SBIC Advisers Relief Act Expected to be Adopted into Law

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Today, December 4, 2015, President Obama is expected to sign into law The SBIC Advisers Relief Act, which amends several key registration provisions and exemptions of the Investment Advisers Act of 1940 (the "Advisers Act"), that are applicable to advisers of small business investment companies ("SBICs"). Foley Hoag was pleased to work with the Small Business Investor Alliance and provide advice and assistance in their efforts to guide these amendments through the legislative process. A summary of the amendments is set forth below.

Preemption of State Registration of SBIC Advisers

As originally adopted, the Advisers Act exemption for advisers whose only clients were SBICs (set forth in Section 203(b)(7) of the Advisers Act) was a federal exemption only, leaving SBIC advisers subject to state regulation. In many instances, this required the adviser to register with state securities regulators, or to qualify for a state level exemption from registration, which itself often included additional substantive requirements as well as reporting to state regulators. The SBIC Advisers Relief Act amends Section 203A of the Advisers Act, to include a provision that state laws requiring registration as an investment adviser will not apply to an adviser relying on the Section 203(b)(7) exemption from registration under the Advisers Act. As a result, advisers whose only clients are SBICs (not including business development companies) will not be required to register at either the federal or state level.

Expansion of Venture Capital Fund Adviser Exemption to Include SBICs

Previously, advisers who solely managed venture capital funds were able to rely on an exemption from registration under Section 203(l) the Advisers Act, similar to the exemption for advisers who solely managed SBICs set forth in Section 203(b)(7). However, if an adviser managed one or more venture capital funds and one or more SBICs, no exemption from registration was available. The SBIC Advisers Relief Act provides relief to such advisers, by providing that SBICs will be considered to qualify as a "venture capital fund" for purposes of the VC fund adviser exemption, thereby allowing these advisers to rely on that exemption. It should be noted that the VC fund exemption will require the adviser to report as an "exempt reporting adviser" in order to claim the exemption. Further it should be noted that this remains applicable only to the federal exemption and does not preempt state regulation of advisers qualifying for this exemption.

Expansion of Private Fund Adviser Exemption

The SBIC Advisers Relief Act will also provide relief for certain investment advisers that advise an SBIC Fund and other Private Funds, and who may not take advantage of the expansion to the venture capital fund adviser exemption discussed above, by expanding the availability of the so-called "private fund adviser exemption" set forth in Section 203(m) of the Advisers Act, which is available to advisers whose clients are solely private funds and whose regulatory assets under management ("RAUM") in the United States were less than $150 million. This $150 million calculation included the gross asset value of all assets, plus uncalled LP commitments, of any private fund managed by the adviser, including with respect to SBICs the full value of assets purchased with SBA leverage with no deduction for the leverage obligation.

Given the typical size and 2:1 leverage ratio of SBICs, very few advisers managing SBICs and other private funds fell under this threshold. The SBIC Advisers Relief Act expands the exemption by excluding assets of SBICs managed by the adviser from the calculation of RAUM for purposes of the $150 million threshold. As a result, an adviser whose non-SBIC private funds have gross assets (including unfunded commitments) of less than $150 million may qualify for the exemption, regardless of the AUM of the adviser's SBIC funds. This may be of

particular use for any adviser that previously relied on the SBIC adviser exemption set forth in Section 203(b)(7) of the Advisers Act, who for administrative convenience later elected to relinquish the license of an SBIC under its management during the wind-down phase of such fund. As with the venture capital adviser exemption, the private fund adviser exemption does require reporting as an exempt reporting adviser in order to claim the exemption, and is an exemption only for federal registration (does not preempt state regulation).

Advisers managing SBICs and other private funds, particularly those currently registered and/or reporting to federal and/or state securities authorities, should review and understand these amendments in order to determine the availability of exemptive relief.

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