SZENBERG & OKUN PLLC

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Practice Note

Real Estate Fund Managers – Potential Investment Advisers Act Registration Requirements

Due to the COVID-19 pandemic, shelter-in-place orders, unemployment levels that rival those of the Great Depression and widespread civil unrest, 2020 has been a challenging year for the real estate industry. In recent weeks, we have seen increased interest from clients looking to form real estate investment funds with a view toward pursuing opportunities that are bound to arise from widespread displacement in real estate markets. Real estate professionals and investment managers are sometimes surprised to learn that certain real estate investments can involve transactions in securities, which may have significant regulatory implications for real estate fund managers. For instance, the manager of a real estate-oriented investment vehicle that invests in a portfolio that includes securities may be subject to registration or other compliance obligations under the Investment Advisers Act of 1940 (the Advisers Act). [i] The prospect of a registration requirement under the Advisers Act should be a formidable concern for real estate fund managers because registration results in significant compliance costs, restrictions and burdens, which can be prohibitive, particularly for emerging fund managers.[ii]

Unfortunately, it is often not readily apparent when a real estate fund's investment portfolio may involve a securities transaction, and traps for the unwary abound. As a result, the analysis of whether a real estate investment manager[iii] has registration[iv] or compliance obligations under the Advisers Act is highly fact sensitive. As discussed below, this analysis not only requires a careful and nuanced review of both the types of assets held by the fund and the structure of the fund's investment vehicles, but also a keen understanding of the interplay between the Advisers Act and other federal securities statutes.

Overview

Investment advisers are regulated by the Securities and Exchange Commission (the SEC).[v] The Advisers Act defines an investment adviser as including any person or firm that (i) for compensation, (ii) is engaged in the business of (iii) providing advice to others concerning the value of, or the advisability of purchasing or investing in, securities.[vi]

Unless an exemption applies, any firm or person that satisfies each of the elements of the definition of an investment adviser is required to register with the SEC, becomes subject to SEC

examinations and is subject to numerous compliance obligations.[vii] Investment advisers (even if exempt from registration) are also subject to non-waivable fiduciary duties to their clients under the Advisers Act[viii] and the anti-fraud provisions of the Advisers Act.

In most cases, a fund manager will satisfy the first two elements of the definition of investment adviser. Specifically, the SEC construes the term compensation broadly and in a manner that would ordinarily capture the typical fee structure of a real estate investment fund.[ix] Furthermore, fund managers that receive performance based compensation or compensation based on asset values will often be regarded as being "engaged in the business," especially if the manager is managing a blind pool fund. This conclusion is true even in the absence of the receipt of performance based compensation or compensation based on asset values unless the manager renders advice (which can include selection of investments on a discretionary basis) only on a rare or isolated occasion.[x] However, even if the first two elements are satisfied, a fund manager will be an investment adviser under the Advisers Act only if its advisory activities pertain to securities.

As a result, a real estate fund manager's potential obligations under the Advisers Act will most commonly hinge on (i) whether the fund invests or transacts in securities and (ii) if the fund does invest or transact in securities, whether the manager has sufficient assets under management to become subject to the Advisers Act's registration regime.

Does the Fund Invest in Securities?

The securities laws do not regulate transactions in real property. An acquisition of fee simple title to an office building, home, apartment building or hotel does not involve the sale of securities.[xi] However, real estate transactions often overlap with transactions in securities. In addition, certain assets that are related to real estate, such as passive interests in REITs (other than certain subsidiary REITs), are undoubtedly securities. Between the clear cases on the spectrum – between brick-and-mortar real estate assets, which are undoubtedly not securities, and passive interests in REITs, which are definitively securities – are a myriad of investment structures and asset classes that require a deep factual analysis to determine if they involve an investment in securities.

The starting point of this analysis draws upon the definition of a security under the Advisers Act, which provides that a "security" includes:

> any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any

> put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase any of the foregoing.[xii]

Over the past eighty years, there have been a plethora of cases ruling on whether a particular transaction or investment product involves a security. The substantial majority of these cases have opined on matters brought under the Securities Act of 1933 (the Securities Act), the Securities Act of 1934 (the Exchange Act) and the Investment Company Act of 1940 (the Company Act), each of which has a definition of "security" that is substantially similar to the definition found in the Advisers Act. The SEC has never provided guidance on whether it interprets the Advisers Act's definition in the same manner as those of the other statutes. However, cases and no-action letters relating to the other Acts should heavily influence a manager's analysis of his or her potential obligations under the Advisers Act. Importantly, in many cases, the SEC has applied a more expansive definition of security under the Company Act.[xiii] Especially in light of the similar policy objectives underlying the Company Act and the Advisers Act, it is prudent for fund managers to operate under the assumption that the SEC would adopt a similar approach with respect to the Advisers Act.

Holding Companies and Joint Ventures

As real estate funds commonly make investments through joint ventures and holding companies, a logical starting point of the analysis is to assess whether a fund's interests in these ventures or holding companies may constitute a security.[xiv] For instance, a real estate investment fund may hold an interest in a real estate investment through a joint venture or co-investment vehicle together with other investors. Real estate joint ventures and holding companies are typically organized in the form of a limited partnership or a limited liability company.[xv] While neither a limited partnership nor a limited liability company interest is expressly referenced in the Advisers Act's (or any other federal statute's) definition of security, an equity interest in a partnership or a limited liability company can be a security by virtue of being characterized as a "investment contract."[xvi] In *Sec v. W.J. Howey*,[xvii] the U.S. Supreme Court defined an investment contract as an arrangement that involves an (i) an investment of money in a common enterprise with others, (ii) an expectation of profits from the investment and (iii) the outcome of the investment depends solely on the efforts of others.[xviii] Lower courts have used the principles established in the seminal *Howey* case to evaluate whether partnership or membership interests are securities. Based on these cases, the linchpin of the analysis is the degree of control that the holder of the partnership or membership interest has over the partnership or company. Applying this principle to the fund context, a fund's interests in an investment vehicle or venture that is controlled by the fund or its manager will typically not qualify as a security. Conversely, a fund that lacks the indicia of control over an investment vehicle or venture is more likely to be viewed as investing in an investment contract under the *Howey* test because its expectation of profit

depends on the efforts of others. Against this backdrop, we can consider common structures for investing in and holding real estate assets to assess how they may be treated under the *Howey* test.

General Partnership/Managing Member Interests

General partnership interests are ordinarily not securities because the general partner will typically control the decisions of the investment vehicle and does not rely on the efforts of third parties. The same is true for managing member interests in a limited liability company in which the managing member plays a substantially similar role to a general partner. However, courts will scrutinize the operating agreement of a partnership or limited liability company agreement to determine if the general partner or managing member in fact possesses true indicia of control. If an absence of meaningful control is found or if the general partner or managing member is viewed as inexperienced or otherwise dependent on the management efforts of other parties to the venture, substance will prevail over form. For example, in a highly influential opinion, the Fifth Circuit determined that a general partnership interest may be an investment contract if, among other things, the operating agreement leaves the general partner with so little power that its interest in the partnership is of the nature of a limited partner, if the general partner is inexperienced and incapable of exercising its partnership powers or is dependent on the managerial efforts of other managers.[xix] As such, in cases where the fund (through its manager) has powers and control rights that are typically ascribed to a general partner or a managing member, the fund is unlikely to be deemed to have acquired an investment contract by virtue of its participation in a joint venture or other investment vehicle that holds a real estate asset. The risk that a general partnership or managing member interest can be characterized as a security is most acute if there are multiple managers with similar or superior rights or powers to that of the fund or the operating agreement for the venture otherwise limits the fund's role in participating in the management or approving major decisions of the partnership or limited liability company.[xx] Other factors that may be important to this analysis include any limitations on information provided to the fund as an investor in the partnership or limited liability company and whether the fund can be removed as general partner or managing member without cause.

Based on these principles, it also follows that a Fund's interest in a single member limited liability company and similar holding vehicles wholly owned by a fund to hold a real estate asset will not be viewed as an investment contract.

Limited Partnership/Non-Managing Membership Interests

A Fund that has a limited partnership interest or passive membership interest in a partnership or company ordinarily will be deemed to have invested in a security.[xxi] However, as is the case with general partnership or managing member interests, courts will examine the substance of the rights and powers set forth in the operating agreement for the partnership and the company. As such, if the limited partner or passive member has control rights or other powers

that are akin to those normally possessed by a general partner or managing member, the limited partner interest or membership interest will not be an investment contract.[xxii]

Joint Venture Key Considerations

As discussed above, funds often invest in real estate assets together with third parties through joint ventures or co-investment vehicles, which are often structured as limited liability companies or partnerships. Regardless of the form of the joint venture, in each case, careful consideration should be directed at the specific terms of the joint venture's operating agreement, including, in particular, the degree of control that the operating agreement affords to the fund, the approval rights possessed by the fund and the other parties to the venture, whether the fund is the manager of the venture and, if so, whether there are multiple managers, and the nature of the removal rights that can allow other members to remove the manager. Also of significant importance is the degree of knowledge and expertise that the fund's manager possesses with respect to the investments made by the joint venture, whether the fund is dependent on the expertise or management skills of others in managing the venture and the fund' percentage ownership of the venture.[xxiii] Finally, a venture that has been formed at the behest of the fund and its manager specifically to hold an investment held by the fund is less likely to involve an investment in securities as compared to a venture that has been formed by third parties independently of the fund.

Real Estate Debt

Managers of funds that invest in real estate debt must also consider whether the debt investment is an investment contract under *Howey* and its progeny. In addition, because the definition of security includes "notes," it is also necessary to determine whether the debt instrument is a note. Unfortunately, there is considerable uncertainty in this area, and fund managers often err on the side of concluding that a debt investment is a security for purposes of the Advisers Act.

The U.S. Supreme Court in *Reeves v. Ernst & Young*[xxiv] established that even though the term "note" is included in the definition of a security, a note is not necessarily a security under the Securities Act and the Exchange Act if the note is used for a commercial loan. Under *Reeves*, debt that is distributed among multiple investors or is issued with the expectation of the development of a secondary market is likely to be considered securities.[xxv] Conversely, mortgage notes are typically not considered securities under the Securities Act or Exchange Act. However, the SEC interprets the definition of security more broadly under the Company Act and has consistently held in recent decades that commercial loans are securities under the Company Act, notwithstanding that they would be securities under Securities Act or the Exchange Act under *Reeves*.[xxvi] While the SEC has not expressed a view on how debt would be considered under the Advisers Act, due to the similar policy considerations underlying the Company Act and Advisers Act, fund managers often treat debt investments by a fund as securities, including mezzanine and mortgage debt.

Other Real Estate Investments that may be Securities

In addition to interests in joint ventures and debt instruments, there are numerous other real estate-related investments that can be regarded as securities by virtue of being an investment contract under *Howey*. For example, the offering of condominium units[xxvii] and co-tenancy or tenancy-in-common participations have been determined to be securities if certain circumstances are met.[xxviii] Similarly, purchase and sale agreement that contain earn-out provisions can be viewed as investment contracts under *Howey* because the seller's ability to profit is dependent on the managerial efforts of the buyer. Other examples abound. As the ambit of the definition of investment contract is exceptionally broad, it is important for a fund manager to carefully review the terms of the fund's agreements relating to these instruments to determine if the SEC or a court can characterize them as an investment contract.

Regulatory Assets Under Management

If a fund manager meets the definition of an investment adviser because it manages funds or vehicles that invest in securities, the next step is to determine whether the manager has an obligation to register as an investment adviser with the SEC. Unless an exemption is available, an investment adviser may register with the SEC once it has $100 million in regulatory assets under management (RAUM) and must register once it has $110 million in RAUM.[xxix] Investment advisers that have a principal place of business in New York are required to register if their RAUM exceeds $25 million, unless an exemption applies.[xxx] In order to calculate RAUM, managers must calculate the value of their securities portfolios over which the manager provides continuous and regular supervisory or management services.[xxxi] Item 5.F of Part I to Form ADV provides than an account is a securities portfolio if at least 50% of the value of the account consists of securities. However, a "private fund" is required to treat all of its assets, including uncalled commitments, as a securities portfolio, regardless of the nature of its assets. Private funds include investment vehicles that are exempt from registration under the Company Act under 3(c)(1) (*i.e.*, funds or investment vehicles offered to fewer than 100 persons) or 3(c)(7) (*i.e.*, funds or investment vehicles offered only to qualified purchasers) of the Company Act.

As a result of the foregoing, real estate funds with securities in their portfolio that rely on Sections 3(c)(1) or 3(c)(7) are required to count all assets and uncalled commitments toward RAUM, even if the security position represents only a small fraction of the overall portfolio. However, a real estate fund that can rely on Section 3(c)(5)(C) of the Company Act would typically not be considered a private fund and, consequently, would not be subject to the same rigorous standard for calculating RAUM as a private fund (*i.e.*, being subject to a requirement to count *all* assets toward RAUM). Under SEC guidance, in order to be able to rely on the so-called real estate exemption set forth in Section 3(c)(5)(C), at least 55% of the investment vehicle's assets must consist of direct ownership interests in mortgages and other liens and interests in real estate (qualifying interests), such qualifying interests together with real estate-type interests such as interests in companies that invest in real estate or mortgages (real estate related interests) must

comprise at least 80% of total assets and no more than 20% of total assets consist of assets that have no relationship to real estate.[xxxii] Thus, with respect to a 3(c)(5)(C) fund, if less than 50% of the value of the fund is comprised of securities (*i.e.*, the manager does not manage a securities portfolio), the manager would not have to count any of the fund's assets toward its RAUM. Conversely, if more than 50% of the value of 3(c)(5)(C) fund's assets are comprised of securities, then the assets of the fund would be a securities portfolio and would be counted toward the manager's RAUM.[xxxiii] It should be noted that determining whether a fund's assets constitutes a "qualifying interest" or "real estate related interest" is highly fact specific and, especially in the context of joint ventures, considers many of the same factors that are applied for determining if an interest in a joint venture is an investment contract (*e.g.*, participation in active management of the venture and rights to approve major decisions).[xxxiv]

Investor Control

Managers of investment vehicles in which investors are afforded significant control over the vehicle's investment decisions and operations potentially have additional arguments that they are not subject to registration under the Advisers Act. For example, a manager of a fund that allows investors to preapprove all investments may be able to argue that the assets of the vehicle should not be counted toward RAUM because the manager is not providing "continuous and regular supervisory or management services," the manager is not "in the business of" providing advice regarding securities or the manager is merely managing the operations of a business on behalf of the investors and not an investment on behalf of its clients.[xxxv] These arguments are potentially available in club deals where a manager may be required to obtain approval from investors before making an investment, especially if the investors are highly sophisticated and conduct their own due diligence on investments. Supporting a position of this nature requires a careful analysis of facts and circumstances and a close review of the investment vehicle's operating agreements, including the investor's control rights and the manager's fee and promote structure. If investors have differing rights, it is also possible that, while these positions may be sustainable with respect to certain investors who are granted significant control rights under the operating agreement or a side letter, they may ultimately fail as a result of other investors in the vehicle that do not share the same control rights. Managers should exercise caution before adopting these arguments as there is a dearth of SEC guidance expressly in support of them.

Key Implications

The types of investments made by a real estate fund and the structure of these investments heavily inform whether a manager will have obligations under the Advisers Act. As discussed above, it is clear that not all real estate fund managers are investment advisers. The cornerstone of the analysis ultimately rests upon the determination of whether or not the fund invests in securities. A fund that limits its investments to direct interests (including investments through wholly owned partnerships or limited liability companies) in brick-and-mortar assets will not implicate the requirements of the Advisers Act because the fund's investment activities do

not involve an investment in securities. Conversely, managers of funds that make passive investments, including funds that invest through joint ventures in which the fund or its manager does not have meaningful control rights, are likely to be deemed to be managing securities. Similarly, fund managers that focus on debt or other instruments may be be characterized as investment advisers. Due to the breadth of the definition of a security, many of the larger real fund managers register as investment advisers.[xxxvi] The larger a manager's repertoire of investment strategies, the more flexibility it will need to make investments that can be classified as securities. This calculation often justifies registration for larger managers despite the significant attendant compliance burdens and costs. Smaller managers are often more reluctant to register because the costs of compliance can be crippling for an emerging fund. As such, these managers are therefore more inclined to pursue strategies that do not involve an investment in securities or to operate through structures that are less likely to implicate the requirements of the Advisers Act.

Ultimately, real estate managers seeking to understand their potential obligations under the Advisers Act are compelled to navigate a highly complex interplay between various securities law statutes and the operating documents of their funds and investment vehicles. The analysis is highly fact-sensitive and complex and is mired with considerable uncertainty. As such, managers should consult with legal counsel who has significant expertise in real estate, fund formation and securities regulation matters and can advise the manager based on its specific objectives and circumstances.

Endnotes

[i] There are numerous other regulatory considerations that real estate fund managers need to consider. For example, a fund that invests in securities may be subject to registration under the Investment Company Act of 1940. Furthermore, investment vehicles that transact in swaps, which includes hedging transactions such as caps and interest rate swaps, may trigger commodity pool operator/commodity trading advisor registration requirements under the Commodity Exchange Act. Real estate investment fund managers should also consider whether their funds are holding "plan assets" under the U.S. Employee Retirement Income Security Act of 1974. These considerations are outside of the scope of this Practice Note.

[ii] Registration under the Investment Advisers Act can also limit the universe of investors that can legally invest in a fund that pays a customary promote because the Investment Advisers Act prohibits registered investment advisers from charging performance fees to any investor other than a "qualified client," which includes investors that have $1 million in assets under management or that the adviser reasonably believes has $2.1 million in net worth. 15 U.S.C. §80b-2(a)(11)(a); 17 CFR §275.205-3. This can result in a considerable obstacle to fundraising, particularly for emerging fund managers.

[iii] While this Practice Note focuses on managers of investment funds, in certain cases, similar considerations can apply to managers that manage real estate investments through single purpose vehicles.

[iv] The Advisers Act makes it unlawful for an investment adviser to conduct business in the United States unless it registers as an investment adviser or an exemption to registration is available. 15 U.S.C. §80b-3(a).

[v] Investment advisers may also be subject to registration requirements and regulations of state securities authorities. A discussion of state investment adviser requirements is outside of the scope of this Practice Note.

[vi] 15 U.S.C. §80b-2(a)(11).

[vii] Compliance obligations of a registered investment adviser include, among other things, submitting to the SEC and updating Form ADV, record-keeping, reporting, custody obligations, appointing a chief compliance officer, establishing a code of ethics, enacting compliance policies and limitations on the receipt of performance based on compensation.

[viii] *S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180 (1963).

[ix] *See e.g.* Investment Advisers Act Release (No. 1092) (Oct. 8, 1987) ("Release 1092").

[x] *Zinn v. Parish*, 644 F.2d 360 (7th Cir. 1981); Release 1092 (setting forth factors for determining if a firm or person is "engaged in the business," which include, among other things, whether the person receives compensation that represents a clearly definable charge for providing investment advice); *See also*, *Independent Drug Wholesalers Group, Inc.*, SEC Staff No-Action Letter (Apr. 16, 1992).

[xi] *See e.g.* Securities Act Release No. 5347, 33 Fed. Reg. 5347 (Jan. 4, 1973) (Release No. 5347); Form ADV, Instructions for Part 1A, Instruction Item 5.F (Item 5F) (listing real estate as non-securities, which are excluded from the calculation of an investment adviser's assets under management); Kenneth H. Flood, SEC Staff No-Action Letter (Mar. 2, 1984) (concluding that fee interests in real estate are generally not securities under the Investment Company Act).

[xii] 15 U.S.C. §80b-2(a)(18).

[xiii] This is especially true in respect of the SEC's treatment of commercial notes and loans, which would not constitute securities under the Securities Act or the Exchange Act but have been interpreted by the SEC as being securities under the Company Act. *See e.g.,* Protecting Investors: A Half Century of Investment Company Regulation, a report prepared by the Division of Investment Management of the Securities and Exchange Commission (1992) (the Protecting Investors Report) (providing that "notes representing the sales price of merchandise, loans to manufacturers, wholesalers, retailers and purchasers of merchandise or insurance, and mortgages and other interest in real estate are investment securities for purposes of the Act"); SEC Release No. IC-19105 (Nov. 19, 1992).

[xiv] For clarity, a real estate fund itself is typically structured as a limited partnership or a limited liability company. The fund investor's limited partnership or membership interests in the fund are securities. However, the fact that these interests in the fund are securities does not independently result in the fund manager managing investments in securities because the manager is not acting as an adviser with respect to these interests. Instead, Advisers Act concerns potentially arise if the fund invests in limited partnerships or limited liability company together with third party investors to the extent that the fund's interests in those ventures can be securities.

[xv] Real estate funds may also hold interests in trusts and corporations. These interests, especially when not wholly-owned, present complex issues in determining if they are securities. An analysis of these structures is outside of the scope of this Practice Note.

[xvi] *Williamson v. Tucker*, 645 F.2d 404 (5th Cir.), cert denied, 454 U.S. 897 (1981); *U.S. v. Leonard*, 529 F.3d 83 (2d Cir. 2008).

[xvii] 328 U.S. 293 (1946).

[xviii] Subsequent cases have omitted the word "solely" from this formulation, and an investment contract can be found as long as the expectation of a profit is derived in part from the efforts of others. *United Housing Foundation v. Forman*, 421 U.S. 837 (1975). *See also, SEC v. Glenn W. Turner Enterprises*, 474 F.2d 476, 482 (C.A. 9, 1973), cert. denied, 414 U.S. 821 (1973) (stating that the "solely on the efforts of others" standard is satisfied if the "efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise").

[xix] *Williamson,* 645 F.2d at 424 (applying a non-exclusive three-factor test for assessing when a partnership interest is an investment contract, which includes (i) the operating agreement leaves the general partner with so little power that its powers are more consistent with those of a limited partner, (ii) the general partner is so inexperienced that it is incapable of intelligently exercising its partnership powers or (iii) the general partner is so dependent on the unique managerial experience of other managers that it cannot replace the other manager or otherwise exercise meaningful managerial powers); *Leonard*, 529 F.3d at 90-91 (citing a Williamson and applying an economic reality test to conclude that a membership interest in a limited liability company is an investment contract).

[xx] *Coldwell Banker Commercial Group, Inc.*, SEC Staff No-Action Letter (Jan. 21, 1982).

[xxi] *Ethanol Partners Accredited v. Wiener*, 635 F. Supp 18, 20 (E.D. Pa. 1985).

[xxii] *Steinhardt Group Inc. v. Citicorp*, 126 F.3d 144 (3d Cir. 1997)(holding that a limited partnership interest was not a security where the limited partner had broad-reaching approval rights and owned a substantial majority of the interests in the limited partnership).

[xxiii] *See e.g. Gordon v. Terry,* 684 F.2d 736 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); New World Associates, SEC Staff No-Action Letter (Aug. 9, 1985).

[xxiv] 494 U.S. 56 (1990).

[xxv] *See e.g. Pollack v. Laidlaw Holdings, Inc.,* 27 F.3d 808 (2d Cir. 1994) (holding that loan participations sold through securities brokers are securities) *but see*, *Banco Espanol de Credito v. Security Pacific National Bank,* 973 F.3d 51 (2d Cir. 1992), *cert. denied*, 509 U.S. 903 (1993)(holding that loan participations that were offered solely to institutional and corporate investors and that were subject to OCC regulation were not securities).

[xxvi] *See e.g.* Merrill Lynch, Pierce, Fenner & Smith, Inc., SEC Staff No-Action Letter (Oct. 28, 1982); Bank of America Canada, SEC Staff No-Action Letter (July 25, 1983); Harrell Int'l, Inc., SEC Staff No-Action Letter (May 24, 1989); *See Also,* the *Protecting Investors Report* at footnote 251 (stating that mortgages and other notes relating to investment in real estate are securities for purposes of the Company Act).

[xxvii] *See*, Release No. 5347

[xxviii] *See, e.g.* Cook v. Farrell, No. 75-247 A, 1975 WL 427, at 1 (N.D. Ga. Aug. 26, 1975).

[xxix] 17 CFR § 275.203A-1. Investment advisers that do not meet these thresholds are generally required to register under state investment adviser registration regimes. A discussion of state investment adviser requirements is outside of the scope of this Practice Note. An investment adviser that does not meet these thresholds are generally prohibited from registering with the SEC. This can create significant challenges in cases where there is uncertainty as to whether a fund's interests or investments are a security.

[xxx] *See* Instructions for Item 2 of Part 1A of Form ADV. The disparate treatment of New York investment advisers arises from the fact that New York investment advisers are not subject to examination by New York state securities authorities.

[xxxi] Item 5F. For ADV provides guidelines for determining whether a manager provides "continuous and regular supervisory or management services." In most cases, these criteria would be satisfied in the case of a blind pool discretionary fund where the manager receives customary fees and carried interest.

[xxxii] *See, e.g.* Greenwich Capital Acceptance Inc., SEC Staff No-Action Letter (Aug. 8, 1991); Capital Trust Inc., SEC Staff No-Action Letter (Feb. 3, 2009); Great:t Ajax Funding LLC, SEC Staff No-Action Letter (Feb. 12, 2018); Redwood Trust, Inc. SEC Staff No-Action Letter (Aug. 15, 2019).

[xxxiii] Managers of private funds that have under $150 million in RAUM are exempt from registration as investment advisers under the so-call private fund exemption but have the status of exempt reporting advisers, which requires the filing of Part I of Form ADV and compliance with certain other requirements under the Advisers Act, if they exceed $110 million in RAUM ($25 million if the principal place of business is in New York). *See* 15 U.S.C. § 80b-3(m); 17 CFR § 275.204.4. Because the private fund exemption is limited to managers that solely manage private funds, managers that wish to rely on this exemption must carefully consider any side-by-side or co-invest arrangements where the manager separately manages the investments of a single investor or a small number of investors as these may not qualify as private funds.

[xxxiv] United States Property Investments, N.V., SEC Staff No-Action Letter (Apr. 14, 1989). Managers that exert significant control over a fund asset, including by virtue of being a board member or an executive officer, of an underlying portfolio asset may also assert that the asset should not be counted toward RAUM because Form ADV excludes from the calculation of RAUM real estate or business operations that that a manager "manages on behalf of a client but not as an investment." Item 5.F.

[xxxv] Item 5F instructs managers to only calculate assets for which they provide continuous and regular supervisory or management services as part of the manager's RAUM. The criteria for "continuous and regular supervisory or management services" are narrower where the manager lacks discretionary authority over an account as compared to when a manager has discretionary authority. However, it is still possible for a manager that does not have discretionary authority to be performing continuous and regular supervisory services if the manager makes recommendations based on the specific needs of its investor and arranges or effects the purchase and sale of the asset. Item 5F also instructs managers to exclude from RAUM investments that "consist of real estate or businesses whose operations" the manager manages "on behalf of a client but not as an investment."

[xxxvi] *See* "Private Equity Real Estate Top 50-2016 Edition of Who is Registered," available at: https://www.compliancebuilding.com/2016/05/04/private-equity-real-estate-top-50-2015-edition-of-who-is-registered-2/.

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