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Private Investment Funds and Unregistered Marketers

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For many years the legal and regulatory environment applicable to the private investment fund industry (which includes hedge funds, private equity funds and similar vehicles) enabled it to operate with little oversight relative to other investment products. Recently however, on the heels of the 2010 Dodd-Frank financial reform legislation and a more enforcement-oriented mindset on the part of regulators, the industry and some of its long-standing practices have come under greater scrutiny. This article discusses a particular area of increased focus—whether in-house and third-party marketers of private funds must register as broker-dealers and the implications of failing to register. In addition to the newly relevant, but longstanding broker-dealer registration requirements, this article addresses recent legislation which has lifted a ban on general solicitation in connection with certain private offerings of securities by private investment funds (and other issuers) and how it may impact the obligations of fund managers and their marketers.

The Spotlight Shifts

In an April 5, 2013 speech, David Blass, Chief Counsel of the Securities Exchange Commission's (SEC) Division of Trading and Markets, cautioned the private investment fund industry that the SEC had its eye on a "significant area of concern"—in-house and third-party marketers that solicit investors for funds, without becoming registered broker-dealers.[1] Blass identified a number of factors that such funds should

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From the EDITORS

Wachtell Lipton's Answer to the Billable Hour Sheds Light on Legal Industry

Here at *Wall Street Lawyer*, we don't often get into bouts of navel-gazing when it comes to the legal industry. We stick to our bread and butter—legal developments within the securities industry regulation and litigation sphere. But sometimes, things come across our desk that underscore how much the legal industry itself is changing under our feet.

One such thing was the recent news, leaked via a two-year-old client letter, that Wachtell, Lipton, Rosen & Katz had abandoned, at least in some legal work on deals, the iconic "billable hour" with which many law firms earn their own bread and butter.

In the client letter to the general counsel of CVR Energy, Wachtell Lipton—widely regarded as a pack leader in legal deal work—details its alternative fee arrangement, which calls for a $200,000 fee paid up front, and a percentage of the resulting transaction. That percentage ranges from up to 1% for deals under $250 million to 0.1% or less for deals valued at more than $25 billion. Interestingly, at least some of the pressure to move toward this percentage structure may have come from clients themselves who want the law firms, like the investment banks involved, to have their interests aligned with the goal of getting the deal done.

Wachtell's letter goes on to state that these fees are based "not on time, but on the intensity of the firm's efforts, the responsibility assumed, the complexity of the matter and the result achieved." For the hefty sum, Wachtell supplies the client with "the direct personal attention of partners having expertise and sophistication with respect to the issues."

Such a matchless approach to client billing shouldn't surprise anyone who has followed the changes roiling the once staid world of corporate law. Since the financial crisis, as more and more companies tightened their belts, they began to look for cost-cutting wherever they could find it. Eventually, the scissors found the legal spend budget, leading to a rapid shift in the industry from a sellers' to a buyers' market. Mix that with at best modest growth in the demand for legal services and strong growth in the market share being eaten up by of tech-savvy non-traditional legal service providers, and you have recipe for a seismic quake in the law firm world.

Bruce MacEwen, President of Adam Smith, Esq., which provides management consulting services on the business and economics of law firms, sees the pace of change accelerating even if many law firms are slow to notice. "We're going to see more change in the next five or so years than we've seen in the last couple of decades, frankly," MacEwen said. "I think clients learned a lesson during the Great Recession that they can actually cut total legal spending without sacrificing quality—and I don't think they're going to forget that lesson anytime soon."

Indeed, many companies and their general counsel wouldn't mind if more firms did away with the billable hour, as Wachtell did, and which many think is an antiquated and often unfair way to pay for legal service. And those GCs know that if their law firm of choice isn't willing to budge, there are many alternatives for delivery of legal service now, including moving more of the work in-house to expanded internal legal departments or farming it out in pieces to tech-focused firms that can do certain legal tasks—discovery, for example—much cheaper than traditional law firms.

It is a shift, and one some law firms—like Wachtell—seem to be picking up on faster than others.

— JOHN F. OLSON & GREGG WIRTH

CONTINUED FROM PAGE 1

consider when weighing their decision to register, including the primary activities of the employee and their compensation structure.[2] A person engaged in the business of effecting transactions in securities for the account of others, especially transactions "at key points in the chain of distribution", must generally register as a broker-dealer.[3] Additionally, it is unlawful to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security without being so registered.[4] A failure to register should be of great concern to fund managers because investors may seek rescission of transactions entered into with unregistered brokers and the SEC may seek a host of other remedies for violations.[5]

Once a fund is successfully sued for employing an unregistered broker, in addition to paying damages and other sanctions associated with the suit, the fund must also disclose this information in future offerings and sales.[6] With the potential for serious repercussions for failure to comply with the broker-dealer registration requirements under Section 15 of the Securities Exchange Act of 1934 (the "Exchange Act"—codified at 15 U.S.C. Section 78*a* et seq.) cited above, fund advisers would be well advised to take this requirement seriously.

Is Your Marketer Actually a Broker?

Section 3(a)(4) of the Exchange Act broadly defines a "broker" as "any person engaged in the business of effecting transactions in securities for

an equally liberal interpretation. A person may be found to be acting as a broker if that person participates in securities transactions "at key points in the chain of distribution."[8] Generally, a person engaged in the business of effecting transactions in securities for the account of others must register as a broker-dealer with the SEC, as a member of the Financial Industry Regulatory Commission (FINRA), and comply with any applicable requirements under state law.[9] Although the Exchange Act does not explicitly define "engaged in the business", subsequent court and SEC interpretations have developed the "engaged in the business" test.[10]

Private funds typically market through one of three strategies: (i) in-house employees that are dedicated to the marketing process and may be compensated on a commission basis; (ii) the fund and manager have informal arrangements with third-party finders and other sourcing agents (any of which may or may not be registered as broker-dealers) where the finders or agents are typically compensated through a share of the management and performance compensation received; and (iii) the funds enter into formal placement arrangements with major investment firms.[11] The first two strategies raise significant questions regarding broker-dealer registration and potential liability.

An in-house or third-party marketer may need to register if they are engaged in the following activities:

- identifying potential purchasers of fund interests;
- marketing securities to investors;
- soliciting or negotiating securities transactions;
- providing advice as to the merits of a fund investment; or
- handling customer funds and securities.[12]

In his 2013 speech, Blass provides questions that advisers and managers should ask themselves in order to determine whether or not registration

is how the adviser solicits and retains investors.[14] The duties and responsibilities of adviser personnel performing the soliciting and marketing is another determining factor.[15] Blass said:

> **"[A] dedicated sales force of employees working within a 'marketing' department may strongly indicate that they are in the business of effecting transactions in the private fund."[16]**

Another consideration is whether or not the marketing personnel have other responsibilities.[17] If their primary function is to solicit investors, registration is likely required.[18]

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Compensation is also a key factor in determining the registration requirement. When the individual's compensation depends on the outcome or size of the transaction, rather than a flat fee, retainer or salary, these activities weigh even more heavily toward the need to register.[19] According to Blass, as a bright-line rule, transaction-based compensation arrangements entered into by private fund managers require broker-dealer registration.[20]

Blass noted:

> **"A person's receipt of transaction-based compensation in connection with [marketing] activities is a hallmark of broker-dealer activity."[21]**

If the personnel receive commissions, bonuses or other types of compensation linked to successful investments, then registration is required.[22] Furthermore, in certain circumstances registration may be required even when compensation is not based on specific transactions.[23] Despite recent SEC action and the Blass speech, a U.S. District Court rejected the SEC's view that transaction-based compensation alone requires broker-dealer registration. In *SEC v. Kramer*, the court refused to follow Blass's bright-line test, instead electing to impose another test that employed several non-determinative factors.[24]

When That Marketer Is Actually a Broker-Dealer

According to §15(a)(1) of the Exchange Act (15 U.S.C. §78*o*(a)(1)), it is unlawful for a person to make use of the mail or any means of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security unless that person is registered as a broker-dealer. Therefore, if a fund uses unregistered solicitors they may be in violation of the law and in turn create liability for the individual, the fund and the fund manager. In the SEC decision *In the Matter of Ranieri Partners LLC and Donald W. Phillips*, the Commission determined that an independent consultant had operated as an unregistered broker.[25] The consultant's solicitation efforts included: sending private placement memoranda, subscription documents, and due diligence materials to potential investors; urging at least one investor to consider adjusting its portfolio allocations to accommodate an investment with Ranieri Partners; and providing potential investors with his analysis of Ranieri Partners' fund strategy and performance track record.[26]

As illustrated by the Ranieri decision and discussed further in the "Consequences of Violating the Registration Requirement" section below, an unregistered individual who identifies potential purchasers of fund interests, markets securities to investors, solicits or negotiates securities transactions, provides advice as to the merits of a fund investment, or handles customer funds and securities, will likely be found in violation of federal securities law. While that is certainly a problem for that individual, the greater concern for the fund manager is the possibility that it may incur aiding and abetting liability for the marketer's underlying violation, among other things.

Recent developments, including relaxed statutory and judicial standards for establishing aiding and abetting liability, are likely to encourage the SEC to bring more of such enforcement actions in the future. For instance, in *In the Matter of Visionary Trading LLC*, the SEC charged a manager and a registered broker-dealer with willfully aiding and abetting and causing an unregistered broker-dealer and its employees to violate the Exchange Act.[27] On the other hand, some recent case law suggests that the aiding and abetting charge in the Ranieri case and in other cases will not always apply. For example, in the *Wexler v. KPMG LLP* case a fund investor who lost his investment in the Madoff Ponzi Scheme brought suit against the fund manager.[28] The New York Supreme Court dismissed the aiding and abetting claim, stating that there was no evidence the fund manager substantially assisted the fraud.[29] However, the *Wexler* case may be distinguishable on its facts. The fund manager in *Wexler* may have been unaware of the Madoff fraud since that is a fact intrinsic to a particular entity or person that the manager may or may not discover. In contrast, it may be more difficult for a fund manager to validly claim that it is unaware that, as a general rule, fund marketers are required to register as

broker-dealers or qualify for a clear exemption from registration.

Improbable Exemptions

Although there is a possible safe harbor, known as the Issuers Exemption, in which certain associated persons (*e.g.* directors and officers) of the issuer (or certain affiliates) can participate in the sale of the issuer's securities without being considered a broker, the exemption is inapplicable to most private fund marketers, mainly because it restricts them from being compensated based on their participation in the securities transaction.[30] In order to qualify for the exemption, the associated person must satisfy three primary requirements and at least one of three alternative sets of conditions. The primary requirements are that the associated person must **not** be: (1) subject to a statutory disqualification, as defined in Section 3(a)(39); (2) compensated in commissions; and (3) at the time of his participation an associated person of a broker or dealer.[31] In addition to these three primary requirements, the associated person must also satisfy one of the three alternative sets of criteria listed under SEC Rule 3a4-1(a)(4). The alternative set of requirements that may be most useful to fund managers is found in sub-clause (a)(4)(ii) of Rule 3a4-1, which requires the associated person to: (*i*) have substantial other duties than marketing securities; (*ii*) have not been associated with a broker-dealer in the prior 12 months; and (*iii*) not participate in securities offerings more than once every 12 months.[32] Fund managers may qualify for this exemption, but a full-time employee in a marketing department offering securities on a continuous basis is unlikely to do so.[33]

Another possible safe harbor exists in what is known as the Finders Exception. Based on a handful of SEC staff no-action letters, it is generally thought that persons who do nothing more than introduce prospective investors to the issuer are "finders," not "brokers," and are not required to register. A finder is prohibited from negotiating the transaction or receiving commissions related to the amount of the transaction. While a few no-action letters support this position and the SEC has not formally withdrawn them, the SEC has been reluctant to create an official "finder's exemption."[34] Many securities practitioners view the Finders Exception to be too narrow to have any practical utility.

The SEC has cautioned that persons who find investors for issuers, even in a "consultant" capacity, may still need to register as a broker depending on a number of factors, including whether: (*i*) the finder participates in the solicitation, negotiation or execution of the transaction; (*ii*) compensation is related to the outcome or size of the transaction; (*iii*) the finder is otherwise engaged in the business of effecting securities transactions; and (*iv*) the finder handles securities or funds of others. A "yes" answer to any of these factors indicates that registration may be required.[35]

This area of regulation is currently in a state of flux and it remains to be seen if and how the SEC will enforce the provisions requiring broker-dealer registration for private fund marketers. In his speech, Blass floated the idea of creating an exemption specifically for private fund marketing, but wouldn't budge on extending the hypothetical exemption to unregistered employees being paid on commission basis.[36]

Consequences of Violating the Registration Requirement

There is a broad range of consequences for failing to register in-house marketers as broker-dealers or using the services of an unregistered third-party, and either of these violations can implicate the fund and its manager. The remedies available in an SEC enforcement action or private civil action include: the potential right of rescission on the part of investors under federal or state law; fines, disgorgement, injunctions and the suspension of some or all activity; potential reputational risks in the marketplace and negative publicity; and if any resulting disciplinary event reaches the level of a Rule 506(d) "bad act," potentially losing the ability to issue fund securities through an exempt private placement under Regulation D.[37]

The Exchange Act provides that a contract made in violation of the Act shall be void.[38] If a purchase of fund securities through an unregis-

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tered broker-dealer is "rendered void, investors would then be entitled to demand rescission of their investment in the fund and the unwinding of their investment to the detriment of the fund, its investors and, of course, the fund adviser."[39] A private plaintiff seeking rescission of the contract under the Act bears the burden of proving the marketer was not registered and was required to be.[40] Such a rescission action must be brought within one year after the discovery that the sale was made in violation of the Exchange Act and within three years of such violation.[41] The right to rescission applies to any purchaser in the transaction, and not just purchasers who had been located by unregistered marketers.[42] In addition to the Exchange Act, many state statutes that provide for a right of rescission can be read broadly to apply against an issuer if the purchaser bought securities through a marketer who was required to be registered as a broker under state law, but was not so registered.[43]

Violating the broker-dealer registration requirement has even broader consequences for issuers.[44] If the SEC determines that a finder was an unregistered broker-dealer, the issuer may be restricted from using any and all future registration exemptions under the Securities Act.[45] Moreover, use of an unregistered broker-dealer may subject the issuer to liability for fraud under Section 20(e) of the Exchange Act.[46] The issuer could be liable under the theory that they aided and abetted the unregistered broker-dealer in violating the Act.[47] With such liability, both the finder and the issuer could be subject to civil monetary penalties and disgorgement of profits and/or commissions.[48]

Ranieri Partners illustrates the real world consequences of an issuer using an unregistered broker-dealer.[49] The SEC not only found that the unregistered broker had violated the Exchange Act by failing to register as a broker-dealer, but that Ranieri Partners had caused the violations by failing to oversee his activities, and that the then Managing Partner had willfully aided and abetted the broker's violations by failing to limit his activities.[50] As part of the settlement, the violating broker agreed to be permanently barred from the securities industry and to pay disgorgement and prejudgment interest in excess of $2.8 million.[51] Moreover, Ranieri Partners agreed to a civil money penalty of $375,000 and to cease and desist from causing any future violations of the Act.[52] The Managing Partner also submitted to a cease and desist order, agreed to a $75,000 civil penalty, and accepted a nine-month suspension from acting in a supervisory capacity in the securities industry.[53]

The potential for severe consequences resulting from the use of unregistered broker-dealers is also illustrated by the 2012 Chapter 11 bankruptcy filing of Neogenix Oncology Inc.[54] In 2011, an SEC inquiry revealed that Neogenix had been making sales through unregistered third-party broker-dealers in violation of the Exchange Act.[55] Consequently the firm had significant potential rescission liability for the securities sold in connection with the unregistered marketers.[56] This potential liability caused uncertainty in their financial statements and due to the uncertainty, the Neogenix auditors were unable to sign-off on those statements.[57] Without third-party auditor sign-off, Neogenix could not properly file quarterly and annual financial statements with the SEC and struggled to raise additional capital that was essential for the development stage company.[58] Neogenix subsequently filed for bankruptcy in July of 2012.[59]

Disclosing Violations of the Registration Requirement

Once a fund uses an unregistered broker-dealer, the fund must satisfy certain disclosure requirements.[60] Both federal and state securities laws require that a fund disclose if it has compensated any person to sell such securities.[61] Failing to disclose such compensation can expose an issuer to potential liability for fraud under Section 10b-5 of the Securities Act.[62] "Even if rescission is not demanded by prior investors, the use of an unregistered broker-dealer in a prior transaction will create disclosure requirements in subsequent financings, acquisitions, or offerings."[63] The risk of private suit, illegality or rescission, arising from finder non-registration, is a material fact that, if omitted, constitutes a 10b-5 violation.[64] Note, however, that such failure to disclose is

only fraudulent if the issuer knows the finder is not registered, but should be.[65] Therefore, once a fund is successfully sued for employing an unregistered broker, they must disclose this information in future offerings and sales.[66]

General Solicitation and Broker Registration

One other factor that is increasing the SEC's attention to marketing by private investment funds and broker-dealer registration is the recent enactment of the Jumpstart Our Business Startups Act (JOBS Act), particularly Title II, Access to Capital for Job Creators.[67] On July 10, 2013, the SEC approved final rules under the JOBS Act to allow general solicitation and advertising in Rule 506 and Rule 144A offerings conditional on all purchasers being accredited investors.[68] Although the JOBS Act was intended to encourage the funding of small businesses and startups, Title II opens the door for general solicitation by private investment funds.[69] Some funds have already begun to take advantage of the recent changes with direct marketing efforts, despite not registering as broker-dealers.[70] However, the increased risk of fraud and predatory targeting of unsophisticated investors that general solicitation creates may be expected to be exacerbated even further by the use of unregistered finders in those solicitation efforts. In light of the SEC's general animus against unregistered finders which it views as presenting greater potential for abuse, the SEC is likely to increase its regulatory focus and scrutiny on the marketing activities of private funds that engage in general solicitation.

Conclusion

Given the SEC's recent increased interest in the proper registration of marketers, fund managers should already be on notice that individuals, whether in-house or third-party, who engage in marketing securities will likely be required to register as broker-dealers. Without significant change to the compensation structure and job description of these marketers, it is unlikely that any of the current exemptions to registration will apply. As is evident from the experiences of Ranieri Partners and Neogenix, disclosure that a finder was in fact an unregistered broker-dealer can be the beginning of a long and arduous process for the issuer. Litigating these cases can be expensive and both the issuer and finder risk reputational damage regardless of the actual outcome of the case. Once the matter is disclosed to the public, both the issuer and the finder may be open to rescission liability, consequent monetary penalties and other liabilities. Therefore, issuers would be wise to heed David Blass' warning and ensure their marketers are properly registered.

NOTES

1. David W. Blass, Chief Counsel, Sec. Exch. Comm'n Div. of Trading & Mkts., "A Few Observations in the Private Fund Space," (Speech at the American Bar Association, Trading and Markets Subcommittee) (Washington, D.C., 5 April 2013) ("Blass Speech"). Full text available at http://www.sec.gov/News/Speech/Detail/Speech/1365171515178.
2. Blass Speech.
3. *See Mass. Fin. Serv., Inc. v. Sec. Investor Prot. Corp.*, 411 F. Supp. 411, 415 (D. Mass.), *aff'd,* 545 F.2d 754 (1st Cir. 1976), *cert. denied*, 431 U.S. 904 (1977).
4. *See* 15 U.S.C. §78*o*.
5. *See* 15 U.S.C. §78*cc*(b).
6. 17 C.F.R. § 230.502.
7. 15 U.S.C. §78*c*(a)(4).
8. *See Mass Fin. Serv., Inc.*, 411 F. Supp. at 415.
9. *See* Guide to Broker-Dealer Registration, U.S. Secs. & Exch. Comm'n: Division of Trading and Markets (Apr. 2008) *available at* http:// www.sec.gov/divisions/marketreg/bdguide.htm#II (citing Exchange Act, 15 U.S.C. §§ 78o, 78c(a)(4)(A), (a)(5)(A) (2012).
10. *See* Scott W. Naidech & Coleman C. Miller, *Broker-Dealer Registration Concerns For Private Fund Sponsors*, Private Funds Practice Newswire, Chadbourne & Parke LLP 4 (Feb. 2014) *available at* http://www.chadbourne.com/files/Publication/ae4f94c5-34ec-4edf-99fd-d8680edadbcc/Presentation/PublicationAttachment/809dfe29-1944-4b89-ab24-d9efb93d2071/PrivateFundsNewsWire_Feb14_web.pdf#page=6. The "engaged in the business" test focuses primarily on the individual's regularity of participation in securities transactions, spotlighting two non-determinative factors: (*i*) the number of clients held and transactions executed by the individual; and (*ii*) the total dollar value of securities ex-

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changed. *See Mass Fin. Serv., Inc.*, 411 F. Supp. at 415. *See also SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998); *SEC v. Margolin,* 1992 WL 279735, *5 (S.D.N.Y.); *SEC v. Nat'l Exec. Planners, Ltd.*, 503 F. Supp. 1066, 1073 (M.D.N.C. 1980) (sale of $4.3 million in a single investment product was sufficient for broker status under the test). Other factors that may demonstrate an individual is engaged in the business are: (*i*) receiving transaction-based commissions, (*ii*) identifying oneself as a broker; and (*iii*) actively soliciting transactions. *See Kenton Capital, Ltd.*, 69 F. Supp. 2d at 12-13. *See also BondGlobe, Inc.*, SEC Denial of No-Action Request (Feb. 6, 2001); *SEC v. Martino*, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003); *SEC v. Margolin*, 1992 WL 279735, *5 (S.D.N.Y. Sept. 30, 1992); *SEC v. Century Inv. Transfer Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 93,232 (S.D.N.Y. Oct. 5, 1971) (defendant "engaged in the business" by soliciting customers through ads in The Wall Street Journal).

11. Ethan W. Johnson, Hedge fund marketing overview. *Journal of Investment Compliance*, Vol. 7 No. 2 2006, pp. 48-51, Emerald Group Publishing Limited.
12. *See* Blass Speech; *See also* Naidech & Miller, *Broker-Dealer Registration Concerns for Private Fund Sponsors*.
13. Blass Speech.
14. Blass Speech.
15. Blass Speech.
16. Blass Speech.
17. Blass Speech.
18. Blass Speech.
19. Blass Speech.
20. Blass Speech.
21. *See* Order Exempting the Federal Reserve Bank of New York, Maiden Lane LLC and the Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1 from Broker-Dealer Registration, Securities Exchange Act Release No. 61884 (April 9, 2010).
22. Blass Speech.
23. Blass Speech.
24. *See SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011); *See also Maiden Lane Partners, LLC v. Perseus Realty Partners, G.P. II, LLC*, CIV.A. 09-2521-BLS1, 2011 WL 2342734 (Mass. Super. May 31, 2011) (rejecting the idea that commission-based pay is a dispositive factor in defining a broker).
25. SEC Release No. 34-69091, Administrative Proceeding File No. 3-15234 (March 8, 2013).
26. *In the Matter of Ranieri Partners LLC and Donald W. Phillips*. SEC Release No. 34-69091, Administrative Proceeding File No. 3-15234 (March 8, 2013).
27. *In the Matter of Visionary Trading LLC*. SEC Release No. 34-72872, Administrative Proceeding File No. 3-15823 (April 4, 2014). The SEC's standard in bringing the aiding and abetting charges was that the Respondent "knew or was reckless in not knowing" that its employees were operating an unregistered broker-dealer. Also in this case, the owners and employees of the unregistered broker-dealer employed a fraudulent trading scheme which likely increased the SEC's hostility in bringing charges. The fund manager and registered broker-dealer settled the case without admitting guilt.
28. *Wexler v. KPMG LLP*, 2014 WL 1292665 (N.Y.Sup.), 1 ("[s]ubstantial assistance" requires a showing that the " 'defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed,' " and that these actions " 'proximately caused the harm on which the primary liability is predicated' ")
29. *Wexler v. KPMG LLP*, 2014 WL 1292665 (N.Y.Sup.), 1.
30. 17 C.F.R. §240.3a4-1.
31. 17 C.F.R. §240.3a4-1.
32. 17 C.F.R. §240.3a4-1.
33. 17 C.F.R. §240.3a4-1.; *See also* Blass Speech.
34. *Paul Anka*, SEC No-Action Letter (July 24, 1991). *Brumberg, Mackey & Wall*, SEC No-Action Letter (May 17, 2010).
35. *Anka*, SEC No-Action Letter (July 24, 1991).
36. *See* Blass Speech.
37. 15 U.S.C. §78*o*(m); *See also* Panel Discussion, "Current Issues Facing Private Equity & Fund Managers in Today's Changing Landscape", New York City Bar, November 6, 2013 *available at* http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22922.13.pdf.
38. 15 U.S.C. §78*cc*(b).
39. National Regulatory Services, *SEC Set to Enforce Broker-Dealer Registration Requirements on Private Fund Managers*, *White Papers*, *available at* http://www.nrs-inc.com/About-Us/White-Papers/SEC_Set_Enforce_Broker_Dealer_Registration.
40. Nicholas S. Hodge, Luke T. Cadigan and Pablo J. Man; "Wake-Up Call for Unregistered Solicitors and the Managers That Hire Them", *The Investment Lawyer* vol. 20, issue 5 (2013).
41. 15 U.S.C. §78cc(b)(2)(B).
42. *See* Nancy D. Lieberman. Risks in Using Unregistered Finders to Raise Capital. SEC Trends & Developments (2012), *available at* http://www.eisneramper.com/SEC_Trends_and_Developments/Finders-Risk-Right-of-Rescission-1212.aspx.
43. *See, e.g.*, Fla. Stat. §517.021; Cal. Corp. Code §25501.5(a)(1); Ohio Rev. Code Ann. §1707.43(A); Wash. Rev. Code §21.20.430(1).

44. *See* Lieberman, Risks in Using Unregistered Finders.
45. Lieberman, Risks in Using Unregistered Finders.
46. 15 U.S.C. §78*t*.
47. 15 U.S.C. §78*t*.
48. 15 U.S.C. §78*u* (d)(3).
49. SEC Release No. 34-69091.
50. SEC Release No. 34-69091.
51. Latham & Watkins. "Finders" and the "Issuer's Exemption": The SEC Sheds New Light on an Old Subject. *Client Alert*, 1503: 3 (2013).
52. Latham & Watkins. "Finders" and the "Issuer's Exemption."
53. Latham & Watkins. "Finders" and the "Issuer's Exemption."
54. *See* Michael B. Gray. Perils of Using Unregistered Finders in Securities Transactions. *Neal, Gerber & Eisenberg Corporate Securities Alert*, 1 (2013).
55. Gray, Perils of Using Unregistered Finders.
56. Gray, Perils of Using Unregistered Finders.
57. Gray, Perils of Using Unregistered Finders.
58. Gray, Perils of Using Unregistered Finders.
59. *See* Latham & Watkins, "Finders" and the "Issuer's Exemption"at 4.
60. Steve Ganis, Jeremy D. Glaser, and Jake Romero; "Using Finders to Assist in Financings Can Impose Significant Risks on Your Company"; *Securities Alert* (2011) *available at* http://www.mintz.com/newsletter/2011/Advisories/1088-0411-NAT-SEC/web.htm.
61. 17 C.F.R. §§ 230.500 et seq. (Regulation D).
62. Ganis, Glaser, & Romero, Using Finders to Assist in Financings.
63. Ganis, Glaser, & Romero, Using Finders to Assist in Financings.
64. 17 C.F.R. § 240.10b–5(b).
65. *See, e.g., Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 634 (11th Cir. 2010) (finding that the issuer's lack of knowledge that the finders were not registered, but should have

66. 17 C.F.R. § 230.502.
67. *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106 Stat. 306 (2012). Full text *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf.
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69. SEC Fact Sheet, July 10, 2013.
70. Alexandra Stevenson; "With Ban on Ads Removed, Hedge Funds Test Waters"; *New York Times*, Feb. 20, 2014 *available at* http://dealbook.nytimes.com/2014/02/20/with-ban-on-ads-lifted-hedge-funds-test-waters/?_php=true&_type=blogs&_r=0.

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