

Torys on Private Equity

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Obama Administration Proposes Registration of Most Private Fund Advisers

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On July 15, 2009 the Obama administration proposed legislation titled Private Fund Investment Advisers Registration Act of 2009 (the Proposed Legislation), which, if enacted as proposed, would require registration with the Securities and Exchange Commission (SEC) by investment advisers to private funds with assets under management of \$30 million or more.

The Proposed Legislation has two main features. First, it would effectively eliminate the registration exemption (the private adviser exemption) under the Investment Advisers Act of 1940 (the Advisers Act), currently available to all advisers that do not publicize themselves as investment advisers and who have fewer than 15 clients. The exemption would be available only to non-U.S.-based advisers with fewer than 15 U.S. clients and less than \$25 million in U.S.-sourced assets under management. As a result, advisers that have, until now, relied on the private adviser exemption would have to register with the SEC; these include advisers to many types of private investment pools (such as hedge funds, private equity funds and venture capital funds).

The second feature involves giving the SEC record keeping, reporting and inspection authority so that it can gather and share information about “private funds” managed by all registered advisers. Under the Proposed Legislation, a private fund is any fund that

- relies on the exceptions under the definition of “investment company” in the Investment Company Act of 1940 (the 1940 Act), sections 3(c)(1) and 3(c)(7) – that is, issuers with securities owned by no more than 100 persons and that are not making, or proposing to make, a public offering or issuers with securities owned by qualified purchasers and that are not making, or proposing to make, a public offering; and
- is either organized under U.S. law or has 10% or more of its outstanding securities owned by U.S. persons.

In addition to the existing requirements that come with registration, the SEC may require additional reporting by registered advisers, including the following information:

- amount of assets under management
- use of leverage (including off-balance sheet leverage)
- counterparty credit-risk exposures

To discuss these issues, please contact the authors.

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- trading and investment positions
- trading practices
- such other information as the SEC, in consultation with the Federal Reserve, determines necessary or appropriate in the public interest and to protect investors or to enable them to assess systemic risk.

Under the Proposed Legislation, advisers would maintain records of this information and make them available to the SEC upon request. Advisers would also be subject at any time to periodic, special or other examinations by the SEC. The SEC may provide this information on a confidential basis to the Board of Governors of the Federal Reserve System and the Financial Services Oversight Council. It is unclear what other information may be required; however, note that the legislation eliminates the Advisers Act prohibition to disclose the identity of or information about an adviser's client. To protect investors or enable them to assess systemic risk, the Proposed Legislation would also authorize the SEC to require investment advisers to provide reports, records and other documents relating to the private funds to investors, prospective investors, counterparties and creditors.

Three other legislative proposals dealing with fund oversight are currently pending in Congress. First, a Senate bill titled the Hedge Fund Transparency Act is the only proposal that focuses on private funds, as opposed to adviser, registration. It would effectively require any private fund (not just hedge funds) with more than \$50 million to register with the SEC as an investment company under the 1940 Act.

Second, a House of Representatives proposal called the Hedge Fund Adviser Registration Act of 2009 is similar to the Proposed Legislation in that it would also eliminate the private adviser exemption. But the House proposal does not seek to supplement SEC rulemaking authority.

Third, a Senate bill titled the Private Fund Transparency Act of 2009 was introduced in June and is the most similar to the Proposed Legislation. Like the Proposed Legislation, this bill would narrow the private adviser exemption to apply only to non-U.S. advisers with fewer than 15 clients representing less than US\$25 million in assets; it would also broaden SEC authority regarding registered adviser reporting and record keeping, particularly with respect to private funds, but not to the extent contemplated under the Proposed Legislation.

We will continue to follow each of these proposed bills and keep you informed of any developments.

The Proposed Legislation can be accessed [here](#). 