



STATE OF SOUTH CAROLINA

OFFICE OF THE ATTORNEY GENERAL

SECURITIES DIVISION

ORDER NUMBER 19003

EXEMPTION FOR INVESTMENT ADVISERS TO PRIVATE FUNDS

Pursuant to the South Carolina Uniform Securities Act of 2005, South Carolina Code Section 35-1-101 *et seq.* (the “Act”), which grants the Securities Commissioner the authority to issue orders necessary or appropriate to carry out provisions of the Act, the Securities Commissioner hereby issues the following order pertaining to exemptions from registration for investment advisers to private funds:

A. Definitions. For purposes of this order, the following definitions shall apply:

(1) “3(c)(1) fund” means a qualifying private fund that is eligible for the exclusion from the definition of an investment company under Section 3(c)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(c)(1)).

(2) “Private fund adviser” means an investment adviser who provides advice solely to one or more qualifying private funds.

(3) “Qualifying private fund” means a private fund that meets the definition of a qualifying private fund in SEC Rule 203(m)-1 (17 C.F.R. 275.203(m)-1).

(4) “Venture capital fund” means a private fund that meets the definition of a venture capital fund in SEC Rule 203(l)-1 (17 C.F.R. 275.203(l)-1).

B. Exemption for Private Fund Advisers. Subject to the additional requirements of subsection C below, a private fund adviser shall be exempt from the registration requirements of Section 35-1-403 of the Act if the private fund adviser satisfies each of the following conditions:

(1) Neither the private fund adviser nor any of its advisory affiliates are subject to an event that would disqualify an issuer under Rule 506(d)(1) of SEC Regulation D (17 C.F.R. 230.506(d)(1));

(2) The private fund adviser files with the state each report and amendment thereto that an exempt reporting adviser is required to file with the Securities and Exchange Commission pursuant to SEC Rule 204-4 (17 C.F.R. 275.204-4); and

(3) The private fund adviser pays the fees specified in Section 35-1-702 of the Act for Investment Advisers.

C. Additional Requirements for Private Fund Advisers to Certain 3(c)(1) Funds. In order to qualify for the exemptions described in subsection B of this order, a private fund adviser who advises at least one 3(c)(1) fund that is not a venture capital fund shall, in addition to satisfying each of the conditions specified in subsections B(1) through B(3), comply with the following requirements:

(1) The private fund adviser shall advise only those 3(c)(1) funds (other than venture capital funds) whose outstanding securities (other than short-term paper) are beneficially owned entirely by persons who, at the time that the securities are purchased from the issuer, would each either meet the definition of (i) an accredited investor in SEC Rule 501(a) (17 C.F.R. 230.501(a)), or (ii) a qualified client as defined in SEC Rule 205-3(d) (17 C.F.R. 275.205-3(d)) under the Investment Advisers Act of 1940 (or by persons that have subsequently acquired such securities by gift or bequest, or pursuant to an agreement related to a legal separation or divorce);

(2) At the time of purchase, or upon a transition in compliance with section H(1) below, the private fund adviser shall disclose the following in writing to each beneficial owner of a 3(c)(1) fund that is not a venture capital fund:

- (a) All services, if any, to be provided to individual beneficial owners;
- (b) All duties, if any, the private fund adviser owes to the beneficial owners; and
- (c) Any other material information affecting the rights or responsibilities of the beneficial owners;

(3) (a) The private fund adviser shall obtain on an annual basis audited financial statements of each 3(c)(1) fund that is not a venture capital fund, and shall deliver a copy of such audited financial statements to each beneficial owner of the fund within 120 days of the end of the fiscal year (or 150 days for a fund of funds);

(b) If a 3(c)(1) fund that is not a venture capital fund begins operations more than 180 days into a fiscal year, the private fund adviser need not comply with subsection (3)(a) above for that initial fiscal year, provided that the financial audit for the fiscal year immediately succeeding this period is supplemented by, or includes, a financial audit of the initial fiscal year; and

(4) A private fund adviser may not enter into, perform, renew, or extend an investment advisory contract that provides for compensation to the private fund adviser on the basis of a share of (i) the capital gains upon (ii) or the capital appreciation of, the funds, or any portion of the funds, of an investor who is not a qualified client unless the private fund adviser discloses in writing to the client all material information concerning the proposed fee arrangement, including the following:

- (a) The fee arrangement may create an incentive for the private fund adviser to make investments that are riskier or more speculative than would be the case in the absence of a performance fee;
- (b) Where relevant, that the private fund adviser may receive increased compensation with regard to unrealized appreciation as well as realized gains in the client's account;

- (c) The periods that will be used to measure investment performance throughout the contract and their significance in the computation of the fee;
- (d) The nature of any index that will be used as a comparative measure of investment performance, the significance of the index, and the reason the private fund adviser believes that the index is appropriate; and
- (e) Where the private fund adviser's compensation is based in part on the unrealized appreciation of securities for which market quotations are not readily available within the meaning of Rule 2a-4(a)(1) under the Investment Company Act of 1940, how the securities will be valued and the extent to which the valuation will be independently determined.

D. Private fund advisers that manage funds aggregating less than \$25 million shall be exempt from the provisions of subsections B(2), B(3), and C(3) of this order.

E. Federal Covered Investment Advisers. If a private fund adviser is registered with the Securities and Exchange Commission, the adviser shall not be eligible for this exemption and shall comply with the state notice filing requirements applicable to federal covered investment advisers in Section 35-1-405 of the Act.

F. Investment Adviser Representatives. A person is exempt from the registration requirements of Section 35-1-404 of the Act if he or she is employed by or associated with an investment adviser that is exempt from registration in this state pursuant to this order and does not otherwise act as an investment adviser representative.

G. Electronic Filing. The report filings described in subsection B(2) above shall be made electronically through the Investment Adviser Registration Depository (the "IARD"). A report shall be deemed filed when the report and the fee required by Section 35-1-702 of the Act are filed and accepted by the IARD on the state's behalf.

H. Transition.

(1) A private fund adviser who is registered as an investment adviser with the state at the time this order is issued and who wishes to rely on the exemption provided by this order must comply with the provisions herein within 60 days of relying on the exemption provided by this order.

(2) An investment adviser who becomes ineligible for the exemption provided by this order must comply with all applicable laws and rules requiring registration or notice filing within ninety (90) days from the date the investment adviser's eligibility for this exemption ceases; provided that South Carolina Code of Regulations 13-502(A)(18) shall not apply to any investment adviser exempt from registration by this order or to the performance of any advisory contract entered into by such investment adviser at a time when such investment adviser was exempt from registration by this order.

I. Waiver Authority with Respect to Statutory Disqualification. Subsection B(1) of this order shall not apply upon a showing of good cause and without prejudice to any other action of the Securities Commissioner, if the Securities Commissioner determines that it is not necessary under the circumstances that an exemption be denied.

J. Cross References. Where in this order reference is made to specific state and federal laws, it shall be understood that such references are intended to include such laws as they now exist or may hereafter be amended so as to carry out the intent of this order, unless the contrary is provided herein.

K. Nothing in this exemption is intended to relieve or should be construed as in any way relieving an investment adviser from the anti-fraud provisions of the Act.

IT IS SO ORDERED.

9/6/19

Date



Alan Wilson

Securities Commissioner