SEC ADOPTS FINAL DODD-FRANK ADVISERS ACT REQUIREMENTS BUT DELAYS IMPLEMENTATION UNTIL 2012

June 27, 2011

To Our Clients and Friends:

Last Wednesday, the U.S. Securities and Exchange Commission (the "SEC") adopted a series of rules and rule amendments to implement the changes under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") requiring the registration of private fund sponsors, hedge fund advisers and other previously exempt advisers under the Investment Advisers Act of 1940 (the "Advisers Act").[1] With certain important changes made in response to the over 115 comment letters submitted on the SEC's initial proposals, the final rules and amendments were adopted substantially as proposed in November 2010. Recognizing that the final rules were adopted only a month before the July 21, 2011 Dodd-Frank Act deadline, the SEC delayed the implementation of the final rules until 2012. The precise implementation timetable is discussed below.

As background, although the Dodd-Frank Act repealed the exemption from registration under Section 203(b)(3) of the Advisers Act[2] for investment advisers with fewer than 15 clients, on which private fund sponsors and other money managers currently rely, it created three new exemptions from Advisers Act registration:

- An exemption for advisers solely to private funds with less than $150 million in assets under management in the United States (the "Private Fund Adviser Exemption").
- An exemption for advisers solely to venture capital funds (the "VC Adviser Exemption").

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1 *See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less than $150 Million in Assets Under Management, and Foreign Private Advisers, SEC Rel. No. IA-3222 (June 22, 2011) and Rules Implementing Amendments to the Investment Advisers Act of 1940, SEC Rel. No. IA-3221 (June 22, 2011). We note that the SEC issued on the same date a release adopting final rules implementing the exemption from Advisers Act registration for "family offices." This memorandum does not address that release. All releases are available at http://sec.gov/rules/final.shtml*

2 *References to the Advisers Act hereinafter refer to the Advisers Act, as amended by the Dodd-Frank Act.*

- An exemption for certain advisers with (i) no place of business in the United States (ii) fewer than 15 (a) clients in the United States and (b) investors in the United States in private funds advised by the adviser, and (iii) less than $25 million in assets under management from such clients and investors (the "Foreign Private Adviser Exemption"). Only clients *in the United States* and investors *in the United States* need be included for purposes of this exemption.

The SEC also amended Form ADV (the Advisers Act registration form). Currently registered advisers must transition to the amended Form next year (as discussed below). In addition, advisers that will be relying on the VC Adviser Exemption or the Private Fund Adviser Exemption ("exempt reporting advisers") will be required to file a modified Part 1A of Form ADV (also discussed below). The amended Form ADV requires relatively extensive disclosures about investment advisers' business organizations and the private funds they manage. Information filed on Form ADV is available to the public. However, in response to serious concerns expressed about public disclosure of private fund data that could reveal sensitive or competitive information, or even be used to "reverse engineer" the identities of investors, the SEC dropped certain proposed disclosure items.

REGISTRATION TIMETABLE EXTENDED TO MARCH 2012

The SEC, by an exemptive rule, has deferred until March 30, 2012 the deadline for investment advisers currently relying on the "fewer than 15 clients" exemption to register under the Advisers Act. March 30, 2012 is now a key date for a number of purposes:

- Newly Registering Advisers. Any adviser that will be required to register under the Advisers Act for the first time must have its registration effective by **March 30, 2012**. Therefore, these advisers should plan to have implemented all necessary Advisers Act compliance policies and procedures and file Form ADV by **February 14, 2012** (allowing the SEC the 45 days required by the Advisers Act to declare the registration effective).

- Exempt Reporting Advisers. Exempt reporting advisers will be required to file Part 1A (Part 2 is not required) of Form ADV no later than **March 30, 2012**.

- Previously Registered Advisers. Any adviser registered with the SEC as of January 1, 2012 must file an amendment to its Form ADV on the amended Form no later than **March 30, 2012**. The main purpose of this filing is to allow the SEC to determine whether the adviser is entitled to remain registered with the SEC. An adviser with less than $100 million of assets under management (calculated as discussed below) will not be eligible for SEC registration if (i) the adviser's principal office and place of business is in a state that would require the investment adviser to register with that state, and (ii) the adviser would be subject to examination by that state.[3]

REGULATORY ASSETS UNDER MANAGEMENT

In most cases, an adviser's "assets under management" will determine whether the adviser has to register with the SEC or is eligible for an exemption from registration (for example, under the Private Fund Adviser Exemption or the Foreign Private Adviser Exemption). To that end, the SEC has included in Form ADV a mandatory method for calculating assets under management (termed "regulatory assets under management" or "Regulatory AUM") for these purposes. (These instructions will not apply to other situations where an adviser discloses its assets under management in describing its business.)

Under this method, an adviser's Regulatory AUM is the total value of those "securities portfolios" for which the adviser provides "continuous and regular supervisory or management services."

- Securities Portfolio. A "securities portfolio" is generally any account for which securities (including cash and cash equivalents) consist of at least 50 percent of the total value of the account. For example, an account for which 60 percent of the value consists of commodities would not be a securities portfolio. However, if an account is a "securities portfolio," then all assets in the account (including those that are non-securities) are included in the calculation of Regulatory AUM.

  In calculating its Regulatory AUM, an adviser must include securities portfolios for which it does not receive compensation, proprietary accounts, family accounts and accounts of non-U.S. clients. If the adviser only manages a portion of a securities portfolio, it need only include the value of the portion that it manages.

- Private Funds. An account that meets the definition of a "private fund" – that is, a pooled investment vehicle that would be an "investment company" but for either Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 (the "Investment Company Act") –

3 *The Dodd-Frank Act created a new category of "mid-sized advisers" and shifted primary responsibility for their regulatory oversight to the states. Mid-size advisers are defined as those that have between $25 million and $100 million of assets under management. The states will also be generally responsible for oversight of advisers with less than $25 million of assets under management.*

constitutes a securities portfolio. Thus, the value of all private fund assets must be included in the adviser's Regulatory AUM calculation. In addition, a private fund's assets must include the amount of any uncalled capital commitments.

Other types of pooled investment vehicles may not be securities portfolios. For example, a real estate fund relying on Section 3(c)(5)(C) of the Investment Company Act may not be a "securities portfolio" if more than 50 percent of its assets are made up of fee simple interests in real estate.

- Valuation Methodology. A securities portfolio's value is based on the current market value of the assets (or fair value if a market value is not available) as determined within 90 days prior to the date of filing Form ADV. The SEC declined to adopt commenter proposals of other methodologies for determining the value of assets, particularly in the case of private funds. Form ADV does not specify a method to be used to determine portfolio values, but the SEC states that in the case of a private fund, the adviser may rely on the procedure for calculating fair value specified in its fund's governing documents. An adviser that calculates fair value in accordance with GAAP or another basis of accounting for financial reporting purposes will be expected to use the same basis for purposes of determining its Regulatory AUM.

- Gross Value. An adviser's Regulatory AUM is the total (not net) value of all securities portfolios. This means that there is no deduction for outstanding indebtedness or accrued but unpaid liabilities.

An adviser will have "assets under management" if it provides "continuous and regular supervisory or management services" with regard to those assets. The SEC stated that an adviser meets this standard if it has ongoing responsibility to select or make securities recommendations with regard to a particular account. In response to questions raised by commenters, the SEC clarified that ministerial functions such as research or due diligence services are not themselves continuous and regular supervisory or management services.

THE THREE NEW EXEMPTIONS FROM SEC REGISTRATION

Private Fund Advisers

An investment adviser can advise an unlimited number of private funds, as long as the aggregate value of the assets under management "in the United States" is less than $150 million (discussed below). A private fund adviser that has its principal office and place of business in the United States (a "U.S.-based adviser") may not rely on the exemption if it has any client that is not a "qualifying private fund." The SEC has signaled that it will look at whether two or more affiliated but separately formed advisers with less than $150 million should be combined for regulatory purposes, depending on the facts and circumstances (discussed below).

An investment adviser that has its "principal office and place of business" outside the United States (a "non-U.S.-based adviser") can have an unlimited number of clients and assets under management in U.S. qualifying private funds, but, again, it can have no other types of U.S. clients. A non-U.S.-based adviser is not limited in the size or types of clients it has outside the United States.

A "qualifying private fund" is a private fund that is not a registered investment company and that has not elected to be treated as a business development company. An adviser may also treat as a qualifying private fund certain other types of funds that do not rely on Section 3(c)(1) or 3(c)(7) of the Investment Company Act (such as a real estate fund that relies on Section 3(c)(5) of the Investment Company Act), provided that the adviser treats the issuer as a private fund for all other purposes under the Advisers Act (*e.g.*, for purposes of calculating Regulatory AUM and for disclosure on Form ADV). The SEC also noted that a single investor private fund could be a private fund for purposes of the exemption (*e.g.*, if the fund seeks to raise capital from, or had, prior to redemptions, multiple investors, but has only a single, initial investor for a period of time) but expressed concerns that single-investor funds could be used as a means to avoid registration under the Advisers Act.

- Assets Under Management in the United States. The key condition of the Private Fund Adviser Exemption is the amount of assets under management *in the United States*. All of the private fund assets of a U.S.-based adviser are "assets under management in the United States," even if the adviser has offices outside the United States. The adviser's "principal office and place of business" is the location where the adviser controls, or has ultimate responsibility for, the management of private fund assets. In the case of a U.S.-based adviser, the SEC makes clear that its principal office and place of business is considered to be the place where *all* the adviser's assets are managed, even if some management of assets takes place elsewhere. Importantly, however, a non-U.S.-based adviser need only include the assets that it manages "at a place of business" in the United States in determining whether it has less than $150 million under management for purposes of this exemption. Assets managed at a place of business outside the United States do not count toward the $150 million.

- Place of Business in the United States. If a non-U.S-based adviser has a "place of business" in the United States, then all of the clients whose assets are managed *at that place of business* must be qualifying private funds and the assets managed from that place of business must be less than $150 million. A "place of business" is an office where the adviser regularly provides advisory services, solicits, meets with, or otherwise communicates with clients, and any other location that is held out to the general public as a location at which the investment adviser provides such services. (A place of business would not include an office where an adviser performs administrative services and back-office activities.)

  Whether an adviser has a place of business in the United States is a facts and circumstances determination. The SEC clarified, however, that for purposes of the exemption, the analysis is really based on whether or not the adviser has "assets under management" in the United States, which means that it is providing "continuous and regular supervisory or management services" for securities portfolios at a U.S. place of business. Providing research or conducting due diligence would not meet this test if a person or entity outside the United States makes and implements independent investment decisions. Even so, if the adviser has an office in the United States that conducts research or due diligence, such activities may still be investment advisory services causing the adviser to have a place of business in the United States – an important point for purposes of the Foreign Private Adviser Exemption (discussed below).

- Clients. A non-U.S.-based adviser may have clients that are not qualifying private funds as long as those clients are not U.S. persons. In a welcome clarification, the SEC stated that this determination only needs to be made when the person becomes a client; therefore, if a non-U.S. person becomes a U.S. person after he or she becomes a client, it will not affect the ability of the adviser to rely on the Private Fund Adviser Exemption. A U.S.-based adviser must consider all of its clients, wherever located, in making this determination.

For this purpose, the status of a client as a U.S. person would be determined generally in the same fashion as under Regulation S under the Securities Act of 1933 (the "Securities Act"). For example, a partnership or corporation would be a U.S. person if it is either (i) organized or incorporated under the laws of the United States or (ii) organized or incorporated under the laws of any foreign jurisdiction and formed by a U.S. person principally for the purpose of investing in securities not registered under the Securities Act (*e.g.*, interests in a private fund), unless it is organized or incorporated, and owned, by accredited investors that are not natural persons, estates or trusts.[4]

In a significant change from the proposal, an adviser only needs to make the determination whether it can rely on the Private Fund Adviser Exemption annually (*e.g.*, within 60 days after the end of its fiscal year) rather than quarterly. Thus, an adviser that could no longer rely on the exemption would have to register within 90 days after filing its annual Form ADV update reporting that its Regulatory AUM managed at a U.S. place of business exceeded $150 million, in effect 180 days after the end of the fiscal year. In order to rely on the exemption, a Part 1A of Form ADV must be filed annually, as discussed below.

Foreign Private Advisers

The Dodd-Frank Act replaces the current private adviser exemption in Section 203(b)(3) with the Foreign Private Adviser Exemption. The SEC adopted the rules to implement this exemption substantially as proposed, although the SEC, in response to comments, decided not to include "knowledgeable employees" as investors that need to be counted.

A Foreign Private Adviser (i) cannot have a place of business in the United States (as described above), (ii) cannot have more than 14 clients in the United States or investors in the United States in private funds the adviser manages and (iii) must have aggregate assets under management attributable to those U.S. clients or investors of less than $25 million. Whether a client or investor is "in the United States" depends on whether the client or investor is a "U.S. person" (as discussed above with regard to the Private Fund Adviser Exemption).

The final rule defines certain other terms and adopts rules with respect to client counting that are similar in many respects to the current method advisers use to count clients under Rule 203(b)(3)-2 (which has been rescinded). For example, a natural person, certain family members of such person and all accounts or trusts of which such natural person and family members are the beneficiaries may be counted as a single client and two or more legal organizations that have identical shareholders may be counted as a single client. Unlike the existing rule, clients who do not pay fees must be counted.

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4 *There is one difference from the approach under Regulation S: any discretionary account or similar account that is held for the benefit of a U.S. person by a non-U.S. dealer or other professional fiduciary would be deemed to be "in the United States" if the dealer or professional fiduciary is a related person of the investment adviser relying on the exemption.*

In order to rely on the Foreign Private Adviser Exemption, the adviser also needs to determine the number of U.S. persons who are "investors" in private funds managed by the investment adviser. Generally, the SEC defines an "investor" as any person that would be included in determining the number of beneficial owners of the outstanding securities of a private fund under Section 3(c)(1) of the Investment Company Act (a privately offered fund with fewer than 100 investors) or whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under Section 3(c)(7) of the Investment Company Act (a privately-offered fund with only qualified purchasers as investors). Foreign Private Advisers will have to "look through" certain private fund investors organized as pooled investment vehicles to determine the number of investors in the United States. Holders of short-term paper issued by a 3(c)(1) fund must be counted as investors for purposes of determining whether the adviser may rely on the exemption. However, as noted above, unlike the proposed rule, the rule does not require knowledgeable employees to be counted as investors or as clients.

These look-through provisions, coupled with the $25 million cap on assets under management attributable to U.S. clients or U.S. investors in private funds, suggest that this exemption will be of very limited utility to a non-U.S.-based adviser, particularly one that manages a private fund that has raised capital from U.S. persons.

Venture Capital Fund Advisers

Section 203(l) of the Advisers Act provides an exemption from registration for advisers who provide advice solely to "venture capital funds." In response to comments requesting greater flexibility, the SEC made some important modifications to the venture capital fund definition, including a new 20% basket for non-qualifying investments (the "non-qualifying basket"). Unfortunately, and as feared, the SEC declined to permit non-U.S.-based advisers wishing to rely on the VC Adviser Exemption to have any clients, even outside the United States, that would not qualify as venture capital funds if they were offered in the United States. As a result, a non-U.S.-based adviser with a multi-strategy platform will not be able to rely on the VC Adviser Exemption.

In summary, a venture capital fund is a private fund that (i) invests capital directly in portfolio companies for the purpose of funding the expansion and development of the companies' business rather than buying out existing security holders; (ii) does not use a significant amount of leverage; (iii) does not issue redeemable securities; and (iv) holds itself out to the public as pursuing a venture capital strategy. The components of the definition are quite detailed but the following points are notable:

- Redemption Rights. The fund may only issue securities the terms of which do not provide a holder with any right, except in extraordinary circumstances, to withdraw, redeem or require the repurchase of such securities. The SEC confirmed that the term "extraordinary circumstances" is intended to convey events that may be foreseeable but that are typically beyond the control of the adviser and fund investor (*e.g.*, mergers and tax and regulatory changes). The SEC also stated that an adviser or its related persons could not, while relying on the venture capital exemption, create *de facto* periodic transfer or redemption rights by, for example, regularly identifying potential investors on behalf of fund investors seeking to transfer or redeem fund interests.

- Non-Qualifying Basket. The non-qualifying basket permits a fund to invest up to 20% of its aggregate capital contributions and uncalled capital commitments in the assets that are not equity securities of qualifying portfolio companies (discussed below). This 20% threshold is tested whenever the fund makes an investment in a non-qualifying investment, although after the acquisition, the fund need not dispose of the non-qualifying investment if it increases in value. Of course, the higher value may determine whether other non-qualifying investments may subsequently be acquired. The rule also permits the adviser to determine the fund's compliance with the 20% non-qualifying basket based on either the investment's historical cost or fair value, provided that the method is applied consistently to all such investments.

- Qualifying Portfolio Companies. The balance of the fund's investment must consist of equity securities issued by (and acquired directly from) "qualifying portfolio companies" and cash equivalents, including U.S. Treasuries with a remaining maturity of 60 days or less and shares of registered money market funds. A "qualifying portfolio company" is a company that: (i) is not subject to reporting requirements under the Securities Exchange Act of 1934 (the "Exchange Act") or listed or traded on any exchange, including a foreign exchange; (ii) does not borrow or issue debt obligations in connection with the fund's investment in such company and distribute to the fund the proceeds of such borrowing or issuance in exchange for the fund's investment; and (iii) is not an investment company, private fund or commodity pool. Whether a company is a qualifying portfolio company will be determined at the time of investment (*e.g.*, a non-reporting company could become a reporting company after investment). In a change from the proposal, a venture capital fund may hold equity securities of a company subject to reporting under the Exchange Act, if such equity securities were issued to the fund, for example, in exchange for directly-acquired equities of a qualifying portfolio company that became a majority-owned subsidiary of the reporting company.

- Portfolio Company Leverage. As noted above, a qualifying portfolio company may not issue debt in connection with the fund's investment *and* distribute the proceeds of such borrowing *in exchange for* the fund's investments. Borrowings for normal portfolio company operating expenses are permitted. This provision, which is somewhat more flexible than the proposal, is designed to distinguish advisers to venture capital funds from those who advise other types of private funds.

- Fund Leverage. The venture capital fund may not incur leverage in excess of 15 percent of the private fund's aggregate capital contributions and uncalled committed capital. With one important exception, any such borrowing, indebtedness, guarantee or leverage must be for a non-renewable term of no longer than 120 calendar days. In a change from the proposal, a fund may guarantee a qualifying portfolio company's obligations up to the amount of the value of the private fund's investment in the qualifying portfolio company without regard to the 120 calendar day limit.

- Managerial Assistance. In a helpful change from the proposal, there is no requirement that the fund or its adviser offer to provide managerial assistance to the qualifying portfolio company.

- Holding Out. The SEC made clear that the "holding out" requirement goes to the investment strategy conveyed to potential investors – not to the name of a particular fund; however, the fund must affirmatively represent itself as pursuing a venture capital strategy to its investors.

The rule provides for limited grandfathering for an adviser to private funds that: (i) represented to investors and potential investors at the time their funds offered their securities that it pursues a venture capital strategy; (ii) sold securities to one or more investors prior to December 31, 2010; and (iii) does not sell any securities to, including accepting any capital commitments from, any person after July 21, 2011 (even if such commitments have not been called by that date). Consistent with the holding out condition of the rule, the holding out criterion in the grandfathering provision has also been changed from the proposal to refer to the strategy pursued by the private fund, as opposed to the name of the fund.

SUBADVISERS AND AFFILIATES

In response to several comment letters (including one submitted by this firm) seeking guidance on how the new rules will apply to sub-advisers and affiliates, the SEC included several paragraphs of welcome interpretation.

First, the SEC confirmed that subadvisers are entitled to rely on any of the new exemptions from registration. For example, although in some instances both a private fund (*e.g.*, a venture capital fund) and the fund's adviser may be viewed as "clients" of the subadviser, a subadviser would be eligible to rely on the Private Fund Adviser Exemption or the VC Adviser Exemption if the services relate solely to the qualified kinds of funds and other requirements are met.

Second, consistent with precedent, the SEC indicated that it would treat as a single adviser "two or more affiliates" that are operationally integrated even if separately organized. However, in an important clarification, the SEC clearly stated that the *Unibanco* line of no-action letters will not be withdrawn. These letters, as relevant for the new exemptions, provide that the SEC staff will not recommend enforcement action to apply the substantive provisions of the Advisers Act to a non-U.S.-based adviser's relationship with its non-U.S. clients. Moreover, if a non-U.S.-based advisory affiliate of a registered U.S.-based adviser shares personnel with, or provides certain services through, the registered adviser affiliate, the non-U.S.-based advisory affiliate need not also register with the SEC, as long as it satisfies certain conditions, including (i) the two affiliates must be separately organized, (ii) the U.S. affiliate must have personnel capable of providing investment advice, (iii) the non-U.S. personnel involved in U.S. advisory activities must be treated as "associated persons" of the U.S.-based adviser, and (iv) the non-U.S.-based adviser must keep certain SEC-required books and records. The SEC also indicated that its staff stands ready to provide guidance on the subject in the form of no-action letters with respect to its applicability to the Private Fund Adviser Exemption and the Foreign Private Adviser Exemption.

DISCLOSURE REQUIREMENTS; SOME REGULATORY BAGGAGE

The Private Fund Adviser Exemption and the VC Adviser Exemption come with some regulatory baggage. An exempt reporting adviser that avails itself of either of these two exemptions will be subject to reporting requirements. And, while these advisers will not be subject to routine SEC examinations, the SEC has the authority to examine such advisers if it determines that it has cause to do so. It should be noted that the SEC rules only provide exemption from SEC registration. Depending on the circumstances, an exempt reporting adviser may be required to register with a state.

An exempt reporting adviser is required to file Part 1A of Form ADV with the SEC, and to update its filing on an annual basis or more frequently as needed. The reports will be publicly available on the Investment Adviser Public Disclosure (IAPD) website. An exempt reporting adviser is not required to provide all of the information required by Part 1A; rather, it is only required to provide certain identifying information concerning the exempt reporting adviser and the private funds that it manages. (Exempt reporting advisers that are required to register with a state will be required to complete the entire Form.)

As noted above, in response to serious concerns expressed about public disclosure of private fund data that could reveal sensitive or competitive information, the SEC dropped certain proposed disclosure items. Specifically, the SEC omitted from the final Part 1A of Form ADV proposed requirements requiring disclosure of a private fund's net assets, its assets and liabilities by class and categorization, and the specified percentage owned by particular types of beneficial owners.

The required information in Form ADV does include basic information concerning the adviser including:

- basic identifying information (including Regulatory AUM);
- form of organization;
- basis for the exemption on which the adviser relies;
- information concerning the adviser's other business activities;
- information concerning the private funds that it manages (described in more detail below) and its affiliates that are involved in the financial services industry;
- information concerning the adviser's control persons; and
- disciplinary history of the adviser and its employees.

Exempt reporting advisers are not required to file Part 2A of Form ADV, which provides more extensive information concerning an adviser's business, its advisory personnel and the conflicts of interest that the adviser may face.

Both exempt reporting advisers and registered investment advisers are required to provide information concerning the private funds that they manage. As noted above, this information is not as burdensome as was proposed. Information required to be disclosed includes the following:

- basic identifying information of the fund (which may be provided on an anonymous, code-based basis);
- the private funds structure (master-feeder, fund of funds, etc.);
- the types of the private funds (hedge, private equity, real estate, etc.);
- gross assets;
- minimum investment commitment;
- certain information concerning the fund's beneficial owners (*i.e.*, number of investors, approximate percentage of fund owned by the adviser and its affiliates, funds of funds and non-U.S. persons);
- whether the fund relies on Regulation D in connection with its offering of securities;
- whether the fund's financial statements are audited; and
- information concerning the private funds' service providers (*i.e.*, its auditors, prime brokers, custodians, administrators and marketers).

The SEC defines the terms hedge fund and private equity fund for purposes of these reporting requirements. The term "private equity fund" is defined mainly by reference to what it is not. A "private equity fund" means any private fund that is not a hedge fund, liquidity fund, real estate fund, securitized asset fund, or venture capital fund and does not provide investors with redemption rights in the ordinary course. The breadth of the definition of "hedge fund" may, however, pick up certain private equity funds.

"Hedge fund" means any private fund that, among other things, may borrow an amount in excess of one-half of its net asset value (including any committed capital) or that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration). Thus, a private equity fund that engages in *de minimis* short selling would be a hedge fund. The organizational documents of certain private equity funds may not explicitly prohibit short selling or borrowing in excess of one-half of its net asset value; however, the SEC stated that it would not interpret such a fund as satisfying the "may" borrow or short sell prongs of the "hedge fund" definition, if the fund (i) does not engage in those activities and (ii) "a reasonable investor would understand, based on the fund's offering documents, that the fund will not engage in these practices." While this may not be significant for purposes of responding to Form ADV, the reporting burdens imposed by proposed Form PF (which is still under consideration) on hedge funds are likely to be more significant than those imposed on private equity funds. Filings on Form PF will not be available to the public.[5]

PAY-TO-PLAY

The SEC approved an amendment to Rule 206(4)-5 under the Advisers Act (the "Pay-to-Play Rule") to allow advisers to use a registered municipal adviser to solicit state and local governments. As is the case under the current rule, an adviser may also retain a registered broker-dealer or registered investment adviser for such solicitations. Broker-dealers and municipal advisers must be subject to pay-to-play rules that are equivalent to the SEC's Pay-to-Play Rule, which applies to investment advisers. Since the relevant self-regulatory organizations for broker-dealers and municipal securities dealers have not yet adopted such rules, the SEC delayed the compliance deadline with respect to this provision of the Pay-to-Play Rule from September 13, 2011 to **June 13, 2012**.

STILL UNANSWERED QUESTIONS

Certain interpretive and issues and other questions raised by commenters were not addressed by the SEC. For example, the SEC did not address whether the general partner of a private fund must separately register as an investment adviser. We believe the SEC staff is continuing to study certain issues and we anticipate that it may provide guidance on such questions through subsequent no-action relief and interpretive releases.

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5 *See our client memo, Registered Advisers to Private Funds Hit With New Risk Reporting on Form PF, available at* *http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=82a0053c-137c-4efb-a25a-e6b00c54965e*

Please feel free to contact us with any questions.

Washington, D.C.

Kenneth J. Berman
+1 202 383 8050
kjberman@debevoise.com

Gregory T. Larkin
+1 202 383 8064
gtlarkin@debevoise.com

New York, N.Y.

Michael P. Harrell
+1 212 909 6349
mpharrell@debevoise.com

Jaime E. Doninger
+1 212 909 6046
jedoninger@debevoise.com

Frankfurt

Marcia L. MacHarg
+49 69 2097 5120
mlmacharg@debevoise.com