TKD
LEGAL ALERT

DEADLINE APPROACHING FOR REGISTRATION UNDER FEDERAL OR STATE INVESTMENT ADVISERS ACTS

On June 22, 2011, the Securities and Exchange Commission (the "SEC") adopted rules and rule amendments to the Investment Advisers Act of 1940 (the "Advisers Act"), implementing a number of significant changes that are applicable to investment advisers as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Among the significant changes are investment advisers' registration obligations among the SEC and state securities regulators. For many investment advisers who have not previously registered with the SEC because they relied on the "private adviser exemption" (described below), March 30, 2012 is the deadline to have their registration effective. Investment advisers registering with the SEC need to make the initial filing no later than February 14, 2012.

Federal or State Registration

Section 203A of the Advisers Act divides regulatory responsibility for investment advisers between the SEC and state securities regulators. Essentially, an investment adviser must either register with the SEC or with state securities regulators unless it is otherwise exempt from registration. Before Dodd-Frank, an investment adviser generally must register with the SEC if it had at least $25 million of assets under management or was an adviser to a registered investment company. Such investment advisers registered with the SEC would not be required to register with any state securities regulators. An investment adviser with less than $25 million of assets under management would generally be required to register under comparable state investment adviser laws.

Dodd-Frank created a new category for advisers with assets under management between $25 million and $100 million. Now, an adviser with between $25 million and $100 million of assets under management may not register with the SEC unless such adviser is not subject to registration and examination in the state in which it maintains its principal office and place of business or otherwise would be required to register with 15 or more states. An investment adviser that does not meet this threshold must register with applicable state securities regulators unless it qualifies for an exception permitting SEC registration or is otherwise exempt from state registration. Most states exempt from registration those investment advisers who have no place of business in the state and whose only clients are large or institutional investors. In addition, the Advisers Act's "national de minimis rule" prohibits states from requiring the registration of any investment adviser who has no place of business in such state and during the preceding twelve months has had fewer than six clients who are residents of such state.

Repeal of the Private Adviser Exemption

Prior to Dodd-Frank, a common exemption from registration that many investment advisers relied upon, referred to as the "private adviser" exemption, exempted from registration persons with 14 or fewer clients during the preceding twelve months, who did not hold themselves out to the public as investment advisers, and did not act as an investment adviser to a registered investment company. The private adviser exemption was repealed by Dodd-Frank. By March 30, 2012, persons relying on the private adviser exemption must either register under the Advisers Act or otherwise fit within another exemption.

Dodd-Frank, however, created several new exemptions from registration under the Advisers Act, including the private funds adviser exemption, the foreign private adviser exemption and the venture capital funds adviser exemption, each of which is summarized in a separate client alert. Compliance, however, with these exemptions does not necessarily exempt the investment adviser from registration under state laws.

Registration for New York-Based Investment Advisers

An adviser with its principal office and place of business in New York may be surprised to learn that

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advisers are currently not "subject to examination" in New York. As a result, such investment advisers who previously relied on the private adviser exemption and have at least $25 million of assets under management are generally required to register with the SEC. New York-based investment advisers with less than $25 million of assets under management will generally be required to register in New York, unless there is an exemption available.

New York exempts certain defined persons from registration, including, under the New York de minimis exemption, "a person who sells investment advisory services to less than six persons in New York exclusive of financial institutions and institutional buyers." When applying the New York de minimis exemption and the national de minimis exemption under the Advisers Act, certain smaller advisers may be exempt from any registration. For example, a New York-based investment adviser with only a New York office and with no more than five clients in New York and with no more than five clients in any other state, and with less than $25 million under management will generally be exempt from registration under both the Advisers Act and New York law.

Registration Process in New York

The New York Attorney General's Investor Protection Bureau enforces New York's investment adviser law, called the "New York Investment Advisory Act." An investment adviser application should be filed no less than ten days prior to engaging in investment advisory activities in the State of New York. However, an application is not considered filed until the required fee and all required submissions have been received by the Bureau. Below is a very brief summary of the registration requirements:

- *Form ADV*. The investment adviser must complete and file Form ADV along with the $200 filing fee. This is generally filed electronically through the Investment Adviser Regulatory Depository, or IARD, system. Form ADV must be periodically updated and amended.
- *Financial Statements*. The investment adviser must prepare and file with the Form ADV an income statement and balance sheet as of the end of its most recent fiscal year along with interim financial statements that are not more than 90 days old.
- *Exams*. Persons who represent the investment adviser to the public generally must take and pass within two years prior to the date of filing the Form ADV either (i) the Uniform Investment Adviser Law Examination (Series 65 examination), or (ii) the General Securities Representative Examination (Series 7 examination) and the Uniform Combined State Law Examination (Series 66 examination). There are exemptions for certain designations, such as CFPs, as well as exemptions for persons with clean records who have engaged in investment advisory business outside of New York for the prior two years.
- *Investment Advisory Literature and Advertisements*. Investment advisory literature sold to clients must be sent to the Bureau on the date of the first general distribution to the investing public. In addition, any advertisement for the purpose of soliciting investment advisory accounts or clients must also be filed with the Bureau.
- *Record Keeping*. Investment advisers must maintain certain books and records.

Whether a particular investment adviser is exempt from registration and other reporting obligations depends on many variables unique to each investment adviser. The attached flowchart is a simplified guide to assist New York-based investment advisers determine whether they need to register under the Advisers Act or under New York law.

Should you have any questions, please feel free to contact us:

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