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INVESTMENT FUNDS ALERT

SEC ADOPTS ANTI-FRAUD RULE FOR PRIVATE FUNDS

On July 11, 2007, the Securities and Exchange Commission (SEC) voted to adopt a previously proposed anti-fraud rule under the Investment Advisers Act of 1940 (the Advisers Act) that will apply to advisers to private investment funds, including hedge funds, private equity funds and venture capital funds, as well as advisers to mutual funds. This rule was one of the proposals set forth in December 2006 as part of the SEC's response to the decision in *SEC v. Goldstein*[1], which vacated the SEC's rule requiring certain hedge fund advisers to register with the SEC. The SEC adopted the rule to clarify its general anti-fraud enforcement powers under the Advisers Act.

New Rule 206(4)-8 under the Advisers Act will prohibit an adviser to a "pooled investment vehicle" from making any untrue statement of a material fact or omitting a material fact or otherwise engaging in any act, practice or course of business that is fraudulent, deceptive or manipulative. Under the rule, a "pooled investment vehicle" will include any registered investment company and any company that would be an investment company but for the exclusions set forth in Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940. Thus, the rule will apply to most hedge funds, private equity funds and even registered mutual funds.

The new rule applies to any adviser to a "pooled investment vehicle," including registered advisers, advisers that are not required to be registered with the SEC and advisers registered only with state regulatory authorities.

Unlike other similar anti-fraud rules, such as Rule 10b-5 of the Securities Exchange Act of 1934, as amended, the new rule is not limited to fraudulent activity that occurs during the offer, sale or redemption of a security and does not require the adviser to have acted with *scienter*. This means that statements made to prospective investors as well as actual investors in a fund will be subject to an anti-fraud claim, regardless of whether the adviser had knowledge of their inaccuracy. It also means that statements made outside of the transaction of buying or selling interests in a fund will be covered, such as statements made in reports to investors and in marketing materials to prospective investors. The absence of a *scienter* requirement means that

[1] 451F.3d 873 (D.C. Cir. June 23, 2006).

the SEC is only required to demonstrate simple negligence to support an anti-fraud claim, rather than meeting the higher standard of proving that the violation was made with requisite knowledge of the impropriety of the statement or omission.

Although the scope of the new rule is broad, the SEC has indicated that Rule 206(4)-8 does not create a private right of action against fund advisers and does not create any new fiduciary duty to existing or prospective investors that is not already imposed by law.

Advisers may wish to take this opportunity to review existing offering documents, marketing materials, reports to investors, and policies and procedures related to the production and review of such materials in order to ensure that all information provided to prospective and existing investors is accurate and complete.

Rule 206(4)-8 will take effect 30 days after its publication in the *Federal Register*.

CONTACT INFORMATION

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