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#### About Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP is a California law firm with more than 230 attorneys practicing out of seven offices in Los Angeles, Century City, Orange County, Del Mar Heights, San Diego, San Francisco and Walnut Creek. The firm's broad based areas of focus include corporate, real estate, construction, real estate finance, business litigation, employment and labor law, taxation, land use, bankruptcy and creditors' rights, intellectual property and environmental. [more...](#)

## Proposed Legislation Imposes New Requirements on Private Fund Advisers

Three pieces of draft legislation aimed at tackling key parts of reforming the regulatory structure of the United States financial services industry were released on October 1, 2009. The proposed legislation tightens regulation on "private fund" advisers requiring registration and imposing new record keeping requirements.

This alert is important to any person or entity that manages private funds.

One of the draft bills is the "Private Fund Investment Advisers Registration Act of 2009" (the "Private Fund Advisers Act"). The Private Fund Advisers Act would require registration of almost all advisers to "private funds" and the imposition of new record keeping and disclosure requirements for those private fund advisers.

#### "Private Fund" Defined

As proposed, a "private fund" is any investment fund that would be an investment company under Section 3(a) of the Investment Company Act of 1940 but for the private investment company exemption of Section 3(c)(1) or the qualified purchaser fund exemption of Section 3(c)(7) and, either is organized or created under the laws of the United States or any state, or has 10% or more of its outstanding securities by value owned by United States persons.

#### New Registration Requirements

An investment adviser to a private fund will be required to register under the Investment Advisers Act of 1940 regardless of the number of clients it may have, but the Advisers Act will continue to prohibit registration of any adviser that is regulated under state law and who has less than \$25,000,000 in assets under management.

The Advisers Act currently exempts from registration any investment adviser registered with the Commodity Futures Trading Commission as a commodity trading advisor whose business does not consist primarily of acting as an investment adviser and who does not act as an investment adviser to a registered investment company or a business development company. The proposed bill will eliminate this exemption as it relates to any adviser to a private fund.

A "foreign private fund adviser" will be exempt from the registration and reporting requirements. This term is defined as an investment adviser who:

- has no place of business in the United States

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- during the preceding 12 months had fewer than 15 clients in the United States and assets under management attributable to clients in the United States of less than \$25,000,000 or such higher amount as the Securities and Exchange Commission (“SEC”) may designate by rule, and
  - 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 or a company which has elected to be a business development company under the Investment Company Act.

#### “Venture Capital Fund” Adviser Exemption

The Private Fund Advisers Act requires the SEC to identify and define the term “venture capital fund” and to provide that an adviser to a “venture capital fund” is exempt from registration under the Advisers Act; provided, however, those advisers will be obligated to maintain such records and provide annual or other reports as determined by the SEC to be necessary or appropriate in the public interest or for the protection of investors.

#### New Record-Keeping, Reporting and Disclosure Requirements

The Private Fund Advisers Act will require that investment advisers to private funds maintain records, and provide reports to the SEC, with regard to:

- the amount of assets under management
- the use of leverage including off-balance sheet leverage
- counterparty credit risk exposure
- trading and investment positions
- trading practices, and
- such other information as the SEC, 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.

The bill grants authority to the SEC to require reporting of other additional information and to authorize different reporting requirements for different classes of private fund advisers, based on the particular types or sizes of private funds advised by these advisers.

The SEC will be authorized to determine the period or periods during which an investment adviser must maintain its records and to make periodic, special and other examination of those records at any time and from time to time. The adviser must make copies or extracts from its records available to the SEC and the SEC will be mandated to share, on a confidential basis, such information with the Board of Governors of the Federal Reserve System and “others entities” identified by the SEC as having systemic risk responsibility. In addition, the new law will require registered investment advisers to provide reports, records, and other documents to investors, prospective investors, counterparties and creditors of any private fund advised by such investment adviser as

the SEC may prescribe by rule or regulation.

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As proposed, the SEC cannot be compelled to disclose any report required to be filed with it, or information contained therein, other than to Congress or any other Federal department or agency or self-regulatory organization requesting the report or information for purposes within the scope of its jurisdiction or in complying with an order of court.

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