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REAL ESTATE INVESTMENT MANAGERS NATIONAL ASSOCIATION

House Financial Services Committee Passes Private Fund Investment Advisers Registration Act of 2009

On October 27, 2009, the House Financial Services Committee passed by a vote of 67-1 H.R. 3818, the Private Fund Investment Advisers Registration Act of 2009 ("PFIARA") (Kanjorski D-PA). The bill will be considered by the full House later this year along with other financial services reform bills.

Registration Requirement and Exemptions

Currently, many advisers to private funds rely upon the private adviser exemption to avoid registering as an investment adviser with the Securities and Exchange Commission ("SEC") under the Investment Advisers Act of 1940 ("Advisers Act"). In general, the exemption provides that an adviser with less than 15 clients that does not hold itself out to the public is exempt from registration.

> ***The PFIARA would eliminate the private adviser exemption by amending Section 203(b) of the Advisers Act to exclude from the registration exemption an investment adviser to any "private fund."***

The PFIARA defines a "private fund" as a fund that is "organized or otherwise created under the laws of the United States or of a state" or "has 10% or more of its outstanding securities by value owned by U.S. persons," and would be deemed an "investment company" under the Investment Company Act of 1940 ("1940 Act"), but for the exceptions in Section 3(c)(1) or Section 3(c)(7) of the 1940 Act. Investment advisers to private funds would therefore be required to register with the SEC and comply with all applicable provisions of the Advisers Act.

The amended bill provides an exemption from Advisers Act registration to a private fund adviser if each of the private funds it manages has assets under management ("AUM") of less than $150 million. It is not yet clear, however, whether the AUM test will be calculated once or periodically, and whether it will be based on committed or invested capital. Advisers to venture capital funds (as defined by the SEC) continue to remain outside the scope of registration, as envisaged by the original proposal. Although they will be exempt from Advisers Act registration, advisers to funds with AUM of less than $150 million or venture capital funds will nevertheless be required to maintain records and provide the SEC with annual reports or other data the SEC deems necessary or appropriate.

The bill includes a transition period of one year following enactment before its provisions become effective. This would give advisers who would become subject to registration time to implement the appropriate internal systems and controls

The PFIARA would exempt advisers to "venture capital funds" from the requirement to register, but has tasked the SEC with defining the term "venture capital fund" and crafting the exemption.

The PFIARA would NOT exempt "foreign private fund advisers". The original bill provided an exemption for foreign advisors defined as investment advisers that have no place of business in the U.S., do not generally hold themselves out to the public in the U.S., have fewer than 15 clients in the U.S. during the preceding 12 months, and have less than $25 million in assets under management that are attributable to U.S. clients.

Recordkeeping, Reporting and Examinations

Under the legislation, advisers to hedge funds, private equity firms, single-family offices, and other private pools of capital will have to obey some basic ground rules in order to continue to play in our capital markets. Regulators will have authority to examine the records of these investment advisers.

The legislation mandates the confidential reporting to the SEC of amount of:

- assets under management,
- borrowings,
- off-balance sheet exposures,
- counterparty credit risk exposures,
- trading and investment positions, and
- other important information relevant to determining potential systemic risk and potential threats to our overall financial stability.

The legislation would require the SEC to conduct regular examinations of such funds to monitor compliance with these requirements and assess potential risk. In addition, the SEC would share the disclosure reports received from funds with the Federal Reserve Board and the Financial Services Oversight Council.

The PFIARA would provide the SEC with broad authority to examine the records of advisers to private funds and the records of the funds. The SEC could also request that advisers make available to the SEC copies or extracts of such records.

The SEC would be required to share with the Board or any other federal agency having systemic risk responsibilities copies of all reports, documents, records and information filed with the SEC. The SEC would keep such information confidential and, subject to certain limited exceptions, could not be compelled to disclose it. Finally, the PFIARA would authorize the SEC to require advisers to private funds to provide such information as the SEC deems necessary or appropriate in the public interest to investors, prospective investors, counterparties and creditors.

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