

Client Alert

A report
for clients
and friends
of the Firm July 2009

Obama Administration Proposes Investment Adviser Registration for Most Hedge Fund and Private Equity Managers

On July 15th, the Obama Administration proposed the “Private Fund Investment Advisers Registration Act of 2009” (the “Act”) as part of the Administration’s broader financial regulatory reforms proposed in the White Paper published on June 17th. The Act would amend the Investment Advisers Act of 1940 (the “Advisers Act”) to make registration mandatory for most private investment fund managers based in the United States or advising funds domiciled in the United States (as well as many non-U.S. managers), including managers of hedge funds, private equity funds and venture capital funds with more than \$30 million under management.

The Act would eliminate two current commonly-used exemptions from registration under the Advisers Act: 1) the “private adviser” exemption for U.S. advisers with fewer than 15 clients; and 2) the exemption for certain commodity trading advisors registered with the Commodity Futures Trading Commission if the commodity trading advisor acts as an investment adviser to a “private fund.” The removal of these two exemptions from the Advisers Act would make registration mandatory for almost all U.S. advisers to private pools of capital with \$30 million or more under management. The “private adviser” exemption would remain available to a limited extent to a non-U.S. manager, provided that such manager has no place of business in the U.S., fewer than 15 clients in the United States over the last twelve months, and assets under management attributable to “clients” in the United States of less than \$25,000,000.

The Act would also give the Securities and Exchange Commission (the “SEC”) the power to redefine the

term “client” differently for different purposes under the Advisers Act, which would enable the SEC to create rules making any U.S. investor in a private fund a “client” for the purposes of determining whether registration is required, and which may extend certain duties of investment advisers under the Advisers Act to individual investors in private funds.

Under the Act, the SEC would also gain new rule-making authority and broader powers to gather information, including the ability: 1) to compel an investment adviser to maintain records and submit reports relating to itself and to the “private funds” it manages (including at minimum, for each private fund, the amount of assets under management, use of leverage (including off-balance sheet leverage), counterparty credit risk exposures, trading and investment positions, and trading practices), such information to be used by the Federal Reserve and the Financial Services Oversight Council for the supervision of systemic risk; and 2) to require an investment adviser to provide reports, records and other documents regarding the private funds it manages to investors, prospective investors, counterparties, and creditors. Under the Act, “private fund” would be redefined to mean any company that would be an investment company under the Investment Company Act of 1940 but for the exceptions contained in Section 3(c)(1) or Section 3(c)(7) that is either organized under the laws of the United States or of a U.S. state, or has 10 percent or more of its outstanding securities owned by U.S. persons. A registered investment adviser would be required to maintain the new records and reports for any private pool of capital meeting the “private fund” definition.

Investment advisers would be compelled to maintain the new records regarding operations and the private funds that they advise, and to make them available to the SEC upon request. The records would be subject to periodic, special, or other examinations by the SEC at any time. The new legislation would permit the SEC to keep these reports confidential, other than from requests by Congress or other federal agencies.

We will continue to keep clients and friends of the firm updated on registration requirements and proposals.

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Proskauer's 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.

Please feel free to call any of the Proskauer lawyers listed below at any time if you have additional questions, or if we can be of additional assistance with the issues raised in this alert.

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