

PUBLICATION

SEC Issues Final Rules For Investment Advisers

July 14, 2011

On June 22, 2011, the SEC adopted rules that affect the registration requirements of investment advisers under the Investment Advisers Act of 1940 (Advisers Act), as amended. The new rules (i) provide certain limited registration exemptions to advisers of private funds, (ii) require certain advisers to register with the SEC and (iii) reallocate regulatory oversight between the SEC and the state regulatory authorities. These new rules will become effective July 21, 2011.

With the enactment of the Dodd-Frank Act, the broad exemption under Section 203(b)(3) of the Advisers Act for advisers to private funds was repealed and three new limited exemptions were adopted. These new exemptions can be used by advisers who solely advise venture capital funds, advisers who advise private funds that have less than \$150 million in assets under management and foreign private advisers.

Venture Capital Fund Exemption. An adviser to a fund that falls within the newly-defined term “venture capital fund” will be exempt from registration. The SEC defines “venture capital fund” as a private fund that (i) holds no more than 20 percent of the fund’s capital commitments in non-qualifying investments, (ii) does not borrow or incur leverage, other than limited short-term borrowing, (iii) does not offer its investors redemption or liquidity rights, except in extraordinary circumstances, (iv) represents itself as pursuing a venture capital strategy to its investors and prospective investors and (v) is not registered under the Investment Company Act of 1940 and has not elected to be a business development company. Existing venture capital funds may qualify as “venture capital funds” under the new exemption if certain conditions are met.

Private Fund Adviser Exemption. Advisers of private funds that have less than \$150 million in assets under management are also exempt from registration if the adviser solely advises “qualifying private funds” as that term is defined in the Advisers Act. A “qualifying private fund” includes a private fund (i) that does not fall within the definition of an “investment company” under the Investment Company Act, which includes funds that do not publicly offer their securities and either have less than 100 beneficial owners or its owners are limited to “qualified purchasers”, (ii) that is not registered under Section 8 of the Investment Company Act and (iii) that does not hold itself out as a business development company under the Investment Company Act. The instructions to the Form ADV specify how the assets under management are to be calculated for purposes of the \$150 million threshold. Even if exempt from registration, an adviser must calculate managed assets on an annual basis and report the amount of managed assets on its annual updating amendment to the Form ADV.

Foreign Private Adviser Exemption. A foreign private adviser is exempt from registration if it (i) has no place of business in the United States, (ii) has fewer than 15 U.S. clients and investors in private funds, (iii) has assets under management attributed to U.S. clients and investors that, in the aggregate, total less than \$25 million and (iv) generally does not hold itself out in the United States as an investment adviser. To calculate the assets under management, a foreign private adviser must use the same method as private fund advisers, as instructed on the Form ADV.

Reporting Requirements of Exempt Reporting Advisers

Advisers that rely upon the venture capital fund exemption or the private fund exemption are required to file a Form ADV with the SEC within 60 days of claiming the exemption. The exempt reporting advisers are required

to amend the Form ADV annually, within 90 days of the close of the exempt reporting adviser's year-end, or more frequently if required by the instructions of the Form ADV. The information reported on the Form ADV by the exempt reporting advisers will be publicly available.

State Registration

The Dodd-Frank Act raised the threshold for investment advisers registering with the SEC to \$100 million from the prior threshold of \$25 million. An adviser currently registered with the SEC will have until March 30, 2012 to determine whether it is still eligible to be registered with the SEC. An adviser that is no longer eligible to register with the SEC will have until June 28, 2012 to withdraw its registration with the SEC and register with the appropriate state.

If you have questions about this or any other investment adviser regulatory issues, please contact your Baker Donelson attorney.