HEDGE FUNDS, PRIVATE EQUITY FUNDS AND OTHER SIMILAR INVESTMENT VEHICLES

GEORGETOWN UNIVERSITY LAW CENTER
SYLLABUS AND READING LIST
JANUARY 17, 2017

SPRING 2017
TUESDAYS 5:45 P.M. - 7:45 P.M.
McDonough 201

Professor Barry P. Barbash
Professor James G. Silk

General notes on class readings:

(1) Many reading selections set out below are excerpted. Excerpting generally is indicated by three asterisks at the location of the omitted text; deleted footnotes are not marked.

(2) You should review the sections of, and rules under, the statutes cited below as you read the other selections, instead of trying to read the sections and rules first.

(3) All reading selections set out below are designed to help you understand the topics to be discussed in class. All sections of statutes and rules under those sections are important and should be read.

(4) The area of law and practice we will be studying may be subject over the course of the semester to new developments that may be reflected in additional reading selections throughout the semester.

(5) Supplemental readings related to certain classes are set out in the Appendix to this Syllabus and Reading List. Materials set out in the Appendix are not required to be read for class, but are provided for your reference and optional use.

Class 1: Introduction to Private Funds
(Jan. 17)

Topics:

- Types of Private Funds
- Private Funds Contrasted with Public Pools
- Business Goals of Private Fund Managers
- Service Providers of Private Funds
- Intended Investors of Private Funds
- Regulatory and Business Themes
- Inventory of Applicable Legal Constraints:
  - Terms and conditions of exemptions/exclusions in laws regulating pooled investment vehicles, particularly the Investment Company Act of 1940 (the "1940 Act")
Terms and conditions of exemptions from laws – principally the Securities Act of 1933 (the “Securities Act”) – relating to the offering of securities
- Regulations imposed on the managers of private funds through the application of the Investment Advisers Act of 1940 (the “Advisers Act”)
- Regulations imposed on the managers of private funds having employee benefit plan investors and individual retirement accounts through the application of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and rules under ERISA
- Regulations imposed on private funds and their managers as institutional investors under various federal statutes

Required Readings:
- *Implications of the Growth of Hedge Funds, Staff Report to the United States Securities and Exchange Commission* (“SEC”) (Sept. 2003) (“SEC Staff Report”) (Executive Summary (pp. vii-xiii), pp. 3-36, 43-44, 52-61 and 67-68) (pay particular attention to pp. 11-32)
- Andrew Ceresney, Director, SEC Division of Enforcement, *Keynote Address at the Securities Enforcement Forum West 2016: Private Equity Enforcement* (May 12, 2016)

Class 2: Operating Outside of the Scope of the 1940 Act
(Jan. 24)

Topics:
- The Business/Regulatory Goal
- Overview of the 1940 Act
- The Section 3(c)(1) Exclusion
- The Section 3(c)(7) Exclusion
- “Knowledgeable Employees”

Required Readings:
- 1940 Act Sections and Rules:
  - Section 2(a)(51)
  - Section 3(c)(1)
  - Section 3(c)(7)
  - Section 48
  - Rules 2a51-1, 2a51-2 and 2a51-3
  - Rules 3c-1, 3c-5 and 3c-6
- *Managed Funds Association*, SEC No-Action Letter (Feb. 6, 2014)
- SEC Staff Report (pp. 11-13) (included in Class 1 materials)

**Class 3: Provisions of the 1940 Act From Which No Exemptions Apply**  
(Jan. 31)

**Topics:**
- The Business/Regulatory Goal
- Provisions From Which No Escape is Possible
- Section 12(d)(1)
- Section 17

**Required Readings:**
- 1940 Act Sections and Rules:
  - Sections 12(d)(1)(A), (B), (C) and (G)
  - Section 17(a)
  - Section 17(d)
  - Section 17(e)
  - Rules 12d1-1, 12d1-2 and 12d1-3
  - Rule 17d-1
- Diagrams of Affiliated Transactions Provisions

**Class 4: Indirect Regulation of Private Funds: The Advisers Act**  
(Feb. 7)

**Topics:**
- The Business/Regulatory Goal
- The Definition of Investment Adviser

**Required Readings:**
- Advisers Act Section:
  - Section 202(a)(11)
- *SEC v. Fife*, 311 F.3d 1 (1st Cir. 2002)
Exemptions of Consequence

Required Readings:

- Advisers Act Section and Rules:
  - Section 202(a)(30)
  - Rule 202(a)(11)(G)-1
  - Rule 202(a)(30)-1
  - Rule 203(l)-1
  - Rule 203(m)-1
  - Rule 204-4
- SEC Adopts Rules Implementing Dodd-Frank Investment Adviser Exemptions and Registration Requirements, Willkie Farr & Gallagher LLP (“WFG”) Client Memorandum (June 30, 2011)
- SEC Adopts Rule Defining “Venture Capital Fund” for Purposes of Exemption from the Investment Advisers Act, WFG Client Memorandum (July 5, 2011)
- SEC Adopts Rule Defining “Family Office” for Purposes of Exclusion from the Advisers Act, WFG Client Memorandum (June 29, 2011)

Indirect Regulation of Private Funds: The Advisers Act (Continued); Compliance and Enforcement (Feb. 14)

Treatment of Affiliates

Required Readings:

- Advisers Act Section:
  - Section 208(d)
- American Bar Association Subcommittee on Hedge Funds, SEC No-Action Letter (Jan. 18, 2012)
Topics:

- Fiduciary Duties
- Anti-Fraud Provisions
- Disclosure

Required Readings:

- Advisers Act Sections:
  - Sections 206(1), 206(2) and 206(3)
- Mary Jo White, Chair, SEC, Remarks at the Securities Enforcement Forum (Oct. 9, 2013)
- Review Andrew Ceresney, Director, SEC Division of Enforcement, Keynote Address at the Securities Enforcement Forum West 2016: Private Equity Enforcement (May 12, 2016) (included in Class 1 materials)
- Review Julie M. Riewe, Co-Chief, Asset Management Unit, SEC Division of Enforcement, Conflicts, Conflicts Everywhere – Remarks to the IA Watch 17th Annual IA Compliance Conference: The Full 360 View (Feb. 26, 2015 ) (included in Class 1 materials)
- Joan Conan, Advisers Act Release No. 1,446 (Sept. 30 1994)
- Gardner Russo & Gardner, SEC No-Action Letter (June 7, 2006)
- United States v. James Tagliaferri, No. 15-536 (2d Cir. 2016)
- Blackstreet Capital Management, LLC, Advisers Act Release No. 4,411 (June 1, 2016)

Class 6: Compliance and Enforcement (Continued) (Feb. 28)

Topic:

- Significant Advisers Act Rules

Required Readings:

- Advisers Act Section and Rules:
  - Section 206(4)
  - Rule 206(4)-1
  - Rule 206(4)-2
  - Rule 206(4)-5
  - Rule 206(4)-6
  - Rule 206(4)-7
  - Rule 206(4)-8
- Guidance on the Testimonial Rule and Social Media, SEC Division of Investment Management Guidance Update No. 2014-04 (March 2014)
• Private Funds and the Application of the Custody Rule to Special Purpose Vehicles and Escrows, SEC Division of Investment Management Guidance Update No. 2014-07 (June 2014)
• TL Ventures Inc., Advisers Act Release No. 3,859 (June 20, 2014)
• Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms, Staff Legal Bulletin No. 20 (IM/CF) (June 30, 2014)

Class 7: Regulation of Private Funds with Employee Benefit Plan Investors: ERISA (Mar. 7)

Topics:
• The Business/Regulatory Goal
• ERISA
  o Plan Assets
  o Operating as a Fiduciary

Required Readings:
• SEC Staff Report (pp. 23-32) (included in Class 1 materials)
• Barry P. Barbash and Simon F. T. Cox, Fund Managers, Private Equity Funds and Investment Companies, SEC Regulation Outside the United States (6th ed. 2007) (pp. 319-323)
• DOL Publishes Final Rule Defining “Fiduciary” and Related Exemptions, WFG Client Memorandum (May 6, 2016)
• Settlement Agreement and Release between Department of Labor and Western Asset Management Co. (Jan. 13, 2014)

Class 8: Offering and Selling Interests in Private Funds (Mar. 21)

Topics:
• The Business/Regulatory Goal
• The Securities Act:
  o The Section 4(a)(2) Exemption
  o Regulation D
    • Bad Actor Provisions
  o Use of the Internet and Other Social Media
• Broker-Dealer Registration Considerations
• Section 7(d)

Required Readings:
• Securities Act Section and Rules:
  o Section 4(a)(2)
  o Rules 501, 502 and 506 of Regulation D (pay particular attention to Rule 502(c) and Rules 506(b), (c) and (d))
  o Rule 902(k) of Regulation S
• Advisers Act Section and Rules:
  o Section 205(a)(1)
  o Rule 205-3
  o Rule 206(4)-1 (included in Class 6 materials)
  o Rule 206(4)-3
• 1940 Act Section:
  o Section 7(d)
• Exchange Act Sections:
  o Section 3(a)(4) and (5)
• SEC Staff Report (pp. 13-18 (included in Class 1 materials) and 44-52)
• Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Securities Act Release No. 9,415 (July 10, 2013)
• Goodwin, Procter & Hoar LLP, SEC No-Action Letter (Feb. 28, 1997)
• Investment Funds Institute of Canada, SEC No-Action Letter (Mar. 4, 1996)
• Citizen VC, Inc., SEC No-Action Letter (Aug. 6, 2015)
• Ranieri Partners LLC, Advisers Act Release No. 3,563 (Mar. 8, 2013)

Fact Pattern for Discussion During Class 9 to be Provided to Students

Class 9: Practicum I: Offering and Selling of Interests in a Private Fund
(Mar. 28)

Discussion of Fact Pattern Previously Provided

Class 10: Business Terms and Conditions in Fund Documents
(Apr. 4)

Topics:

• Relevant Law for Building Private Investment Vehicle
• U.S. State Law
• Offshore Jurisdictions
• Constructing a Limited Partnership or Limited Liability Company Agreement
• Confidential Offering Memorandum or Private Placement Memorandum
• The Subscription Agreement
• The Basic Offering Document
• Fees:
  o Performance v. Management
  o High Water Marks
  o Preferred Return/Hurdle Rate
  o Clawbacks
• Allocation of Expenses
• Sharing of Responsibilities:
  o Sub-Advisory Relationships
• Valuation
• Side Letter Agreements
Required Readings:
- Sample Provisions
- Sample Side Letter
- Model Agreement of Limited Partnership*
- Model Confidential Private Placement Memorandum*
- Model Subscription Booklet*

*Please skim and bring documents to class

Fact Pattern for Discussion During Class 11 to be Provided to Students

Class 11: Practicum II: Dealing with an SEC Examination (Apr. 11)

Discussion of Fact Pattern Previously Provided

Fact Pattern for Discussion During Class 12 to be Provided to Students

Class 12: Practicum III: Working with a Typical Private Fund Transaction (Apr. 18)

Discussion of Fact Pattern Previously Provided

Class 13: Miscellaneous Issues (Apr. 25)

Topics:
- Qualified Clients
- Assignment of Advisory Agreements
- Others to be identified

Required Readings:
- 1940 Act Section and Rule:
  - Section 2(a)(3)
  - Rule 2a-6
- Advisers Act Sections and Rules:
  - Section 202(a)(12)
  - Section 205(a)
  - Rule 202(a)(1)-1
  - Rule 205-3 (included in Class 8 materials)
  - Rule 204A-1
- SEC Staff Report (pp. 61-65)

Final Exam: May 8, 2017 at 6:00 P.M.
CLASS 1: Introduction to Private Funds

- Ernst & Young, 2016 Global Hedge Fund and Investor Survey (2016)
- Form PF, Reporting Form for Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisor, SEC (2015)

CLASS 2: Operating Outside of the Scope of the 1940 Act

- SEC Provides Guidance Regarding Knowledgeable Employees Investing in Private Funds, The Investment Lawyer (June 2014)

CLASS 3: Provisions of the 1940 Act From Which No Exemptions Apply

- Fund of Funds Investments, 1940 Act Release No. 27,399 (June 20, 2006) (pp. 1-6, 14-19)
- Gabelli Global Multimedia Trust, Inc. v. Western Investment LLC, No. 10-0557 (D. Md. 2010)
- Barry P. Barbash and Simon F. T. Cox, Fund Managers, Private Equity Funds and Investment Companies, SEC Regulation Outside the United States (6th ed. 2007) (pp. 301-324) (pp. 319-323 are included in Class 7 materials)
- Red Rocks Capital, LLC, SEC No-Action Letter (June 3, 2011)
- Christopher B. Ruffle, 1940 Act Release No. 31,066 (June 2, 2014)
- Kara M. Stein, Commissioner, SEC, Mutual Funds - The Next 75 Years (June 15, 2015)
- Norm Champ, then Director, SEC Division of Investment Management, Remarks to the Practising Law Institute, Hedge Fund Management Seminar 2014 (Sept. 11, 2014)

CLASSES 4 AND 5: Indirect Regulation of Private Funds: The Advisers Act

- Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006)
- Protecting Investors: A Half Century of Investment Company Regulation, Chapter 5, SEC Division of Investment Management (1992)
- US v. Ogale, No. 09-11780, slip op. (11th Cir. 2010)
- Uniao de Bancos de Brasileiros S.A., SEC No-Action Letter (July 28, 1992)
- U.S. v. Lay, 612 F.3d 440 (6th Cir. 2010)
Classes 5 and 6: Compliance and Enforcement

- **SEC v. Cioffi**, No. 08 Civ. 2457 (E.D.N.Y. 2008)
- **SEC v. Cuban**, No. 3:08-cv-02050-D (N.D. Tex. 2013)
- *Testimony Concerning the Regulation of Hedge Funds: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 109th Cong.* (2006) (statement of then Chairman Christopher Cox, SEC)
- **SEC v. Fife**, Complaint No. 1:07-CV-347 (N.D. Ill. 2007)
- **SEC v. Friedlander**, Complaint No. 01 Civ. 4596 (S.D.N.Y. 2007)
- **Steven Andrew Roberts**, Advisers Act Release 2,662 (Sept. 27, 2007)
- Robert Khuzami, then Director, SEC Division of Enforcement, *Speech to the Society of American Business Editors and Writers* (Mar. 19, 2010)
- **SEC Staff Report** (pp. 72-76)
- **SEC v. ICP Asset Management, LLC**, Complaint No. 10 Civ. 4791 (S.D.N.Y. 2010)
- Form ADV and Investment Advisers Act Rules, 17 C.F.R. Parts 275 and 279 (Aug. 25, 2016)
- SEC Adopts Amendments to Form ADV to Add Separately Managed Account Disclosure and “Umbrella Registration” for Relying Advisers, WFG Client Memorandum (Sep. 28, 2016)

Class 7: Regulation of Private Funds with Employee Benefit Plan Investors: ERISA

- Letter to the Plan Administrator from James Benages, Director of the Boston Regional Office, U.S. Dept. of Labor (July 1, 2008)
- Definition of the Term “Fiduciary”; Conflict of Interest Final Rule, Department of Labor, Employee Benefits Security Administration, 81 Fed. Reg. 20,945 (Apr. 8, 2016)
- Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, Department of Labor, Employee Benefits Security Administration, 81 Fed. Reg. 21,089

Class 8: Offering and Selling Interests in Private Funds

- Securities Act Rules:
  - Rules 901, 902, and 903 of Regulation S
- Amendments to Regulation D, Form D and Rule 156, Securities Act Release No. 9,416 (July 24, 2013)
- Sanders Morris Harris, Inc., BD No. 20,580, FINRA Letter of Acceptance, Waiver and Consent No. 2009018184601 (July 11, 2012)
- NASD Reminds Members of Obligations When Selling Hedge Funds, NASD Notice to Members 03-07 (Feb. 2003)
- NASD Reminds Members of Obligations When Selling Non-Conventional Investments, NASD Notice to Members 03-71 (Nov. 2003)
- FINRA Requests Comment on Proposed FINRA Rule Addressing the Circulation of Rumors, FINRA Notice to Members 08-68 (Nov. 2008)
Class 10: Business Terms and Conditions in Fund Documents

- Chart: Comparison of Offshore Hedge Fund Domiciles – British Virgin Islands, Cayman Islands and Jersey, Walkers Firm Memo (May 2012)
- Larry E. Bergmann, Hedge Funds and Prime Brokers: The Legal Relationship from the US Perspective, Hedge Funds and Prime Brokers (2008) (Chapter 3)
- Testimony Concerning Hedge Funds: Hearing Before the Subcomm. on Securities and Investment of the S. Comm. on Banking, Housing, and Urban Affairs, 109th Cong. (2006) (statement of Susan Ferris Wyderko, then Director, Office of Investor Education and Assistance, SEC) (see especially pp. 4 for discussion of side letter agreements)

Class 13: Miscellaneous Issues