November 4, 2011

Implementing Amendments to the Investment Advisers Act of 1940

This memorandum provides a general overview of the new rules, rule amendments and Form ADV amendments that the Securities and Exchange Commission (the "SEC") has adopted in order to implement certain provisions of the Private Fund Investment Advisers Registration Act of 2010 (the "Registration Act").[1] At an open meeting on June 22, 2011, the SEC adopted final rules to implement the proposals set forth in its proposed rules issued in November 2010. The SEC adopted the proposed rules and rule amendments with several modifications to address commenters' concerns.[2]

Background

The Dodd-Frank Act in part: (1) repeals the private adviser exemption of section 203(b)(3) of the Investment Advisers Act of 1940, as amended (the "Advisers Act")[3], thus requiring most advisers to hedge funds and other private funds[4] to register with the SEC; (2) introduces several new and more limited exemptions for family office advisers, foreign private advisers, advisers to venture capital funds and advisers to private funds with less than $150 million in assets under management in the United States; (3) generally increases the statutory threshold (from $25 million to $100 million) for registration by investment advisers with the SEC rather than the states; and (4) mandates reporting under the Advisers Act by advisers that act as investment advisers solely to: (a) one or more venture capital funds; or (b) private funds if such investment advisers have assets under management in the United States of less than $150 million (collectively the advisers in clauses (a) and (b) are referred to as "exempt reporting advisers").[5]

In November 2010, the SEC issued a release with rule proposals that focused on: (1) a new rule and Form ADV amendments facilitating the transition from SEC to state registration for advisers with assets under management between $25 million and $100 million ("mid-sized investment advisers"); (2) a new rule describing reporting requirements that will apply to exempt reporting advisers; (3) Form ADV amendments primarily designed to give effect to these exemptions and reporting requirements as well as policy considerations underlying the Dodd-Frank Act; and (4) amendments to the SEC's "Pay-to-Play" rule.[6]

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1 The Registration Act is comprised of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (the "Dodd-Frank Act"), which was signed into law by President Barack Obama on July 21, 2010. The Dodd-Frank Act became effective July 21, 2011.

2 *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3221 (June 22, 2011) (the "Implementing Final Release"), 17 C.F.R. Parts 275 and 279.

3 Dodd-Frank Act § 403. The "Private Adviser Exemption" provided that an investment adviser is exempt from registration if, during the course of the preceding 12 months, it had fewer than 15 clients and neither held itself out generally to the public as an investment adviser nor acted as an investment adviser to any registered investment company, or any business development company (a "BDC") under section 54 of the Investment Company Act of 1940, as amended, 15 U.S.C. §§ 80a-1 to 80a-64 (the "Investment Company Act."). *See* 15 U.S.C. § 80b-3(b)(3).

4 Section 202(a)(29) of the Advisers Act defines a "private fund" as an issuer that would be an investment company, as defined in section 3 of the Investment Company Act, but for section 3(c)(1) or 3(c)(7) of the Investment Company Act. 15 U.S.C. § 80b-2(29); *see* 17 C.F.R. § 275.202(a)(29) (2011).

5 *See* Dodd-Frank Act §§ 403, 401-10.

6 *See* Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 3110, 75 Fed. Reg. 77,052 (proposed Nov. 19, 2010) (the "Implementing Proposing Release"). The amendments to the "Pay-to-Play" rule are discussed in a separate firm mailing.

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I. Eligibility for SEC Registration

Section 410 of the Dodd-Frank Act prohibits from SEC registration any investment adviser that: (1) is "required to be registered" as an investment adviser with a state securities authority in the state in which it maintains its principal office and place of business; (2) if registered, would be "subject to examination" by such state securities authority; and (3) is a "mid-sized investment adviser" with assets under management between $25 million and $100 million.[7] Prior to the adoption of the Dodd-Frank Act, section 203A of the Advisers Act generally prohibited SEC registration by an investment adviser who was regulated or required to be regulated as an investment adviser in the state in which it maintains its principal office and place of business, unless the adviser: (1) had at least $25 million of assets under management or (2) advised a registered investment company.[8]

A. Transition to State Registration

As a result of Section 410 of the Dodd-Frank Act and the adoption of these final rules, approximately 3,200 SEC-registered advisers will have to withdraw their registrations with the SEC and register with one or more state securities authorities.[9] The SEC adopted rules and rule amendments, discussed below, that provide the SEC with a means of identifying advisers that must transition to state regulation, that clarify the application of new statutory provisions, and that modify certain exemptions from the prohibition on SEC registration that previously applied under Section 203A of the Advisers Act.[10]

The SEC adopted new rule 203A-5 to provide for an orderly transition to state registration for mid-sized advisers that will no longer be eligible to register with the SEC as described below. The effective date of rule 203A-5(a) was July 21, 2011, and the effective date of rule 203A-5(b) was September 19, 2011.[11] The transition period begins on January 1, 2012.[12]

B. Existing Registrants

Each adviser registered with the SEC on January 1, 2012 must file an amendment to its Form ADV no later than March 30, 2012.[13] In addition, rule 203-5A requires that such advisers must determine their assets under management based on the current market value of the assets as determined within 90 days prior to the date of filing the Form ADV amendment, rather than 30 days as originally proposed.[14]

Any mid-sized advisers registered with the SEC as of July 21, 2011 must remain registered with the SEC (unless an exemption from SEC registration is available) until January 1, 2012.[15] Mid-sized advisers that are no longer eligible for SEC registration must withdraw their registrations with the

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7 See below for explanations of when an adviser is "required to be registered" and "subject to examination."

8 15 U.S.C. § 80b-3a(a)(1).

9 *See* Implementing Final Release at 130.

10 *Id.* at 10.

11 *Id.* at 92.

12 *Id.* at 182.

13 *Id.* at 10. For most advisers, this will be their annual updating amendment. *See* Division of Investment Management: Frequently Asked Questions Regarding Mid-Sized Advisers, *available at* http://sec.gov/divisions/investment/midsizedadviserinfo.htm ("SEC FAQs").

14 *See* 17 C.F.R. § 275.203A-5 (2011).

15 Implementing Final Release at 11.

SEC after filing their Form ADV amendments by filing Form ADV-W no later than June 28, 2012.[16] This includes advisers that would be prohibited from registering with the SEC under section 203A(a)(2) of the Advisers Act[17] and are not otherwise exempted by rule 203A-2 from such prohibition.[18] The SEC is providing a temporary exemption from the prohibition on SEC registration for mid-sized investment advisers. Until January 1, 2012, the prohibition of section 203A(a)(2) of the Advisers Act does not apply to an investment adviser registered with the SEC on July 21, 2011.[19]

After June 28, 2012, the SEC will cancel the registration of (1) advisers no longer eligible to register with the SEC and (2) advisers that fail to file an amendment or withdraw their registrations in accordance with the rule.[20]

The transition period reflected in the final rules differs from the proposed transition period. The SEC had originally proposed a 90-day transitional process with two "grace periods."[21] However, the SEC delayed the transition process because of the need to re-program the IARD to reflect the revisions to Form ADV that were also adopted in the Implementing Final Release.[22] The SEC believes that the IARD will be updated to reflect the revisions to the Form ADV that were adopted in the Implementing Final Release beginning in November.[23]

C. New Applicants

Until July 21, 2011, when the amendments to section 203A(a)(2) took effect, advisers applying for registration with the SEC that qualify as mid-sized advisers under section 203A(a)(2) of the Advisers Act were permitted to register with either the SEC or the appropriate state securities authority.[24] After July 21, 2011, all such advisers are prohibited from registering with the SEC and must register with the state securities authorities. Advisers with assets under management of $100 million or more will continue to register with the SEC (unless an exemption from registration with the SEC is otherwise available).[25]

D. Advisers Previously Exempt under Section 203(b)(3)

The SEC also adopted a transition provision in rule 203-1 for advisers that are newly required to register due to the Dodd-Frank Act's repeal of the "private adviser" exemption in section 203(b)(3). Under newly added rule 203-1(e), an adviser that was relying on, and was entitled to rely on, the

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16 *See* 17 C.F.R. § 275.203A-5.

17 An adviser prohibited from SEC registration pursuant to section 203A(a)(2) is one that: (i) is required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the State in which it maintains its principal office and place of business and, if registered, would be subject to examination as an investment adviser by any such commissioner, agency, or office; and (ii) has assets under management between—(I) the amount specified under subparagraph (A) of paragraph (1) (not less than $25 million, or such higher amount as the SEC may, by rule, deem appropriate); and (II) $100 million, or such higher amount as the SEC may, by rule, deem appropriate. 17 C.F.R. § 275.203-1(a) (2011).

18 Rule 203A-2 exempts from the prohibition on registration certain categories of investment advisers and was amended in the Implementing Final Release as discussed below.

19 17 C.F.R. § 275.203A-5(a).

20 *See* Implementing Final Release at 15.

21 *Id.* at 12.

22 *Id.* at 13.

23 *Id.*

24 *Id.* at 11.

25 *Id.* at 12.

"private adviser" exemption in section 203(b)(3) on July 20, 2011, may delay registering with the SEC until March 30, 2012.[26] Since initial applications for registration can take up to 45 days to be approved, the SEC recommends that advisers relying on this transition period should file a complete application, that is, both Part 1 and a brochure meeting the requirements of Part 2 of Form ADV, at least by February 14, 2012.[27] To qualify for the delayed transition under rule 203-1(e) an adviser must (1) during the course of the preceding 12 months, have had fewer than 15 clients and (2) neither hold itself out generally to the public as an investment adviser nor (3) act as an adviser to a registered investment company or a BDC.[28]

E. Amendments to Form ADV

The SEC adopted several amendments to Item 2.A. of Part 1A of Form ADV to reflect the new threshold for registration and the revisions in response to the enactment of the Dodd-Frank Act.[29] Under Item 2, each investment adviser applying for registration is required to indicate its basis for registration with the SEC and to report annually whether it is eligible to remain registered.[30] The SEC adopted revisions to Item 2.A. substantially as proposed, except that it revised the instructions to Item 2.A.(1) to reflect the adoption of a "buffer" for advisers with close to $100 million in assets under management.[31] Pursuant to Item 2.A., each adviser registered with the SEC (and each applicant for registration) must identify whether it is eligible to register with the SEC because it: (1) is a large adviser that has $100 million or more of regulatory assets under management (or $90 million or more if an adviser is filing its most recent annual updating amendment and is already registered with the SEC); (2) is a mid-sized adviser that does not meet the criteria for state registration or is not subject to examination; (3) has its principal office and place of business in Wyoming (which does not regulate advisers) or outside the United States; (4) meets the requirements for one or more of the revised exemptive rules under section 203A; (5) is an adviser (or subadviser) to a registered investment company; (6) is an adviser to a BDC and has at least $25 million of regulatory assets under management; or (7) received an order permitting the adviser to register with the SEC.[32] If none of the items is applicable, the adviser must indicate that it is no longer eligible to remain registered with the SEC.[33]

F. Assets Under Management

The SEC adopted revisions regarding assets under management as proposed in the Implementing Proposing Release. The instructions to Part 1A were adopted to implement a uniform method for advisers to calculate assets under management that will be used under the Advisers Act for regulatory purposes in addition to assessing whether an adviser is eligible to register with the SEC.[34] Amended rule 203A-2 continues to require that the calculation of "assets under management" for purposes of section 203A of the Advisers Act be the calculation of the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services, as

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26 17 C.F.R. § 275.203-1(e) (2011).

27 Implementing Final Release at 94.

28 *Id.* at 94-95.

29 *Id.* at 16-17.

30 *Id.* at 17.

31 *Id.*

32 *Id.* at 17-18.

33 *Id.* at 18.

34 *Id.* at 19.

reported on the investment adviser's Form ADV.[35] The SEC changed the terminology in Part 1A of Form ADV to refer to an adviser's "regulatory assets under management" in order to acknowledge the "regulatory" purposes of this reporting requirement and to distinguish it from the assets under management disclosure that advisory clients receive in Part 2 of Form ADV.[36]

Prior to the adoption of these rules and amendments, Item 5.F. of Part 1A of Form ADV permitted an investment adviser some limited discretion in choosing which assets to include in the calculation. The amended rule removes this discretion and creates a uniform method of calculating assets under management. Advisers are now required to include in their regulatory assets under management securities portfolios for which they provide continuous and regular supervisory or management services, regardless of whether these assets are family or proprietary assets, assets managed without receiving compensation, or assets of foreign clients.[37] An adviser must calculate its regulatory assets under management on a gross basis, without deduction of "any outstanding indebtedness or other accrued but unpaid liabilities."[38]

The revised instructions also provide guidance on how an adviser to private funds determines the amount of assets it has under management.[39] An adviser must include the value of any private fund over which it exercises continuous and regular supervisory or management services, regardless of the nature of the assets held by the fund.[40] A sub-adviser to a private fund would include only that portion of the value of the portfolio for which it provides continuous and regular supervisory or management services.[41] In addition, advisers must include the amount of any uncalled capital commitments made to a private fund managed by the adviser. Advisers must use the market value of private fund assets, or the fair value of private fund assets where market value is unavailable.[42] The use of fair value differs from the current instruction that allows an adviser to value its assets based on the method the adviser uses to report assets to clients or to calculate fees for investment advisory services. The SEC did not adopt a requirement to value assets in accordance with generally accepted accounting principles ("GAAP").[43] The SEC states it would expect that an adviser that calculates fair value in accordance with GAAP or another basis of accounting for financial reporting purposes will also use that same basis for purposes of determining the fair value of its regulatory assets under management.[44]

The SEC had requested comment in the Implementing Proposing Release on whether to change the frequency of reporting assets under management. As many commenters recommended, the SEC did not change the frequency of the reporting requirement – advisers are required to report assets under management annually.[45]

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35 *Id.*; 17 C.F.R. § 275.203A-3 (2011).

36 Implementing Final Release at 19-20.

37 *Id.* at 20.

38 *Id.* at 22.

39 *Id.* at 23.

40 *Id.* at 24. The SEC clarified that advisers that have discretionary authority over assets, or a portion of fund assets, and that provide ongoing supervisory or management services over those assets, would exercise continuous and regular supervisory or management services.

41 *Id.*

42 *Id.* at 25.

43 *Id.* at 27 n.99.

44 *Id.*

45 *Id.* at 28.

G. Switching Between State and SEC Registration

Rule 203A-1 is designed to prevent an adviser from having to switch frequently between State and SEC registration due to changes in the value of its assets under management or the departure of clients.[46] The SEC is replacing the buffer for advisers with assets under management between $25 and $30 million with a similar buffer for mid-sized advisers.[47] The SEC is retaining the requirement as proposed that eligibility for registration be determined annually as part of an adviser's annual updating amendment. [48] Pursuant to new rule 203A-1, a mid-sized adviser that is described in section 203A(a)(2)(B) of the Advisers Act may, but is not required to register with the SEC if it has assets under management of at least $100 million but not less than $110 million and it does not have to withdraw its registration unless it has less than $90 million of assets under management.[49] However, the rule does not apply if the adviser is an adviser to a company registered under the Investment Company Act or to a company which has elected to be a BDC and has not withdrawn the election, or the adviser is eligible for an exemption under rule 203A-2. If an adviser is registered with a state securities authority, it must apply for registration with the SEC within 90 days of filing an annual updating amendment to its Form ADV reporting that it is eligible for SEC registration and is not relying on an exemption from registration under sections 203(l) or 203(m) of the Advisers Act.[50] If an adviser is registered with the SEC and files an annual updating amendment to its Form ADV reporting that it is not eligible for SEC registration and is not relying on an exemption from registration under sections 203(l) or 203(m) of the Advisers Act, it must file Form ADV-W to withdraw its SEC registration within 180 days of its fiscal year end (unless it is then eligible for SEC registration).[51]

H. Exemptions from the Prohibition on Registration with the SEC

The SEC adopted amendments to three of the exemptions in rule 203A-2 from the prohibition on SEC registration in section 203A in the Implementing Final Release as proposed.[52] The SEC noted that each of the exemptions (including those that are not being amended) also applies to mid-sized advisers.[53]

The SEC eliminated, as proposed, the exemption in rule 203A-2(a) from the prohibition on SEC registration for nationally recognized statistical rating organizations.[54] In addition, the SEC amended rule 203A-2(b), the exemption available to pension consultants, to increase the minimum value of plan assets required to rely on the exemption from $50 million to $200 million.[55] Finally, as

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46 *Id.*

47 *Id.*

48 *Id.* at 28-29.

49 17 C.F.R. § 275.203A-1. Implementing Final Release at 29.

50 *Id.* § 275.203A-1(b).

51 *Id.* § 275.203A-1(b)(2). During the period when the adviser is registered with both the SEC and one or more state securities authorities, the Advisers Act and applicable state law will apply to the adviser's advisory activities. If, prior to the effective date of the withdrawal from registration of an adviser on Form ADV-W, the SEC has instituted a proceeding pursuant to section 203(e) of the Advisers Act to suspend or revoke registration, or pursuant to section 203(h) of the Act to impose terms or conditions upon withdrawal, the withdrawal from registration will not become effective except at such time and upon such terms and conditions as the SEC deems necessary or appropriate in the public interest or for the protection of investors.

52 Implementing Final Release at 31.

53 *Id.* at 32.

54 *Id.*

55 *Id.* at 33. Accordingly, advisers currently relying on the pension consultant exemption that advise plan assets of less than $200 million may be required to withdraw from SEC registration and register with one or more states.

proposed, the SEC adopted amendments to rule 203A-2(d) which permits all investment advisers who are required to register as an investment adviser with 15 or more states to register with the SEC, instead of 30 states (as currently required).[56] When an adviser relying on this rule is no longer required to be registered with 15 states, it must then withdraw from registration with the SEC.[57] To rely on this exemption, an adviser must also: (i) include a representation on Schedule D of Form ADV that the investment adviser has concluded that it must register as an investment adviser with the required number of states; (ii) undertake to withdraw from registration with the SEC if the adviser indicates on an annual updating amendment to Form ADV that it would be required by the laws of fewer than 15 states to register as an investment adviser with the state; and (iii) maintain a record of the states in which the adviser has determined it would, but for the exemption, be required to register.[58]

I. Elimination of Safe Harbor

The SEC rescinded, as proposed, rule 203A-4, which provided a safe harbor from SEC registration for an investment adviser that is registered with the state securities authority of the state in which it has its principal office and place of business based on a reasonable belief that it is prohibited from registering with the SEC because it does not have sufficient assets under management.[59]

J. Mid-Sized Advisers

In order to implement the Dodd-Frank Act amendment to section 203A of the Advisers Act, the SEC amended Form ADV to require a mid-sized adviser registering with the SEC to affirm, upon the initial application and annually thereafter, that it is either: (1) not required to be registered as an adviser with the state securities authority in the state where it maintains its principal office and place of business; or (2) is not subject to examination as an adviser by that state.[60] A mid-sized adviser is prohibited from registering with the SEC only: (1) if the adviser is required to be registered[61] as an investment adviser with the securities commissioner (or any agency or office performing similar functions) of the state in which it maintains its principal office and place of business; and (2) if registered, the adviser would be subject to examination as an investment adviser by such commissioner, agency or office.[62]

To determine whether it is required to be registered, a mid-sized adviser should consult the investment adviser laws or the state securities authority for that state.[63] The SEC also adopted instructions to Form ADV to explain that a mid-sized adviser "is not required to be registered" with the state

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56 *Id.* at 34.

57 *Id.* at 34-35. The SEC also rescinded, as proposed, the provision in the current rule for multi-state advisers that permits advisers to remain registered until the number of states in which they must register falls below 25 states, and did not adopt a similar cushion for the 15-state threshold.

58 *See* 17 C.F.R. § 275.203A-2(d)(2)-(3) (2011); Implementing Final Release at 35 n.132.

59 Implementing Final Release at 36.

60 *Id.* at 37.

61 The Form ADV instructions that the SEC adopted reflect that the "required to be registered" standard included in new section 203A(a)(2) of the Advisers Act for mid-sized advisers is different from the "regulated or required to be regulated" standard set forth in section 203A(a)(1) for small advisers. A mid-sized adviser "is not required to be registered" with the state securities authority and must register with the SEC (unless an exemption is otherwise available) if the adviser is exempt from registration under the law of the state in which it has its principal office and place of business, or is excluded from the definition of investment adviser in that state. *See* Implementing Final Release at 38.

62 *Id.* at 37.

63 *See* SEC FAQs.

securities authority and must register with the SEC (unless an exemption from registration with the SEC otherwise is available) if the adviser is exempt from registration under the law of the state in which it has its principal office and place of business, or is excluded from the definition of investment adviser in that state.[64] The SEC staff contacted the state securities authority for each state and identified those states that do not subject advisers registered with them to examination.[65] The SEC posted this list on its website.[66] Currently, a mid-sized adviser with its principal office and place of business in either New York or Wyoming is not "subject to examination" by the state securities authority and would have to register with the SEC; a mid-sized adviser with its principal office and place of business in any other state is "subject to examination."[67]

II. Reporting by Exempt Reporting Advisers

In order to implement new sections 203(l) and 203(m) of the Advisers Act,[68] the SEC has adopted a new rule, as proposed, requiring advisers relying on those exemptions from registration (the "exempt reporting advisers") to submit, and to periodically update, reports that consist of a limited subset of items on Form ADV.[69] The SEC is also adopting the amendments proposed to Form ADV in order to (1) permit the form to serve as both a reporting and registration form and (2) to specify the seven items that the exempt reporting advisers must complete.[70] Exempt reporting advisers must file their first reports on Form ADV through IARD between January 1 and March 30, 2012 (not on August 20, 2011 as proposed).[71]

The SEC notes that most of the rules that apply to registered advisers do not apply to exempt reporting advisers, such as the custody rule, but notes, for example, that the pay to play rule, rule 206(4)-5, does apply to exempt reporting advisers.[72] The SEC does not anticipate conducting compliance examinations of exempt reporting advisers on a regular basis, although it has the right to conduct such examinations and will do so if there are indications of wrongdoing, such as from tips or complaints.[73] Exempt reporting advisers may choose to register with the SEC if they otherwise meet the requirements. Exempt reporting advisers need to evaluate whether they have any state investment adviser registration requirements.[74]

A. Reporting Required

Rule 204-4 requires exempt reporting advisers to file reports with the SEC electronically within 60 days of relying on the exemption from registration under either section 203(l) or 203(m) on Form

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64 Implementing Final Release at 38-39.

65 *Id.* at 39.

66 *See* http://www.sec.gov/divisions/investment/midsizedadviserinfo.htm.

67 *See* SEC FAQs.

68 Section 203(l) exempts advisers that advise solely one or more "venture capital funds" from the registration requirement; section 203(m) instructs the SEC to exempt an adviser that acts solely as an adviser to private funds and has assets under management in the United States of less than $150 million. *See* Implementing Final Release at 41.

69 *Id.* at 40-41.

70 *Id.* at 41.

71 *Id.* at 95; new Rule 203A-5(b).

72 *Id.* at 47-48.

73 *Id.* at 48.

74 *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Investment Advisers Act Release No. 3222 (June 22, 2011) at 7 & nn.24-25.

ADV through the IARD using the same process used by registered investment advisers.[75] Each Form ADV is considered filed with the SEC upon acceptance by the IARD.[76] Each adviser must pay a filing fee, which the SEC anticipates will be the same as those fees for registered investment advisers, which currently range from $40 to $225 based on the amount of assets under management.[77]

B. Information in Reports

The SEC amended Form ADV to accommodate its use by exempt reporting advisers. For instance, the SEC amended Item 2 of Part 1A to add a new subsection B that requires an exempt reporting adviser to identify the exemption(s) on which it is relying to report with the SEC.[78] The SEC adopted, as proposed, a requirement that exempt reporting advisers complete the following items of Part 1A of Form ADV: Items 1 (Identifying Information); 2.B. (SEC Reporting by Exempt Reporting Advisers); 3 (Form of Organization); 6 (Other Business Activities); 7 (Financial Industry Affiliations and Private Fund Reporting); 10 (Control Persons); and 11 (Disclosure Information).[79] In addition, the SEC is requiring, as proposed, that exempt reporting advisers also complete corresponding sections of Schedules A, B, C, and D.[80]

C. Public Availability of Reports

Section 210(a) of the Advisers Act requires information reported on Form ADV to be made available to the public, unless the SEC finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. Finding public disclosure to be beneficial, the SEC has decided that information reported on Form ADV will be publicly available.[81]

D. Updating Requirements

The SEC amended rule 204-1 under the Advisers Act to require exempt reporting advisers to file updating amendments to reports filed on Form ADV.[82] As amended, rule 204-1 requires an exempt reporting adviser, like a registered adviser, to amend its reports on Form ADV: (1) at least annually, within 90 days of the end of the adviser's fiscal year; and (2) more frequently, if required by the instructions to Form ADV.[83] In addition, the SEC amended General Instruction 4 to Form ADV to require an exempt reporting adviser, like a registered adviser, to update promptly Items 1 (Identification Information), 3 (Form of Organization), and 11 (Disclosure Information) if they become inaccurate in any way, and to update Item 10 (Control Persons) if it becomes materially inaccurate.[84]

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75 Implementing Final Release at 42; *see* Amended Form ADV: General Instruction 13, *available at* http://www.sec.gov/rules/final/2011/ia-3221-appa.pdf.

76 If an exempt reporting adviser is unable to file electronically as a result of technical difficulties, such adviser may request a temporary hardship exemption of up to seven business days after the filing was due. *See* Implementing Final Release at 42; 17 C.F.R. § 275.204-4(e).

77 Implementing Final Release at 43.

78 *Id.* at 44.

79 *Id.* at 45.

80 *Id.*

81 *Id.* at 49.

82 *Id.* at 51.

83 *Id.*

84 *Id.*

E. Final Reports

When an adviser ceases to be an exempt reporting adviser, new rule 204-4 requires the adviser to file an amendment to its Form ADV to indicate that it is filing a final report.[85] Amended General Instruction 15 to Form ADV provides guidance to exempt reporting advisers transitioning to becoming registered with the SEC. An exempt reporting adviser wishing to register with the SEC can file a single amendment to its Form ADV that will serve both as a "final report" as an exempt reporting adviser and an application for registration under the Advisers Act.[86] While an application is pending, but before it is approved, an adviser may continue to operate as an exempt reporting adviser in accordance with the terms of the relevant exemption.[87] Also, General Instruction 15 provides a safe harbor for certain exempt reporting advisers relying on the "private fund adviser" exemption provided by rule 203(m)-1.[88] Such an adviser that has complied with all of its reporting obligations as an exempt reporting adviser may continue advising private fund clients for up to 90 days after filing an annual updating amendment indicating that it has private fund assets of $150 million or more before filing its final report and application for registration.[89] The transition period is not available to advisers relying on the "venture capital adviser" exemption in section 203(l) of the Advisers Act. Advisers seeking to rely on that exemption may not accept a client that is not a venture capital fund without first registering under the Advisers Act. [90]

III. Amendments to Form ADV

The Implementing Final Release sets forth various amendments to Form ADV. The amended Form ADV requires advisers to provide the SEC with additional information about three areas of their operations: (1) additional information about private funds they advise, (2) additional information about their advisory business (including data about the types of clients they advise, their employees, and their advisory activities) and information about their business practices that may present significant conflicts of interest (such as the use of affiliated brokers, soft dollar arrangements, and compensation for client referrals), and (3) additional information about their non-advisory activities and their financial industry affiliations.[91] The amendments to Form ADV set forth in the Implementing Final Release became effective September 19, 2011.[92]

A. Private Fund Reporting on Schedule D

The SEC adopted amendments to Item 7.B.(1) of Schedule D of Form ADV in order to obtain the additional information discussed above.[93] Amended Item 7.B. requires both registered and exempt reporting advisers to complete a separate Schedule D for each "private fund" that the adviser (but not a related person) manages.[94] The use of the new term "private fund," as defined in section 202(a)

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85 *Id.* at 52; 17 C.F.R. § 275.204-4(f).

86 Implementing Final Release at 52-53.

87 *Id.* at 53; *see* Amended Form ADV: General Instruction 15.

88 Implementing Final Release at 53.

89 *Id.*

90 *Id.*

91 *Id.* at 54.

92 *Id.* at 92.

93 *Id.* at 56.

94 *Id.* at 56-57. This modification was adopted as proposed.

(29) of the Advisers Act, will result in advisers reporting on pooled investment vehicles regardless of how they are organized.[95] As proposed, the SEC narrowed the reporting requirements so advisers do not have to report on the funds of their related persons.[96] In addition, the SEC adopted the following measures to help avoid multiple reporting for each private fund and to minimize the overall burden of reporting private fund information: (1) if a private fund has more than one adviser, only one adviser must report the full scope of information for each private fund; (2) an adviser managing a master-feeder arrangement may submit a single Section 7.B.(1) for the master fund and all of the feeder funds if such funds would otherwise report substantially identical information; and (3) an adviser with a principal office and place of business outside the U.S. is not required to complete Schedule D for any private fund that, during the adviser's last fiscal year, was not a U.S. person, was not offered in the U.S. and was not beneficially owned by any U.S. person.[97]

Section 7.B.(1) for each private fund must include the name of the fund and the state or country in which the fund is organized and identify other persons involved in the management of the fund.[98] Also, the adviser must report whether the fund is part of a master-feeder arrangement or is a fund of funds and must provide information about the regulatory status of the fund. An adviser also must identify, within seven broad categories, the type of investment strategy the fund employs, report whether the fund invests in securities of registered investment companies, and provide the gross asset value of the fund.[99] An adviser must provide limited information regarding investors in the fund, including (1) the minimum amount that investors are required to invest; (2) the approximate number of beneficial owners of the fund and the approximate percentage of the fund beneficially owned by the adviser and its related persons, funds of funds and non-U.S. persons; and (3) the extent to which clients of the adviser are solicited to invest, and have invested, in the fund.[100]

In Part A, Private Funds, of Section 7.B.(1), an adviser must classify each of its private funds by strategy, using definitions that the SEC proposed in the instructions to Form ADV.[101] The SEC adopted several changes to the definitions. First, the SEC clarified the definitions to exclude securitized asset funds from the definition of "hedge fund" and modified "securitized asset fund" so that it is not defined by reference to "hedge fund." Second, the SEC modified clause (a) of the "hedge fund" definition, which classifies funds based on whether performance fees or allocations are calculated by taking into account unrealized gains. Third, the SEC clarified that clause (a) would not include performance fees or allocations, the calculation of which may take into account unrealized gains, solely for the purpose of reducing such fees or allocations to reflect net unrealized losses.[102] Finally, the SEC modified clause (c)

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95 *Id.* at 57.

96 *Id.* at 57.

97 *Id.* at 57-58.

98 *Id.* at 58.

99 *Id.* at 59.

100 *Id.* at 59-60; *see* Amended Form ADV, Part 1A, Section 7.B.(1).A of Schedule D, questions 1-22, *available at* http://sec.gov/rules/final/2011/ia-3221-appd.pdf. For purposes of these questions, beneficial owners are persons who would be counted as beneficial owners under section 3(c)(1) of the Investment Company Act or who would be included in determining whether the owners of the fund are qualified purchasers under section 3(c)(7) of that Act. *See* 15 U.S.C. 80a-3(c)(1), (7). There were several proposed amendments to Part A, Private Funds, of Section 7.B.(1) that the SEC proposed but did not adopt, including requirements: (1) to disclose each private fund's net assets; (2) to report private fund assets and liabilities by class and categorization in the fair value hierarchy established under GAAP; and (3) to specify the percentage of each fund owned by particular types of beneficial owners. Implementing Final Release at 61-62.

101 Implementing Final Release at 62.

102 *Id.* at 63.

of the "hedge fund" definition, which looks to whether a fund may engage in short selling, to provide an exception for short selling that hedges currency exposure or manages duration.[103]

The amendments to Part B, Service Providers, of Section 7.B.(1) require advisers to report information concerning five types of service providers that generally perform important roles as "gatekeepers" for private funds.[104] These five "gatekeepers" are auditors, prime brokers, custodians, administrators, and marketers.[105] An adviser must identify each of these service providers, report their locations, and indicate which of them, if any, are related persons of the adviser.[106] For certain types of service providers, an adviser must report information intended to help the SEC and investors understand the nature of the services provided.[107] The SEC adopted Part B with minor changes from the Implementing Proposing Release designed to clarify instructions.[108] When an adviser must report the percentage of the fund's assets "valued" by a third party, the SEC revised the question and instructions to explain that a person should be viewed as valuing an asset for this purpose only if that person carried out the valuation procedure for that asset (if any), and that person's determination as to value was used for purposes of subscriptions, redemptions, distributions or fee calculations. [109] Advisers are not required to report the name or location of the third parties performing these valuations.[110] Question 23, which requires information about the relevant private fund's auditing firm, has been revised so that advisers must indicate whether the fund's auditor issued an unqualified opinion on the fund's financial statements.[111]

The SEC dismissed objections from commenters on the public disclosure of proprietary and sensitive information, finding that public disclosure of the information will help deter fraud and other misconduct.[112]

B. Advisory Business Information

Item 5 of Part 1A, as amended, requires a registered adviser to provide basic information regarding the business of the adviser that allows the SEC to identify the scope of the adviser's business, the types of services it provides, and the types of clients to whom it provides those services. It also requires information from the adviser about the number of its employees, the amount of assets it manages, and the number and types of its clients.[113] The SEC amended Item 5.B. as proposed to require an adviser to indicate how many of its employees are registered as investment adviser representatives or are licensed insurance agents.[114] Also, an adviser is required to provide a single numerical approximation in response to these questions as well as to the existing questions that ask about employees that perform investment advisory

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103 *Id.* at 64.

104 *Id.* at 65.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.* at 66. Question 23.(h) requires an adviser promptly to file an amendment to its Form ADV if the adviser checks "Report Not Yet Received." *see* Amended Form ADV, Part 1A, Section 7.B.(1).A of Schedule D, question 23(h), *available at* http://sec.gov/rules/final/2011/ia-3221-appd.pdf.

112 *Id.* at 67-68.

113 *Id.* at 70.

114 *Id.*

functions or are registered representatives of a broker-dealer, and firms that solicit advisory clients.[115] Items 5.C. and 5.D. have been amended to require each registered adviser to: (1) provide an approximate number of clients if it has over 100; (2) report the approximate percentage of its clients that are not U.S. persons; (3) specify the types of clients that it advises (adding categories for BDCs, other investment advisers, and insurance companies) and the percentage that each client type comprises of its total number of clients; and (4) report in a new item the approximate percentage of assets under management attributable to each client type.[116] As proposed, the SEC adopted amendments to Item 5.G. which requires an adviser to select from a list the types of advisory services it provides, and the SEC added two additional types of services to the list.[117] Also, the SEC clarified that educational seminars and workshops would not include episodic meetings at which advisers educate existing clients about issues related to the ongoing management of their accounts.[118] If an adviser selects "portfolio management for investment companies," (as well as BDCs), the adviser must provide the SEC file number in Section 5.G. of Schedule D for each registered investment company, as well as each BDC that has made an election pursuant to section 54 of the Investment Company Act.[119] Finally, the SEC adopted new Item 5.J. to require advisers to indicate whether they report, in response to Item 4.B. of Part 2A, that they provide investment advice only with respect to limited types of investments.[120]

C. Other Business Activities and Financial Industry Affiliations

In order to provide the SEC with a more complete picture of the activities of an adviser and its related persons, the SEC adopted amendments to Items 6 and 7 of Part 1A.[121] Items 6 and 7 require advisers, including exempt reporting advisers, to report those financial services the adviser or a related person is actively engaged in providing, from lists of financial services set forth in the items.[122] First, the SEC expanded the lists of types of financial service businesses in Items 6.A. and 7.A., so that an adviser must also report whether it or a related person is a trust company, registered municipal advisor, registered security-based swap dealer, or major security-based swap participant.[123] Second, an adviser must also report if it is an accountant (or accounting firm) or lawyer (or law firm).[124] Finally, an adviser must report if a related person is a sponsor, general partner or managing member of a pooled investment vehicle, and the responses must include related persons that are foreign affiliates, regardless of whether they are registered or required to be registered in the U.S.[125]

The SEC also amended Schedule D, which contains expanded reporting requirements that correspond to Items 6 and 7.[126] As a result of the amendments, an adviser does not have to complete Section

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115 *Id.* at 70-71.

116 *Id.* at 71.

117 *Id.* at 72. The two additional services are: (1) portfolio management for pooled investment vehicles, other than registered investment companies; and (2) educational seminars or workshops.

118 *Id.*

119 *Id.*

120 *Id.* at 73.

121 *Id.*

122 *Id.*

123 *Id.*

124 For responses to Item 7.A. relating to natural persons, the SEC clarified that advisers should respond affirmatively only for such persons that have a separate business in that field rather than for those persons that the adviser may employ as accountants or lawyers. *Id.* at 74.

125 *Id.*

126 *Id.*

7.A. of Schedule D for any related person if: (1) the adviser has no business dealings with the related person in connection with advisory services it provides to its clients; (2) the adviser does not conduct shared operations with the related person; (3) the adviser does not refer clients or business to the related person, and the related person does not refer prospective clients or business to the adviser; (4) the adviser does not share supervised persons or premises with the related person; and (5) the adviser has no reason to believe that its relationship with the related person otherwise creates a conflict of interest with its clients.[127] In an effort to centralize reporting of related qualified custodians in a single item, the SEC also moved to Section 7.A. of Schedule D (question 8) a question that had been in Item 9 that requires advisers to report whether a related person foreign financial institution acts as a qualified custodian for client assets under the adviser custody rule.[128]

D. Participation in Client Transactions

The SEC adopted three amendments to Item 8, which requires a registered adviser to report information about its transactions, if any, with clients, including whether the adviser or its related person engages in transactions with clients as a principal, otherwise sells securities to clients, or has discretionary authority over client assets.[129] The amendments, adopted as proposed, require: (1) that an adviser that indicates it has discretionary authority to determine the brokers or dealers for client transactions or that it recommends brokers or dealers to clients must additionally report whether any of such brokers or dealers are related persons of the adviser; (2) that an adviser that indicates it receives "soft dollar benefits" must also report whether all those benefits qualify for the safe harbor under section 28(e) of the Securities Exchange Act of 1934 (the "Exchange Act") for eligible research or brokerage services; and (3) that an adviser report whether it or its related person receives direct or indirect compensation for client referrals.[130]

E. Custody

To provide the SEC with a more complete picture of an adviser's custodial practices, the SEC amended Item 9 to require each registered adviser to indicate the total number of persons that act as qualified custodians for the adviser's clients in connection with advisory services the adviser provides to its clients.[131] The SEC also adopted several clarifications requested by commenters and made certain technical changes.[132] First, the SEC clarified that Item 9 asks whether the adviser or a related person has custody of funds and securities of clients that are not registered investment companies.[133] Also, the SEC clarified in Items 9.B. and 9.C. that advisers' responses must include funds and securities of which a related person has custody in connection with advisory services the adviser provides to clients.[134] Last, amended question (6) within Section 9.C. of Schedule D enables an adviser to check a box to indicate that it has not yet received a report prepared by an independent accountant that audited a pooled investment vehicle or that examined internal controls.[135]

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127 *Id.* at 76.

128 *Id.* at 77.

129 *Id.*

130 *Id.*

131 *Id.* at 78.

132 *Id.* at 79. The notes within Item 9.A. have been amended to require an adviser to exclude from 9.A. and to report in 9.B. only client assets for which custody is attributed to the adviser as a result of related person custody. *Id.* at 79-80.

133 *Id.* at 79.

134 *Id.* at 80.

135 *Id.* at 80. The updating requirements, however, require advisers to promptly file an amendment to update their response when the accountant's report is available.

F. Reporting $1 Billion in Assets

To identify advisers that could be subject to rules regarding certain excessive incentive-based compensation arrangements required by section 956 of the Dodd-Frank Act, the SEC adopted, as proposed, Item 1.O. of Part 1A and related instructions to require each adviser to indicate whether it had $1 billion or more in total assets shown on the adviser's balance sheet as of the last day of the most recent fiscal year.[136] For purposes of this reporting requirement only, an adviser must determine the amount of assets in the same manner as it determines the amount of "total assets" on its balance sheet for its most recent fiscal year end, using the same accounting method to prepare the balance sheet.[137]

G. Other Amendments

The SEC adopted other amendments to Part 1A of Form ADV to improve its ability to assess compliance risks.[138] Item 1 was adopted as proposed, with the addition of new Item 1.P.[139] New Item 1.P. requires an adviser to provide a "legal entity identifier" if it has one.[140] The SEC amended Item 1.J. to require an adviser to provide contact information for its chief compliance officer to give the SEC direct access to the person designated to be in charge of its compliance program.[141] In addition, the SEC amended Item 1 to require an adviser to indicate whether it or any of its control persons is a public reporting company under the Exchange Act. With respect to reporting disciplinary events, the SEC adopted certain technical changes.[142]

Because all commenters opposed accelerating the deadline for filing an annual updating amendment to an adviser's Form ADV filing, the SEC did not adopt a requirement to accelerate the annual updating amendment deadline, which will continue to be 90 days after the adviser's fiscal year end.[143]

The SEC also amended rule 204-1 under the Advisers Act, which requires advisers to update their Form ADV filings, to require exempt reporting advisers to file updating amendments to reports filed on Form ADV. As amended, rule 204-1 requires an exempt reporting adviser, like a registered adviser, to amend its reports on Form ADV: (1) at least annually, within 90 days of the end of the adviser's fiscal year; and (2) more frequently, if required by the instructions to Form ADV.[144] Subject to paragraph (c) of that rule, advisers must file all amendments to Part 1A and Part 2A of Form ADV electronically with the IARD, unless the adviser has received a continuing hardship exemption.[145] If an adviser is required to file a brochure and its fiscal year ends on or after December 31, 2010, the adviser must amend its Form ADV by electronically filing with the IARD one or more brochures that

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136 *Id.* at 81.

137 *Id.* at 81 n.322.

138 *Id.* at 82.

139 *See* i*d.*

140 *Id.* at 82-83.

141 *Id.* at 82. An adviser also has the option, in Item 1.K., to provide additional regulatory contacts for Form ADV. Neither Items 1.K. nor 1.J. may be viewed by the public on the SEC website.

142 *Id.* at 83. The SEC added a box to Item 11, as proposed, for advisers to check if any disciplinary information reported in that item and the corresponding disclosure reporting pages is being reported about the adviser or any of its supervised persons. Also, the SEC added a third option to each disclosure reporting page that permits an adviser to remove the disclosure reporting page from its filing by adding a box an adviser could check if it was filed in error. Finally, the SEC amended Item 3.D. of Part 2B (the brochure supplement) to correct a drafting error. Advisers must include in the brochure supplements disclosure regarding hearings or formal adjudications relating to the revocation or suspension of a professional attainment, designation, or license of the supervised person by the designating authority. *Id.* at 83-84.

143 *Id.* at 84.

144 *Id.* at 51.

145 17 C.F.R. § 275.204-1(b).

satisfy the requirements of Part 2A of Form ADV as part of the next annual updating amendment it is required to file.[146]

The SEC also revised Form ADV-H, ADV-NR, and ADV-E. The revised Forms are included as attachments to the Implementing Final Release. The text of those forms does not, and the amendments will not, appear in the Code of Federal Regulations.[147]

IV. Technical and Conforming Amendments

Client Counting Rules

Rule 202(a)(30)-1 adopted by the SEC includes a slightly modified version of the safe harbor for counting clients currently used for purposes of the Private Adviser Exemption that is being eliminated.[148] New rule 202(a)(30)-1 allows an adviser to treat as a single client a natural person and: (1) that person's minor children (whether or not they share the natural person's principal residence); (2) any relative, spouse, spousal equivalent, or relative of the spouse or of the spousal equivalent of the natural person who has the same principal residence;[149] (3) all accounts of which the natural person and/or the person's minor child or relative, spouse, spousal equivalent, or relative of the spouse or of the spousal equivalent who has the same principal residence are the only primary beneficiaries; and (4) all trusts of which the natural person and/or the person's minor child or relative, spouse, spousal equivalent, or relative of the spouse or of the spousal equivalent who has the same principal residence are the only primary beneficiaries.[150] Rule 202(a)(30)-1 also permits an adviser to treat as a single client (1) a corporation, general partnership, limited partnership, limited liability company, trust, or other legal organization to which the adviser provides investment advice based on the legal organization's investment objectives, and (2) two or more legal organizations that have identical shareholders, partners, limited partners, members, or beneficiaries.[151] Unlike the previous client counting rules under the private adviser exemption, new rule 202(a)(30)-1 requires that advisers count as a client any person for whom the adviser provides investment advisory services without compensation.[152]

The new rule includes two provisions that clarify that advisers need not double-count private funds and their investors under certain circumstances. One provision, as proposed, specifies that an adviser need not count a private fund as a client if the adviser counted any investor, as defined in the rule, in that private fund as an investor in that private fund for purposes of determining the availability of the exemption. The other provision, recommended by commenters, clarifies that an adviser is not required to count a person as an investor if the adviser counts such person as a client of the adviser. Thus, a client who is also an investor in a private fund advised by the adviser would only be counted once.[153]

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146 *Id.* § 275.204-1(c).

147 Implementing Final Release at 234.

148 *Id.* at 89.

149 17 C.F.R. § 275.202(a)(30)-1(a). Unlike the proposed rule, the final rule 202(a)(30)-1(a)(1) includes the concept of a spousal equivalent, which the SEC incorporated in response to a suggestion it received in a comment letter. *See* Exemptions Release at 104 n.422. The SEC defines "spousal equivalent" by reference to rule 202(a)(11)(G)-1(d)(9), i.e., as "a cohabitant occupying a relationship generally equivalent to that of a spouse." *Id.*

150 17 C.F.R. § 275.202(a)(30)-1(a).

151 *Id.*

152 Exemptions Release at 105.

153 *Id.* at 106. In addition, the following "special rules" apply: (1) an adviser must count a shareholder, partner, limited partner, member, or beneficiary (each, an "owner") of a corporation, general partnership, limited partnership, limited liability company, trust, or other legal organization, as a client if the adviser provides investment advisory services to the

A. Books and Records Rule

The SEC adopted three amendments to rule 204-2 of the Advisers Act, the "books and records" rule, which sets forth the books and records required to be maintained by investment advisers.

The first amendment, substantially as proposed, updates the "grandfathering provision" for investment advisers that were exempt from registration under the "private adviser" exemption, but will be required to register by March 31, 2012.[154] The update clarifies that such an adviser is not obligated to keep the performance-related records set forth under rule 204-2(a)(16) for a private fund or other account it advised during any period that ended before its registration with the SEC; provided, however, if an adviser did preserve any books and records in its possession that pertain to the performance or rate of return of a private fund or other account it advised before its registration, it must continue to preserve them.[155]

The second amendment, as proposed, modifies rule 204-2(e)(3)(ii) of the Advisers Act by adding a cross-reference to the definition of "private fund" in Section 202(a)(29).[156] Before the amendment, rule 204-2(e)(3)(ii) used the term "private fund" without cross-referencing a definition.[157]

The third amendment, as proposed, rescinds rule 204-2(l) of the Advisers Act.[158] Rule 204-2(l) stated that if an investment adviser that is registered or required to be registered under Section 203 of the Advisers Act (1) advises a private fund and (2) acts, or a person related to the adviser acts, as the private fund's general partner, managing member or in a comparable capacity, then the books and records of the private fund are deemed to be the records of the adviser for purposes of Section 204 of the Advisers Act.[159] The SEC rescinded rule 204-2(l) because it was vacated by a federal appeals court[160] and because the Registration Act's addition of section 204(b)(2) to the Advisers Act codifies the same approach in the Advisers Act itself.[161]

B. Cross Reference Corrections[162]

The SEC adopted, as proposed, two amendments to rule 222-2 of the Advisers Act. Rule 222-2 defines the term "client" for purposes of the national de minimis standard.[163] The amendments update

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owner separate and apart from the investment advisory services provided to the legal organization; (2) an adviser is not required to count an owner as a client solely because the adviser, on behalf of the legal organization, offers, promotes, or sells interests in the legal organization to the owner, or reports periodically to the owners as a group solely with respect to the performance of or plans for the legal organization's assets or similar matters; and (3) any general partner, managing member or other person acting as an investment adviser to a limited partnership or limited liability company must count the partnership or limited liability company as a client. *Id.* At 105 n.424.

154 Implementing Final Release at 89.

155 17 C.F.R. § 275.204-2(e)(3)(ii); Implementing Final Release at 89. While the proposed amendment would have applied the grandfathering provision only to those periods prior to July 21, 2011, the adopted amendment applies the grandfathering provision to any period prior to the adviser's registration. This is the result of the SEC's decision to provide a transition period for advisers relying on the private adviser exemption, requiring that they register and comply with all Advisers Act provisions by March 30, 2012. Implementing Final Release at 89 n.360.

156 *Id.* at 90.

157 17 C.F.R. § 275.204-2(e)(3)(ii).

158 Implementing Final Release at 90.

159 17 C.F.R. § 275. 204-2(l).

160 *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006).

161 Implementing Final Release at 90; *see also* 17 C.F.R. § 275.204(b)(2).

162 The SEC adopted, as proposed, an amendment to rule 0-7(a)(1) of the Advisers Act to correct a cross reference to Section 203A(a)(2) of the Advisers Act, which defines "small entities" and has been renumbered as section 203A(a)(3) by the Registration Act. Implementing Final Release at 90.

163 17 C.F.R. § 275.222-2.

cross-references used in the definition of "client" resulting from the SEC's elimination of Rule 203(b)(3)-1 and adoption of new rule 202(a)(30)-1.[164] As previously discussed above, the SEC rescinded rules 203(b)(3)-1 and 203(b)(3)-2, which were the client counting rules for the now repealed "private adviser" exemption, and adopted new client counting rule 202(a)(30)-1 for purposes of the new foreign private adviser exemption.[165]

The SEC chose not to adopt a third proposed amendment to rule 222-2 specifying that, for purposes of the de minimis standard, an adviser is not required to count as a client any person for whom the adviser provides investment advisory services without compensation.[166] The SEC received a comment letter stating that it would be confusing and inconsistent to require an adviser to count such a person for purposes of the foreign private adviser exemption but not for the de minimis standard, and the SEC agreed with this analysis.[167]

C. Defined Term Correction

The SEC replaced, as proposed, the term "principal place of business" with the term "principal office and place of business" in rule 222-1(b) under the Advisers Act, [168] but there is no change to the definition of the term. This correction is intended only to conform to the Registration Act's amendments to section 222 of the Advisers Act.[169]

D. Rescission of a Vacated Rule

The SEC rescinded rule 202(a)(11)-1 under the Advisers Act, which addressed the application of the Advisers Act to broker-dealers offering certain types of brokerage programs.[170] The SEC rescinded rule 202(a)(11)-1 because it was vacated by a federal appeals court.[171]

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164 Implementing Final Release at 91.

165 *See supra* "IV. Technical and Conforming Amendments—A. Client Counting Rules."

166 Implementing Final Release at 92.

167 *Id.*; *see also supra* "IV. Technical and Conforming Amendments—A. Client Counting Rules."

168 Implementing Final Release at 91.

169 *Id.*

170 *Id.* at 92; *see also* 17 C.F.R. § 275.202(a)(11)-1.

171 Implementing Final Release at 92; *Fin. Planning Ass'n v. SEC*, 482 F.3d 481 (D.C. Cir. 2007).