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SEC Adopts Final Rules Regarding Investment Advisers Act Registration and Exemptions

On June 22, 2011, the Securities and Exchange Commission (the "SEC") adopted final rules (the "Final Rules") to implement certain provisions of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in connection with the registration of investment advisers under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). The Final Rules address the definition of venture capital fund and private fund advisers with less than $150 million in assets under management for purposes of the exemptions under Dodd-Frank. Set forth below are the highlights of the Final Rules.

Extension of Registration Deadline

The Final Rules provide an extension of the registration deadline for private fund advisers that are required to register as a result of the enactment of Dodd-Frank until March 30, 2012. The extension applies to private fund advisers that were exempt from registration with the SEC under the "private adviser" exemption under Section 203(b) of the Advisers Act, which, until repealed by Dodd-Frank, provided an exemption to advisers who had fewer than fifteen clients and who did not hold themselves out to the public as investment advisers.

Advisers to Venture Capital Funds

Dodd-Frank amended the Advisers Act to exempt from registration those managers advising only venture capital funds and directed the SEC to define the term "venture capital fund." Under the Final Rules, a "venture capital fund" is a private fund (one that is exempt from registration under the Investment Company Act of 1940 by virtue of Section 3(c)(1) or 3(c)(7) of such Act) that:

- invests at least 80% of its committed capital in "qualifying investments" (generally, equity securities of unleveraged operating companies);
- does not borrow or incur leverage in excess of 15% of its committed capital, and such borrowing, guarantee or indebtedness is for a term of not more than 120 days;
- does not permit withdrawal, redemption or similar liquidity rights with respect to investor interests, except in certain extraordinary circumstances;
- represents to investors and prospective investors that it employs a venture capital strategy; and
- is not registered under the Investment Company Act and has not elected to be treated as a business development company.

The SEC also approved a "grandfathering" exemption for any fund that represented itself as being a venture capital fund, completed an initial closing with investors prior to December 31, 2010 and will complete its final closing by July 21, 2011.

Qualifying Private Fund Advisers

Section 203(m) of the Advisers Act, as amended by Dodd-Frank, requires the SEC to exempt from registration those investment advisers acting solely as advisers to private funds that have assets under management of less than $150 million, as determined on an annual basis. The amount of assets under management is based upon the market value of such assets, or their fair value if market value is not available. Assets under management

also include uncalled capital commitments and are calculated on a gross basis, without deduction for liabilities such as accrued fees and expenses or the amount of any borrowing.

Reporting Requirements for Exempt Reporting Advisers

The Final Rules require exempt reporting advisers (advisers that rely on the exemptions for venture capital funds and qualifying private funds with assets under management of less than $150 million) to file a Form ADV with the SEC within 60 days of their reliance upon the exemption from registration. Thereafter, the exempt reporting adviser must file annually a report on Form ADV Part 1A, together with corresponding Schedules A, B, C and D, providing certain specified information. In addition, exempt reporting advisers will be subject to recordkeeping rules to be adopted in the future. Exempt reporting advisers must file their initial reports on Form ADV between January 1, 2012 and March 30, 2012.

State Registration Requirements

Advisers not subject to registration with the SEC will be subject to applicable state investment adviser registration requirements.

Exempt Foreign Private Advisers

Section 203(b)(3) of the Advisers Act provides an exemption from registration for certain foreign private advisers. A foreign private adviser will not be required to register 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 advised by the adviser; (iii) has less than $25 million in aggregate assets under management attributable to clients and investors in the U.S.; and (iv) does not hold itself out generally to the public in the U.S. as an investment adviser.

If you have any questions regarding the amendments, please contact Scott McGinness at smcginness@millermartin.com, Lance Bridgesmith at lpbridgesmith@millermartin.com, Tyler Hand at thand@millermartin.com or any other member of Miller & Martin's Investment Management Practice Group.

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