
House Passes Private Fund Investment Advisers Registration Act

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On December 11, the US House of Representatives approved the Wall Street Reform and Consumer Protection Act of 2009 (the "Act"), a complex and sweeping overhaul of many aspects of financial services regulation. The legislation, among other things, would for the first time regulate the OTC derivatives markets, splitting regulatory oversight between the Commodity Futures Trading Commission and the SEC, create a new Consumer Financial Protection Agency to regulate consumer financial products and services, require registration of advisers to most types of private investment funds, and substantially enhance the SEC's oversight and enforcement authorities.

Title V of the Act includes the Private Fund Investment Advisers Registration Act, which generally requires advisers to private equity funds and other private pools of capital with assets under management of at least \$150 million to register with the SEC.

Existing Exemption:

In its current form, section 203(b) of the Investment Advisers Act generally provides an exemption from the registration requirements to an investment adviser who, during any 12-month period, had fewer than 15 clients and who does not hold himself out generally to the public as an investment adviser. In counting the number of clients of a general partner or management company to a venture capital or private equity fund, the fund itself, rather than the investors therein, is treated as the client.

Amendments Under the Act:

This 15-client exemption is eliminated under the Act, and is replaced with the general requirement (subject to certain exemptions discussed below) that an investment adviser to any private equity fund or other private pool of capital must register with the SEC. The Act provides the following exemptions from this registration requirement:

- **Foreign Advisers:** The Act exempts from registration foreign private fund advisers, which are defined as advisers that (a) had, during the preceding 12 months, (1) fewer than 15 clients and investors in the United States in the private funds of the adviser, and (2) an

aggregate of less than \$25 million in assets under management attributable to clients and investors in the United States in private funds of the adviser; (b) do not have a place of business in the United States; and (c) do not hold themselves out generally to the public as an investment adviser and do not act as an adviser to any registered investment company or business development company.

- **Less than \$150 Million Under Management:** The Act exempts from registration investment advisers to funds with less than \$150 million in assets under management. Such advisers would still be subject to some disclosure and recordkeeping requirements.
- **Venture Capital Funds:** The Act directs the SEC to engage in rulemaking to exempt from registration advisers to venture capital funds (to be defined by the SEC). Such advisers would still be subject to some disclosure and recordkeeping requirements.

The Act further requires registered advisers to maintain and file with the SEC records regarding the amount of assets under management, the use of leverage, including off-balance sheet leverage, counterparty credit risk exposures, trading and investment positions, trading practices and any other information the SEC or the Federal Reserve deem necessary and appropriate.

The Act also directs the SEC to provide registration and examination procedures for advisers to mid-sized private funds, taking into account the level of systemic risk posed by mid-sized funds. The Act does not define mid-sized private funds.

The Senate is expected to act on its counterpart financial services reform bill in the first quarter 2010. The most recently circulated Senate draft was similar to the House bill summarized above in most respects, with the notable difference that the Senate bill preserved exemptions from registration for a broader universe of private fund managers. However, that draft is likely to be superseded by a new draft when the Senate takes up the issue.

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