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ABOUT THE AUTHOR

Alexander J. Davie is an attorney based in the Nashville, TN area. His practice focuses on corporate, finance, and real estate transactions. He works mainly with emerging companies, venture funds, entrepreneurs, and startups. His firm's website can be found at **www.alexanderdavie.com**.

In his corporate practice, Mr. Davie has worked extensively with his clients on all aspects of their businesses, including company formation, business planning, mergers and acquisitions, vendor and customer contracts, corporate governance, debt and equity financings, and securities offerings. In addition, he has represented investment advisors, securities brokers, hedge funds, private equity funds, and real estate partnership syndicators in numerous private offerings of securities and in ongoing compliance. Prior to returning to private practice, Mr. Davie served as the general counsel to a private investment fund manager.

In his real estate practice, he has participated in property acquisitions, mortgage financings, and commercial leasing matters throughout the United States. He has represented developers, governmental entities, life insurance companies, banks, and owners of malls, shopping centers, industrial parks, and office towers. He has worked on a number of transactions involving the syndication of real estate partnerships, advising sponsors on both real estate and securities issues.

State Investment Adviser Registration Requirements for Private Fund Managers Part 3: The Midwest

This post is the third in a series discussing the issues private fund managers face with state investment adviser registration requirements and how those requirements interact with federal law.

Previously, I have written about the fact that even when a private fund manager may be exempt from SEC registration, it still may be subject to a registration requirement with its own home state. The rules vary greatly from state to state. As the third installment in my series of posts dealing with these issues, I have summarized below the rules as they exist as of August 23, 2011 in the eight states in the Midwestern portion of the United States. Future posts will focus on states in other regions of the United States.

1. Illinois. Ill. Admin. Code tit. 14, § 130.805(b) exempts from registration " any investment adviser or federal covered investment adviser who during the immediately preceding twelve consecutive months has not had more than five clients in [Illinois]…" Therefore, if a fund manager manages five or fewer funds, it is exempt from registration. The exemption is contained in regulations; therefore the Illinois Securities Department could at some point in the future repeal it, though I am not aware of any plans to do so. Fund managers in Illinois registered with the SEC must make a notice filing with the Illinois Securities Department even if they would otherwise meet the five client exemption.[1]

2. Indiana. It appears that there is no exemption for private fund managers.[2] Any private fund manager in the state of Indiana must register with the Indiana Securities Division unless it is registered with the SEC. In addition, fund managers in Indiana registered with the SEC must make a notice filing with the Indiana Securities Division.

3. Iowa. There is no exemption for private fund managers. Any private fund manager in the state of Iowa must register with the Iowa Commissioner of Insurance unless it is registered with the SEC. In addition, fund managers in Iowa registered with the SEC must make a notice filing with the Iowa Commissioner of Insurance.

4. Michigan. Mich. Comp Laws § 451.2403(c) exempts from investment adviser registration "[a] person that does not hold itself out to the general public as an investment adviser and that has had, during the preceding 12 months... not more than 5 clients who are natural persons, who are residents of this state, and who are accredited investors as defined in [Regulation D]." Therefore, if a fund manager manages five or fewer funds, it is exempt from registration (provided that the funds qualify as accredited investors, which they would, as long as all investors in the funds are accredited investors). The exemption is statutory; therefore it will require an act of the state legislature to repeal it. Fund managers in Michigan registered with the SEC must make a notice filing with the Michigan Securities Division even if they would otherwise meet the five client exemption described above.

5. Minnesota. There is no exemption for private fund managers. Any private fund manager in the state of Minnesota must register with the Minnesota Commissioner of Insurance unless it is registered with the SEC. In addition, fund managers in Minnesota registered with the SEC must make a notice filing with the Minnesota Commissioner of Insurance.

6. Missouri. Prior to the repeal of the federal exemption contained in Section 203(b)(3) of the Investment Advisers Act of 1940 (also commonly known as the so-called "15 client exemption"), Missouri had an exemption for fund managers who were exempt under Section 203(b)(3) and who managed investments solely for private funds with at least $5 million under management. After the repeal of the Section 203(b)(3) exemption, fund managers must rely on a No-Action Determination by the Missouri Commissioner of Securities dated July 20, 2011, which extends this exemption until the earlier of June 28, 2012 or the promulgation of a state regulation similar to the Private Fund Adviser Exemption adopted by the SEC.[3] In any case, fund managers in Missouri registered with the SEC must make a notice filing with the Missouri Commissioner of Securities.

7. Ohio. Ohio Admin. Code § 1301:6-3-01(L) exempts from the definition of the term "investment adviser" any person who "during the course of the preceding twelve months: (a) [h]as had fewer than fifteen clients; (b) [d]oes not hold himself out generally to the public as an investment adviser; and (c) [h]as clients consisting solely of... "[a]ccredited investors" as defined in... Regulation D…" Therefore, most fund managers should be excluded from the definition of the term "investment adviser" and would not need to register. The exemption is contained in regulations; therefore the Ohio Division of Securities could at some point in the future repeal it, though I am not aware of any plans to do so. Since this rule excludes fund managers from the definition of the term "investment adviser," federally registered fund managers in Ohio do not need to make a notice filing with the Ohio Division of Securities if they meet the 15 client exemption described above. The Ohio Division of Securities provides a useful flowchart illustrating the above principles here.

8. Wisconsin. Wis. Stat. § 551.403(2)(a)(2m) exempts from investment adviser registration any person whose only clients in Wisconsin are certain categories of accredited investors under federal Regulation D. One of the applicable categories of accredited investor is any entity in which all of the equity owners are accredited investors. Therefore, most fund managers are exempt from registration in Wisconsin. The

exemption is statutory; therefore it will require an act of the state legislature to repeal it. In addition, fund managers in Wisconsin registered with the SEC are not required to make a notice filing with the Wisconsin Division of Securities if they meet a similar exemption, contained in Wis. Stat. § 551.405(2)(a)(2m).

As always, you should consult an attorney who is familiar with securities regulatory issues in assessing whether your particular fund management business is required to register under state law.

Footnotes

[1] The wording of Ill. Admin. Code tit. 14, § 130.805(b) is somewhat strange since it specifically exempts federal covered investment advisers from "registration" if they meet the five client exemption, yet federal covered investment advisers would be exempt from registration regardless of whether they met the five client exemption. There is no language in Illinois statutes or regulations providing for an exemption from notice filing requirements for federally covered investment advisers who meet the five client exemption. I have not had any discussions with staff at the Illinois Securities Department clarifying this apparent ambiguity.

[2] Pursuant to an "Amended Statement of Policy Regarding Private Equity/Venture Capital Funds and Investment Adviser Registration" dated July 10, 2008, there is an exemption for any person who "(i) maintains a place of business in [Indiana]; (ii) has had during the preceding twelve (12) months, not more than five (5) clients that are residents in Indiana; (iii) does not hold itself out generally to the public as an investment adviser; (iv) is exempt from registration under the Investment Advisers Act of 1940, as amended, by virtue of Section 203(b)(3) of that Act; and (v) provides investment advise [sic] to venture capital companies only." A venture capital company is a company which has at least 50% of its assets invested in "venture capital investments" or investments derived from "venture capital investments." A "venture capital investment" is an investment in a company over which (i) the venture capital company has management rights and (ii) is active in the production or sale of a product or service or in the development, ownership, purchase, or sale of real estate. Since Section 203(b)(3) is now repealed, this exemption would appear to no longer be available. I have not had any discussions with the staff at the Indiana Securities Commissioner to verify their current position on this exception.

[3] This would imply that Missouri is likely to adopt a similar regulatory regime to what was adopted in the Dodd-Frank Act: fund managers who manage under $150 million would be exempt (but would be considered "exempt reporting advisers") and fund managers who manage over that amount would be required to register.

Contact Information

Alexander J. Davie
Attorney at Law
1109 Davenport Boulevard, # 211
Franklin, TN 37069
Phone: (615) 585-3546
Email: adavie@alexanderdavie.com