October 6, 2009

Representative Kanjorski Releases Investor Protection, Private Investment Fund Advisers Registration and Federal Insurance Office Proposals

Introduction

Discussion drafts of three bills: the Investor Protection Act of 2009, the Private Fund Investment Advisers Registration Act of 2009 and the Federal Insurance Office Act of 2009 were released on October 1, 2009 by Paul E. Kanjorski, Chairman of the House Financial Services Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises. The draft bills modify prior versions released by the Treasury Department this past summer (collectively, the "Treasury Proposal").

The Investor Protection Act would modify certain aspects of the Treasury Proposal and add certain Madoff-related provisions and amendments to the securities laws sought by the SEC, including:

- revisions to the Treasury Proposal's conduct standards for broker-dealers and investment advisers providing investment advice to retail customers;
- new fee assessments for registered investment advisers;
- SEC rulemaking authority for securities lending;
- record maintenance obligations for persons having custody or use of registered investment company assets and new SEC examination authority over such records;
- new SEC examination authority over persons having custody or use of assets of registered investment advisers' clients;
- 180 day deadlines for the completion of SEC examinations, investigations and enforcement actions, unless deemed complex by SEC senior staff;
- An independent study of the SEC's organization, internal communications and hiring practices and the role of self-regulatory organizations ("SROs");
- coverage of futures positions in portfolio margin accounts under the Security Investor Protection Act; and
- liability of persons who misrepresent membership in or coverage by the Securities Investor Protection Corporation, including internet service providers who knowingly transmit such misrepresentations.

The Private Fund Investment Advisers Registration Act is similar to the Treasury Proposal, but also would:

- exempt investment advisers to venture capital funds from registration requirements; and
- enhance the SEC's rulemaking authority in this area.

The Federal Insurance Office Act is nearly identical to the Treasury Proposal, but deletes a provision providing subpoena authority.

This memorandum highlights the key differences between Chairman Kanjorski's discussion drafts and the Treasury Proposal, and the attached chart catalogs the additional provisions of the Investor Protection Act.

The Davis Polk memoranda related to the Treasury Proposals can be accessed below:

- Investor Protection Act of 2009, July 13, 2009
- Private Fund Investment Advisers Registration Act, July 17 2009

- The Regulatory Reform Marathon, July 28, 2009 (discussing the proposed Office of National Insurance, among other proposals by President Obama)

Investor Protection Act of 2009

Fiduciary Standards and Enforcement Authority

Like the Treasury Proposal, the Investor Protection Act seeks to ensure that the same fiduciary standard applies to both broker-dealers and investment advisers providing investment advice to retail customers, as well as other customers designated by the SEC. To address criticisms that the Treasury Proposal might result in a new, less rigorous standard for broker-dealers, the Investor Protection Act would require the SEC to apply the same standard of conduct to a broker-dealer that is providing investment advice to a retail customer as applies to an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act").

Further, the Investor Protection Act would require the SEC to provide that the standard of conduct for investment advisers and broker-dealers, in providing advice to retail customers, is to act in the best interest of the customer without regard to the firm's interests. While the Investor Protection Act may not have been intended to alter the standard applicable to broker-dealers from that applied by the Treasury Proposal, the new articulation may be viewed as applying broader adviser duties to broker-dealers, including the principal trading and crossing restrictions of Section 206(3) of the Advisers Act.

The Investor Protection Act also would:

- provide that receipt of compensation based on commission will not in and of itself violate the broker-dealer's standard of care;
- apply the best interest standard to all investment advice rendered to retail customers, not just advice concerning securities; and
- define retail customer as including all individuals, irrespective of wealth or sophistication, who receive personalized advice and use it primarily for personal, family, or household purposes. Retail customer would also include the legal representatives of retail customers, which is potentially significant because it could pick up, for example, an investment adviser acting with investment discretion over an individual client's account.

The Investor Protection Act also would require the SEC to promulgate regulations to ensure that the enforcement options and remedies for violations of standards of conduct are comparable for broker-dealers and investment advisers.

Annual Fees on Registered Investment Advisers

A new provision would require the SEC to impose an annual assessment on registered investment advisers to cover the SEC's cost of inspections and examinations of those advisers. This provision would require that the aggregate amount of fees raised be greater than the SEC's inspection costs during the 2009 fiscal year.

In determining the fee for a registered investment adviser, the SEC would be required to consider factors such as the investment adviser's size, risk profile, types of clients and "other relevant factors." Beyond these criteria and a requirement that the fee be "fair and reasonable," the SEC has uncapped authority to set fees. There is no provision for judicial review of any increases and decreases in fees.

Expansion of Sarbanes-Oxley Act of 2002 to Auditors of Registered Broker-Dealers

The Investor Protection Act would extend the authority of the Public Company Accounting Oversight Board (the "PCAOB") to include auditors of registered broker-dealers, and by implication, over the registered broker-dealers themselves. Under current law, auditors of registered broker-dealers must be registered with the PCAOB. However, these auditors are not otherwise subject to the PCAOB oversight, which applies only to public companies. The Investor Protection Act would make auditors of registered broker-dealers subject to PCAOB oversight and permit

PCAOB to refer investigations, as well as release documents and information gathered in investigations, to a registered broker-dealer's SRO.

Enforcement-Related Provisions

There are three general categories of enforcement-related provisions in the Investor Protection Act. First, the bill would expand the scope of the securities laws to permit both SEC enforcement proceedings and, in some cases, private civil actions that are not currently available under the securities laws. Second, it would eliminate a number of procedural barriers and arm the SEC with additional enforcement tools. Finally, it would address the way the SEC carries out its internal functions.

Although the Investor Protection Act contains a number of new provisions not included in the draft legislation released by the Treasury Department on July 10, 2009, it incorporates three noteworthy provisions from the Treasury Proposal — those relating to whistleblower protections, imposition of collateral bars, and expanded liability for aiding and abetting. Overall, the Investor Protection Act's enforcement-related provisions closely track those on the "wish list" of legislative changes the SEC reportedly has sought from Congress for some time. The only new provisions not contained on the "wish list" are, perhaps not surprisingly, those which impose new restrictions and requirements on the SEC.

Several of the most noteworthy enforcement-related provisions are discussed below.

A. Expansion of Jurisdiction

The Investor Protection Act would expand the SEC's enforcement jurisdiction in several ways. The bill would eliminate any doubt that the SEC can pursue actions against persons formerly associated with entities regulated by the SEC, and as noted above, provides expanded jurisdiction for the SEC over those who aid and abet violations of the securities laws, similar to the Treasury Proposal.

In addition, the Investor Protection Act would expand jurisdiction – both in SEC enforcement actions and private civil litigation – over foreign-related transactions. The federal securities laws are currently silent as to their extraterritorial application, and the courts have applied varying standards to determine whether overseas conduct is covered by the securities laws. The Supreme Court is currently deciding whether to accept an appeal on this issue from a recent Second Circuit decision, and has invited the Solicitor General to file a brief "expressing the views of the United States." The Investor Protection Act adopts the most expansive approach applied by the courts, and arguably further expands even that standard, by providing for U.S. jurisdiction whenever there is either (i) "conduct within the United States that constitutes significant steps in furtherance of [a] violation, even if the securities transaction occurs outside the United States and involves only foreign investors" or (ii) "conduct outside the United States that has a foreseeable substantial effect in the United States." Should this version of the bill pass, courts would be forced to grapple under the first prong with the meaning of "significant steps in furtherance of the violation," a standard so broad it could potentially reach conduct that exceeds Congress's authority under the Commerce Clause.

The Investor Protection Act provides only for the extraterritorial application of the anti-fraud provisions, even though similar extraterritorial issues arise under securities regulatory provisions.

B. Expansion of the SEC's Ability to Obtain Information

The Investor Protection Act would expand the SEC's authority to obtain information potentially relevant to violations of the securities laws. First, it would amend the Sarbanes-Oxley Act to permit the disclosure by a court, upon motion by a government attorney, to the Commission of matters occurring before a grand jury that relate to conduct that "may constitute a violation of any provision of the securities laws," so long as the court determines that there is a "substantial need in the public interest." It is far from clear whether the Department of Justice (the "DOJ") would welcome such a provision, and if it is enacted there may well be disagreement between the DOJ and SEC over what information should and should not be shared. Second, the Investor Protection Act would amend the Sarbanes-Oxley Act to grant the SEC the authority to obtain information from foreign public accounting firms that perform audit or other material functions on behalf of any issuer or its subsidiary, or which perform work for any registered accounting firms that rely on the foreign firm's work.

C. Expansion of the Exchange Act's Anti-Fraud Provisions

The Investor Protection Act would increase the scope of the Securities Exchange Act of 1934 (the "Exchange Act") by replacing or removing several phrases in the provisions related to market manipulation and short sales. Section 9 (relating to market manipulation) and 10(a)(1) (relating to short sales) would be amended to cover any security "other than a government security," as compared to the current versions of these Sections, which cover only securities "registered on a national securities exchange." Section 9(b) (relating to options) would be amended to extend the SEC's rulemaking authority to non-exchange transactions in options. Section 9(c) would be amended to subject all brokers and dealers to the provision, not just "member[s] of a national securities exchange." Section 15(c)(1)(A) would be amended to cover exchange transactions, not just over-the-counter transactions.

The general anti-fraud prohibitions found in Section 10(b) apply to all securities, not merely those registered on a national exchange; as a result, manipulation-based enforcement actions relating to non-exchange-listed securities historically have been brought under Section 10(b). The Investor Protection Act's changes seemingly would permit such actions to be brought directly under Section 9 as well. More significantly, the amendments would extend the SEC's plenary rulemaking authority over short sales to short sales in pink sheet securities and non-equity securities. In addition, the amendments would extend the SEC's rulemaking authority to all options on securities.

D. Increased Appropriations

In addition to arming the SEC with expanded enforcement authority and expanded procedural tools to implement that authority, the Investor Protection Act would also dramatically increase the SEC's funding. The bill would appropriate an additional $10 billion to the SEC over the next six years, likely leading to still more robust SEC examination and enforcement activity.

E. Restrictions on the Timing of SEC Action

In one of the more notable new proposals, the Investor Protection Act seeks to impose a 180-day deadline on SEC examinations, investigations and enforcement action. In particular, the bill provides that the SEC "shall complete any examination, investigations, or enforcement action initiated by the Commission not later than 180 days after the date on which such examination, inspection, or enforcement action is commenced." We note that this provision of the bill refers, inconsistently, to "investigations" in some places and "inspections" in others; for purposes of this discussion we will assume the draft intends to impose deadlines on "examinations, investigations and enforcement actions." There is an exception for matters that are "sufficiently complex" to justify an extension; in such cases, a division or office head may extend the 180-day deadline by another 180 days upon notice to the Chairman of the SEC.

The provision would be less controversial were its reach confined to SEC examinations and formal administrative enforcement proceedings. The imposition of deadlines in the examination context is not altogether surprising; recently the SEC Inspector General recommended that the Office of Compliance Inspections and Examinations staff be required to explain why any cause exam has been open for more than 180 days. As to administrative enforcement proceedings, SEC rules and guidelines already dictate timetables for such matters.

But the bill's imposition of fixed, statutory deadlines for the completion of SEC enforcement investigations would likely raise serious issues. Despite an exception for an additional 180 days in "sufficiently complex" matters, this provision would have a profound, and potentially quite harmful, impact on the manner in which enforcement investigations are conducted and resolved. On the one hand, the provision would ensure that enforcement investigations would be concluded promptly, potentially affording the subjects of such investigations increased certainty about the results of an investigation. On the other hand, the provision would result in a dramatically shorter period of time for the SEC Enforcement Staff to gather documents, take testimony and reach a conclusion on whether to recommend enforcement action; this is particularly evident if one factors in the time necessary for the Wells process and Commission review. As a result, this provision could well create incentives for SEC staff either to avoid hard cases out of fear such cases could not be completed within 180 or even 360 days, or to proceed and attempt to complete such investigations without an adequately developed and considered evidentiary record. The provision would also distort the timing of the formal initiation and conclusion of investigations and enforcement

actions. It is also unclear if the timeframes would serve as statutes of limitations for aged investigations. In short, although the proposal would accomplish faster enforcement, it would necessarily create a number of unintended (though not unforeseen) negative consequences.

Private Fund Investment Advisers Registration Act

Elimination of "Private Investment Adviser" Registration Exemption

Like the Treasury Proposal, the Private Fund Investment Advisers Registration Act would amend the Advisers Act to generally require all advisers to private funds to register with the SEC. Currently, many advisers to private funds, such as private equity and hedge funds, fit within the so-called "private investment adviser" exemption under the Advisers Act and are therefore not required to register with the SEC, although a significant number do so voluntarily. Both pieces of proposed legislation would eliminate the ability of advisers to private funds to rely on the "private investment adviser" exemption.

Carve-out for Advisers to Venture Capital Funds

Unlike the Treasury Proposal, which did not distinguish between advisers to hedge funds and other private funds, the Private Fund Investment Advisers Registration Act would exempt advisers of "venture capital funds" from SEC registration.

This means:

- Advisers to "venture capital funds" would not be subject to the provisions of the Advisers Act requiring them to, among other things, implement a comprehensive compliance program, adopt a code of ethics and an insider trading policy, comply with certain custody procedures, advertising restrictions and document retention obligations, disclose and report specified information on Form ADV and subjecting them to SEC examinations.
- Such advisers would, however, be subject to the anti-fraud provisions of the Advisers Act and unspecified SEC-determined recordkeeping and reporting requirements.

Importantly, the Private Fund Investment Advisers Registration Act does not define the term "venture capital funds," leaving that difficult and nuanced task to the SEC.

Private Fund Disclosure Requirements

The Treasury Proposal's grant of rulemaking authority to the SEC to establish public disclosure requirements pertaining to advisers to private funds remains unchanged in Chairman Kanjorski's draft. Neither bill provides detail about the nature of any such disclosures.

The Private Fund Investment Advisers Registration Act would, however, expand the Treasury Proposal's controversial new books and records requirements, which are intended to provide the federal government with systemic risk data, by granting the SEC broad rulemaking authority in this area.

The Private Fund Investment Advisers Registration Act would also expand the list of entities with which the SEC may share systemic risk information. It would authorize the SEC to share such information with not only the Federal Reserve and the Financial Services Oversight Council, as did the Treasury Proposal, but also with other entities identified by the SEC as having "systemic risk responsibility."

Significantly Enhanced SEC Rulemaking Authority

The Private Fund Investment Advisers Registration Act goes substantially further in amending Section 211 of the Advisers Act than did the Treasury Proposal. If this version of the bill were to pass, Section 211 of the Advisers Act would be amended to endow the SEC with sweeping powers to come up with new rules, amend existing rules and even rescind rules, regulations and orders "as are necessary or appropriate to the exercise of the functions and powers conferred upon the [SEC] elsewhere in this title." Ultimately, these amendments increase the likelihood that

the SEC would withstand a legal challenge to any new rule it may promulgate pursuant to the Private Fund Investment Advisers Registration Act based on the grounds that the rule exceeded the scope of the SEC's authority.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact

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Appendix – Provisions of Chairman Kanjorski's Investor Protection Act

Investment Advisers and Investment Companies Provisions

Section	Description	Comments
103 Fiduciary duty standard for broker-dealers and investment advisers	See discussion above in section "Fiduciary Standards and Enforcement Authority" on page 2.	
302 Annual fees on investment advisers	See discussion above in section "Annual Fees on Registered Investment Advisers" on page 2.	
106 Access to custody records	Amends the Investment Company Act of 1940 (the "Investment Company Act") to authorize the SEC to prescribe a records retention requirement on, and inspect records of, any person with "custody or use of a registered investment company's securities, deposits, or credits" as appropriate in the public interest. Also amends the Advisers Act to authorize the SEC to inspect, or otherwise request information from, persons with "custody or use of a [registered investment adviser's] client's securities, deposits or credits."	This expansive provision would provide the SEC ready access to records to ensure that the assets of registered investment companies and the assets of clients of registered investment advisers are properly custodied. The term "client" is generally construed broadly in the context of the Advisers Act and encompasses, for example, private funds and registered investment companies as well as managed accounts. Madoff-related.
218 Access to investment company records	Subjects all records of registered investment companies and "each underwriter, broker, dealer or investment adviser that is a majority-owned subsidiary of such a company" to SEC examination upon a determination by the SEC that such an examination is "necessary or appropriate in the public interest or for the protection of investors."	Currently, the SEC can examine only those records it requires registered investment companies and certain of their subsidiaries to maintain pursuant to Section 31(a) of the Investment Company Act. This amendment is consistent with authority under the Exchange Act and the bill's general expansion of the SEC's power to collect data from and otherwise examine financial intermediaries in the name of the public interest or investor protection.
216 Fidelity bonding	Expands the SEC's bonding authority to require registered investment companies classified as management companies under Section 4 of the Investment Company Act to provide bonds against loss caused by any fraudulent act or theft committed by an officer or employee of the company, or by any affiliated person.	Under current law, the SEC is authorized to require bonds against acts of larceny and embezzlement and only by the officer or employee. The broader scope of SEC's bonding authority is likely to make fidelity bonds more expensive to obtain and maintain for registered investment companies classified as management companies.

Section	Description	Comments
413 Investment companies holding illiquid securities	Grants the SEC the authority to promulgate rules limiting the ability of registered open-end investment companies to "own, hold or invest in illiquid securities or other illiquid property."	This broad grant of rule-making authority, which appears aimed at preventing registered open-end investment companies from encountering issues with respect to their redemption requirements, has the potential to meaningfully reduce the ability of these investment companies to invest in illiquid securities or assets from the fifteen-percent threshold that currently applies.
412 "Interested persons" of investment companies	Amends the definition of "interested person" with respect to a registered investment company in Section 2(a)(19)(A) of the Investment Company Act. The amendment would, in effect, broaden the definition of the term, by substituting a new, principles-based subsection for two subsections that currently focus on certain highly specific business relationships with a registered investment company in assessing whether a person may be deemed an "interested person." The new language would define an "interested person" to include any natural person "unlikely to exercise an appropriate degree of independence" because of "a material business or professional relationship" with an investment company or its affiliate or "a close familial relationship" with an affiliated natural person.	The Investment Company Act limits the percentage of "interested persons" who may serve on a registered investment company's board of directors and requires that certain contracts of the registered investment company, including its investment advisory contract, be approved by a majority of disinterested directors. As a practical matter, should the Investor Protection Act be enacted as-is, registered investment companies should consider reevaluating each of their board members with respect to their status as an "interested person." Interestingly, the Investor Protection Act leaves unchanged Section 2(a)(19)(B) of the Investment Company Act, which defines the term "interested person" with respect to an investment adviser or principal underwriter of a registered investment company. This may be an oversight.

Broker-Dealer and Market Provisions

Section	Description	Comments
103 Fiduciary duty standard for broker-dealers and investment advisers	See discussion above in section "Fiduciary Standards and Enforcement Authority" on page 2.	
601 Expansion of Sarbanes-Oxley Act to registered broker-dealers	See discussion above in section "Expansion of Sarbanes-Oxley Act of 2002 to Registered Broker-Dealers" on page 2.	
401 Expansion of anti-fraud authority to securities lending	Provides the SEC with rulemaking authority regarding securities lending transactions.	This provision would significantly expand the SEC's authority over the securities lending business.

Section	Description	Comments
508 Liability for false representations relating to SIPC insurance	Imposes civil liability and criminal penalties for falsely representing membership in the Securities Investor Protection Corporation ("SIPC") or that an account is protected by SIPC. The provision would also impose liability on an Internet service provider that, with actual knowledge, facilitates transmission or stores any material containing the false representations of SIPC membership or protection. The Internet service provider's liability would extend to all damages caused by the false representation, including damages suffered by the SIPC.	The Internet service provider provision may raise broader cyberspace regulation issues.
403 Fingerprinting	Requires the personnel of registered securities information processors, national securities exchanges, and national securities associations to be fingerprinted, creating parity between these entities and the entities already in the statute.	This is a change that the SEC previously requested from Congress to assist with background checks and terrorism financing.
404 Voiding of waivers of SRO rules	Expands Section 29(a) of the Exchange Act to render unenforceable a waiver of the rules of any self-regulatory organization (such as FINRA or a registered clearing organization) that are required by the Exchange Act or rules thereunder. Currently, Section 29(a) refers only to the enforceability of waivers of provisions of the Exchange Act, rules thereunder and required rules of exchanges.	
411 MSRB governance changes	Alters the composition of the Municipal Securities Rulemaking Board so that a majority of the board would consist of public representatives, rather than industry representatives.	This provision is consistent with the trend for SROs to have boards balanced with independent members.
105 Beneficial ownership and short-swing profit notifications and reporting deadlines	Authorizes the SEC to shorten the 10 day time window for reporting acquisitions of positions under Section 13 and 16, and removes the existing requirements that positions be reported to exchanges (and in certain cases, issuers).	
501 Increasing minimum SIPC assessment	Increases the minimum assessment on each SIPC member from $150 per annum to 0.02 percent of the "gross revenues of such member of SIPC."	In March 2009, SIPC raised assessments from the current statutory minimum of $150 to 0.25 percent of a firm's net operating revenues from the securities business. This increased assessment is intended to raise the SIPC fund balance to its target amount of $1 billion. This provision prevents SIPC from returning to a de minimis fee.
511 SIPC general assessment criteria	Requires that any general assessment imposed by SIPC on its members be based on a risk-based assessment system. Notably, the bill would authorize SIPC to establish separate risk-based assessment systems for large and small members of SIPC.	This provision is intended to reduce the impact of the fee increase on small broker-dealers.
502 Increasing SIPC borrowing limit from	Increases SIPC's borrowing limit from the Treasury from $1 billion to $2.5 billion.	This provision would provide to SIPC additional resources in view of SIPC's unprecedented potential exposure in light of the Lehman and Madoff liquidations.

Section	Description	Comments
Treasury		
505 Insiders ineligible for SIPC advances	Prohibits payments of SIPC funds to claimants that are "insiders" of the debtor.	
509 Limit on customer status for repurchase parties	Excludes a party to a repurchase agreement from qualifying as a "customer" for most purposes under the Securities Investor Protection Act of 1970.	This provision would codify SIPC's long-standing position that cash and securities exchanged pursuant to a repurchase agreement do not qualify for SIPC protection.
510 SIPC treatment of futures held in a portfolio margin account	Includes in (i) the definition of "customer property" futures and options on futures (and proceeds thereof) that are contained in securities accounts that are part of a portfolio margining program approved by the SEC, and (ii) the definition of "customer" persons having a claim against a broker-dealer in respect of cash, securities, futures contracts or options on futures contracts arising out of or held in such accounts. The provision also addresses the treatment of such accounts and claims for purposes of determining "net equity" for purposes of SIPA.	This amendment should permit greater use of portfolio margin accounts by customers by addressing concerns that customers holding futures positions in portfolio margin securities accounts would be unprotected in a SIPC liquidation of their broker-dealer.

Enforcement-Related Provisions

Section	Description	Comments
215 Anti-fraud extraterritorial jurisdiction	See discussion above in section "Enforcement-Related Provisions – Expansion of Jurisdiction" on page 3.	
213 Access to grand jury information	See discussion above in section "Enforcement-Related Provisions – Expansion of the SEC's Ability to Obtain Information" on page 3.	
603 Expansion of audit information by foreign auditors	See discussion above in section "Enforcement-Related Provisions - Expansion of the SEC's Ability to Obtain Information" on page 3	
220 Expansion of anti-fraud authority to exchange and OTC transactions	See discussion above in section "Enforcement-Related Provisions – Expansion of the Exchange Act's Anti-Fraud Provisions" on page 4.	

Section	Description	Comments
301 Increased appropriations	See discussion above in section "Enforcement-Related Provisions – Increased Appropriations" on page 4.	
208 Timetable for exams and enforcement actions	See discussion above in section "Enforcement-Related Provisions – Restrictions on the Timing of SEC Action" on page 4.	
201 Authority to restrict mandatory arbitration	Permits the SEC to prohibit or limit the use of mandatory arbitration provisions related to disputes with brokers, dealers, municipal securities dealers and investment advisers arising under the federal securities laws or self-regulatory organization rules if the SEC finds that such action is in the public interest and protects investors.	This provision was left largely unchanged from the Treasury Proposal.
205 Collateral bars	Permits the SEC to impose collateral bars under the Exchange Act and the Advisers Act, prohibiting offenders from associating with a broad range of SEC-regulated entities, rather than only those entities regulated under the particular statutory provisions under which the violation occurred.	Part of the SEC's "wish list." This provision was left largely unchanged from the Treasury Proposal.
209 Nationwide service of process	Amends the securities laws to provide for nationwide service of any subpoena issued by a federal district court in an action brought by the SEC.	Part of the SEC's "wish list." Currently, the Commission has at its disposal nationwide service only in administrative proceedings. This would provision eliminate a procedural hurdle for the SEC when attempting to obtain documents or testimony from individuals or entities residing outside the jurisdiction of the court in which the action was brought.
210 Civil penalties in cease and desist actions	Amends the Securities Act of 1933 to permit the assessment of civil penalties by the Commission in cease and desist cases, where the Commission finds that a person "(i) is violating or has violated any provision of this title, or any rule or regulation thereunder; or (ii) is or was a cause of the violation of any provision of this title, or any rule or regulation thereunder." The provision creates three tiers of penalties, with each tier increasing the maximum penalty based on the conduct of the actor and the loss resulting from the unlawful conduct. The provision would also make civil penalties available in cease-and-desist actions under the Exchange Act, the Investment Company Act, and the Investment Advisers Act.	Part of the SEC's "wish list." Currently, the SEC is able to seek civil money penalties in administrative cease-and-desist proceedings, but only against entities and persons directly regulated by the SEC. In addition, the Exchange Act, the Investment Company Act and the Advisers Act each contain provisions permitting the imposition of civil penalties in non-cease and desist cases. Although the imposition of monetary penalties under the statutes in non-cease and desist cases requires a finding that the violator acted willfully, this provision would not impose such a requirement in cease and desist cases.

Section	Description	Comments
211 Formerly associated persons	Amends the Exchange Act to permit the Commission to take action against an individual who, at the time of the alleged misconduct, was, but no longer is, (1) a member or employee of the Municipal Securities Rulemaking Board; (2) a person associated with a government securities broker or dealer; (3) a person associated with a member of a national securities exchange or registered securities association; (4) a participant of a registered clearing agency; (5) an officer or director of a self-regulatory organization; or (6) a person formerly associated with a public accounting firm. This provision similarly amends the Investment Company Act to reach individuals who were, but no longer are, an officer or director of an investment company. It amends the Sarbanes-Oxley Act to reach individuals who were, but no longer are (1) persons formerly associated with a public accounting firm; (2) supervisory personnel of an audit firm; or (3) members of the PCAOB.	Part of the SEC's "wish list." This provision is intended to prevent persons formerly associated with a registered entity from avoiding a penalty or bar simply because they no longer are associated with that registered person. Although the SEC may already be authorized under the current securities laws to bring suits against formerly associated persons, this provision would make that authority explicit and definitive.
212 Sharing privileged information	Amends the Exchange Act to include a provision for the sharing of privileged information, which would state that the Commission shall not be deemed to have waived any privilege applicable to any information in its possession by sharing that information with any agency, foreign securities or law enforcement authority, or State securities or law enforcement authority.	Part of the SEC's "wish list." The provision address privilege waiver questions that may arise when entities that are the subject of SEC investigations provide privileged material to the SEC in the first place -- an issue that has engendered a difference of opinion among various circuit courts of appeal.
206, 214 Reckless aiding and abetting standard	Extend the SEC's aiding and abetting enforcement authority to cover all of the securities statutes (it currently covers only the Exchange Act and the Advisers Act). This provision would also clarify that the SEC's authority to pursue aiders and abettors would extend to reckless conduct, resolving a current split among the U.S. Courts of Appeals.	Part of the SEC's "wish list." This provision was left largely unchanged from the Treasury Proposal. Unlike other Congressional proposals such as Senator Spector's July 30, 2009 proposed legislation, this provision would not create a private right of action to pursue claims against aiders or abettors under any of the securities statutes.
409 Confidentiality of information	Protects the confidentiality of sensitive business records and information that the staff obtains during the supervisory process, with exceptions for requests for information from any other federal department or agency or any self-regulatory organization requesting the information for purposes within the scope of its jurisdiction, or for complying with an order of a court of the United States in an action brought by the United States or the Commission against a person subject to the provision.	Part of the SEC's "wish list."
202 Whistleblower protections	Authorizes the SEC, in any action in which it levies sanctions in excess of $1,000,000, to compensate whistleblowers with up to 30% of the amount of the sanctions, an increase from the SEC's current authority under the Exchange Act, which caps such compensation at 10% of collected penalties, and restricts it to	Part of the SEC's "wish list." The whistleblower provisions were left largely unchanged from the Treasury Proposal. The provisions do, however, provide

Section	Description	Comments
	the insider trading context. Also establishes an Investor Protection Fund, intended to grow to a maximum of $100,000,000 through revenues from certain sanctions, to pay awards to whistleblowers and to fund investor education initiatives.	whistleblowers with an express private right of action against employers who retaliate against them, thereby resolving any ambiguity on the subject in the Treasury Proposal.
217 Access to surveillance or risk assessment information	Broadly expands the SEC's authority to obtain information from and conduct examinations of registered entities for risk assessment and surveillance purposes.	Part of the SEC's "wish list."
602 Sharing information with foreign regulators	Amends the Sarbanes-Oxley Act to provide for the sharing of information with foreign auditor oversight authorities without waiving confidentiality or privilege.	Part of the SEC's "wish list." This is in line with the amendment to the Exchange Act to permit sharing of privileged information without waiving the privilege.
219 Control person liability	Amends Section 20(a) of the Exchange Act to provide that control persons could be held liable by the SEC in any action brought under 21(d)(1) and (3).	Part of the SEC's "wish list." This would override several recent court decisions that held only private parties could rely on Section 20(a).
304 Study of the SEC	Requires the SEC to hire an independent consultant to review the internal operations, structure and funding, and need for fundamental reform of the SEC, SROs, and other entities relevant to regulation and protection of investors.	This provision, responding to the SEC Inspector General reports on the Madoff examinations, creates further uncertainty for the SEC and SROs.
407 Improving financial reporting	Requires the SEC, FASB and PCAOB to provide annual testimony by their chairpersons describing efforts to reduce the complexity in financial reporting.	
604 Fair fund revenues	Allows the SEC to add civil penalty payments to a fund for distribution to the victims of a securities law violation regardless of whether the SEC also obtains disgorgement against the violator (as is required under current law).	Part of the SEC's "wish list."