Proskauer

A Reminder: SEC Exempt Reporting Adviser Filing Due March 30 From Many U.S. and Non-U.S. Investment Advisers

March 15, 2012

The deadline for filing with the SEC as an Exempt Reporting Adviser (ERA) is March 30, 2012. This filing may be required by certain advisers that are exempt from full SEC registration because they qualify under either the "private fund adviser" or the "venture capital adviser" exemption. Many non-U.S. advisers that manage a U.S. or non-U.S. fund with more than $25 million from U.S. clients or investors or 15 or more U.S. clients or investors may be required to file. With regard to non-U.S. managers, see our client alert below for more.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), signed into law on July 21, 2010, is a significant reform of U.S. law and regulatory framework governing the U.S. financial markets and industry. Title IV of the Dodd-Frank Act made several changes to the Investment Advisers Act of 1940 (the Advisers Act), which significantly narrow the exemptions from the Advisers Act's registration requirements that currently are available to advisers of private funds (including private equity and hedge funds). As a result, many U.S. and non-U.S. private fund advisers will be required to register as investment advisers under the Advisers Act, thereby subjecting such advisers to a myriad of rules governing their conduct, public reporting requirements and enhanced regulatory oversight from the U.S. Securities and Exchange Commission (the SEC).

New Registration Requirements under the Advisers Act

Generally, if any of the following apply to a non-U.S. adviser (which includes managers and managing general partners), then an adviser must consider whether registration with the SEC under the Advisers Act is required:

- if the adviser has a U.S. office from which any research, advisory, management or other investment activities are carried out;

- if the adviser manages or advises funds in which there are any U.S. investors (U.S. investors for this purpose are "U.S. persons" as defined in the U.S. Securities Act);
- if the adviser has any direct managed accounts or investment management or advisory agreements with U.S. clients/persons; or
- if the adviser holds itself out as an investment adviser in the U.S.

The final rules adopted by the SEC implement several exemptions from registration under the Advisers Act. Of these, the exemptions likely to be most relevant to non-U.S. advisers are:

- **Foreign Private Adviser Exemption** - an exemption for certain non-U.S. advisers (i) with no place of business in the U.S.; (ii) with fewer than 15 U.S. clients and U.S. investors in private funds managed by the non-U.S. adviser; (iii) with less than $25 million in assets under management attributable to such U.S. clients and investors; and (iv) who do not hold themselves out to the public in the U.S. as an investment adviser. The SEC has provided some guidance as to how to count U.S. clients and investors toward the 15 client/investor limit, and on what method should be used to calculate the amount of assets under management attributable to such clients/investors. In the case of a non-U.S. adviser to a non-U.S. fund, assets under management includes all of the assets of the fund that are attributable to U.S. investors, regardless of the nature of those assets, and also should include any uncalled capital commitments to the fund. Assets under management is to be determined on a gross (not net) basis. In other words, the amount of a fund's outstanding indebtedness or other accrued but unpaid liabilities may not be deducted from the fund's total assets for purposes of determining an adviser's assets under management.
- **Private Fund Adviser Exemption** – as applied to non-U.S. advisers, this exemption is available for advisers with their principal place of business outside the United States (i) with no clients that are U.S. persons other than "qualifying" private funds, and (ii) who manage no assets from a place of business in the U.S. other than private fund assets having a total value of less than $150 million. Under this exemption, an adviser cannot manage any separate account money from a place of business in the U.S. However, non-U.S. advisers with no place of business in the U.S., and whose only U.S. "clients" are private funds, will not be required to register under the Advisers Act, regardless of the amount of private fund assets under management attributable to U.S. investors. The method used for calculating assets under management applies as described above with respect to the Foreign Private Adviser Exemption.
- **Venture Capital Fund Adviser Exemption** - an exemption available for advisers who only manage venture capital funds.

Non-U.S. advisers that can rely on the Foreign Private Adviser Exemption are completely exempt from the Advisers Act, and face no additional registration requirements or regulatory oversight from the SEC as a result of the Dodd-Frank Act.

Non-U.S. advisers that rely on either the Private Fund Adviser Exemption or the Venture Capital Fund Adviser Exemption will be considered "Exempt Reporting Advisers" under the Advisers Act ("ERAs"), and will be subject to certain additional regulatory requirements, which are summarised below.

Exempt Reporting Advisers – Filing & Disclosure

On an annual basis, ERAs are required to submit an abbreviated version of Part 1A of Form ADV to the SEC within 90 days of each fiscal year-end, which will be made publicly available on the SEC's Web site. Information that will need to be provided includes basic identifying information, the adviser's basis for an SEC exemption, form of organisation, other business activities, financial industry affiliations, disciplinary history, and information about the adviser's direct and indirect owners, executive officers and other "control" persons. In addition to annual update filings, ERAs will be required to file prompt amendments if certain information previously filed becomes inaccurate (e.g., type of organisation, disciplinary history, etc.)

ERAs also are required to disclose detailed information about each private fund advised by them, including:

- gross asset value of the fund;
- name of the GP/managing member;
- detailed ownership breakdown (although names of investors are not required to be disclosed); and
- identity and detailed information regarding placement agents, custodians, prime brokers and administrators (where applicable).

In addition, ERAs will need to comply with certain limited SEC rules and regulations going forward, including with respect to:

- new recordkeeping requirements (which the SEC has yet to issue and which will be the subject of future rule making);
- requirements to adopt policies to prevent the misuse of material non-public information (e.g., insider trading);

- restrictions on the use of political contributions for the purposes of obtaining or retaining business from U.S. state or local government clients (so-called "pay to play rules"); and
- general antifraud rules.

Further, the SEC has indicated that while it does not expect to examine ERAs on a periodic basis, it reserves the right to do so if there is any indication of any wrongdoing by the ERA (e.g., by virtue of an investor complaint or tip).

Timing

A foreign adviser of private equity funds who previously was exempt from registration under the Advisers Act has until either: (i) February 14, 2012 to file for full registration with the SEC under the new Advisers Act registration regime, or (ii) if exempt from registration as an ERA, until March 30, 2012 to make the requisite ERA filing with the SEC. The process for registering as an ERA is not as onerous as full registration with the SEC, but nonetheless it does comprise a number of stages, including setting up an IARD account and the appointment of a Super Account Administrator and, accordingly, it is advisable to start the process as soon as possible.

Which Entity in a Fund Manager's Structure Should Register or File the Form ADV?

The Advisers Act defines the term "investment adviser" broadly to include "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . ." As such, the definition of investment adviser could be construed to encompass virtually any management company or general partner/managing general partner entity in a private fund organization.

The SEC has recognised that, due to this broad definition of investment adviser, non-U.S. advisers may encounter interpretive issues when considering whether one general partner/investment adviser/management company in the fund structure can report to the SEC on behalf of all affiliated general partner entities (including "managing general partner" entities), investment advisers and/or management companies or whether each general partner/investment adviser/management company must report separately.

It is expected that the SEC will continue to evaluate certain of these issues where it has not issued guidance in the past and will publish interpretive guidance relating to such issues in the future. However, absent further guidance from the SEC, non-U.S. advisers may wish to follow common practices in the U.S. in analogous contexts that are based on historical no-action guidance that the SEC has issued under the old legislation.

Under such SEC no-action guidance, if investment advisers are operationally integrated by virtue of being controlled by a common set of owners and sharing resources and personnel (including advisory personnel), these investment advisers should aggregate their activities for the purposes of determining whether an exemption from the Advisers Act applies.

Where, following such determination, non-U.S. advisers are required to either register with the SEC or report to the SEC as an ERA, non-U.S. advisers may wish to again follow common U.S. practice whereby a single advisory entity may register or report, as appropriate, to the SEC under an "umbrella" Form ADV that incorporates required disclosures relating to the advisory entity itself as well as its operationally integrated affiliates. The SEC recently has reaffirmed its 2005 no-action position permitting "umbrella registrations" for special purpose vehicles set up to be general partners or managing members of private funds, and also expanded the scope of its position to encompass other groups of private fund investment advisers that are under common control and operate as a single advisory business under a single unified compliance program.[1]

However, despite the existence of common practices in the U.S., we would encourage non-U.S. advisers to raise any queries regarding SEC registration and reporting with their legal counsel to ensure that the adviser complies with all of its obligations under the Advisers Act and any filing and reporting contains all necessary information to minimize any risk of enforcement action against the manager being taken by the SEC.

Please contact your Proskauer relationship attorney if you would like to discuss how the Dodd-Frank Act will impact your existing and future business, whether any of the main exemptions are available to you, and/or how to prepare for the initial filing with the SEC.

[1] The terms of this updated no-action relief is discussed in more detail in our client alert, dated January 23,2012, SEC Issues No Action Letter Regarding Registration of Affiliates of Investment Advisers.

Related Professionals

- **Nigel van Zyl**
  Partner
- **Amanda H. Nussbaum**
  Partner
- **Scott S. Jones**
  Partner
- **Charles (Chip) Parsons**
  Partner
- **Jamiel E. Poindexter**
  Partner
- **Marc A. Persily**
  Partner
- **Ira G. Bogner**
  Managing Partner
- **Sarah K. Cherry**
  Partner
- **Bruce L. Lieb**
- **Arnold P. May**
  Partner
- **Mary B. Kuusisto**
  Partner
- **David W. Tegeler**
- **Howard J. Beber**
  Partner
- **Robin A. Painter**
- **Christopher M. Wells**

- **Stephen T. Mears**
  Partner