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SECURITIES DIVISION

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INDIANA
SECRETARY OF STATE

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SECURITIES DIVISION

IN THE MATTER OF:	)	
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UPDATED PRIVATE EQUITY/VENTURE	)	12-0012 AO
CAPITAL FUNDS AND INVESTMENT	)	
ADVISER REGISTRATION	)	
	)	
	)	

ADMINISTRATIVE ORDER

The Indiana Secretary of State and the Securities Commissioner ("Commissioner") have determined that it is appropriate and in the public interest to issue an Administrative Order regarding investment adviser registration of certain private equity/venture capital funds.

Regulatory 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 Commissioner exempts by rule or order. On July 1, 2008, the Commissioner issued a Statement of Policy regarding Private Equity/Venture Capital funds and Investment Adviser Registration that provided a no action position for certain private equity/venture capital funds to operate in Indiana without registering as investment advisers.

Background

Because of changes in the transition from the Indiana Securities Act (Ind. Code § 23-2-1-1 *et seq.*) to the Indiana Uniform Securities Act (Ind. Code 23-19-1 *et seq.*), the exemption for investment advisers with five (5) or fewer clients in Indiana was limited to only those investment advisers without a place of business in Indiana. The Securities Division ("Division") interprets the client of private advisers to be the fund itself. As a result, the Indiana based managers of private equity/venture capital funds were required by the Act to register as investment advisers with the Division. Recognizing that traditional investment adviser registration did not fit the business model of certain private equity/venture capital funds, the Commissioner issued a Statement of Policy on July 1, 2008, providing a no action position for private equity funds. To claim the exemption, the private equity fund must: (1) maintain a place of business in Indiana; (2) advise five (5) or fewer clients in the previous twelve (12) months; (3) not hold itself out to

the general public as an investment adviser; (4) be exempt from the Investment Adviser Act of 1940 under Section 203(b)(3); and (5) provide advice to venture capital companies only. The Statement of Policy further defined "venture capital company" 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.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (H.R. 4173) ("Dodd-Frank"), which went into effect on July 22, 2011, eliminated the private adviser exemption under Section 203(b)(3) of the Investment Adviser Act of 1940 thereby rendering the July 1, 2008, Statement of Policy requirements impossible to meet. In its place, Dodd-Frank enacted Section 203(l), which specifically exempts venture capital funds and requires the Securities and Exchange Commission ("SEC") to define "venture capital fund." The SEC defined "venture capital fund" in 17 C.F.R. 275.203(I)-1 to include funds that (1) represent to investors that it pursues a venture capital strategy; (2) holds no more than twenty percent (20%) of its assets in securities of qualifying companies; (3) does not issue excessive debt; (4) does not issue redeemable securities; and (5) is not registered under Section 8 of the Investment Company Act of 1940 and does not define itself as a business development company.

Until the Division can promulgate rules to address venture capital funds and investment adviser registration, the Commissioner is granting a no action position to certain private equity funds. This no action position will in effect act as an extension of the July 1, 2008, Statement of Policy.

IT IS THEREFORE ORDERED that:

Until such time as the Securities Commissioner adopts final rules on the regulation of private equity/venture capital funds and investment adviser registration, 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:

(a) maintains a place of business in Indiana;

(b) has had during the preceding twelve (12) months, not more than five (5) clients that are residents in Indiana;

(c) does not hold itself out generally to the public as an investment adviser;

(d) Advises a qualifying private fund (as defined in SEC Rule 203(m)-1, 17 C.F.R. 275.203(m)-1) so long as neither the fund adviser nor any of its advisory affiliates are subject to a disqualification as described in Rule 262 of SEC Regulation A, 17 C.F.R. § 230.262.

A fund adviser described in paragraph (d) above who advises at least one qualifying private fund that is eligible for the exclusion from the definition of an investment company under section 3(c)(1) of the Investment Company Act of 1940, 15 U.S.C. 80a-3(c)(1) that is not a venture

capital fund shall, in addition to satisfying the conditions specified in paragraph (d), comply with the following requirements:

(a) The fund adviser shall advise only those 3(c)(1) funds (other than venture capital funds as defined in SEC Rule 203(l)-1, 17 C.F.R. § 275.203(l)-1) whose outstanding securities (other than short-term paper) are beneficially owned entirely by persons who would each meet the definition of an accredited investor under SEC Regulation D, Rule 501(a), 17 C.F.R.§ 230.501(a), at the time the securities are purchased from the issuer;

(b) At the time of purchase, the private fund adviser shall disclose the following in writing to each beneficial owner of a 3(c)(1) fund that is not a venture capital fund:
(1) all services, if any, to be provided to individual beneficial owners;
(2) all duties, if any, the investment adviser owes to the beneficial owners; and
(3) any other material information affecting the rights or responsibilities of the beneficial owners.

(c) The private fund adviser shall obtain on an annual basis audited financial statements of each 3(c)(1) fund that is not a venture capital fund, and shall deliver a copy of such audited financial statements to each beneficial owner of the fund.

DATED at Indianapolis, Indiana, this 9TH day of JANUARY, 2012.

CHARLES P. WHITE
SECRETARY OF STATE

CHRIS NAYLOR
SECURITIES COMMISSIONER