Hedge Fund Transparency Act of 2009

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February 13, 2009

As noted in our January 30 Foley Adviser, Senators Chuck Grassley, R-Iowa and Carl Levin, D-Michigan introduced the Hedge Fund Transparency Act of 2009 (the "2009 Bill") on January 29, 2009. The 2009 Bill (S. 344), has been referred to the Senate Committee on Banking, Housing and Urban Affairs.

The 2009 bill is not the first hedge fund related bill filed by Senator Grassley. In 2007, Senator Grassley introduced the Hedge Fund Registration Act of 2007 (S. 1402) which, if adopted, would have amended Section 203(b)(3) of the Investment Advisers Act of 1940, as amended (the "Advisers Act") to require many investment advisers currently exempt from registration under the Advisers Act to register with the Securities and Exchange Commission (the "SEC"). The 2009 Bill takes a different approach to the regulation of hedge funds by proposing amendments to the Investment Company Act of 1940, as amended (the "1940 Act"), which amendments would require any private investment fund (including hedge funds, venture capital funds and private equity funds) with $50 million or more under management to register with the SEC. The 2009 Bill also would require such funds to submit an annual information statement with the SEC. In addition, the 2009 Bill would require the adoption of anti-money laundering programs.

Amendments to definition of "Investment Company"

Currently private investment funds avoid registration under the 1940 Act by complying with the exceptions to the definition of "investment company" set forth in sections 3(c)(1) or 3(c)(7) of the 1940 Act. A fund which meets the requirements set forth in either section 3(c)(1) or 3(c)(7) is specifically excluded from the definition of "investment company" and therefore outside the scope of the 1940 Act. The 2009 Bill would strike sections 3(c)(1) and 3(c)(7) as exclusions from the definition of "investment company," therefore bringing such funds within the scope of the 1940 Act. The 2009 Bill would also add provisions to section 6 of the 1940 Act exempting 3(c)(1) and 3(c)(7) funds from the full registration and filing requirements of the 1940 Act applicable to traditional registered investment companies.

The proposed amendments to section 6 would not require investment companies with less than $50 million under management to register with the SEC. However, private investment funds with assets under management of $50 million or more, and which meet either the current section 3(c)(1) or section 3(c)(7) exception to registration under the 1940 Act, would be required to register with the SEC and comply with several disclosure requirements. Failure to comply with such disclosure requirements would require the private investment fund to fulfill the full range of registration and filing requirements applicable to traditional registered investment companies under the 1940 Act. The section 6 requirements proposed by the 2009 Bill include:

- Registering with the SEC.
- Maintaining books and records that the SEC may require.
- Cooperating with any request by the SEC for information or examination.Filing an information form with the SEC electronically, at least once a year. This form, which would be made freely available to the public in an electronic, searchable format, must include:
  - The name and current address of each individual who is a beneficial owner of the private investment fund.
  - The name and current address of any company with an ownership interest in the private investment fund.
  - The name and current address of the investment company's primary accountant and primary broker.
  - An explanation of the structure of ownership interests in the private investment fund.

- Information on any affiliation with another financial institution.
- A statement of any minimum investment commitment required of a limited partner, member, or investor.
- The total number of any limited partners, members, or other investors.
- The current value of the assets of the company and the assets under management by the company.

A press release from Senator Levin's office on February 5, 2009 clarified that, despite the current language of the legislation, the intent of the 2009 Bill is not to require disclosure of parties who invest in a hedge fund, but rather the 2009 Bill "requires disclosure of a hedge fund's beneficial owners who profit from the fees generated in operating the fund."

Required Anti-Money Laundering Program:

Another aspect of the 2009 Bill is to require that private investment funds with assets under management of $50 million or more, and which are relying on the new section 6(a) exemptions described above, establish an anti-money laundering program and report suspicious transactions. If passed, the 2009 Bill would require that minimum requirements for the anti-money laundering programs be set by the Treasury Secretary within 180 days of enactment. Such minimum requirements would call for the use of risk-based due diligence policies, procedures and controls reasonably designed to ascertain the identity of and evaluate any foreign person that supplies funds or plans to supply funds to be invested with the advice or assistance of such investment company.

Implications for Unregistered Advisers:

In addition to requiring registration of private investment funds under the 1940 Act, an indirect consequence of the 2009 Bill will be the required registration of many additional investment advisers under the Advisers Act. Section 203(b)(3) of the Advisers Act provides that investment advisers who advise fewer than 15 clients, do not hold themselves out generally to the public as an investment adviser and do not advise investment companies registered under the 1940 Act do not need to register as an investment adviser with the SEC. If the 2009 Bill is adopted, section 3(c)(1) or section 3(c)(7) funds would become "investment companies" and, therefore, the exemption from registration under the Advisers Act provided by section 203(b)(3) would no longer be available to investment advisers who advise a section 3(c)(1) or 3(c)(7) fund with $50 million or more in assets under management.

Additional Hedge Fund Legislation:

In addition to the 2009 Bill which was submitted to the Committee on Banking, Housing and Urban Affairs, the Hedge Fund Adviser Registration Act (H.R. 711) and the Hedge Fund Study Act (H.R. 713) have been filed and referred to the House Committee on Financial Services.

The Hedge Fund Adviser Registration Act, sponsored by Representatives Michael Capuano (D-MA) and Michael Castle (R-DE), would amend §203(b)(3) of the Advisers Act to remove the exemption from registration provided to investment advisers with fewer than 15 clients. Such an amendment would further expand the pool of investment advisers required to register with the SEC.

The Hedge Fund Study Act, sponsored by Representative Michael Castle (R-DE), would require that the President's Working Group on Financial Markets conduct a study on the hedge fund industry.

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