

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION  
AT RICHMOND, JULY 25, 2011

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COMMONWEALTH OF VIRGINIA, *ex rel.*

STATE CORPORATION COMMISSION

CASE NO. SEC-2011-00034

*Ex Parte:* In the matter of  
Adopting a Revision to the Rules  
Governing the Virginia Securities Act

ORDER TO TAKE NOTICE

Section 12.1-13 of the Code of Virginia provides that the State Corporation Commission ("Commission") shall have the power to promulgate rules and regulations in the enforcement and administration of all laws within its jurisdiction. Section 13.1-523 of the Virginia Securities Act ("Act"), § 13.1-501 *et seq.* of the Code of Virginia, provides that the Commission may issue any rules and regulations necessary or appropriate for the administration and enforcement of the Act.

The rules and regulations issued by the Commission pursuant to the Act are set forth in Title 21 of the Virginia Administrative Code. A copy also may be found at the Commission's website: <http://www.scc.virginia.gov/case>.

On July 19, 2011, the Division of Securities and Retail Franchising ("Division") issued a policy statement which recognized changes in federal laws and regulations governing investment advisors adopted under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The policy statement is attached hereto. As part of the policy statement, the Division stated that it was responding to the regulatory gaps created by the Dodd-Frank Act as recognized and addressed by other member states of the North American Securities Administrators Association. Specifically, the Division noted that changes occasioned by the Dodd-Frank Act had left certain investor advisors uncertain regarding when they must register to

comply with state securities laws, including under the Act. The Division's policy statement addresses these issues concerning the registration of investment advisors and their investment advisor representatives managing private equity and venture capital funds operating within the Commonwealth of Virginia.

Accordingly, the Division has submitted to the Commission proposed revisions to Chapters 10 and 80 of Title 21 of the Virginia Administrative Code entitled "Rules and Forms Governing Virginia Securities Act" ("Rules").

Rule 21 VAC 5-80-215 is created granting certain investment advisors and investment advisor representatives an exemption from the registration provisions of the Act provided the investment advisor was exempt from registration pursuant to § 203(b)(3) of the Investment Advisors Act of 1940 ("40 Act") prior to July 21, 2011, and the investment advisor is subject to the Securities and Exchange Commission's ("SEC") Rule 203-1(e) granting an extension to those investment advisors formerly exempt from registration under § 203(b)(3) of the 40 Act until March 30, 2012, who would otherwise have been required to register with the SEC by July 21, 2011.

Rule 21 VAC 5-80-210 A. 7 is repealed in its entirety.

Rule 21 VAC 5-10-40 is amended to replace the word "chapter" with "title."

The Division has recommended to the Commission that the proposed revisions should be considered for adoption with a proposed effective date of September 2, 2011. The Division also has recommended to the Commission that a hearing should be held only if requested by those interested parties who specifically indicate that a hearing is necessary and the reasons therefor.

A copy of the proposed revisions may be requested by interested parties from the Division by telephone, by mail or e-mail request and also can be found at the Division's website:

<http://www.scc.virginia.gov/srf>. Any comments to the proposed rules must be received by August 29, 2011.

Accordingly, IT IS ORDERED THAT:

- (1) The proposed revisions are appended hereto and made a part of the record herein.
- (2) Comments or requests for hearing on the proposed revisions must be submitted in writing to Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218, on or before August 29, 2011. Any request for hearing shall state why a hearing is necessary and why the issues cannot be adequately addressed in written comments. All correspondence shall contain a reference to Case No. SEC-2011-00034. Interested persons desiring to submit comments electronically may do so by following the instructions available at the Commission's website:

<http://www.scc.virginia.gov/case>.

- (3) The proposed revisions shall be posted on the Commission's website at <http://www.scc.virginia.gov/case> and on the Division's website at <http://www.scc.virginia.gov/srf>. Interested persons may also request a copy of the proposed revisions from the Division by telephone, mail or e-mail.

- (4) This Order, together with a copy of the proposed revisions, shall be sent to the Registrar of Regulations for publication in the Virginia Register.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to the Division's Director, who shall forthwith provide notice of this Order via US mail and email to any interested persons as he may designate.

# COMMONWEALTH OF VIRGINIA

Ronald W. Thomas  
Director

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Deputy Director



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## STATE CORPORATION COMMISSION DIVISION OF SECURITIES AND RETAIL FRANCHISING

### STATEMENT OF POLICY REGARDING REGULATION OF CERTAIN INVESTMENT ADVISORS MANAGING PRIVATE EQUITY AND VENTURE CAPITAL FUNDS ("PRIVATE ADVISORS")

The Director of the Division of Securities and Retail Franchising ("Division") of the Virginia State Corporation Commission ("Commission"), in recognition of changes in federal laws and regulations governing investment advisors adopted under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")<sup>1</sup>, and in response to the resulting regulatory gaps as recognized and addressed by other member states of the North American Securities Administrators Association ("NASAA"), has determined that it is appropriate and in the public interest to issue a Statement of Policy addressing the registration of investment advisors and their investment advisor representatives managing private equity and venture capital funds operating within the Commonwealth of Virginia.

#### *Background*

The Dodd-Frank Act made significant changes to the regulation of investment advisors and their funds. In addition to placing formally federal covered investment advisors under state regulation and registration requirements, the Dodd-Frank Act repealed federal registration exemptions for certain investment advisors managing private equity and venture capital funds ("private advisors"). Specifically, the Dodd-Frank Act repealed Section 203(b)(3) of the Investment Advisers Act of 1940 ("40 Act"), which had granted an exemption from registration to those investment advisors having fewer than fifteen (15) clients and whom did not hold themselves out to the general public as investment advisors.

The Dodd-Frank Act also instructed the U.S. Securities and Exchange Commission ("SEC") to promulgate rules to implement the new legislation. On June 22, 2011, the SEC issued final rules implementing the Dodd-Frank Act's required changes. Among these final rules, the SEC promulgated Rule 203-1(e), which grants an extension to private advisors formerly exempt from registration under Section 203(b)(3) of the 40 Act until March 30, 2012 ("extension period"). Without Rule 203-1(e), these private advisors would have been required to register with the SEC by July 21, 2011.

The delay of the implementation of the new federal regulatory requirements left a gap in regulatory authority over these private advisors under state law, which would require these firms to register. A number of investment advisory firms operating in Virginia have requested that the Division address the regulatory gap. Furthermore, several NASAA member states have taken regulatory action either through the implementation of new regulations or the issuance of no-action letters in response to the regulatory gap. Accordingly, the Division has chosen to similarly respond.

<sup>1</sup> Public Law No. 111-203

Rule 21 VAC 5-80-210 of the Commission's Rules and Regulations governing investment advisors expressly excludes private advisors who are exempt under Section 203(b)(3) of the 40 Act from the definition of "investment advisor" under the Virginia Securities Act ("Act"), § 13.1-501 *et seq.*, Code of Virginia. As a result, private advisors have been exempt from state registration under the Act. Following repeal of Section 203(b)(3) under the Dodd-Frank Act, however, such exemption from state registration in Virginia under Rule 21 VAC 5-80-210 will no longer be available to private advisors after July 21, 2011.

Consequently, private advisors relying on SEC Rule 203-1(e) for exemption from federal registration during the extension period would nevertheless be subject to state registration under the Act if they engaged in investment advisory business within the Commonwealth. To ensure business continuity for such private advisors and to facilitate the transition from exempt status to registrant status during the extension period provided under SEC Rule 203-1(e), the Division will seek to have the Commission, following a period of publication and comment, issue regulations intended to take effect on or about September of 2011, to address this issue.

In the interim, until such rules are promulgated by the Commission, the Director of the Division is issuing the following policy regarding the Division's position on enforcement of the Act against private advisors who choose not to register in the Commonwealth by July 21, 2011.

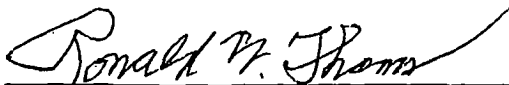
*Policy*

Until such time as the Commission promulgates a rule to address the regulatory gap, the Division will not institute enforcement action against any investment advisor or its investment advisor representative for failing to register whose only client is one (or more) of the following:

a corporation, general partnership, limited partnership, limited liability company, trust or other legal organization that:

- (i) has assets of not less than \$5,000,000 and;
- (ii) receives investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members or beneficiaries, provided the investment advisor was exempt from registration pursuant to Section 203(b)(3) of the Investment Advisors Act of 1940 prior to July 21, 2011, and the investment advisor is subject to SEC Rule 203-1(e) granting an extension to investment advisors formerly exempt from registration under Section 203 (b)(3) of the Investment Advisers Act of 1940 until March 30, 2012, whom would have been required to register with the SEC by July 21, 2011.

Dated at Richmond, Virginia, this 19th day of July, 2011.



RONALD W. THOMAS, DIRECTOR  
DIVISION OF SECURITIES AND RETAIL FRANCHISING  
STATE CORPORATION COMMISSISON

STATE CORPORATION COMMISSION, DIVISION OF SECURITIES AND RETAIL  
FRANCHISING

Private advisor exception

**21VAC5-10-40. Definitions.**

As used in this ~~chapter~~ title, the following regulations and forms pertaining to securities, instructions and orders of the commission, the following meanings shall apply:

"Act" means the Securities Act contained in Chapter 5 (§ 13.1-501 et seq.) of Title 13.1 of the Code of Virginia.

"Applicant" means a person on whose behalf an application for registration or a registration statement is filed.

"Application" means all information required by the forms prescribed by the commission as well as any additional information required by the commission and any required fees.

"Bank Holding Company Act of 1956" (12 USC § 1841 et seq.) means the federal statute of that name as now or hereafter amended.

"Boiler room tactics" mean operations or high pressure tactics utilized in connection with the promotion of speculative offerings by means of an intensive telephone campaign or unsolicited calls to persons not known by or having an account with the salesman or broker-dealer represented by him, whereby the prospective purchaser is encouraged to make a hasty decision to invest, irrespective of his investment needs and objectives.

"Breakpoint" means the dollar level of investment necessary to qualify a purchaser for a discounted sales charge on a quantity purchase of open-end management company shares.

"Commission" means State Corporation Commission.

"Federal covered advisor" means any person who is registered or required to be registered under § 203 of the Investment Advisers Act of 1940 as an "investment adviser."

"Investment Advisers Act of 1940" (15 USC § 80b-1 et seq.) means the federal statute of that name as now or hereafter amended.

Notwithstanding the definition in § 13.1-501 of the Act, "investment advisor representative" as applied to a federal covered advisor only includes an individual who has a "place of business" (as that term is defined in rules or regulations promulgated by the SEC) in this Commonwealth and who either:

1. Is an "investment advisor representative" as that term is defined in rules or regulations promulgated by the SEC; or
2. a. Is not a "supervised person" as that term is defined in the Investment Advisers Act of 1940; and
  - b. Solicits, offers or negotiates for the sale of or sells investment advisory services on behalf of a federal covered advisor.

"Investment Company Act of 1940" (15 USC § 80a-1 et seq.) means the federal statute of that name as now or hereafter amended.

"NASAA" means the North American Securities Administrators Association, Inc.

"NASD" means the National Association of Securities Dealers, Inc., or its successor, the Financial Industry Regulatory Authority, Inc. (FINRA).

"Notice" or "notice filing" means, with respect to a federal covered advisor or federal covered security, all information required by the regulations and forms prescribed by the commission and any required fee.

"Registrant" means an applicant for whom a registration or registration statement has been granted or declared effective by the commission.

"SEC" means the United States Securities and Exchange Commission.

"Securities Act of 1933" (15 USC § 77a et seq.) means the federal statute of that name as now or hereafter amended.

"Securities Exchange Act of 1934" (15 USC § 78a et seq.) means the federal statute of that name as now or hereafter amended.

"Solicitation" means an offer to one or more persons by any of the following means or as a result of contact initiated through any of these means:

1. Television, radio, or any broadcast medium;
2. Newspaper, magazine, periodical, or any other publication of general circulation;
3. Poster, billboard, Internet posting, or other communication posted for the general public;
4. Brochure, flier, handbill, or similar communication, unless the offeror has a substantial preexisting business relationship or close family or personal relationship with each of the offerees;
5. Seminar or group meeting, unless the offeror has a substantial preexisting business relationship or close family or personal relationship with each of the offerees; or
6. Telephone, facsimile, mail, delivery service, or electronic communication, unless the offeror has a substantial preexisting business relationship or close family or personal relationship with each of the offerees.



Part IV  
Exclusions

**21VAC5-80-210. Exclusions from definition of "investment advisor" and "federal covered advisor."**

A. The terms "investment advisor" and "federal covered advisor" do not include any person engaged in the investment advisory business whose only client is one (or more) of the following:

1. An investment company as defined in the Investment Company Act of 1940.
2. An insurance company licensed to transact insurance business in this Commonwealth.
3. A bank, a bank holding company as defined in the Bank Holding Company Act of 1956, a trust subsidiary organized under Article 3.1 (§ 6.1-32.1 et seq.) of Chapter 2 of Title 6.1 of the Code of Virginia, a savings institution, a credit union, or a trust company if the entity is either (i) authorized or licensed to transact such business in this Commonwealth or (ii) organized under the laws of the United States.
4. A broker-dealer so registered under the Act and under the Securities Exchange Act of 1934.
5. An employee benefit plan with assets of not less than \$5,000,000.
6. A governmental agency or instrumentality.
- ~~7. A corporation, general partnership, limited partnership, limited liability company, trust or other legal organization that (i) has assets of not less than \$5,000,000 and (ii) receives investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members or beneficiaries, provided the investment advisor or federal covered advisor is exempt from~~

~~registration pursuant to § 203(b)(3) of the Investment Advisors Act of 1940 or by any rule or regulation promulgated by the SEC under that section. If the entity's assets fall below \$5,000,000 for a period not to exceed 90 days, the investment advisor shall file an application to register with the division within 30 days.~~

B. Any investment advisor or federal covered advisor who (i) does not have a place of business located within this Commonwealth and (ii) during the preceding 12-month period has had fewer than six clients who are residents of this Commonwealth other than those listed in subsection A of this section is excluded from the registration and notice filing requirements of the Act.

C. The term "investment advisor" does not include any certified public accountant who holds a valid CPA certificate as defined by § 54.1-2000 of Title 54.1 of the Code of Virginia and who during the ordinary course of business:

1. Issues publications, writings, reports, or testimony in a court of law or in an arbitration as to the value of privately held securities in a transaction involving the purchase, sale or valuation of a business;
2. Issues publications, writings, reports or testimony in a court of law or in an arbitration as to the advisability of investing in, purchasing, or selling privately held securities in a transaction involving the purchase, sale or valuation of a business; or
3. Advises clients about the disposition or value of assets, of which ownership is evidenced by privately held securities and such assets are the subject of (i) bankruptcy, (ii) estate or gift tax planning or settlement, (iii) divorce, (iv) sale of a business, whether whole or in part, (v) employee stock option plan, or (vi) an insurance settlement.

**21VAC5-80-215. Exemption for certain private advisors.**

Registration under the Act shall not be required of any investment advisor or its investment advisor representative whose only client (or clients) is a corporation, general partnership, limited partnership, limited liability company, trust or other legal organization that:

1. Has assets of not less than \$5,000,000; and
2. Receives investment advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members or beneficiaries, provided the investment advisor was exempt from registration pursuant to § 203(b)(3) of the Investment Advisors Act of 1940 immediately prior to July 21, 2011 and the investment advisor is subject to SEC Rule 203-1(e) granting an extension to investment advisors formerly exempt from registration under Section 203(b)(3) of the Investment Advisors Act of 1940 until March 30, 2012, who would otherwise have been required to register with the SEC by July 21, 2011.