

SEC ISSUES NO-ACTION LETTER ON REGISTRATION OF RELATED INVESTMENT ADVISERS

On January 18, 2012, the Division of Investment Management of the Securities and Exchange Commission (“SEC”) issued a no-action letter (the “Related Adviser Letter”)¹ in response to an inquiry from the Business Law Section of the American Bar Association (“ABA”). The ABA letter inquired into the impact of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) on the SEC’s views with respect to registration requirements for investment advisers that are related to registered investment advisers.

SPVs CREATED BY REGISTERED INVESTMENT ADVISERS

In a December 8, 2005 letter to the ABA’s Subcommittee on Private Investment Entities (the “2005 Letter”), the SEC staff took the position that it would not recommend enforcement action under sections 203(a) or 208(d) of the Investment Advisers Act of 1940, as amended (the “Advisers Act”), against a registered adviser or a special purpose vehicle (“SPV”) created by such registered adviser for the failure of the SPV to separately register as an investment adviser; provided that the following requirements were met:

1. the investment adviser to a private fund must establish the SPV to act as the private fund’s general partner or managing member;
2. the SPV’s formation documents must designate the investment adviser to manage the private fund’s assets;
3. all of the investment advisory activities of the SPV will be subject to the Advisers Act and the rules thereunder, and the SPV will be subject to examination by the SEC; and
4. the SPV, all of its employees and the persons acting on its behalf must be “persons associated with”² the registered adviser.

In the Related Adviser Letter, the SEC’s Division of Investment Management affirmed that after the Dodd-Frank Act’s repeal of the exemption under section 203(b)(3) of the Advisers Act,³ its position with respect to SPVs remains the same. The SEC staff noted that its position also applies to situations in which a registered adviser forms multiple SPVs. In addition, in the case of an SPV with independent directors, the SEC staff would not recommend enforcement action against a registered adviser and its

¹ The Related Adviser Letter is available at: <http://sec.gov/divisions/investment/noaction/2012/aba011812.htm>.

² As defined in section 202(a)(17) of the Advisers Act, the term “persons associated with” an investment adviser means any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser, except that, other than in certain limited circumstances, persons associated with an investment adviser whose functions are clerical or ministerial will not be included in the meaning of such term.

³ Section 203(b)(3) of the Advisers Act provided an exemption from registration for private advisers with fewer than fifteen clients during the preceding twelve-month period.

SPV for failure of the SPV to separately register if the only persons acting on the SPV's behalf who were not "persons associated with" the registered adviser were the independent directors.

MULTIPLE INVESTMENT ADVISERS IN A SINGLE ADVISORY BUSINESS

In the Related Adviser Letter, the SEC staff stated that it would not recommend enforcement action under sections 203(a) or 208(d) of the Advisers Act against an investment adviser that filed a single Form ADV for itself and other advisers controlled by or under common control with that adviser; provided that all such advisers collectively conducted a single advisory business. The SEC staff stated that, absent additional facts suggesting otherwise, a filing adviser and relying advisers would be considered to be conducting a single advisory business if the following conditions were satisfied:

1. the filing adviser and each relying adviser must advise only private funds and separate account clients that are "qualified clients"⁴ and are otherwise eligible to invest in the private funds and whose accounts pursue investment objectives and strategies that are substantially similar or otherwise related to those private funds;
2. each relying adviser, its employees and the persons acting on its behalf must be "persons associated with" the filing adviser;
3. the filing adviser must have its principal office and place of business in the United States and, therefore, all of the substantive provisions of the Advisers Act and the rules thereunder will apply to the filing adviser's and each relying adviser's dealings with each of its clients;
4. the advisory activities of each relying adviser will be subject to the Advisers Act and the rules thereunder, and each relying adviser will be subject to examination by the SEC;
5. the filing adviser and each relying adviser must operate under a single code of ethics adopted in accordance with Advisers Act rule 204A-1 and a single set of written policies and procedures adopted and implemented in accordance with Advisers Act rule 206(4)-(7) and administered by a single chief compliance officer in accordance with that rule; and

⁴ As defined in Advisers Act rule 205-3, the term "qualified client" means: (i) a natural person who or a company that immediately after entering into the contract has at least \$750,000 under the management of the investment adviser; (ii) a natural person who or a company that the investment adviser entering into the contract (and any person acting on his behalf) reasonably believes, immediately prior to entering into the contract, either: (a) has a net worth (together, in the case of a natural person, with assets held jointly with a spouse) of more than \$1,500,000 at the time the contract is entered into; or (b) is a qualified purchaser as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 at the time the contract is entered into; or (iii) a natural person who immediately prior to entering into the contract is: (a) an executive officer, director, trustee, general partner, or person serving in a similar capacity, of the investment adviser; or (b) an employee of the investment adviser (other than an employee performing solely clerical, secretarial or administrative functions with regard to the investment adviser) who, in connection with his or her regular functions or duties, participates in the investment activities of such investment adviser, provided that such employee has been performing such functions and duties for or on behalf of the investment adviser, or substantially similar functions or duties for or on behalf of another company, for at least twelve months.



6. the filing adviser must disclose in its Form ADV that it and its relying advisers are filing a single Form ADV in reliance on the Related Adviser Letter and the filing adviser must identify each relying adviser and complete a separate Section 1.B., Schedule D, of Form ADV for each such relying adviser.

ABOUT CURTIS

Curtis, Mallet-Prevost, Colt & Mosle LLP is a leading international law firm. Headquartered in New York, Curtis has 15 offices in the United States, Mexico, Europe, the Middle East and Central Asia. Curtis represents a wide range of clients, including multinational corporations and financial institutions, governments and state-owned companies, money managers, sovereign wealth funds, family-owned businesses, individuals and entrepreneurs.

For more information about Curtis, please visit www.curtis.com.

FOR FURTHER INFORMATION, CONTACT:

VICTOR ZIMMERMANN
e-mail: vzimmermann@curtis.com
tel: +1 212-696-6952

CARL RUGGIERO
e-mail: cruggiero@curtis.com
tel: +1 212-696-6116

THOMAS LAURER
e-mail: tlaurer@curtis.com
tel: +1 212-696-6077