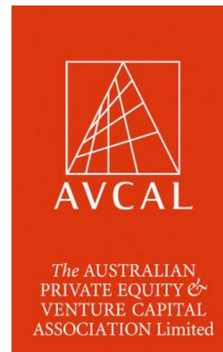

SUBMITTED BY COURIER AND E-MAIL

June 28, 2011

Capital Markets Authority
Ahmad Tower-Sharq, Floor 19
P.O. Box. 3913
Safat, 13040
Kuwait

Attention: Mr. Sulaiman Hamad Al Moussa, Manager of the Directorate for Companies Organisation and Investment Funds

Mr. Saleh Mubarak Al-Falah, Chairman of the Board of Commissioners

Re: Executive Regulations of Law No. 7 of 2010 Concerning Establishment of a Capital Markets Authority and Organization of Security Authority

Dear Sirs:

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 *Executive Regulations of Law No. 7 of 2010 Concerning Establishment of a Capital Markets Authority and Organization of Security Authority* (the "Regulation") published in Kuwait's Official Gazette, Issue No. 964 (56th year). While we understand that no official comment period has been opened to the public in connection with publication of the Regulation, which came into force in March of this year, we are grateful for your consideration of our views and respectfully request a letter from the Capital Markets Authority (the "CMA") (*a*) outlining official guidance to

the general public on the interpretation of the Regulation as applied to the activities in Kuwait of investment funds established outside Kuwait ("Foreign Investment Funds") and (*b*) offering specific responses to the questions posed herein (a "Letter of Guidance").

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 35 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 includes international private equity fund sponsors whose interests would be affected most significantly by the Regulation's potential role in regulating Foreign Investment Funds, our 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 support the CMA in issuing the Regulation insofar as it is protecting investors that may lack a full understanding of the characteristics of investment funds and the ability to bear the financial risks associated therewith. The Regulation's investment fund policies are in many ways tailored towards retail investors and liquid investment funds that are publicly offered in Kuwait. However, we believe the Regulation casts too wide a net in that it inadvertently restricts the offerings of interests in Foreign Investment Funds, even when such offerings are conducted on a private placement basis only to sophisticated investors (*e.g.*, institutional and governmental investors such as the Kuwait Fund for Arab Economic Development, the Kuwait Investment Authority and the Public

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[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; Crestview Partners; Francisco Partners; General Atlantic; 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; Thomas H. Lee Partners; TPG Capital (formerly Texas Pacific Group); Vector Capital; and Welsh, Carson, Anderson & Stowe.

Institution for Social Security) that have a thorough understanding of the financial product being offered and the means to bear the full risks associated therewith. In addition, private equity funds will be largely unable to comply with many of the Regulation's requirements, as is described in more detail below in Section II, and the impact on the opportunities available to Kuwaiti investors is likely to be severe, as is described in more detail below in Section III. Furthermore, without the necessary amendments discussed herein, we respectfully believe that the Regulation is likely to have a negative impact on Emir Sabah IV Al-Ahmad Al-Jaber Al-Sabah's vision of Kuwait becoming a leading regional financial center.

To address these concerns while preserving the protective nature of the Regulation for discerning investors and as further described in Section IV below, we respectfully request that the CMA provide clarification to the private placement exemption the CMA has already established the framework for in Article 302 of the Regulation by issuing a Letter of Guidance exempting Foreign Investment Funds from the Regulation's substantive requirements if such funds are offered in Kuwait on a private placement basis. Although the Regulation acknowledges the concept of a private placement, it currently appears to impose the same substantive requirements on funds that are marketed through such a private placement as those that are offered publicly.

II. Impact on Foreign Investment Funds

Article 310 of the Regulation sets forth the requirements that appear to apply to all Foreign Investment Funds marketed in Kuwait. We discuss below the difficulties complying with these requirements pose for global private equity funds (in many cases it may be impossible for them to comply with the Regulation). We respectfully believe that, without clear exemptions to the Regulation, such restrictions will serve to disadvantage sophisticated Kuwaiti investors by causing sponsors to turn away from fundraising in Kuwait due to what are perceived as unnecessary and overly burdensome requirements.

1. Chaperone Requirement. To the extent a Foreign Investment Fund is not separately licensed by the CMA, Article 310(2) of the Regulation requires such Foreign Investment Fund to retain a CMA-licensed local promoter and distributor (the "Chaperone Requirement") to conduct marketing and distribution activities in Kuwait.[2] 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 for both Foreign Investment Funds and sophisticated Kuwaiti investors. In particular:

(a) these investors often develop close working relationships with the sponsors of Foreign Investment Funds and inserting a chaperone into such

[2] Although the Regulation permits a Foreign Investment Fund sponsor to apply for a license to market directly to Kuwaiti investors, the process is likely to be prohibitively burdensome and time-consuming for the majority of offshore fund sponsors in practice.

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 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 Kuwait 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 Kuwaiti investors outside of Kuwait, thus bringing them outside the purview of the CMA altogether; and

(e) in light of clauses (a) through (d) above, the Chaperone Requirement would impose significant logistical and commercial impediments for both foreign fund sponsors and Kuwaiti 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 Kuwaiti investors as compared to investors in other jurisdictions.

Based on significant practical experience, we believe that the similar rules that were introduced in the Kingdom of Saudi Arabia (requiring a locally-licensed "Authorised Person" to be engaged to conduct the offering of foreign funds in Saudi Arabia) have disadvantaged sophisticated Saudi Arabian investors because certain international sponsors are turning away from fundraising in Saudi Arabia due to what are perceived as overly stringent requirements. Instead, investors and fundraising activities are migrating from Saudi Arabia to other free zones and jurisdictions like the Dubai International Financial Centre, Switzerland and the United Kingdom. We believe that a similar movement away from marketing in Kuwait would likely have a negative impact on Kuwait's ambition of becoming a leading regional financial center.

2. Additional Requirements. Pursuant to Article 310(3) of the Regulation, all of the substantive requirements of the Regulation applicable to domestic funds must be complied with by foreign investment funds marketing in Kuwait unless the CMA decides, in its sole discretion, to release a particular fund from certain specific requirements. Chapter Eight of the Regulation sets forth the requirements applicable to investment funds in Kuwait (including the promotion of Foreign Investment Funds), a number of which appear to have been designed for retail funds and funds with liquid trading strategies. It would be difficult or impossible for most global private equity funds to

comply with such requirements since they tend to take large long-term positions in private companies (or public companies that they take private). Such provisions include the following restrictions and requirements, among others:

(a) *An investor must pay its entire "unit value" at the time of its subscription to an investment fund (rather than having capital called down on a quarterly basis, or as otherwise needed). [Article 295]* This requirement is incompatible with the structure of private equity funds, in which an investor only makes a *commitment* to contribute capital at the time of its subscription for an interest in a fund, with capital being drawn down as needed to fund investments and expenses. Requiring an investor to contribute the entire "unit value" in cash to the fund sponsor at the investor's closing date is not advantageous to the investor because it has to come out of pocket with funds that are not deployed until a later date (private equity funds typically have the right to make investments over a five- to six-year period).

(b) *Each fund manager must make available to the CMA <u>and the public</u> the annual audited financial statements of each investment fund within 30 days from the end of each fiscal year of the fund. [Article 350]* This requirement to make financial statements publicly available is inconsistent with the standard, accepted practice of private equity funds, pursuant to which proprietary valuation and other information regarding the fund's portfolio is generally kept confidential among the sponsor and the investors in the fund. Public disclosure would erode the proprietary value of this information, thus disadvantaging investors and the portfolio companies of the fund, without providing what we believe to be a commensurate benefit since Foreign Investment Funds are not open to investment by the public. In addition, each investment fund must provide (*i*) quarterly reports to its unit holders within 15 days from the end of each quarter and (*ii*) monthly information to the public through the stock exchange within seven days after the end of each month. Private equity funds with illiquid holdings are dependent on receiving financial information from their underlying portfolio companies and as a result, it would not be possible to provide accurate reporting in the timeframe established by the Regulation. In private equity funds reports are required to be provided to investors within a time period date negotiated on a fund-by-fund basis, which in any event is significantly longer than the periods required by the Regulation (often within 90 days after the end of a quarter (where such reports are provided) and within 120 days after the end of a fiscal year). These standard private equity fund reporting practices are the result of careful negotiations between fund sponsors and sophisticated institutional investors from across the globe.

(c) *No investment fund may own more than 10% of the securities of any one entity. [Article 347(1)]* This requirement is fundamentally inconsistent

with the core private equity buyout/growth capital fund models, which are premised on seeking control or significant minority positions in portfolio companies, often even acquiring up to full ownership. These funds acquire and hold control positions with the goal of improving operations, governance, capital structure and strategic direction of the businesses in which they invest. We respectfully believe that the application of this requirement to Foreign Investment Funds would effectively close off the global private equity fund market to Kuwaiti investors.

(d) *No investment fund may hold more than 10% of its net asset value in one Portfolio Company. [Article 347(2)]* Private equity funds are typically subject to diversification limitations set forth in their governing documents that are the result of careful negotiations with investors and therefore reflect the judgment of the both the sponsor and investors as to the appropriate level of concentration given the particular investment strategy of the fund and the anticipated dedication of resources to each investment. Commonly, this figure is 20% or 25% (or higher), often with the ability for the fund to make larger investments on a short-term basis or with the approval of an advisory committee of investors. In addition to closing off larger investment opportunities, because private equity funds actively manage their portfolio investments during their long-term holding periods, imposing a lower threshold would have the effect of stretching a firm's resources more thinly across more investments, potentially to the detriment of all participants. Finally, this requirement would preclude Kuwaiti investors from participating in "co-investment funds" designed to invest in a single, identified portfolio company, which are often highly desired by investors as a result of the favorable economic terms on which they are offered.

(e) *No investment fund may borrow more than 10% of its net asset value (increased to 30% for real estate funds). [Article 347(3)]* The extent to which a fund may borrow is a commonly negotiated term, and for a number of funds (such as certain real estate funds), borrowing in excess of 10% or 30% of a fund's net asset value may be an integral part of the fund's investment strategy. We do, however, acknowledge that borrowing at the fund level other than for certain short-term purposes is unusual for private equity buyout funds. That being said, sophisticated investors will be able to assess whether leverage is consistent with their risk tolerance in connection with negotiating the terms of the fund, taking into account that strategy of that particular fund.

(f) *The employees and officers of a fund manager may not serve on the board of, or hold any position in, any of the portfolio companies managed by the manager. [Article 317]* This requirement is also largely inconsistent with the common private equity fund model in which a fund sponsor seeks to gain representation on the boards of portfolio companies. As discussed

above, the investment strategies of private equity funds typically focus on control positions and active management of portfolio companies to maximize value. The ability of private equity fund sponsors to appoint board members and thereby influence the management and operations of portfolio companies is a core component of their ability to add value to those companies and therefore to provide attractive returns to investors.

(g) *At least one-third of the members of the investment fund's board of directors must be independent, and approval of the CMA is required prior to making any change in the board's membership. [Article 314]* While private equity funds are often structured as limited partnerships and therefore generally do not have boards of directors, investment decisions are typically made by an investment committee of the general partner that is traditionally constituted entirely by the sponsor's investment professionals. The private equity fund business model is premised on the sponsor's investment professionals to manage the fund. Investors rely on the sponsor's decision-making expertise, often choosing the funds in which they will invest based upon a sponsor's reputation and/or track record. It would be inconsistent with this model to include independent seats on the investment committee, and therefore most existing private equity funds would be unable to comply with this restriction. To the extent this requirement is meant to address conflicts of interest issues, tailored procedures for dealing with conflicts are typically expressly negotiated and specified in the governing documents of a fund.

(h) *Organizational expenses of an investment fund may not be borne by the fund. [Article 321]* It is the accepted market practice for the investors of a private equity fund to share in the fund's organizational expenses up to a specified, pre-negotiated cap, and therefore most Foreign Investment Funds would not be in compliance with this requirement. A large portion of such expenses consists of costs for negotiating the fund documentation with the investors to their liking. This requirement may have a chilling effect on a sponsor's ability to entertain discussions on an investor-by-investor basis about their specific investment requirements, which would be detrimental for the investors.

(i) *The assets of the investment fund must be held by an independent custodian headquartered in Kuwait or an offshore sub-advisor appointed by the Kuwaiti custodian for assets held outside of Kuwait. [Article 339]* We presume that this requirement in particular was intended for Kuwaiti-based funds investing in Kuwait, since it would be both impractical and inconsistent with regulations applicable in the home countries of Foreign Investment Funds to apply this to all investments of Foreign Investment Funds merely because they have one or more Kuwaiti-based investors. However, with no express exemption from this requirement, sponsors have no certainty as to its applicability.

(j) *Governing documents of a fund must be available in Arabic free of charge. [Article 306]* We understand the logic of this requirement for local Kuwaiti funds or for foreign-sponsored funds offered in Kuwait on a retail basis. However, this requirement places an unnecessary administrative burden on Foreign Investment Funds which often have investors from across the globe and governing documents in another language to accommodate the requirements of all such investors. In our experience, the governmental, institutional, and other sophisticated investors based in Kuwait that participate in private equity funds, along with their representatives and legal advisers, are highly proficient in English.

(k) *Amendments to the Articles of Association of an investment fund may not be implemented without prior approval of the CMA. [Article 307]* As a general rule, the governing documents of those funds contain carefully negotiated provisions dictating the necessary investor approvals for various types of amendments (for instance, an amendment may require a super-majority vote if such amendment would alter certain types of material economic rights under the agreement). We believe that it would be prohibitively burdensome, and unduly detrimental to both investors and sponsors, to require the CMA to review and approve investments that have already been approved by investors pursuant to these specifically negotiated amendment provisions.

(l) *All units in an investment fund must have "equal rights". [Article 295]* Foreign Investment Funds would generally not be able to comply with this restriction insofar as the sponsors typically hold general partner interests that have different governance and economic rights than the limited partner interests held by investors. Even as between limited partners, it is common practice in the private equity industry for sponsors to negotiate "side letter" agreements with certain limited partners to accommodate, among other things, investment restrictions, regulatory limitations and other particular needs of those investors. Importantly, Kuwaiti institutional investors have a long tradition of benefitting from such side letter arrangements (*e.g.*, catering to their requirements of being excused from non-*Shari'ah* compliant transactions).

(m) *Foreign Investment Funds must pay a fee equal to 1% of the total value of the units intended to be marketed in Kuwait* (Resolution No. 2 of 2011 Concerning Issuance of the Schedule of Fees, issued on April 12, 2011). The licensing application fee structure places a substantial financial burden on Foreign Investment Fund sponsors and is expected to have a significant chilling effect on marketing in Kuwait, to the detriment of Kuwait's competitiveness as a leading financial center in the region (particularly since no other major jurisdiction, to our knowledge, has adopted a similar approach).

We believe that the mere potential for any of these restrictions to apply to a Foreign Investment Fund (in addition to Article 310(4), pursuant to which the CMA may require a Foreign Investment Fund to fulfill any other terms and conditions it deems appropriate) could lead to great unpredictability for Foreign Investment Fund sponsors and therefore discourage marketing to sophisticated Kuwaiti investors, including those that have been longtime successful investors in global private equity funds.

III. Impact on Local Investors

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

On one end of the spectrum, governmental and institutional investors such as the Kuwait Fund for Arab Economic Development, Kuwait Investment Authority and the Public Institution for Social Security may be disadvantaged when compared with other investors of similar size and stature (for example, the Abu Dhabi Investment Authority, the Abu Dhabi Investment Council and the Emirates Investment Authority) 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 Kuwait. Many of Kuwait'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 fully evaluate 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.

At the other end of the spectrum, high-net-worth individuals often 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 is 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. Private Placement Exemption

To address the concerns we raised in Sections II and III above, and to ensure that the Regulation achieves its objective of protecting Kuwaiti retail investors without unduly restricting the investment activities of non-retail investors, we respectfully request

that the CMA consider issuing a Letter of Guidance giving substance to the private placement exemption in the Regulation by excluding Foreign Investment Funds marketed solely to non-retail investors on a private placement basis from the application of the Regulation. As noted above, the Regulation as currently drafted recognizes the concept of a "private placement" and distinguishes between foreign and domestic funds; however, it currently appears to impose the same substantive requirements on funds marketed solely by Foreign Investment Funds through private placements as domestic funds offered publicly (described in Section II above).

Pursuant to Article 302 of the Regulation, it appears that in order to qualify as a "private placement," an offering of securities must fall into one of several categories, which include (among others), an offering made to (*1*) the Government of Kuwait, the Central Bank of Kuwait, an investment company or certain other specified sophisticated investors, or (*2*) no more than 200 investors in Kuwait, in each case with a minimum investment amount of 100,000 Kuwaiti Dinars. We seek clarification that an offering may qualify as a private placement by meeting any one of the four prongs set forth in Article 302, rather than all of the prongs.

V. Private Placement Exemptions in Other Jurisdictions

Many jurisdictions have adopted private placement exemptions for investment funds offerings. For your ease of reference, we have outlined the exemptions in the United Kingdom, United States and 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. We believe that the Regulation's private placement definition is comparable to the concepts outlined below, and our hope is that the descriptions that follow will serve as a helpful guide to the CMA as to how other countries have implemented a private placement exemption to their respective regulatory marketing regimes.

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.

(a) *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.

(b) *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: (*i*) "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), (*ii*) "high net worth bodies" (which include *inter alia* unincorporated associations or partnerships that have net assets of not less than £5 million) and (*iii*) "certified high net worth individuals", being individuals who certify either that (*A*) they had during the immediately preceding financial year annual income to a value of at least £100,000, or (*B*) they held throughout the immediately preceding financial year net assets to the value of at least £250,000. If prospective investors fall 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 and the substantive restrictions applicable to public offerings therefore do not apply to the fund conducting such private placement. 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.

VI. Informal Exemptions

We recognize that the CMA has the ability, including under Article 310(3), to adopt an informal or *ad hoc* approach not to enforce some or all of the provisions of the Regulation against Foreign Investment Funds offered on a private placement basis. However, although such an informal approach to exemptions is marginally better than no exemption at all, in our experience this type of approach is likely to 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, under this approach enforcement becomes difficult for the regulator and *ad hoc* application of the rules leads to inequitable and ineffective investors' protection. On the other hand, the resulting 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 understand 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 Kuwaiti investors and the competitiveness of Kuwait as a leading regional financial center.

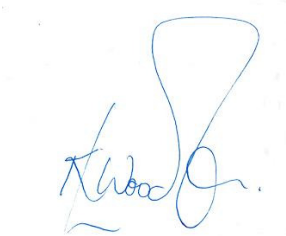
* * *

The PEGCC and AVCAL appreciate the CMA's consideration of our views and are ready and available to respond to any questions that the CMA may have concerning this letter or that otherwise may develop concerning the private equity industry in Kuwait. We also welcome an in-person discussion and collaboration on how to appropriately accommodate Foreign Investment Funds offered on a private placement basis, while still

preserving the protections that the Regulation establishes for other offerings. We have prepared a fact sheet describing the structure and operations of private equity funds in further detail. Other regulators have found such fact sheet to be helpful and we would be happy to share it with the CMA.

Respectfully submitted,

Douglas Lowenstein
President
Private Equity Growth Capital Council



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