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U.S. House Proposes Registration of Most Private Fund Advisers, Excepting "Venture Capital Fund Advisers"

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On October 27, 2009, the U.S. House of Representatives Financial Services Committee approved out of committee proposed legislation titled the "Private Fund Investment Advisers Registration Act of 2009" (the Proposed Legislation); this is the fifth bill introduced this year to regulate private funds. A vote of the full House and Senate is required for the Proposed Legislation to become law.

A substantially similar (and identically titled) Act proposed by the Obama administration in July 2009 (the July Proposal) is described in Torys' July Private Equity Bulletin.

The Proposed Legislation would eliminate the registration 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 that 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 Securities and Exchange Commission (SEC); these include advisers to many types of private investment pools (such as hedge funds and private equity funds).

The most significant departure from the July Proposal is that the Proposed Legislation would exempt advisers to venture capital funds from the requirement to register under the Advisers Act. The bill leaves it up to the SEC to define the term "venture capital fund" and to draft the exemption.

As in the July Proposal, the Proposed Legislation gives the SEC record-keeping, reporting and inspection authority so that it can gather and share information about "private funds" managed by all registered advisers. However, the Proposed Legislation differs from the July Proposal with respect to reporting requirements in

- granting the SEC the power to set additional different reporting requirements for different classes of private fund advisers, on the basis of the particular types or sizes of private funds they advise, and to classify persons within the SEC's jurisdiction on the basis of size, scope, business model, compensation scheme or potential to create systemic risks;
- allowing the SEC to share systemic risk information with any entity that the SEC identifies as having "systemic risk responsibility"; and
- authorizing the SEC to set record-keeping and reporting requirements for registration-exempt venture capital fund advisers.

To discuss these issues, please contact the authors.

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In addition to the Proposed Legislation and the July Proposal, 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 fund, as opposed to adviser, registration. It would effectively require any private fund (not just hedge funds) with more than $50 million in assets under management to register with the SEC as an investment company under the 1940 Act. (For further details, please see Torys’ February Private Equity Bulletin.)

Second, a different House of Representatives proposal, the “Hedge Fund Adviser Registration Act of 2009,” would simply eliminate the private adviser exemption without any supplement to SEC rulemaking authority, information reporting requirements or the exemption for venture capital fund advisers.

Third, a Senate bill titled the “Private Fund Transparency Act of 2009” is similar to the Proposed Legislation in that it would narrow the private adviser exemption to apply only to non-U.S. advisers with fewer than 15 clients representing less than $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.

The Proposed Legislation can be accessed here.

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