

DIRK KEMPTHORNE
GOVERNOR



GAVIN M. GEE
DIRECTOR

STATE OF IDAHO
DEPARTMENT OF FINANCE
700 W. STATE STREET, 2ND FLOOR
P.O. BOX 83720
BOISE, IDAHO 83720-0031
Website: finance.state.id.us

May 3, 2002

Re:

Dear M

This is in reference to your recent request on behalf of
that this Department take a no enforcement action position with regard to
registration for the investment advisory activities of

As you are aware, we view as subject to the investment advisory
registration requirements of the Act. However, we concur in part with your letter that
s a venture capital fund and reasonable cause exists to decline to require
compliance with these registration requirements.

We note that information regarding the minimum investment amount required of
investors was not included in your letter. As you will notice, our no enforcement action
position with regard to was premised in part on the fact that
the minimum dollar investment was \$250,000. We view this minimum investment
amount as an integral factor in determining whether or not to grant a no enforcement
action position in matters such as these. It appears from your letter that has closed
it's offering after raising a total of \$14,090,000. Your letter also states "...no further
offering or sale of LP Interests is contemplated." Based on this representation, we take a
no enforcement action position with regard to the minimum investment amount for sales
already transacted. However, be aware that any future sale of interests must meet or
exceed the \$250,000 minimum.

Our no enforcement action position is predicated upon the facts and
representations contained within your letter of March 22, 2002. Should these facts or
representations change or prove to be inaccurate, our no enforcement action position may
also change. Furthermore, it is important to note that while we concur with your

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assessment that a venture capital fund, we do not necessarily accede to other analysis presented in your letter.

Sincerely,


PATRICIA R. HIGHLEY
Senior Securities Analyst
Idaho Department of Finance

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March 22, 2002

Idaho Department of Finance
Attention: Ms. Marilyn Chastain
700 W. State Street, 2nd Floor
P.O. Box 83720
Boise, Idaho 83720-0031

Re:

Dear Ms. Chastain:

This office represents _____, and
(the "*Fund*").

In connection with and in response to the Department's letter dated March 6, 2002, we hereby request that the Idaho Department of Finance (the "*Department*") take a "no enforcement action" position under Section 30-1402(6)(i) of the Idaho Securities Act (the "*Idaho Act*") and Section 12.01.08.125 of the Idaho Administrative Procedure Act (the "*IAPA*") to the effect that _____ and its members and employees do not need to register as investment advisors under the Idaho Act, based upon the specific facts and representations set forth herein.

Background

As an initial matter, please be advised that the Fund is a venture capital fund, formed for the sole and specific purpose of making portfolio company investments in early stage and emerging growth companies located in Idaho and elsewhere in the Pacific Northwest.

_____ is the general partner of the Fund. The principal place of business of the Fund and of _____ is in Boise, Idaho, and the Fund enjoys the distinction of being the first venture capital fund located in and focused on the State of Idaho.

At formation, the Fund was limited to \$15 million in investments; at closing, the Fund had raised a total of \$14,090,000 through the sale of limited partnership interests ("*LP Interests*") to accredited investors only, pursuant to an exemption from the registration and

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prospectus delivery requirements of the Securities Act of 1933, as amended (the "1933 Act") afforded by Regulation D promulgated under the 1933 Act. The Fund is now closed, and no further offering or sale of LP Interests is contemplated.

Exemption from Federal Registration

As a result of the \$15 million limitation described above, [redacted] is not required to register as an investment advisor under the Federal Investment Advisor's Act of 1940, as amended (the "1940 Act"), because it is exempt from Federal registration by virtue of having less than \$25 million of assets under management. See Section 203A(a) of the 1940 Act. For purposes of this Section of the 1940 Act, the term "assets under management" means the securities portfolio with respect to which an investment advisor provides continuous and regular supervisory or management services. As a closed fund with a maximum investment amount of \$15 million and \$14,090,000 actually invested or committed to be invested, the Fund is exempt from Federal regulation by virtue of the less than \$25 million exemption provided by Section 203A(a) of the 1940 Act.

Registration / Exemption Under Idaho Act

However, as you know, the Federal scheme now contemplates that investment advisors with less than \$25 million of assets under management are subject to State regulation. Accordingly, [redacted] would be required to register as an investment advisor with the Department of Finance under the Idaho Act unless a specific exemption applies or the Department adopts a "no enforcement action" position in response to the request contained in this letter.

The Idaho Act does not contain specific exemptions from investment advisor registration similar to those found in the 1940 Act. However, the Director of the Department is empowered, under Section 30-1402(6)(i) of the Idaho Act, to exclude from the term "investment advisor" such "other persons not within the intent of this subsection as the Director may, by rule or order, designate." Similarly, the director of the Department is given the discretion, under Section 12.01.08.125 of the IAPA, to ". . . either upon request or upon his own motion, waive or modify the application of any particular section to a particular salesman, broker dealer or investment advisor when, in his opinion, just and reasonable cause exists for such action and the waiving or modifying of such rule would not be contrary to the provisions of the [Idaho] Act or to the public interest."

We believe that just and reasonable cause exists for a “no enforcement action” position based on the following: (1) while the exemptions from Federal registration under the 1940 Act, do not directly apply to _____, they provide a compelling public policy framework and rationale for granting such an exemption at the State level, (2) the private offering and sale of limited partnership interests is sufficiently regulated by the Federal and State securities laws to provide adequate protection to the investing public, and (3) the activities, purpose and structure of _____ and the Fund are significantly different from those of a typical mutual fund or hedge fund subject to 1940 Act registration.

1940 Act Exemptions

The 1940 Act, and the rules and regulations thereunder, provides two exemptions from registration which are applicable to _____ and which provide a rationale for granting an exemption from registration at the State level:

1. *First*, Section 203(b)(1) of the 1940 Act exempts from registration, “Any investment advisor all of whose clients are residents of the State within which such investment advisor maintains his or its principal office and place of business, and who does not furnish advice or issue analysis or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange.” The Fund is the only client of _____ and its principal place of business is Boise, Idaho. If _____ were governed by the Federal regulatory scheme, the exemption afforded by Section 203(b)(1) of the 1940 Act would apply.

2. *Second*, Section 203(b)(3) of the 1940 Act exempts from registration, “Any investment advisor who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment advisor nor acts as an investment advisor to any investment company. . . .” _____ has only one client - the Fund. This interpretation of the “single client” relationship between _____ and the Fund is supported by Section 275.203(b)(3)-1 of the Code of Federal Regulations, subsection (a)(2)(i), which defines a “single client” as, “A corporation, general partnership, limited partnership, limited liability company, trust, . . . or other legal organization . . . that receives investment advice based upon its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members or beneficiaries. . . . (*emphasis added*).” As described below, _____, as

general partner of the Fund, has sole authority with respect to investment decisions of the Fund, based on the Fund's investment objectives and parameters, and not on any individual considerations of the Fund's limited partners. Again, if _____ were governed by the Federal regulatory scheme, the exemption afforded by Section 203(b)(3) of the 1940 Act would apply.

Sufficient Regulatory Protection

As stated above, the offering of LP Interests by the Fund was conducted under the safe harbor of Regulation D, in that: (i) the Fund accepted subscriptions only from "accredited investors" as that term is defined in Rule 501 under Reg D, and each limited partner investment was thoroughly documented with a formal accredited investor questionnaire and subscription agreement, (ii) each limited partner was required to represent and warrant that it was acquiring the LP Interests for investment purposes only, and not with a view to the resale or distribution thereof, and (iii) the Fund did not engage in any public solicitation or general advertising to potential LP Interest investors.

We submit that from a regulatory standpoint, there is very little to be gained in investor protection from requiring registration as an investment advisor that is not already accomplished and safeguarded pursuant to the requirements of Regulation D.

Organization and Structure of Fund

The Fund is organized and operated in accordance with its Agreement of Limited Partnership (the "*Partnership Agreement*"), as follows:

- The Partnership Agreement of the Fund vests control and management authority over the Fund in _____ the general partner. A Limited Partner Advisory Board serves as a "sounding board" for reviewing general partner decisions, but its authority is limited to (a) approval of the Fund's annual asset valuation, (b) review of outside investments by the general partner for any conflict of interest issues, (c) approval of the Fund's outside auditors, (d) approval of capital calls in excess of one-third of the limited partners' total committed capital, and (e) consultation with the general partner regarding termination and liquidation of the Fund.

- The investment objectives of the Fund are clearly delineated in the Partnership Agreement, and provide that the primary purpose of the Fund is to make venture capital investments in technology-based, emerging growth companies located primarily in the Pacific Northwest States of Idaho, Washington, Oregon, and in Northern California. All investment decisions of the Fund are based on these criteria, and not the individual investment objectives of any limited partner. _____ as general partner, has sole discretion with respect to investment by the Fund in portfolio companies.
- Except as short-term investments, the Fund does not invest or reinvest in publicly-traded securities, bonds, or other types of marketable securities. The Fund makes truly "private equity" investments in that the investments in portfolio companies are illiquid and long-term.
- Management Fees paid to _____ are based solely on a percentage of the total commitment of the limited partners: 2.5% during the first year, declining by 0.5% each year thereafter to a base of 1.0% per year. There are no "performance based" fees.
- The general partner is required to provide quarterly written reports to limited partners on the Fund's investments and investment opportunities.
- The term of the Fund is to expire on December 31, 2007, provided that the general partner may extend the term of the Fund for an additional five years if it determines that such extension is required or desirable for an orderly liquidation and distribution of the assets of the Fund.
- Limited partners do not have the right to redeem or withdraw their investment in the Fund, absent the approval of the general partner and two-thirds in interest of the limited partners. Similarly, no limited partner may transfer its LP Interests in the Fund without the prior consent of the general partner.
- Subject to working capital needs and other limitations set forth in the Partnership Agreement, it is the intention of the Fund to distribute cash profits to limited partners promptly following the closing of a sale transaction involving one of the Fund's portfolio companies.

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Perhaps most importantly, and what really distinguishes [redacted] and the Fund and other similar venture capital entities from mutual funds and other investment vehicles governed by the 1940 Act, is that the Fund is required to operate at all times in such a manner that it qualifies as a "venture capital operating company" within the meaning of Section 2510.3-101 of the Department of Labor regulations. This means that at least 50% of the Fund's investment must be in operating companies as to which the Fund has "management rights." As defined in Section 2510.3-101(d)(3)(ii), the term "management rights" means contractual rights which enables the investor to "substantially participate in, or substantially influence the conduct of, the management of the operating company."

In practice, a representative of [redacted] currently sits on the Board of Directors of three of the Fund's five portfolio companies. It is this participation in management, as well as the other provision of on-going advice and support on a regular basis, which distinguishes the venture capital company from the typical mutual fund or hedge fund.

For the foregoing reasons, we respectfully request that the Department adopt a "no enforcement action" position to the effect that [redacted] does not need to register as an investment advisor under the Idaho Act. We acknowledge and understand that any no-action letter would be limited to the facts and circumstances presented in this letter.

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Thank you for your prompt attention to this matter. If you have any questions, please give me a call a

Very truly yours,

cc: Ms. Patricia R. Highley