



KIRKLAND & ELLIS LLP

Private Equity Newsletter

## Financial Service Reform Begins—Proposed Registration of Private Funds and Their Advisers

### PENpoints

New proposals in the Senate and House call for new registration requirements for private funds and their managers.

In light of the current financial crisis and recent scandals, both the Senate and House of Representatives have proposed legislation to significantly expand registration of private funds and their managers (not merely hedge funds and their managers as misleadingly suggested by the bills' titles).

The administration has also announced plans for significant financial services reforms, which could differ from the Senate and House bills.

#### Senate Bill – Limited Registration of Private Funds

Most private funds—including private equity funds, venture capital funds, real estate funds,<sup>1</sup> and hedge funds (U.S. or non-U.S., with any U.S. investors), as well as any other private investment vehicles—are exempt from Investment Company Act (“ICA”) registration either under ICA §3(c)(1) (100 or fewer investors) or ICA §3(c)(7) (100% qualified purchaser investors).

The Senate bill (inaccurately entitled the *Hedge Fund Transparency Act*) would amend the ICA to require a fund, otherwise exempt under §3(c)(1) or §3(c)(7), with \$50 million or more of assets or commitments to file a limited registration with the SEC, which would then be publicly available in electronic format. Such a fund would be required to disclose, and update at least annually, the following:

- each owner’s name and address,
- the fund’s primary broker and primary accountant,
- an explanation of the fund’s ownership structure,

- any fund affiliation with another financial institution,
- the fund’s minimum LP investment commitment,
- the fund’s total number of investors, and
- the current value of the fund’s assets and assets under management.

The Senate bill would also require such a private fund to (1) maintain books and records, supply information and submit to examination as required by the SEC; (2) establish anti-money laundering programs, including “know your customer” requirements for non-U.S. owners; and (3) report suspicious transactions.

The Senate bill would apparently cover a family investment partnership with \$50 million of assets or commitments.<sup>2</sup>

#### House Bill – Registration of Private Fund Managers

A private fund manager with fewer than 15 clients (e.g., funds) is generally exempt from registration under the Investment Advisers Act (“IAA”) §203(b)(3). The House bill (inaccurately entitled the *Hedge Fund Adviser Registration Act*) would require an investment adviser to one or more private funds (if the adviser has more than \$30 million in assets under management in the aggregate) to register with the SEC under the IAA, regardless of the number of clients.<sup>3</sup>

If adopted, these two bills (which are still in early stages) would bring significant changes to the regulation of private funds and their managers. In any event, changes to the current regulatory scheme appear increasingly likely.

- 1 A real estate fund exempt under ICA § 3(c)(5)—generally a fund acquiring mortgages and other liens on and interests in real estate—would not be affected by the Senate bill.
- 2 The Senate bill would also apparently cover the entity general partner of a private investment fund if such GP entity receives money from an equity owner not actually involved in the GP entity's management, which money is in turn invested in the fund.
- 3 An investment adviser with its principal place of business in a state that does not regulate investment advisers (apparently, only Wyoming) would be covered regardless of how small the amount of its assets under management.

If you have any questions about the matters addressed in this Kirkland PEN article, please contact the following Kirkland authors or your regular Kirkland contact.

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## New Hart-Scott-Rodino Act Thresholds & Penalties

The Federal Trade Commission ("FTC") recently announced its annual revisions to the Hart-Scott-Rodino ("HSR") Act filing thresholds.

Subject to certain exemptions, an HSR filing must be made when, as a result of an acquisition, the buyer will hold voting securities and/or assets valued in excess of \$65.2 million, and the transaction involves parties with annual net sales or total assets of \$13 million or more and \$130.3 million or more, respectively. If the value of the voting securities and/or assets exceeds \$260.7 million, then the size of the parties is irrelevant and an HSR filing is required. The revised thresholds will apply to all transactions that close on or after February 12, 2009.

The following chart summarizes the new HSR thresholds:

	<b>2008 Thresholds</b>	<b>New Thresholds</b>
<b>Size-of-Transaction</b>	\$63.1 million	\$65.2 million
	\$252.3 million	\$260.7 million
<b>Size-of-Person</b>	\$12.6 million	\$13.0 million
	\$126.2 million	\$130.3 million

Filing fees have not changed and apply to the new thresholds as follows:

<b>Transaction Value</b>	<b>Filing Fee</b>
Greater than \$65.2 million but less than \$130.3 million	\$45,000
Greater than or equal to \$130.3 million but less than \$651.7 million	\$125,000
\$651.7 million or more	\$280,000

The FTC also has announced an increase in the maximum civil penalty amounts for HSR violations from \$11,000 per day to \$16,000 per day, effective February 8, 2009.

Application of the HSR thresholds to a transaction involves detailed knowledge of the HSR Act and its implementing regulations. If you have questions regarding the HSR Act or its revised thresholds, please contact the following individuals or your regular Kirkland contact.

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## Look Out for Hoax Letters

We recently learned that several private equity funds have received letters purporting to be from or, in some cases, to the Securities and Exchange Commission requesting that such funds not make capital calls on their limited

partners and/or reduce the commitments of their limited partners. If you receive such a letter, you should consult with counsel to determine whether or not it is authentic or a hoax.

### PENpoints

Annual revisions to the HSR thresholds become effective on February 12, 2009.

## **Revised Cross-Border M&A Rules Come Into Effect**

On December 8, 2008, the final rule amending the cross-border exemptions for business combination transactions and rights offerings—first published by the Securities and Exchange Commission on September 19, 2008—took effect. While the amended rules do not change the basic approach or scope of the U.S. regulatory regime, they should provide participants in cross-border business combination transactions involving non-U.S. targets with greater certainty and flexibility in structuring their transactions. For more on the amendments, please see our recent [M&A Update](#).

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## **TALF 2.0: Will This Release Reboot The Market?**

On December 19, 2008, the Federal Reserve Bank of New York released a revised set of terms and conditions for the Term Asset-Backed Securities Liquidity Facility, or TALF. The TALF is designed to improve liquidity in the market for asset-backed securities backed by pools of consumer loans—such as auto, student and credit card debt—in the hopes of reviving consumer lending. For more on the revisions to TALF, please see our recent [Kirkland Alert](#).

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**American Securitization Forum 2009**  
**Las Vegas, Nevada**  
**February 8 - 11, 2009**

The American Securitization Forum draws a critical mass of securitization market professionals from all asset classes and product sectors. The Kirkland-sponsored conference will feature an extensive, current and topical agenda designed by industry professionals while offering a robust business networking environment.

**2009 Kellogg Private Equity and Venture Capital Conference**  
**Chicago, Illinois**  
**February 11, 2009**

Kirkland partner Jeffrey C. Hammes, P.C., is a keynote speaker at The Kellogg School of Management's 2009 Private Equity and Venture Capital Conference. This conference brings together some of the brightest minds involved in venture capital and buyouts, and will provide an open forum for discussing trends and challenges, exchanging ideas and views, and debating current hot topics in the industry. Kirkland partner Jon A. Ballis, P.C., will also moderate a panel on Opportunities in Today's Market.

**Real Estate Joint Ventures**  
**Chicago, Illinois**  
**February 19 - 20, 2009**

Kirkland partner Gary E. Axelrod will speak on "Governance, Risk Management and Allocation of Liability in Real Estate Joint Ventures" at this two-day conference, which will provide a comprehensive examination of the issues that often arise in the formation and operation of real estate joint ventures and an in-depth discussion of the key economic and business terms found in joint venture agreements. The seminar will be held at the University of Chicago's Gleacher Center.

**Beecken Petty O'Keefe & Company Private Equity Conference**  
**Chicago, Illinois**  
**February 20, 2009**

This event is designed to give students and friends of The University of Chicago Booth School of Business an opportunity to hear from successful professionals and alumni in the private equity industry. Keynote speakers include Peter Kagan, managing director at Warburg Pincus, and Raymond Svider, a co-chairman of BC Partners. Kirkland partner Jack S. Levin, P.C., will moderate a panel on debt restructuring and partners Sanford E. Perl, P.C., and Linda K. Myers, P.C., will participate as panelists.

**PLI's "Drafting Corporate Agreements 2009"**  
**Chicago, Illinois**  
**February 27, 2009**

This program will discuss and explain how to identify issues, how to find effective and creative drafting solutions to address those issues, how the provisions of an agreement are connected and where the tough issues usually arise. In addition, litigators will discuss how to draft contracts with enforcement in mind. Kirkland partner Gerald T. Nowak will chair this event and speak on credit and indenture agreements and ethical issues in drafting corporate agreements. Kirkland partner Keith S. Crow, P.C., will speak on acquisition agreements.

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## Kirkland & Ellis LLP's Private Equity Practice

Kirkland & Ellis LLP's private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms in every major market around the world.

Kirkland has been widely recognized for its preeminent private equity practice. In 2009, Mergermarket ranked Kirkland first by volume for Global and USA Buyouts in its "Global M&A Round-up for Year End 2008." In 2008, Kirkland received prestigious first-tier rankings in both private equity and fund formation from Chambers & Partners.

*The Lawyer* magazine recently recognized Kirkland as one of the firms in "The Transatlantic Elite," noting that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent." In addition, Kirkland's London office was recently named the 2008 "Banking Team of the Year" at the Dow Jones *Private Equity News* Awards for Excellence in Advisory Services.

## KIRKLANDPEN

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