The Obama Administration Proposes The Private Fund Investment Advisers Registration Act of 2009

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On July 15, 2009, the Obama administration delivered to Congress the Private Fund Investment Advisers Registration Act of 2009 [.pdf] (the "Legislation"). The Legislation would seek to regulate private investment funds, such as hedge funds, private equity funds and venture capital funds, through mandatory federal registration, risk monitoring and disclosure requirements for private investment fund advisers managing assets valued at more than $30 million.

Private Fund Investment Adviser

The Legislation, if passed in its current form, would require all advisers to private funds (which would include hedge funds, private equity funds and venture capital funds) whose assets under management exceed $30 million to register with the Securities and Exchange Commission ("SEC") under the Investment Advisers Act of 1940, as amended. Under the Legislation, a private fund is defined as an investment fund that:

(i) Would be an investment company (as defined in Section 3 of the Investment Company Act of 1940, as amended, (the "1940 Act")) but for section 3(c)(1) or 3(c)(7) of the 1940 Act; and

(ii) Either;

a. is organized or otherwise created under the laws of the United States or of a state; or

b. has 10 percent or more of its outstanding securities owned by U.S. persons.

Advisers would be required to report, on a confidential basis, certain information, such as assets under management, the use of leverage (including off-balance sheet leverage), counterparty credit risk exposures, trading and investment positions and trading practices along with any other information the SEC determines is necessary or appropriate to assess potential threats to financial stability.

The Legislation further calls for imposition on all private investment funds advised by an SEC-registered investment adviser of certain recordkeeping requirements, requirements with respect to disclosures to investors, creditors, and counterparties, and regulatory reporting requirements. The SEC would conduct regular, periodic examinations of such funds to monitor

compliance with these requirements. Furthermore, the SEC would share the reports that it receives from the investment advisers regarding the funds they manage with the Board of Governors of the Federal Reserve System (the "Federal Reserve"). Any private fund that is determined to meet Tier 1 FHC criteria (defined as a financial firm whose failure could pose a threat to financial stability based on a combination of size, leverage and interconnectedness), would then be regulated and supervised by the Federal Reserve.

Foreign Private Adviser Requirements

Finally, the Legislation would not require a foreign investment adviser to register with the SEC who:

(i) has no place of business in the United States;

(ii) during the preceding 12 months has had

a. fewer than 15 clients in the United States; and

b. assets under management attributable to clients in the United States of less than $25,000,000, or such higher amount as the SEC may deem appropriate; and

(iii) neither holds itself out generally to the public in the United States as an investment adviser, nor acts as an investment adviser to any registered investment company or business development company.

It is not clear how a "client" is determined for purposes of this exemption.