HOUSE PASSES INVEST ACT WITH CRITICAL IMPLICATIONS FOR FUND SPONSORS

On December 11, the U.S. House of Representatives passed H.R. 3383, the Incentivizing New Ventures and Economic Strength Through Capital Formation Act (the "INVEST Act") on a bipartisan vote of 302 to 123.

Eighty-seven Democrats joined all House Republicans present in support of the bill, designed to allow more investor access to private markets and to facilitate wider capital formation, economic growth and job creation. A wide-ranging set of reforms, the bill would provide a friendlier regulatory landscape for private fund sponsors. The bill now heads to the Senate. While there is no assurance that the Senate would vote on or enact the INVEST Act in substantially the same format as the House version, Senate Banking Committee Chair Tim Scott (R-SC) has long championed making capital formation easier, including his sponsorship of similar legislation in the prior Congress.

If any form of the INVEST Act is adopted by the Senate and signed by President Donald Trump, the legislation would represent the most significant statutory action impacting private capital since the Jumpstart Our Business Startups (JOBS) Act of 2012 (the "JOBS Act") or perhaps even the landmark 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

Among other things, the INVEST Act contains the following provisions that, taken together, would amount to a significant shift for private funds and direct a flurry of rulemaking at the Securities and Exchange Commission (the "SEC").

- **Increasing the Private Fund Exemption Threshold to $175 Million.**[1] For the first time since the Dodd-Frank Act, the INVEST Act would increase the threshold for the private fund adviser exemption (the "PF Exemption") under Section 203(m) of the U.S. Investment Advisers Act of 1940 (the "Advisers Act") from $150 million in private fund assets under management ("AUM") to $175 million. Furthermore, the INVEST Act would require the PF Exemption's AUM threshold to be adjusted for inflation every five years (to the nearest multiple of $1 million).[2]

[1] Section 104 of the INVEST Act.

[2] The PF Exemption, currently available to advisers exclusively advising private funds with no more than $150 million in AUM, is one of two key exemptions from full registration created by the Dodd-Frank Act. Exempt reporting advisers ("ERAs") who rely on the PF Exemption must calculate AUM on an annual basis; if private fund assets exceed $150 million, ERAs must transition to become registered investment advisers subject to additional Advisers Act rules and SEC examination.

- **Broadening the Venture Capital Exemption to Permit Secondaries and VC Funds.**[3] The INVEST Act would also broaden the other major exemption established by the Dodd-Frank Act, the venture capital fund adviser exemption (the "VC Exemption") under Section 203(l) of the Advisers Act. Currently, venture capital funds are permitted to invest primarily in qualifying investments – generally, direct equity securities of qualifying portfolio companies (*i.e.* operating companies that are not publicly traded companies), albeit with the flexibility of investing up to 20% of its capital in non-qualifying investments. The new legislation would direct the SEC to expand the definition of "qualifying investment" under Rule 203(l)-1 to include (i) investments in secondary transactions and (ii) investments in another venture capital fund so long as such investments do not exceed 49% of the venture capital fund's aggregate capital contributions and uncalled committed capital. Under the proposed legislation, pure venture capital funds-of-funds would remain ineligible to use the VC Exemption, but the provision would nonetheless allow venture capital funds to significantly expand their investment strategies.

- **Expanding the Section 3(c)(1)(C) Exemption for Venture Capital Funds.**[4] The INVEST Act would also loosen an existing exemption for venture capital funds under the U.S. Investment Company Act of 1940 (the "1940 Act").[5] As part of the Economic Growth, Regulatory Relief and Consumer Protection Act, Congress in 2018 amended Section 3(c)(1), which provides an exemption from registration under the 1940 Act for investment companies with fewer than 100 beneficial owners. Section 3(c)(1)(C) allows certain venture capital funds to admit up to 250 beneficial owners so long as the fund has no more than $12 million (adjusted upward from $10 million initially) in aggregate capital contributions and uncalled committed capital.[6] The legislation would extend the Section 3(c)(1)(C) exemption for venture capital funds to 500 beneficial owners and increases the dollar amount limitation to $50 million, with this threshold to be indexed for inflation every five years by the SEC. If adopted, this would significantly widen the applicability of Section 3(c)(1)(C) for the venture capital industry.

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[3] Section 109 of the INVEST Act.
[4] Section 108 of the INVEST Act.
[5] Eligible funds include those that meet the definition of "venture capital fund" in Rule 203(l)-1 under the Advisers Act.
[6] Private funds overwhelmingly rely on the Section 3(c)(1) and 3(c)(7) exemptions from 1940 Act registration. Unlike Section 3(c)(1), which imposes a ceiling on the number of beneficial owners, Section 3(c)(7) permits an investment company to have an unlimited number of beneficial owners so long as they meet the "qualified purchaser" standard – in very broad terms, individuals and family offices with at least $5 million in investments or entities with at least $25 million in investments.

- **Creating an Examination to Achieve "Accredited Investor" Status.**[7] Yet another provision of the INVEST Act would require the SEC to establish within one year an examination to certify an individual as an accredited investor. The legislation would require the examination to be designed "with an appropriate level of difficulty such that an individual with financial sophistication would be unlikely to fail." The examination would determine competency with respect to (i) different types of securities, (ii) disclosure requirements for offering exemption from registration under the Securities Act, (iii) corporate governance, (iv) financial statements, (v) aspects of unregistered securities, securities issued by private companies and investments into private funds (including, among other things, the risks associated with limited liquidity, limited disclosures, valuation tools, information asymmetry, leverage risks, concentration risk and longer investment horizons), (vi) potential conflicts of interest and (vii) additional criteria as the SEC determines necessary or appropriate in the public interest or for the protection of investors.[8]

- **Loosening Certain Restrictions on General Solicitation.**[9] The legislation would largely codify Rule 148 in permitting presentations at specified sponsored events – such as those hosted by governmental entities, universities, non-profits, angel groups, incubators and accelerators – without being deemed "general solicitation."[10] Under Rule 506(b) of Regulation D, the traditional safe harbor for private placements, fund sponsors are not permitted to engage in general solicitation.[11] While the INVEST Act would allow issuers to engage in certain presentations without

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[7] Section 203 of the INVEST Act.

[8] In some ways, the proposed examination is an extension of the SEC's August 2020 amendments to the Rule 501 definition of "accredited investor" that, among other things, added knowledge- and credentials-based paths to qualification for the first time. For example, the 2020 amendments permitted individuals holding certain professional licenses (currently Series 7, 65, or 82) to be deemed accredited investors, as well as certain "knowledgeable employees" (as defined in Rule 3c-5 under the U.S. Investment Company Act of 1940) of a private fund.

[9] Section 102 of the INVEST Act.

[10] The SEC adopted Rule 148 in 2020 to allow issuers to engage in certain communications at "demo day" type events without crossing the line into general solicitation if sponsored by certain qualified sponsors (such as universities, non-profits, angel groups and accelerators).

[11] Rule 502(c) prohibits issuers relying on Rule 506(b) from engaging in general solicitation or advertising, although Regulation D does not define "general solicitation" or "general advertising," which must be determined on a facts-and-circumstances basis in light of decades of SEC guidance and interpretation. The JOBS Act directed the SEC to allow private fund sponsors for the first time to engage in general solicitation, which is now permitted under an alternative safe harbor, Rule 506(c). Sponsors who engage in general solicitation, however, must also take certain steps – beyond those required under Rule 506(b) – to affirm the accredited investor status of prospective investors. By far, most private placements continue to be conducted under Rule 506(b).

risking general solicitation, the legislation imposes severe limits on such presentations. For example, under the loosened guidelines, fund sponsors would not be able to make investment recommendations to attendees; engage in active investment negotiations; charge fees for attendance; receive compensation for making introductions between investors at such events; or provide disclosures longer than one page (with such disclosures limited to describing the nature of the event and risks of investment). Issuers, furthermore, would not be permitted to provide specific information about an offering of securities other than (i) that an issuer is in the process of offering securities, (ii) the type and amount of securities being offered, (iii) the amount of securities being offered that have already been subscribed for and (iv) the intended use of proceeds of the offering. In some cases, the INVEST Act is stricter than current Rule 148. For example, the proposed legislation expressly provides that attendance alone does not establish a pre-existing substantive relationship for purposes of Rule 506(b).[12]

- **Facilitating Electronic Delivery of Investor Documents**.[13] The legislation would direct the SEC to finalize rules, regulations, amendments, or interpretations broadly to allow certain entities – including registered investment companies, registered broker-dealers, registered investment advisers, among others – to satisfy obligations to deliver regulatory documents required under securities laws to investors using electronic delivery. The provisions also include safeguards, opt-out rights, and transition rules.

- **Prohibiting the SEC from limiting closed-end funds investment into private funds**.[14] Another INVEST Act provision would restrict the SEC from prohibiting or limiting a closed-end fund investing any or all of its assets in securities issued by private funds (as defined under Section 202(a)(29) of the Advisers Act). The provision would also prohibit the SEC from imposing any conditions on, restricting or otherwise limiting the offer or sale of securities issued by a closed-end company that invests (or proposes to invest) in securities issued by private funds.[15]

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[12] Traditionally, a pre-existing substantive relationship has been a strong indicator of the lack of general solicitation under the Securities Act. The Staff in 2015 provided guidance stating that the existence of a pre-existing, substantive relationship is one means, but not the exclusive means, of demonstrating the absence of a general solicitation in a Regulation D offering. Accordingly, an offer of the issuer's securities to the person with whom the issuer, or a person acting on its behalf, has such a relationship would not constitute a general solicitation and, therefore, would not be in contravention of Rule 502(c).

[13] Section 205 of the INVEST Act.

[14] Section 206 of the INVEST Act.

[15] While nearly 75% of all registered funds are mutual funds, and nearly 24% of registered funds are exchange-traded funds, a tiny percentage of registered funds are closed-end funds (including tender offer funds and

- **Relaxing Accountant Review for Certain Crowdfunding.**[16] The legislation would increase the crowdfunding exemptive offering threshold under Section 4A of the Securities Act requiring accountant review from $100,000 to $250,000, giving the SEC the discretion to increase the threshold to $400,000. Section 4A(b)(1)(d) establishes this threshold as a statutory requirement for the Regulation Crowdfunding ("Regulation CF").[17] We note that the threshold for an accountant review had previously been adjusted for inflation to $124,000. The legislation would not change the thresholds for the requirement for a crowdfunding issuer to provide audited financial statements at $1,235,000.

Other changes would impact markets far beyond private funds. For example, Section 303 of the INVEST Act directs the SEC to ease testing-the-waters requirements to promote IPOs and to allow issuers to submit a confidential draft registration statement to the SEC prior to public filing. Section 202 would expand investment options for 403(b) retirement plans, aligning them more closely with 401(k) treatment.

Sponsored by Capital Markets Subcommittee Chair Ann Wagner (R-MO-02) and Gregory Meeks (D-NY-05), the legislation addresses legislators' concerns about the growth of private markets vis-à-vis public markets in recent years, noting that the number of public companies has fallen from 8,800 in 1997 to fewer than 4,000 today.

The House legislation mirrors steps taken by both the SEC under its new chair Paul Atkins and the Trump administration to widen access to private capital markets. On August 7, President Trump signed an executive order, "Democratizing Access to Alternative Assets for 401(k) Investors," directing the Department of Labor and the SEC to revise regulations to

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interval funds). Closed-end funds, which may be registered under both the 1940 Act and the Securities Act, are far more likely to invest in private funds. From 2002 until very recently, the SEC staff had informal rule during both 1940 Act and Securities Act registration that registered funds that, in turn, invest in private funds be limited to making only 15% of their investments in private funds unless (i) all investors were accredited investors and (ii) there was a $25,000 minimum investment. Nearly a month after taking office as SEC chair, however, Paul Atkins, on May 19, 2025, delivered a speech indicating that the SEC staff would reconsider the informal 15% rule in order to allow retail investors access to high-return asset classes.

[16] Section 103 of the INVEST Act.

[17] The JOBS Act created a new category of exempt transaction under Section 4(a)(6) that currently allows up to $5 million in certain offerings (within a 12-month period) in accordance with Regulation CF. Initially limited to just $1.07 million when it took effect in May 2016, the SEC increased Regulation CF's limit to $5 million as part of reforms harmonizing rules among several varieties of exempt transactions under the Securities Act. Regulation CF severely limits the amount of securities that can be sold to any non-accredited investor. In addition, Regulation CF transactions require that the issuer be organized in the United States, issuer must sell securities online through an SEC-registered intermediary, such as a broker-dealer or a funding portal, and certain disclosures are required. As with private placements under Rule 506(b) and Rule 506(c), Regulation CF offerings are subject to the "bad actor" disqualifications of Rule 506(d).

facilitate investment by participant-directed defined-contribution 401(k) plans in alternative assets, including private funds. Such investment is currently heavily restricted under Securities Act and 1940 Act regulation as well as ERISA and Department of Labor regulations.

Conclusion

Shulman Rogers regularly represents private fund sponsors, including both registered and exempt investment advisers. Our attorneys continue to monitor ongoing legal and regulatory developments for private funds and investment advisers, such as the INVEST Act, and we will provide additional updates if and when the Senate takes action on all or part of the INVEST Act.

Please reach out to Scott Museles, Kimberly Mann or Kevin Lees at Shulman Rogers if you have any questions.