DAVISBROWN
LAW FIRM

INVESTMENT ADVISER ALERT

SEC ADOPTS RULES IMPLEMENTING CHANGES FOR INVESTMENT ADVISER EXEMPTIONS AND REGISTRATION

The U.S. Securities and Exchange Commission (the "SEC") has adopted rules implementing provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") which, among other things, repealed a previous registration exemption for certain investment advisers with fewer than 15 clients. In effect, the Dodd-Frank Act has extended registration requirements under the Investment Advisers Act of 1940 (the "Advisers Act") to advisers of hedge funds, private equity funds and other private funds.

In addition to removing the 15-client exemption previously provided by Section 203(b)(3) of the Advisers Act, effective July 21, 2011 the Dodd Frank Act has created the following three limited exemptions from registration under the Advisers Act:

1. Advisers who solely advise "venture capital funds;"

2. Advisers who solely advise "private funds" if assets under management are less than $150 million; or

3. Advisers who are "foreign private advisers."

Although advisers eligible to rely on these new exemptions will no longer be required to register with the SEC, they will be required to report certain information to the SEC on an ongoing basis by completing certain portions of the revised Form ADV.

In its June 22, 2011 release, the SEC defined the term "venture capital fund" generally as a private fund that:

1. holds no more than 20% of its capital commitments in non-qualified investments (equity securities of qualifying portfolio companies);
2. does not borrow or incur leverage (except limited short-term borrowings);
3. does not generally offer its investors redemption or similar liquidity rights;
4. represents itself as pursuing a venture capital strategy; and
5. is not registered under the Investment Company Act of 1940 and is not a business development company.

In its June 22, 2011 release, the SEC described criteria for exemption for private funds with less than $150 million under management as follows:

1. An adviser may advise an unlimited number of private funds, but is not eligible for the exemption if it has one or more clients that are not private funds; and
2. In the case of a non-U.S. adviser, the exemption is available only as long as all of the adviser's U.S. clients are qualifying private funds.

In order to comply with the less than $150 million test, an adviser must annually calculate its aggregate private fund assets under management in accordance with revised Form ADV instructions. The computation is based on gross assets and includes proprietary assets, assets managed without compensation and, importantly for private equity managers, uncalled capital commitments.

A formerly exempt adviser who does not fall within one of the above exemptions may delay registration with the SEC until **March 30, 2012,** so long as the adviser: (1) during the course of the preceding 12 months, had fewer than 15 clients; and (2) neither holds itself out generally to the public as an investment adviser, nor acts as an investment adviser to a registered investment company or a business development company. In order to for registration to be effective on March 30, 2012, a Form ADV needs to be filed on or before **February 14, 2012**.

The new rules also adjust the dollar thresholds that trigger SEC registration, and provide a timetable designed to facilitate an orderly transition from SEC to state registration, where applicable. Under the rules, advisers with less $100 million in assets under management will be prohibited from registering with the SEC and instead will be required to comply with applicable state securities authorities, unless the adviser's state does not require registration or does not examine advisers, in which case SEC registration will be required. A new category of "midsized advisers" (generally, advisers with assets under management between $25 million and $100 million) must file an amendment to Form ADV no later than March 30, 2012 and, with certain limited exceptions, must withdraw their registration with the SEC by June 28, 2012 in order to transition their registration to applicable state securities authorities. Any adviser who falls within one of the three exemptions listed above, however, may voluntarily register with the SEC if the adviser has at least $100 million in assets under management. The new rules applicable to midsized advisers also contain a "buffer" for advisers whose assets under management hover near the $100 million assets under management threshold. For advisers whose assets under management are between $100 million and $110 million, registration is voluntary, and registration is not required until assets under management exceed $110 million. Once registered, an adviser will not be required to withdraw its SEC registration until its assets under management fall below $90 million.

In a separate release, the SEC has exempted "family offices" from the definition of "investment adviser" (and, thus, from the requirement to register under the Advisers Act) if:

1. the entity has no clients other than "family clients;"

Beverly Evans
Robert W. Dixon
Davis Brown Law Firm
215 10th St., Ste 1300
Des Moines, Iowa 50309
(515) 288.2500
www.davisbrownlaw.com

2. the entity is wholly owned by family clients and exclusively controlled (directly or indirectly) by "family members" or "family entities;" and
3. the entity does not hold itself out to the public as an investment adviser.

Each of these elements is addressed in detail in the SEC release.

These new rules for investment advisers contain various other grace periods, grandfathering and transition requirements that affected advisers should review carefully to ensure compliance. For further information regarding the above, see the SEC releases listed below, all available at: http://www.sec.gov/rules/final.shtml.

- SEC Investment Advisers Act Release No. 3220, File No: S7-25-10 June 22, 2011.
- SEC Investment Advisers Act Release No. 3220, File No: S7-36-10 June 22, 2011.
- SEC Investment Advisers Act Release No. 3220, File No: S7-37-10 June 22, 2011.

Beverly Evans
Robert W. Dixon
Davis Brown Law Firm
215 10th St., Ste 1300
Des Moines, Iowa 50309
(515) 288.2500
www.davisbrownlaw.com