Investment Funds and SBIC Formation

Investment Advisors Act Relief for SBICs and other Private Equity Funds

By Alan B. Roth, Kate L. Price and Breanne K. Long

On December 4, 2015, President Obama signed the SBIC Advisers Relief Act (the Relief Act) into law. The Relief Act expands certain investment adviser registration exemptions relating to small business investment companies (SBICs) available under the Investment Advisers Act of 1940, as amended (the Advisers Act). The Relief Act (1) eliminates the applicability of state registration and reporting requirements for advisers managing solely SBIC funds and relying on the federal SBIC adviser exemption, (2) expands the availability of a federal registration exemption for advisers of SBIC funds who also have non-SBIC assets under management (AUM), and (3) allows certain advisers who manage both venture capital funds and SBICs to qualify for a federal registration exemption under the newly-expanded venture capital registration exemption.

Under the Relief Act, investment advisers who advise solely SBIC funds (SBIC Advisers) will no longer be subject to state investment adviser registration and reporting requirements. Previously, the Advisers Act provided only a federal exemption for SBIC Advisers. Accordingly, SBIC Advisers were still required to register under state securities laws if they could not rely on a specific state exemption, and many states had not adopted a similar SBIC exemption. The Relief Act provides for federal preemption of these state regulations, so that the state laws requiring registration no longer apply to SBIC Advisers relying on the federal registration exemption.

The Relief Act also broadens the private fund adviser exemption included in the Advisers Act. Since the SBIC Adviser exemption requires that an adviser manage solely SBICs, if an adviser manages even one dollar outside of its SBIC vehicles (in a co-investment vehicle, for example), it cannot rely on the SBIC Adviser exemption. However, such an adviser might be able to rely on the private fund adviser exemption, which exempts from federal registration advisers who manage solely private funds (which may include SBICs) and whose regulatory AUM in the U.S. are under $150 million. Previously, the assets of the adviser's SBIC funds counted towards the $150 million AUM limit. Under the Relief Act, the calculation of AUM will now exclude the assets of any SBICs managed by the adviser. Therefore, an investment adviser can now manage multiple SBIC vehicles *and* up to an additional $150 million in AUM and still qualify for an exemption. To qualify for this exemption, the investment adviser must file as an exempt reporting adviser.

Additionally, the Relief Act expands the Advisers Act federal registration exemption for advisers managing venture capital funds (the VC Exemption). Previously, the VC Exemption applied only to advisers managing solely venture capital funds; if the adviser also managed SBICs or had any AUM outside of its venture capital funds, there was no exemption available. Under the Relief Act, advisers managing both venture capital funds and SBICs can now rely on the VC Exemption. To rely upon the VC Exemption, an investment adviser must file as an exempt reporting adviser.

The Relief Act will decrease the regulatory and compliance burdens affecting both exempt SBIC Advisers, who will no longer be subject to duplicative state and federal registration requirements, and other investment

advisers who will now qualify for exemptions from federal registration. If you have questions regarding the Relief Act or the SBIC program in general, please contact your SBIC counsel at Jenner & Block.

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