KIRKLAND & ELLIS

KIRKLANDPEN
Private Equity Newsletter

June 30, 2011

Dodd-Frank Update for Private Fund Managers

In May and June 2011 the SEC adopted rules and proposed other rules implementing the July 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or "Act"). The new rules significantly affect private fund managers, including investment advisers ("IAs") to "private funds" (i.e., funds that rely on either the § 3(c)(1) (100 or fewer investors) or § 3(c)(7) (all qualified purchaser ("QP") investors) exemption from the Investment Company Act). Highlights include:

- Final SEC rules implementing IA registration for a private fund manager and the new limited exemptions for (1) a mid-size private fund adviser with less than $150 million AUM, (2) a venture capital fund adviser, (3) a foreign private adviser and (4) a family office adviser.
- Final SEC rules on whistleblowers designed to incentivize employees and other individuals to report to the SEC alleged securities law violations by private fund managers and others.
- Proposed SEC rules increasing the financial tests for an individual investing in certain private funds charging performance-based compensation, such as carried interest.
- Proposed SEC "bad boy" disqualification rules making the Reg. D Rule 506 private fund offering exemption unavailable because of adverse regulatory events involving a private fund or its affiliates.

In addition, the U.S. House of Representatives is considering a proposal to add a new exemption from IA registration for a private equity fund manager. We discuss each of these developments below.

—*The Editors*

Private Fund Manager—Final IA Registration and Exemption Rules Adopted with Registration Deadline Extended to March 30, 2012

PENpoints

The SEC has adopted final rules implementing IA registration for private fund managers, including limited exemptions for advisers with less than $150 AUM, venture capital fund advisers, foreign private advisers and family office advisers.

Background

On June 22, 2011 the SEC adopted final rules (1) implementing the Dodd-Frank Act's elimination of the fewer-than-fifteen-client exemption from IA registration, thus requiring many private fund managers to register with the SEC as IAs by March 30, 2012 and (2) defining several new narrower IA exemptions, including exemptions for a mid-size private fund adviser with less than $150 million AUM,[1] a venture capital fund adviser, a foreign private adviser and a family office adviser.

While exempt from SEC IA registration, a mid-size private fund adviser with less than $150 million AUM and a venture capital fund adviser will be required to make extensive filings with the SEC containing some of the same information required for SEC registered advisers, including new information about private funds managed.

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State registration may be required for a smaller fund manager not eligible for SEC IA registration if the manager's AUM is under $100 million (or under $25 million if located in Minnesota, New York or Wyoming),[2] as discussed below.

Extension of IA Registration Deadline to March 30, 2012

The SEC formally extended until March 30, 2012 the registration deadline for a private fund manager which currently relies on the fewer-than-fifteen-client exemption, effectively requiring filing of Form ADV by a private fund manager which is subject to registration no later than February 14, 2012 (to allow time for a 45-day processing period). A private fund manager seeking an exemption is required to file its Form ADV Part 1A exemption application between January 1, 2012 and March 30, 2012.

A new private fund manager (i.e., an IA who was not previously relying on the fewer-than-fifteen-client exemption) with an initial fund closing after July 20, 2011 may need to register with the SEC earlier than March 30, 2012 unless one of the new exemptions, such as the exemption for an IA managing private funds with less than $150 million AUM, is available.

Division of IA Responsibility Between SEC and States

Prior to July 21, 2011, the Advisers Act has generally (1) prohibited an IA with less than $25 million AUM from registering with the SEC and (2) preempted state laws from applying to an SEC-registered IA. As a result, the states have historically served as primary regulators of smaller IAs, with the SEC as primary regulator of larger IAs.

This jurisdictional division was not relevant to most private fund managers using the fewer-than-fifteen-client exemption because the vast majority of states also provided exemptions from state IA registration.[3] However, because of the Dodd-Frank Act's significant narrowing of federal IA exemptions and the expected narrowing of state IA exemptions[4] (thus requiring most private fund managers to become either SEC or state registered), the AUM-based division will now become relevant for startup and growing private fund managers.

The Dodd-Frank Act creates a new category of "mid-sized" IAs—those with AUM of at least $25 million but less than $100 million—and shifts primary responsibility for their regulatory oversight to the states so long as the IA is required to be registered in its home state (i.e., location of its principal office and place of business) and is subject to periodic state examination. The only states that do not currently have a registration requirement or do not currently conduct periodic examinations are Minnesota, New York and Wyoming, so a mid-sized IA with one of these three states as its home state generally must register with the SEC at the lower $25 million AUM threshold.[5] A mid-sized IA with a home state other than Minnesota, New York or Wyoming generally must register with its home state unless it has $100 million or more AUM and either does not qualify for an SEC exemption or does qualify but nonetheless voluntarily registers with the SEC. A private fund manager with AUM less than $150 million (and no advisees other than private funds) is expected to qualify under SEC's new mid-size private fund adviser exemption (discussed below) and hence would generally not register with the SEC unless the manager's home state has no available exemptions from IA registration.

An SEC-registered IA (other than one in Minnesota, New York or Wyoming) with less than $100 million AUM will transition to state registration by June 28, 2012; until then, a new adviser seeking SEC registration must generally meet the $100 million AUM test (or expect to meet such test within 120 days after registration).[6]

Mid-Size Private Fund Adviser Exemption

As directed by the Dodd-Frank Act, the SEC adopted rules defining a limited exemption for private fund managers with less than $150 million AUM. The exemption applies differently to U.S. and non-U.S. managers based on where the manager's principal office and place of business is located, which turns for these purposes on where the manager's partners, executive officers or managers direct, control or coordinate its activities.

U.S. Adviser

A private fund manager with its principal office and place of business in the U.S. (a "U.S. adviser") acting as an IA solely to private funds is exempt from registration if its aggregate AUM is less than $150 million. For affiliated IAs, the aggregate AUM includes AUM for all affiliates unless the affiliates are operated independently (e.g., independent management and investment operations).

An IA may not rely on this exemption if it manages or advises any type of account other than a private fund (e.g., a separate account or employees securities company), whether or not fee-paying. A single-investor fund may not qualify as a private fund depending on the specific facts and circumstances, and the exemption is not available if the manager advises "what is nominally a 'private fund' but that in fact operates as a means for providing individualized investment advice" to the fund's investors. The SEC cites two examples of a single-investor fund as appropriate for treatment as a "private fund" for purposes of this exemption: (1) a fund seeking to raise capital from multiple investors which has only a single investor for a period of time and (2) a fund in which all the investors but one have redeemed. Thus, a single-investor co-invest or other vehicle managed by an IA is unlikely to be viewed as a private fund for this exemption.

U.S. advisers relying on the mid-size private fund adviser exemption must make annual filings on Form ADV as an "exempt reporting adviser" (as discussed below).

Non-U.S. Adviser

A private fund manager with a principal office and place of business outside the U.S. (a "non-U.S. adviser"), may rely on the mid-size private fund adviser exemption if:

- all of the non-U.S. IA's fund clients formed under U.S. law are private funds;
- the non-U.S. IA has no other U.S. client (e.g., a separate account for a U.S. resident); and
- all assets managed by the non-U.S. IA from a place of business in the U.S.[7] are solely attributable to private funds, the aggregate value of which is less than $150 million.

Therefore, a non-U.S. IA with no U.S. office may advise an unlimited number of U.S. and non-U.S. private funds with unlimited AUM and an unlimited number of other non-U.S. persons with unlimited AUM, so long as all of its U.S. clients are private funds.

A non-U.S. IA relying on the mid-size private fund adviser exemption must also make annual filings on Form ADV as an exempt reporting adviser (as discussed below).

Foreign Private Adviser Exemption

As directed by the Dodd-Frank Act, the SEC adopted rules defining a limited exemption for a foreign private adviser, which must:

- not have a U.S. place of business;
- have fewer than 15 U.S. clients, with a look-through to the U.S. investors in a private fund,[8] whether or not fee-paying;
- have less than $25 million AUM attributable to U.S. clients and investors (including AUM attributable to U.S. investors in a private fund);
- not hold itself out as a U.S. IA; and
- not advise any registered investment company or business development company.

This exemption's principal advantage is that a qualifying non-U.S. IA is not required to make filings as an exempt reporting adviser. Most private fund managers, however, are unlikely to qualify due to the look-through to a private fund's U.S. investors.[9]

Venture Capital Fund Adviser Exemption

As directed by the Dodd-Frank Act, the SEC adopted a limited exemption from IA registration for a manager solely advising venture capital private funds. The final rules are designed to distinguish "venture capital" funds from other "private equity" funds.

To qualify as a venture capital fund adviser, a private fund manager must manage only qualifying funds and not other types of funds and must not provide investment advisory services to other clients, such as separate accounts or employee securities companies.[10]

A venture capital private fund formed and closed by July 21, 2011, that does not meet all of the specific requirements still qualifies for the exemption if such fund was offered as a venture capital fund in the offering materials, but a private fund formed or closed after July 21, 2011 must meet all of the new requirements discussed below.

80% Qualifying Investments

A venture capital fund must have at least 80% of the fund's assets (including investments measured at cost or fair value, consistently calculated, plus bona fide uncalled capital commitments) invested in qualifying

investments and/or cash and cash equivalents at the time the fund acquires any non-qualifying asset. "Qualifying investment" means that at the time of purchase by the fund, such investment is:

- an equity security such as stock or a similar security (e.g., a partnership or limited liability company interest), security convertible (with or without consideration) into stock or a similar security or carrying any warrant or right to purchase such security;
- issued by a U.S. or non-U.S. company so long as neither the company nor an affiliate has any security (debt or equity) that is SEC-registered under the 1934 Act or listed on a securities exchange (whether U.S. or non-U.S.);
- issued directly to the fund by the company for operating and business purposes (and not in a secondary transaction involving sale of such securities by owners of the company) or in certain circumstances issued by another company in connection with the acquisition or merger of a company that was a qualifying investment;
- in an operating company and not an investment company or vehicle, such as a private fund or co-invest relying on § 3(c)(1) or § 3(c)(7) of the Investment Company Act;[11] and
- issued in a transaction not involving borrowing or issuance of debt securities by the company where the proceeds of such borrowing or issuance are distributed to the fund.

The other 20% of the fund's assets (i.e., the 20% basket) is available for non-qualifying investments, e.g., public or listed company stock, pure debt securities, or securities acquired from existing security holders in secondary transactions.

Leverage Limitations

A venture capital fund may not borrow, issue debt obligations, provide guarantees or otherwise use leverage in excess of 15% of its capital contributions and uncalled capital commitments, and any such leverage must be non-renewable and mature in 120 days or less. However, a guarantee by the fund of a qualifying portfolio company's obligations up to the value of the company's equity securities acquired by the fund may be outstanding more than 120 days.

No Redemption Rights

A venture capital fund may not offer redemption rights to its limited partners except under extraordinary circumstances. Whether a limited partner opt-out or other special redemption right is permitted depends on facts and circumstances, but a general partner's consent to secondary transfers should not generally be considered a redemption right so long as the private fund manager does not identify potential purchasers of the limited partner's interests, such as through a qualified matching service.

Held Out as Venture Capital Fund

A venture capital fund must consistently represent itself as pursuing a venture capital strategy in offering materials, investor reports and otherwise (e.g., in response to diligence or other permissible inquiries). Use of "venture capital" in a fund's name is not essential, but is part of the overall analysis of how the fund represents its investment strategy.

Non-U.S. Venture Capital Adviser

A non-U.S. private fund manager may rely on the venture capital exemption only if all of the private funds it manages (whether organized under U.S. or non-U.S. laws) qualify as venture capital private funds.

Exemption Filing

A private fund manager relying on the venture capital fund adviser exemption must make an exemption filing claiming the exemption (as discussed below).

Exempt Reporting Adviser

An IA relying on the mid-size private fund adviser exemption (including a non-U.S. IA with no U.S. office) or the venture capital fund adviser exemption—referred to as "exempt reporting advisers"—must file Form ADV Part 1A with the SEC, although limited to a subset of the information required of a registered IA.[12] This information includes:

- basic identification details such as name, address, contact information, form of organization, and who controls the IA;
- an indication of the exemption on which the IA is relying;
- details regarding any other financial industry business activities in which the IA or its affiliates are engaged;
- information regarding each private fund advised by the IA, including name and AUM; and

- disciplinary history of the IA and its personnel, including a description of each reportable disciplinary event.

Because an IA is liable for any inaccuracy in the required information, an exempt reporting adviser should consider canvassing its personnel prior to its initial filing in order to confirm the absence of any reportable disciplinary events or, if there are any reportable events, to confirm the relevant details so that they may be reported accurately. Ideally, this would be accomplished through a questionnaire or similar form, signed or attested to by each respondent. Any such questionnaire should also contain an obligation for the respondent to notify the IA of any changes.

Unlike an SEC-registered IA, an exempt reporting adviser need not complete or file Form ADV Part 2 (i.e., the so-called "brochure," containing narrative descriptions of the IA's business, fee arrangements, conflicts of interest, risk factors and other matters).

The initial filing by an exempt reporting adviser is due between January 1 and March 30, 2012 (or, for a newly formed IA commencing operations after January 1, 2012, within 60 days of commencement). Thereafter, the filing must be updated annually or, in the case of certain material amendments, promptly. Filings are made electronically via the Investment Adviser Registration Depository (IARD) system, and will be publicly available.[13]

The SEC does not currently anticipate conducting regular compliance examinations of exempt reporting advisers. However, the SEC will conduct "cause" based examinations where it believes there is evidence of wrongdoing. The SEC also notes its authority to conduct examinations of exempt reporting advisers generally, and states that it may reevaluate the need to conduct periodic compliance examinations.

Family Office Exemption

The SEC also adopted final rules defining a family office and exempting from registration under the Advisers Act a family office that provides investment advice to family members. Such a "family office" is generally an adviser that:

- provides investment advice only to "family clients";[14]
- is wholly-owned by family clients and exclusively controlled by family members; and
- does not hold itself out as an IA.

The family office exemption is largely based upon and consistent with prior exemptive orders granted by the SEC to family offices prior to this rulemaking.

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1 The SEC standardized calculation of AUM for private fund managers is (1) uncalled fund capital commitments plus (2) the gross market value or fair value of existing investments managed by the manager, including proprietary and non-fee paying assets or vehicles (e.g., co-invest funds).

2 Since Wyoming currently has no state IA registration requirements, a Wyoming-based private fund manager not qualifying for an SEC exemption would be required to register with the SEC even with less than $25 million AUM.

3 There are several jurisdictions (e.g., Arizona, Colorado and the District of Columbia) with no IA exemption for a private fund manager. Private fund managers located in such jurisdictions have often registered with the SEC (so long as they have $25 million AUM) to preempt burdensome state regulations, such as examination requirements for fund manager personnel or restrictions on performance-based fees.

4 A number of states are currently evaluating existing exemptions from IA registration and may eliminate such exemptions or may limit them to a private fund manager solely offering QP-only private funds formed under § 3(c)(7) of the Investment Company Act.

5 See note above regarding Wyoming.

6 Starting in 2012, the AUM test will be calculated annually and is subject to a 20% buffer (i.e., allowing a previously SEC-registered IA to remain SEC registered until it falls below $90 million AUM and allowing a previously state-registered IA to remain state registered until it reaches $110 million AUM or more) to reduce the likelihood of unnecessary annual switching between SEC and state regulators.

7 For this purpose, assets are viewed as managed from a place of business if such place of business (1) either provides (or holds itself out as providing) investment advisory services from the U.S. place of business or solicits, meets with or otherwise communicates with clients from the U.S. place of business and (2) provides "continuous and regular supervisory or management services" (i.e., ongoing investment advice) at the U.S. place of business. The SEC states that a U.S. place of business, which conducts only research and due diligence is generally not viewed as managing assets in the U.S. so long as a person outside of the U.S. makes and implements independent investment decisions.

8 Determined by reference to the rules of § 3(c)(1) or § 3(c)(7) of the Investment Company Act so that "knowledgeable employees" of the private fund adviser are excluded.

9 The SEC's release states that, in general, an unregistered non-U.S. advisory affiliate of an SEC-registered adviser may provide certain advisory services through the SEC-registered affiliate without itself registering with the SEC, confirming the SEC's longstanding *Unibanco* doctrine.

10 As noted above, a single-investor vehicle is likely to be viewed by the SEC as equivalent to a separate account and thus not as a private fund.

11 While the SEC release states that wholly-owned subsidiaries or blockers used by a fund for tax, legal or regulatory reasons do not violate this restriction, certain other structures could cause an investment not to qualify, such as a co-invest vehicle or club fund structure involving multiple funds investing in an operating company through an aggregator vehicle.

12 Such an exempt reporting adviser is not, however, a registered IA and thus is not subject to the carried interest prohibition that applies to a registered IA not qualifying for any of the new Advisers Act registration exemptions (unless such registered IA qualifies for one of the exemptions from the carried interest prohibition).

13 An exempt reporting adviser is also required to comply with recordkeeping obligations, adopted by future SEC rulemaking.

14 "Family clients" generally includes family members that are direct lineal descendants of a common ancestor and such lineal descendants' spouses or spousal equivalents (including former spouses and spousal equivalents) and certain "family entities" and "key employees" of the family office.

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

Scott A. Moehrke, P.C.
http://www.kirkland.com/smoehrke
+1 312-862-2199

Nabil Sabki
http://www.kirkland.com/nsabki
+1 312-862-2369

Robert H. Sutton
http://www.kirkland.com/rsutton
+1 212-446-4897

Courtney P. Mitchell
http://www.kirkland.com/cmitchell
+1 212-446-4946

Dodd-Frank Whistleblower Rules Adopted

PENpoints

The final whistleblower rules are designed to incentivize individuals to report to the SEC alleged securities law violations by private fund managers and others.

The Dodd-Frank Act directs the SEC to pay an award to a whistleblower who provides the SEC with original information about a securities law violation leading to a successful enforcement and/or related action resulting in monetary sanctions exceeding $1 million.

Due to the potential monetary incentives for individuals to report securities law violations directly to the SEC, a private fund manager should be able to respond quickly to internal reports of potential securities law violations and any inquiries from the SEC and should avoid punitive actions against any person believed to be a whistleblower.

Requirements for Whistleblower Awards

The SEC's final rules condition a whistleblower award on the following:

- A whistleblower must be an individual (rather than a company or another entity) who submits original information to the SEC in accordance with specified procedures;[1]
- The submission must relate to a violation of the federal securities laws; and
- The whistleblower must voluntarily submit

information (i.e., such submission must occur prior to a request by the SEC or other specified governmental bodies).

Compliance Programs

Although the final rules do not require an employee whistleblower to report violations through a firm's internal compliance program before informing the SEC, the rules attempt to mitigate the incentive of a whistleblower to bypass a firm's compliance program:

- A whistleblower who reports information through the firm's compliance program before or at the same time as he or she reports the information to the SEC will receive "full credit" for the information if the firm ultimately reports the information,
- A whistleblower's voluntary participation in an entity's internal compliance and reporting systems may increase the amount of an award, and
- A whistleblower's interference with internal compliance and reporting policies (e.g., mandatory internal reporting requirements of known violations) may decrease the amount of an award.

The SEC intends such incentives to encourage companies to promote a culture of compliance: if an employee understands that internal reporting can have a constructive result, the net effect will be enhanced compliance with federal securities laws. Accordingly, the common requirement that an employee report securities law violations to a firm's compliance officer remains permissible, subject to the anti-retaliation provisions described below. Because of the new whistleblower incentives, a firm should be prepared to quickly address any internal report of a securities law violation, remedy any actual violation, evaluate the advisability of self-reporting such violation to the SEC, and respond to inquiries from the SEC or other governmental agencies arising from a whistleblower report.

Anti-Retaliation

The Dodd-Frank Act gives a whistleblower the right to sue if he or she is discharged, demoted or discriminated against for reporting potential violations to the SEC. For purposes of the anti-retaliation provision, a whistleblower must (i) possess a "reasonable belief" that the information he or she provides relates to a possible securities law violation that has occurred, is ongoing, or is about to occur, and (ii) report the information as required by the rule. The SEC intends the "reasonable belief" standard to avoid encouraging bad faith or frivolous reports. However, the retaliation protections apply even if the whistleblower's report does not ultimately lead to a successful SEC enforcement action.

In its release, the SEC clarifies that the statute prohibits an adverse employment action taken "because of" a lawful act by the whistleblower to provide information and does not prohibit an adverse employment action taken for other reasons.

The SEC's rules also prohibit a firm from taking any action to impede a whistleblower from communicating directly with SEC's staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement.

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[1] In addition, the following categories of people, among others, are generally not eligible for a whistleblower award: (a) attorneys using client information, (b) compliance and internal audit personnel, (c) public accountants working on SEC client engagements, and (d) persons who obtain the information in violation of federal or state criminal law.

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Scott A. Moehrke, P.C.
http://www.kirkland.com/smoehrke
+1 312-862-2199

Robert Morrison
http://www.kirkland.com/rmorrison
+1 312-862-2512

SEC Proposes Qualified Client Changes

PENpoints

The SEC has proposed rules increasing the financial tests for an individual investing in certain private funds that charge performance-based fees, such as carried interest.

Under the Advisers Act, a registered IA is prohibited from (directly or indirectly) charging a private fund investor a performance-based fee (e.g., a carried interest) unless the client is a "qualified client" (as defined by SEC rule). The Dodd-Frank Act requires the SEC to adjust the qualified client thresholds for inflation. The SEC has proposed rules revising the definition of qualified client as a person (e.g., a private fund investor) with:

- at least $1 million (up from $750,000) under management with the adviser immediately after entering into the advisory arrangement (e.g., an investment in a private fund);[1] or
- net worth (together with assets held jointly with a spouse, but excluding the value of a person's primary residence and related debt) greater than $2 million (up from $1.5 million) at the time of entering into the advisory arrangement (e.g., an investment in a private fund).

These thresholds will be adjusted for inflation every five years.

An IA registering because of the elimination of the fewer-than-fifteen-client exemption and on or before March 30, 2012 is not subject to the qualified client test and is able to continue to charge performance-based fees to pre-existing non-qualified private fund investors.[2]

A previously registered IA can continue to use the $750,000 / $1 million qualified client test for persons who were investors prior to the new rule's effective date.

Comments on the proposed rule are due by July 11, 2011. The SEC is expected to adopt a final rule by late 2011.

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1 Calculated by the client's (1) uncalled fund capital commitment plus (2) gross market value or fair value of existing investments managed by the manager.

2 QPs and knowledgeable employees of an IA also generally constitute qualified clients, and non-U.S. persons generally are not covered by the performance-based fee prohibition. All such investors may be charged performance-based fees without meeting either of the dollar-based tests described in text above. Accordingly, the dollar-based tests generally are relevant only for a 100-or-fewer-beneficial owner private fund formed under §3(c)(1) of the Investment Company Act or for a separate account with a non-QP.

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Scott A. Moehrke, P.C.
http://www.kirkland.com/smoehrke
+1 312-862-2199

Nancy Kowalczyk
http://www.kirkland.com/nkowalczyk
+1 312-862-3134

SEC Proposes "Bad Boy" Disqualifications for Private Fund Offerings

PENpoints

Proposed "bad boy" rules would make the Reg. D Rule 506 private offering exemption unavailable because of adverse regulatory events involving a private fund or its affiliates.

The Dodd-Frank Act requires the SEC to adopt a rule disqualifying private funds and other entities from relying on Reg. D's commonly used Rule 506 safe harbor from securities registration if any of the fund, the fund sponsor, certain affiliates or the fund's placement agent, or certain of their respective personnel, is subject to securities-related felonies, misdemeanors, SEC, state or self-regulatory organization actions or other similar disqualifying events. Under the proposed rule, disqualifying events can look-back 5 or 10 years. However, SEC may grant waivers under specified circumstances.

A private fund manager intending to rely on Rule 506 for private placement activity after adoption of the final rule will need to implement procedures to conduct thorough diligence (e.g., periodically circulating compliance questionnaires and/or obtaining representations) of its personnel, affiliates and third-party placement agents to ensure that none of them are subject to a disqualifying event.

Comments on the proposed rule are due by July 14, 2011and the final rule is expected to be adopted by the end of 2011.

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Scott A. Moehrke, P.C.
http://www.kirkland.com/smoehrke
+1 312-862-2199

Nancy L. Kowalczyk
http://www.kirkland.com/nkowalczyk
+1 312-862-3134

House Bill Creating Private Equity Fund Adviser Exemption Approved by Financial Services Committee, but Faces Hurdles

PENpoints

The U.S. House of Representatives is considering a proposal to add a new exemption from IA registration for private equity fund managers.

On June 22, 2011, the House Committee on Financial Services approved the "Small Business Capital Access and Job Preservation Act" (H.R. 1082, introduced by Rep. Hurt (R-VA)). As currently drafted, the bill would exempt most private equity fund advisers from SEC registration by exempting investment advice relating to a "private equity fund" (to be defined by SEC rulemaking) that has fund-level debt of no more than twice its funded capital.

Likelihood of the bill's passage into law remains highly uncertain, given that it faces separate votes in the House and Senate, as well as approval by the President (or sufficient votes in Congress to overcome a Presidential veto).

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

Robert H. Sutton
http://www.kirkland.com/rsutton
+1 212-446-4897

PENbriefs

General Release—Handle with Caution

A recent decision by the highest court in New York highlights the broad finality of a general release given in the context of a transaction, even where significant fraud is subsequently alleged. The release in question was given by minority stockholders who sold their interests to the majority shareholder. The sellers alleged that they agreed to the price only as a result of fraudulent information given to them by the majority shareholder, resulting in an undervaluation of almost $1 billion. The court held that the fraud claims—which were not known at the time the release was given—were barred by the broad release unless the sellers could prove that a separate fraud (independent from the fraud in the transaction) induced the release. To learn more, see our recent *M&A Update*.

Revlon Duties Apply When There is "No Tomorrow" For A Significant Portion Of The Consideration

The circumstances under which *Revlon* duties apply to transactions with mixed consideration of cash and stock has long been an unsettled question under Delaware law. Prior Delaware cases have held that *Revlon* did not apply when the consideration was 33% cash, but did apply when the consideration was 62% cash. Recently, the Delaware Chancery Court narrowed the gap when it held that *Revlon* applied to a 50% cash-consideration transaction, but uncertainties remain. To learn more, see our recent *M&A Update*.

India Finalizes Merger Control Regulations

In early June 2011 India's recently announced pre-merger notification regime took effect. Because these new regulations may trigger filing obligations for international deals, it is an important development for private equity firms and their portfolio companies already doing business in India, and for those considering investments in India. To learn more about the new Indian pre-merger notification rules, see our recent *Kirkland Alert*.

FTC Guidance on Using Escrows in Hart-Scott-Rodino Reportable Transactions

On limited occasions in the past, the FTC's Premerger Notification Office (PNO) has allowed parties to a transaction subject to Hart-Scott-Rodino Act clearance to transfer voting securities into an escrow account pending expiration of the HSR waiting period. The PNO recently issued a statement that, absent "exceptional circumstances" (subject to prior consultation with the PNO), such escrow arrangements may not be used to solve timing problems resulting from HSR waiting periods. To learn more about this change in policy, see our recent *Kirkland Alert*.

PENnotes

PLI's 12th Annual Private Equity Forum - New York
New York, New York
July 11-12, 2011

PLI's 12th Annual Private Equity Forum will take place at PLI's New York headquarters on July 11-12, 2011. Key topics for this program will include: current issues in private equity investing and private equity funds; dealing with fund sponsor issues, and current regulatory, legislative and tax issues. Kirkland partner Robert H. Sutton will participate in a panel discussion on "Other Regulatory Developments Affecting the Marketing of Private Equity Funds." For more information, or to register for this event, please visit: www.pli.edu.

Practising Law Institute's "Mergers & Acquisitions 2011: What You Need to Know Now"
Chicago, Illinois
New York - September 8, 2011
Chicago - September 22-23, 2011

At this two-day program, top deal lawyers, general counsel, regulators and investment bankers will discuss trends and techniques in tender offers and private equity transactions, dramatic developments in Delaware law and shareholder litigation, continuing vitality of the poison pill and insight into the antitrust regulatory landscape. Kirkland partner R. Scott Falk, P.C., is a co-chair of this event. For more information, or to register for this event, please visit: www.pli.edu.

Brazil Investment Summit 2011
New York, New York
October 25-27, 2011

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Chicago
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
+1 (312) 862-2000
+1 (312) 862-2200 fax

Hong Kong
Kirkland & Ellis LLP
26th Floor
Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
+852-3761-3300
+852-3761-3301 fax

London
Kirkland & Ellis
International LLP
30 St Mary Axe
London, EC3A 8AF
United Kingdom
+44 20 7469 2000
+44 20 7469 2001 fax

Los Angeles
Kirkland & Ellis LLP
333 South Hope Street
29th Floor
Los Angeles, CA 90071
+1 (213) 680-8400
+1 (213) 680-8500 fax

Munich
Kirkland & Ellis
International LLP
Maximilianstrasse 11
80539 Munich
Germany
+49 89 2030 6000
+49 89 2030 6100 fax

New York
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
+1 (212) 446-4800
+1 (212) 446-4900 fax

Palo Alto
Kirkland & Ellis LLP
950 Page Mill Road
Palo Alto, CA 94304
+1 (650) 859-7000
+1 (650) 859-7500 fax

San Francisco
Kirkland & Ellis LLP
555 California Street
San Francisco, CA 94104
+1 (415) 439-1400
+1 (415) 439-1500 fax

Shanghai
11th Floor, HSBC Building
Shanghai IFC
8 Century Avenue
Pudong New District
Shanghai 200120
P.R. China
+8621 3857 6300
+8621 3857 6301 fax

Washington, D.C.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
+1 (202) 879-5000
+1 (202) 879-5200 fax

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Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named Best M&A Firm in the United States at World Finance's 2011 Legal Awards and was honored as the "Private Equity Team of the Year" at the 2011 IFLR Americas Awards. Kirkland was also recognized as "Law Firm of the Year" in *Buyouts* magazine's "2010 Deal of the Year Yearbook." 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 2010 "Private Equity Breakdown."

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EDITORS

Jack S. Levin, P.C.
Margaret A. Gibson, P.C.
Norbert B. Knapke II

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kirklandpen@kirkland.com
+1 (312) 862-2894

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