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**INVESTMENT MANAGEMENT
UPDATE****Obama Administration Proposes "Private Fund Investment Advisers Registration Act of 2009"**

On July 15, 2009, the Obama Administration delivered to Congress proposed legislation (the "Proposed Legislation") that would require all advisers to hedge funds and other private pools of capital, including private equity and venture capital funds, to register with the Securities and Exchange Commission (SEC) if such advisers have more than \$30 million in assets under management. The legislation also would grant broad power to the SEC to adopt rules requiring advisers to provide certain information to the SEC relevant to the Federal Reserve's or the Financial Services Oversight Council's¹ assessment of systemic economic risk. The Proposed Legislation also gives the SEC authority to regulate the information such advisers provide to existing investors, prospective investors, counterparties and creditors of private funds.

Advisers to Private Funds Subject to Registration under Advisers Act

The Proposed Legislation subjects investment advisers to private funds having assets under management of \$30 million or more to registration under the Investment Advisers Act of 1940 (the "Advisers Act") by eliminating the exemption from registration commonly relied upon by such advisers. Specifically, the Proposed Legislation eliminates in its entirety the "private adviser" or "client counting" registration exemption set forth in Section 203(b)(3)² of the Advisers Act. The Proposed Legislation also excludes any investment adviser to a private fund from the "intrastate adviser" registration exemption set forth in Section 203(b)(1)³ of the Advisers Act. Further, the Proposed Legislation provides that, under Section 203(b)(6) of the Advisers Act, advisers to private funds are subject to registration regardless of whether such advisers may also be registered with the Commodity Futures Trading Commission ("CFTC") as a commodity trading adviser.

The Proposed Legislation amends Section 202(a) by creating the new term "private fund," which is defined to mean an investment fund that (i) would be regulated as an investment company under the Investment Company Act of 1940 ("1940 Act") but for Sections 3(c)(1)⁴ or 3(c)(7)⁵ of the 1940 Act; and (ii) either is organized under the laws of the United States or, if organized under the laws of a foreign jurisdiction, has 10 percent or more of its outstanding securities owned by U.S. persons.

The Proposed Legislation also creates a second new defined term "foreign private adviser," which is defined to mean any investment adviser who (i) has no place of business in the United States; (ii) 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 million, or such higher amount as is determined by the SEC; and (iii) neither holds itself out generally to the



public as an investment adviser nor acts as an investment adviser to any investment company registered under the 1940 Act or a company which has elected to be a business development company under the 1940 Act. Under the Proposed Legislation, investment advisers falling within the definition of foreign private advisers are not subject to registration under the Advisers Act.

Reporting, Examination and Disclosure Requirements

As set forth in the Proposed Legislation, new Section 204(b) of the Advisers Act authorizes the SEC to require investment advisers to maintain and provide to the SEC such records about private funds that may be necessary for the Federal Reserve or the Financial Services Oversight Council to assess systemic economic risk. The Proposed Legislation further provides that this information shall include, among any other information required by the SEC in consultation with the Federal Reserve, (i) amount of assets under management, (ii) use of leverage (including off-balance sheet leverage), (iii) counterparty credit risk exposures, (iv) trading investment positions, and (v) trading practices generally. The Proposed Legislation also indicates that all records required to be maintained by new Section 204(b) are subject to such periodic or special examination as the SEC may determine.

New Section 204(b) further authorizes the SEC to require investment advisers registered under the Advisers Act to provide any such documents, reports or other information to “investors, prospective investors, counterparties, and creditors” of any private fund advised by the investment adviser as the SEC shall reasonably determine.

The Proposed Legislation eliminates in its entirety Section 210(c) of the Advisers Act, which generally prevents the SEC from requiring an investment adviser to disclose the “identity, investments or affairs of any client of such investment adviser except as such disclosure is necessary or appropriate in a particular proceeding or investigation having its object the enforcement of the Advisers Act.”

Rule Making and Interpretive Authority

The Proposed Legislation proposes certain amendments to Section 211 of the Advisers Act that give the SEC broad rule making and interpretive authority. The legislation requires the SEC and the CFTC to establish joint rules for investment advisers that are already subject to regulation by the CFTC and would, under the Proposed Legislation, also be regulated by the SEC.

Outlook

If adopted by Congress, the Proposed Legislation will have a significant impact on the hedge fund, private equity fund and venture capital fund industry. The Proposed Legislation will likely add significant compliance burdens to the private fund industry that is generally absent under the current regulatory regime. While the ultimate impact of the Proposed Legislation is difficult to quantify, the internal compliance divisions supporting hedge funds, private equity funds and



venture capital funds will likely need to be enhanced in a dramatic and potentially costly manner. It is likely lobbying groups will make every effort to weigh in before Congress takes any final action with respect to the Proposed Legislation.

FOR MORE INFORMATION

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¹The Financial Services Oversight Council, as currently proposed by the Obama Administration, would be chaired by the Department of the Treasury and have the “authority to gather information from any financial firm” and the responsibility for “referring emerging risks to the attention of regulators with the authority to respond.”

²Section 203(b)(3) of the Advisers Act generally exempts from registration any investment adviser who, during the prior 12-month period, has fewer than 15 clients and does not hold himself out to the public nor acts as a investment adviser to an investment company registered under the 1940 Act. Regulation 203(b)(3)-1 further clarifies this registration exemption by providing generally that a private investment fund organized as an entity or other legal organization may be treated as a single client of an investment adviser if such fund receives investment advice based on its investment objectives rather than the individual investment objectives of the fund’s investors.

³Section 203(b)(1) of the Advisers Act exempts from registration any investment adviser that exclusively serves clients who are residents of the state within which such investment adviser maintains its principal place of business.

⁴Section 3(c)(1) of the 1940 Act exempts from the definition of investment company “[a]ny issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities.”

⁵Section 3(c)(7) of the 1940 Act exempts from the definition of investment company “[a]ny issuer, the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities.”