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Private Equity Newsletter

June 16, 2010

House-Senate Conference Committee Agrees: Large Private Equity Fund Managers Must Register as Investment Advisers

PENpoints

House-Senate Conference agreement is expected to require private equity fund managers with $150 million or more AUM to register with the SEC as investment advisers by July 2011.

The House-Senate Conference Committee on Financial Services Reform met on June 15, 2010 to reconcile differences between the House and Senate versions of the Private Fund Investment Advisers Registration Act. The Committee agreed to the more restrictive provisions modeled on the House Bill passed in December 2009, which would:

- Eliminate the federal fewer-than-fifteen-client exemption from Investment Advisers Act registration, thus requiring private fund managers with aggregate assets under management ("AUM") of $150 million or more, including private equity, hedge and real estate fund managers, to register within one year after enactment.

- Require the SEC to adopt a new mid-size private fund adviser exemption from registration if the adviser solely manages private funds (i.e., §3(c)(1) and §3(c)(7) entities) and has aggregate AUM of less than $150 million.

- Require an adviser that has any advisees other than private funds to register with the SEC if the adviser has at least $100 million AUM (up from prior $25 million AUM), with states regulating advisers with less than $100 million AUM.

- Require the SEC to adopt an exemption for "venture capital funds" and family office managers (and also exempt SBIC managers without further SEC rulemaking).

- Exempt from federal investment adviser registration a "foreign private adviser" that (1) has no place of business in the United States, (2) has fewer than fifteen U.S. clients or U.S. investors in the adviser's private funds, (3) has less than $25 million AUM attributable to U.S. clients or U.S. investors in the adviser's private funds and (4) does not hold itself out as an adviser in the U.S. or advise a U.S. registered investment company or BDC.

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- Exclude a natural person's primary residence value from the calculation of the accredited investor $1 million net worth standard, as of the enactment date, and direct the SEC not to further adjust the $1 million net worth standard for four years.

- Require that the SEC adjust two tests for inflation: (1) the qualified client tests for carried interest/performance fees, currently $1.5 million net worth or $750,000 AUM, within one year after enactment, and (2) the accredited investor natural person $1 million net worth standard, but not until four years after enactment.

- Require private funds to maintain records and confidentially report to the SEC the following information (to be shared with the newly created systemic risk regulator): (1) AUM and use of leverage, including off-balance-sheet leverage, (2) counterparty credit risk exposure, (3) trading and investment positions, (4) valuation policies and practices of the fund, (5) types of assets held, (6) side letters, (7) trading practices and (8) other information required by the SEC and the systemic risk regulator.

The Committee will continue the reconciliation process over the next two weeks,[1] targeting final action

by late June or early July. At this point, however, we believe it likely that most large private fund managers will be required to register with the SEC as investment advisers by July 2011.

[1] For example, still pending with the Committee is the Senate Bill's "Volcker Rule," which generally would restrict insured depository institutions, bank holding companies and their subsidiaries from (1) engaging in proprietary trading, (2) owning, sponsoring or investing in private funds or (3) entering into certain transactions or relationships with private funds advised by an affiliate.

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

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When a General Release is Too General

A recent Delaware court decision shows that, absent cautious drafting, parties may release more than they anticipate when executing a customary general release, particularly when given in the context of a transaction. Unexpected and unintended results can be avoided through careful drafting of thoughtful limits to a release rather than simply using the blunt instrument of a general release. To learn more, please see our *M&A Update*.

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Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis LLP's nearly 400 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 around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Law Firm of the Year" in *Buyouts* magazine's "2010 Deal of the Year Yearbook," and was also honored with the 2010 "Award for Excellence" in Investment Funds by Chambers & Partners at its annual Chambers USA Awards. Kirkland was ranked in the first tier among law firms for both Private Equity Buyouts and Private Equity Funds by *The Legal 500 U.S. 2010*. Additionally, *Pitchbook* named Kirkland as one of the most active law firms representing private equity firms in its 2009 "Private Equity Breakdown."

The Lawyer magazine recognized Kirkland as one of the "The Transatlantic Elite" in 2008, 2009 and 2010, 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."

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