THE HOUSE FINANCIAL SERVICES COMMITTEE APPROVES A BILL TO REQUIRE MANY ADVISERS TO PRIVATE FUNDS TO REGISTER WITH THE SECURITIES AND EXCHANGE COMMISSION

In a 67-1 vote, the U.S. House of Representatives Committee on Financial Services approved a bill sponsored by Congressman Paul Kanjorski (D-PA) that, if enacted into law, would largely eliminate the "private adviser exemption" from registration with the SEC under the Investment Advisers Act of 1940. That exemption currently allows an investment adviser to avoid registration with the SEC if, among other criteria, the adviser has fewer than 15 clients in a 12-month period.[1] Many U.S. and non-U.S. advisers to hedge funds, private equity funds and other private funds currently rely on the private adviser exemption to avoid registration under the Advisers Act.

The text of the bill has not been published, however we understand that the bill includes several noteworthy new elements that were not contained in a discussion draft of the bill released last month:[2]

- In addition to exempting advisers to "venture capital funds" from registration under the Advisers Act, the bill also would exempt advisers to small business investment companies, which are regulated by the Small Business Administration. Proposals presented at today's Committee meeting to exempt private equity fund advisers from registration were defeated and no further gloss was provided on the difference between venture capital funds and private equity funds for purposes of registration under the Advisers Act.

- In approving the bill, the Committee discussed increasing the assets under management threshold for registration as an investment adviser from $25 million to $150 million, although it is not clear whether this increase would apply broadly to all advisers or only to advisers to privately offered funds.

---

1 Advisers Act Section 203(b)(3). Section 203(b)(3) is not the exclusive means for a money manager to avoid registration as an investment adviser with the SEC. Today, non-U.S. private fund managers are required to count only U.S. clients toward the 14-client limitation.

2 We provided an overview of Congressman Kanjorski's bill regarding private fund adviser registration in a previous client memorandum: *Key U.S. House of Representatives Committee Holds Hearing To Discuss Legislation That Would Require Registration For Certain U.S. And Non-U.S. Private Fund Managers* (October 7, 2009), *available at:* www.willkie.com/files/tbl_s29Publications/FileUpload5686/3127/Key%20US%20House%20of%20Representatives%20Committee%20Holds%20Hearing.pdf.

- The bill would have a one-year implementation period for registration. The SEC would be required to adopt a rule providing procedures for registration during the implementation period.

- The bill would retain an exemption from the registration requirement for a "foreign private fund adviser." We understand that the bill will define a "foreign private fund adviser" as a person or entity that:

  - has no place of business in the United States; and

  - during the preceding 12 months has had fewer than 15 clients in the United States and has had assets under management attributable to clients in the United States of less than $25 million (subject to increase by the SEC); and

  - does not hold itself out generally to the public in the United States as an investment adviser or act as an investment adviser to a registered investment company.

- The bill, while permitting the SEC to define the term "client" differently for different purposes under the Advisers Act, would not allow the SEC to define the term "client" to include an investor in a private fund. This would mean generally that a fund, not an investor in the fund, would be an adviser's client.

- The term "private fund" would include a private fund organized outside the U.S. as well as private funds organized in the U.S. This would have the effect of narrowing exemptions from registration for advisers that also are registered with the Commodity Futures Trading Commission or that offer advisory services only within one state, as an adviser to a private fund organized outside the U.S. would not qualify for either of those exemptions.

- Income or asset-based qualifications for an investor to invest in a private fund, for example, qualification as an accredited investor under Regulation D of the Securities Act of 1933, would be adjusted automatically for inflation. It was not clear from the discussion at the Committee meeting how these adjustments would be implemented.

As a next step, the Financial Services Committee is expected to publish the text of the bill, together with a report, to the full U.S. House of Representatives. We will provide you with in-depth analysis of the full bill upon its publication.

* * * * * * * * * * * * * * *

If you have any questions concerning the foregoing or would like additional information, please contact James G. Silk (202-303-1275, jsilk@willkie.com), David W. Blass (202-303-1114, dblass@willkie.com), or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, D.C., 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, D.C. telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at www.willkie.com.

October 27, 2009