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Wake-Up Call for Unregistered Solicitors and the Managers That Hire Them

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The practice of marketing interests in private investment funds through solicitors that are not registered as brokers under federal or state law is widespread. In some cases, a solicitor will, in fact, fall outside the broker regulatory schemes or qualify for exemptions from them, however, in many instances they will not. In the past, seldom have federal or state regulators brought actions against unregistered solicitors or the fund managers that hire them, except where there were also allegations of fraud. Some solicitors and fund managers may have interpreted the relatively light degree of regulatory enforcement in this area as tacit acquiescence to such practices. Any such notions should have been dispelled on March 11, 2013, when the Securities and Exchange Commission (SEC) announced charges against an unregistered

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broker, the private equity firm that hired him, and the senior managing director of that firm,[1] and then again on April 5, 2013, when David W. Blass, Chief Counsel of the SEC's Division of Trading and Markets, gave a speech discussing the "perennial topic" of "the broker-dealer registration requirements as they apply to [solicitors]."[2]

In addition, fund managers may not be sufficiently aware of broker registration requirements applicable to their own personnel. As the Blass Speech makes clear, the broker registration requirements may apply not only where a manager of private funds hires an unaffiliated solicitor, but also where such a manager employs a dedicated internal marketing team or personnel whose primary function is to market interests in those private funds. Depending on the facts, such employees may be required to be registered as brokers or affiliated with registered broker-dealers in order to perform their duties.

The recent registration of thousands of private fund managers under the Investment Advisers Act of 1940, as amended (the Advisers Act), will subject the marketing practices of those advisers to fresh scrutiny by the SEC.

Solicitors that wish to continue to avoid registration as brokers, and issuers that wish to continue to hire them, should be aware of recent judicial and administrative interpretations that clarify the scope of the registration requirements under Section 15(a) of the Securities Exchange Act of 1934, as amended (the 1934 Act).

The Wake-Up Call

On March 8, 2013, the SEC issued two orders instituting administrative and cease-and-desist proceedings in connection with the solicitation activities of an unregistered broker: one against William M. Stephens, an independent consultant who was engaged in such solicitation; and the other against Ranieri Partners LLC (Ranieri Partners), the firm that hired him, and Donald W. Phillips, a former senior managing director in charge of capital raising efforts for Ranieri Partners, who was responsible for supervising Mr. Stephens. Mr. Stephens, Ranieri Partners, and Mr. Phillips agreed to settle the SEC's charges. In the Blass Speech, these enforcement actions were called "an area of recent focus" for the SEC, and it was noted that they "demonstrate that there are serious consequences for acting as an unregistered broker, even where there are no allegations of fraud."[3]

Mr. Stephens was charged with operating as an unregistered broker in violation of Section 15(a) of the 1934 Act when he solicited investors as a hired consultant for Ranieri Partners and received transaction-based compensation for his services. According to Mr. Phillips, he informed Mr. Stephens that his activities were limited to contacting potential investors to arrange meetings for the principals of Ranieri Partners. However, the SEC concluded that Mr. Stephens' role, in fact, was far more expansive. In particular, the SEC found that Mr. Stephens' solicitation efforts included: (1) sending private placement memoranda, subscription documents, and due diligence materials to potential investors; (2) urging at least one investor to consider adjusting its portfolio allocations to accommodate an investment with Ranieri Partners; (3) providing potential investors with his analysis of Ranieri Partners' funds' strategy and performance track record; and (4) providing potential investors with confidential information relating to the identity of other investors and their capital commitments. In addition, Mr. Stephens received a fee equal to one percent of all capital commitments made to Ranieri Partners' funds by investors introduced by Mr. Stephens. On that basis, the SEC charged that Mr. Stephens effected transactions in securities without being registered as a broker or affiliated with a registered broker-dealer in violation of Section 15(a) of the 1934 Act.

In a separate proceeding, Ranieri Partners and Mr. Phillips were also charged with violations of the securities laws. Specifically, Ranieri Partners was alleged to have caused Mr. Stephens' violations of the 1934 Act, and Mr. Phillips was alleged to have willfully aided, abetted, and caused Mr. Stephens' violations of the 1934 Act. The SEC concluded that Ranieri Partners failed adequately to oversee Mr. Stephens' activities. Although Mr. Phillips claimed to have forbidden Mr. Stephens from sending private placement memoranda to potential investors, the SEC found that Mr. Stephens obtained such documents from

Ranieri Partners and sent them to prospective investors. Moreover, the SEC claimed that Ranieri Partners did not seek to limit Mr. Stephens' contact with prospective investors even though it was aware that he was having extensive contact with potential investors. In addition, the SEC concluded that Mr. Phillips assisted Mr. Stephens in his solicitation efforts by providing Mr. Stephens with key fund documents and information. Further, aside from weekly meetings at which Mr. Stephens and others discussed their efforts in raising capital for the Ranieri Partner funds, the SEC concluded that Mr. Phillips failed to monitor and limit Mr. Stephens' solicitation activities despite knowing that Mr. Stephens was supposed to play a limited role in introducing potential investors.

To settle the charges, Ranieri Partners agreed to pay a penalty of $375,000, Mr. Phillips agreed to pay a penalty of $75,000, and Mr. Stephens agreed to be barred from the securities industry.[4] The SEC's orders require each of them to cease-and-desist from further violations of Section 15(a) of the 1934 Act. The SEC also suspended Mr. Phillips from acting in a supervisory capacity at an investment adviser or broker-dealer for nine months. Ranieri Partners, Mr. Phillips, and Mr. Stephens consented to the entry of the SEC's orders without admitting or denying the findings.

The Federal Regulatory Scheme

Section 15(a)(1) of the 1934 Act requires any "broker" that makes use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security to register with the SEC. The term "broker" is defined in Section 3(a)(4)(A) of the 1934 Act as "any person engaged in the business of effecting transactions in securities for the account of others." As set forth below, courts, the SEC, and the SEC Staff have considered various factors in determining whether a person is acting as a "broker" under the 1934 Act, generally employing a two-part test to analyze whether a person is: (1) "engaged in the business"; and (2) "effecting transactions in securities."[5]

1. "Engaged in the Business"

a. Transaction-Based Compensation

Courts have held and the SEC Staff has routinely stated that having a "salesman's stake" in a securities transaction is a hallmark of "broker" activity.[6] A "salesman's stake" is typically present when a person receives commissions or other compensation based, directly or indirectly, on the size, value or completion of any securities transactions (Transaction-Based Compensation).[7] Because the receipt of Transaction-Based Compensation can lead to high pressure sales tactics and heightened conflicts of interest,[8] the SEC Staff has stated that any person who receives such compensation must register as a broker-dealer and operate pursuant to the customer protection standards governing broker-dealers and their associated persons.[9]

b. Additional Factors

The SEC and its Staff have indicated that Transaction-Based Compensation is not the only factor in determining whether broker registration is required. As noted in Mr. Blass' recent speech, "[a]lthough the receipt of compensation in connection with a purchase or sale of securities generally requires, as a practical matter, registration or association with a registered broker-dealer, it is important to understand that the receipt of transaction-based compensation in connection with securities transactions is not a necessary element to require broker-dealer registration. In other words, one can be acting as a broker-dealer without having received transaction-based compensation."[10]

In the absence of Transaction-Based Compensation, however, courts have historically required a significant level of participation in securities transactions on a regular basis before requiring registration as a broker-dealer.[11] Regularity of participation has been demonstrated by such factors as the dollar amount of securities sold and the extent to which there was advertising and investor solicitation.[12] In addition, the SEC Staff also considers the following factors in determining whether a person is "engaged in the business" of effecting transactions in securities:

(1) holding oneself out as offering brokerage services; (2) locating issuers, soliciting clients, and acting as a customers' agent in structuring or negotiating transactions; and (3) soliciting securities transactions.[13]

2. "Effecting Transactions"

Courts and the SEC have clarified that a person effects transactions in securities if he or she regularly participates in such transactions "at key points in the chain of distribution."[14] Such participation includes assisting an issuer in structuring prospective securities transactions, helping an issuer to identify potential purchasers of securities, soliciting securities transactions (including advertising), and participating in the order-taking or order-routing process.[15] The greater the person's involvement in the transaction, the more likely that person's actions will trigger broker-dealer registration requirements.

The So-Called "Finder's Exception"

The so-called "finder's exception" has widely been relied upon by solicitors, sometimes mistakenly, to avoid registration as brokers under the 1934 Act. Such a "finder's exception" is not defined in any federal statute or rule; rather, it is predicated on certain court cases and no-action letters issued by the SEC Staff. The "finder's exception" permits "a person or entity to perform a narrow scope of activities without triggering the broker/dealer registration requirements."[16] Under this exception, for example, "[m]erely bringing together the parties to transactions, even those involving the purchase and sales of securities is not enough to warrant broker registration under Section 15(a)."[17] Factors that suggest that a solicitor is acting as more than a finder, such that the exception would be less likely to apply, include:

(1) Involvement in the negotiations between the issuer and the purchaser;
(2) Making recommendations to prospective purchasers of securities;
(3) Receipt of Transaction-Based Compensation; and
(4) Previous involvement in sales of securities.

Further, the SEC Staff has backtracked and withdrawn at least one of its key prior no-action letters relating to the finder's exception,[18] and the remaining no-action relief is likely to have limited utility with respect to most solicitation arrangements.[19] Consequently, and not surprisingly, the Director of the SEC's Division of Investment Management expressed concern in a 2010 speech about participants in the private fund space "inappropriately claiming to rely on exemptions or interpretive guidance to avoid broker-dealer registration."[20]

The SEC Staff currently appears less likely to grant relief in situations where the solicitation relates to the sale of an issuer's securities to investors than when the underlying transaction relates to the sale of a business.[21] With respect to the former, for example, in a 1985 letter to Dominion Resources Inc. (the 1985 Dominion Letter),[22] the SEC Staff had granted Dominion no-action relief from broker registration in connection with Dominion's plans to assist a limited number of corporate and government issuers in the structuring and issuance of both taxable and tax-exempt securities transactions including: (1) analyzing the financial needs of an issuer; (2) recommending or designing financing methods and securities to fit the issuer's needs; (3) recommending bond lawyers, underwriters, or broker-dealers for the distribution or marketing of the securities in the secondary market; (4) participating in negotiations; (5) introducing an issuer to a commercial bank to act as the initial purchaser of securities and as a stand-by purchaser if the securities could not be readily marketed by a broker-dealer; and (6) recommending a commercial bank or other financial institution to provide a letter of credit or other credit support for the securities. Dominion represented that the only contact it would have with any potential purchaser was the possible introduction of an issuer to a commercial bank standby purchaser. In exchange for its services, Dominion planned to receive a negotiated fee that would generally not be payable unless the financing closed successfully. In revoking its position in the 1985 Dominion Letter, the SEC Staff noted that "the [S]taff no longer believes that an entity conducting the activities described in that letter would not have to register as a broker-dealer under 1934 Act."[23]

Given the withdrawal of the 1985 Dominion Letter, the most relevant no-action letter that applies to persons acting as finders for issuers is the 1991 no-action letter issued to Paul Anka.[24] Mr. Anka, a well-known singer/songwriter, entered into an agreement with The Ottawa Senators Hockey Club Limited Partnership (the Senators) and Terrace Investments Limited, the managing general partner of the Senators, to provide the Senators with the names of prospective purchasers of limited partnership units, to be issued in a private placement by the Senators. For his services, Mr. Anka would receive a transaction-based fee equal to 10 percent of the sales price of units sold.

The SEC Staff agreed to take a no-action position with respect to Mr. Anka, but it did so in reliance on numerous considerations that effectively limit the scope of the relief. In particular, the SEC Staff noted that Mr. Anka's sole activity would involve providing the list of names of prospective investors. Moreover, the Staff relied on representations that Mr. Anka would not: (1) "participate in any advertisement, endorsement, or general solicitation in the United States"; (2) "participate in the preparation of any materials (including financial data or sales literature)"; or (3) "perform any independent analysis of the sale, engage in any 'due diligence' activities, assist in or provide financing for such purchases, provide any advice relating to the valuation of or the financial advisability of such an investment, or handle any funds or securities." In addition, the Staff noted that Mr. Anka: (1) "has not previously engaged in any private or public offering of securities (other than buying and selling securities for his own account through a broker-dealer)"; (2) "has not acted as a broker or finder for other private placements of securities"; and (3) "does not intend to participate in any distribution of securities after the completion of this proposed private placement." Very few solicitors would satisfy these conditions.

The Risks for Solicitors

As discussed above, whether broker registration is required depends upon the activities performed in connection with securities transactions. As a practical matter, in any dealings with the SEC Staff in regard to broker status, the solicitor will bear the burden of persuading the Staff that based on an analysis of the relevant factors, it falls outside the definition of a broker. If a solicitor is marketing securities to investors on a regular basis and soliciting or negotiating securities transactions, the solicitor will likely have difficulty convincing the Staff that it is not a broker.[25] If the solicitor seeks to take advantage of the finder's exception, it faces several hurdles. On this issue as well, the solicitor would have the burden of proof and would have to convince the Staff that the exception applied. Any vagueness in the criteria for meeting the finder's exception would work against the solicitor, making it more difficult to show definitively that the exception applies. Not only are some of the criteria themselves vague, but the proper weight to attribute to each criterion in the myriad of fact situations in which they arise is uncertain. Moreover, even a solicitor that unquestionably qualifies for the finder's exception from registration as a broker under federal law may be required to register as a broker under applicable state law.

In the event that the SEC decides to bring an enforcement action charging a violation of Section 15(a) of the 1934 Act, the SEC would have the burden of proving to the fact finder (the judge or jury) that the individual was acting as an unregistered broker.[26] Likewise, a private plaintiff seeking rescission of a contract pursuant to Section 29(b) of the 1934 Act bears the burden of proof on this issue.[27] If cases of this sort are fully litigated, the solicitor may even prevail.[28] In *SEC* v. *Kramer*, for example, the court held that the SEC had not met the burden of proving that Mr. Kramer had violated Section 15(a) of the 1934 Act even though Mr. Kramer had received Transaction-Based Compensation. However, the expense of litigating cases of this sort can be prohibitive, and there is a risk of reputational damage to the solicitor even if, years later, the solicitor is ultimately vindicated. As a practical matter, therefore, most solicitors should assume that in order to avoid the expense and risk associated with an SEC action, they will bear the burden of proving to the SEC Staff that they fall outside the broker-dealer regulatory scheme.

If a solicitor cannot avail itself of the finder's exception, in addition to regulatory risks, an unregistered solicitor is subject to a contractual risk. Section 29 of the 1934 Act provides that a contract made in violation of the 1934 Act is void as regards the rights of any person who entered into or performed the contract in violation of the 1934 Act. An issuer of securities that has entered into a contract with an unregistered solicitor may refuse to pay the solicitor the compensation to which it is contractually entitled on the grounds that the contract is void.[29]

The Risks for Fund Managers

The regulatory risk is not limited to solicitors. As the Ranieri Proceedings demonstrate, the manager of a private fund and its principals may be held liable for aiding and abetting violations by the unregistered broker. Furthermore, any sale of a security in violation of federal or state law may be found to give rise to a right of rescission on the part of the purchaser against the issuer of securities. As Mr. Blass pointed out, "securities transactions intermediated by an inappropriately unregistered broker/dealer could potentially be rendered void." Many state statutes that provide an explicit right of rescission can be read broadly to apply against the issuer if the purchaser purchased securities through a solicitor that was required to be registered as a broker under state law, but was not so registered.[30]

In addition, the issues relating to broker registration are not limited to the engagement of a third-party solicitor. The SEC Staff has given no reason to believe that an in-house marketing representative that regularly effects transactions in securities of private funds for compensation would not be subject to the same registration requirements. To the contrary, Mr. Blass indicated that the existence of a "dedicated sales force of employees working within a 'marketing' department" was strongly indicative that those employees would be considered to be "in the business of effecting transactions in the private fund, *regardless of how the personnel are compensated*" (emphasis added).[31] Although Rule 3a4-1 under the 1934 Act provides a safe harbor against broker registration for certain employees of an issuer of securities, that safe harbor is almost never available to employees that market interests in private funds because they cannot meet its conditions. Among other things, such conditions require that the employee not be compensated in connection with his or her participation in the sale of securities of the issuer by the payment of commissions or other remuneration based, directly or indirectly, on transactions in securities.[32] Thus, under ideal circumstances, each such person in an in-house marketing team would hold the necessary securities licenses and would be a person associated with a broker-dealer that has agreed to supervise his or her activities. Such a broker-dealer may be affiliated or unaffiliated with the issuer of securities.

Conclusion

In the past, the marketing practices of a manager of private funds would generally not have been subject to regulatory review unless the manager was alleged to have committed fraud. That is no longer the case. The marketing practices of newly-registered advisers will likely be scrutinized by the SEC in the course of routine examinations. As Mr. Blass notes, compliance with the 1934 Act may be overlooked by fund managers that have recently registered as investment advisers and are devoting their resources to their compliance responsibilities under the Advisers Act.

Mr. Blass tells us that the SEC Staff has been considering "a more customized approach for regulation of market participants who perform only limited broker functions." Those initiatives may eventually result in the proposal and adoption of new exemptions from broker-dealer registration. In the meantime, however, solicitors and private fund managers would be well-advised to undertake a very fact-specific examination of their practices to determine whether broker-dealer registration is currently required under federal or state law.

Notes

1. *See* 1934 Act Release No. 69090 (March 8, 2013) (finding independent consultant marketed interests in

violation of Section 15(a) of the Securities Exchange Act of 1934); *see also* 1934 Act Release No. 69091 (March 8, 2013) (finding private equity firm and former senior manager willfully aided and abetted such violation of the Securities Exchange Act of 1934) (collectively, the Ranieri Proceedings). Neither of these actions included allegations of fraud.

2. *See* David W. Blass, Chief Counsel, Division of Trading and Markets, "A Few Observations in the Private Fund Space," (Apr. 5, 2013) (Blass Speech), available at: *http://www.sec.gov/news/speech/2013/spch040513dwg.htm*.

3. *See* Blass Speech, *supra* n.2.

4. Any reapplication for association would be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned on a number of factors, including but not limited to, the satisfaction of any or all of the following: (a) disgorgement ordered against Mr. Stephens, whether or not the SEC has fully or partially waived payment of such disgorgement; (b) arbitration award related to the conduct that served as the basis for the SEC order; (c) self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the SEC order; and (d) restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the SEC order. *See* Ranieri Proceedings.

5. The phrase "engaged in the business" has not been defined in federal law or regulation,

6. *See, e.g.,* FundersClub Inc. and FundersClub Management LLC, SEC No-Action Letter (pub. avail. Mar. 26, 2013); AngelList LLC, SEC No-Action Letter (pub. avail. Mar. 28, 2013); Brumberg, Mackey & Wall, P.L.C., SEC No-Action Letter (pub. avail. May 17, 2010).

7. *See* SEC v. Martino, 255 F. Supp. 2d 268, 283 (S.D.N.Y. 2003); SEC v. Margolin, 1992 WL 279735 (S.D.N.Y. Sept. 30, 1992); BondGlobe, Inc., SEC No-Action Letter (pub. avail. Feb. 6, 2001); Progressive Technology Inc., SEC No-Action Letter (pub. avail. Oct. 11, 2000); BD Advantage, Inc., SEC No-Action Letter (pub. avail. Oct. 11, 2000); Transfer Online, Inc., SEC No-Action Letter (pub. avail. May 13, 2000); MuniAuction, Inc., SEC No-Action Letter (pub. avail. Mar. 13, 2000); Brumberg, Mackey & Wall, P.L.C., SEC No-Action Letter (pub. avail. May 17, 2010); Wolff Juall Investments, LLC, SEC No-Action Letter (pub. avail. May 17, 2005); Birchtree Financial Services, Inc., SEC No-Action Letter (pub. avail. Sept. 22, 1998); Vanasco, Wayne & Genelly, SEC No-Action Letter (pub. avail. Feb. 17, 1999); SEC v. FTC Capital Markets, Inc. et al., No. 09-CV-4755 (S.D.N.Y. May 20, 2009); SEC v. UBS AG, No. 1:09-CV-00316 (D.D.C. Feb. 18, 2009); SEC v. Milken and MC Group, No. 98-CV-1398 (S.D.N.Y. Feb. 26, 1998); *see also* SEC, Staff Study on Investment Advisers and Broker-Dealers (Jan. 2011), available at *www.sec.gov/news/studies/2011/913studyfinal.pdf*, at 10–11 ("Generally, the compensation in a broker-dealer relationship is transaction-based and is earned through commissions, mark-ups, mark-downs, sales loads or similar fees on specific transactions…."); *Persons Deemed Not To Be Brokers*, 1934 Act Release No. 22172 (June 27, 1985) (noting that "the receipt of transaction-based compensation often indicates that such a person is engaged in the business of effecting transactions in securities").

8. *See* Blass Speech, *supra* n.2 ("[T]ransaction-based compensation is a hallmark of being a broker. This makes sense to me as the broker regulatory structure is built, at least in large part, around managing the conflict of interest arising from a broker acting as a securities salesman, as compared to an investment adviser which traditionally acts as a fiduciary and which should not have that same type of conflict of interest.")

9. 1st Global, Inc., No-Action Letter (pub. avail. May 7, 2001); Brumberg, Mackey & Wall, P.L.C., SEC No-Action Letter (pub. avail. May 17, 2010) (denying no-action request where a law firm would be compensated for providing introductions to investors upon the closing of a financing based upon a percentage of the amounts raised).

10. *See* Blass Speech, *supra* n.2.

11. Massachusetts Financial Services, Inc. v. Securities Investor Protection Corp., 411 F. Supp. 411, 415 (D. Mass.), *aff'd*, 545 F.2d 754 (1st Cir. 1976), *cert. denied*, 431 U.S. 904 (1977) ("Massachusetts Financial Services").

12. Massachusetts Financial Services, *supra* n.11. *See also* SEC v. Nat'l Executive Planners, Ltd., 503 F. Supp 1066, 1073 (M.D.N.C. 1980); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 12 (D.D.C 1998).

13. *See, e.g.,* PRA Securities Advisers, L.P., SEC No-Action Letter (pub. avail. Mar. 3, 1993); BondGlobe, Inc., SEC No-Action Letter (pub. avail. Feb. 6, 2001).

14. Massachusetts Financial Services, *supra*, n.11 (establishing the "chain of distribution" doctrine, which has been interpreted by the SEC Staff to require registration by those who deal only with intermediaries because this could be considered to be participating in the chain of distribution of securities); *see also*, SEC v. National Executive Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980).

15. MuniAuction, Inc., SEC No-Action Letter (pub. avail. Mar. 13, 2000).

16. SEC v. Kramer, 778 F. Supp. 2d 1320, 1336 (M.D. Fla. 2011) (citations and internal quotation marks omitted).

17. *Id.* (*quoting* Apex Global Partners, Inc. v. Kaye/Bassman Intern. Corp., 2009 WL 2777869, at *3 (N.D. Tex. 2009) (internal quotation marks omitted)).

18. *See* Dominion Resources, Inc., SEC No-Action Letter (pub. avail. Mar. 7, 2000) (revoking the SEC Staff's prior position permitting an entity to receive transaction-based compensation for various activities, including solicitation).

19. Even under the best of circumstances, no-action letters are informal and possess no binding legal authority. *See* Kramer, *supra* n.16, at 1336 n.50.

20. Andrew J. Donohue, Director, SEC's Division of Investment Management, "Keynote Address at the ALI-ABA Compliance Conference," (June 3, 2010), available at: *http://www.sec.gov/news/speech/2010/spch060310ajd.htm*.

21. *See* Int'l Bus. Exch. Corp., SEC No-Action Letter (pub. avail. Dec. 12, 1986) (granting no-action relief from broker registration when commissions paid for introducing parties in connection with the sale of a business and otherwise only performing ministerial tasks); *see also* Country Bus., Inc., SEC No-Action Letter (Nov. 8, 2006) (granting similar no-action relief under similar conditions).

22. *See* Dominion Resources, Inc., SEC No-Action Letter (pub. avail. Aug. 22, 1985).

23. *See* Dominion Resources, Inc., SEC No-Action Letter (pub. avail. Mar. 7, 2000).

24. *See* Paul Anka, SEC No-Action Letter (pub. avail. Jul. 24, 1991).

25. See above discussion; *see also* Blass Speech, *supra* n.2 ("examples of activities, or factors, that might require private fund adviser personnel to register as a broker-dealer include: [(1)] Marketing securities (shares or interests in a private fund) to investors, [or (2)] Soliciting or negotiating securities transactions."). *But see* Kramer, *supra* n.16, at 1341 (finding that the SEC had not met the burden of proof that defendant's conduct violated Section 15(a)(1) of the 1934 Act). The SEC alleged that the defendant in Kramer: (1) received transaction-based compensation; (2) actively solicited investors (by distributing promotional material and directing people to issuer's website); (3) advised investors about the issuer (by telling people that the issuer was a good company and suggesting that people read issuer's press releases); (4) used a "network" of associates to promote issuer; (5) demonstrated a regularity of participation (through the money that defendant earned and the two years over which the conduct occurred); (6) promoted the shares of other issuers; and (7) earned commissions rather than a salary as an issuer employee. However, the decision was based very specifically on the facts, which the court acknowledged to be "odd." For example, the defendant was never hired by the issuer, and the court found that the defendant merely brought the parties together to a transaction. Therefore, the court concluded the defendant was not "engaged in the business of effecting transactions in securities for the accounts of others" even though he received transaction-based compensation. In addition, the court specifically noted that the conduct in question had taken place prior to the issuance of certain SEC guidance that clarified that such conduct likely would have required registration.

26. *See* SEC v. Ginsburg, 362 F.3d 1292, 1298 (11th Cir. 2004).

27. *See* Salamon v. Teleplus Enterprises, Inc. 2008 WL 2277094, at *6 (D.N.J. June 2, 2008).

28. *See* Kramer, *supra* n.16, at 1341 (finding that the SEC had not met its burden of proof).

29. *See* Cornhusker Energy Lexington, LLC v. Prospect St. Ventures, 2006 WL 2620985, at *6-*9 (D.Neb. 2006).

30. *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).

31. *See* Blass Speech, *supra* n.2. Mr. Blass stated that "[d]etermining whether a person is a broker-dealer can be fairly fact intensive." He noted specific questions for private fund advisers to consider: "How does the adviser solicit and retain investors? I recommend some thinking go into the duties and responsibilities of personnel performing such solicitation or marketing efforts." He further indicated that if employees who solicit investors have other responsibilities, additional consideration should be given to what those responsibilities are and whether the primary function of these employees is to solicit investors.

32. *See* Rule 3a4-1 under the 1934 Act; Blass Speech, *supra* n.2 ("Rule 3a4-1 generally is not used by private fund advisers. . . . It could be difficult for private fund advisers to fall within [the rule's] conditions.").