

COMPARISON OF TEXT OF “THE PRIVATE FUND REGISTRATION ACT OF 2009”
IN HR 3818 (WITH AMENDMENTS)¹ WITH
“THE PRIVATE FUND REGISTRATION ACT OF 2009” INCLUDED IN THE
DISCUSSION DRAFT OF
RESTORING AMERICAN FINANCIAL STABILITY ACT OF 2009

A legend is included on the last page hereof.

~~111th CONGRESS~~ TITLE IV—REGULATION OF ADVISERS TO HEDGE FUNDS

~~1st Session~~
~~H. R. 3818~~

AND OTHERS

SEC. 401. SHORT TITLE.

This ~~Act~~title may be cited as the ~~“Private Fund Investment Advisers Registration Act of 2009”~~.

SEC. ~~2.~~402. DEFINITIONS.

Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b~~—~~2(a)) is amended by adding at the end the following ~~new paragraphs~~:

~~“(29) PRIVATE FUND—~~The term ~~“private fund”~~ means an ~~issuer~~investment fund that~~—~~

~~“(A) would be an investment company under~~(as defined in section 3~~(a)~~) of the Investment Company Act of 1940 (15 U.S.C. 80a~~—~~3~~(a)~~), but for ~~the exception provided from that definition by either~~ section 3(c)(1) or ~~section~~3(c)(7) of ~~such~~that Act; ~~and~~

~~“(B) either—~~

~~“(i) is organized or otherwise created under the laws of the United States or of a State; or~~

~~“(ii) has 10 percent or more of its outstanding securities owned by United States persons.”~~

~~“(30) FOREIGN PRIVATE FUND ADVISER—~~The term ~~“foreign private fund adviser”~~ means ~~any~~any investment adviser who~~—~~

¹ As of the date of the preparation of this alert, the official “recorded version,” i.e. the version approved by the House Financial Services Committee with its amendments have not been posted. The version used for comparison is the original introduced version with manually inserted amendments from the House Financial Services Committee’s markup page available here:

http://www.house.gov/apps/list/speech/financialsvcs_dem/markup_102109.shtml

~~“(A) has no place of business in the United States;~~

~~“(B) during the preceding 12 months has had (i) has fewer than 15 clients in who are domiciled in or residents of the United States; and~~

~~“(C) has assets under management attributable to clients in who are domiciled in or residents of the United States of less than \$25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in the public interest or for the protection of investors accordance with the purposes of this title; and~~

~~“(D) neither holds itself out generally to the public in the United States as~~

~~(i) an investment adviser, nor acts as an investment adviser to any investment company registered under the Investment Company Act of 1940, 1940; or~~

~~(ii) a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53), and has not withdrawn such its election.”~~

SEC. ~~3~~403. ELIMINATION OF PRIVATE ADVISER EXEMPTION;

LIMITED EXEMPTION FOR FOREIGN PRIVATE ~~FUND~~-ADVISERS; LIMITED INTRASTATE EXEMPTION.

Section 203(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(b)) is amended—

(1) in paragraph (1), by inserting ~~“(~~ except other than an investment adviser who acts as an investment adviser to any private fund, ~~“after any investment adviser”~~ before “all of whose”;

(2) by ~~amending~~ striking paragraph (3) ~~to read as follows~~ and inserting the following:

~~“(3) any investment adviser that is a foreign private fund-adviser;”~~ and (3) in paragraph (5), by striking “or” at the end; (4) in paragraph (6)—

(A) in subparagraph (A), by striking ~~“(or”~~ at the end;

(B) in subparagraph (B), by striking the period at the end and ~~adding~~ inserting “; or”; and

(C) by adding at the end the following ~~new subparagraph~~:

~~“(C) a private fund.”~~
~~(5) by striking the period at the end of paragraph (6) and inserting a semicolon; and~~
~~(6) by adding at the end the following:~~
~~“(7) any investment adviser who solely advises~~
~~(A) small business investment companies licensed under the~~
~~Small Business Investment Act of 1958;~~

~~(B) have received from the Small Business Administration notice to proceed to qualify for a license, which notice or license has not been revoked; or
(C) applicants, related to one or more licensed small business investment companies covered in subparagraph (A), that have applied for another license, which application remains pending.”~~

“(C) a private fund.”

SEC. ~~4~~404. COLLECTION OF SYSTEMIC RISK DATA; REPORTS; EXAMINATIONS; DISCLOSURES.

Section 204 of the Investment Advisers Act of 1940 (15 U.S.C. 80b~~4~~) is amended~~—~~

(1) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and (2) by inserting after subsection (a) the following ~~new subsection~~:

~~“(b) Records and Reports of Private Funds—~~
“(b) RECORDS AND REPORTS OF PRIVATE FUNDS.—

~~“(1) IN GENERAL—~~—The Commission ~~is authorized to~~may require any investment adviser registered under this ~~Act~~title—

~~“(A) to maintain such records of, and file with the Commission such reports regarding, private funds advised by the investment adviser, as are necessary or and appropriate in the public interest~~interest and for the protection of investors, or for the assessment of systemic risk ~~as the Commission determines in consultation with the Board of Governors of the Federal Reserve System. The Commission is authorized~~by the Agency for Financial Stability; and

~~“(B) to provide or make available to the Board of Governors of the Federal Reserve System, and to any other entity that the Commission identifies as having systemic risk responsibility,~~Agency for Financial Stability those reports or records or the information contained therein.

~~“(2) TREATMENT OF RECORDS.—~~The records and reports of any private fund, ~~provided to which any such~~an investment adviser ~~registered under this title who~~ provides investment advice, ~~maintained or filed by an investment adviser registered under this Act, to that~~private fund shall be deemed to be the records and reports of the investment adviser.

~~“(23) REQUIRED INFORMATION—~~—The records and reports required to be ~~maintained or~~ filed with the Commission under this subsection shall include, for each private fund advised by the investment adviser~~—~~, a description of—

~~“(A) the amount of assets under management; (B) the~~ use of leverage ~~(including off-balance sheet leverage);~~

~~“(B) counterparty credit risk~~ ~~exposures~~exposure;

~~“(D)~~ trading and investment positions;

“(D) valuation methodologies of the fund;

~~“(E)~~ types of assets held;

“(F) side arrangements or side letters, whereby certain investors in a fund obtain more favorable rights or entitlements than other investors;

“(G) trading practices; and

~~“(F)~~ such other information as the Commission, in consultation with the ~~Board of Governors of the Federal Reserve System, determines~~ Agency for Financial Stability, ~~deems~~ necessary ~~or~~ and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk.

~~“(3) OPTIONAL INFORMATION—The Commission may require the reporting of such additional information from private fund advisers as the Commission determines necessary. In making such determination, the Commission, taking into account the public interest and potential to contribute to systemic risk, may set different reporting requirements for different classes of private fund advisers, based on the particular types or sizes of private funds advised by such advisers.~~

~~“(4) MAINTENANCE OF RECORDS—~~ An investment adviser registered under this Act is ~~required to~~ title shall maintain ~~and keep~~ such records of private funds advised by the investment adviser for such period or periods as the Commission, by rule ~~or regulation,~~ may prescribe as necessary ~~or~~ and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.

~~“(5) EXAMINATION OF RECORDS—~~

~~“(A) PERIODIC AND SPECIAL EXAMINATIONS—All.~~ The Commission—

“(i) shall conduct periodic inspections of all records of ~~a~~ private ~~fund~~ funds maintained by an investment adviser registered under this ~~Act shall be subject~~ title in accordance with a schedule established by the Commission; and

“(ii) may conduct at any time and from time to time ~~to~~ such ~~periodic~~ additional, special, and other examinations ~~by the Commission, or any member or representative thereof,~~ as the Commission may prescribe ~~as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.~~

~~“(B) AVAILABILITY OF RECORDS—~~ An investment adviser registered under this Act ~~title~~ shall make available to the Commission ~~or its representatives~~ any copies or extracts from such records as may be prepared without undue effort, expense, or delay, as the Commission or its representatives may reasonably request.

~~“(6) INFORMATION SHARING.—The Commission shall make available to the Board of Governors of the Federal Reserve System, and to any other entity that the Commission identifies as having systemic risk responsibility, Agency for Financial Stability~~ copies of all reports, documents, records, and information filed with or provided to the Commission by an investment adviser under this subsection as the ~~Board, or such other entity, Agency for Financial Stability~~ may consider necessary for the purpose of assessing the systemic risk ~~of posed by~~ a private fund. ~~All information in all~~ such reports, documents, records, and information ~~obtained by the Board, or such other entity, from the Commission under~~in this subsection shall be kept strictly confidential ~~in a manner consistent with confidentiality established by the Commission pursuant to paragraph (8).~~

~~“(7) DISCLOSURES OF CERTAIN PRIVATE FUND INFORMATION—An investment adviser registered under this Act shall provide such reports, records, and other documents to investors, prospective investors, counterparties, and creditors, of any private fund advised by the investment adviser as the Commission, by rule or regulation, may prescribe as necessary or appropriate in the public interest and for the protection of investors or for the assessment of systemic risk.~~

~~“(8) CONFIDENTIALITY OF REPORTS.—Notwithstanding any other provision of law, the Commission shall may not be compelled to disclose any supervisory report or information contained therein required to be filed with the Commission under this subsection. Nothing, except that nothing in this paragraph shall authorize subsection authorizes the Commission—~~

~~“(A) to withhold information from the Congress, upon an agreement of confidentiality; or~~

~~“(B) prevent the Commission from complying with—~~

~~“(i) a request for information from any other Federal department or agency or any self-regulatory organization requesting the report or information for purposes within the scope of its jurisdiction; or complying with~~

~~“(ii) an order of a court of the United States in an action brought by the United States or the Commission.~~

~~“(8) PUBLIC INFORMATION EXCEPTION.—For purposes of section 552 of title 5, United States Code, this paragraph subsection shall be considered a statute described in subsection (b)(3)(B) of such section. 552.~~

~~“(9) REPORT TO CONGRESS.—The Commission shall report annually to Congress on how the Commission has used the data collected pursuant to this subsection to monitor the markets for the protection of investors and the integrity of the markets.”.~~

SEC. ~~5. ELIMINATION OF~~405. DISCLOSURE PROVISION ELIMINATED.

Section 210 of the Investment Advisers Act of 1940 (15 U.S.C. 80(b-)~~10~~) is amended by striking subsection (c).

~~SEC. 6. EXEMPTION OF AND REPORTING BY VENTURE CAPITAL FUND ADVISERS.~~

~~Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3) is amended by adding at the end the following new subsection:~~

~~“(l) Exemption of and Reporting by Venture Capital Fund Advisers—The Commission shall identify and define the term ‘venture capital fund’ and shall provide an adviser to such a fund an exemption from the registration requirements under this section (excluding any such fund whose adviser is exempt from registration pursuant to paragraph (7) of subsection (b)). The Commission shall require such advisers to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.”~~

~~SEC. 7. EXEMPTION OF AND REPORTING BY CERTAIN PRIVATE FUND ADVISERS~~

~~Section 203 Investment Advisers Act of 1940 (15 U.S.C. 80b-11), as amended by section 6, is further amended by adding at the end of the following new subsections:~~

~~“(m) EXEMPTION OF AND REPORTING BY CERTAIN PRIVATE FUND ADVISERS~~

~~“(1) IN GENERAL.—The Commission shall provide an exemption from the registration requirements under this section to any investment adviser of private funds, if each of such private funds has assets under management in the United States of less than \$150,000,000~~

~~“(2) REPORTING.—The Commission shall require investment advisers exempted by reason of this subsection to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors.~~

~~“(n) REGISTRATION AND EXAMINATION OF MID-SIZED PRIVATE FUND ADVISERS.—In prescribing regulations to carry out the requirements of this section with respect to investment advisers acting as investment advisers to mid-sized private funds, the Commission shall take into account the size, governance, and investment strategy of such funds to determine whether they pose systemic risk, and shall provide for registration and examination procedures with respect to the investment advisers of such funds which reflect the level of systemic risk posed by such funds.”~~

~~SEC. 8. 406. CLARIFICATION OF RULEMAKING AUTHORITY.~~

~~Section 211 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-11) is amended——~~

(1) ~~by amending~~ in subsection (a) ~~to read as follows:—~~ (A) by striking the second sentence;

~~“(a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this title~~ (B) by inserting before the period at the end of the first sentence the following: “, including rules and regulations defining technical, trade, and other terms used in this title. ”;

(C) by inserting “(1) IN GENERAL.—” before “The Commission”; and

(D) by adding at the end the following:

“(2) COMMISSION AUTHORITY.—For the purposes of its rules and regulations, the Commission may ~~—~~ —

~~“(1A) classify persons and matters within its jurisdiction based upon, but not limited to—~~

~~“(A) size;~~

~~“(B) scope;~~

~~“(C) business model;~~

~~“(D) compensation scheme; or~~

~~“(E) potential to create or increase systemic risk;”~~ (2) and

prescribe different ~~requirements~~ requirements for different classes of persons or matters; and

~~“(3B) ascribe different meanings to terms (including the term ‘client’, except the Commission shall not ascribe a meaning to the term ‘client’ that would include an investor in a private fund managed by an investment adviser, where such private fund has entered into an advisory contract with such adviser ‘client’)~~ “client” used in different sections of this title, as the Commission determines necessary to effect the purposes of this title.”; and

(2) by adding at the end the following ~~new subsection:~~

~~“(e) DISCLOSURE RULES ON PRIVATE FUNDS.—~~The Commission and the Commodity Futures Trading Commission shall, after consultation with the ~~Board of Governors of the Federal Reserve System, within 12~~ Agency for Financial Stability, not later than 6 months after the date of enactment of the Private Fund Investment Advisers Registration Act of 2009, jointly promulgate rules to establish the form and content of the reports required to be filed with the Commission under ~~sections 203(f) and~~ subsection 204(b) and with the Commodity Futures Trading Commission by investment advisers that are registered both under the Investment Advisers Act of 1940 (15 U.S.C. 80b-~~1~~ et seq.) and the Commodity Exchange Act (7 U.S.C. 1a et seq.).”

~~SEC. 9. CLARIFICATION OF RULEMAKING AUTHORITY.~~

~~Section 211 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-11) is amended—~~

~~(1) by amending subsection (a) to read as follows:~~

~~“(a) The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this title, including rules and regulations defining technical, trade, and other terms used in this title. For the purposes of its rules and regulations, the Commission may—~~

~~SEC. 10. QUALIFIED CLIENT STANDARD.~~

~~Section 205(3) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-11) is amended by adding at the end of the following: “With respect to any factor used by the Commission in making a determination under this subsection, if the Commission uses a dollar amount test in connection with such factor, such as a net asset threshold, the Commission shall, not later than one year after the date of the enactment of the Private Fund Investment Advisers Registration Act of 2009, and every 5 years thereafter, adjust for the effects of inflation on such test. Any such adjustment that is not a multiple of \$1,000 shall be rounded to the nearest multiple of \$1,000.~~

~~SEC. 11. TRANSITION RULE~~

~~(i) TRANSITION RULE.—The Securities and Exchange Commission shall prescribe rules and regulations to permit an investment adviser who will be required to register with the Securities and Exchange Commission by reason of the Act with the option of registering with the Securities and Exchange Commission before the date described under this section.~~

~~SEC. 12. GAO STUDY.~~

~~(a) STUDY REQUIRED.—The Comptroller General of the United States shall carry out a study to assess the annual costs on industry members and their investors due to the registration requirements and ongoing reporting requirements under this Act and the amendments made by this Act.~~

[SEC. 407. EXEMPTIONS OF VENTURE CAPITAL FUND ADVISERS.](#)

[Section 203 of the Investment Advisers Act of 1940 \(15 U.S.C. 80b-3\) is amended by adding at the end the following:](#)

“(1) EXEMPTION OF VENTURE CAPITAL FUND ADVISERS.—No investment adviser shall be subject to the registration requirements of this title with respect to the provision of investment advice relating to a venture capital fund. Not later than 6 months after the date of enactment of this subsection, the Commission shall issue final rules to identify and define the term ‘venture capital fund’ for purposes of this subsection.”.

SEC. 408. EXEMPTION OF AND RECORD KEEPING BY PRIVATE EQUITY FUND ADVISERS.

Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3) is amended by adding at the end the following:

“(m) EXEMPTION OF AND REPORTING BY PRIVATE EQUITY FUND ADVISERS.—

“(1) IN GENERAL.—Except as provided in this subsection, no investment adviser shall be subject to the registration or reporting requirements of this title with respect to the provision of investment advice relating to a private equity fund.

“(b) REPORT TO THE CONGRESS²) MAINTENANCE OF RECORDS AND ACCESS BY COMMISSION.—Not later than ~~the end of the 2-year period beginning on~~ 6 months after the date of ~~the~~ enactment of this ~~Act~~ subsection, the Commission shall issue final rules—

“(A) to require investment advisers described in paragraph (1) to maintain such records and provide to the Commission such annual or other reports as the Commission determines necessary and appropriate in the public interest and for the protection of investors; and

“(B) to identify and define the term ‘private equity fund’ for purposes of this subsection.”.

SEC. 409. FAMILY OFFICES.

Section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)) is amended by striking “or (G)” and inserting the following: “(G) any family office, as defined by rule, regulation, or order of the Commission, in accordance with the purposes of this title; or (H)”.

SEC. 410. STATE AND FEDERAL RESPONSIBILITIES; ASSET THRESHOLD FOR FEDERAL REGISTRATION OF INVESTMENT ADVISERS.

Section 203A(a)(1)(A) of the Investment Advisers Act (15 U.S.C. 80b-3a(a)(1)(A)) is amended by striking “\$25,000,000” and inserting “\$100,000,000”.

SEC. 411. CUSTODY OF CLIENT ASSETS.

The Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) is amended by adding at the end the following new section:

“SEC. 223. INDEPENDENT CUSTODY OF CLIENT ASSETS.

“The Commission shall prescribe rules requiring investment advisers registered under this title to use an independent custodian to hold client assets, where necessary and appropriate in the public interest and for the protection of investors.”

SEC. 412. ADJUSTING THE ACCREDITED INVESTOR STANDARD FOR INFLATION.

The Commission shall, by rule—

(1) increase the financial threshold for an accredited investor, as set forth in the rules of the Commission under the Securities Act of 1933, by calculating an amount that is greater than the amount in effect on the date of enactment of this Act of \$200,000 income for a natural person (or \$300,000 for a couple) and \$1,000,000 in assets, as the Commission determines is appropriate and in the public interest, in light of price inflation since those figures were determined; and (2) adjust that threshold not less frequently than once every 5 years, to reflect the percentage increase in the cost of living.

SEC. 413. STUDIES AND REPORTS.

The Comptroller General of the United States shall ~~submit a report to the Congress containing the findings and determinations made by the Comptroller General in carrying out the study required under subsection (a).~~ conduct a study on—

~~SEC. 13. TRANSITION PERIOD AND EFFECTIVE DATE.~~

~~This Act, and the amendments made by this Act, shall take effect with respect to investment advisers after the end of the 1-year period beginning on the date of the enactment of this Act. Notwithstanding the previous sentence, an investment adviser may, at the adviser's discretion, register with the Commission before such date.~~

(1) the appropriate criteria for determining the financial thresholds or other criteria needed to qualify for accredited investor status and eligibility to invest in hedge funds, and shall submit a report to Congress on the results of such study not later than 1 year after the date of enactment of this Act;

(2) the feasibility of forming a self-regulatory organization to oversee hedge funds, private equity funds, and venture capital funds, and shall submit a report to Congress on the results of such study not later than 1 year after the date of enactment of this Act; and

(3) the state of short selling in the stock market, with particular attention to the impact of recent rule changes and the incidence of the failure to deliver shares sold short, and shall submit a report to Congress on the results of such study not later than 2 years after the date of enactment of this Act.

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