



October 9, 2012

Dr. Thomas Steffen
State Secretary
Federal Ministry of Finance
Wilhelmstrasse 97
10117 Berlin
Germany

Re: Draft Legislation that Would Implement the Alternative Investment Fund Managers Directive in the Federal Republic of Germany

Dear Dr. Steffen:

The Private Equity Growth Capital Council (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 36 of the world’s leading private equity and growth capital firms (“private equity firms”) united by their commitment to growing and strengthening the businesses in which they invest.¹

Many of the PEGCC’s members manage and advise private equity, growth capital and other alternative investment funds (collectively, “funds”) that invest in Germany, and have done so for many years. A large number of these private equity firms and funds focus on investing in small and medium-sized enterprises, with the aim of helping those businesses improve their operations and, where appropriate, expand beyond their home country (such as Germany) and become global companies. Many of the PEGCC’s members have raised material amounts of capital from professional investors in Germany, such as German insurance companies, that invest in private equity funds around the world as part of their asset diversification strategies.

The PEGCC is deeply concerned that draft legislation proposed by the Federal Ministry of Finance (the “Draft Implementing Legislation”) to implement the Alternative Investment Fund Managers Directive (the “AIFMD”) in Germany, if adopted as currently drafted, would effectively ban U.S. private equity firms from marketing the funds that they manage to professional investors in Germany. Furthermore, the additional requirements that a U.S. private equity firm would need to satisfy were it to market its funds to German professional investors from mid 2013 are onerous, will be difficult to satisfy

¹ The members of the PEGCC are: American Securities; Apax Partners; Apollo Global Management LLC; ArcLight Capital Partners; The Blackstone Group; Brockway Moran & Partners; The Carlyle Group; CCMP Capital Advisors, LLC; Crestview Partners; The Edgewater Funds; Francisco Partners; Genstar Capital; Global Environment Fund; GTCR; Hellman & Friedman LLC; Irving Place Capital; 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; TPG Capital (formerly Texas Pacific Group); Vector Capital; Vestar Capital Partners; and Welsh, Carson, Anderson & Stowe.

in practice and extend far beyond the uniform protections set down in the AIFMD. The PEGCC respectfully requests that you consider these concerns when finalizing the Draft Implementing Legislation.

The Draft Implementing Legislation Would Effectively Ban U.S. Private Equity Firms from Marketing Their Funds to Professional Investors in Germany

Under the AIFMD, until late 2015 at the earliest, U.S. and other non-EU private equity firms will not be eligible to register and benefit from the EU “marketing passport” that will benefit EU private equity firms beginning in July 2013. Fortunately, although U.S. and other non-EU private equity firms cannot benefit from the marketing passport until late 2015 at the earliest, the AIFMD permits those firms to continue marketing their funds to EU professional investors under national private placement regimes, subject to a set of uniform minimum protections. Unfortunately, however, the Draft Implementing Legislation would impose conditions to marketing in Germany on U.S. and other non-EU fund managers that go far beyond the uniform protections of the AIFMD.²

Most alarmingly, certain of these additional conditions in the Draft Implementing Legislation would effectively ban U.S. private equity firms from marketing their funds in Germany because the conditions are inconsistent with the U.S. regulatory structure applicable to private equity firms and funds, and with general industry practice in the United States. This is the case even though every sizeable U.S. private equity firm is now required to register, and is regulated, under the Investment Advisers Act of 1940, as expanded and amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Advisers Act”).

Specifically, the Draft Implementing Legislation would make it impossible in practice for U.S. private equity firms to market the private funds that they manage and advise to professional investors in Germany because, under the Draft Implementing Legislation, a non-EU private equity firm would not be permitted to market an alternative investment fund to professional investors in Germany unless (1) the private equity firm (the fund manager/adviser) and the fund are subject to “efficient” public supervision and (2) the private equity firm and the fund are located in the same country.

Many U.S. private equity firms cannot meet the first requirement listed above because the Advisers Act requires registration of, and regulates, private equity firms, as well as the general partners of their funds, but not the funds themselves.³ Furthermore, most U.S. private equity firms cannot satisfy the second requirement listed above because, very frequently, U.S. private equity firms and their funds are required by their U.S. and non-U.S. fund investors to be organized in different jurisdictions to address the tax and regulatory concerns of those investors. This is a common and legal practice for U.S. (and many non-U.S.) private equity firms.

² To our knowledge, no EU Member State that has a substantial professional investor base – other than Germany – currently intends to go beyond the uniform minimum provisions established by the AIFMD, presumably on the basis that those Member States acknowledge the importance for local professional investors of maintaining access to non-EU funds and fund managers.

³ We note that private equity funds organized under the laws of Delaware or another state of the United States are not entirely unregulated. They are subject to the anti-fraud provisions of, and other regulation under, the U.S. Securities Act of 1933, the U.S. Investment Company Act of 1940 and other U.S. federal and state securities laws, as well as state partnership laws and, in some cases the U.S. Employee Retirement Income Security Act of 1974, as well as other federal and state laws, rules and regulations. However, it is not clear to the PEGCC that the Ministry of Finance would view this level of regulation as satisfying the requirements of the Draft Implementing Legislation.

The PEGCC believes that the registration under the Advisers Act of private equity firms (managers), and the general partners of the funds that those firms manage, is more than adequate to protect the interests of German and other investors in those funds. Accordingly the PEGCC believes that, at least for funds managed by U.S. private equity firms that are registered under the Advisers Act, the requirements that (1) the funds themselves also be subject to regulation under the Advisers Act and (2) those funds must be organized in the same jurisdiction as the manager, should not be conditions to marketing to professional investors in Germany.⁴

The Draft Implementing Legislation Imposes Other Onerous Conditions Not Required by the AIFMD on U.S. and Other Non-EU Private Equity Firms

Finally, other conditions set out in the Draft Implementing Legislation are also more onerous than required by the AIFMD and will be difficult to satisfy. These include (1) the requirement to use a depositary that needs to comply with all obligations under the AIFMD, (2) the requirement to submit to BaFin German translations of annual reports of the manager and other documentation and (3) the requirement to comply with all requirements under Chapter 3 of the German law.

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The Draft Implementing Legislation presents important market access concerns for U.S. private equity firms. Germany's proposal to introduce significantly more onerous requirements than are required by the AIFMD could seriously harm the interests of German and other investors in funds managed by U.S. and other non-EU private equity firms. The PEGCC respectfully requests that you consider these concerns and revise the Draft Implementing Legislation to take them into account.

The PEGCC appreciates the opportunity to express these concerns, and would be pleased to answer any questions you might have regarding this topic.

Respectfully submitted,



Steve Judge
President and CEO
Private Equity Growth Capital Council

cc: Ambassador Peter Ammon

⁴ We note that our request that public supervision of funds themselves not be required, so long as the manager is regulated, is consistent with the AIFMD because the AIFMD itself is based on the principle of the regulation of managers, not funds.