CARLTON FIELDS

Agency Positions Unfavorable to Investment Companies

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May 9, 2012 – In an interpretation of the Jumpstart Our Business Startups (JOBS) Act last week, the SEC staff resolved a regulatory uncertainty adversely to registered investment companies, as did the CFTC a few weeks ago in amending its Rule 4.5. Specifically, the SEC staff supplemented guidance it had issued on April 16, 2012 with responses to additional Frequently Asked Questions (FAQ) (available here). The staff's response last week to new FAQ 20 advises that the staff "believes" that registered investment companies do not qualify as "emerging growth companies" under the JOBS Act. This interpretation, however, is arguably inconsistent, conceptually, with the staff's response to FAQ 21 to the effect that business development companies may qualify as emerging growth companies. Business development companies, although not subject to the registration and most other provisions of the Investment Company Act of 1940, are in many respects similar to closed-end registered investment companies. Absent the staff's interpretation in FAQ 20, several provisions of the so-called "on-ramp" procedures that Title I of the JOBS Act provides for emerging growth companies would potentially be of value to registered investment companies. Among these would be the long-sought ability to submit registration statements to the SEC staff in draft form, thereby shielding proprietary and competitive information from early disclosure. Under Title I of the JOBS Act, emerging growth companies also have an enhanced ability, even before an SEC registration statement is filed, to explore the interest of institutional investors without running afoul of "gun jumping" prohibitions. The SEC staff's conclusion in FAQ 20 is largely based on the inapplicability to registered investment companies of many of the obligations that the JOBS Act on-ramp provisions eliminate for emerging growth companies. In this regard, the staff specifically cites the inapplicability to registered investment companies of certain executive compensation disclosure and financial statement requirements. In addition, the staff was influenced by the fact that the on-ramp provisions provide relief only from certain requirements under the Securities Act of 1933 and the Securities Exchange Act of 1934, whereas "compliance with the registration and disclosure regime for registered investment companies also fulfills their obligations under the Investment Company Act from which Title I provides no exemption." Under the CFTC's recent amendments to Rule 4.5, investment advisers to registered investment companies will in many cases be required to

register as commodity pool operators (CPOs), unless the companies' operations are modified to comply with the new requirements of the exclusion that is set forth in the rule. (*See* our Expect Focus Alert dated February 17, 2012 for more detail on this subject.) In order to alleviate the burdens of CPO registration for investment company advisers, the CFTC is also proposing to "harmonize" certain of its recordkeeping, reporting, and disclosure requirements with applicable SEC requirements. As a practical matter, however, the "harmonization" that the CFTC has so far proposed primarily aims to facilitate the imposition of the CFTC's *additional* requirements, rather than to eliminate those requirements for registered investment companies. Accordingly, although it is still uncertain how the harmonization process will ultimately play out, it may well produce substantially increased filing responsibilities and additional formalized offering disclosure to investors in affected investment companies. If so, the CFTC, like the SEC staff's response to FAQ 20, will not appropriately streamline the filing and offering requirements applicable to registered investment companies.

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