

Treasury's Regulatory Reform Proposals— Impact on Private Fund Managers

PENpoints

A new proposal from the U.S. Department of the Treasury calls for all managers of "private pools of capital" to register with the SEC as an investment adviser if they meet a relatively low assets-under-management threshold.

The U.S. Department of the Treasury recently released a white paper (the "Proposal") calling for an overhaul of the regulatory regime for financial services firms. Although most of the 88-page Proposal does not apply to private funds, some elements could have a significant impact on such funds and their managers.

SEC Registration of Private Fund Managers

As anticipated, the Proposal calls for all managers of "private pools of capital," including hedge funds, buy-out funds, venture capital funds and real estate funds, to register with the SEC as an investment adviser if they meet a relatively low assets-under-management threshold (anticipated to be as low as \$25 million).¹

SEC-registered investment advisers ("RIAs") would be subject to:

- current Investment Advisers Act regulations applicable to RIAs, including the prohibition on an RIA's receipt of carried interest (or other performance-based compensation) other than from a Section 3(c)(7) QP fund, a BDC, a non-U.S. person or a "qualified" LP in a Section 3(c)(1) fund (i.e., a person with \$750,000 or more in assets managed by the RIA or a net worth of more than \$1.5 million, with a look-through for an entity that is itself an investment entity);²
- recordkeeping requirements (perhaps beyond those currently required for RIAs);
- disclosure requirements to investors, creditors and counterparties;
- regular, periodic compliance examinations; and
- additional regulatory reporting requirements, which could include confidential reporting of

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assets under management,³ borrowings, off-balance sheet exposure and other information.

Federal Reserve Regulation of "Too Big to Fail" Firms

The Proposal also calls for formation of a Financial Services Oversight Council to monitor systemic risk, coordinate financial regulation and, in consultation with the Federal Reserve, designate certain firms as "Tier 1 FHCs"—financial firms whose failure could pose a threat to overall financial stability due to their size, leverage and "connectedness" to other firms.

The Fed would be given examination power over any financial firm above a minimum size to determine whether it is a Tier 1 FHC. The Fed would also regulate Tier 1 FHCs by imposing capital, liquidity and risk management standards on such firms and restricting them from engaging in certain non-financial services activity.

Tier 1 FHC designations are not limited to banking institutions and could include private fund sponsors. However, the designation is more likely to apply to hedge fund managers as it is unlikely that even large private equity fund sponsors pose systemic risk.

Interaction with Proposed EU Regulation

Many U.S. private fund managers have offices in EU countries and/or offer private fund interests to EU investors.

The EU Commission's April 2009 proposed directive (the "Directive") would impose extensive regulation on firms managing or marketing large private equity and hedge funds.⁴ The Directive would apply to the spon-

sor of a private fund located in the EU and/or marketing to EU investors with assets under management greater than a specified minimum. The Directive would become final only if approved by both the

European Parliament and Council (in effect, the governments of each EU member state) but could come into force during 2011.

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- 1 As noted in a previous [KirklandPEN](#), several legislative proposals call for SEC registration of private fund managers and in some cases registration of private funds themselves. In addition, SEC Chairman Schapiro recently stated that the SEC is examining whether to require registration of hedge funds, in addition to their managers.
 - 2 It is unclear whether the SEC would grandfather existing funds, as it sought to do in its 2004 registration rule for hedge fund managers, which was subsequently declared invalid by the D.C. Circuit Court of Appeals.
 - 3 Presumably this requirement would go beyond current Form ADV's annual disclosure of assets under management.
 - 4 The Directive is discussed in more detail in a previous [KirklandPEN](#).
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Noted M&A Attorneys David Fox and Daniel Wolf Join Kirkland

PENbriefs

David Fox and Daniel Wolf, prominent M&A lawyers, join Kirkland's Corporate practice from Skadden, Arps, Slate, Meagher & Flom.

On May 15, 2009, Kirkland announced that David Fox and Daniel E. Wolf, prominent M&A lawyers, joined the firm's New York office as partners. David and Daniel come to Kirkland from Skadden, Arps, Slate, Meagher & Flom, where David had been a leader of Skadden's Corporate Group and a member of the firm's governing body.



In his more than 20 years of practice at Skadden, David Fox has advised leading companies on multifaceted domestic and international transactions. David also regularly counsels senior management in crisis situations and general governance matters and has been a key figure in some of the highest-profile deals in the last decade.

Recently, he represented BHP Billiton in the largest transaction of 2008, the now-withdrawn \$150 billion offer to acquire Rio Tinto, and the real estate brokerage company Realogy Corporation in its \$9 billion going-private acquisition by Apollo Management, L.P. To read David's full biography, visit www.kirkland.com/dfox.



Daniel Wolf focuses his thriving practice on mergers and acquisitions, corporate finance, securities and general corporate matters. He has been recognized by *The New York Times* as one of the "next generation of deal makers" under the age of 40, and was also named to *Investment Dealer's Digest's* "40 Under 40."

Daniel has substantial experience in the hospitality, health care, financial services and telecommunications industries and has advised clients on many significant negotiated and contested M&A transactions. To read Daniel's full biography, visit www.kirkland.com/dwolf.

PENnotes

The Capital Roundtable's MasterClass: How to Find & Build Winning Food & Beverage Companies in Spite of the Recession

New York, New York

June 25, 2009

Kirkland partner Eva Davis will be a panelist at this conference, which will focus on investing in the food & beverage sector, common issues surrounding food & beverage deals, the lenders who pursue these deals and other topics.

IP and Technology Deals in an Uncertain World - Part II: Protecting IP and Technology When Bankruptcy Looms

Chicago, Illinois

June 26, 2009

This Kirkland breakfast seminar, the second event in the series, will focus on the intersection between intellectual property and technology transactions and restructuring. Hosted in Kirkland's Chicago office, partners Gregg Kirchoefer, P.C., Neil S. Hirshman, P.C., and David L. Eaton will lead a discussion on protecting IP and technology when bankruptcy looms. The formal invitation can be viewed at: <http://www.kirkland.com/ipbreakfastseminar>.

Private Equity Forum 2009

New York, New York

July 13-14, 2009

The 10th annual Private Equity Forum 2009 will cover topics such as structuring private equity investments and private equity funds, dealing with fund sponsor issues, current regulatory, legislative and tax issues and how private equity funds are addressing issues raised by the current environment, including fund and investor liquidity issues. Kirkland partner Mark Mifsud will speak on EU regulatory developments in a panel titled "Implications of the New Regulatory Environment."

American Bar Association's Section of Business Law Annual Meeting

Chicago, Illinois

July 31-August 3, 2009

Kirkland partner Bruce Ettelson will speak on "Private Equity Fund Issues in the Current Market: Defaulting LPs, Carried Interest Renegotiation and Taxation of Carried Interest" on Sunday, August 2, 2009, at the American Bar Association's annual meeting.

The Fourth Annual Kirkland & Ellis LLP Real Estate Private Equity Forum

New York, New York

September 24, 2009

This year's forum, titled "Real Estate Private Equity: Through the Looking Glass," will explore creative responses to the current market and its likely effects on the real estate private equity business. Kirkland real estate partners, including Stephen G. Tomlinson, P.C., and special guest panelists representing both the GP and LP communities, will look at issues and opportunities for real estate funds in the current market, focusing on the current real estate private equity model, whether it needs fixing and what those fixes might be, as well as opportunities for real estate funds for the remainder of 2009 into 2010.

Mergers and Acquisitions 2009: What You Need to Know Now

Chicago, Illinois

September 24 - 25, 2009

This seminar will focus on the continuing effects of uncertainty in the credit and equity markets, the impact of government intervention in financial markets, how contract terms are changing in light of current risks and uncertainties and trends and tactics in hostile bids and takeover battles. Kirkland partner R. Scott Falk, P.C., is a co-chair of this event and will participate in a panel discussion on "The Current M&A Landscape" and partner Marc Kieselstein, P.C., will participate in a panel discussion on "Acquisitions of Distressed Businesses."

PEI's Infrastructure Investor

New York, New York

September 29-30, 2009

This seminar, targeted to infrastructure investors, fund managers, government officials and other stakeholders, will focus on the proliferating opportunities in infrastructure, developing viable fund structures and securing capital amidst current financial conditions. Kirkland partner Sean Patrick Maloney, former First Deputy Secretary to the Governor of New York and architect of the Governor's multi-billion dollar proposal to monetize the New York State Lottery and the New York State Commission on State Asset Maximization, will discuss "The Future of PPPs in the U.S." Partner Bruce Gelman will lead a "Fund Terms & Conditions" workshop.

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