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SEC Reaffirms Position with Respect to RIA Registration for Special Purpose Vehicles

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On January 19, 2012, the Division of Investment Management of the Securities and Exchange Commission (the "Staff" or the "SEC") reaffirmed its position in its December 8, 2005, response to the American Bar Association no-action letter (the "ABA Correspondence"), in which the SEC stated that, under certain conditions, special purpose vehicles ("SPVs") would not be required to register as an investment adviser with the SEC (the "No-Action Letter"). The No-Action Letter was released in advance of the March 31, 2012, deadline to register as an investment adviser under the new requirements pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

In the ABA Correspondence, the SEC addressed concerns that SPVs created and controlled by registered investment advisers ("RIAs") would be required to file separate Form ADVs with the SEC. This would have required many private funds to file multiple ADVs containing substantially similar, if not identical, information. In response to these concerns, the Staff provided comfort that the SEC would not seek enforcement action against an SPV that did not file a Form ADV, if:

(i) The RIA created the SPV to act as the general partner;
(ii) The formation documents for the SPV explicitly designate the RIA to manage the assets of the private fund;
(iii) The SPV is subject to examination by the SEC and the investment advisory activities of the SPV are subject to the Investment Advisers Act of 1940 (the "IAA"); *and*,
(iv) The RIA supervises and controls the SPV, its employees, and persons acting on its behalf.

Consequently, if these conditions are met, the SPV may rely upon the RIA's registration.

Significantly, despite the Dodd-Frank Act's substantial narrowing of the registration exemptions under Section 203 of the IAA, the No-Action Letter not only provides that the Staff will continue to rely on the carve outs to registration in the ABA Correspondence, but the Staff also expanded the scope of these carve outs in three (3) notable ways. First, the SEC relaxed the above-listed requirements that all persons associated with the RIA be under the control of the RIA. Notably, independent directors, who are not "under the control" of the RIA, but are often required to satisfy legal obligations of the SPV and can uniquely protect the interests of investors, may continue to serve on the Board of Directors for the SPV without requiring the SPV to register

independently. By carving out an exemption to the control element for independent directors, the SEC seeks to promote compliance with other federal law, while maintaining protection of investors.

Second, the SEC extended its position on registration to RIAs with multiple SPVs under its control. Consequently, a master entity with control over numerous SPVs and funds would only be required to register one (1) entity; ultimately saving time and money from filing multiple Form ADVs.

Finally, the Staff clarified its position as to multiple fund advisers. If multiple fund advisers are under common control and the entities run a single advisory business, these advisers will only be required to file a single Form ADV. The SEC deems multiple entities to be engaged in a single advisory business under the following circumstances:

- (i) The filing adviser and the relying advisers advise only private funds and separate account clients that are "qualified clients," as defined in Rule 205-3 of the IAA;
- (ii) The filing adviser and the relying advisers have substantially similar or related strategies and investment objectives;
- (iii) The relying advisers and its employees and persons acting on its behalf are "persons associated with" the filing adviser pursuant to Section 202(a)(17) of the IAA;
- (iv) The filing adviser has its principal office and place of business in the United States;
- (v) The relying advisers are subject to the provisions of the IAA and examination by the SEC;
- (vi) The filing adviser and the relying advisers have a single code of ethics and have a single chief compliance officer;
- (vii) The filing adviser discloses on Form ADV that it is filing with relying advisers in expressed reliance on the No-Action Letter; and,
- (viii) The filing adviser identifies each relying adviser on a separate Section 1.B., Schedule D of Form ADV and identifies the relying adviser by the notation "*relying adviser*."

If multiple advising entities meet the criteria listed above, the SEC will not seek enforcement under Sections 203(a) and 208(a) of the IAA for failure to file a Form ADV for each entity. Although the new registration exemptions under the Dodd-Frank Act highlight the SEC's desire to broaden registration, the opinions of the Staff demonstrate a balance between greater disclosure and overburdening private funds that are structured to comply with tax, legal, and regulatory regimes.

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If you have any questions regarding this article, please contact Steven J. Thayer at (312) 641-2100. For additional information or for a complete copy of the ABA Correspondence or the No-Action Letter, see http://www.sec.gov/divisions/investment/im-noaction.shtml#chron.

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