



Legislation Proposed by U.S. Treasury Would Require Private Fund Advisers to Register with the SEC

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On July 15 the U.S. Department of the Treasury proposed legislation to be known as the Private Fund Investment Advisers Registration Act of 2009 that would effectively require most investment advisers to private pools of investment capital with minimum U.S. contact to register with the SEC. If enacted, the Proposed Act would have far-reaching implications for advisers of hedge funds, venture capital funds, private equity funds, and other U.S. and non-U.S. domiciled private pools of investment capital. It also would appear to eliminate the "small adviser exception" for advisers who have fewer than 15 clients and do not hold themselves out to the public as investment advisers.

Proposed Changes

Registration Requirement. Under the Proposed Act, investment advisers of private funds must register with the SEC if a fund they manage is organized in or created under the laws of the United States or a State **or** has 10% or more of its outstanding securities owned by U.S. persons unless the investment adviser qualifies as a "Foreign Private Adviser".

Definition of "Foreign Private Adviser." The Proposed Act also sets forth a narrow definition of "foreign private adviser." Advisers who satisfy the definition of "foreign private adviser" would not have to register. In order to be deemed a foreign private adviser an investment adviser must be an investment adviser that:

- Has no place of business in the U.S.
- Has served fewer than 15 U.S. clients within the last 12 months
- Has less than \$25 million in assets from U.S. clients under management within the last 12 months
- Does not hold itself out as investment adviser to the U.S. investing public
- Does not act as investment adviser to a registered investment company or a business development company under the Investment Company Act

Increased Regulatory Oversight and Disclosure. If enacted, the Proposed Act would substantially increase the reporting requirements and regulatory oversight of the private fund advisers who would be required to register. Each adviser to a

private fund would be required to file records and reports with the SEC, which at a minimum would include information as to each fund's:

- Amount of assets under management
- Use of leverage (including off-balance-sheet leverage, such as swaps)
- Counterparty credit risk exposures
- Trading and investment positions
- Trading practices

The Proposed Act also permits the SEC to require additional records and reports to be filed as the SEC may determine to be necessary or appropriate for the assessment of systemic risk. Provisions in the Proposed Act open the door for the SEC to start requiring that specific disclosures be contained in private fund offering materials. The Proposed Act also raises concern that the SEC may require fund managers to disclose the identities and other information about investors in the funds.

Reports to Private Fund Investors. The Proposed Act specifically permits the SEC to adopt rules that would require advisers to provide investors, prospective investors, counterparties, and creditors of their private funds with specified records, reports, and other documents. As this authority is not limited to the records and reports required to be filed with the SEC, the Proposed Act effectively opens the door for the SEC to prescribe requirements for private fund offering documents and periodic reports.

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