Notice

The Texas State Securities’ board recently adopted Amendments to the Board Rules resulting in revised registration exemptions for Adviser to private funds. Amendments become affective on March 31st, 2014.

The TSSB amendment Section 109.6 of the Board Rules and also created a new registration exemption under $139.23 of the Board Rules.

Advisers to Hedge Funds and other private funds should review the amended rules to determine how they may be impacted. Additional information can be found at TSSB website.

<http://www.ssb.state.tx.us/Texas_Securities_Act_and_Board_Rules/Adopted_Rules/AD_March_31_2014.php>

**Adopted Rules**

**TITLE 7. BANKING AND SECURITIES**

**PART 7. STATE SECURITIES BOARD
CHAPTER 109. TRANSACTIONS EXEMPT FROM REGISTRATION**

**7 TAC §109.6**

The Texas State Securities Board adopts an amendment to §109.6, concerning investment adviser registration exemption for investment advice to financial institutions and certain institutional investors, with changes to the proposed text as published in the October 4, 2013, issue of the Texas Register (38 TexReg 6778). The text in subsection (e) was changed to a date certain (March 31, 2014) to coordinate the adoption of this amendment and new §139.23 with the SEC filing deadline for annual amendments to Form ADV.

The amendment coordinates with new §139.23, a registration exemption for investment advisers to private funds, which is being concurrently adopted. The exclusion from the exemption in subsection (c) for advisers to "private funds" is removed and language added to reference the new §139.23 exemption for private fund advisers. A grandfathering provision is added as new subsection (e) to allow an investment adviser currently relying on §109.6 as it now exists for advisory services rendered to a "private fund" (as defined in new §139.23) to continue using the exemption in certain circumstances - if the private fund was in existence on March 31, 2014, and the private fund ceases to accept new beneficial owners.

The preamble for the published proposal clarified that the following would not be considered "new beneficial owners": donees of gifts (where the donor is a natural person, and the donee is either a natural person family member of donor (or an entity composed only of such family members, i.e., trusts, etc.) or is an IRC 501(c)(3) charitable organization); a successor who received the interest due to an involuntary transfer (examples would be legal separation, divorce, death, devise, bankruptcy, or receivership); or a "knowledgeable employee" of the issuer or adviser who replaces a departing knowledgeable employee.

The exemption is preserved for investment advisers who currently come within its provisions.

The Board received a comment letter on the proposal from members of the subcommittee of the Securities Law Committee of the Business Law Section of the State Bar of Texas. The letter expressed support for the amendment to §109.6. The Board agreed and adopted the amendment substantially as published.

The amendment is adopted under Texas Civil Statutes, Articles 581-5.T, 581-12.C, and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The adopted amendment affects Texas Civil Statutes, Articles 581-5, 581-12, 581-12-1, and 581-18.

*§109.6. Investment Adviser Registration Exemption for Investment Advice to Financial Institutions and Certain Institutional Investors.*

(a) Availability. The exemption from investment adviser and investment adviser representative registration provided by the Texas Securities Act, §5.H, or this section is not available if the financial institution or other institutional investor named therein is in fact acting only as agent for another purchaser that is not a financial institution or other institutional investor listed in §5.H or this section. These exemptions are available only if the financial institution or other institutional investor named therein is acting for its own account or as a bona fide trustee of a trust organized and existing other than for the purpose of acquiring the investment advisory services for which the investment adviser or investment adviser representative is claiming the exemption. For purposes of this section, an investment adviser or investment adviser representative that is providing investment advisory services to a corporation, general partnership, limited partnership, limited liability company, trust or other legal entity, other than a private fund (as that term is defined in §139.23 of this title (relating to Registration Exemption for Investment Advisers to Private Funds)), is not providing investment advisory services to a shareholder, general partner, member, other security holder, beneficiary or other beneficial owner of the legal entity unless the investment adviser provides investment advisory services to such owner separate and apart from the investment advisory services provided to the legal entity.

(b) Investment advice rendered to certain institutional investors. The State Securities Board, pursuant to the Act, §5.T and §12.C, exempts from the investment adviser and investment adviser representative registration requirements of the Act, persons who render investment advisory services to any of the following:

(1) an "accredited investor" (as that term is defined in Rule 501(a)(1)-(3), (7), and (8) promulgated by the Securities and Exchange Commission (SEC) under the Securities Act of 1933, as amended (1933 Act), as made effective in SEC Release Number 33-6389, as amended in Release Numbers 33-6437, 33-6663, 33-6758, and 33-6825);

(2) any "qualified institutional buyer" (as that term is defined in Rule 144A(a)(1) promulgated by the SEC under the 1933 Act, as made effective in SEC Release Number 33-6862, and amended in Release Number 33-6963); and

(3) a corporation, partnership, trust, estate, or other entity (excluding individuals) having net worth of not less than $5 million, or a wholly-owned subsidiary of such entity.

(c) Exclusions from exemption. There is no exemption under this section for an investment adviser providing investment advisory services to a natural person. A private fund adviser, as that term is defined in §139.23 of this title (relating to Registration Exemption for Investment Advisers to Private Funds), may not rely on this exemption except as provided in subsection (e) of this section.

(d) Financial statements. For purposes of determining an institutional investor's total assets or net worth under this section, an investment adviser or investment adviser representative may rely upon the entity's most recent annual balance sheet or other financial statement which shall have been audited by an independent accountant or which shall have been verified by a principal of the institutional investor.

(e) Grandfathering. An investment adviser to a private fund, as that term is defined in §139.23 of this title (relating to Registration Exemption for Investment Advisers to Private Funds), may nonetheless qualify for the exemption described in subsection (b) of this section if:

(1) the private fund existed prior to March 31, 2014;

(2) the investment adviser qualified for the exemption in subsection (b) of this section as modified by subsection (c) of this section as both subsections existed prior to March 31, 2014; and

(3) as of March 31, 2014, the private fund ceases to accept new beneficial owners.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 16, 2014.

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John Morgan

Securities Commissioner

State Securities Board

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Proposal publication date: October 4, 2013

For further information, please call: (512) 305-8303

**CHAPTER 139.  EXEMPTIONS BY RULE OR ORDER**

**7 TAC §139.23**

The Texas State Securities Board adopts new §139.23, concerning registration exemption for investment advisers to private funds, without changes to the proposed text as published in the October 4, 2013, issue of the Texas Register (38 TexReg 6786).

This is a new registration exemption for investment advisers to private funds. A related amendment to §109.6, concerning investment adviser registration exemption for investment advice to financial institutions and certain institutional investors, is being concurrently adopted. Both the amendment to §109.6 and new §139.23 will take effect on March 31, 2014, to allow advisers affected by the changes to make an orderly transition and prepare and make any filings necessitated by the changes.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203 ("Dodd-Frank"), made substantial changes to the regulation of private funds. Dodd-Frank mandated Securities and Exchange Commission ("SEC") registration for investment advisers to private funds if they have assets under management of at least $150 million and subjected them to recordkeeping and disclosure requirements.

The SEC provides an exemption from the registration requirements under the Investment Advisers Act of 1940 for an investment adviser that acts solely as an adviser to private funds and has assets under management of less than $150 million. Although exempt from federal registration, these advisers must file reports with the SEC and are called "exempt reporting advisers." The new exemption extends this filing requirement to private fund investment advisers who utilize the exemption so that the Agency has comparable information on advisers using the exemption. Alternatively, some investment advisers to private funds with assets under management of more than $100 million can opt to register with the SEC.

The Form ADV filing required under subsection (b)(1) would be made on a comparable schedule as an exempt reporting adviser making the Form ADV filing with the SEC. Form ADV, General Instruction number 13, requires this filing to be made within 60 days of the adviser relying on §203(m) of the Investment Advisers Act because the adviser acts solely as an adviser to private funds. An adviser who is registered must file a Form ADV-W to withdraw from registration before submitting the first report as an exempt reporting adviser. No filing fee is imposed on either the investment advisers or their representatives who qualify for the exemption.

The exemption in §139.23 ceases to be available for an investment adviser once the adviser becomes registered with the SEC. At that point, the adviser makes a notice filing in Texas. As with other investment adviser exemptions, the adviser's representatives whose activities are similarly limited are covered by the adviser's exemption from registration. Although the exemption does not specifically address the disclosures that must be made by the exempt investment adviser, the general antifraud provisions of the Texas Securities Act would apply.

The exemption contains bad-actor disqualifications applicable to the investment adviser and to its advisory affiliates and imposes additional restrictions on advisers to 3(c)(1) funds.

Transparency will be enhanced for investment advisers who no longer qualify for the exemption contained in §109.6.

The Board received a comment letter on the proposal from members of the subcommittee of the Securities Law Committee of the Business Law Section of the State Bar of Texas. The letter expressed support for new §139.23. The Board agreed and adopted the rule as published.

The new rule is adopted under Texas Civil Statutes, Articles 581-5.T, 581-12.C, and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The new rule affects Texas Civil Statutes, Articles 581-5, 581-7, 581-12, 581-12-1, and 581-18.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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John Morgan

Securities Commissioner

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