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REFERENCE TITLE: private fund advisers; exemption

State of Arizona
Senate
Fifty-second Legislature
Second Regular Session
2016

SB 1005

Introduced by
Senators Farnsworth D: Shooter; Representatives Cobb, Lawrence, Norgaard, Petersen, Thorpe, Townsend

AN ACT

AMENDING SECTION 44-3152, ARIZONA REVISED STATUTES; RELATING TO INVESTMENT MANAGEMENT.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 44-3152, Arizona Revised Statutes, is amended to read:

44-3152. Exemption of certain investment advisers and investment adviser representatives; private fund adviser exemption; definitions

A. An investment adviser is not required to be licensed or make a notice filing under this chapter if that investment adviser does not have a place of business in this state and either:

1. Its only clients in this state are investment companies, other investment advisers, dealers, depository institutions, insurance companies, employee benefit plans with assets of not less than one million dollars and governmental agencies or instrumentalities, whether acting for themselves or as trustees with investment control.

2. During the preceding twelve months it had fewer than six clients who are residents of this state other than those clients specified in paragraph 1 OF THIS SUBSECTION.

B. AN INVESTMENT ADVISER IS NOT REQUIRED TO BE LICENSED OR MAKE A NOTICE FILING UNDER THIS CHAPTER IF THAT INVESTMENT ADVISER IS A PRIVATE FUND ADVISER WHO:

1. SATISFIES EACH OF THE FOLLOWING CONDITIONS:

(a) THE PRIVATE FUND ADVISER OR ANY OF ITS ADVISORY AFFILIATES ARE NOT SUBJECT TO AN EVENT THAT WOULD DISQUALIFY AN ISSUER UNDER SEC RULE 262 OF REGULATION A (17 CODE OF FEDERAL REGULATIONS SECTION 230.262).

(b) THE PRIVATE FUND ADVISER TO A QUALIFYING PRIVATE FUND THAT IS NOT A VENTURE CAPITAL COMPANY FILES WITH THE COMMISSION EACH REPORT AND EACH REPORT AMENDMENT THAT THE INVESTMENT ADVISER IS REQUIRED TO FILE WITH THE SEC PURSUANT TO SEC RULE 204-4 (17 CODE OF FEDERAL REGULATIONS SECTION 275.204-4). THE PRIVATE FUND ADVISER SHALL ELECTRONICALLY FILE THE REPORTS WITH THE COMMISSION THROUGH THE IARD. A REPORT IS DEEMED FILED WHEN THE REPORT AND THE FEE REQUIRED BY SUBDIVISION (c) OF THIS PARAGRAPH ARE ACCEPTED BY THE IARD ON THIS STATE'S BEHALF.

(c) THE PRIVATE FUND ADVISER TO A QUALIFYING PRIVATE FUND THAT IS NOT A VENTURE CAPITAL COMPANY HAS PAID A FEE OF ONE HUNDRED TWENTY-FIVE DOLLARS TO THE COMMISSION FOR EACH CALENDAR YEAR IN WHICH IT RELIES ON THE EXEMPTION PROVIDED BY THIS SUBSECTION.

2. EXCEPT AS PROVIDED IN SUBSECTION H OF THIS SECTION, ADVISES AT LEAST ONE RETAIL BUYER FUND AND WHO COMPLIES WITH PARAGRAPH 1 OF THIS SUBSECTION AND ALL OF THE FOLLOWING REQUIREMENTS WITH RESPECT TO EACH RETAIL BUYER FUND ADVISED BY THE PRIVATE FUND ADVISER:

(a) THE PRIVATE FUND ADVISER ONLY ADVISES THOSE RETAIL BUYER FUNDS WHOSE OUTSTANDING SECURITIES, OTHER THAN SHORT-TERM PAPER, ARE BENEFICIALLY OWNED ENTIRELY BY EITHER:

(i) ANY PERSON WHO, AT THE TIME THAT THE SECURITIES ARE SOLD, THE PRIVATE FUND ADVISER REASONABLY BELIEVES TO BE AN ACCREDITED INVESTOR AS

DEFINED IN SEC RULE 501(a) OF REGULATION D (17 CODE OF FEDERAL REGULATIONS SECTION 230.501(a)) OR WHO IS A MANAGER, DIRECTOR, OFFICER OR EMPLOYEE OF THE PRIVATE FUND ADVISER.

(ii) ANY PERSON THAT OBTAINS THE SECURITY THROUGH A TRANSFER NOT INVOLVING A SALE OF THAT SECURITY.

(b) AT OR BEFORE THE TIME OF PURCHASE OF ANY SECURITY OF A RETAIL BUYER FUND, THE PRIVATE FUND ADVISER DISCLOSES IN WRITING TO THE PURCHASER OF THE SECURITY BOTH OF THE FOLLOWING:

(i) ALL SERVICES, IF ANY, TO BE PROVIDED BY THE INVESTMENT ADVISER TO A PURCHASER OF SECURITIES OF THE RETAIL BUYER FUND AND TO THE RETAIL BUYER FUND ITSELF.

(ii) ALL DUTIES, IF ANY, THAT THE INVESTMENT ADVISER OWES TO A PURCHASER OF SECURITIES OF THE RETAIL BUYER FUND AND TO THE RETAIL BUYER FUND ITSELF.

(c) THE PRIVATE FUND ADVISER OBTAINS ON AN ANNUAL BASIS AUDITED FINANCIAL STATEMENTS OF EACH RETAIL BUYER FUND THAT IS ADVISED BY THE PRIVATE FUND ADVISER AND DELIVERS A COPY OF THE AUDITED FINANCIAL STATEMENTS TO EACH PURCHASER OF SECURITIES OF THE RETAIL BUYER FUND. THIS SUBDIVISION DOES NOT APPLY TO A LIMITED RETAIL BUYER FUND WITH RESPECT TO ANY ANNUAL PERIOD FOR WHICH EACH OWNER OF OUTSTANDING SECURITIES OF THE LIMITED RETAIL BUYER FUND HAS WAIVED THE APPLICATION OF THIS SUBDIVISION AFTER THE BEGINNING OF THE ANNUAL PERIOD TO WHICH THE WAIVER APPLIES.

C. IF A PRIVATE FUND ADVISER IS REGISTERED WITH THE SEC, THE PRIVATE FUND ADVISER IS NOT ELIGIBLE FOR THE EXEMPTION PROVIDED BY SUBSECTION B OF THIS SECTION.

D. A PERSON IS NOT REQUIRED TO BE LICENSED OR TO MAKE A NOTICE FILING UNDER THIS CHAPTER IF THE PERSON IS EMPLOYED BY OR ASSOCIATED WITH AN INVESTMENT ADVISER THAT IS NOT REQUIRED TO BE LICENSED OR MAKE A NOTICE FILING UNDER THIS CHAPTER PURSUANT TO SUBSECTION B OF THIS SECTION AND THE PERSON DOES NOT OTHERWISE ACT AS AN INVESTMENT ADVISER REPRESENTATIVE.

E. AN INVESTMENT ADVISER WHO BECOMES INELIGIBLE FOR THE EXEMPTION PROVIDED BY SUBSECTION B OF THIS SECTION MUST COMPLY WITH ALL APPLICABLE LAWS AND RULES REQUIRING LICENSING OR NOTICE FILING WITHIN NINETY DAYS AFTER THE DATE THAT THE INVESTMENT ADVISER'S ELIGIBILITY FOR THE EXEMPTION CEASES.

F. SUBSECTION B, PARAGRAPH 1, SUBDIVISION (a) OF THIS SECTION DOES NOT APPLY ON A SHOWING OF GOOD CAUSE AND WITHOUT PREJUDICE TO ANY OTHER COMMISSION ACTION IF THE COMMISSION DETERMINES THAT IT IS NOT NECESSARY UNDER THE CIRCUMSTANCES THAT AN EXEMPTION BE DENIED.

G. COMPLIANCE WITH SUBSECTION B, PARAGRAPH 2, SUBDIVISION (b) OF THIS SECTION DOES NOT RELIEVE A PRIVATE FUND ADVISER OF ANY DISCLOSURE OBLIGATION UNDER ANY OTHER STATE OR FEDERAL LAW.

H. AN INVESTMENT ADVISER TO A RETAIL BUYER FUND THAT EXISTED BEFORE SEPTEMBER 1, 2016 AND THAT DOES NOT SATISFY THE CONDITIONS PRESCRIBED BY SUBSECTION B, PARAGRAPH 2, SUBDIVISION (a) OF THIS SECTION ON SEPTEMBER 1,

2016 MAY BE ELIGIBLE FOR THE EXEMPTION PRESCRIBED BY SUBSECTION B, PARAGRAPH 1 OF THIS SECTION IF ALL OF THE FOLLOWING CONDITIONS ARE SATISFIED:

1. BEGINNING ON SEPTEMBER 1, 2016, THE RETAIL BUYER FUND CEASES TO SELL SECURITIES TO PERSONS OTHER THAN THE PERSONS DESCRIBED IN SUBSECTION B, PARAGRAPH 2, SUBDIVISION (a), ITEM (i) OF THIS SECTION.

2. THE INVESTMENT ADVISER DISCLOSES IN WRITING THE INFORMATION DESCRIBED IN SUBSECTION B, PARAGRAPH 2, SUBDIVISION (b) OF THIS SECTION TO EACH PURCHASER OF SECURITIES OF THE RETAIL BUYER FUND BY DECEMBER 1, 2016.

3. FOR EVERY FISCAL YEAR ENDING AFTER AUGUST 31, 2016, THE INVESTMENT ADVISER DELIVERS AUDITED FINANCIAL STATEMENTS TO EACH OWNER OF SECURITIES OF THE RETAIL BUYER FUND AS REQUIRED BY SUBSECTION B, PARAGRAPH 2, SUBDIVISION (c) OF THIS SECTION.

~~B.~~ I. If the commission determines that it is not necessary for any investment adviser or class of investment advisers or investment adviser representative or class of investment adviser representatives to be licensed to protect the public interest because of the special characteristics of the securities or transactions in which the investment adviser or investment adviser representative may be involved, the commission may by rule or order provide limited licensure requirements or exempt these persons from licensure under this article.

~~C.~~ J. A dealer or salesman that is registered with the commission pursuant to chapter 12, article 9 of this title is not required to be licensed, make a notice filing or comply with reporting requirements under this article.

~~D.~~ K. The authorized use of the designation "chartered financial consultant" by an insurance producer licensed by the department of insurance does not in and of itself constitute holding oneself out to the public as an investment adviser or require a license under this article.

L. SUBSECTION B OF THIS SECTION DOES NOT EXEMPT AN INVESTMENT ADVISER WHO HAS CUSTODY OF ANY SECURITIES OR FUNDS OF ANY CLIENT FROM COMPLYING WITH COMMISSION RULES RELATING TO THE CUSTODY OF CLIENT FUNDS OR SECURITIES BY INVESTMENT ADVISERS.

M. FOR THE PURPOSES OF THIS SECTION:

1. "ADVISORY AFFILIATE" HAS THE SAME MEANING PRESCRIBED IN THE GLOSSARY OF TERMS TO FORM ADV, WHICH IS THE UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION (17 CODE OF FEDERAL REGULATIONS SECTION 279.1) OR ITS SUCCESSOR FORM.

2. "AFFILIATED PERSON" MEANS A PERSON THAT CONTROLS, IS CONTROLLED BY OR IS UNDER COMMON CONTROL WITH THE OTHER SPECIFIED PERSONS.

3. "CONTROL" MEANS POSSESSING, DIRECTLY OR INDIRECTLY, THE POWER TO DIRECT OR CAUSE THE DIRECTION OF MANAGEMENT AND POLICIES.

4. "DERIVATIVE INVESTMENT" MEANS AN ACQUISITION OF SECURITIES BY A VENTURE CAPITAL COMPANY IN THE ORDINARY COURSE OF ITS BUSINESS IN EXCHANGE FOR AN EXISTING VENTURE CAPITAL INVESTMENT, EITHER ON THE EXERCISE OR CONVERSION OF THE EXISTING VENTURE CAPITAL INVESTMENT OR IN CONNECTION WITH A

PUBLIC OFFERING OF SECURITIES OR THE MERGER OR REORGANIZATION OF THE OPERATING COMPANY TO WHICH THE EXISTING VENTURE CAPITAL INVESTMENT RELATES.

5. "ENTITY" MEANS A PARTNERSHIP, CORPORATION, TRUST, LIMITED LIABILITY COMPANY, LIMITED LIABILITY PARTNERSHIP, SOLE PROPRIETORSHIP OR OTHER ORGANIZATION.

6. "LIMITED RETAIL BUYER FUND" MEANS A RETAIL BUYER FUND THAT SATISFIES ALL OF THE FOLLOWING CONDITIONS:

(a) HAS NO MORE THAN, OR THE PRIVATE FUND ADVISER REASONABLY BELIEVES THAT THE FUND HAS NO MORE THAN, FIFTEEN PURCHASERS OF SECURITIES, INDIVIDUALLY OR COLLECTIVELY WITH ALL OTHER LIMITED RETAIL BUYER FUNDS, THAT ARE ADVISED BY THE PRIVATE FUND ADVISER OR AN AFFILIATED PERSON.

(b) EACH PURCHASER OF SECURITIES FROM THE LIMITED RETAIL BUYER FUND THAT IS NOT A QUALIFIED PURCHASER, AS DEFINED IN SECTION 2(a)(51) OF THE INVESTMENT COMPANY ACT OF 1940, HAS THE KNOWLEDGE AND EXPERIENCE IN FINANCIAL AND BUSINESS MATTERS SO THAT THE PURCHASER IS CAPABLE OF EVALUATING THE MERITS AND RISKS OF THE PROSPECTIVE INVESTMENT, OR THE PRIVATE FUND ADVISER REASONABLY BELIEVES THAT EACH PURCHASER IS CAPABLE OF EVALUATING THE MERITS AND RISKS OF THE PROSPECTIVE INVESTMENT IMMEDIATELY BEFORE THE INVESTMENT.

(c) THE PRIVATE FUND ADVISER AND ANY AFFILIATED PERSON DO NOT HOLD THEMSELVES OUT TO THE PUBLIC AS AN INVESTMENT ADVISER AND THE PRIVATE FUND ADVISER AND ANY AFFILIATED PERSON DO NOT ACT AS AN INVESTMENT ADVISER TO ANY INVESTMENT COMPANY REGISTERED UNDER THE INVESTMENT COMPANY ACT OF 1940.

(d) THE PRIVATE FUND ADVISER AND ANY AFFILIATED PERSON HAVE NOT OFFERED OR SOLD ANY SECURITIES OF THE LIMITED RETAIL BUYER FUND BY ANY FORM OF GENERAL SOLICITATION OR GENERAL ADVERTISING.

7. "MANAGEMENT RIGHTS" MEANS THE RIGHT, OBTAINED CONTRACTUALLY OR THROUGH OWNERSHIP OF SECURITIES, EITHER THROUGH ONE PERSON ALONE OR IN CONJUNCTION WITH ONE OR MORE PERSONS ACTING TOGETHER OR THROUGH AN AFFILIATED PERSON, TO SUBSTANTIALLY PARTICIPATE IN, SUBSTANTIALLY INFLUENCE THE CONDUCT OF OR PROVIDE OR OFFER TO PROVIDE SIGNIFICANT GUIDANCE AND COUNSEL CONCERNING THE MANAGEMENT, OPERATIONS OR BUSINESS OBJECTIVES OF THE OPERATING COMPANY IN WHICH THE VENTURE CAPITAL INVESTMENT IS MADE.

8. "OPERATING COMPANY":

(a) MEANS AN ENTITY THAT IS PRIMARILY ENGAGED, DIRECTLY OR THROUGH A MAJORITY OWNED SUBSIDIARY, IN THE PRODUCTION OR SALE, INCLUDING ANY RESEARCH OR DEVELOPMENT, OF A PRODUCT OR SERVICE OTHER THAN THE MANAGEMENT OR INVESTMENT OF CAPITAL.

(b) DOES NOT INCLUDE AN INDIVIDUAL OR SOLE PROPRIETORSHIP.

9. "PERSON" MEANS AN INDIVIDUAL OR AN ENTITY.

10. "PRIVATE FUND ADVISER" MEANS AN INVESTMENT ADVISER WHO PROVIDES ADVICE SOLELY TO ONE OR MORE QUALIFYING PRIVATE FUNDS.

11. "QUALIFYING PRIVATE FUND" MEANS AN ISSUER THAT QUALIFIES FOR THE EXCLUSION FROM THE DEFINITION OF AN INVESTMENT COMPANY UNDER SECTION 3(c)(1), 3(c)(5) OR 3(c)(7) OF THE INVESTMENT COMPANY ACT OF 1940.

12. "RETAIL BUYER FUND" MEANS A QUALIFYING PRIVATE FUND THAT IS NEITHER A VENTURE CAPITAL COMPANY NOR A QUALIFYING PRIVATE FUND THAT QUALIFIES FOR THE EXCLUSION FROM THE DEFINITION OF AN INVESTMENT COMPANY UNDER SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT OF 1940.

13. "VENTURE CAPITAL COMPANY" MEANS AN ENTITY THAT SATISFIES AT LEAST ONE OF THE FOLLOWING CONDITIONS:

(a) THE ENTITY IS A VENTURE CAPITAL FUND AS DEFINED IN SEC RULE 203(l)-1 (17 CODE OF FEDERAL REGULATIONS SECTION 275.203(l)-1).

(b) THE ENTITY IS A VENTURE CAPITAL OPERATING COMPANY AS DEFINED IN SEC RULE 2510.3-101(d) (29 CODE OF FEDERAL REGULATIONS SECTION 2510.3-101(d)).

(c) ON AT LEAST ONE OCCASION DURING THE ANNUAL PERIOD COMMENCING WITH THE DATE OF ITS INITIAL CAPITALIZATION, AND ON AT LEAST ONE OCCASION DURING EACH ANNUAL PERIOD THEREAFTER, AT LEAST FIFTY PERCENT OF ITS ASSETS OTHER THAN SHORT-TERM INVESTMENTS PENDING LONG-TERM COMMITMENT OR DISTRIBUTION TO INVESTORS, VALUED AT COST, ARE VENTURE CAPITAL INVESTMENTS OR DERIVATIVE INVESTMENTS.

14. "VENTURE CAPITAL INVESTMENT" MEANS AN ACQUISITION OF SECURITIES OF AN OPERATING COMPANY AS TO WHICH THE INVESTMENT ADVISER, THE ENTITY ADVISED BY THE INVESTMENT ADVISER OR AN AFFILIATED PERSON OF EITHER HAS OR OBTAINS MANAGEMENT RIGHTS.

Sec. 2. Effective date

Section 44-3152, Arizona Revised Statutes, as amended by this act, is effective from and after August 31, 2016.