Investment Advisers Faced a Tumultuous Regulatory Year

By Gisella Rivera

In 2011, the executive, legislative and judicial branches of the U.S. government focused their not inconsiderable efforts on the regulatory regime surrounding investment advisers. This article provides an overview of selected court decisions, and regulatory and legislative actions significantly affecting the asset management business.

Private Right of Action

An investor's private right of action for securities fraud has been judicially created by courts in cases where no such remedy is explicitly provided for in the law. In 2011, courts in *Curran v. Principal Management* Corporation and *Janus Capital Group v. First Derivative Traders* have narrowed the application of these rights, giving investment advisers bright line rules in determining their liability under the causes of action brought therein.…

Exemptions from Registration Under the Advisers Act

By Gisella Rivera

Pursuant to final rules adopted by the Securities and Exchange Commission ("SEC") effective July 21, 2011, family offices, foreign private advisers and investment advisers to venture capital funds and to private funds with assets under management of less than $150 million are exempt from registration under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). These exemptions are mutually exclusive and an adviser relying on one exemption may not rely on another. Further, advisers who choose to rely on the exemption from registration provided to advisers of venture capital funds (the "venture capital fund exemption") or to advisers of private funds with assets under management of less than $150 million (the "private fund exemption") are still subject to certain reporting requirements under the Advisers Act and may be required to register with state securities authorities pursuant to state securities laws. Investment advisers who formerly relied on an exemption from registration pursuant to Section 203(b) (3) of the Advisers Act and who are not otherwise eligible for an exemption from registration under the foregoing final rules must register with the SEC no later than March 30, 2012, which would require filing a registration application with the SEC no later than February 14, 2012.

Below is a brief discussion of some of the finer points of the above recently issued SEC final rules.…

Through the Looking Glass (Inside the World of Private Funds)

By Gisella Rivera

This article seeks to present how recent regulatory initiatives benefit investors who have invested, or are looking to invest, in private funds. Private fund industry participants, particularly compliance officers of private fund advisers, closely monitor proposed regulations to determine how such proposals affect the business and operations of private fund advisers. Compliance officers may find viewing regulatory initiatives from an investor's perspective advantageous in effectively implementing and designing policies and procedures in response to regulatory changes.

"How nice it would be if we could only get through into Looking-glass House!"

To some extent, investors must have echoed Alice's feelings when viewing the world of private funds through the lenses of advisers to private funds.

The world of private funds is just that… private… so private that the Dodd-Frank Act described it as a "shadow financial system." Investors who want to invest in private funds do so by appointment only. Securities of these private funds are offered generally through a private placement which requires that the information on the offering is not made available to the general public. Similarly, information on private fund advisers who are exempt from registration with the SEC is generally not available to the public. Accordingly, in most cases, an investor looking to invest, or who has invested, in a private fund managed by an adviser exempt from SEC registration would rely, to a great extent, on the adviser's agreement to provide information regarding itself and the private fund it manages…

Accredited Investor Today Not Tomorrow

By Gisella Rivera

Beginning July 21, 2010, who can buy and to whom companies can sell privately placed securities changed when President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Individual investors can no longer include the value of their primary residence when calculating their net worth for purposes of determining whether they are eligible, as "accredited investors," to purchase unregistered and unlisted securities issued by companies in private placements.

Under the U.S. Securities Act of 1933 (the “Securities Act”), an individual investor qualifies as an accredited investor when, at the time of purchase, he has a net worth (or a joint net worth with his spouse) that is at least $1,000,0002 or an income of $200,000 (or a joint income with his spouse of $300,000) in each of the two most recent years and has a reasonable expectation of reaching the same income level in the year of investment

This change is meant to address concerns by U.S. regulators that an increasing number of individual investors qualified as accredited investors primarily due to inflation and rising real estate prices. Regulators were apprehensive that individual investors to whom offers of privately placed securities were made did not have, at the time of purchase, the requisite sophistication and financial knowledge necessary to fully understand the risks underlying such investments…