[DISCUSSION DRAFT]

111TH CONGRESS 1ST SESSION

H. R. ______

To amend the Investment Advisers Act of 1940 to require advisers of certain unregistered investment companies to register with and provide information to the Securities and Exchange Commission, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. KANJORSKI introduced the following bill; which was referred to the Committee on

A BILL

To amend the Investment Advisers Act of 1940 to require advisers of certain unregistered investment companies to register with and provide information to the Securities and Exchange Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

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

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SEC. 2. DEFINITIONS.

Section 202(a) of the Investment Advisers Act of 1934 (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 investment fund that—

“(A) would be an investment company under 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 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 by value owned by United States persons.

“(30) FOREIGN PRIVATE FUND ADVISER.—The term ‘foreign private fund adviser’ means an investment adviser who—

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

“(B) during the preceding 12 months has had—
“(i) fewer than 15 clients in the United States; and

“(ii) assets under management attributable to clients in 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; and

“(C) neither holds itself out generally to the public in the United States as an investment adviser, nor acts as an investment adviser to any investment company registered under the Investment Company Act of 1940, or 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development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-53) and has not withdrawn such election.”.

SEC. 3. 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 an investment adviser who acts as an investment ad-
viser to any private fund,’’ after ‘‘any investment ad-
viser’’;

(2) by amending paragraph (3) to read as fol-
lows:

“(3) any investment adviser that is a foreign 
private fund adviser,’’; and

(3) in paragraph (5), by striking ‘‘or’’ at the 
end;

in paragraph (6)—

(A) in subparagraph (A), by striking ‘‘or’’;

(B) in subparagraph (B), by striking the 
period at the end and adding ‘‘; or’’; and

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

“(C) a private fund.”.

SEC. 4. COLLECTION OF SYSTEMIC RISK DATA.

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 (e) and (d), respectively; and

(2) by inserting after subsection (a) the fol-
lowing new subsection:

“(b) RECORDS AND REPORTS OF PRIVATE FUNDS.—

“(1) IN GENERAL.—The Commission is author-
ized to require any investment adviser registered
under this Act to maintain such records of and file with the Commission such reports regarding private funds advised by the investment adviser as are necessary or appropriate in the public 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 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, those reports or records or the information contained therein. The records and reports of any private fund, to which any such investment adviser provides investment advice, maintained or filed by an investment adviser registered under this Act, shall be deemed to be the records and reports of the investment adviser.

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

“(C) counterparty credit risk exposures;

“(D) trading and investment positions;

“(E) trading practices; and

“(F) such other information as the Commission, in consultation with the Board of Governors of the Federal Reserve System, determines necessary or 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 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 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 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 records of a private fund maintained by an investment adviser registered under this Act shall be subject at any time and from time to time to such periodic, special, and other examinations by the Commission, or any member or representative thereof, as the Commission may prescribe.

“(B) AVAILABILITY OF RECORDS.—An investment adviser registered under this Act 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, 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, may
consider necessary for the purpose of assessing the
systemic risk of a private fund. All such reports,
documents, records, and information obtained by the
Board, or such other entity, from the Commission
under this subsection shall be kept confidential.

“(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 inves-
tors, counterparties, and creditors, of any private
fund advised by the investment adviser as the Com-
mission, by rule or regulation, may prescribe as nec-
essary or appropriate in the public interest and for
the protection of investors or for the assessment of
systemic risk.

“(8) Confidentiality of reports.—Not-
withstanding any other provision of law, the Com-
mission shall not be compelled to disclose any report
or information contained therein required to be filed
with the Commission under this subsection. Nothing
in this paragraph shall authorize the Commission to
withhold information from the Congress or prevent
the Commission from complying with 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 an order
of a court of the United States in an action brought
by the United States or the Commission. For pur-
poses of section 552 of title 5, United States Code,
this paragraph shall be considered a statute de-
scribed in subsection (b)(3)(B) of such section.”.

SEC. 5. ELIMINATION OF DISCLOSURE PROVISION.
Section 210 of the Investment Advisers Act of 1940
(15 U.S.C. 80b-10) is amended by striking subsection (c).

SEC. 6. EXEMPTION OF AND REPORTING BY VENTURE CAP-
ITAL 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 iden-
tify 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. The Commiss-
ion shall require such advisers to maintain such records
and provide to the Commission such annual or other re-
ports as the Commission determines necessary or appro-
priate in the public interest or for the protection of investors.”.

SEC. 7. 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—

“(1) 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) prescribe different requirements for different classes of persons or matters; and
“(3) ascribe different meanings to terms (including the term ‘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) The Commission and the Commodity Futures Trading Commission shall, after consultation with the Board of Governors of the Federal Reserve System, within 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(i) and 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. 1 et seq.).”.