PROSKAUER ROSE LLP

Private Investment Funds Update

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In this issue:

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This Private Investment Funds Update focuses on recent and proposed U.S. federal regulatory and tax changes applicable to fund managers. Given the present political environment and the recent statements of the current Administration, we expect continuing tax and regulatory changes. We will continue to endeavor to keep our clients and friends informed about these changes in future Client Alerts and Private Investment Funds Updates.

SEC Proposes Amendments to "Custody Rule" Affecting Private Investment Fund Advisers

On May 14, 2009, the U.S. Securities and Exchange Commission proposed rule amendments to strengthen the custody controls applicable to investment advisers registered under the Investment Advisers Act of 1940 (the "Advisers Act"). Chairman Mary L. Schapiro noted that the proposed amendments to Advisers Act Rule 206(4)-2, generally known as the "Custody Rule," are in response to recent Ponzi schemes and shaken investor confidence. If passed, the proposed amendments to the Custody Rule would have significant ramifications for registered investment advisers to private investment funds.

Under the proposed amendments, all registered investment advisers with custody of client assets must submit to an annual "surprise" examination by an independent public accountant. The scope of the examination would include "privately placed and uncertificated securities." Within 120 days of the examination the accountant would be required to file a Form ADV-E with the SEC, accompanied by a certificate stating that it has examined funds and securities and describing the nature and extent of the examination. If the accountant finds any "material discrepancy" during the surprise examination, the accountant would be obligated to report it to the SEC within one business day. The accountant would also be obligated to report the termination of its engagement with the investment adviser to the SEC within four business days, including any problems with the examination that led to the termination. The examination requirement will also cover those registered advisers that are deemed to have custody of assets solely as a result of being a general partner or managing member of a private fund or having authority to withdraw advisory fees from client accounts.

An investment adviser that holds client assets directly will be required to obtain an "internal control report" from an independent public accountant that describes custody controls in

place at the advisory firm and provides the results of tests conducted on the effectiveness of those controls. The scope of the internal control report would include privately placed and uncertificated securities held directly by a registered investment adviser.

According to Chairman Schapiro, "[b]y requiring on-site, third party, independent public accountant examinations both to verify client assets and assess the quality of custody controls . . . our proposals would greatly enhance the independent checks on client assets of investment advisers."

The proposed rule also contemplates amending Form ADV in several respects. Under amended Item 7 of Form ADV, a registered investment adviser would be required to report all related persons who are broker-dealers and to identify which, if any, serve as qualified custodians with respect to the adviser's clients' funds or securities. An amended Item 9 would require a registered investment adviser to provide additional information about its custodial practices, including the amount in U.S. dollars of client assets under its custody, and report on its compliance with the Custody Rule.

Currently, a registered investment adviser to a private investment fund may comply with its reporting requirements under the Custody Rule by submitting to a pre-arranged annual audit and by sending the audited financial statements to investors within 120 days after the fund's fiscal year-end (or 180 days for funds-of-funds). Moreover, privately placed and uncertificated securities are currently not subject to the Custody Rule. The proposed amendments to the Custody Rule would preserve the pre-arranged annual audit exemption for private investment funds, but subject private investment fund advisers that are registered with the SEC to an additional annual "surprise" examination and the other requirements described above.

Proposal to Require Swaps and Derivatives to Be Traded on Exchanges

On May 13, 2009, the Treasury Department, along with the Commodity Futures Trading Commission and the SEC, announced their intention to seek legislation that could significantly change how over-the-counter ("OTC") derivatives transactions occur in the United States.

The Treasury stated that commodity regulations and the federal securities laws should be amended to require clearing of all standardized OTC derivatives through clearinghouses. The Treasury suggested that the fact that an OTC derivative is accepted for clearing by a clearinghouse should create a presumption that the OTC derivative is a standardized contract and therefore must be cleared through a clearinghouse.

The Treasury stated that all OTC derivatives dealers and all other firms that create "large exposures" to counterparties should be subject to regulations that, among other things, would impose capital requirements and business standards and set forth mandatory margin requirements in connection with OTC derivatives transactions. Hedge funds and other firms that are active in the OTC derivatives markets could, therefore, find themselves subject to new regulatory requirements with respect to these activities, although the Treasury's

proposal does not specify any criteria for determining whether a firm has created a "large exposure" to one or more of its counterparties and would thus be subject to regulation under the Treasury's proposal.

The Treasury proposal further recommends that the clearing facilities be required to promptly report these transactions.

The Chairman of the SEC has stated that she supports the Treasury proposal.

Restoring Uptick Rule and Other Short Sale Restrictions

The SEC is seeking comment on whether short sale price restrictions or circuit breaker restrictions should be imposed and whether such measures would help market stability and investor confidence. The SEC has proposed several alternative approaches:

1. an uptick rule similar to former Rule 10a-1, the pre-2007 uptick rule (i.e., a rule meant to prohibit short selling a security below its last reported sale price);
2. a modified uptick rule (i.e., a market-wide short sale price test based on the "national best bid" in order to eliminate the issues caused by delayed sale price reporting); and
3. a circuit breaker that would either (i) ban short selling in a particular security for the remainder of the day if there is a severe decline in the price of that security or (ii) impose a short sale price test of the type described in (1) or (2) above in a particular security for the remainder of the day if there is a severe decline in price in that security.

In the proposal, the SEC outlined certain potential exemptions to the uptick rules including: (i) a short sale at the volume-weighted average price of a security during the relevant trading day and (ii) a short sale for bona fide domestic arbitrage (short sale to profit from a price differential between a convertible security and the stock underlying it) or international arbitrage (a short sale to pick up price differences between markets in different countries). In the case of the circuit breaker rule, the SEC proposed exceptions for the automatic exercise or expiration of equity options or future contracts held prior to the triggering of the circuit breaker and certain short sales in connection with bona fide market making.

Comments to the SEC on these proposed rules are due by June 19, 2009.

Proposed EU Rules Targeting Hedge Funds Would Require U.S. Manager to Establish an EU Manager for any Fund Offered in the EU

The European Commission recently published its draft proposed directive (the "Directive") on Alternative Investment Fund Managers ("AIFM"). The Directive, if adopted, will apply to any AIFM established in an EU Member State which provides management or administration services to one or more alternative investment funds ("AIF"). Hedge funds and private equity funds will constitute the majority of AIF; real estate, commodity and infrastructure funds will also be AIF. AIFM managing AIF portfolios with total assets of

less than €100 million will be exempt. In a concession to the private equity industry, AIFM managing AIF portfolios of less than €500 million which are not leveraged and with no redemption rights exercisable for five years following launch also will be exempt. Most importantly for U.S. managers, the Directive also creates an authorization requirement for AIFM, wherever based, who wish to market AIF in the EU.

Non-EU AIFM will need authorization under the Directive in order to market AIF in the EU, even under existing private placement regimes. Such non-EU AIFM could only be authorized if they demonstrate that they are subject to equivalent prudential regulation (*i.e.*, capital requirements) and supervision, that the AIFM's country of incorporation has entered into co-operation agreements with the Member State as to the exchange of tax and supervisory information, and allows similar access for EU AIFM to its markets. U.S. AIFM currently are not subject to any prudential regulation and therefore would not be able to get authorized to market AIF unless they incorporate themselves in the EU and become authorized.

See our Client Alert entitled: "EU Commission Publishes Draft Proposal for Regulating Alternative Investment Fund Managers." This proposal is not expected to be adopted in the near future and is already receiving significant criticism.

FASB Guidance under FASB Statement No. 157 for Fund of Funds

At a May 6, 2009 meeting of the Financial Accounting Standards Board, the FASB determined to provide additional guidance for determining the fair value, in accordance with FASB Statement No. 157, *Fair Value Measurements,* of certain alternative investments, such as limited partner interests in private equity, venture capital and hedge funds. This additional guidance may be particularly significant to funds-of funds. While most investors in a private investment fund have historically valued their limited partner interest based on the most recently reported capital account balance or NAV, with perhaps some adjustments for subsequent contributions and distributions if measuring value after the reporting date, prior guidance from the staff of the FASB had suggested that NAV may not be an appropriate value under FAS 157, which looks to transactions between market participants for the relevant valuation inputs, if there have been transfers of interests in the fund. Because of the varying motivations of sellers of interests in private investment funds, the way that secondary transactions are packaged and structured, and the relative lack of visibility on transfer price, this prior guidance was not appealing. On June 8, 2009 the staff of the FASB issued proposed FSP FAS 157-g, that would permit (but not require) an investor in a private investment fund to estimate the fair value of its interest in the fund using the reported NAV as of the fund's financial statement date, as long as the NAV has been calculated in accordance with the AICPA Audit and Accounting Guide, *Investment Companies.*

In addition to fair value, proposed FSP would require an investor in a private investment fund to disclose the investor's best estimate of the fund's remaining life, the amount of any remaining capital commitments and, for a fund with redemption rights, (a) the terms and conditions upon which the investor may redeem its investment (for example, quarterly redemption with 60 days' notice) and (b) the terms and conditions of any restrictions that would (or could) temporarily preclude redemption by the investor, including the investor's best estimate of when the restriction will lapse.

As a result of the proposed guidance, general partners and sponsors may receive requests for confirmation that their funds apply the investment companies guide.

The proposed FSP is subject to public comment, with comments due by July 8, 2009. The proposed guidance would be effective upon issuance including prior periods for which financial statements have not been issued.

Connecticut Hedge Fund Legislation Dies

Connecticut's Senate passed a bill called "An Act Concerning Hedge Funds" (SB 953) that would have required investment advisers to hedge funds located or doing business in Connecticut to disclose to investors any material conflicts of interest. In addition, hedge funds regulated under the proposed law would have been prohibited from admitting natural person investors who, individually or jointly with a spouse, had less that $2.5 million in investments. The bill appears to have died in Connecticut's House of Representatives on June 3, 2009.

June 30 Deadline for Reporting Foreign Accounts to U.S. Department of Treasury

U.S. persons who have a financial interest in, or who have signature authority over, a foreign financial account generally must file Form TD F 90-22.1 with the Department of Treasury. The filing requirement applies if the aggregate value of all of the U.S. person's foreign financial accounts exceeds $10,000 at any time during the year. This law applies to every person who resides in the United States or is a United States citizen, as well as to every domestic partnership, corporation, estate, and trust (including a tax-exempt organization) who has a financial interest in, or signature authority over, a foreign financial account. The filing deadline to report foreign financial accounts is June 30, 2009. Each failure to file could result in a penalty of up to $10,000, and if the Department of Treasury determines that the failure to file was willful, the penalty is the greater of $100,000 or 50% of the account balance. Criminal penalties may also apply.

A U.S. person generally has a "financial interest" in a foreign financial account if such person holds legal title or is the owner of record of such account. It does not matter for filing purposes whether the U.S. person manages the account for personal benefit or for the benefit of others. Also, if a person holds more than 50% of a partnership's capital or profits, or more than 50% of a corporation's stock (by vote or value), and such partnership or corporation, as applicable, holds legal title to a foreign financial account, that person has

a financial interest in a foreign financial account and must file. Signature authority is fairly straightforward and generally includes the authority to control the disposition of the account's assets.

A "financial account" generally includes any bank, securities, securities derivatives, or other financial instruments accounts, as well as commingled funds (including mutual funds). The term "mutual fund" is not presently defined and thus it is unclear how to apply this term in the investment fund context. For purposes of the filing requirement, a foreign private equity or hedge fund (or other investment fund) could be viewed as a comingled fund and, therefore, a financial account. U.S. persons who have interests in foreign private equity and/or hedge funds should consult their tax advisors regarding whether a filing is required. The examples below set forth how this law affects U.S. persons holding foreign financial accounts.

Foreign fund, foreign master fund, or foreign feeder fund	A foreign fund is not a U.S. person and therefore does not need to file.
Domestic fund	A domestic fund must file if it has an interest in a foreign financial account.
Domestic feeder investing in master fund	If a domestic feeder owns more than a 50% interest in either a domestic or foreign master fund that has a foreign financial account, the domestic feeder must file. Moreover, if the foreign master fund is considered to be a financial account, the domestic feeder would have to file.
U.S. general partner or manager of domestic or foreign fund	The general partner is a U.S. person and should report all of the foreign financial accounts that it owns directly, including any interest in a foreign fund (if the foreign fund is considered to be a financial account).
Employees of the management company (or others with signature authority) who are U.S. citizens or residents	Any individual having signature or other authority over a foreign financial account must file.
U.S. investors in foreign funds	If the foreign fund is considered to be a financial account, a U.S. investor in such foreign fund would have to file.

MFA/AIMA Back Private Investment Fund Registration

Both the Managed Funds Association ("MFA") and the Alternative Investment Management Association ("AIMA") have announced their support for mandatory registration of hedge fund advisers in statements to a U.S. House committee.

MFA President Richard H. Baker and AIMA Chairman W. Todd Groome both testified at a hearing sponsored by the U.S. House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises that their organizations believe the approach taken by H.R. 711, the Hedge Fund Adviser Registration Act of 2009, is the proper approach to hedge fund registration.

H.R. 711 would amend the Investment Advisers Act to repeal the exemption to the registration requirement for any investment adviser who: (1) during the preceding twelve months has had fewer than 15 clients; and (2) neither holds himself or herself out to the public as an investment adviser, nor acts as an investment adviser to any registered investment company or any business development company. For purposes of this exemption, a private investment fund is a single client and most private investment funds, including hedge funds, buy-out funds and venture capital funds, rely on this exemption.

Baker said in his statement that the mandatory registration of investment advisers is the correct approach to the regulation of advisers of all private pools, not just hedge funds. Groome said in his statement that H.R. 711 would "seem to put the US registration approach on substantially the same basis as that operating in the UK." Groome noted, however, that H.R. 711 in its current form would apply to non-U.S. based investment advisers who do not operate from the U.S. if they have one U.S. client. Groome noted that this would raise serious issues regarding the need to dual register (a process many countries have been strongly trying to discourage). Groome also suggested that an exemption for managers with less than US$500 million in assets under management would make sense.

Placement Agent/Pay to Play Investigations Spread and Intensify

The New York Attorney General (NYAG) and the SEC recently announced three more significant developments in their continuing investigation into abuses in the pension fund arena. On May 12, they announced that Julio Ramirez, an unlicensed placement agent formerly associated with two Los Angeles firms, Wetherly Capital and Blackstone affiliate Park Hill, pled guilty to securities fraud under New York's Martin Act and was added as a defendant in a pending SEC enforcement case filed on March 19, 2009. Neither Wetherly nor Park Hill has been implicated. Two days later, on May 14, the NYAG announced a $20 million settlement with The Carlyle Group for having retained, at Ramirez's urging, Henry "Hank" Morris as its placement agent. Morris was formerly chief fundraiser for New York Comptroller, Alan Hevesi. Morris was charged in a 123 count indictment, along with David Loglisci, former Chief Investment Officer of the New York State Common Retirement Fund (NYCRF), with having conducting a pay-to-play kick-back scheme that interfered with NYCRF's selection of investment managers. On June 11, the NYAG announced an agreement with Riverstone Holdings LLC to pay $30 million to the NYCRF as restitution. Riverstone and Carlyle had teamed up to form three funds in which the NYCRF invested between 2003 and 2005 and they had retained Searle & Co, a company associated with Hank Morris, as placement agent in connection with the investments.

These developments come on the heels of the recent issuance by the NYAG of more than 100 subpoenas and formation of a 36-state task force to investigate placement agents and potential pay-to-play activities in the public pension fund advisory business. What began as

a New York state investigation has expanded to include investigations and reviews by regulators, pension funds and investigative reporters across the country that now touches New York City, Connecticut, Texas (Dallas), New Mexico and California, including CalPERS (the nation's largest public pension fund) and the Los Angeles Department of Fire and Police Pensions Commission. Several public pension funds have updated their policies with respect to placement agents, following one of two alternative paths:

Outright Ban

On April 22, New York Comptroller Thomas DiNapoli banned the use of placement agents by investment managers seeking investments from NYCRF. Various New York City pension plans quickly followed suit as did the New Mexico State Investment Council in early June. Illinois has passed legislation prohibiting interaction between its state pension funds and placement agents, and Ohio has a long-standing ban in place.

In addition, as part of their agreements with the NYAG, Carlyle and Riverstone adopted a Public Pension Fund Reform Code of Conduct that prohibits their use of placement agents to lobby public pension funds nationwide. The code similarly bans campaign contributions to public officials who could influence pension fund investment decisions.

Increased Disclosure

Enthusiasm for an outright ban on placement agents is not universal. Michael Travaglini, executive director of the Massachusetts public pension system, argues that "[t]here's a legitimate place for placement agents" and that public pension funds would be better served installing checks and balances to prevent undue political influence.

CalPERS, for example, still permits the use of placement agents. However, on May 8, CalPERS adopted a policy requiring detailed disclosure, including resumes of an agent's principal officers, descriptions of the compensation paid and copies of the actual contract between the manager and the agent. Similarly, Los Angeles City Employees Retirement System and the State of Connecticut still permit placement agents, but have beefed up disclosure requirements. The New Mexico Educational Retirement Board, unlike the New Mexico State Investment Council, announced that it will pursue heightened disclosure rather than a permanent ban.

SEC Files First Insider Trading Suit Involving Credit Default Swaps

The SEC recently brought its first insider trading suit involving credit default swaps ("CDSs"). The SEC's civil complaint claims that John-Paul Rorech, a bond and CDS salesman at Deutsche Bank Securities Inc. ("DBSI"), became privy to "material" information concerning a change to an upcoming bond issuance by an international media conglomerate, VNU, and provided that confidential information to Renato Negrin, a portfolio manager at the hedge fund, Millennium Partners, L.P. The defendants deny violating any securities laws.

The complaint first alleges that Rorech breached his duty of confidentiality to DBSI by supplying the restructuring information to Negrin. According to the SEC, DBSI employees, including Rorech, were aware that VNU was about to issue a new "tranche" of bonds that would be covered by the existing CDSs and that this information would affect the market price for the CDSs. In a series of recorded and unrecorded telephone conversations, Rorech informed Negrin of the tranche issuance before the public announcement and assured him that he would profit from buying the CDSs.

The complaint then alleges that Negrin placed two separate orders with DBSI for €20 million worth of VNU CDS. Following the pubic announcement that bonds would be issued and deliverable into CDSs, the price of the CDSs rose substantially and Negrin sold his VNU CDS for a profit of $1.2 million. Finally, the complaint alleges that both Rorech and Negrin were aware that the conversations they were having regarding the CDSs were "material, nonpublic and provided in breach of Rerech's duties to [DBSI]."

The SEC says that the CDSs are security-based swap agreements and, according to the Gramm-Leach-Bliley Act of 2002, are subject to the antifraud provisions in the Securities Exchange Act.

Proposed Reforms to SEC's Division of Enforcement

Newly appointed Enforcement Director Robert Khuzami recently outlined proposed changes to policies of the Division of Enforcement in testimony before the Senate Banking Committee. Clearly reacting to criticism regarding the SEC's prior enforcement lapses, Mr. Khuzami stated that the restructuring would involve reducing supervisory checks and providing the Division with increased enforcement powers.

Some of the proposals Mr. Khuzami spoke about included:

1. Nationwide service of process in civil actions filed in federal courts.
2. Civil penalties against aiders and abettors under the Investment Advisers Act.
3. A whistle-blower program.
4. New authorization to permit penalties in cease-and-desist proceedings.
5. Reorganizing the enforcement attorneys along product lines.
6. Eliminating certain approvals required to proceed with an action.
7. Increasing the number of lawyers in the SEC's trial unit.

We will keep you informed of future enforcement developments.

SEC Proposed Rules and Delaware Amendments to DGCL to Aid Activist Shareholders

On May 20, 2009, the SEC voted to propose a series of rule amendments to facilitate the ability of shareholders to nominate directors to corporate boards. The most significant proposed change is new Securities Exchange Act Rule 14a-11 which would allow shareholders to include nominees for director in the company's proxy materials. These rules would also apply to investment companies that are required to report under the Securities Exchange Act of 1934. Public comments must be received by the Commission within 60 days after publication in the Federal Register.

Activist shareholders should be helped by the new amendments to the Delaware General Corporation Law ("DGCL") signed into law on April 10, 2009. These amendments permit Delaware corporations to have by-law provisions allowing shareholders direct access to a corporation's proxy statement for the nomination of directors and permit Delaware corporations to reimburse shareholders for their costs incurred in proxy contests. Although these provisions allow Delaware corporations to adopt these changes to their by-laws, no corporation is required to adopt these changes.

DOJ Antitrust Enforcement Shift

Newly installed Assistant Attorney General for Antitrust, Christine Varney, has announced that the Antitrust Division is reversing the prior administration's policy with respect to Sherman Act Section 2 enforcement. Section 2 of the Sherman Act provides that persons that monopolize or attempt to monopolize trade shall be deemed guilty of a felony.

Varney said that under the prior policy of "inadequate antitrust oversight" with respect to dominant firm conduct, markets have failed to self-police and that, as a result, we now see numerous markets distorted, and further that "vigorous antitrust enforcement must play a significant role in the Government's response to economic crises to ensure that markets remain competitive." Specifically with respect to Section 2 enforcement, Varney said that vigorous enforcement of Section 2 of the Sherman Act will be part of the Division's contribution to the Government's multifaceted response to the current market conditions, and stressed the importance of making the Division's position known by courts, practitioners and the business community.

All businesses, especially those with significant market positions, should take a fresh look at any practices that could be construed to be exclusionary or predatory, such as below-cost pricing, bundling, exclusive licensing arrangements, exclusive distribution practices, refusals to deal and other types of discriminatory or predatory practices.

Please see the Proskauer Client Alert entitled "Major Antitrust Enforcement Policy Shift Announced: DOJ To Take Aim at Market Leaders" for further information on this topic.

Proposed Taxation of Carried Interest

The tax treatment of carried interest continues to be scrutinized by lawmakers, with certain political support to tax carried interest in the same manner as ordinary income. This treatment was recommended by the Obama administration in its 2010 revenue proposals, and in April, Rep. Sander Levin re-introduced a sweeping bill that generally would achieve this result. Although the bill introduced by Rep. Levin is detailed, the proposed change in law raises many, as yet unanswered, questions.

The Private Investment Funds Group has formed a multi-disciplinary task force to monitor developments in this area, including evaluating alternative fund and investment structures. If you would like to further discuss the status of the legislation or our current thinking on this matter, please contact your Proskauer Rose attorney.

Private Investment Funds Practice

Our Private Investment Funds Group comprises more than 100 lawyers and advises clients worldwide on all of the legal and business issues important to private equity and hedge funds and their managers, including structuring investment vehicles of all types, portfolio company investments, institutional investor representation and secondary purchases and sales.

This newsletter for clients of our Private Investment Funds Practice discusses recent developments affecting hedge funds and private equity funds.

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