House Committee Passes Private Fund Investment Advisers Registration Act of 2009

by Jonathan S. Storper & Scott C. Smith

Private investment funds are likely to become subject to more scrutiny by the Securities and Exchange Commission ("SEC") due to the passage of a bill by a key House Committee. The House Financial Services Committee approved the Private Fund Investment Advisers Registration Act of 2009 (H.R. 3818) on October 27, 2009 with a bipartisan vote of 67-1 (Rep. Ron Paul (R-TX) opposing). This bill, if enacted, will require private fund advisers to any fund with at least $30 million in assets under management, to register with and provide information to the SEC. There is a one-year transition period from the time the bill becomes law for investment advisers to register.

It is anticipated that the bill will have no trouble passing on the House floor given its overwhelming support in committee. The bill's fate on the Senate floor is less clear. A version of the bill is likely to be considered by the Senate Banking Committee as part the Obama Administration's regulatory reform plan. This gives the bill, or a version of the bill, a good chance of reaching the Senate floor by next year.

Major Highlights of the Bill

- The bill would eliminate the exemption currently contained in the Investment Advisers Act of 1940 ("Advisers Act") for investment advisers with fewer than 15 clients. Many advisers fit into this exemption because a typical "blind pool" fund is treated as a single client, regardless of the number of investors that invest through the fund.

- Three kinds of funds will be afforded an exemption from registration under this bill: (i) venture capital funds, as such term is to be defined by the SEC, (ii) "private funds" (as referenced in Section 3(c) of the Advisers Act) with assets under management in the United States of less than $150 million, and (iii) licensed small business investment companies. Investment advisers to such funds still would be required to maintain records and provide to the SEC annual or other reports as the SEC determines is necessary.

- Currently registered private fund advisers would have ongoing requirements imposed on them including: (i)

maintaining books and records and submitting reports about the private funds to the SEC, (ii) making certain disclosures to investors, prospective investors, counterparties, and creditors, and (iii) sharing information with the Board of Governors of the Federal Reserve System for the purpose of assessing the systemic risk of a private fund.

- The bill authorizes information reporting and record maintenance with any entity identified by the SEC as having "systemic risk responsibility." "Systemic risks" include such matters as fund assets under management, the use of leverage, counterparty credit risk exposure, trading and investment positions, and trading practices.

- The bill's coverage also includes offshore funds as part of the definition of "private funds." Offshore investment advisers will still be exempt from registration if they meet the definition of a "foreign private fund adviser," as set forth in the bill. Domestic investment advisers that advise offshore funds with minimal assets in the United States, however, are now subject to registration, where they once were not. The bill's author, Rep. Paul Kanjorski (D-Pa) said including offshore funds would significantly increase the amount of capital for which the SEC would have systemic risk information.

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