

NVCA Suggested Revisions to VC Rule

§ 275.203(l)-1 Venture capital fund defined.

(a) *Venture capital fund defined.* For purposes of section 203(l) of the Act (15 U.S.C. 80b-3(l)), a venture capital fund is any entity described in subparagraph (A), (B), or (C) of section 203(b)(7) of the Act (15 U.S.C. 80b-3(b)(7)) (other than an entity that has elected to be regulated or is regulated as a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53)) or any private fund that:

- (1) Represents to investors and potential investors that it pursues a venture capital strategy;
- (2) Immediately after the acquisition of any asset, other than qualifying investments or short-term holdings, holds no more than 20 percent of the amount of the fund's aggregate capital contributions and uncalled committed capital in assets (other than short-term holdings) that are not qualifying investments, valued at cost or fair value, consistently applied by the fund;
- (3) Does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage (collectively, "borrowing"), in excess of 15 percent of the private fund's aggregate capital contributions and uncalled committed capital, and any such borrowing, ~~indebtedness, guarantee or leverage~~ is for a non-renewable term of no longer than 120 calendar days, ~~except that any:~~
 - (i) Any guarantee by the private fund of a qualifying portfolio company's obligations up to the amount of the value of the private fund's investment in the qualifying portfolio company is not subject to the 120-calendar day limit regardless of the term of the guarantee;
 - (ii) Any borrowing pursuant to a subscription credit facility entered into for the purpose of providing the fund liquidity pending receipt of capital contributions and secured by a pledge of such contributions if the term of the commitment is no longer than 365 days; and
- (4) Only issues securities the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities but may entitle holders to receive distributions made to all holders pro rata; and
- (5) Is not registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8), and has not elected to be treated as a business development company pursuant to section 54 of that Act (15 U.S.C. 80a-53).

(b) *Certain pre-existing venture capital funds.* For purposes of section 203(l) of the Act (15 U.S.C. 80b-3(l)) and in addition to any venture capital fund as set forth in paragraph (a) of this section, a venture capital fund also includes any private fund that:

- (1) Has represented to investors and potential investors at the time of the offering of the private fund's securities that it pursues a venture capital strategy;
- (2) Prior to December 31, 2010, has sold securities to one or more investors that are not related persons, as defined in § 275.206(4)-2(d)(7), of any investment adviser of the private fund; and
- (3) Does not sell any securities to (including accepting any committed capital from) any person after July 21, 2011.

(c) *Definitions.* For purposes of this section:

- (1) *Committed capital* means any commitment pursuant to which a person is obligated to:
 - (i) Acquire an interest in the private fund; or
 - (ii) Make capital contributions to the private fund.

(2) *Equity security* has the same meaning as in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(11)) and § 240.3a11-1 of this chapter.

(3) *Qualifying investment* means:

(i) An equity security issued by a qualifying portfolio company ~~that has been acquired directly by the private fund from the qualifying portfolio company;~~

(ii) Any equity security issued by a qualifying portfolio company in exchange for an equity security issued by the qualifying portfolio company described in paragraph (c)(3)(i) of this section; ~~or~~

(iii) Any equity security issued by a company of which a qualifying portfolio company is a majority-owned subsidiary, as defined in section 2(a)(24) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(24)), or a predecessor, and is acquired by the private fund in exchange for an *equity security* described in paragraph (c)(3)(i) or (c)(3)(ii) of this section; ~~or~~

(iv) Any blockchain token issued by a qualifying portfolio company.

(4) *Qualifying portfolio company* means any company that:

(i) At the time of any investment by the private fund, is ~~not reporting or foreign traded and~~

(A) An “emerging growth company” as that term is defined in Section 2(a)(19) of the Securities Act of 1933 (15 U.S.C. 77a);

(B) Not a reporting or foreign traded company and does not control, is not controlled by, or under common control with another company, directly or indirectly, that is a reporting or foreign traded company and whose securities have been acquired directly by the private fund from the company; or

(C) A venture capital fund, as defined in this section (the “acquired fund”), provided that, immediately after the time of investment:

(1) The amount of the borrowings of the acquired fund attributable to the investment of the private fund (the “acquiring fund”) together with the borrowings of the acquiring fund does not exceed 15 percent of the acquiring fund’s aggregate capital contributions and uncalled committed capital; (2) The amount of the investments of the acquired fund that are not qualifying investments attributable to the investment of the acquiring fund, valued at cost or fair value, together with the value of investments of the acquiring fund that are not qualifying investments, also valued at cost or fair value, does not exceed 20 percent of the acquiring fund’s aggregate capital contributions and uncalled committed capital (other than short-term holdings);

(ii) Does not borrow or issue debt obligations in connection with the private fund's investment in such company and distribute to the private fund the proceeds of such borrowing or issuance in exchange for the private fund's investment; and

(iii) Is not an investment company, a private fund, an issuer that would be an investment company but for the exemption provided by § 270.3a-7 of this chapter, or a commodity pool; unless such company is also a venture capital fund as defined in this section

(5) *Reporting or foreign traded* means, with respect to a company, being subject to the reporting requirements under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), or having a security listed or traded on any exchange or organized market operating in a foreign jurisdiction.

(6) *Short-term holdings* means cash and cash equivalents, as defined in § 270.2a51-1(b)(7)(i) of this chapter, U.S. Treasuries with a remaining maturity of 60 days or less, and shares of an open-end management investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8) that is regulated as a money market fund under § 270.2a-7 of this chapter. For purpose of this definition, cash and cash equivalents include a virtual currency.

(7) Blockchain token means a digital unit of value that was:

(i) Created:

(A) In response to the verification or collection of a specified number of transactions relating to a digital ledger or database;

(B) Based on random selection or the possession or age of existing units; or

(C) Using any combination of the methods specified in subparagraphs (A) and (B);

(ii) Recorded in a digital ledger or database which is chronological, consensus-based and mathematically verifiable in nature, especially relating to the supply of units and their distribution; and

(iii) Capable of being traded or transferred between persons.

(8) Virtual Currency means any token that is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value, although such token may not be legal tender.

Note: For purposes of this section, an investment adviser may treat as a private fund any issuer formed under the laws of a jurisdiction other than the United States that has not offered or sold its securities in the United States or to U.S. persons in a manner inconsistent with being a private fund, provided that the adviser treats the issuer as a private fund under the Act (15 U.S.C.) and the rules thereunder for all purposes.