

As Passed
by the Senate Conference

June 15, 2010

**** Draft Senate Counteroffer ****

Title: Title IV

Matter: Regulation of Advisers to Private Funds and Others

1. Add House provision that requires registration with the SEC of Commodity Trading Advisers (CTAs) who advise private funds (House Bill § 5003, page 1204, lines 1-7)

Reject.

2. Add House provision which requires disclosure of certain private fund information to investors, prospective investors, counterparties and creditors. (House bill § 5004, page 1209, lines 1-10)

Reject.

3. Add new provision which provides a savings clause to ensure that the new registration requirements for advisers to private funds under the Act does not absolve these advisers of their existing registration requirements, as applicable, under the Commodity Exchange Act. (Add new language to Senate bill § 406, page 463)

Accept

4. Strike Senate exemption of investment advisers to private equity firms from registration with the SEC (Senate bill § 408, page 464)

Counterproposal to exempt private equity fund advisers with more than \$1 billion in assets under management

5. Add House provision to exempt investment advisers of private funds with less than \$150 million in assets under management (House bill § 5007, page 1212)

Accept

6. Amend Senate exemption for the investment advisers of venture capital firms. Though exempt from registration with the SEC, require the advisers of venture capital firms to keep records and provide reports to the SEC (House bill § 5006, page 1212, lines 3-8)

Accept

7. Strike and replace Senate provision defining state and federal responsibilities for investment advisers. Replace with House provision that requires investment advisers who qualify to register with their home state (i.e. less than \$100 million in assets under management) to register

Accept

with the SEC should their home state not perform examinations. (Strike Senate bill § 410 page 466 and replace with House bill § 7418, page 1377)

Counterproposal – Reed amendment 4078 from Senate Floor

8. Strike and replace Senate provision for custodial assets. Replace with House provision that prohibits an investment adviser from providing custodial services for customer accounts. The SEC may provide an exception from this prohibition if the customer assets are verified by an entity that has a fiduciary duty to the client. (Strike Senate bill § 411, page 466 and replace with House bill § 7419, page 1378)

Reject

9. Add House provision which requires the SEC to index for inflation the dollar amount measures to determine who is a qualified client for purposing of paying a performance fee to a registered investment adviser. It also calls for a rounding to the nearest \$100,000 when making the determination. (House bill § 5011, page 1216)

Accept

HOUSE PROPOSED AMENDMENTS TO TITLE IV

Page 454, strike lines 10 and 11 and insert the following:

CFTC registrants

#1 REJECT

- 1 (4) in paragraph (6)—
- 2 (A) in subparagraph (A), by striking “or”;
- 3 (B) in subparagraph (B), by striking the
- 4 period at the end and adding “; or”; and
- 5 (C) by adding at the end the following new
- 6 subparagraph:
- 7 “(C) a private fund; or”; and

Page 459, insert after line 22 the following (and redesignate succeeding paragraphs accordingly):

#2 REJECT

- 8 (8) DISCLOSURE OF PRIVATE FUND INFORMA-
- 9 TION.—An investment adviser registered under this
- 10 Act shall provide such reports, records, and other
- 11 documents to investors, prospective investors,
- 12 counterparties, and creditors, of any private fund
- 13 advised by the investment adviser as the Commis-
- 14 sion, by rule or regulation, may prescribe as nec-
- 15 essary or appropriate in the public interest and for

- 1 the protection of investors or for the assessment of
- 2 systemic risk.

Page 463, line 6, strike "The" and insert "(1) The".

Page 463, line 16, strike the closed quotation marks and following period and after such line insert the following (and redesignate succeeding sections and conform the table of contents accordingly):

#3
ACCEPT

- 3 "(2) Nothing in this Act shall relieve any per-
- 4 son of any obligation or duty, or affect the avail-
- 5 ability of any right or remedy available to the Com-
- 6 modity Futures Trading Commission or any private
- 7 party, arising under the Commodity Exchange Act
- 8 (7 U.S.C. 1 et seq.) governing commodity pools,
- 9 commodity pool operators, or commodity trading ad-
- 10 visors."

11 SEC. 407. EXEMPTION OF AND REPORTING BY CERTAIN
12 PRIVATE FUND ADVISERS.

#5
ACCEPT

13 Section 203 of the Investment Advisers Act of 1940
14 (15 U.S.C. 80b-3), as amended by section 5006, is further
15 amended by adding at the end the following new sub-
16 sections:

17 "(m) EXEMPTION OF AND REPORTING BY CERTAIN
18 PRIVATE FUND ADVISERS.—

#5
Accept

1 “(1) IN GENERAL.—The Commission shall pro-
2 vide an exemption from the registration require-
3 ments under this section to any investment adviser
4 of private funds, if each of such investment adviser
5 acts solely as an adviser to private funds and has as-
6 sets under management in the United States of less
7 than \$150,000,000.

8 “(2) REPORTING.—The Commission shall re-
9 quire investment advisers exempted by reason of this
10 subsection to maintain such records and provide to
11 the Commission such annual or other reports as the
12 Commission determines necessary or appropriate in
13 the public interest or for the protection of investors.

REJECT #7

14 “(n) REGISTRATION AND EXAMINATION OF MID-
15 SIZED PRIVATE FUND ADVISERS.—In prescribing regula-
16 tions to carry out the requirements of this section with
17 respect to investment advisers acting as investment advis-
18 ers to mid-sized private funds, the Commission shall take
19 into account the size, governance, and investment strategy
20 of such funds to determine whether they pose systemic
21 risk, and shall provide for registration and examination
22 procedures with respect to the investment advisers of such
23 funds which reflect the level of systemic risk posed by such
24 funds.”.

#6
ACCEPT

(VENTURE
CAPITAL
FUNDS)

Page 463, line 17, insert "AND REPORTING BY"
after "EXEMPTION OF".

Page 464, line 4, insert before the closed quotation
mark the following: "The Commission shall require such
advisers to maintain such records and provide to the
Commission such annual or other reports as the Commis-
sion determines necessary or appropriate in the public in-
terest or for the protection of investors."

#4
ACCEPT

Beginning on page 464, strike line 5 through page
465, line 6.

#7
REJECT

Page 466, strike lines 1 through 17 and insert the
following:

1 SEC. 410. INVESTMENT ADVISERS SUBJECT TO STATE AU-
2 THORITIES.

3 Section 203A(a) of the Investment Advisers Act of
4 1940 (15 U.S.C. 80b-3a(a)) is amended—

5 (1) by redesignating paragraph (2) as para-
6 graph (3); and

7 (2) by inserting after paragraph (1) the fol-
8 lowing new paragraph:

9 "(2) TREATMENT OF CERTAIN MID-SIZED IN-
10 VESTMENT ADVISERS.—Notwithstanding paragraph
11 (1), an investment adviser that is not exempt from
12 registration under section 203 and—

#7
REJECT

1 “(A) is regulated and examined, or re-
2 quired to be regulated and examined, in the
3 State where it maintains its principal office and
4 place of business; and

5 “(B) has assets under management be-
6 tween—

7 “(i) the amount specified under sub-
8 paragraph (A) of paragraph (1), as such
9 amount may have been adjusted by the
10 Commission pursuant to that subpara-
11 graph; and

12 “(ii) \$100,000,000, or such higher
13 amount as the Commission may, by rule,
14 deem appropriate in accordance with the
15 purposes of this title,

16 shall register with, and be subject to examina-
17 tion by, such State. The Commission shall pub-
18 lish a list of the States that regulate and exam-
19 ine, or require regulation and examination of,
20 investment advisers to which the requirements
21 of this paragraph apply. If no State in which an
22 investment adviser described in subparagraph
23 (B) is registered conducts such an examination,
24 the investment adviser must register with the
25 Commission. If, pursuant to this paragraph, an

~~#7~~
REJECT

1 investment adviser would be required to register
2 with 5 or more States, then the adviser may
3 maintain its registration with the Commis-
4 sion.”.

Page 466, strike lines 18 through 21 and insert the following (and conform the table of contents accordingly):

#8
REJECT

(KEEP
SENATE)

5 **SEC. 411. CUSTODIAL REQUIREMENTS.**

6 (a) **IN GENERAL.**—Not later than 180 days after the
7 date of the enactment of this title, the Securities and Ex-
8 change Commission shall adopt a rule pursuant to its au-
9 thority under section 211(a) of the Investment Advisers
10 Act of 1940 making it unlawful under section 206(4) of
11 that Act for an investment adviser registered under such
12 Act to have custody of funds or securities of a client, un-
13 less—

14 (1) the funds and securities are maintained
15 with a qualified custodian either in a separate ac-
16 count for each client under the client’s name, or in
17 accounts that contain only client funds and securi-
18 ties under the name of the investment adviser as
19 agent or trustee for the client; and

20 (2) the qualified custodian does not directly or
21 indirectly provide investment advice with respect to
22 such funds or securities.

1 (b) EXCEPTIONS.—The rule adopted under sub-
 2 section (a) shall include such exceptions as the Commis-
 3 sion determines in the public interest and consistent with
 4 the protection of investors. Any exemption granted under
 5 this subsection shall ensure that at least once per year,
 6 a client described in subsection (a) shall receive a report
 7 from an independent entity with a fiduciary responsibility
 8 to the client to verify that the assets in the client's account
 9 are in accord with those stated on the client's account
 10 statement.

#8
 REJECT

11 (c) NO LIMITS ON OTHER ACTIONS.—Nothing in this
 12 section shall be construed to limit other actions the Securi-
 13 ties and Exchange Commission may take under this Act
 14 to require the protection of client assets.

Page 472, after line 3, insert the following new sec-
 tion (and redesignate the succeeding section and conform
 the table of contents accordingly):

15 **SEC. 416. QUALIFIED CLIENT STANDARD.**

16 Section 205(e) of the Investment Advisers Act of
 17 1940 (15 U.S.C. 80b-5(e)) is amended by adding at the
 18 end the following: "With respect to any factor used in any
 19 rule or regulation by the Commission in making a deter-
 20 mination under this subsection, if the Commission uses
 21 a dollar amount test in connection with such factor, such
 22 as a net asset threshold, the Commission shall, by order,

#9
 ACCEPT

#9
ACCEPT

1 not later than 1 year after the date of the enactment of
2 the Private Fund Investment Advisers Registration Act of
3 2009, and every 5 years thereafter, adjust for the effects
4 of inflation on such test. Any such adjustment that is not
5 a multiple of \$100,000 shall be rounded to the nearest
6 multiple of \$100,000.”



**Restoring American Financial Stability
Conference Amendment (Senate
Counteroffer)**

- 1 On page 464, line 16, insert before the period the
- 2 following: “, unless the value of the assets under manage-
- 3 ment by such fund or funds exceeds \$1,000,000,000”.

Restoring American Financial Stability Conference Amendment (Counteroffer)

1 Strike section 410 and insert the following:

2 **SEC. 410. STATE AND FEDERAL RESPONSIBILITIES; ASSET**
3 **THRESHOLD FOR FEDERAL REGISTRATION**
4 **OF INVESTMENT ADVISERS.**

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

7 (1) by redesignating paragraph (2) as para-
8 graph (3); and

9 (2) by inserting after paragraph (1) the fol-
10 lowing:

11 “(2) **TREATMENT OF MID-SIZED INVESTMENT**
12 **ADVISERS.—**

13 “(A) **IN GENERAL.—**No investment adviser
14 described in subparagraph (B) shall register
15 under section 203, unless the investment ad-
16 viser is an adviser to an investment company
17 registered under the Investment Company Act
18 of 1940, or a company which has elected to be
19 a business development company pursuant to
20 section 54 of the Investment Company Act of
21 1940, and has not withdrawn the election, ex-

1 cept that, if by effect of this paragraph an in-
2 vestment adviser would be required to register
3 with 15 or more States, then the adviser may
4 register under section 203.

5 “(B) COVERED PERSONS.—An investment
6 adviser described in this subparagraph is an in-
7 vestment adviser that—

8 “(i) is required to be registered as an
9 investment adviser with the securities com-
10 missioner (or any agency or office per-
11 forming like functions) of the State in
12 which it maintains its principal office and
13 place of business and, if registered, would
14 be subject to examination as an investment
15 adviser by any such commissioner, agency,
16 or office; and

17 “(ii) has assets under management
18 of—

19 “(I) not less than the amount
20 specified under subparagraph (A) of
21 paragraph (1), as such amount may
22 have been adjusted by the Commission
23 pursuant to that subparagraph; and

24 “(II) not more than
25 \$100,000,000, or such higher amount

1 as the Commission may, by rule, deem
2 appropriate in accordance with the
3 purposes of this title.”