

Strictly Business

A Business Law Blog for Entrepreneurs, Emerging Companies, and the Investment Management Industry.



ABOUT THE AUTHOR

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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 5: The Northwest

This post is the fifth 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, in the first installment of this series, [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. In further installments, I summarized the state rules regarding investment adviser registration for private fund managers in the [Southeast](#), [Midwest](#), and [Southwest](#). As the fifth installment, I have summarized below the rules as they exist as of September 7, 2011 in the ten states in the Northwestern portion of the United States (which I've defined rather loosely to include all of the West Coast, Alaska, and Hawaii).

1. [Alaska](#). There is no exemption for private fund managers. Any private fund manager in the state of Alaska must register with the Alaska Division of Banking and Securities unless it is registered with the SEC. In addition, fund managers in Alaska registered with the SEC must make a notice filing with the Alaska Division of Banking and Securities.

2. [California](#). Previously, under Cal. Code Regs. tit. 10, § 260.204.9, private fund managers in California were exempt from investment adviser registration if they met the federal 15 client exemption, and they had assets under management of \$25 million or more or they provided investment advice solely to venture capital funds. On June 13, 2011, the California Department of Corporations amended this rule to remove the reference to the federal 15 client exemption. Thus, currently, a private fund manager is exempt if it "(1) does not hold itself

out generally to the public as an investment adviser, (2) during the course of the preceding twelve months has had fewer than 15 clients, (3) does not act as an investment adviser to any investment company registered under... the Investment Company Act of 1940..., and (4) either (i) has assets under management... of not less than \$25,000,000 or (ii) provides investment advice to only venture capital companies..."[1] However, this change is temporary and the exemption will automatically expire on January 21, 2012. Between now and then the California Department of Corporations intends to "study how best to regulate advisers to alternative investment vehicles, while balancing the regulatory burden on such advisers, with any corresponding investor protections issues." Therefore, it remains to be seen what California's eventual approach will be. Also, fund managers in California registered with the SEC must make a notice filing with the California Department of Corporations.

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

4. Idaho. There is no exemption for private fund managers. Any private fund manager in the state of Idaho must register with the Idaho Department of Finance unless it is registered with the SEC. In addition, fund managers in Idaho registered with the SEC must make a notice filing with the Idaho Department of Finance.

5. Montana. There is no exemption for private fund managers. Any private fund

manager in the state of Montana must register with the Montana Commissioner of Securities and Insurance unless it is registered with the SEC. In addition, fund managers in Montana registered with the SEC must make a notice filing with the Montana Commissioner of Securities and Insurance.

6. North Dakota. There is no exemption for private fund managers. Any private fund manager in the state of North Dakota must register with the North Dakota Securities Department unless it is registered with the SEC. In addition, fund managers in North Dakota registered with the SEC must make a notice filing with the North Dakota Securities Department.

7. Oregon. Or. Admin. R. § 441-175-0030(1) exempts from the definition of the term "state investment adviser"[2] any person who "conducts no public advertising or general solicitation in this state and whose only clients in this state are "accredited investors" as that term is defined in [Oregon's administrative rules]." Oregon's definition of "accredited investor" is substantially the same as the one contained in federal Regulation D and most private funds would qualify as an "accredited investor" under either standard. Therefore, most fund managers would be excluded from the definition of the term "investment adviser" and would not need to register. The exemption is contained in regulations; therefore the Oregon Division of Finance and Corporate Securities could at some point in the future repeal it, though I am not aware of any plans to do so. However, this rule excludes fund managers solely from the definition of the term "state investment adviser." Therefore, fund managers in Oregon registered with the SEC are required to make a notice filing with the Oregon Division of Finance and Corporate Securities.

8. South Dakota. There is no exemption for private fund managers. Any private fund manager in the state of South Dakota must register with the South Dakota Division of Securities unless it is registered with the SEC. In addition, fund managers in South Dakota registered with the SEC must make a notice filing with the South Dakota Division of Securities.

9. Washington. There is no exemption for private fund managers. Any private fund manager in the state of Washington must register with the Washington Securities Division unless it is registered with the SEC. In addition, fund managers in Washington registered with the SEC must make a notice filing with the Washington Securities Division.

10. Wyoming. Wyoming is unique among the 50 states in that it has no statute regulating investment advisers. As a result, all investment advisers in Wyoming are regulated on the federal level and there is no exemption from federal registration for investment advisers in Wyoming with assets under management of less than \$25 million. Of course, private fund managers in Wyoming may still take advantage of any other exemption available on the federal level, such as the venture capital exemption and private fund adviser exemption (i.e. the fund manager manages under \$150 million).

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] An entity is a "venture capital company" if, on at least one occasion during the annual period commencing with the date of its initial capitalization, and on at least one occasion during each annual period thereafter, at least fifty percent (50%) of its assets (other than short-term investments pending long-term commitment of distribution to investors), valued at cost, are "venture capital investments" or investments derived therefrom. A "venture capital investment" is an acquisition of securities in an "operating company" as to which the investment adviser, the entity advised by the investment adviser, or an affiliated person of either has or obtains management rights. An "operating company" means an entity that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale (including any research or development) of a product or service.

[2] Under Oregon's version of the Uniform Securities Act, investment advisers who are not federal covered investment advisers are called "state investment advisers."

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