

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 I: The Basics

This post is the first 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 obligations of private fund managers who are exempt from registration under the Dodd-Frank Act to file a truncated Form ADV as "exempt reporting advisers." In addition, I have also [previously discussed the proposed model rule written by the NASAA](#) that address the potential obligations of fund managers who may be exempt under federal law but must register under state law. To my knowledge, as of today, no states have yet adopted the model rule. Therefore, fund managers must look to their home state to determine whether they must register as investment advisers with their state securities commissioner.

To be clear, these state registration requirements arise in two situations. The first situation is when a fund manager has less than \$25 million under management. In such instance, the fund manager is not required to register with the SEC and is in fact prohibited from doing so.^[1] Given this outright exemption, a fund manager with less than \$25 million under management does not need to rely on the private fund adviser exemption (i.e. it manages under \$150 million) or the venture capital exemption, which means that it is not considered an "exempt reporting adviser" and is not required by federal law to file a truncated Form ADV. However, if the fund manager's state does require it to register as an investment adviser with the state's securities commissioner, then it will need to do so. The second situation where state registration requirement arise is when the fund manager has \$25 million or more under management but is otherwise exempt because of the private fund adviser exemption or the venture capital fund exemption. In this instance, if the state does not require the fund manager to register, then it will be required to file a truncated Form ADV with the SEC as an exempt reporting adviser, but no registration will be required. If the fund manager's state does require it to be registered, then it must register with the state's securities commissioner and file a truncated Form ADV with the SEC as an exempt reporting adviser.^[2]

There are two other requirements that fund managers must be mindful of. First, if a fund manager is required to be registered with the SEC, then it does not need to register with any state, because the federal registration requirements preempt the state registration requirements. However, states are permitted and generally do require notice filings from SEC registered

investment advisers (usually called "federal covered advisers") doing business in their state, which takes the form of filing a copy of Form ADV with the state securities commissioner and paying a filing fee.

The chart below summarizes the situation, including how fund managers would be treated in states where the NASAA model rule is in place (see [my previous post](#) for a description on how the model rule works):

	Exempt from state registration	Not exempt from state registration	Not exempt from state registration but NASAA model rule is in place
Assets under management under \$25 million	No registration required	Register with state only	Exempt reporting adviser - file truncated Form ADV with state; and Notice filing with state required
Assets under management of \$25 million or more, but exempt from SEC Registration	Exempt reporting adviser - file truncated Form ADV with SEC only	Register with state; and Exempt reporting adviser - file truncated Form ADV with SEC	Exempt reporting adviser - file truncated Form ADV with state and SEC; and Notice filing with state required
Assets under management of \$25 million or more, but not exempt from SEC Registration	Register with SEC only; Notice filing with state may be required [3]	Register with SEC only; Notice filing with state required	Register with SEC only; Notice filing with state required

Given the very fact specific nature of these issues, you should consult a qualified attorney in making the decision of whether to register as an investment adviser.

Footnotes

[1] One exception to this rule is that any adviser located in the state of Wyoming is subject to federal registration requirements because Wyoming does not regulate investment advisers. Therefore, in Wyoming, all investment advisers, regardless of their size, are subject to the registration requirements of the Federal Investment Advisers Act of 1940 unless they qualify for one of the federal exemptions.

[2] This obligation to register with the state and file the truncated Form ADV is not particularly onerous, since the truncated Form ADV is a subset of the Form ADV that must be filed with state registration. Therefore, a state registered fund manager should be able to fulfill their obligations as an exempt reporting adviser simply by selecting the option on the IARD system that directs a copy of Form ADV to the SEC.

[3] The requirement of a federal covered adviser to make a notice filing with the state securities commissioner is often independent of the exemptions from state investment adviser registration. Therefore, a fund manager may qualify for a state exemption, but because it must register with the SEC, it is a federal covered adviser and must make a notice filing. A few states do grant the same exemption from notice requirements of federal covered advisers as they do to non-SEC registered investment adviser (Georgia and Florida come to mind here); thus if a federal covered adviser also qualifies for an exemption from state registration, no notice filing is required.

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