

CLIENT MEMORANDUM

SEC Enforcement Action Relating to Private Equity Transaction Fees and Broker-Dealer Registration

June 2, 2016

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On June 1, 2016, the SEC announced a settlement with a Maryland-based private equity firm in connection with, among other things, the firm's failure to register as a broker-dealer under the Securities Exchange Act of 1934. The SEC alleged that the firm provided brokerage services to and received transaction-based compensation from its portfolio companies in connection with acquisitions and dispositions and therefore should have been registered not only as an investment adviser under the Investment Advisers Act of 1940, but also as a broker-dealer, notwithstanding disclosure of the brokerage services made to funds managed by the firm and investors in those funds. The order would seem to reflect the Commission's continuing enforcement focus on aspects of the private equity business, a focus described in detail recently in a speech by Andrew Ceresney, the Commission's Director of Enforcement.¹

Private equity firms have historically not registered as broker-dealers in connection with their own fundraising activities or with respect to services provided and transaction fees charged to their portfolio companies (which fees are now typically subject to offset against the management fee paid by investors, often up to 100%). The question of whether these activities cause a private equity firm to be engaged in the business of effecting transactions in securities for the account of

¹ See Andrew Ceresney, Director, Division of Enforcement, U.S. Securities and Exchange Commission, "Private Equity Enforcement," May 12, 2016, available [here](#) and our client memorandum entitled "SEC Enforcement Director Reviews Focus on Private Equity," May 16, 2016, available [here](#).

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others has been an industry-wide discussion, notably following a 2013 speech by a then senior SEC counsel in the Division of Trading and Markets.²

In light of the SEC's enforcement action, private equity firms should review their practices with respect to capital markets activity and advisory services, transaction fees, offsets and other firm practices, in the context of the broker-dealer registration requirements. Numerous factors should be considered and discussed with counsel when assessing these industry-wide practices against the broker-dealer registration rules.

If you have any questions regarding this memorandum, please contact Barry P. Barbash (202-303-1201; bbarbash@willkie.com), Scott A. Arenare (212-728-8252; sarenaire@willkie.com) or the attorney with whom you regularly work.

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² See David W. Blass, Chief Counsel, Division of Trading and Markets, U.S. Securities and Exchange Commission, "A Few Observations in the Private Fund Space," April 5, 2013, available [here](#).