



# Summary of the SBIC Advisers Relief Act and Implications for SBIC Managers

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# Dodd-Frank Changes to Advisers Act Exemptions from Registration

- Effective in 2011, the Dodd-Frank Wall Street Reform and Consumer Protection Act eliminated the most commonly relied upon exemption from registration under the Investment Advisers Act of 1940 (“Advisers Act”), formerly set forth in Section 203(b)(3) of the Advisers Act, for advisers with fewer than 15 clients. In its place, the Dodd-Frank Act implemented several new exemptions from registration, including the following (being the three most relevant exemptions to advisers managing SBICs and other private funds):
  - SBIC Adviser Exemption (Section 203(b)(7) of the Adviser Act)
  - Private Fund Adviser Exemption (Section 203(m) of the Advisers Act, SEC Rule 203(m)-1)
  - Venture Capital Fund Adviser Exemption (Section 203(l) of the Advisers Act, SEC Rule 203(l)-1)
- In addition, the Dodd-Frank Act instituted a minimum AUM of \$100 million to qualify for federal registration (with certain minor exceptions). As a result smaller managers with no available exemptions were forced to register with state securities regulators.



# SBIC Advisers Exemption (prior to SBIC Advisers Relief Act)

- Exemption from registration for advisers whose sole clients are SBICs, including funds that are in the process of applying for an SBIC license pursuant to an active “green light letter” and funds that are subject to pending applications which are affiliated with an existing SBIC. Does not include an adviser to a BDC.
- Exemption is self-executing – no filing required to be made in order to rely on the exemption.
- Did not preempt state regulation of SBIC advisers, requiring the need for a separate exemption at the state level or federal or state registration.



# Private Fund Advisers Exemption (prior to SBIC Advisers Relief Act)

- For U.S. investment advisers whose only clients are private funds (or a non-U.S. investment advisers whose only U.S. clients are private funds) and whose regulatory assets under management that are managed from a U.S. place of business are less than \$150 million. “Private funds” are defined as investment pools relying on exemptions set forth in Sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940.
- Not a self-executing exemption – requires the adviser to file reports with the SEC (within 60 days of relying on the exemption and annually thereafter) as an “exempt reporting adviser” in order to claim the exemption.
- Does not preempt state regulation, although some (but not all) states have adopted a similar exemption for advisers to private funds. Some state exemptions place additional substantive requirements not present in the federal exemption, depending on the type of private fund (qualified client requirement, audit and disclosure requirements, e.g.). Necessary to examine the laws of each state in which the adviser has a place of business for an available exemption.

## Venture Capital Fund Advisers Exemptions (prior to SBIC Advisers Relief Act)

- For advisers whose only clients are venture capital funds. “Venture capital fund” is defined a series of qualifying criteria the fund must meet: holding itself out as pursuing a venture capital strategy, limits on permitted borrowing, limits on non-qualifying investments – qualifying investments are generally equity securities of private operating companies; generally no redemption rights for investors.
- Not a self-executing exemption – requires the adviser to file reports with the SEC (within 60 days of relying on the exemption and annually thereafter) as an “exempt reporting adviser” in order to claim the exemption.
- Does not preempt state regulation, although some (but not all) states have adopted a similar exemption for advisers to venture capital funds. Necessary to examine the laws of each state in which the adviser has a place of business for an available exemption.

# Common Problems with Exemptions prior to the SBIC Advisers Relief Act

- No ability to combine exemptions
- Multiple layers of oversight for SBICs resulting from lack of state preemption
- Use of SBA leverage renders many smaller SBIC managers unable to meet the private fund adviser threshold



# Amendments to the Investment Advisers Act Introduced by the SBIC Advisers Relief Act

## ■ SBIC Adviser Exemption

- Expanded to preempt state regulation of advisers relying on this exemption. Allows advisers that only manage SBICs to have SBA as their primary regulator, without reporting to or examination by state securities authorities.

## ■ Venture Capital Fund Exemption

- Expands the definition of “Venture Capital Fund” to include SBICs. Allows advisers that manage both SBICs and VC funds to rely on this exemption at the federal level.



## ■ Private Fund Adviser Exemption

- Excludes SBIC assets from the \$150 million threshold. As a result, an adviser may rely on this at the federal level if it is managing only (i) SBICs (not including BDCs), and (ii) non-SBIC private funds having less than \$150 million in RAUM.

# Are Advisers Fully Exempt Under the Expanded Provisions?

- For advisers who solely, manage SBICs (other than BDCs), the answer is Yes. For others, No. If relying on the Venture Capital Fund Adviser Exemption or the Private Fund Adviser Exemption, the adviser will need to report as an exempt reporting adviser.
- Neither the Venture Capital Fund Adviser Exemption nor the Private Fund Adviser Exemption will preempt state regulation of the adviser. Advisers relying on these exemptions will need to determine if a state level equivalent (or another state level exemption) is available or face registration with state securities authorities. For states that have adopted a state level equivalent, it will be necessary to review the specific language of the state exemption to determine whether it will incorporate the amendments to the federal exemption by means of applicable cross-reference or seek guidance from state level regulators.



- If an adviser is eligible for either the private fund or venture capital fund advisers exemption, but not a state level exemption, then registration as an investment adviser will be necessary. In such instance, it will be necessary to determine if registration should be made at the federal or state level. As state registration does not preempt registration requirements of other states, and state regimes often include examination requirements (Series 65), many advisers to SBICs and other private funds may prefer federal registration.
- Qualification for a federal exemption will not prevent an adviser from federal registration, provided that the minimum AUM threshold has been met.
- While SBIC assets are excluded from the calculation of private fund assets under management for purposes of determining whether the adviser is eligible for the private fund adviser exemption, they are included for purposes of determining whether the adviser satisfies the \$100 million threshold for eligibility for federal registration.

Thank You!

