

Strictly Business

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



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 2: The Southeast

This post is the second 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 by its own home state. The rules vary greatly from state to state. As the second installment in my series of posts dealing with these issues, I have summarized below the rules as they exist as of August 16, 2011 in 12 states in the Southeastern portion of the United States. Future posts will focus on states in other regions of the United States.

1. Alabama. There is no exemption from registration for private fund managers. Any private fund manager in the state of Alabama must register with the Alabama Securities Commission unless it is registered with the SEC. In addition, fund managers in Alabama registered with the SEC must make a notice filing with the Alabama Securities Commission.

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

3. Florida. Fla. Stat. § 517.021(13)(b)(7) exempts "[a]ny person who does not hold herself or himself out to the general public as an investment adviser and has no more than 15 clients within 12 consecutive months in [Florida]." Therefore, Florida has retained the equivalent of the 15 client exemption that used to be in place in the federal Investment Adviser Act of 1940. The exemption is statutory; therefore it will require an act of the state legislature to repeal it. Federally registered fund managers in Florida do not need to make a notice filing with the Florida Division of Securities if they meet the 15 client exemption, per Fla. Stat. § 517.021(9).

4. Georgia. Private fund managers are exempt if they have less than 6 clients in Georgia within the preceding 12 months. Since each fund is considered a client (not the investors), most fund managers should be exempt. This exemption is made pursuant to an order by the Georgia



Commissioner of Securities entitled "[Uniform Act Implementation Order 2010-5](#)" dated December 31, 2010. Without Order 2010-5, fund managers would be required to register with the Georgia Commissioner of Securities under the Georgia Uniform Securities Act of 2008. Order 2010-5 can be repealed at any time. I suspect that the Commissioner is leaving this in place until a more comprehensive permanent approach is adopted (perhaps something along the lines of the [proposed NASAA model rule](#)).^[1] In addition, fund managers in Georgia registered with the SEC do not need to make a notice filing with the Georgia Commissioner of Securities if they meet the "less than 6 client" exemption contained in Order 2010-5.

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

6. Louisiana. La. Rev. Stat. Ann. § 51:702(7)(f) exempts "A person... who during any period of twelve consecutive months, has had fewer than fifteen clients in [Louisiana] and who does not hold himself or herself out generally to the public as an investment adviser." Therefore, Louisiana has retained the equivalent of the 15 client exemption that used to be in place in the federal Investment Adviser Act of 1940. The exemption is statutory; therefore it will require an act of the state legislature to repeal it. Federally registered fund managers in Louisiana must make a notice filing with the Louisiana Securities Division even if they would otherwise meet the 15 client exemption.

7. Mississippi. There is no exemption from registration for private fund managers. Any private fund manager in the state of Mississippi must register with the Mississippi Securities and Charities Division unless it is registered with the SEC. In addition, fund managers in Mississippi registered with the SEC must make a notice filing with the Mississippi Securities and Charities Division.

8. North Carolina. Currently, if a private fund manager was exempt under the federal 15 client exemption, then the fund manager is still exempt in North Carolina, pursuant to an order by the North Carolina Securities Division entitled "[ORDER](#)

[GRANTING TEMPORARY RELIEF FOR INVESTMENT ADVISERS PREVIOUSLY EXEMPT FROM REGISTRATION UNDER N.C.G.S. § 78C-16\(a\)\(4\)](#)" dated July 19, 2011. The North Carolina Securities Division has made it clear that this order is temporary and expects to replace it with a different approach in the future (perhaps something along the lines of the [proposed NASAA model rule](#)). Federally registered fund managers in North Carolina must make a notice filing with the North Carolina Securities Division even if they would otherwise meet the exemption contained in the order.

Strangely enough, there are portions of the North Carolina Investment Advisers Act that imply that fund managers should be exempt from registration even without the order. N.C.G.S. § 78C-16(a)(4), the exemption which is being temporarily extended by the order, exempts any person who "is exempt from registration under the Investment Advisers Act of 1940 by operation of section 203(b)(3) of that act... provided that any reference in this subsection to any statute, rule, or regulation shall be deemed to incorporate the statute, rule, or regulation (and any statute, rule, or regulation referenced therein) as in effect June 1, 1988." (Section 203(b)(3) is the now-repealed 15 client exemption.) Since the North Carolina statute, as written, deems Section 203(b)(3) to be read as it was in effect in 1988 (before Section 203(b)(3) was repealed), then the repeal of Section 203(b)(3) should not adversely affect the availability of North Carolina's 15 client exemption. In addition, the North Carolina Investment Advisers Act, per N.C.G.S. § 78C-2(1)(j), excludes from the definition of the term investment adviser "[a]n individual who, as an employee, officer or director of, or general partner in, another person and in the course of performance of his duties as such, provides investment advice to such other person, or to entities that are affiliates of such other person..." Fund managers, since they are frequently the general partners of their funds, should qualify for this exception. I have not discussed these two lines of reasoning with the North Carolina Securities Division staff and they do seem to run counter to the Division's position on the issue, so I would use them with caution and only after consulting legal counsel.

9. South Carolina. There is no exemption from registration for private fund managers. Any private fund manager in the state of South Carolina must register with the South Carolina Attorney General

unless it is registered with the SEC. In addition, fund managers in South Carolina registered with the SEC must make a notice filing with the South Carolina Attorney General.

10. Tennessee. Tenn. Admin Reg. 0780-04-03-.05(1)(b) exempts "[a]ny person domiciled in [Tennessee] who, during the course of the preceding twelve (12) months, has had fewer than fifteen (15) clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the Investment Company Act." Therefore, Tennessee has retained the equivalent of the 15 client exemption that used to be in place in the federal Investment Adviser Act of 1940. The exemption is contained in regulations; therefore the Tennessee Securities Division could at some point in the future repeal it, though I am not aware of any plans to do so. Federally registered fund managers in Tennessee must make a notice filing with the Tennessee Securities Division even if they would otherwise meet the 15 client exemption.

11. Virginia. Prior to the repeal of the federal 15 client exemption, Virginia had an exemption for fund managers that met the federal 15 client exemption and who advised only "corporation[s], general partnership[s], limited partnership[s], limited liability compan[ies], trust[s] or other legal organization[s]" with assets of \$5 million or more. This of course means that this exemption, left untouched, would no longer be available because of the repeal of the federal 15 client exemption. Pursuant to a "[Statement of Policy Regarding Regulation of Certain Investment Advisors Managing Private Equity and Venture Capital Funds \("Private Advisors"\)](#)" dated July 19, 2011 and an accompanying [proposed Rule 21 VAC 5-80-215](#), the Virginia Division of Securities & Retail Franchising extended this exemption until March 30, 2012, which coincides with the deadline that the SEC has designated for advisers who previously were exempt

Contact Information

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

© 2011 Alexander J. Davie — This article is for general information only. The information presented should not be construed to be formal legal advice nor the formation of a lawyer/client relationship.

from registration under the 15 client exemption to register with the SEC.[2] After March 30, 2012, there will be no exemption for private fund managers in Virginia and private fund managers will be required to register with the Virginia Division of Securities & Retail Franchising unless they are registered with the SEC. Both before and after March 30, 2012, federally registered fund managers in Virginia must make a notice filing with the Virginia Division of Securities & Retail Franchising even if they would otherwise meet the exemption contained in the Statement of Policy and proposed rule.

12. West Virginia. There is no exemption from registration for private fund managers. Any private fund manager in the state of West Virginia must register with the West Virginia Securities Commission unless it is registered with the SEC. In addition, fund managers in West Virginia registered with the SEC must make a notice filing with the West Virginia Securities Commission.

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

Footnotes

[1] I have not had any discussion with staff at the Georgia Commissioner of Securities confirming this belief.

[2] The wording of the Statement of Policy is somewhat ambiguous in that it could be read to imply that the Virginia exemption will go past the March 30, 2012 deadline. However, a conversation I had with staff at the Virginia Division of Securities & Retail Franchising indicates that they view the exemption as expiring on March 30, 2012.

