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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA-5454]

RIN 3235-AM68

Exemptions From Investment Adviser Registration for Advisers to Certain Rural Business Investment Companies

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are amending the definition of the term “venture capital fund” and the private fund adviser exemption under the Investment Advisers Act of 1940 (the “Advisers Act”) to reflect in our rules exemptions from registration for investment advisers who advise rural business investment companies (“RBICs”). These exemptions were enacted as part of the RBIC Advisers Relief Act of 2018 (the “RBIC Advisers Relief Act”), which amended Advisers Act sections 203(l) and 203(m), among other provisions. Specifically, the RBIC Advisers Relief Act amended Advisers Act section 203(l), which exempts from investment adviser registration any adviser who solely advises venture capital funds, by stating that RBICs are venture capital funds for purposes of the exemption. Accordingly, we are amending the definition of the term “venture capital fund” to include RBICs. The RBIC Advisers Relief Act also amended Advisers Act section 203(m), which exempts from investment adviser registration any adviser who solely advises private funds and has assets under management in the United States of less than \$150 million, by excluding RBIC assets from counting towards the \$150 million threshold. Accordingly, we are amending the definition of the term “assets under management” in the private fund adviser exemption to exclude the assets of RBICs.

DATES: *Effective date:* [Insert date of publication in the *Federal Register*].

FOR FURTHER INFORMATION CONTACT: Alexis Palascak, Senior Counsel, or Jennifer Songer, Branch Chief, Investment Adviser Regulation Office at (202) 551-6787 or IARules@sec.gov; Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to 17 CFR 275.203(l)-1 [rule 203(l)-1] and 17 CFR 275.203(m)-1 [rule 203(m)-1] under the Investment Advisers Act of 1940 [15 U.S.C. 80b].¹

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¹ Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code [15 U.S.C. 80b], at which the Advisers Act is codified, and when we refer to Advisers Act rules, or any paragraph of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR part 275], in which these rules are published.

I. BACKGROUND

The RBIC Advisers Relief Act of 2018 (the “RBIC Advisers Relief Act”)² amended the Investment Advisers Act of 1940 (the “Advisers Act”) to provide one new and two expanded exemptions from registration for investment advisers who advise rural business investment companies (“RBICs”).³ The RBIC Advisers Relief Act added section 203(b)(8) to the Advisers Act (the “RBIC adviser exemption”). The RBIC adviser exemption exempts from registration any investment adviser who solely advises RBICs. An investment adviser who relies on the RBIC adviser exemption is not subject to reporting or recordkeeping provisions under the Advisers Act and is not subject to examination by our staff.⁴ The RBIC Advisers Relief Act also added section 203A(b)(1)(D) to the Advisers Act, which provides that no law of any state or political subdivision thereof requiring the registration, licensing, or qualification as an

² Pub. L. No. 115-417, 132 Stat. 5438 (Jan. 3, 2019).

³ An RBIC is (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (“Investment Company Act”)); (1) a rural business investment company (as defined in section 384A of the Consolidated Farm and Rural Development Act (the “CFRD”)); or (2) a company that has submitted to the Secretary of Agriculture an application in accordance with section 384D(b) of the CFRD that either (i) has received from the Secretary of Agriculture a letter of conditions, which has not been revoked; or (ii) is affiliated with one or more rural business investment companies (as defined in section 384A of the CFRD). *See* 15 U.S.C. 80a-53, 7 U.S.C. 2009cc, 7 U.S.C. 2009cc-3(b). This definition is consistent with the definition of RBIC used in sections 203(l) and 203(m) of the Advisers Act discussed below, and we have used this term for purposes of this release. We note that RBIC is also defined in Advisers Act section 203(b)(8) as (1) a rural business investment company (as defined in section 384A of the CFRD); or (2) a company that has submitted to the Secretary of Agriculture an application in accordance with section 384D(b) of the CFRD that either (i) has received from the Secretary of Agriculture a letter of conditions, which has not been revoked; or (ii) is affiliated with one or more rural business investment companies (as defined in section 384A of the CFRD).

⁴ Under Advisers Act section 204(a), the Commission has the authority to require an investment adviser to maintain records and provide reports, as well as the authority to examine such adviser’s records, unless the adviser is specifically exempted from the requirement to register pursuant to Advisers Act section 203(b), which includes Advisers Act section 203(b)(8) (the RBIC adviser exemption). 15 U.S.C. 80b-4(a), 15 U.S.C. 80b-3(b).

investment adviser or supervised person of an investment adviser shall apply to any person that is not registered under Advisers Act section 203 because that person is exempt from registration under the RBIC adviser exemption, or is a supervised person of such person.⁵

In addition, the RBIC Advisers Relief Act expanded the applicability of two additional exemptions from investment adviser registration for investment advisers to RBICs when the adviser cannot rely on the RBIC adviser exemption: the exemption for any adviser who solely advises one or more venture capital funds in Advisers Act section 203(l)⁶ (the “venture capital fund adviser exemption”), and (2) the exemption for any adviser who solely advises private funds and has assets under management in the United States of less than \$150 million in Advisers Act section 203(m)⁷ (the “private fund adviser exemption”). Specifically, the RBIC Advisers Relief Act amended the venture capital fund adviser exemption by stating that RBICs are venture capital funds for purposes of the exemption. It also amended the private fund adviser exemption by excluding RBIC assets from counting towards the \$150 million threshold. An investment adviser who relies on the venture capital fund adviser exemption or the private fund adviser exemption is considered an “exempt reporting adviser” and must maintain such records and submit such reports as the Commission determines to be necessary or appropriate in the public interest or for the protection of investors.⁸ Exempt reporting advisers are required to file

⁵ 15 U.S.C. 80b-3a(b)(1)(D). *See infra* footnote 11.

⁶ 15 U.S.C. 80b-3(l).

⁷ 15 U.S.C. 80b-3(m).

⁸ Investment advisers who are exempt from registration in reliance on Advisers Act section 203(l) (the venture capital fund adviser exemption) or Advisers Act section 203(m) (the private fund adviser

with the Commission certain information required by Form ADV⁹ but are not subject to many of the other substantive requirements to which registered investment advisers are subject.¹⁰

Additionally, an investment adviser who relies on the venture capital fund adviser exemption or the private fund adviser exemption must evaluate the need for state registration.¹¹

We are amending our rules to reflect the RBIC Advisers Relief Act amendments to the Advisers Act. Specifically, we are amending the definition of the term “venture capital fund” in

exemption) are not specifically exempted from the requirement to register pursuant to Advisers Act section 203(b), and the Commission has authority under Advisers Act section 204(a) to require those advisers to maintain records and provide reports, as well as the authority to examine such advisers’ records. In this release, we refer to advisers who rely on the venture capital fund adviser exemption and the private fund adviser exemption as “exempt reporting advisers.” The Advisers Act rule in 17 CFR 275.204-4 [rule 204-4] sets forth reporting requirements for exempt reporting advisers. *See* 17 CFR 275.204-4.

⁹ Exempt reporting advisers must complete a subset of items and schedules on Form ADV. However, exempt reporting advisers who are also registering with a state authority must complete all of Form ADV. *See* Form ADV, General Instruction 3 (How is Form ADV organized?), available at <https://www.sec.gov/about/forms/formadv-instructions.pdf>.

¹⁰ For example, registered investment advisers are required to comply with the Advisers Act rule in 17 CFR 275.204-2 [rule 204-2] (books and records to be maintained by investment advisers), Advisers Act rule in 17 CFR 275.204-3 [rule 204-3] (delivery of brochures and brochure supplements), Advisers Act rule in 17 CFR 275.204(b)-1 [rule 204(b)-1] (reporting by investment advisers to private funds), Advisers Act rule in 17 CFR 275.204A-1 [rule 204A-1] (investment adviser codes of ethics), Advisers Act rule in 17 CFR 275.206(4)-1 [rule 206(4)-1] (advertisements by investment advisers), Advisers Act rule in 17 CFR 275.206(4)-2 [rule 206(4)-2] (custody of funds or securities of clients by investment advisers), Advisers Act rule in 17 CFR 275.206(4)-3 [rule 206(4)-3] (cash payments for client solicitations), Advisers Act rule in 17 CFR 275.206(4)-6 [rule 206(4)-6] (proxy voting), and Advisers Act rule in 17 CFR 275.206(4)-7 [rule 206(4)-7] (compliance procedures and practices).

¹¹ Advisers Act section 203A(b)(1) does not specifically exempt from state regulatory requirements advisers relying on the venture capital fund adviser exemption or the private fund adviser exemption. Advisers Act section 222 provides that a state cannot require registration, licensing, or qualification as an investment adviser if the investment adviser (1) does not have a place of business located within the state and (2) during the preceding 12-month period, has had fewer than six clients who are residents of that state. Form ADV, General Instruction 14 provides instructions for exempt reporting advisers who may be required to register with or submit reports to state securities authorities. 15 U.S.C. 80b-3a(b)(1), 15 U.S.C. 80b-18a, Form ADV: General Instruction 14 (I am an exempt reporting adviser. Is it possible that I might be required to also register with or submit a report to a state securities authority?) (emphasis omitted), available at <https://www.sec.gov/about/forms/formadv-instructions.pdf>. Exempt reporting advisers must complete all of Form ADV if they are also registering with a state securities authority. *See id.*

Advisers Act rule 203(l)-1 to include RBICs. We also are amending the definition of the term “assets under management” in Advisers Act rule 203(m)-1 to exclude RBIC assets from counting towards the \$150 million threshold.

II. DISCUSSION

A. The Venture Capital Fund Adviser Exemption and Amendments to Advisers Act Rule 203(l)-1

As noted above, the venture capital fund adviser exemption in Advisers Act section 203(l) provides an exemption from registration under the Advisers Act for investment advisers who solely advise venture capital funds.¹² The RBIC Advisers Relief Act amended Advisers Act section 203(l) by stating that RBICs are venture capital funds for purposes of the venture capital fund adviser exemption.

To make our rules consistent with amended Advisers Act section 203(l), we are amending Advisers Act rule 203(l)-1, which defines the term “venture capital fund” for purposes of the venture capital fund adviser exemption.¹³ Specifically, we are amending Advisers Act rule

¹² An adviser may not advise venture capital funds with more than \$150 million in assets under management in reliance on the venture capital fund adviser exemption and also advise other types of private funds with less than \$150 million in assets under management in reliance on the private fund adviser exemption. Depending on the facts and circumstances, we may view two or more separately formed advisory entities, each of which purports to rely on a separate exemption from registration, as a single adviser for purposes of assessing the availability of exemptions from registration. *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than \$150 Million in Assets Under Management, and Foreign Private Advisers, Investment Advisers Act Release No. 3222 (June 22, 2011) [76 FR 39646 (July 6, 2011)] at n.314 and accompanying text, n.506 and accompanying text. *See also*, Advisers Act section 208(d), which prohibits a person from doing indirectly, or through or by another person, any act or thing which it would be unlawful for such person to do directly. 15 U.S.C. 80b-8.

¹³ Advisers Act rule 203(l)-1 currently defines the term “venture capital fund” as any SBIC (defined below) or any private fund that (1) represents to investors and potential investors that it pursues a venture capital strategy; (2) immediately after the acquisition of any asset, other than qualifying investments or short-term

203(l)-1 to provide that the term “venture capital fund” includes RBICs.¹⁴ This amendment is designed to reflect that an investment adviser who relies on the venture capital fund adviser exemption may advise solely venture capital funds, including RBICs.

An adviser to RBICs who relies on the venture capital fund adviser exemption will be required to submit Form ADV reports to the Commission as an exempt reporting adviser, consistent with the current requirements for advisers relying on the venture capital fund adviser exemption.¹⁵ Furthermore, an adviser to RBICs who relies on the venture capital fund adviser exemption will be required to report on Form ADV certain information about the private funds it advises, consistent with the current requirements for exempt reporting advisers.¹⁶

holdings, holds no more than 20 percent of the amount of the fund’s aggregate capital contributions and uncalled committed capital in assets (other than short-term holdings) that are not qualifying investments, valued at cost or fair value, consistently applied by the fund; (3) does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage, in excess of 15 percent of the private fund’s aggregate capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage is for a non-renewable term of no longer than 120 calendar days, except that any guarantee by the private fund of a qualifying portfolio company’s obligations up to the amount of the value of the private fund’s investment in the qualifying portfolio company is not subject to the 120 calendar day limit; (4) only issues securities the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities but may entitle holders to receive distributions made to all holders pro rata; and (5) is not registered under section 8 of the Investment Company Act, and has not elected to be treated as a business development company pursuant to section 54 of the Investment Company Act. 15 U.S.C. 80a-8. An SBIC is (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act) (1) a small business investment company that is licensed under the Small Business Investment Act of 1958 (the “SBIA”); (2) an entity that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company under the SBIA, which notice or license has not been revoked; or (3) an applicant that is affiliated with one or more small business investment companies that are licensed under the SBIA and that has applied for another license under the SBIA, which application remains pending. *See* 15 U.S.C. 80b-3(b)(7).

¹⁴ Amended Advisers Act rule 203(l)-1(a).

¹⁵ *See* 15 U.S.C. 80b-3(l)(1) and *supra* footnote 8.

¹⁶ Form ADV requires exempt reporting advisers to disclose information about the private funds they advise.

B. The Private Fund Adviser Exemption and Amendments to Advisers Act Rule 203(m)-1

The private fund adviser exemption in Advisers Act section 203(m) directs the Commission to provide an exemption from registration to any investment adviser who solely advises private funds and has assets under management in the United States of less than \$150 million.¹⁷ The RBIC Advisers Relief Act amended Advisers Act section 203(m) by excluding RBIC assets from counting towards the \$150 million threshold.

To make our rules consistent with amended Advisers Act section 203(m), we are amending Advisers Act rule 203(m)-1(d)(1), which defines the term “assets under management” for purposes of the private fund adviser exemption.¹⁸ Specifically, we are amending Advisers Act rule 203(m)-1(d)(1)¹⁹ to provide that the term “assets under management” excludes the regulatory assets under management attributable to a private fund that is an RBIC.²⁰ This amendment is designed to reflect that an investment adviser can rely on the private fund adviser

¹⁷ Depending on the facts and circumstances, we may view two or more separately formed advisory entities, each of which purports to rely on a separate exemption from registration, as a single adviser for purposes of assessing the availability of exemptions from registration. *See supra* footnote 12.

¹⁸ Advisers Act rule 203(m)-1(d)(1) currently defines the term “assets under management” as the regulatory assets under management as determined under Form ADV, Part 1A, Item 5.F (Regulatory Assets Under Management) except that the regulatory assets under management attributable to a private fund that is an SBIC shall be excluded from the definition of assets under management for purposes of the private fund adviser exemption. 17 CFR 275.203(m)-1(d)(1), Form ADV, Part 1A, Item 5.F (Regulatory Assets Under Management), available at <https://www.sec.gov/about/forms/formadv-part1a.pdf>.

¹⁹ Amended Advisers Act rule 203(m)-1(d)(1).

²⁰ The Commission is adding subordinate paragraphs to Advisers Act rule 203(m)-1(d)(1) so that Advisers Act rule 203(m)-1(d)(1)(i) will concern the exclusion of regulatory assets under management attributable to a private fund that is an SBIC and Advisers Act rule 203(m)-1(d)(1)(ii) will concern the exclusion of regulatory assets under management attributable to a private fund that is an RBIC. The subordinate paragraphs are designed to make Advisers Act rule 203(m)-1(d)(1) easier to read than if it were presented without subordinate paragraphs.

exemption without counting the assets of its private funds that are RBICs towards the \$150 million threshold.

An adviser to RBICs who relies on the private fund adviser exemption will be required to submit Form ADV reports to the Commission as an exempt reporting adviser, consistent with the current requirements for advisers relying on the private fund adviser exemption.²¹ Furthermore, an adviser to RBICs who relies on the private fund adviser exemption will be required to report on Form ADV certain information about the RBICs that it advises, consistent with the current requirements for exempt reporting advisers.²²

III. PROCEDURAL MATTERS

The Administrative Procedure Act (“APA”) generally requires an agency to publish notice of a proposed rulemaking in the *Federal Register* and provide an opportunity for public comment.²³ This requirement does not apply, however, if the agency, for good cause, finds that the notice and public comment are impracticable, unnecessary, or contrary to the public interest.²⁴ There is good cause for the Commission to find that notice and public comment are

²¹ See 15 U.S.C. 80b-3(m)(2) and *supra* footnote 8.

²² Form ADV requires exempt reporting advisers to disclose information about the private funds they advise. For an adviser to rely on the private fund adviser exemption, any RBIC that it advises must be a private fund and, therefore, must be disclosed on Form ADV.

²³ See 5 U.S.C. 553.

²⁴ See 5 U.S.C. 553(b).

unnecessary because this rulemaking involves a minimal exercise of discretion.²⁵ We are merely amending our rules to reflect the RBIC Advisers Relief Act amendments to the Advisers Act.

The APA generally requires publication of a rule at least 30 days before its effective date.²⁶ This requirement does not apply, however, if the agency finds good cause for making the rule effective sooner.²⁷ For the same reasons as we are forgoing notice and comment, we find good cause to make the rules effective upon publication in the *Federal Register*.

IV. ECONOMIC ANALYSIS

A. Introduction

The Commission is sensitive to the potential economic effects of the amendments to Advisers Act rules 203(l)-1 and 203(m)-1. These effects include costs and benefits to investment advisers, their funds, and the investors in their funds as well as the amendments' implications for efficiency, competition, and capital formation. The economic effects of the amendments are discussed below.

We are amending Advisers Act rules 203(l)-1 and 203(m)-1 to reflect in our rules the RBIC Advisers Relief Act amendments to the Advisers Act. Although the RBIC Advisers Relief Act does not expressly require the Commission to amend the Advisers Act rules, the

²⁵ This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rule amendments to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are impractical, unnecessary, or contrary to the public interest, a rule shall take effect at such time as the federal agency promulgating the rule determines). The amendments also do not require analysis under the Regulatory Flexibility Act. *See* 5 U.S.C. 604(a) (requiring a final regulatory flexibility analysis only for rules required by the APA or other law to undergo notice and comment).

²⁶ *See* 5 U.S.C. 553(d).

²⁷ *Id.*

amendments are designed to eliminate any confusion that might otherwise exist if Advisers Act rules 203(l)-1 and 203(m)-1 were not amended. We are amending the definition of the term “venture capital fund” in Advisers Act rule 203(l)-1 to include RBICs. We also are amending the definition of the term “assets under management” in Advisers Act rule 203(m)-1 to exclude RBIC assets from counting towards the \$150 million threshold.

Economic Baseline

To establish a baseline useful for evaluating the economic effects of the amendments, we briefly describe the nature of RBICs and then define the different classes of advisers that could be affected by the amendments.

RBICs are investment funds that make equity investments mostly in smaller enterprises located primarily in rural areas.²⁸ The United States Department of Agriculture (“USDA”) licenses RBICs to promote economic development and the creation of wealth and job opportunities in rural areas and among individuals living in those communities.²⁹

Advisers to RBICs may also advise funds that are not RBICs. Prior to enactment of the RBIC Advisers Relief Act, advisers to RBICs belonged to one of three classes, depending on the amount of assets and types of funds they advised: (1) registered investment advisers solely to RBICs; (2) registered investment advisers to RBICs and non-RBICs; or (3) exempt reporting advisers. Advisers to RBICs could have been exempt reporting advisers by relying on the

²⁸ See *supra* footnote 3 and *Rural Business Investment Program*, USDA (May 2016), available at <https://www.rd.usda.gov/files/fact-sheet/RD-Factsheet-RBS-RBusInvestmentProgram.pdf>.

²⁹ See 7 CFR 4290.10.

venture capital fund adviser exemption or the private fund adviser exemption, if they met applicable requirements.

Before the RBIC Advisers Relief Act amended the Advisers Act, RBICs were not included in the definition of the term “venture capital fund;” therefore, for an adviser to qualify for the venture capital fund adviser exemption, any RBICs that it advised would have had to meet the current definition of the term “venture capital fund.”³⁰ An adviser could qualify for the private fund adviser exemption if it advised solely private funds and had assets under management in the United States, including assets of the private funds that were RBICs, of less than \$150 million.³¹ As discussed in Section I above, an adviser who relies on the venture capital fund adviser exemption or the private fund adviser exemption is considered an “exempt reporting adviser” and must maintain such records and submit such reports as the Commission determines to be necessary or appropriate in the public interest or for the protection of investors.³² Exempt reporting advisers are required to file with the Commission certain information required by Form ADV but are not subject to many of the other substantive requirements to which registered investment advisers are subject.³³ In contrast, registered

³⁰ See 17 CFR 275.203(l)-1 and *supra* footnote 13.

³¹ As discussed above, however, the assets of SBICs are excluded for purposes of calculating private fund assets towards the \$150 million threshold under Advisers Act rule 203(m)-1. See *supra* Section II.B.

³² See *supra* footnote 8.

³³ See *supra* footnotes 9 and 10.

investment advisers are required to file Form ADV and are subject to other substantive requirements, including the establishment of a compliance program and a Code of Ethics.³⁴

In addition to the three classes of advisers who advised RBICs as discussed above, two additional classes of advisers that did not advise RBICs are also relevant: (1) advisers solely to venture capital funds that qualify for the venture capital fund adviser exemption from registration and are considered exempt reporting advisers; and (2) advisers solely to non-RBIC private funds with less than \$150 million in assets under management in the United States that qualify for the private fund adviser exemption from registration and are considered exempt reporting advisers. Before the RBIC Advisers Relief Act amended the Advisers Act, advisers relying on the venture capital fund adviser exemption were required to register with the Commission if they added RBIC clients that did not meet the current definition of the term “venture capital fund.”³⁵ In addition, before the RBIC Advisers Relief Act amended the Advisers Act, advisers relying on the private fund adviser exemption were required to register with the Commission if they added RBIC clients that caused their total assets under management in the United States to equal or exceed \$150 million.

As of August 2019, after the enactment of the RBIC Advisers Relief Act, there were approximately 13,428 registered investment advisers reporting a total of approximately \$84

³⁴ See *supra* footnote 10.

³⁵ See 17 CFR 275.203(l)-1 and *supra* footnote 13.

trillion in regulatory assets under management.³⁶ In addition, there were 4,166 exempt reporting advisers,³⁷ of whom 1,256 relied on the venture capital fund adviser exemption,³⁸ 3,318 relied on the private fund adviser exemption,³⁹ and 431 qualified for both exemptions.⁴⁰ For exempt reporting advisers that relied on the private fund adviser exemption, total private fund assets under management were approximately \$3 trillion.⁴¹ Registered investment advisers advised approximately 37,004 private funds, while exempt reporting advisers advised approximately 17,643 private funds.⁴² As of August 2019, there were 5 RBICs who were licensed by the USDA managing approximately \$352 million in assets.⁴³ We are unable to identify which of those RBICs are managed by advisers solely to RBICs compared to advisers that also advise other types of funds because filers of Form ADV are not required to explicitly indicate whether they advise RBICs. Because filers of Form ADV are not required to explicitly indicate whether they

³⁶ Form ADV, Part 1A, Item 2.A, Item 5.F.(2)(c).

³⁷ Form ADV, Part 1A, Item 2.B.

³⁸ Form ADV, Part 1A, Item 2.B.(1).

³⁹ Form ADV, Part 1A, Item 2.B.(2).

⁴⁰ Form ADV, Part 1A, Item 2.B.(1), Item 2.B.(2). Eighty-two advisers indicated in Form ADV, Part 1A, Item 2.B.(3) that they act solely as an adviser to private funds, but have assets under management in the United States of \$150 million or more. The subparts of Form ADV Item 2.B are not mutually exclusive to each other; therefore, adding up the responses to the subparts of Form ADV Item 2.B would not reliably result in the total number of exempt reporting advisers.

⁴¹ Form ADV, Schedule D, Section 7.B.(1)(A)(11).

⁴² Form ADV, Schedule D, Section 7.B.(1). A private fund is counted for both a registered investment adviser and exempt reporting adviser if advised by both types of advisers. To avoid double-counting, feeder funds whose master fund is also reported on Form ADV, Schedule D, Section 7.B.(1) are removed.

⁴³ Rural Business Investment Company Applications filed with the USDA. To contact the USDA for data about Rural Business Investment Company Applications filed with the USDA *see* <https://www.rd.usda.gov/programs-services/rural-business-investment-program>.

advise RBICs, we are not able to estimate the number of advisers that have already taken advantage of the exemptions afforded to them by the RBIC Advisers Relief Act's amendments to the Advisers Act, as compared to the number of advisers who have not done so due to any inconsistencies between the Advisers Act rules and the Advisers Act as amended by the RBIC Advisers Relief Act.

By amending sections 203 and 203A of the Advisers Act, the RBIC Advisers Relief Act provided the five classes of advisers discussed above with additional flexibility:

- Registered investment advisers solely to RBICs can rely on the RBIC adviser exemption in Advisers Act section 203(b)(8) to withdraw from registration and have no obligation to report information to the Commission on Form ADV.
- Registered investment advisers to RBICs and non-RBIC funds:
 - Registered investment advisers to private funds that include RBICs and non-RBICs may withdraw from registration and report to the Commission as exempt reporting advisers if their private fund assets under management in the United States are less than \$150 million, excluding the assets of RBICs and SBICs.
 - Registered investment advisers to RBICs and other venture capital funds may withdraw from registration and report to the Commission as exempt reporting advisers because the definition of venture capital fund now includes RBICs.
- Exempt reporting advisers advising RBICs that qualified for the private fund adviser exemption may increase their total private fund assets under management in the United States above the \$150 million threshold without triggering a requirement to register with the Commission as an investment adviser, provided that their non-RBIC private fund

assets and non-SBIC private fund assets under management in the United States remain below the \$150 million threshold.

- Advisers that did not advise RBICs and qualified for the venture capital fund adviser exemption may begin advising RBICs without changing their registration status.
- Advisers that did not advise RBICs and qualified for the private fund adviser exemption may begin advising RBICs without changing their registration status regardless of the amount of assets attributable to RBICs.

For those advisers that benefit from the alternatives above, it would have been in their economic interest to, depending on their class, withdraw from registration, avail themselves of exempt reporting adviser status, or attract additional RBIC assets following the passage of the RBIC Advisers Relief Act. We believe, therefore, that it is likely that such advisers have already exercised these options. Certain advisers who intend to advise RBICs solely, may rely on the RBIC adviser exemption to not register. Registered advisers who currently advise solely RBICs may rely on the RBIC adviser exemption to withdraw from registration with the Commission. Registered investment advisers to private funds that include RBICs and non-RBICs and have private fund assets under management in the United States of less than \$150 million, excluding the assets of RBICs and SBICs, may have withdrawn from registration and begun reporting to the Commission as exempt reporting advisers in reliance on the private fund adviser exemption. Registered investment advisers to venture capital funds, including RBICs, may have withdrawn from registration and begun reporting to the Commission as exempt reporting advisers. Finally, advisers that qualified for the private fund adviser exemptions before the RBIC Advisers Relief

Act amended the Advisers Act may have begun advising RBICs without changing their registration status independent of the amount of assets attributable to RBICs.

However, inconsistencies in the definitions of venture capital funds and private fund assets under management that exist between the Advisers Act rules and the Advisers Act as amended by the RBIC Advisers Relief Act may have discouraged some advisers from changing business practices following passage of the RBIC Advisers Relief Act. Furthermore, these inconsistencies may result in private fund assets under management being calculated differently by advisers for purposes of the private fund adviser exemption, which could lead to similar advisers determining their reporting statuses differently.

The amendments to our rules, which reflect the RBIC Advisers Relief Act amendments to the Advisers Act, may affect the classes of investment advisers mentioned above, the funds they advise, and the investors in those funds. We discuss the potential economic effects of the amendments and the RBIC Advisers Relief Act, including costs and benefits and impacts on efficiency, competition, and capital formation, on these investment advisers and investors in the next two sections.

B. Costs and Benefits

Because substantial portions of the amendments simply restate changes to Advisers Act section 203 that are self-implementing, even in the absence of regulatory action, the bulk of the economic effects of the amendments are not readily separable from those of the RBIC Advisers Relief Act's amendments to the Advisers Act. However, to the extent that inconsistencies between the current rules and the Advisers Act as amended by the RBIC Advisers Relief Act caused certain advisers not to exercise the exemption options under the Advisers Act as amended

by the RBIC Advisers Relief Act when doing so would have otherwise been in their interest, the amendments could produce economic effects in addition to those resulting from the RBIC Advisers Relief Act's amendments to the Advisers Act themselves.

Because we believe that it is likely that advisers have already exercised any exemption options provided to them by the RBIC Advisers Relief Act's amendments to the Advisers Act under the baseline if doing so was in their interest, we do not expect the magnitude of the effects associated directly with the amendments to be significant. However, we do not have information on the extent to which advisers solely to RBICs have been deterred from exercising their options under the RBIC Advisers Relief Act's amendments to the Advisers Act due to any inconsistencies between the Advisers Act and Commission rules under the baseline and thus we cannot estimate how many additional advisers would exercise these options as a result of the amendments that have not already done so.

Notably, the economic effects of the amendments on advisers that had not previously chosen to exercise the exemption options under the RBIC Advisers Relief Act's amendments to the Advisers Act are generally consistent with the effects on advisers that have already chosen to do so; for example, advisers who choose to report to the Commission as exempt reporting advisers, whether they did so after the RBIC Advisers Relief Act amended the Advisers Act or will choose to do so after the amendments to our rules, will likely experience the same change in reporting costs. Any costs incurred before this rulemaking by advisers that already exercised exemption options provided to them by the RBIC Advisers Relief Act's amendments to the Advisers Act are a direct effect of the RBIC Advisers Relief Act; however, we do not have information to estimate the number of advisers that have already exercised these options.

To the extent that any inconsistencies between the Advisers Act and Advisers Act rules 203(l)-1 and 203(m)-1 have discouraged advisers solely to RBICs from taking advantage of the venture capital fund adviser or private fund adviser exemptions, the amendments could lead these advisers to take on additional venture capital or private fund clients. Such advisers can weigh the additional fee revenue associated with advising non-RBIC private funds or venture capital funds against the costs of reporting to the Commission as exempt reporting advisers when determining whether to rely on either of the exemptions. We estimate that the annual cost of filing Form ADV for an exempt reporting adviser, who is not registered with any state securities authority, is approximately \$983.⁴⁴ In addition, advisers that switch from exempt to exempt reporting status may incur indirect costs if the information they disclose on Form ADV, such as any disciplinary history, reduces investor demand for their advisory services. We are unable to estimate how many advisers solely to RBICs would choose to take on non-RBIC private funds or non-RBIC venture capital funds as a result of the amendments because we do not have information on the demand for their advisory services from non-RBIC private funds or non-RBIC venture capital funds, or whether any additional business generated would offset these reporting costs.

The amendments provide registered advisers that have not taken advantage of the venture capital fund adviser and private fund adviser exemptions due to inconsistencies between the RBIC Advisers Relief Act's amendments to the Advisers Act and Commission rules with

⁴⁴ *Form ADV under the Investment Advisers Act of 1940* (OMB No. 3235-0049), Supporting Statement at footnote 43 and accompanying text (conclusion date of October 4, 2019). *See supra* footnote 9.

clarification on the option to switch from registered investment adviser to exempt reporting adviser status. This option provided by the RBIC Advisers Relief Act is difficult to value, but its value is broadly determined by the cost reductions associated with the change in registration status compared to the explicit and implicit costs of withdrawing from registration. Advisers that elect to change (like those that already did so as a result of the RBIC Advisers Relief Act) from registered to exempt reporting adviser status and who are not also registering with a state authority should expect to face reduced ongoing costs associated with filing Form ADV because, as exempt reporting advisers who are not also registered with a state authority, they would only be required to complete certain portions of Form ADV.⁴⁵ We estimate the annual cost savings associated with filing Form ADV as an exempt reporting adviser who is not registered with any state securities authority, instead of as a registered investment adviser to be approximately \$10,361.⁴⁶ Furthermore, such advisers would no longer bear the costs associated with the substantive requirements of being an adviser registered with the Commission.⁴⁷ Such advisers would incur the one-time cost of filing a Form ADV-W withdrawal, which we estimate to be

⁴⁵ See *supra* footnote 9.

⁴⁶ *Form ADV under the Investment Advisers Act of 1940* (OMB No. 3235-0049), Supporting Statement at footnote 10 (stating the number of registered investment advisers), footnote 45 (stating the total annual cost of filing Form ADV), footnote 43 (stating the annual filing cost per exempt reporting adviser), and accompanying text (conclusion date of October 4, 2019). We made the following calculations to find the estimated annual cost of filing Form ADV as a registered investment adviser: total cost for registered investment advisers and exempt reporting advisers of approximately \$141 million - total cost for exempt reporting advisers of approximately \$4.6 million = total cost for registered investment advisers of approximately \$136.4 million. Total cost for registered investment advisers of approximately \$136.4 million / 12,024 registered advisers = approximately \$11,344 per registered investment adviser to file Form ADV annually. The estimated cost for an exempt reporting adviser who is not also registered with a state securities authority is approximately \$983. \$11,344 - \$983 = \$10,361.

⁴⁷ See *supra* footnote 10.

approximately \$117 per full withdrawal and \$15 per partial withdrawal.⁴⁸ They may also incur one-time operational costs associated with switching from registered to exempt reporting status, such as those associated with adapting information technology systems to a new reporting regime. Finally, to the extent that advisers benefit from marketing themselves as registered investment advisers to client funds and investors, they will forgo this benefit by withdrawing from registration. Because advisers are not required to rely on either of the exemptions in Advisers Act rule 203(l) or 203(m) even though they may qualify for them, we expect only those registered investment advisers would experience a net benefit by relying on these exemptions to withdraw from registration.

Investors in private funds, venture capital funds, or RBICs may experience costs and benefits as a result of the amendments and the RBIC Advisers Relief Act. If investors face fixed costs in transacting with a given adviser, for example in performing any necessary due diligence, they may benefit if the amendments and the RBIC Advisers Relief Act encourage more advisers to advise both RBIC and non-RBIC private funds, allowing investors to consolidate different types of investments with a single adviser. We cannot quantify the extent to which investors prefer to use a single adviser or the number of advisers who will expand into either RBICs or non-RBIC private funds because we do not have the information needed to assess investors'

⁴⁸ *Rule 203-2 and Form ADV-W under the Investment Advisers Act of 1940* (OMB Control No. 3235-0313) Supporting Statement at footnotes 5 and 7 and accompanying text (conclusion date of November 22, 2017). An adviser would file a full withdrawal if it was only registered with the Commission. An adviser would file a partial withdrawal if it was required to remain registered with one or more states. *See* Form ADV-W, Instruction 1.

latent demand for consolidated advice services or the number of advisers that have been deterred from expanding their client bases under the baseline. We therefore cannot estimate the magnitude of this potential cost reduction for investors.

In addition, to the extent that the amendments and the RBIC Advisers Relief Act result in advisers changing their status from registered to exempt reporting, it may impose costs on investors. If investors value the transparency provided by complete Form ADV reporting and the safeguards associated with the other substantive requirements of being a registered investment adviser, then the modifications could impose costs on investors if the modifications result in advisers changing their status from registered to exempt reporting. However, such investors have the option of moving their investments to advisers that are registered and, as noted above, we expect that advisers will weigh the benefits and costs associated with remaining registered in connection with any change in reporting status. The amendments and the RBIC Advisers Relief Act could also impose costs on investors if any reduction in transparency or the other substantive requirements associated with registration reduce the ability of the Commission to protect investors from potentially fraudulent investment advisory schemes.⁴⁹

C. Efficiency, Competition, and Capital Formation

As discussed above, the RBIC Advisers Relief Act changed registration and reporting requirements for advisers solely to RBICs and for advisers to non-RBIC private funds or non-RBIC venture capital funds, and may have resulted in an increased number of advisers in those

⁴⁹ See *supra* footnote 10.

markets. As a result of the RBIC Advisers Relief Act's amendments to the Advisers Act, advisers solely to RBICs may have entered the market for venture capital or other private fund advisory services, and current advisers to non-RBIC private funds or non-RBIC venture capital funds, may have entered the market for RBIC advisory services. As with the costs and benefits discussed above, the effects of the amendments on efficiency, competition, and capital formation are not readily separable from those of the RBIC Advisers Relief Act's amendments to the Advisers Act. We expect the amendments will only affect efficiency, competition, and capital formation to the extent that advisers have not already exercised the exemption options provided to them under the baseline due to any inconsistencies between the RBIC Advisers Relief Act's amendments to the Advisers Act, and Commission rules. Because we expect most advisers that would choose to change business practices because of amendments to the Advisers Act pursuant to the RBIC Advisers Relief Act already have done so, we do not expect the magnitude of these effects attributable solely to the amendments to be significant.

Changes in the costs of advising RBICs while also advising non-RBIC private funds or non-RBIC venture capital funds, as described above, could have several competitive effects. First, to the extent that non-RBIC private fund or non-RBIC venture capital fund advisers find it profitable to enter the market for RBICs under the amendments and the RBIC Advisers Relief Act's amendments to the Advisers Act, competition may increase in that market, resulting in reduced profits for RBIC advisers and lower advisory fees for RBICs and their investors. Similarly, to the extent that RBIC advisers find it profitable to enter the non-RBIC private fund or non-RBIC venture capital fund advisory market, competition in those markets may increase, resulting in reduced profits for non-RBIC private fund and non-RBIC venture capital fund

advisers and lower advisory fees for non-RBIC private funds and non-RBIC venture capital funds and their investors. Whether such a reallocation of advisory services manifests depends on whether advisers find it profitable to expand operations into new markets and whether they can do so without changing the quality or quantity of services in current markets. While we cannot precisely estimate the relative likelihood of the above competitive effects, the fact that RBIC advisers operate in a market that is an order of magnitude smaller than the market in which non-RBIC private fund and non-RBIC venture capital fund advisers operate suggests that non-RBIC private fund and non-RBIC venture capital fund advisers are more likely to benefit from entry into the RBIC market following the RBIC Advisers Relief Act's enactment, thereby increasing the amount of competition in that market. As discussed above, it is likely that most advisers would have already exercised the options afforded them by the RBIC Advisers Relief Act if it was in their interest to do so. Therefore, the bulk of the competitive effects just discussed would have already been realized and the competitive effects directly attributable to the amendments are not likely to be significant.

Any relative shift of advisory talent from one segment of the market to another could also have effects on efficiency and capital formation. To the extent that advisers who expand into new markets possess skill in identifying investment opportunities, an increase in the supply of advisers in the RBIC, non-RBIC private fund, and non-RBIC venture capital fund markets could result in more efficient investment decisions and market prices that more accurately reflect the fundamental value of assets where applicable (for example, certain RBICs invest in private

businesses that do not trade on public exchanges,⁵⁰ but some private funds invest in publicly-traded securities). Also, any increase in the number of advisers in the RBIC market could make more capital available to businesses in rural communities if the increased supply of RBIC advisers attracts more capital to that market. In addition, to the extent that there are economies of scale in the provision of advisory services, advisory services may be provided at lower aggregate cost if there is an expansion of advisers in either the RBIC, non-RBIC private fund or non-RBIC venture capital fund market. To the extent that the amendments and the RBIC Advisers Relief Act's amendments to the Advisers Act result in reduced transparency into advisers because they opt to switch from registered to exempt reporting status, and to the extent that investors rely on that transparency when making investment decisions, these changes might cause a reduction in the efficiency of investor allocations to these advisers. Any reduction in transparency could also reduce the aggregate amount of capital managed by investment advisers if investors cannot find suitable registered investment advisers as replacements and these investors value transparency more than any benefits, such as potentially lower advisory fees, of the amendments and the RBIC Advisers Relief Act's amendments to the Advisers Act. Finally, if these changes increase the supply of investment advisers to RBICs, non-RBIC private funds and non-RBIC venture capital funds, and these advisers attract assets that were not already invested in other markets, they may increase the aggregate amount of capital investment.

V. PAPERWORK REDUCTION ACT ANALYSIS

⁵⁰ See 7 CFR 4290.700.

We do not believe that the amendments to reflect changes that the RBIC Advisers Relief Act made to the Advisers Act make any substantive modifications to any existing collection of information requirements or impose any new substantive recordkeeping or information collection requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).⁵¹ Accordingly, we are not revising any burden and cost estimates in connection with these amendments.⁵²

VI. STATUTORY AUTHORITY

The Commission is amending rule 203(l)-1 under the authority set forth in sections 211(a) and 203(l) of the Advisers Act, (15 U.S.C. 80b-11(a) and 80b-3(l), respectively). The Commission is amending rule 203(m)-1 under the authority set forth in sections 211(a) and 203(m) of the Advisers Act (15 U.S.C. 80b-11(a) and 80b-3(m), respectively).

List of Subjects in 17 CFR Part 275

Reporting and recordkeeping requirements, Securities.

TEXT OF THE RULE AMENDMENTS

For the reasons set forth in the preamble, the Commission is amending title 17, chapter II of the Code of Federal Regulations as follows:

PART 275 – RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

⁵¹ 44 U.S.C. 3501 *et seq.* As discussed in Section IV, only approximately 5 advisers would be affected by the amendments. Therefore, we believe that the amendments do not substantively change the current burdens and cost estimates because they may marginally affect the overall population of respondents.

⁵² *Form ADV under the Investment Advisers Act of 1940* (OMB No. 3235-0049) (conclusion date of October 4, 2019).

1. The authority citation for part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(11)(H), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

2. Amend § 275.203(l)-1 by revising the introductory text to paragraph (a) to read as follows:

§275.203(l)-1 Venture capital fund defined.

(a) *Venture capital fund defined.* For purposes of section 203(l) of the Act (15 U.S.C. 80b-3(l)), a venture capital fund is any entity described in subparagraph (A), (B), or (C) of section 203(b)(7) of the Act (15 U.S.C. 80b-3(b)(7)) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53)) or any entity described in subparagraph (A) or (B) of section 203(b)(8) of the Act (15 U.S.C. 80b-3(b)(8)) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53)) or any private fund that:

* * * * *

3. Amend § 275.203(m)-1 by revising paragraph (d)(1) to read as follows:

§275.203(m)-1 Private fund adviser exemption.

* * * * *

(d) * * *

(1) *Assets under management* means the regulatory assets under management as determined under Item 5.F of Form ADV (§279.1 of this chapter), except the following shall be excluded from the definition of assets under management for purposes of this section:

(i) The regulatory assets under management attributable to a private fund that is an entity described in subparagraph (A), (B), or (C) of section 203(b)(7) of the Act (15 U.S.C. 80b-3(b)(7)) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53)); and

(ii) The regulatory assets under management attributable to a private fund that is an entity described in subparagraph (A) or (B) of section 203(b)(8) of the Act (15 U.S.C. 80b-3(b)(8)) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53).

* * * * *

By the Commission.

March 2, 2020

Vanessa A. Countryman
Secretary

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