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**ATTORNEY GENERAL**

CHAPTER 13

Statutory Authority: 1976 Code Sections 35‑1‑101 et seq.

13‑203. Recognized Securities Manuals.

13‑415. Registration Exemption for Investment Advisers to Private Funds. (New)

13‑416. Registration Exemption for Merger and Acquisition Brokers. (New)

**Synopsis:**

The Office of the Attorney General proposes to update, amend, and promulgate regulations regarding exemptions from registrations requirements, including for securities offerings relying on S.C. Code Ann Section 35‑1‑202(2), advisers to certain private funds, and merger and acquisition brokers. The Notice of Drafting regarding this regulation was published on September 27, 2024, in the *State Register*.

**Instructions:**

Regulation 13‑203 is to be amended and printed as provided below. Regulations 13‑415 and 13‑416 are to be printed immediately following R. 13‑414. All other sections of Chapter 13 not mentioned below are to remain unchanged.

~~Indicates Matter Stricken~~

Indicates New Matter

**Text:**

13‑203. Recognized Securities Manuals.

The following securities manuals are recognized under the provisions of Section 35‑1‑202(2)(D) of the South Carolina Uniform Securities Act of 2005, and the inclusion in any one of these manuals of the information specified in this Section concerning the issuer of the security, exempts such security from the requirements of Sections 35‑1‑301 through 35‑1‑306 and 35‑1‑504 of the South Carolina Uniform Securities Act of 2005: ~~S&P Capital IQ Standard Corporation Descriptions;~~ Mergent’s Manuals; OTC Markets Group, Inc. with respect to securities included in the OTCQX and OTCQB markets.

13‑415. Registration Exemption for Investment Advisers to Private Funds.

A. Definitions. For purposes of this regulation, the following definitions shall apply:

(1) “3(c)(1) fund” means a qualifying private fund that is eligible for the exclusion from the definition of an investment company under Section 3(c)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a‑3(c)(1)).

(2) “Private fund adviser” means an investment adviser who provides advice solely to one or more qualifying private funds.

(3) “Qualifying private fund” means a private fund that meets the definition of a qualifying private fund in SEC Rule 203(m)‑1 (17 C.F.R. 275.203(m)‑1).

(4) “Venture capital fund” means a private fund that meets the definition of a venture capital fund in SEC Rule 203(l)‑1 (17 C.F.R. 275.203(l)‑1).

B. Exemption for Private Fund Advisers. Subject to the additional requirements of section C below, a private fund adviser shall be exempt from the registration requirements of Section 35‑1‑403 of the Act if the private fund adviser satisfies each of the following conditions:

(1) Neither the private fund adviser nor any of its advisory affiliates are subject to an event that would disqualify an issuer under Rule 506(d)(1) of SEC Regulation D (17 C.F.R. 230.506(d)(1));

(2) The private fund adviser files with the State each report and amendment thereto that an exempt reporting adviser is required to file with the Securities and Exchange Commission pursuant to SEC Rule 204‑4 (17 C.F.R. 275.204‑4); and

(3) The private fund adviser pays the fees specified in Section 35‑1‑702 of the Act for Investment Advisers.

C. Additional Requirements for Private Fund Advisers to Certain 3(c)(1) Funds. In order to qualify for the exemptions described in section B above, a private fund adviser who advises at least one 3(c)(1) fund that is not a venture capital fund shall, in addition to satisfying each of the conditions specified in subsections B(1) through B(3), comply with the following requirements:

(1) The private fund adviser shall advise only those 3(c)(1) funds (other than venture capital funds) whose outstanding securities (other than short‑term paper) are beneficially owned entirely by persons who, at the time that the securities are purchased from the issuer, would each either meet the definition of (i) an accredited investor in SEC Rule 501(a) (17 C.F.R. 230.501(a)), or (ii) a qualified client as defined in SEC Rule 205‑3(d) (17 C.F.R. 275.205‑3(d)) under the Investment Advisers Act of 1940 (or by persons that have subsequently acquired such securities by gift or bequest, or pursuant to an agreement related to a legal separation or divorce);

(2) At the time of purchase, the private fund adviser shall disclose the following in writing to each beneficial owner of a 3(c)(1) fund that is not a venture capital fund:

(a) All services, if any, to be provided to individual beneficial owners;

(b) All duties, if any, the private fund adviser owes to the beneficial owners; and

(c) Any other material information affecting the rights or responsibilities of the beneficial owners;

(3)(a) The private fund adviser shall obtain on an annual basis audited financial statements of each 3(c)(1) fund that is not a venture capital fund, and shall deliver a copy of such audited financial statements to each beneficial owner of the fund within 120 days of the end of the fiscal year (or 150 days for a fund of funds);

(b) If a 3(c)(1) fund that is not a venture capital fund begins operations more than 180 days into a fiscal year, the private fund adviser need not comply with subsection (3)(a) above for that initial fiscal year, provided that the financial audit for the fiscal year immediately succeeding this period is supplemented by, or includes, a financial audit of the initial fiscal year; and

(4) A private fund adviser may not enter into, perform, renew, or extend an investment advisory contract that provides for compensation to the private fund adviser on the basis of a share of (i) the capital gains upon (ii) or the capital appreciation of, the funds, or any portion of the funds, of an investor who is not a qualified client unless the private fund adviser discloses in writing to the client all material information concerning the proposed fee arrangement, including the following:

(a) The fee arrangement may create an incentive for the private fund adviser to make investments that are riskier or more speculative than would be the case in the absence of a performance fee;

(b) Where relevant, that the private fund adviser may receive increased compensation with regard to unrealized appreciation as well as realized gains in the client’s account;

(c) The periods that will be used to measure investment performance throughout the contract and their significance in the computation of the fee;

(d) The nature of any index that will be used as a comparative measure of investment performance, the significance of the index, and the reason the private fund adviser believes that the index is appropriate; and

(e) Where the private fund adviser’s compensation is based in part on the unrealized appreciation of securities for which market quotations are not readily available within the meaning of Rule 2a‑4(a)(1) under the Investment Company Act of 1940, how the securities will be valued and the extent to which the valuation will be independently determined.

D. Private fund advisers that manage funds aggregating less than $25 million shall be exempt from the provisions of subsections B(2), B(3), and C(3) above.

E. Federal Covered Investment Advisers. If a private fund adviser is registered with the Securities and Exchange Commission, the adviser shall not be eligible for this exemption and shall comply with the state notice filing requirements applicable to federal covered investment advisers in Section 35‑1‑405 of the Act.

F. Investment Adviser Representatives. A person is exempt from the registration requirements of Section 35‑1‑404 of the Act if he or she is employed by or associated with an investment adviser that is exempt from registration in this state pursuant to this regulation and does not otherwise act as an investment adviser representative.

G. Electronic Filing. The report filings described in subsection B(2) above shall be made electronically through the IARD. A report shall be deemed filed when the report and the fee required by Section 35‑1‑702 of the Act are filed and accepted by the IARD on the state’s behalf.

H. Transition. An investment adviser who becomes ineligible for the exemption provided by this regulation must comply with all applicable laws and rules requiring registration or notice filing within ninety (90) days from the date the investment adviser’s eligibility for this exemption ceases; provided that R. 13‑502(A)(18) shall not apply to any investment adviser exempt from registration by this regulation or to the performance of any advisory contract entered into by such investment adviser at a time when such investment adviser was exempt from registration by this regulation.

I. Waiver Authority with Respect to Statutory Disqualification. Subsection B(1) above shall not apply upon a showing of good cause and without prejudice to any other action of the Securities Commissioner, if the Securities Commissioner determines that it is not necessary under the circumstances that an exemption be denied.

J. Cross References. Where in this regulation reference is made to specific state and federal laws, it shall be understood that such references are intended to include such laws as they now exist or may hereafter be amended so as to carry out the intent of this regulation, unless the contrary is provided herein.

K. Nothing in this exemption is intended to relieve or should be construed as in any way relieving an investment adviser from the anti‑fraud provisions of the Act.

13‑416. Registration Exemption for Merger and Acquisition Brokers.

A. Except as provided in sections B and C below, a Merger and Acquisition Broker shall be exempt from registration pursuant to Section 35‑1‑401.

B. Excluded Activities. A Merger and Acquisition Broker is not exempt from registration under this regulation if such broker does any of the following:

(1) directly or indirectly, in connection with the transfer of ownership of an eligible privately held company, receives, holds, transmits, or has custody of the funds or securities to be exchanged by the parties to the transaction;

(2) engages on behalf of an issuer in a public offering of any class of securities that is registered, or is required to be registered, with the United States Securities and Exchange Commission under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 781, or with respect to which the issuer files, or is required to file, periodic information, documents, and reports under the Securities Exchange Act of 1934 Section 15 subsection (d), 15 U.S.C. 78o(d);

(3) engages on behalf of any party in a transaction involving a shell company, other than a business combination related shell company;

(4) directly, or indirectly through any of its affiliates, provides financing related to the transfer of ownership of an eligible privately held company;

(5) assists any party to obtain financing from an unaffiliated third party without

(a) complying with all other applicable laws in connection with such assistance, including, if applicable, Regulation T (12 C.F.R. 220 et seq.); and

(b) disclosing any compensation in writing to the party;

(6) representing both the buyer and the seller in the same transaction without providing clear written disclosure as to the parties the broker represents and obtaining written consent from both parties to the joint representation;

(7) facilitates a transaction with a group of buyers formed with the assistance of the Merger and Acquisition Broker to acquire the eligible privately held company;

(8) engages in a transaction involving the transfer of ownership of an eligible privately held company to a passive buyer or group of passive buyers; or

(9) binds a party to a transfer of ownership of an eligible privately held company.

C. Disqualifications. A Merger and Acquisition Broker is not exempt from registration under this regulation if such a broker, including any officer, director, member, manager, partner or employee of such broker:

(1) has been barred from association with a broker or dealer by the Securities Commissioner, any state, or any self‑regulatory organization; or

(2) is suspended from association with a broker or dealer.

D. Nothing in this regulation shall be construed to limit any other authority of the Securities Commissioner to exempt any person, or any class of persons, from any provision of the South Carolina Uniform Securities Act of 2005, or from any provision of any rule or regulation thereunder.

E. Definitions. As used in this regulation,

(1) “Business Combination Related Shell Company” means a shell company that is formed by an entity that is not a shell company

(a) solely for the purpose of changing the corporate domicile of that entity solely within the United States; or

(b) solely for the purpose of completing a business combination transaction, as defined under Section 230.165(f) of title 17, Code of Federal Regulations, among one or more entities other than the company itself, none of which is a shell company.

(2) “Control” means the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. There is a presumption of control if, upon completion of a transaction, the buyer or group of buyers

(a) has the right to vote twenty‑five percent or more of a class of voting securities or the power to sell or direct the sale of twenty‑five percent or more of a class of voting securities; or

(b) in the case of a partnership or limited liability company, has the right to receive upon dissolution, or has contributed, twenty‑five percent or more of the capital.

(3) “Eligible Privately Held Company” means a privately held company that meets both of the following conditions:

(a) the company does not have any class of securities registered, or required to be registered, with the United States Securities and Exchange Commission under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 781, or with respect to which the company files, or is required to file, periodic information, documents, and reports under subsection (d), 15 U.S.C. 78o(d); and

(b) in the fiscal year ending immediately before the fiscal year in which the services of the Merger and Acquisition Broker are initially engaged with respect to the securities transaction, the company meets either or both of the following conditions, determined in accordance with the historical financial accounting records of the company:

(i) the earnings of the company before interest, taxes, depreciation, and amortization are less than twenty‑five million dollars; or

(ii) the gross revenues of the company are less than two hundred fifty million dollars.

(4) “Merger and Acquisition Broker” means a broker, and any person associated with a broker engaged in the business of effecting securities transactions solely in connection with the transfer of ownership of an eligible privately held company, regardless of whether the broker acts on behalf of a seller or buyer, through the purchase, sale, exchange, issuance, repurchase, or redemption of, or a business combination involving securities or assets of the eligible privately held company if the broker reasonably believes that

(a) upon consummation of the transaction, any person acquiring securities or assets of the eligible privately held company, acting alone or in concert

(i) will control and, directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company; and

(ii) directly or indirectly, will be active in the management of the eligible privately held company or the business conducted with the assets of the eligible privately held company; and with the assets of the eligible privately held company, including without limitation, for example, by

(A) electing executive officers;

(B) approving the annual budget;

(C) serving as an executive or other executive manager; or

(D) carrying out such other activities as the Securities Commissioner may, by rule, determine to be in the public interest; and

(b) if any person is offered securities in exchange for securities or assets of the eligible privately held company, such person will, prior to becoming legally bound to consummate the transaction, receive or have reasonable access to the most recent fiscal year‑end financial statements of the issuer of the securities as customarily prepared by the management of the issuer in the normal course of operations and, if the financial statements of the issuer are audited, reviewed, or compiled, any related statement by the independent accountant, a balance sheet dated not more than one hundred twenty days before the date of the offer, and information pertaining to the management, business, results of operations for the period covered by the foregoing financial statements, and material loss contingencies of the issuer.

(5) “Shell Company” means a company that at the time of a transaction with an eligible privately held company

(a) has no or nominal operations; and

(b) has no or nominal assets, assets consisting solely of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets.

(F) Inflation Adjustment. Each dollar amount in subsection (E)(3)(b) above shall be adjusted as follows:

(1) on the date that is five years after the date of the enactment of this regulation, and every five years thereafter, by dividing the annual value of the Employment Cost Index For Wages and Salaries, Private Industry Workers, or any successor index, as published by the Bureau of Labor Statistics, for the calendar year preceding the calendar year in which the adjustment is being made by the annual value of such index for the calendar year ending December 31, 2025, and multiplying the quotient obtained by such dollar amount in subsection (E)(3)(b) above; and

(2) each dollar amount determined under subsection (F)(1) above shall be rounded to the nearest multiple of one hundred thousand dollars.

**Fiscal Impact Statement:**

There will be no increased costs to the State or its political subdivisions.

**Statement of Rationale:**

The regulations are being added to reflect updates in state and federal securities laws, keep South Carolina competitive in the financial industry, and to promulgate previously adopted orders of the Securities Commissioner.