HUNTON& WILLIAMS

PRIVATE INVESTMENT FUND UPDATE

February 2011 SEC Implementation of the Dodd-Frank Wall Street Reform Act

SEC Proposes Rules Relating to Net Worth Standard for Accredited Investors

On January 25, 2011, the Securities and Exchange Commission ("SEC") proposed new rules under the Securities Act of 1933, as amended (the "Securities Act"), as required by Section 413(a) of the "Dodd-Frank Wall Street Reform and Consumer Protection Act" ("Dodd-Frank"). The proposal excludes the value of a person's primary residence for purposes of determining whether the person qualifies as an "accredited investor" on the basis of having a net worth in excess of $1 million. A copy of the SEC's Proposing Release is available here.

Background

Section 413(a) of Dodd-Frank changed the net worth standard for accredited investors to exclude the value of the primary residence of a natural person effective upon enactment on July 21, 2010, but directed the SEC to revise the Securities Act rules to reflect the new standard. Before Dodd-Frank, the accredited investor rules permitted the primary residence to be included in calculating net worth. In late July 2010, following enactment of Dodd-Frank, the SEC issued a Compliance & Disclosure Interpretation relating to Section 413.

Section 413(b) of Dodd-Frank directs the SEC to review the definition of the term "accredited investor" as it applies to natural persons, and requires the SEC to review the definition in its entirety every four years. The SEC is not proposing additional changes to the "accredited investor" definition now, but may do so in the future.

Following a comment period, the SEC will adopt final rules, which may differ from the proposed rules in significant respects.

Net Worth Standard

The SEC's proposals amend the definition of "accredited investor" in Rule 501 in connection with the exemptive provisions for private offerings under Regulation D. The SEC also proposes to amend Rule 215 relating to offerings exclusively under Section 4(6) of the Securities Act (to be renumbered as Section 4(5)).

As set forth in the proposals, the new definition will include "any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of purchase, exceeds $1,000,000, excluding the value of the primary residence of such natural person, calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property." Indebtedness secured by the residence in excess of the value of the home should be considered a liability and deducted from the investor's net worth. This is generally consistent with the SEC's Compliance & Disclosure Interpretation.

The SEC is soliciting comments on several aspects of the rule, including whether to define the term "primary residence," whether to include a timing provision in the rule and whether to include transition rules to facilitate subsequent investments by an investor who qualified in a previous sale but no longer qualifies and might not be able to retain a pro rata interest in an issuer in future Regulation D private offerings.

Timetable

The SEC currently plans to finalize and adopt final rules in the second quarter of 2011. The SEC's deadline for submitting comments on the proposals is March 11, 2011. However, because the new net worth standard was effective upon enactment of Dodd-Frank, the SEC is not contemplating a transition period.

Conclusion

The SEC requested comments on a number of aspects of the proposal and it is possible that the final rules may differ in material respects from the proposal. We can assist in evaluating these issues, preparing to address the new rules and drafting proposed comments to the SEC regarding the proposal.

Additional Information

The Hunton & Williams Private Investment Fund practice group regularly represents funds, sponsors and a variety of investors in all types of private investment fund matters, including structuring, formation, offerings and compliance. We will continue to monitor the progress of the SEC's rulemaking to implement Dodd-Frank's requirements relating to investment advisers as well as relevant trends in private investment fund regulation.

For additional information on financial industry recovery proposals, see our related memoranda, available on www.huntonfinancialindustryrecovery.com. For additional information on recent legislation and regulations relating to regulation of private investment funds and their advisers, see our prior memoranda available on our website at www.hunton.com.

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