatible with existing international regulations, but even if achievable, would be costly and burdensome to administer. It would seem prudent for ESCA to defer to the assessment made by the regulators in the related persons' home jurisdictions as to licensing requirements.

3. Chaperone Requirement. Article 36(1)(C) of the Regulation requires that all Foreign Investment Funds retain an ESCA-licensed local promoter and distributor (the "Chaperone Requirement") to conduct marketing and distribution activities in the UAE. While chaperones are arguably helpful in protecting retail investors, their use in relation to the placement of fund interests to institutional and other sophisticated investors capable of making independent investment decisions and possessing appropriate risk tolerance raises a number of concerns. In particular:

(a) these investors often develop close working relationships with the sponsors of Foreign Investment Funds and inserting a chaperone into such relationship would interfere with and frustrate these valuable commercial associations;

(b) these investors have the means of ensuring a thorough and tailored analysis of the investment for their own benefit;

(c) a fund sponsor (or a placement agent of the sponsor's choosing) will be better equipped than a chaperone to appropriately describe the fund product being offered and to address any specific investor considerations; a chaperone that is retained solely to comply with the Regulation is unlikely to add value or investor protection;

(d) chaperones are likely to be commercial banks and other institutions in the UAE that are current or potential competitors of sponsors of Foreign Investment Funds; having such a chaperone present in meetings with some of the sponsors' most valuable relationships is likely to act as a significant incentive for such sponsors to conduct any marketing to UAE investors outside of the UAE, thus bringing them outside the purview of ESCA and the UAE Central Bank altogether; and

(e) in light of clauses (a) through (d) above, the Chaperone Requirement would seem to impose significant logistical and commercial impediments for both foreign fund sponsors and UAE investors in a non-retail investor setting, creating unnecessary expenses (which are likely to be shared by both sponsors and investors) and as a result disadvantaging sophisticated and other high-net-worth UAE investors as compared to investors in other jurisdictions.

We understand that the Regulation may draw upon the regulatory framework for foreign fund offerings that was introduced in the Kingdom of Saudi Arabia a few years ago. Based on significant practical experience, we believe that Saudi Arabia's requirement that an "Authorised Person" be engaged to conduct the offering in Saudi Arabia (after notification to the Capital Market Authority (the "<u>CMA</u>") and with an objection right for the CMA) disadvantages sophisticated Saudi Arabian investors because certain sponsors are turning away from fundraising in Saudi Arabia due to what are perceived as overly stringent requirements.

4. <u>Twin Peak Approval</u>. Article 36 (including Article 36(1)(D)) further requires that a Foreign Investment Fund obtain prior approval of the UAE Central Bank in addition to ESCA. This regulatory approval requirement—especially the dual process—would add significant cost, administrative burden, uncertainty and potential delay. In addition, we are concerned by the general provision that ESCA reserves the right to impose additional conditions or document submission requirements (Articles 36(a) and Article 37) because of the added uncertainty that would bring to the approval process. We question the need for any regulatory approval process where no marketing is made to retail investors and fund promotion is conducted within the pre-defined parameters we have laid out in Section IV below. In particular, the sophisticated institutional and high-net-worth investors described below generally perform their own thorough due diligence prior to making an investment in a fund, often with a combination of in-house and external professional legal and financial advisors that are best suited to provide a tailored assessment of a fund's suitability for the investor; in this context, these costly additional layers of regulatory review would provide little or no additional protection for these investors. The approval process would also likely lead to a high volume of licensing applications. The dual nature of the process would increase the regulatory burden even further, which could ultimately lead to a bottleneck effect. The impact could be broad reaching—adding new cost and labor burdens for ESCA and the Central Bank and rendering investments stale from delay—both of which would have an adverse impact not only on foreign fund sponsors, but also on UAE investors.

5. <u>Reporting</u>. The reporting requirements set out in the Regulation are inconsistent with standard global private equity fund reporting practices, and in particular

require funds to make available certain pricing data that is generally incompatible with a Foreign Investment Fund holding illiquid investments (typical for private equity funds).

The Regulation appears to be aimed at funds offered to retail investors, where the fund is investing in publicly traded securities. Private equity funds with illiquid holdings are unable to provide daily net asset value or pricing figures. The Regulation also requires that each fund provide quarterly audited reports to its UAE investors within 30 days after the end of each quarter and yearly audited reports to ESCA within three months after the end of each fiscal year (together with any other reports or data that may be required by ESCA). It is an established global market practice for private equity funds to provide quarterly or semi-annual unaudited reports and annual audited reports to its investors. Private equity funds with illiquid holdings are dependent on receiving financial information from their underlying portfolio companies and as a result, reports are generally required to be provided 90 days after the quarter-end and 120 days after the year-end. These standard private equity fund reporting practices are the result of careful negotiations between fund sponsors and sophisticated institutional investors from across the globe.

6. Transfers. Article 38 of the Regulation appears to prohibit trading of interests in Foreign Investment Funds within the UAE without the prior approval of ESCA. While private equity fund interests are generally not "traded" in the general sense, there are limited circumstances in which investors may desire to transfer their interests in a fund (usually with the consent of the sponsor). These transfers are typically privately negotiated transactions between two sophisticated parties. It is not clear to us whether Article 38 is intended to prohibit these types of transfers, but we are concerned that the provision could be interpreted this way. We believe that such a restriction on the private transfers of fund interests would be detrimental to UAE investors, who would find themselves at a significant disadvantage in both transferring existing fund interests and acquiring fund interests from third party investors in other jurisdictions.

7. Potential Additional Requirements. Our understanding is that Chapters II and III of the Regulation (Articles 32 and 33) do not apply to Foreign Investment Funds and their related persons. However, due to the ambiguity in the current draft of the Regulation, we would appreciate your confirmation of this understanding. Several provisions set forth requirements with which most Foreign Investment Funds and their related persons could not comply. We would be happy to provide further clarification with respect to this point upon request.

III. Impact on Local Investors

Regulation of Foreign Investment Funds in the UAE could have a significant adverse impact on local investors in the region--both institutions and high-net-worth individuals.

On one end of the spectrum, governmental and institutional investors such as Abu Dhabi Investment Authority, Abu Dhabi Investment Council, the Emirates Investment

Authority, Dubai International Capital and Mubadala Development Company may be disadvantaged when compared with other investors of similar size and stature in other jurisdictions if they are unable to invest in a full range of investment products because attractive private equity funds do not qualify under the requirements imposed on Foreign Investment Funds in the UAE. As noted above, many of the UAE's own institutional investors have long-standing relationships with managers of Foreign Investment Funds and are savvy and knowledgeable private equity fund investors, eliminating the need for the types of protections that may be required in respect of retail investors. Even in the absence of such relationships and experience, these investors are more than well-equipped to fend for themselves in connection with investments in foreign private equity funds by engaging third parties with the proper expertise to evaluate and negotiate the terms of their investments in a manner that is tailored to their specifications. We believe that institutional and governmental investors in the UAE share the same concerns with the Regulation as the PEGCC and AVCAL.

At the other end of the spectrum, high-net-worth individuals are either themselves knowledgeable about private equity funds or have the resources to engage their own legal and/or financial advisors that can address their particular considerations.

Without relaxing the Regulation's requirements for Foreign Investment Funds in respect of these investors, such investors may resolve themselves to avoid the Regulation altogether by engaging in the investment process overseas. This would have the effect of placing these investors completely outside the regulatory regime. In addition, it also possible that overly burdensome regulations may entice both institutional and high-net-worth individuals to relocate their headquarters or residence to other countries in the region with less restrictive regulations.

IV. Non-Retail Investor Exemption

To address the concerns we have raised in Sections II and III above, and to ensure that the Regulation achieves its objective of protecting retail investors without unduly restricting the investment activities of non-retail investors, we recommend that ESCA adopt a formal exemption from the Regulation's Foreign Investment Fund requirements with respect to fund interests placed to non-retail investors on a private placement basis. Many jurisdictions have adopted such approaches with respect to investment funds. For your ease of reference, we have outlined the exemptions in the United Kingdom, United States and the Dubai International Financial Centre (the "DIFC") below. By necessity, these outlines are very summary in nature; we would be happy to provide further color on such exemptions and exemptions in other jurisdictions upon request. In reviewing the descriptions regarding various net asset requirements below, we think it is worth keeping in mind that instituting too high a minimal investment threshold in Foreign Investment Funds may have the adverse effect of making it difficult for investors to appropriately diversify their portfolios (more on the minimum investment threshold issue under Section V.2 below). Our hope is that the definitions of exempted investors below can provide helpful guidance to ESCA in developing a definition of sophisticated investors falling outside the scope of the Regulation.

1. United Kingdom. The United Kingdom has a flexible registration and marketing regime that seeks to strike an appropriate balance between investor protection on the one hand, and stimulation of private equity activities and avoidance of over-regulation, on the other. To this end, the UK regime distinguishes between regulated and unregulated collective investment schemes.

Regulated collective investment schemes are certain funds that generally invest in liquid securities, have an open-ended term and offer investors the ability to enter and exit the funds throughout the term. Regulated collective investment schemes are eligible to be marketed to the public (including to retail investors) and are therefore subject to a high degree of regulation.

Unregulated collective investment schemes, which include most private equity funds, invest primarily in illiquid securities, may have closed-ended terms and do not, as a matter of ordinary course, allow investors to enter and exit the funds throughout the term. Although the managers of these collective investment schemes are regulated, the funds themselves are not subject to regulation. Unregulated collective investment schemes may be marketed only to certain categories of prospective investors that are deemed to be sufficiently sophisticated to understand the risks involved. These include, but are not limited to: (*a*) "investment professionals" (such as firms authorized by the FSA (the UK Financial Services Authority), governments, local authorities, international organizations and persons whose ordinary activities include participation in unregulated collective investment schemes for the purpose of a business carried on by them or who it is reasonable to expect will so participate for the purposes of a business carried on by them), (*b*) "high net worth bodies" (which include *inter alia* unincorporated associations or partnerships that have net assets of not less than £5 million) and (*c*) "certified high net worth individuals", being individuals who certify either that (*i*) they had during the immediately preceding financial year annual income to a value of at least £100,000, or (*ii*) they held throughout the immediately preceding financial year net assets to the value of at least £250,000. If prospective investors falls within one or more of the permitted categories of offerees, offers of fund interests may be made to an unlimited number of prospective investors in the United Kingdom without further regulatory approval.

2. United States. The United States also has a long-standing private placement offering regime upon which private equity funds generally rely in offering their interests If the offering qualifies as a private placement, it is not required to be approved by the SEC. Publicly offered funds (*i.e.*, funds that may be offered to retail investors, among others) are, as in the United Kingdom, subject to a high degree of regulation. To fall within the private placement safe-harbor rules in the United States, the fund interests may (with limited exceptions) be sold only to "accredited investors". Accredited investors include (*a*) certain types of institutional investors with a net worth of over US$ 5 million as well as (*b*) natural persons with a net worth of over US$ 1 million or with an income of US$ 200,000 (or US$ 300,000 jointly with a spouse) in each of the two most recent years with a reasonable expectation of reaching the same income level in the current year. The securities must not be offered via general solicitation or advertising to the public. In addition to this private placement exemption from the public

offering registration requirements, there are separate exemptions in the United States for registration of the funds themselves as investment companies that apply if (*i*) the funds have less than 100 beneficial owners or (*ii*) the fund's beneficial owners are limited to "qualified purchasers" (which generally include natural persons who own at least US$ 5 million in investments and entities that own at least US$ 25 million in investments). The U.S. "accredited investor" standard with respect to natural persons was recently reviewed thoroughly as part of U.S. legal reforms in response to the financial crisis, and with one minor adjustment (excluding from a person's net worth the value of their primary residence), was deemed appropriate as a continuing standard.

3. Dubai International Financial Centre. The DIFC's new Collective Investment Funds regime was enacted on July 11, 2010 ("DIFC Funds Regime"). The DIFC Funds Regime is administered by the Dubai Financial Services Authority (the "DFSA"). A primary feature of the DIFC Funds Regime is a distinction between Public Funds and Exempt Funds. Some of the key features of these types of funds are:

(a) *"Public Funds"* are open to retail investors and can be marketed by way of public offer. As Public Funds are open to retail investors, more extensive regulatory requirements apply to Public Funds to protect retail investors. These requirements meet international standards for retail protection, in particular, the International Organization of Securities Commission's principles for regulating collective investment schemes. These include detailed disclosure in the Public Fund's prospectus to enable retail investors to make an informed investment decision relating to the Public Fund and independent oversight of the Public Fund management either by a three-member oversight committee or by the trustee or eligible custodian of the Public Fund.

(b) *"Exempt Funds"* are open only to "Professional Clients" (as defined in the DIFC Funds Regime) who make at least a minimum subscription of US$ 50,000 each. Exempt Funds have a fast-track registration process based heavily on self-certification and are subject to fewer regulatory requirements than Public Funds (which may be distributed by public placement) such as less stringent disclosure requirements. Exempt Funds can only have 100 or fewer unit holders and cannot be offered to the public. Mass marketing activities relating to units of Exempt Funds are generally not undertaken because such marketing would likely amount to a public offer, which can only be made in respect of a unit of a Public Fund. Exempt Funds can be distributed only by way of private placement. In order to be classified as private placement, an offer for subscribing to units of an Exempt Fund should be made to a person who is likely to be interested in the offer as a result of (*i*) previous contact; (*ii*) a professional or other connection; or (*iii*) statements or actions by the person subscribing to the offer that indicate that he is interested in offers of that kind.

Additionally, the DFSA Funds Regime provides for the creation of certain type of specialist funds including Private Equity Funds that are generally based on the Exempt Funds model.

Under the DIFC Funds Regime, a Professional Client is classified as a person (individual or body corporate) owning net assets of at least US$ 500,000 or an individual who has been, in the previous two years, an employee of the authorised firm licensed by the DFSA that is promoting the fund, or an employee in a professional position of any authorised firm licensed by the DFSA, who, in each case, appears, on reasonable grounds, to have sufficient experience and understanding of relevant financial markets, products or transactions and any associated risks, and who has not elected to be treated as a retail client. Certain categories of entities may qualify as Professional Clients (for example, a collective investment fund, a regulated pension fund, regulated entities or financial institutions, governments, government agencies, central banks or other national monetary authorities, public authorities, state investment bodies, supranational organizations, regulated exchanges, listed body corporate or body corporate with a called up share capital of at least US$ 10,000,000, or any other institutional investor whose main activity is to invest in financial instruments, including an entity dedicated to the securitization of assets or other financial institutions). In addition, a personal investment vehicle may be classified as a Professional Client if it is established and operated for the sole purpose of facilitating the management of the investment portfolio of an existing Professional Client.

V. Sophistication Concerns Relating Primarily to High-Net-Worth Individuals

We would like to make a few suggestions to address ESCA's concern that certain high-net-worth individuals and potentially other investors may lack the sophistication required to appreciate the risks associated with certain Foreign Investment Funds—despite their net wealth. We believe that these suggestions have the benefits of being narrowly tailored to address such concerns while still allowing such investors access to attractive private equity fund investment opportunities and avoiding some of the more harmful unintended consequences that we fear the currently proposed Regulation might entail.

1. Risk Disclosure. We suggest drawing investors' attention to the risks associated with a particular investment by requiring that a prominent legend be included in the private placement memoranda of the Foreign Investment Fund containing language substantially in the form of the following:

> "*The interests in the Fund have not been recommended, approved or disapproved by the securities regulatory authority of any state, nor has any such securities regulatory authority passed upon the accuracy or adequacy of this Memorandum. Investment in the Fund is suitable only for sophisticated investors and requires the financial ability and willingness to accept the high risks and lack of liquidity inherent in an investment in the Fund. Investors in the Fund must be prepared to bear such risks for an indefinite period of time. No assurance can be given that the Fund's investment objective will be achieved or that investors will receive a return of their capital. Accordingly, an investment in the Fund should only be considered by persons who can afford a loss of their entire investment. Past activities of investment entities associated with the sponsor of the Fund provide no assurance of future success. In making an investment decision, prospective investors must rely on their own examination of*

the Fund and the terms of this offering, including the merits and risks involved. Prospective investors should not construe the contents herein as legal, tax, investment, accounting or other advice, and each prospective investor is urged to consult with its own advisors with respect to legal, tax, regulatory, financial and accounting consequences of its investment in the Fund, the suitability of the investment for such investor and any other relevant matters concerning an investment in the Fund."

The use of such a legend would ensure that prospective investors are put on notice of the risks associated with making the investment.

2. Self-Certification. In order to determine whether an investor's wealth is such that it appropriately fits within the non-retail investor exemption we proposed in Section IV above, we recommend obtaining a written self-certification from investors in their subscription documents as to their sophistication, acknowledgment of risks and non-retail status. This would be consistent with the practice in the United States, the United Kingdom and other leading jurisdictions around the world. The fund sponsor would be allow to rely on such certification as long as it has a reasonable belief that the certification is accurate. We understand that ESCA may be considering a certain minimum investment threshold for a particular Foreign Investment Fund as a measure of sophistication. Although we are not necessarily opposed to that approach if ESCA ultimately determines that it is unavoidable, we do have some concerns and would at the very least like to caution ESCA against imposing too high a threshold since that may force an investor to invest more than what it otherwise would have deemed appropriate just to gain access to what it believes to be a very attractive investment opportunity. For this reason, we favor the self-certification.

3. Anti-Fraud Protection. We understand that one of ESCA's key concerns is that it does not currently have any recourse against a fund sponsor for fraudulent marketing to unsophisticated investors. Similar to other leading jurisdictions (such as the United States), ESCA could consider addressing this concern by adopting an anti-fraud provision prohibiting fund sponsors from intentionally making false or misleading statements to investors or prospective investors in connection with the offering of interests in a Foreign Investment Fund rather than imposing rigid licensing and chaperoning requirements that are costly and burdensome for all parties and ultimately unlikely to protect investors against fraudulent marketers.

4. Reverse Solicitation. In the event that ESCA, despite all the arguments we have set forth in this letter, determines to retain certain requirements of the Regulation for non-retail offerings, we would like to propose that ESCA distinguish between cases where a sponsor markets a product to an investor at such investor's initiative (so called "reverse solicitation") and where a sponsor actively approaches the investor. We recommend that ESCA exempts marketing in response to a reverse solicitation from the requirements. In particular, the chaperone requirement would seem to fill little function in this scenario. The prospective investor will already have made a conscious decision to approach the fund sponsor, which in and of itself shows a certain level of sophistication

and desire to invest in the fund sponsor's products. In such cases, the likelihood that the investor is lured into investing in a product that does not comport with its risk profile by a suitcase banker must be negligible.

VI. Informal Exemptions

While technically in breach of the official regulations, regulators in several countries have permitted various levels of informal exemptions for private offerings of interests in foreign investment funds to sophisticated investors. Although such informal exemptions are marginally better than no exemptions at all, in our experience they produce a number of negative consequences, often leading to less investor protection (even for those unsophisticated retail investors who need it the most) and greater uncertainty (for sophisticated fund sponsors and investors, who rely on clear rules and regulations on which to structure their commercial dealings). On the one hand, enforcement becomes difficult for the regulators and *ad hoc* application of the rules leads to inequitable and ineffective investors' protection. On the other hand, uncertainty in the application of a regulatory regime discourages foreign fund sponsors from marketing in the region because of potential contractual, civil and criminal exposure, which ultimately also has a negative impact on local investors and the ability of the region to maintain its status as a desirable jurisdiction for investment activity. Based on our experiences, clearly established rules are of benefit to all constituents and most conducive to growth.

VII. Conclusion

In conclusion, while we applaud the fundamental policy goals of the Regulation in seeking to establish a comprehensive and protective regime for local investors, we are concerned that the great majority of foreign private equity funds would be unable to comply with the Regulation in its current form, which we believe would be to the detriment of not only such funds, but also UAE investors and the competitiveness of the UAE in the international arena.

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The PEGCC and AVCAL appreciate ESCA's consideration of our views, and are ready and available to respond to any questions that ESCA may have concerning this letter or that otherwise may develop concerning the private equity industry in the UAE.

Respectfully submitted,

Douglas Lowenstein
President
Private Equity Growth Capital Council

Dr. Katherine Woodthorpe
Chief Executive
The Australian Private Equity & Venture Capital Association Limited