CARLTON FIELDS

Registration of Private Fund Principals

July 29, 2009

On July 15, the Department of the Treasury delivered to Congress draft legislation entitled, the "Private Fund Investment Advisers Registration Act of 2009," that would amend the federal securities laws to require the registration of investment advisers to private equity funds, hedge funds, family offices and other private investment groups. While the proposed legislation would not require the private funds themselves to register with the Securities and Exchange Commission, it would require that each principal of these funds register as an investment adviser. The proposed act would effect this by removing the private adviser exemption from registration for investment advisers with a place of business in the United States as it would require registration under the Investment Advisers Act of 1940 of all managers of all private funds, other than those with less than $30 million of assets under management. Registration with the SEC would be required even if all the private funds advised by an adviser are in one state, though the draft legislation retains the exemption from registration for intrastate advisers; however, all clients of the adviser must now reside in the state within which the adviser maintains its principal office for this exemption to apply. The legislation would also retain a limited private adviser exemption for foreign investment advisers but only if they have no place of business in the U.S., fewer than 15 U.S. clients, assets under management attributable to U.S. clients of less than $25 million, and do not hold themselves generally to the public as investment advisers. The proposed registration would subject previously unregistered investment advisers to the fully array of requirements under the existing Investors Advisers Act, including, but not limited to: supervision, compliance, recordkeeping, standards of care to clients, disclosure to clients and regulators, custody of client assets, and SEC discipline. The draft legislation also would authorize the SEC to adopt new rules under the Investment Advisers Act designed to further regulate the investment industry. Under the proposed legislation, the SEC's

authority will be expanded to:

- Require investment advisers to maintain and submit to the SEC and the Board of Governors of the Federal Reserve System any records regarding private funds they advise that are "necessary or appropriate" for the assessment of "systemic risk." The proposed language does not define systemic risk but provides that required records and reports would include "assets under management, use of leverage (including off-balance sheet leverage), counterparty credit risk exposure, trading and investment positions, and trading practices," as well as any other information that the SEC, in consultation with the Federal Reserve, determines is appropriate or necessary.
- Make rules requiring advisers to provide such information to investors, potential investors, counterparties, and creditors as may be necessary or appropriate in the public interest and for the protection of investors or the assessment of systemic risk. This would appear to give the SEC broad authority to order public disclosure of a wide range of information regarding an investment fund.
- Prescribe examination procedures for any records of a private fund maintained by a registered investment adviser. Importantly, this draft provision does not require that any such examinations be reasonable, a protection that exists in present law.
- Determine the meanings of various undefined terms including the term "client." This provision will allow the SEC to avoid a court overturning its rules by ascribing different definitions to terms and, as such, provides the SEC a much broader reach.

In addition, whereas the draft legislation provides that the SEC will not be compelled to disclose any information, its language grants the SEC, in its discretion, the right to make public disclosures regarding the identity of, or information about, an investment adviser's clients. This reflects a change in the relevant provisions of the Investment Advisors Act. We will provide updates as this legislation makes its way through Congress as well as if and when the SEC implements rules enforcing this proposed regulatory regime.

Related Practices

Securities Transactions and Compliance
Tax

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This

publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.