House Financial Services Committee Approves The Private Fund Investment Advisers Registration Act

Written by Jeffrey D. Collins

October 2, 2009

On October 27, 2009, the U.S. House of Representatives Financial Services Committee (the "Committee") voted 67-1 to approve the Private Fund Investment Advisers Registration Act (the "Bill"), sponsored by Representative Paul E. Kanjorski (D-PA). The Bill would require advisers to private funds (which would include advisers to hedge funds and private equity funds as defined by the SEC, but not advisers to venture capital funds) to register as investment advisers with the Securities and Exchange Commission (the "SEC") under the Investment Advisers Act of 1940, as amended. The Bill would also impose various recordkeeping and disclosure requirements on advisers.

The Bill, as approved by the Committee, sets a higher AUM threshold at which registration is required than the competing registration proposal set out by the Obama administration earlier this year. The Bill sets the threshold at $150 million in managed assets, rather than the $30 million proposed by the Obama administration. However, the Bill does grant the SEC authority to require exempt advisers to provide certain information about their investments to the SEC.

The Bill as approved has dropped certain language that would have exempted advisers to offshore funds with only limited U.S. ownership. In the original draft bill, a "private fund" would have included a fund only if it either:

- was organized or created under the laws of the United States; or
- had 10 percent or more of its outstanding securities by value owned by a U.S. person.

Under the Bill as adopted, any fund that relies on a 3(c)(1) or 3(c)(7) exemption (i.e., any fund with any U.S. owners), regardless of where it is formed or what percentage of its securities are owned by U.S. persons, will be considered a private fund for purposes of the Bill. However, the Bill does provide an exemption for foreign private fund advisers. A foreign private fund adviser is defined as an adviser that has no place of business in the United States, does not hold itself out generally to the public in the United States as an investment adviser and during the preceding 12 months has had:

- fewer than 15 clients in the United States; and
- 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. It is not clear how "client" is determined for purposes of this exemption.

The Committee approved an amendment by Representative Susan Kosmas, (D-FL) that would give advisers covered under the new regulations a one-year grace period before being required to comply with the new rules. The Bill also grants the SEC rulemaking authority to define "client" and other terms, in a clear response to the Goldstein case.

The Bill will now proceed to the full House for a final vote, likely sometime in November according to Committee chairman Barney Frank (D-MA). Foley Hoag will monitor the progress of the Bill and provide regular updates.

RELATED INDUSTRIES

- Investment Advisers & Private Funds
- Professional Services

RELATED PRACTICES

- Capital Markets

- Business Counseling
- Fund Formation