

SLF Alert

- Exemptions eliminated through the amendment of the 140 Act will become effective one year after the date of enactment of Dodd-Frank.
- Qualified investment advisers may register with the SEC during the transition period.
- The records of private funds obtained by the SEC and other government agencies under Frank-Dodd will be exempt from the Freedom of Information Act.

by, Sheheryar T. Sardar & Benish Shah

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) is slated to effect sweeping changes in the financial services industry with an eye to prevent future financial crisis, as witnessed in recent years. Title IV of the Dodd-Frank Act, the **Private Investment Registration Act of 2010**, places numerous restrictions on private funds and fund advisers. One of the many changes is the amendment of the Investment Advisers Act of 1940 (the 1940 Act) to require previously exempt investment advisers to register with the Securities Exchange Commission (SEC).

Eliminating The Private Adviser Exemption

Dodd-Frank defines “private fund” as an issuer that would be an investment company as defined by Section 3 of the 1940 Act. A key component related to private funds under Dodd-Frank is the elimination of the “private adviser exemption” available to hedge fund advisers and certain other private fund advisers under Section 203(b)(3) of 1940 Act.

Under the 1940 Act, investment advisers that did not generally hold themselves out to the public as an investment adviser were not required to register with the SEC. Section 203(b)(3) also applied the exemption to investment advisers that did not act as an adviser to a registered investment company and had less than 15 clients in a period of 12 months, counting each advised fund as one client. Under Dodd-Frank, these advisers no longer have an exemption and must register with the SEC.

Investment advisers to private funds will be required to register with the SEC unless they are otherwise exempted from SEC registration.

Who Does Exemption Apply To?

There are new exemptions provided for advisers to private funds, foreign advisers, venture capital funds, and SBICs. The exemptions are as follows:

Private Fund Advisers with Managed Assets of \$150 Million or Less.

Registration exemption applies to investment advisers with less \$150 million of assets under management in the United States that act only as advisers to private funds. The exemption is available for advisers that would otherwise be subject to registration with the SEC. Notwithstanding this exemption, the SEC will require such advisers to maintain specified records and provide the SEC with such annual or other reports as the SEC determines are necessary or appropriate in the public interest or for the protection of investors.

Foreign Private Advisor Exemption.

A foreign private advisor is defined as any investment adviser who has: (1) no place of business in the United States; (2) fewer than 15 clients in the United States, with each private fund counting as one client; (3) total assets under management attributable to clients in the United States of less than \$25 million, or a higher amount deemed appropriate by the SEC. Foreign private advisors as defined here receive an exemption to registration. This *does not include* an investment adviser that: (1) holds itself out to the public in the United States as an investment adviser; (2) acts as an investment adviser to a registered investment company; or (3) acts as a company that has elected to be a business development company pursuant to the 1940 Act and has not withdrawn its election.

Venture Capital Advisers. Investment advisers that act as an adviser solely to one or more venture

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capital fund are exempted from registration. There is no clear definition of what a "venture capital fund" constitutes. However, it mandates that the SEC issue final rules that define "venture capital fund." The rules to be issued by the SEC must include provisions requiring the maintenance of certain records and the provision of certain reports by advisers to venture capital funds who are exempt from registration.

Small Business Investment Companies. Any investment adviser, other than a business development company, that advises only: (1) small business investment companies (SBIC) that are licensees under the Small Business Investment Act of 1958 (1958 Act); (2) entities that have received from the Small Business Administration notice to proceed to qualify for a license as an SBIC under the 1958 Act, which notice or license has not been revoked; or (3) applicants affiliated with one or more licensed SBICs and that have applied for another license under the SBIA, which application remains pending.

The amendments to the Act will become effective one year after the date of enactment of the Dodd-Frank. Qualified investment advisers are permitted to register with the SEC during the transition period.

Record Keeping At Private Funds

The SEC will issue rules including provisions requiring the maintenance of certain records and the provision of certain reports by private funds advised by exempted advisers in an extended effort to protect the investors of these funds.

The records and reports required to be maintained by an investment adviser include a description of:

- amount assets under management and use of leverage, including off-balance sheet leverage;
- types of assets held;
- counterparty credit risk exposure;

- valuation of policies and practices of the fund;
- trading and investment positions;
- side letters or side arrangements;
- trading practices; and
- any additional information deemed so by the SEC.

The SEC will also conduct periodic inspections of registered investment advisers' fund records, and advisers will be required to make available to the SEC copies or extracts from the records as deemed necessary or financially feasible to obtain. The SEC will also be reporting annually to Congress on how such collected information has affected the SEC's monitoring of the markets in order to protect investor and market integrity.

However, Dodd-Frank is careful to enhance **confidentiality protection** for private funds. The records of private funds obtained by the SEC and other government agencies under Dodd-Frank will be exempt from the Freedom of Information Act if it is "proprietary information." Proprietary information includes; (1) sensitive, non-public information regarding the adviser's investment or trading strategies; (2) analytical or research methodologies; (3) trading data; (4) computer hardware or software containing intellectual property; and (5) any additional information deemed proprietary by the SEC.

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