KANSAS

OFFICE OF THE SECURITIES COMMISSIONER

KATHLEEN SEBELIUS, GOVERNOR
CHRIS BIGGS, COMMISSIONER

November 4, 2008

Victoria R. Westerhaus, Esq.
Stinson, Morrison, Hecker, LLP
1201 Walnut Street, Ste. 2900
Kansas City, Missouri 64106-2178

RE: Interpretive Opinion No. 2009-003
MLP Co-Investment Opportunity Fund, L.P.

Synopsis: The managers and advisers of a large private equity investment fund are not currently required to register as investment advisers under the Kansas Uniform Securities Act.

Dear Ms. Westerhaus,

In your letter dated October 6, 2008, you inquire whether your clients are required to register as investment advisers in Kansas. As more fully described in your letter, your clients include the fund manager, general partner, and administrator of a private equity investment fund, and your clients have various roles in advising and managing the fund. The fund is expected to have at least $350 million in assets under management and will make investments in the energy infrastructure and natural resources industries. All of the fund's investors will be qualified purchasers as defined under section 2(a)(51) of the Investment Company Act of 1940, so the fund is excluded from the definition of an investment company under section 3(c)(7) and is therefore exempt from registration under that Act.

Under federal law, managers and advisers of pooled investment vehicles or hedge funds typically meet the definition of an investment adviser in section 202(a)(11) of the Investment Advisers Act of 1940. *See* Goldstein v. S.E.C., 451 F.3d 873, 876 (2006). In Kansas, the Office of the Securities Commissioner has similarly interpreted the definition of investment adviser in K.S.A. 17-12a102(15) to include managers of various types of pooled investment vehicles or hedge funds. You concede that the general partner and manager of your clients' fund would be investment advisers, and that the administrator may also be deemed an investment adviser.

However, like many hedge fund managers, your clients are exempt from federal registration as an investment adviser under section 203(b)(3) of the Investment Advisers Act of 1940 because they have fewer than fifteen clients as defined by SEC Rule 203(b)(3)-1.

Your clients' situation exposes some inconsistency between federal law and Kansas law. As you know, investment advisers with more than $25 million under management are typically regulated at the federal level. Therefore, if your clients are investment advisers, they would logically fall under the jurisdiction of the Securities and Exchange Commission. However, because your clients are exempt from federal registration, they are not considered a "federal covered investment adviser" under K.S.A. 17-12a102(6) and do not get the benefit of the exclusion from the definition of an investment adviser in K.S.A. 17-12a102(15)(E). Furthermore, Kansas law has no exemption that specifically corresponds with section 203(b)(3) of the Investment Advisers Act of 1940, and we do not have a general *de minimus* exemption that allows an in-state investment adviser with very few clients to avoid registration.

According to your letter, at least ten states have granted exemptive relief that corresponds with section 203(b)(3), and at least eight more have adopted a *de minimus* exemption. You have requested that we adopt a similar regulation or special order to provide relief to your clients and other similarly situated advisers of pooled investment vehicles.

Whenever possible, the Office of the Securities Commissioner attempts to adopt policies that are consistent with federal law and our sister states. Therefore, we confirm that we will not take enforcement action against your clients if they advise and manage the private equity investment fund as described in your letter without registering as investment advisers under the Kansas Uniform Securities Act.

Please note, however, that we are very reluctant to follow federal law and our sister states in their treatment of hedge fund managers, particularly in the current economic climate. We believe that federal regulation of hedge funds is appropriate, and we intend to advocate for changes to federal law that will give the SEC greater power to regulate hedge funds. If Congress or the SEC adopt changes to federal laws governing hedge funds, we intend to adopt regulations that complement the federal regulatory scheme. Even in the absence of federal changes, we will re-evaluate whether to require registration of hedge fund managers. In either case, we will try to coordinate our efforts with other states and include you and other interested parties in the development of any regulations governing hedge fund advisers.

Upon congressional approval, it is possible that the SEC may simply re-adopt the "Hedge Fund Rule" it previously adopted in 69 Fed.Reg. 72,054 (Dec. 1, 2004) (codified at 17 C.F.R. pts. 275, 279), which was later vacated in Goldstein v. S.E.C. *Supra.* If so, your client may continue to be exempt from federal registration because it is a "private fund" pursuant to that rule, and we will consider whether any Kansas exemption should correlate with the federal treatment of private funds. However, this letter gives no assurances regarding the ultimate exemption that we may adopt, or even that such an exemption will be adopted at all.

Naturally, our current "no action" position may be superseded by subsequent amendments to our regulations, but your clients may rely upon this letter until formal regulations are adopted or this letter is rescinded in writing. Please note that any variance from the facts expressed in your letter could result in a different conclusion. This opinion is intended solely as an expression of enforcement policy by this agency, and its legal conclusions are not binding on any court, legal tribunal, or any other person.

Please contact me if you have any further questions.

Sincerely,

[redacted]

Rick A. Fleming
General Counsel