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Lawsuit Challenges Private Fund Adviser Rules

The Capital Commitment on **September 6, 2023**

On Friday, September 1, 2023, a lawsuit was filed with the federal Court of Appeals in the Fifth Circuit challenging the validity and enforceability of the recently adopted Private Fund Adviser Rules under the Investment Advisers Act of 1940 (the "Advisers Act"). (Please see our prior alerts for a description of the Rules' provisions and their applicability to non-U.S. investment advisers.) The lawsuit was filed in the form of a Petition for Review pursuant to Section 213(a) of the Advisers Act, which authorizes such a petition for persons "aggrieved" by the actions of the Securities and Exchange Commission (the "Commission" or the "SEC").

The Petition asserts that the new Rules "exceed the Commission's statutory authority, were adopted without compliance with notice-and-comment requirements, and are otherwise arbitrary, capricious, an abuse of discretion, and contrary to law, all in violation of the Administrative Procedure Act…and of the Commission's heightened obligation to consider its rules' effects on 'efficiency, competition, and capital formation'" in violation of requirements for SEC rulemaking under the Advisers Act.

The filing of such a lawsuit does not automatically pause the Rules' transition periods or otherwise delay their compliance dates. However, such a stay of the rules may be requested or granted, either by court order as part of the proceedings or as otherwise determined by the SEC.

The Petition was submitted jointly by six trade associations:

- National Association of Private Fund Managers
- Alternative Investment Management Association
- American Investment Council
- Loan Syndications and Trading Association
- Managed Funds Association
- National Venture Capital Association

Each organization’s statement on the lawsuit is available at the above links.

Petitions for Review challenging other federal rules have on other occasions been filed in the D.C. Circuit, but that is not the exclusive venue in which such Petitions may be filed. Here, the Petition asserts that the basis for jurisdiction and venue are proper “because the petition challenges ‘an order issued by the Commission under [the Investment Advisers Act]’ and one or more petitioners ‘reside[ ] or’ have their ‘principal office or place of business’ in this Circuit” – which presumably is a reference to the National Association of Private Fund Managers, whose location in Texas permits the lawsuit to be heard by a federal appeals court that in recent years has been more friendly to challenges of federal regulations than has the D.C. Circuit.

The filing of the Petition is just the first step. The trade associations and the SEC will file briefs laying out their arguments later this fall. We, along with the rest of the private fund community, will be watching as the court considers the arguments.

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