

Client Alert

Corporate Department

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Hedge Fund Transparency Act Would Require Hedge Funds and Other Private Funds to Register with the SEC in Order to Remain Exempt from Regulation as Investment Companies

On January 29, 2009, a bill was introduced in the Senate that seeks to enact the Hedge Fund Transparency Act (“HFTA”). If passed, the HFTA would change current law so that certain funds, including hedge funds, venture capital funds, private equity funds and other private funds (collectively, “Private Funds”), with assets of \$50 million or more would be required to register with the Securities and Exchange Commission (the “SEC”) and meet certain disclosure obligations.

Regulatory Background

Currently, under the Investment Company Act of 1940 (the “1940 Act”), funds with fewer than 100 beneficial owners and funds owned exclusively by “qualified purchasers” (high net worth persons and entities) are excluded from the definition of “investment company” and the regulatory requirements of the 1940 Act under Sections 3(c)(1) and 3(c)(7), respectively. The HFTA would bring any Private Fund currently relying on either of these exceptions within the definition of “investment company.” While preserving the same criteria as the Section 3(c)(1) and 3(c)(7) exceptions, the HFTA would convert these outright exceptions into qualified exemptions under new Sections 6(a)(6) and 6(a)(7) (the “HFTA Exemptions”) of the 1940 Act.

Application of the HFTA Exemptions

Under the HFTA, a Private Fund with assets or assets under management of less than \$50 million that qualifies for either of the HFTA Exemptions will have no additional registration or disclosure requirements. However, Private Funds that qualify for either of the HFTA Exemptions but have \$50 million or more in assets or assets under management can only avail themselves of one of these exemptions if they meet certain registration and disclosure requirements.

Registration and Disclosure Requirements

Private Funds with assets or assets under management of \$50 million or more will only be exempt under the HFTA Exemptions if they:

- Register with the SEC;
- File an annual information form with the SEC (discussed in further detail below);
- Maintain such books and records as the SEC may require; and
- Cooperate with any request for information or examination by the SEC.

Annual Information Form Requirements

The information form, which would be required to be freely available to the public in an electronic, searchable format and filed with the SEC at least once every 12 months, would include the following information:

- The name and current addresses of (a) each person who is a beneficial owner of the Private Fund, (b) any company with an ownership interest in the Private Fund and (c) the primary accountant and primary broker used by the Private Fund;
- An explanation of the structure of ownership interests in the Private Fund;
- Information on any affiliation that the Private Fund has with another financial institution;
- A statement of any minimum investment commitment required of a limited partner, member or other investor;
- The total number of any limited partners, members or other investors; and
- The current value of the Private Fund's assets and any assets under management by the Private Fund.

Anti-Money Laundering Obligations

In addition to the above registration and disclosure requirements, the HFTA would require every Private Fund relying on the HFTA Exemptions to establish an anti-money laundering program and to report suspicious transactions.

Steve Wolosky
swołosky@olshanlaw.com

Adam Finerman

OLSHAN

OLSHAN GRUNDMAN FROME ROSENZWEIG & WOLOSKY LLP

afinerman@olshanlaw.com

Ron Berenblat

rberenblat@olshanlaw.com

David J. Adler

dadler@olshanlaw.com

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