Investment Management Regulatory Update

September 26, 2012

SEC Rules and Regulations

- SEC Issues Proposal to Eliminate General Solicitation Ban
- SEC Staff Responds to a Question About Preserving Client Anonymity on Item 7.B. of Form ADV

Industry Update

- CFTC Issues Guidance on CPO/CTA Registration and Compliance Obligations
- Canadian Registration Requirement for Non-Resident Investment Fund Managers
- Statement by SEC Chairman on Money Market Reform
- SEC Announces its First Award under its Whistleblower Program
- House Passes Bill Seeking to Tighten SEC and CFTC Cost-Benefit Analysis

Litigation

- Second Circuit Relaxes Standard to Prove Aiding and Abetting Liability in SEC Enforcement Actions
- SEC Announces Deferred Prosecution Agreement with Investment Fund

SEC Rules and Regulations

SEC Issues Proposal to Eliminate General Solicitation Ban

On August 29, 2012, the Securities and Exchange Commission (the "**SEC**") issued a proposal to permit advertising and other forms of "general solicitation" in private offerings made in reliance on Rule 506 of Regulation D of the Securities Act of 1933 (the "**Securities Act**"), so long as the purchasers in the offering are accredited investors. The proposal is mandated by Section 201(a) of the Jumpstart Our Business Startups Act (the "**JOBS Act**") but, unlike other portions of the JOBS Act, the proposal would apply to all issuers, not just emerging growth companies.

Rule 506 of Regulation D is a non-exclusive safe harbor that permits the sale of securities in private placements to purchasers that at the time of sale are, or the issuer reasonably believes them to be, accredited investors, as well as up to 35 non-accredited investors, subject to certain conditions. These conditions forbid an issuer or a person acting on its behalf from using any form of general solicitation or general advertising in the offer or sale of securities under Rule 506. The JOBS Act directed the SEC to amend Rule 506 to permit general solicitation or general advertising in Rule 506 offerings, provided that the only purchasers are accredited investors.

The proposal would permit an issuer and its designees to advertise in connection with a Rule 506 offering if (i) the issuer takes "reasonable steps" to verify that the purchasers are accredited investors, (ii) all purchasers are accredited investors or the issuer reasonably believes that they are accredited investors at the time of sale and (iii) all of the terms and conditions of Rule 501 and Rules 502(a) and 502(d) of Regulation D are satisfied.

Reasonable Verification Steps. The proposal would require that the issuer take "reasonable steps" to verify that the purchasers of the securities are accredited investors. The proposal does not list specific measures that an issuer must take to verify a purchaser's accredited investor status or otherwise provide a bright line test for making this "reasonable" assessment. Instead, the proposal explains that whether an issuer's verification efforts are reasonable would be an objective determination, based on the particular facts and circumstances of each transaction. In addition, the proposal suggests that an issuer consider the following factors: (i) the nature of the purchaser and the type of accredited investor that the purchaser claims to be, (ii) the information that the issuer has about the purchaser, (iii) the nature of the offering (such as the manner in which the purchaser was solicited to participate in the offering) and (iv) the terms of the offering (such as the minimum investment amount). Further, the proposal notes the importance of documenting and retaining records related to the "reasonable steps" that the issuer has taken.

Rule 506 Offerings without General Solicitation. Importantly, the proposal would not eliminate the ability of an issuer to sell securities in accordance with the conditions currently in Rule 506. Therefore, an issuer that does not utilize general solicitation in a Rule 506 offering would not be required to verify the accredited investor status of purchasers, but would continue to be required to "reasonably believe," at the time of sale, that a purchaser is an accredited investor.

Form D. The proposal would also amend Form D, which is the notice that issuers must file with the SEC when they sell securities pursuant to Regulation D, to add a separate box for issuers to check if they are using general solicitation in connection with a Rule 506 offering.

Private Funds. The SEC did not propose any additional restrictions on general advertising by private funds, such as mutual fund-like performance-advertising content standards. The SEC also confirmed in the proposal that a private fund relying on either Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940 (the "**Investment Company Act**") for exemption from registration as an investment company would be permitted to engage in a general solicitation under amended Rule 506 without losing either exemption under the Investment Company Act even though such exemptions prohibit, among other things, the "public offering" of a private fund's securities. The SEC, however, declined the request of certain commenters to revise the definition of "accredited investor" to include all persons who are "knowledgeable employees" for purposes of the Investment Company Act.

Comment Period. The comment period for the proposal will run until 30 days after publication in the Federal Register. Until the SEC issues final rules, offering participants relying on Rule 506 remain subject to the current prohibitions on general solicitation and general advertising.

For further discussion of the SEC's proposal, please see the September 4, 2012 Davis Polk Client Newsflash, ***SEC Issues Proposal to Eliminate General Solicitation Ban as Mandated by the JOBS Act***.

- See a copy of the proposal
- See a copy of the SEC's press release

SEC Staff Responds to a Question About Preserving Client Anonymity on Item 7.B. of Form ADV

On August 30, 2012, the SEC's Division of Investment Management issued a response to a question regarding reporting on Item 7.B. of Part 1A of Form ADV. Item 7.B. asks whether an investment adviser provides advice to any private fund. Investment advisers that answer "yes" are required to provide detailed information about each such private fund on Section 7.B.(1) or Section 7.B.(2) of Schedule D of Form ADV (collectively, "**Section 7.B.**"). The instructions to Item 7.B. indicate that an investment adviser required to complete Section 7.B. may preserve the anonymity of a private fund client by using a code or other designation on Section 7.B. in place of the private fund client's name if the investment adviser uses such code or designation in the books and records that it maintains for such private fund client under Rule

204-2 of the Investment Advisers Act of 1940. The SEC's response states that an investment adviser is permitted to use a code or other designation to identify a private fund client on Section 7.B. if the investment adviser maintains *all* books and records required under Rule 204-2 using the same code or designation to identify the private fund client.

For more information on Form ADV generally, please see the June 29, 2011 Davis Polk Client Memorandum, ***SEC Issues Final Rules Implementing Dodd-Frank Amendments to the Investment Advisers Act of 1940***.

- See a copy of the SEC's response

Industry Update

CFTC Issues Guidance on CPO/CTA Registration and Compliance Obligations

On August 14, 2012, the Commodity Futures Trading Commission (the "**CFTC**") issued guidance on registration and compliance obligations of commodity pool operators ("**CPOs**") and commodity trading advisers ("**CTAs**"). As discussed in the February 23, 2012 Davis Polk Client Memorandum, ***CFTC Adopts Amendments to Registration Exemptions for CPOs and CTAs and Proposes Harmonization Rules for Registered Fund CPOs***, in February 2012, the CFTC adopted amendments that (i) rescinded the Rule 4.13(a)(4) exemption from registration that was previously available for CPOs of private funds that are offered only to certain highly sophisticated investors and (ii) restricted the scope of the exclusion from CPO registration for registered investment companies ("**RICs**") under Rule 4.5. As discussed in the ***August 22, 2012 Investment Management Regulatory Update***, following the adoption by the SEC and the CFTC of final swap definitions, the CFTC issued a no-action letter on July 10, 2012 that extended until December 31, 2012 relief from registration as a CPO or CTA that was previously available to asset managers, subject to compliance with certain requirements (including that the CPO or CTA file with the CFTC the notice required to claim such relief).

The guidance responds to questions raised by market participants relating to registration and compliance obligations of CPOs and CTAs, and generally covers, among other things, compliance with Rule 4.13(a)(3), the use of wholly owned subsidiaries, funds of funds, and the process for transitioning from reliance on the Rule 4.13(a)(4) exemption.

Delegation of CPO Rights. According to the guidance, a general partner, managing member or board of directors of a commodity pool that is legally permitted to delegate its rights and responsibilities with respect to the operation of a commodity pool to another person may do so, provided that (i) the delegate is qualified to serve as CPO, (ii) the delegate is registered as a CPO with the CFTC, (iii) the delegate agrees to assume such rights and responsibilities (particularly with respect to compliance with the Commodity Exchange Act and the rules promulgated thereunder) and (iv) consistent with previously issued CFTC no-action letters, the delegating entity or person agrees to remain jointly and severally liable with respect to any violations of the Commodity Exchange Act. This relief enables the investment manager, rather than the general partner or managing member, of the pool to register as a CPO so long as the above conditions are met.

Compliance with Rule 4.13(a)(3). The guidance provides insight on a number of issues relating to compliance with Rule 4.13(a)(3), including that:

- a CPO relying on Rule 4.13(a)(3) will have a "reasonable time" to comply with the trading limits in the rule when, due to certain deal structures, a commodity interest position is necessarily the first position entered into in furtherance of that structure;

- Rule 4.13(a)(3) continues to include as eligible investors all "qualified eligible persons," including non-U.S. persons, and the CFTC intends to make a typographical correction to Rule 4.13(a)(3) to make this inclusion explicit;
- for purposes of calculating commodity interest exposure, swaps will be included in the calculation beginning on December 31, 2012, including all swaps entered into prior to such date and all swaps entered into going forward;
- a CPO must be in compliance with the Rule 4.13(a)(3) trading thresholds at any time a new position is established, but a CPO is not otherwise required to reconfigure its portfolio to comply with such limits;
- the "liquidation value" of a fund includes all cash held by the fund;
- commodity options with the same underlying can be netted across designated contract markets and foreign boards of trade for purposes of calculating commodity interest exposure; and
- the notional value of a swap, whether cleared or uncleared, is the amount reported by the reporting counterparty as the notional amount of the swap under Part 45 of the CFTC's regulations.

Wholly Owned Subsidiaries. The guidance provides that a wholly owned trading subsidiary of a commodity pool should be deemed and regulated as a "pool" within the meaning of CFTC Rule 4.10(d) when its parent is operated by a registered CPO. In addition, the guidance states that wholly owned subsidiaries of commodity pools trading in derivatives are themselves commodity pools.

Funds of Funds. The guidance confirms that CPOs of funds of funds can continue to rely on former Appendix A to Part 4 of the CFTC's rules until such time as the CFTC adopts revised guidance. A link to Appendix A is **available here**.

Transitioning from Rule 4.13(a)(4) to Rule 4.13(a)(3) or Rule 4.7. The guidance provides that CPOs transitioning from an exemption under Rule 4.13(a)(4) to an exemption under Rule 4.13(a)(3) must first submit a written request to the National Futures Association (the "**NFA**") to withdraw the exemption under Rule 4.13(a)(4). Once the CPO has received confirmation from the NFA that the withdrawal has been finalized, the CPO may file the new exemption electronically under Rule 4.13(a)(3). In addition, the CPO must provide notice to participants of the change in exemption.

CPOs transitioning from an exemption under Rule 4.13(a)(4) to relief under Rule 4.7 (so-called "registration lite") must, according to the guidance, register as a CPO with the CFTC and apply for membership with the NFA and then withdraw their exemption under Rule 4.13(a)(4) and file for the exemption under Rule 4.7 (but, according to the guidance, if the CPO withdraws its Rule 4.13(a)(4) exemption prior to December 31, 2012, such CPO could be subject to CFTC and NFA financial reporting requirements). In addition, a CPO currently operating pursuant to the Rule 4.13(a)(4) exemption will not be required to reaffirm that all existing participants continue to meet the qualified eligible person standard for the CPO to claim an exemption under Rule 4.7, but the CPO will be required to ensure that any new participants meet the qualified eligible person standard at the time of such participant's investment in order to maintain a Rule 4.7 exemption.

Annual Reports. The guidance confirms that a CPO does not need to file a 2012 annual report for pools that are having their exemption under Rule 4.13(a)(4) withdrawn on January 1, 2013, but a CPO coming into registration will be required to file its first annual report for fiscal year 2013.

According to the press release issued by the CFTC in connection with the release of the guidance, the CFTC anticipates supplementing or revising the guidance as needed.

- See a copy of the CFTC's guidance
- See a copy of the CFTC's press release

Canadian Registration Requirement for Non-Resident Investment Fund Managers

Pursuant to new regulations adopted in several Canadian provinces this summer, investment fund managers that do not have a place of business in Canada may be subject to a new adviser registration requirement that would take effect December 31, 2012. Managers should also note that one of the possible exemptions depends on the absence of any "active solicitation" in the relevant provinces after this Thursday, September 27, 2012 as described below.

As further described in the attached memorandum of Canadian counsel McCarthy Tetrault, these registration regulations apply only to "investment funds" as defined. For Canadian securities regulatory purposes, an investment fund is either an open-end or closed-end investment fund that offers liquidity, takes passive positions in securities and does not try to exercise control or otherwise influence the day-to-day business of the investee issuer.

The term "investment fund" would not include a fund, such as a private equity fund, that controls or becomes actively involved in the management of an operating company in which it invests, and therefore most private equity funds would not be subject to this registration requirement. Examples of active management in an issuer include having a representative on the board of directors, direct involvement in the appointment of managers, or rights and involvement with respect to material management decisions.

The following briefly describes the new registration requirements that will become effective at the end of this year in Ontario, Quebec and Newfoundland and Labrador (the "**Registration Provinces**") for an investment fund manager that does not have a principal place of business in Canada (an "**international manager**").

In general, an international manager must register as an investment fund manager in a Registration Province if one of its funds is marketed and distributed to investors in the Registration Province. There are several possible exemptions that may be available to a manager.

One exemption would be available if either there are no longer any investors in the investment fund who are residents of a Registration Province or if there is no "active solicitation" of residents in a Registration Province after Thursday, September 27, 2012. Active solicitation is defined generally as an intentional action to encourage the purchase of securities, such as communications initiated by the investment fund manager with Canadian residents and certain advertisements intended to encourage the purchase of securities of the fund (but not responding to unsolicited inquiries from Canadian investors).

Another exemption that may be available for an international manager requires that all securities distributed in the Registration Province must have been offered and sold solely to "permitted clients" (as defined under National Instrument 31-103). Since the definition of permitted client includes regulated Canadian pension plans, certain other investment funds, individuals with net financial assets of more than $5 million and companies (other than investment funds) with net assets of more than $25 million, this standard may be met by a fund that is offered solely to qualified purchasers. However, careful due diligence with regard to each Canadian investor will likely be necessary. In addition, the international manager must make a submission to jurisdiction and file various other forms, as well as make disclosures to Canadian investors to avail itself of this permitted client exemption.

- See a copy of McCarthy Tetrault's memorandum

Statement by SEC Chairman on Money Market Reform

On August 22, 2012, SEC Chairman Mary Schapiro announced that three of the five SEC commissioners had informed her that they would not support a staff proposal to reform the structure of money market funds. As a result, after two and a half years of study by the SEC, the SEC's vote on the money market reform has been cancelled. According to Chairman Schapiro, the structural reform of money market funds was one of the pieces of unfinished business from the financial crisis and was intended to reduce money market funds' susceptibility to runs, protect retail investors and lessen the need for future taxpayer bailouts. In her statement, she outlined the two alternative proposals that the SEC was considering: (i) to require money market funds to float their NAV and use mark-to-market valuation like other mutual funds, rather than fixing their value at $1 per share or (ii) to require a tailored capital buffer of less than 1% of fund assets in order to absorb the day-to-day variations in the value of a money market fund's holdings. The second proposal would have been combined with a minimum balance at risk requirement in times of stress whereby an investor could redeem up to 97% of its investment in a money market fund, but there would be a 30-day holdback of the final 3%. While the reform is currently no longer on the SEC's agenda, Chairman Schapiro has urged other policymakers to consider ways to address what she perceives to be the systemic risks posed by money market funds.

- See a copy of Chairman Schapiro's statement

SEC Announces its First Award under its Whistleblower Program

On August 21, 2012, the SEC issued a press release announcing its first award under its whistleblower program. The whistleblower program, which arises from the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "**Dodd-Frank Act**"), directs the SEC to pay an award to whistleblowers who voluntarily provide original information to the SEC that leads to successful enforcement actions and results in monetary sanctions of more than $1 million. The size of the award can range from ten to thirty percent of the monetary sanctions that the SEC collects.

The recipient of the first award, a whistleblower who helped the SEC stop a multimillion dollar fraud scheme, will receive $50,000—a thirty percent stake of the approximately $150,000 that the SEC has collected thus far in the enforcement action. The enforcement action, however, resulted in a court order for more than $1 million in sanctions. Thus, the whistleblower's award will increase if the SEC collects additional payments. According to the SEC, the whistleblower provided "documents and other significant information that allowed the SEC's investigation to move at an accelerated pace and prevent the fraud from ensnaring additional victims." The SEC's press release also notes that the SEC denied an award claim filed by a second whistleblower, noting that the information provided by the individual "did not lead to or significantly contribute to the SEC's enforcement action, as required for an award." The identities of the whistleblowers remain anonymous, as the SEC is prohibited under the Dodd-Frank Act from disclosing any information that could be reasonably expected to reveal a whistleblower's identity. For further discussion of the whistleblower award, please see the August 23, 2012 Davis Polk Client Newsflash, ***SEC Announces First Whistleblower Program Award***.

- See a copy of the SEC's press release

House Passes Bill Seeking to Tighten SEC and CFTC Cost-Benefit Analysis

On July 26, 2012, the House of Representatives passed a bill—the Red Tape Reduction and Small Business Job Creation Act—that would, among other things, require the SEC and the CFTC to tighten the cost-benefit analysis of each agency's rulemaking. Sponsored by Representative Tim Griffin (R-Ark.), the bill places several restrictions on federal agencies in their promulgation of rules and regulations, including a moratorium (subject to certain exceptions) on significant regulatory actions until the average monthly unemployment rates for any quarter fall to or below six percent.

Importantly, the bill also includes two titles that would increase the cost-benefit requirements for the SEC and the CFTC. Title VI of the bill, called the SEC Regulatory Accountability Act, would require the SEC to take a number of actions before issuing a regulation under the securities laws, including (i) clearly identifying the nature, source and significance of the problem to enable an assessment of whether new regulation is warranted, (ii) utilizing its chief economist to assess the costs and benefits of the regulation, (iii) identifying and assessing available alternatives to the proposed regulation and explaining why the chosen regulation meets the objectives more effectively than other alternatives, (iv) evaluating whether the regulation is tailored to impose the least burden on society (including market participants, individuals, businesses of different sizes and other entities) and (v) to the extent relevant to the proposed regulation, considering the impact of the regulation on investor choice, market liquidity in the securities markets and small businesses. In addition, the bill would require that the SEC review its existing regulations not later than one year after the bill's enactment and every five years thereafter to determine whether such regulations are excessively burdensome.

Title VII of the bill targets the CFTC and, similar to Title VI of the bill, would require that the CFTC's chief economist analyze the costs and benefits of a regulation before it is promulgated. The bill would also require the CFTC to evaluate a number of factors when conducting a cost-benefit analysis, including considerations of (i) the efficiency, competitiveness and financial integrity of futures and swaps markets, (ii) the impact on market liquidity in the futures and swaps markets, (iii) available alternatives to direct regulation, (iv) whether the regulation is tailored to impose the least burden on society (again including market participants, individuals, businesses of different sizes and other entities) and (v) other public interest considerations.

While the bill passed the House by a vote of 245-172, the White House has stated that the President's senior advisors would recommend that he veto the bill. We will continue to monitor developments in this area.

- See a copy of the bill

Litigation

Second Circuit Relaxes Standard to Prove Aiding and Abetting Liability in SEC Enforcement Actions

On August 8, 2012, the U.S. Court of Appeals for the Second Circuit (the "**Second Circuit**") issued a decision in *SEC v. Apuzzo*, Docket No. 11-696-CV (2d Cir. Aug. 8, 2012) relaxing the SEC's pleading standard in SEC civil enforcement actions for aiding and abetting liability. In order to establish aiding and abetting liability under Section 20(e) of the Securities and Exchange Act of 1934 (the "**Exchange Act**"), the SEC must prove: (i) the existence of a securities law violation by the primary party (as opposed to the aider and abettor), (ii) knowledge of the violation on the part of the aider and abettor and (iii) "substantial assistance" by the aider and abettor in the achievement of the primary violation. *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009). In reversing a district court decision, the Second Circuit clarified that the SEC need *not* plead or prove that an aider and abettor "proximately caused" the harm that resulted from a primary securities law violation in order to satisfy the "substantial assistance" component of aiding and abetting liability. Rather, the SEC must plead and prove that the aider and abettor "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed."

The appeal to the Second Circuit resulted from allegations by the SEC that Joseph F. Apuzzo ("**Apuzzo**"), the chief financial officer of equipment manufacturer Terex Corporation ("**Terex**"), aided and abetted an equipment rental company, United Rentals, Inc. ("**URI**"), in fraudulent sale-leaseback transactions designed to inflate URI's profits and enable it to meet its announced earnings expectations. The SEC alleged that such fraudulent transactions involved URI selling equipment to a second company that then leased the equipment back to URI for a short period of time. In order to induce the second company to participate in these transactions, URI convinced Terex to agree to resell the equipment for the second company at the end of each lease period and to guarantee the second company a minimum sales price for such equipment sales. In return, URI secretly agreed to indemnify Terex for any losses Terex suffered from the guarantee Terex made to the second company and to purchase substantial amounts of new equipment from Terex to improve Terex's year-end sales. According to the SEC, Apuzzo knew that URI's auditors would object to URI immediately recognizing revenue from the sale-leaseback transactions if the indemnification payments were disclosed and that he helped document the transactions in a manner designed to conceal these payments from the auditors. Accordingly, the SEC charged Apuzzo with aiding and abetting URI's primary securities laws violations. Apuzzo filed a motion to dismiss in the district court, and the district court granted the motion on the grounds that the SEC had failed to adequately allege that Apuzzo proximately caused the harm on which URI's primary securities law violation was founded and, therefore, did not meet the "substantial assistance" component of aiding and abetting liability.

By reversing the district court's decision and clarifying that aiding and abetting liability does not require an aider and abettor to be the proximate cause of a primary securities law violation, the Second Circuit's decision in *Apuzzo* eases the SEC's burden to show aiding and abetting liability. In noting that Section 20(e) of the Exchange Act was passed in response to a case in which the aiders and abettors were not "involved in the making of the false statements that proximately caused the plaintiffs' injuries," the Second Circuit reasoned that the "statutory mandate would be undercut if proximate causation were required for aider and abettor liability in SEC enforcement actions." The Second Circuit further stated that "many if not most aiders and abettors would escape all liability if such a proximate cause requirement were imposed, since, almost by definition, the activities of an aider and abettor are rarely the direct cause of the injury brought about by the fraud, however much they may contribute to the success of the scheme." In addition, the Second Circuit reiterated, as stated in *DiBella*, that the three components of the aiding and abetting test "cannot be considered in isolation from one another." According to the Second Circuit, in aiding and abetting cases, if the SEC plausibly alleges a high degree of actual knowledge (the second prong of the test), the burden the SEC must meet in alleging substantial assistance (the third prong of the test) is lessened, and vice versa.

In addition to providing clarity on whether proximate causation must be alleged and proved by the SEC in aiding and abetting cases, the Second Circuit also (i) rejected Apuzzo's argument that the standard should require that an aider and abettor be an employee of the company or government entity that was the primary securities law violator and (ii) confirmed the holding of previous Second Circuit case law establishing that "[i]naction on the part of the alleged aider and abettor ordinarily should not be treated as substantial assistance, except when it was designed intentionally to aid the primary fraud or it was in conscious and reckless violation of a duty to act."

- See a copy of the Second Circuit's opinion

SEC Announces Deferred Prosecution Agreement with Investment Fund

On July 18, 2012, the SEC announced that it had entered into a two-year deferred prosecution agreement (the "**DPA**") with the Amish Helping Fund (the "**Fund**"), an Ohio-based non-profit organization that offered and sold investment contracts to investors in the Amish community to fund loans to Amish families in order for such families to purchase real estate or make construction improvements to real estate. The DPA is only the second such deferred prosecution agreement the SEC has reached since the SEC's Division of Enforcement announced the "Cooperation Initiative" in 2010 to facilitate and reward cooperation in SEC investigations.

According to the DPA and the SEC's press release, the Fund, which currently has almost 3,500 investors, more than 1,200 borrowers and approximately $125 million in mortgage receivables, was established in 1995 by elders of the Amish community for the purpose of preserving the Amish way of life. The SEC alleged that the Fund provided to prospective investors a confidential offering memorandum (the "**Memorandum**"), which was originally prepared in 1995 and which was the primary disclosure document presented to prospective investors in the Fund. According to the DPA, the Fund's board of trustees, which was responsible for the Fund's activities, failed to revise or update the Memorandum for the 15-year period after the Fund was formed. The SEC alleged that while the Memorandum was materially correct when originally prepared in 1995, the failure to revise or update the Memorandum caused it to contain material misrepresentations as it related to changes in the Fund's operations, the Fund's cash reserves, the use of investors' money and the ability of investors to redeem their interests in the Fund.

These allegations, according to the DPA, resulted in the Fund violating Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder by knowingly or recklessly making material misrepresentations in the sale of securities. According to the DPA, no investors have suffered any realized losses as a result of the Fund's violations and there have been no foreclosures on the real estate purchased with money borrowed from the Fund.

According to the DPA and the SEC's press release, upon being informed by the SEC of the alleged violations, the Fund cooperated with the SEC's investigation and, among other things, (i) updated the Memorandum and provided the updated Memorandum to existing investors in the Fund, (ii) offered all existing investors in the Fund a right of rescission (an offer which, according to the DPA, "[a]lmost no investors accepted"), (iii) retained an independent certified public accountant to perform ongoing audits of the Fund's financial statements, (iv) registered the Fund's past securities offerings and a new securities offering with the Ohio Division of Securities (the "**ODS**") and (v) consented to a cease-and-desist order with the ODS and, therefore, waived any right to appeal. In addition, according to the DPA, during the two-year deferred prosecution period, the Fund agreed to perform a number of undertakings designed to prevent future violations of the securities laws.

- See a copy of the DPA
- See a copy of the SEC's press release

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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