



California Corporate & Securities Law

“Most” Does Not Mean All

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Because the Dodd–Frank Act requires the adoption of so many new regulations, I like to say that the other shoe (or more likely a whole closet full of shoes) remains to be dropped. One large shoe that is yet to be dropped is how the Securities and Exchange Commission will define “venture capital fund” for purposes of the exemption from the Investment Advisers Act mandated by the Dodd–Frank Act. The comment period on the SEC’s [proposed definition](#) of “venture capital fund” ended yesterday.

As I mentioned in yesterday’s post, the California Commissioner of Corporations, Preston DuFauchard, has submitted a comment letter expressing concerns about the narrowness of the SEC’s proposed definition. In my own [comment letter](#), I take the SEC to task for its use of pseudo legislative history. For example, the SEC misleadingly invoked legislative history by:

- Citing as legislative history two treatises without any evidence that Congress considered or relied upon those books;
- Referring repeatedly to the committee testimony of two private citizens without providing any evidence that Congress relied on this testimony in enacting the Dodd–Frank Act (the testimony was, in fact, given before Representative Frank introduced the bill that was enacted as the Dodd–Frank Act).
- Characterizing testimony about what *most* venture capital companies do as testimony about what *all* venture capital companies.

For at least three decades, California has led the country in venture capital funding. The availability of venture capital funding is absolutely critical to job creation. California, moreover, has had a rule defining “venture capital company” since 2002, 10 CCR § 260.204.9. During this period of time, there has been no evidence of abuse. Rather than relying on questionable legislative history, the SEC should look to California’s experience. To paraphrase the English jurist John Selden, “Old shoes are the easiest for the feet”.^[1]

Whatever Congress’ intent may have been in enacting Section 407 of the Dodd–Frank Act, I’m certain that it was not to stifle business growth and job creation through the imposition of limitations not expressed by Congress.

Please contact [Keith Paul Bishop](#) at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>

[1] “Old Friends are best. King James used to call for his old shoes; they were easiest for his feet.” John Selden, *Table Talk* (1689).

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