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Registration of Advisory Entities Affiliated With a Registered Investment Adviser

On January 18, 2012, the Division of Investment Management of the Securities and Exchange Commission (the "SEC") issued a no-action letter (the "No-Action Letter")[1] in response to a request from the American Bar Association's Subcommittee on Hedge Funds (the "ABA Subcommittee"). The No-Action Letter (i) confirms and expands prior guidance as to the availability of relief from registration under the Investment Advisers Act of 1940, as amended (the "Advisers Act") of certain special purpose vehicles ("SPVs") established by investment advisers that are registered with the SEC ("registered advisers") to act as general partners or managing members to their affiliated private funds and (ii) provides guidance regarding registration issues for certain other advisory entities that are affiliated with registered advisers.

Private Fund General Partners and Similar SPVs

As a matter of administrative practice, the SEC and its staff have not required natural persons associated with a registered adviser to separately register as investment advisers under the Advisers Act solely as a result of their activities as associated persons, but rather have treated the registered adviser's registration with the SEC as effectively covering these associated persons. In a December 8, 2005 letter addressed to the American Bar Association's Subcommittee on Private Investment Entities (the "2005 No-Action Letter"),[2] the staff took a similar approach with respect to certain SPVs created by a registered adviser, subject to certain conditions, as described below.

In light of recent amendments to the Advisers Act pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), the ABA Subcommittee sought confirmation that the 2005 No-Action Letter continues to represent the position of the staff with respect to SPVs.

In the 2005 No-Action Letter, the staff stated that it would not recommend enforcement action to the SEC under section 203(a) or section 208(d) of the Advisers Act against a registered adviser and an SPV if the SPV does not separately register as an investment adviser, subject to the following representations and undertakings (collectively, the "2005 Conditions"):

- the investment adviser to a private fund establishes the SPV to act as the private fund's general partner or managing member;
- the SPV's formation documents designate the investment adviser to manage the private fund's assets;
- all of the investment advisory activities of the SPV are subject to the Advisers Act and the rules thereunder, and the SPV is subject to examination by the SEC; and

1 Copies of the No-Action Letter and the request letter from the ABA Subcommittee are available at http://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm.

2 See American Bar Association Subcommittee on Private Investment Entities, SEC Staff Letter (Dec. 8, 2005, available at http://www.sec.gov/divisions/investment/noaction/aba120805.htm), in Section I of the Questions and Answers at Question and Answer G.1.

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- the registered adviser subjects the SPV, its employees and persons acting on its behalf to the registered adviser's supervision and control and, therefore, the SPV, all of its employees and the persons acting on its behalf are "persons associated with" the registered adviser (as defined in section 202(a)(17) of the Advisers Act).

According to the 2005 No-Action Letter, the SPV would, subject to the 2005 Conditions, look to and essentially rely upon the registered adviser's registration with the SEC in not submitting a separate Form ADV.

The No-Action Letter confirms the interpretative guidance provided by the staff in the 2005 No-Action Letter.

In addition, the No-Action Letter confirms that the relief described above would be available to registered advisers with multiple SPVs, subject to the 2005 Conditions.

The No-Action Letter also confirms that an SPV with directors (as defined in section 202(a)(8) of the Advisers Act) who are independent of the registered adviser (and thus who are not "persons associated with" the registered adviser) may also rely on the relief described above, provided that the SPV otherwise meets the 2005 Conditions.

The Single Registration of Advisory Affiliates of a Registered Adviser

The ABA Subcommittee also inquired as to the circumstances in which advisers that are related to a registered adviser, but which may not be SPVs, may avoid having to register separately with the SEC by relying on the registration of the registered adviser. As noted by the ABA Subcommittee, advisers to private funds[3] are often part of a group of related advisers formed for a variety of reasons (such as tax considerations). The ABA Subcommittee sought guidance as to whether any such advisers that form part of a group of related advisers including at least one registered adviser could satisfy their obligation to register with the SEC through the registration of the registered adviser and the inclusion of the relevant related entities on the registered adviser's Form ADV, in lieu of having to file separate registrations.

Importantly, the No-Action Letter provides expanded relief from registration under the Advisers Act for certain control affiliates of a registered adviser. The staff advised that they would not recommend enforcement action to the SEC against an investment adviser that files (or amends) a single Form ADV (the "filing adviser") on behalf of itself and each other adviser that is controlled by or under common control with the filing adviser that is registering through a single registration with the filing adviser (each, a "relying adviser") where the filing adviser and each relying adviser collectively conduct a single advisory business.

Absent other facts suggesting that a filing adviser and one or more relying advisers conduct different advisory businesses, the staff would view the advisers as collectively conducting a single advisory business and thus a single registration would be appropriate in the following circumstances:

- The filing adviser and each relying adviser advise only private funds and separate account clients that are qualified clients (under Advisers Act rule 205-3) and are otherwise eligible to invest in the private funds advised by the filing adviser or a relying adviser and whose accounts pursue investment objectives and strategies that are substantially similar or otherwise related to those private funds.

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3 The term "private funds," as used in the No-Action Letter, refers to private funds as defined in section 202(a)(29) of the Advisers Act, which are issuers that would be investment companies (as defined in the Investment Company Act of 1940, as amended (the "1940 Act")) but for section 3(c)(1) or section 3(c)(7) of the 1940 Act.

- Each relying adviser, its employees and the persons acting on its behalf are subject to the filing adviser's supervision and control and, therefore, each relying adviser, its employees and the persons acting on its behalf are "persons associated with" the filing adviser.
- The filing adviser has its principal office and place of business in the United States and all of the substantive provisions of the Advisers Act and the rules thereunder apply to the filing adviser's and each relying adviser's dealings with each of its clients, regardless of whether any client or the filing adviser or relying adviser providing the advice is a United States person.
- The advisory activities of each relying adviser are subject to the Advisers Act and the rules thereunder, and each relying adviser is subject to examination by the SEC.
- The filing adviser and each relying adviser operate under a single code of ethics adopted in accordance with Advisers Act rule 204A-1 and a single set of written policies and procedures adopted and implemented in accordance with Advisers Act rule 206(4)-7 and administered by a single chief compliance officer in accordance with that rule.[4]
- The filing adviser discloses in its Form ADV (Miscellaneous Section of Schedule D) that it and its relying advisers are together filing a single Form ADV in reliance on the position expressed in the No-Action Letter and identifies each relying adviser by completing a separate Section 1.B., Schedule D, of Form ADV for each of them, identifying each of them as such by including the notation "(relying adviser)."

The staff also notes that the filing adviser and each relying adviser must not be prohibited from registering with the SEC by section 203A of the Advisers Act. In particular, the filing adviser and each relying adviser must each individually have sufficient assets under management to qualify to register with the SEC or must qualify for an exemption from section 203A's prohibition. As an example, the SEC mentions Advisers Act rule 203A-2(b), which permits an adviser to register with the SEC that would otherwise be prohibited from doing so under section 203A if the adviser is in a control relationship with a registered adviser and has the same principal office and place of business as the registered adviser.

In addition, the staff notes that the SEC has previously stated that it would treat two or more related advisers that are separately organized but "operationally integrated" as a single adviser, and that an adviser that is unable to satisfy the requirements for a single registration described above may nevertheless be "operationally integrated" with one or more related advisers. This could result in a requirement for one or both advisers to register with the SEC.

To satisfy the requirements of Form ADV while using a single registration, the filing adviser must file, and update as required, a single Form ADV (Parts 1 and 2) that relates to, and includes all information concerning, the filing adviser and each relying adviser (*e.g.*, disciplinary information and ownership information on Schedules A and B), and must include this same information in any other reports or filings it must make under the Advisers Act or the rules thereunder (*e.g.*, Form PF).

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4 The code of ethics and written policies and procedures must be administered as if the filing adviser and each relying adviser are part of a single entity, although they may take into account, for example, that a relying adviser operating in a different jurisdiction may have obligations that differ from the filing adviser or another relying adviser.

Conclusions

The No-Action Letter provides welcome confirmation of prior SEC guidance and an expansion of relief to groups of affiliated advisers that will be able to rely on the registration of a single advisory entity.

Nevertheless, even with this expanded relief, some groups of affiliated advisers may be required to register multiple advisers. For example, the relief is not applicable where the relevant advisers do not collectively conduct a single advisory business or in circumstances where the principal office and place of business of the filing adviser is not within the United States.