

**INDIANA SECRETARY OF STATE  
SECURITIES DIVISION**

**AMENDED STATEMENT OF POLICY REGARDING  
PRIVATE EQUITY/VENTURE CAPITAL FUNDS AND  
INVESTMENT ADVISER REGISTRATION**

The Indiana Secretary of State and the Securities Commissioner have determined that it is appropriate and in the public interest to issue a Statement of Policy addressing private equity/venture capital funds and registration as an investment adviser or investment adviser representative.

Statutory Context

Ind. Code § 23-19-4-3(a) contains a violation of the Indiana Uniform Securities Act (“Act”) for a person to transact business as an investment adviser unless the person is registered under the Act or exempt from registration. The exemptions are provided in subsection (b) and include: a person without a place of business in Indiana, and whose clients include federal covered investment advisers, registered investment advisers, broker dealers, or institutional investors; a person without a place of business in Indiana who has five (5) or fewer clients who maintain their principal residence in Indiana; and anyone else the Securities Commissioner (“Commissioner”) exempts by rule or order.

Background

The Indiana Securities Act (“Predecessor Act”), which is repealed as of July 1, 2008, contained an exemption from investment adviser registration for any person transacting business as an investment adviser if the person had five (5) or fewer clients in Indiana. Ind. Code § 23-2-1-8(c)(3). This exemption applied regardless of where the investment adviser was located. Under the Indiana Uniform Securities Act, which takes effect July 1, 2008, any person transacting business as an investment adviser while located in Indiana must register with the Securities Division. Ind. Code § 23-19-4-3(b)(3).

A consequence of the change in this exemption is that managers of private equity/venture capital funds may be required to register as investment advisers. The definition of “investment adviser” is typically read broadly and includes any person that for compensation engages in the business of advising others as to the value of securities or to the advisability of investing in, purchasing, or selling securities. Ind. Code § 23-19-1-2(15). Through a broad reading, the definition of “investment adviser” could include the managers of private equity/venture capital funds, who make recommendations to purchase securities of developing companies to other members of the fund. As a result, the managers of these funds with a place of business in Indiana would be required to register as investment advisers with the Securities Division.

To facilitate the transition of private equity/venture capital funds managers from exempt status to registrant status under the Act, the Commissioner is issuing the following policy, which creates a temporary no action position for private equity/venture capital funds managers if they do not register as an investment adviser or investment adviser representative under the Act. The Commissioner shall provide more permanent guidance in the future.

### Policy

- (a) Until such time as the Securities Commissioner gives further notice, the Securities Commissioner will not institute enforcement action against any person for failing to register as an investment adviser or investment adviser representative if the person:
- (i) maintains a place of business in this state;
  - (ii) has had during the preceding twelve (12) months, not more than five (5) clients that are residents in Indiana;
  - (iii) does not hold itself out generally to the public as an investment adviser;
  - (iv) is exempt from registration under the Investment Advisers Act of 1940, as amended, by virtue of Section 203(b)(3) of that Act; and,
  - (v) provides investment advise to venture capital companies only.
- (b) For the purposes of this order, the following definitions shall apply:
- (1) “Venture capital company” is defined to include any company if, on at least one (1) occasion during the annual period commencing with the date of its initial capitalization, and on at least one occasion during each annual period thereafter, at least fifty percent (50%) of its assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, are venture capital investments or derivative investments.
  - (2) “Venture capital investment” is defined to include an acquisition of securities in an operating company as to which the investment adviser, the entity advised by the investment adviser, or an affiliated person of either has or obtains management rights.
  - (3) “Derivative investment” is defined to include securities acquired by a venture capital company in the ordinary course of its business in exchange for an existing venture capital investment either:
    - (i) upon the exercise or conversion of the existing venture capital investment; or,
    - (ii) in connection with a public offering of securities or the sale, merger, or reorganization of the operating company to which the existing venture capital investment relates.
  - (4) “Management rights” is defined to include the right, obtained contractually or through ownership of securities, either through one person alone or in conjunction with one or more persons acting together or through an affiliated person, to substantially participate in, to substantially influence the conduct of, or to provide

(or to offer to provide) significant guidance and counsel concerning the management, operations, or business objectives of the operating company in which the venture capital investment is made.

- (5) "Operating company" is defined to include an entity, not an individual or sole proprietorship, that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in:
- (i) the production or sale (including any research or development) of any product or service, other than the management or investment of capital; or,
  - (ii) the development, ownership, purchase, or sale of real property or interests therein.
- (6) "Affiliated person" is defined to include a person that controls, is controlled by, or is under common control with the other specified persons.
- (7) "Control" is defined to include possessing, directly or indirectly, the power to direct or cause the direction of management and policies.

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DATED at Indianapolis, Indiana, this 10<sup>th</sup> day of JULY, 2008.



TODD ROKITA  
SECRETARY OF STATE

A handwritten signature in black ink, appearing to read "Chris Naylor".

CHRIS NAYLOR  
SECURITIES COMMISSIONER