SEWARD & KISSEL LLP

December 18, 2000

Memorandum

Procedures for the Offering
of Securities in Private Placements

The suggestions outlined in this memorandum provide general guidance and propose certain compliance measures to permit compliance with the private offering provisions under relevant federal securities regulations to ensure that selling activities will not cause the private investments funds ("Private Funds") to be conducting offerings that are "public".

I. Relevant Federal Securities Law Private Placement Exemptions

Private Funds are excluded from regulation under the Investment Company Act of 1940 by either Section 3(c)(1) or Section 3(c)(7) under that Act. Private Funds rely on the exemption from the registration requirements of the Securities Act of 1933 set forth in Regulation D thereunder ("Regulation D") for transactions by an issuer not involving any public offering.

a) Investment Company Act Exemptions

Private Funds will comply with either Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act in order to avoid registration as an investment company. Section 3(c)(1) limits a fund to 100 beneficial owners. Section 3(c)(7) limits a fund to investors who, at the time they invest, are "qualified purchasers." In addition, certain "knowledgeable employees" of an adviser or its affiliates may invest in a Private Fund (i) without counting as beneficial owners under Section 3(c)(1) or (ii) while being considered qualified purchasers under Section 3(c)(7) even if they do not meet the investments requirement.

b) Securities Act of 1933 Exemptions

(i) General Requirements

To avoid registration under the Securities Act of 1933, interests in Private Funds will be privately placed. A Private Fund's private placements will be limited to "accredited investors" and conducted under Rule 506 of Regulation D under the Securities Act. To qualify under Regulation D, the offering may not involve a "general solicitation" or advertisement. This requires that a Private Fund, its adviser (e.g., general partner) or their respective affiliates have a pre-existing substantive business or personal relationship with each person to whom Private Fund interests are offered. As discussed in Section III, if the general partner/manager of a Private Fund ("GP") receives unsolicited requests for information or unsolicited expressions of

---

1 Qualified purchasers are individuals or family controlled companies owning at least $5 million in investments, or institutional investors owning, or investing on a discretionary basis for others, at least $25 million in investments. 
interest, a waiting period would be necessary in order to thereafter develop the requisite substantive business relationship.

(ii) Regulation D Requirements

Rule 502(c) of Regulation D prohibits the offer or sale of securities in a private placement by any form of "general solicitation" or "general advertising." The staff of the Securities and Exchange Commission has specifically found a solicitation limited to investors with whom the issuer, or a person acting on behalf of the issuer (e.g., a solicitor/placement agent), has a preexisting, substantive business or personal relationship to not constitute a general solicitation. A "substantive relationship" has been defined to be one which allows the issuer, or a person acting on behalf of the issuer, "to be aware of the financial circumstances or sophistication of the persons with whom the relationship exists or that otherwise [is] of some substance and duration." An informal relationship would not meet this standard, even if the Private Fund or placement agent is able to determine that the person is an accredited investor.

In a 1982 no-action letter, (Woodtrails – Seattle Limited, August 9, 1982) the SEC staff provided guidance on the type of information that would be considered sufficient to justify a determination of whether a potential investor is accredited or sophisticated in the context of marketing activities for private investment partnerships. In Woodtrails the staff indicated that the general partner of an investment partnership may send offering materials to potential investors who had invested in other limited partnerships sponsored by the general partner, without the mailing constituting a general solicitation, based on the following factors: (i) the general partner had a preexisting business relationship with each potential investor that was evidenced by a determination at the time of the prior investment that the potential investor met suitability standards and (ii) the general partner believed that, each potential investor had such knowledge and experience in financial and business matters that he or she was capable of evaluating the merits and risks of the prospective investment.

With respect to a Private Fund offering, we believe that a relationship would be "preexisting" if the GP has had sufficient time to review and assess the financial circumstances or sophistication of the potential investor prior to offering units to the potential investor. While we know of no SEC guidelines for how long this should be, we believe that it should be long enough to avoid the appearance that the contact with the potential investor was initiated solely in connection with offering Private Funds. We recommend that interests in Private Funds not be offered to any person with whom the GP has not had regular contact and a pre-existing relationship that is at least one month long.

---

2 The SEC has, however, indicated that a preexisting relationship is not the only method of showing the absence of a general solicitation, stating that "the question of whether or not particular activities constitute a general solicitation must always be determined in the context of the particular facts and circumstances of each case." Securities Act Release No. 6825 (March 14, 1989).

We are familiar with many investment managers who have adopted waiting period requirements that are longer than one month to establish a pre-existing relationship. For instance, many managers have adopted a six month waiting period, although, as discussed above, the SEC has not established any rules or guidelines with respect to the length of the waiting period. An argument can be made that a one month waiting period may be sufficient because the SEC staff permitted this in the recent noteworthy Lamp Technologies, Inc. no-action letter (May 29, 1997). The Lamp letter involved the maintenance of a third party website containing information about many participating private investment companies. The SEC staff indicated that the operation of the website would not constitute general solicitation or advertising within the meaning of Regulation D because (i) the website was password protected and only available to pre-screened accredited investors and (ii) potential investors who accessed the fund information on the website could not invest in any listed fund until after a 30-day holding period.

II. Prohibited Selling Activities

The following are examples of activities that a GP and its representatives should avoid in the marketing interests in Private Funds so as to comply with the limitation on the manner of offering provisions of Regulation D. A GP and its representatives should not:

?? initiate contact with any person to solicit an investment in a Private Fund by discussing a Private Fund with, or providing informational materials describing the Private Fund to, that person unless the Private Fund or any person acting on behalf of the Private Fund has a preexisting, substantive business or personal relationship (i.e., for at least one month) with that person and a determination has been made by the GP that the person solicited is an eligible "accredited investor";

?? post any advertisement relating to a Private Fund in any medium (e.g., print, television, radio or electronic media such as the internet);

?? engage in cold calling, mass mailings (including e-mail) or displays on electronic bulletin boards;

?? circulate any article, notice, press release or other communication describing or mentioning a Private Fund by name that would be published in any newspaper, magazine, newsletter or similar media; or

?? give any seminar or meeting at which information regarding a Private Fund is discussed if the attendees have been invited through any general solicitation or general advertising.
III. Permissible Selling Activities

The following are examples of activities that a GP and its representatives may conduct in marketing interests in Private Funds. The GP and its representatives may:

?? send information, including a summary of terms or other offering materials\(^4\) to persons with whom a Private Fund or persons acting on behalf of the Private Fund has a substantive, pre-existing business or personal relationship and who have been determined to be "accredited investors." As discussed in Section I, we advise that a GP adopt a waiting period of at least one month for a substantive relationship to be established.

?? discuss the Private Fund with or send information regarding the Private Fund to new prospective investors if:

- the prospective investors initiated direct contact with a GP regarding investment advisory services; and

- based on these contacts and the prospective investors' responses to a written questionnaire (see Section IV) regarding the investor's financial circumstances, the GP has sufficient knowledge of the investor's financial circumstances and level of sophistication to determine that the investor would be an accredited investor within the meaning of Regulation D and the relationship would be deemed substantive for purposes of the general solicitation requirement discussed above. We recommend that under these circumstances a GP establish for each potential investor a waiting period between the initial contact and the delivery of purchase documentation sufficient for a substantive relationship to arise in light of the particular investor's sophistication and assets.

IV. Use of Questionnaires

In the H.B. Shaine & Co. no action letter (publ. avail. May 1, 1987), the SEC staff determined that an investor questionnaire would establish a preexisting substantive relationship with the respondent for purposes of Regulation D. (See also, E.F. Hutton, December 3, 1985.) The questionnaire requested specific information regarding the respondent's employment

\(^4\) A GP should number each set of offering materials that it distributes for a particular Private Fund and keep a list indicating the persons to whom the offerings materials are sent.
history, business experience, business or professional education, investment experience, income and net worth. The questionnaire also asked the respondent to provide his or her own opinion about his or her ability to evaluate the merits and risks of the particular investment. In addition, the H.B. Shaine questionnaire was updated annually and sufficient time was permitted to elapse between the respondent's initial completion of the questionnaire and the inception of any particular offering in order that the distribution of the questionnaire would not be deemed to be a solicitation with regard to the offering. The staff did not, however, reach a conclusion as to whether the information requested by the H.B. Shaine questionnaire would be sufficient to form a reasonable basis for determining whether a potential investor is accredited or sophisticated.

In another no-action letter (Bateman Eichler, December 3, 1985) the SEC staff permitted pre-existing relationships to be established based on responses to questionnaires that provided “sufficient information to evaluate the prospective offeree’s sophistication and financial circumstances.” There would also be a waiting period of at least 45-days before any offering materials for particular investment funds would be sent to an investor who returned a questionnaire.

Any questionnaire developed by a GP for marketing activities for Private Funds should conform to the above standards.

Seward & Kissel LLP

99183.000 #89452v2

5 The SEC indicated that a “mere response” to the questionnaire would not be sufficient.
6 As indicated above, we believe that a one month waiting period would be permissible.