

Warshaw Burstein Cohen Schlesinger & Kuh, LLP

MEMORANDUM

To: Our Clients and Friends **Date:** December 18, 2009
From: Warshaw Burstein Cohen Schlesinger & Kuh, LLP
RE: The Wall Street Reform and Consumer Protection Act of 2009 – Synopsis of Provisions Pertinent to Investment Advisers

On December 11, 2009, the House of Representatives passed The Wall Street Reform and Consumer Protection Act of 2009 (the “**Bill**”). This sweeping financial legislation, designed to protect both consumers and investors, is multi-faceted and touches on virtually every aspect of the financial markets. This memorandum provides a brief summary of the provisions of the Bill that are most pertinent to investment advisers.

Registration

Currently, the Investment Advisers Act of 1940 (the “**Advisers Act**”) requires an investment adviser having \$25 million or more in assets under management to register with the Securities and Exchange Commission (the “**SEC**”) unless it satisfies the provisions of one of the exemptions from registration. Most investment advisers to private funds rely on Section 203(b)(3) of the Advisers Act, which exempts from registration those investment advisers that have fewer than 15 clients and do not hold themselves out to the public as investment advisers. The Bill would eliminate the ability of a U.S.-based investment adviser to rely on this provision. It would amend Section 203(b)(3) so that it only applies to foreign advisers having no place of business in the U.S. and having less than \$25 million in assets under management attributable to U.S. clients. The Bill would, however, provide two new exemptions from registration. Under the Bill advisers to “venture capital funds” (which term would be defined by the SEC) would be exempt from registration. In addition, investment advisers of private funds would be exempt from registration if each fund has less than \$150 million in assets under management in the U.S. The Bill also directs the SEC to consider, when prescribing regulations with respect to registration of investment advisers to “mid-sized private funds,” aspects of the funds to determine whether they pose systemic risk, and to prescribe regulations that reflect the level of such risk.

Reporting and Disclosure

The Bill would require registered investment advisers to maintain certain records and file reports with the SEC regarding each private fund they advise. These records and reports would include information as to each fund’s assets, leverage, counterparty credit risk exposures, trading and investment positions, and trading practices. The Bill also grants broad authority to the SEC

to determine what additional information is necessary to assess systemic risk and to require records and/or reports with respect to such information. In addition, the Bill directs the SEC to require advisers exempt from registration pursuant to the venture capital fund or private funds with less than \$150 million in assets under management exemptions described above to maintain such records and file such reports as the SEC determines. The Bill strikes the provision of the Advisers Act that makes all reports filed with the SEC publicly available. However, the Bill grants authority to the SEC to require that registered investment advisers provide certain reports, records and other documents (as determined by the SEC for the protection of investors or assessment of systemic risk) to the investors, prospective investors, counterparties and creditors of any private fund they manage.

Other Provisions

Fees

The Bill would direct the SEC to require registered investment advisers to pay fees that would be used to offset the cost of inspections of registered investment advisers. The size of the fee payable by each adviser would be determined in light of its size and the number and type of its clients.

Aiding and Abetting

The Bill would expand the liability provisions of both the Advisers Act and the Investment Company Act of 1940 (the “1940 Act”) to include liability for any person who aids, abets, counsels, commands or induces a violation of the Advisers Act or the 1940 Act. Such persons would be liable to the same extent as the person who committed the actual violation.

Custody

The Bill charges the SEC with adopting a rule under the Advisers Act that prohibits, subject to such exceptions as determined by the SEC, registered investment advisers from having custody of more than \$10 million in funds or securities unless such funds are held by a qualified custodian in a separate account and such custodian does not provide investment advice with respect to the funds or securities. The Bill compels the SEC to adopt this rule within 180 days of the enactment of the Bill.

Qualified Client Standard

The Advisers Acts prohibits an investment adviser from receiving performance-based compensation from a client unless that client is a “qualified client.” The Bill instructs the SEC to adjust the dollar amount tests under the “qualified client” definition for inflation. These adjustments would occur within the first year of the enactment of the Bill and thereafter every five years.

Definition of the Term "Client"

The Bill grants broad rulemaking authority to the SEC. This includes the authority to define terms, including the term "client." However, the Bill explicitly prohibits the SEC from defining the term "client" to include an investor in a private fund that has entered into an advisory contract with the investment adviser.

Timing

The Bill will need to be reconciled with Senate Legislation and the Senate will not debate financial reform until next year. In the Bill's current form, the provisions of the Subtitle "Private Fund Investment Advisers Registration Act" would not take effect until one year after the enactment of the Bill. This would give investment advisers required, pursuant to the Bill, to register with the SEC until some time in 2011 to do so.

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The foregoing is a synopsis of the key provisions of Bill that amend the Advisers Act. If you are interested in discussing any of these provisions, their implications for your business, or any other provisions of the Bill, please contact Janet R. Murtha at (212) 984-7731.