

## The Impact of the Dodd-Frank Wall Street Reform and Consumer Protection Act on the Registration Obligations of Private Fund Advisers

President Barack Obama signed into law on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (S. 3217) ("Act"), a comprehensive suite of regulatory reforms that significantly changes the regulatory framework and level of supervision of the financial services industry. "Title IV – Regulation of Advisers to Hedge Funds and Others" of the Act, cited therein as the "Private Fund Investment Advisers Registration Act of 2010" ("Advisers Registration Act"): (1) sets forth requirements and limitations with respect to federal and state registration of investment advisers; (2) introduces additional provisions relating to advisers to hedge funds, private equity funds and venture capital funds; (3) adjusts the accredited investor standard and the qualified client standard; and (4) includes requirements for further studies and reports relating to the private fund industry. The provisions of the Advisers Registration Act generally become effective on July 21, 2011, with the expectation that investment advisers will elect to register and comply with the applicable provisions of the Act and the Investment Advisers Act of 1940, as amended ("Advisers Act"), prior to the expiration of the one-year transition period.

Many investment advisers that manage private funds ("private fund advisers")<sup>1</sup> and presently

are not registered as investment advisers, will be required under the Advisers Registration Act to: (1) register with the Securities and Exchange Commission ("SEC") within the one-year transition period noted above; and (2) comply with certain provisions of, and rules under, the Advisers Act that are applicable only to SEC-registered investment advisers. Chief among these requirements are provisions and rules relating to: (1) performance fee arrangements; (2) the marketing of advisory products and services; (3) the custody of client assets; (4) disclosures to the SEC, clients and investors on Form ADV; and (5) the establishment and maintenance of a compliance program reasonably designed to prevent violations of the Advisers Act, including appointment of a chief compliance officer and adoption of compliance policies and procedures.<sup>2</sup> As such, advisers who must register

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one or more other exceptions (such as the Section 3(c)(5)(C) exception for companies primarily engaged in "purchasing or otherwise acquiring mortgages and other liens on and interests in real estate"). Such companies would not be "private funds" for purposes of the Advisers Registration Act. In addition, these companies would be "clients" of an adviser and, to the extent securities-related advice is included, must be taken into account when determining whether (and where) an adviser has to register.

<sup>1</sup> A "private fund" is defined broadly under the Advisers Registration Act as any issuer that would be an "investment company" under the Investment Company Act of 1940, as amended (the "1940 Act"), but for the exceptions set forth in Section 3(c)(1) or Section 3(c)(7) of the 1940 Act. In some cases, a pooled vehicle that has relied on these exceptions from the definition of an investment company may be able to rely on

<sup>2</sup> Private fund advisers should be aware that new or amended rules have recently been adopted relating to: (1) political contributions and (2) custody of client funds and securities. In addition, on July 21, 2010, the SEC adopted new requirements with respect to: (1) the content of Form ADV and (2) the manner in which advisers are required to provide certain Form ADV disclosures to clients and investors.

following the enactment of the Advisers Registration Act will need to appoint a chief compliance officer and conduct a comprehensive review of their policies and procedures to ensure compliance with these and other requirements of the Advisers Act prior to registration.

## Modification to Registration Provisions

### Changes to Exemptions from Registration Available to Private Fund Advisers

The Advisers Registration Act eliminates or significantly limits the availability of several previously-existing exemptions from registration for private fund advisers. In particular, the Advisers Registration Act: (1) eliminates the “private adviser” exemption currently set forth in Section 203(b)(3) of the Advisers Act, which exempts investment advisers with fewer than 15 clients who meet certain other requirements from registration with the SEC; (2) includes a new limited exemption for certain “foreign private advisers,” as described below; (3) prevents a private fund adviser from relying on the “intrastate adviser” exemption currently set forth in Section 203(b)(1) of the Advisers Act; and (4) requires that a private fund adviser relying on the commodity trading advisor (“CTA”) exemption from registration, currently provided in Section 203(b)(6) of the Advisers Act for an adviser that is registered with the Commodity Futures Trading Commission (“CFTC”) as a CTA, to register with the SEC as an investment adviser if, at any point after the enactment of the Advisers Registration Act, the business of the CTA “become[s] predominantly the provision of securities-related advice.”<sup>3</sup>

### Modifications to SEC vs. State Registration Thresholds

The Advisers Act and rules thereunder currently establish thresholds for registration of investment advisers, which do not advise registered investment companies, with either the SEC or the various states, when an adviser has its principal place of business in a U.S. jurisdiction that regulates investment advisers. Although the Advisers

Registration Act retains the current provision requiring advisers to have assets under management (“AUM”) in excess of \$25 million in order to be eligible to register as an investment adviser with the SEC<sup>4</sup>, the Advisers Registration Act effectively increases the AUM threshold to \$100 million, if the adviser: (1) is required to be registered in its home state (*i.e.*, the state in which it maintains its principal office and place of business) and (2) is subject to examination by that state. This provision will have the result of requiring many “mid-sized” U.S. investment advisers to register with one or more states rather than with the SEC. However, to avoid subjecting an adviser to registration in numerous states, the Advisers Registration Act permits an adviser with between \$25 million and \$100 million AUM to register with the SEC where such adviser would otherwise be required to register with 15 or more states due to the operation of this provision.

Additionally, the Advisers Registration Act provides an exemption from registration under the Advisers Act to any investment adviser who acts solely as an investment adviser to private funds, provided such adviser’s AUM in the United States are less than \$150 million (“Private Fund Adviser Exemption”). However, such adviser will be required to maintain such records and provide the SEC with such annual or other reports as the SEC determines to be necessary and appropriate in the public interest or for the protection of investors. Thus, private fund advisers having less than \$150 million in aggregate AUM in the United States, at a minimum, will be subject to record keeping and annual reporting requirements, as shall be determined by the SEC pursuant to subsequent rule-making.

In summary, the application of some of these thresholds will: (1) enable an investment adviser (*e.g.*, a private fund adviser) that is regulated by its home state, but is not required to register with its home state, to voluntarily register with the SEC once it has \$25 million in AUM and (2) obligate a private fund adviser whose only clients are private funds to register with the SEC once the private fund(s) it advises have aggregate AUM of \$150 million or more.

<sup>3</sup> Currently, the CTA exemption is available only if, among other things, the CTA’s business “does not consist primarily of acting as an investment adviser, as defined in Section 202(a)(11)” of the Advisers Act. It is unclear whether the “predominantly” standard added by the Advisers Registration Act is intended to differ from the “primarily” standard or if the “securities-related advice” standard is intended to differ from the “acting as an investment adviser” standard.

<sup>4</sup> Advisers to investment companies registered with the SEC under Section 8 of the 1940 Act, advisers to business development companies registered with the SEC under Section 54 of the 1940 Act (“BDCs”) or advisers that are not subject to regulation by the state in which they maintain their principal office and place of business may register with the SEC without reference to the \$25 million AUM threshold.

## Filing, Recordkeeping, and Examination Requirements

The Advisers Registration Act authorizes the SEC to require any registered private fund adviser to maintain and file with the SEC certain information relating to each private fund it advises that is relevant to the protection of investors and assessment of systemic risk. Such information includes:

- AUM;
- information on the use of leverage (including off-balance sheet leverage);
- counterparty credit risk exposure;
- trading and investment positions;
- valuation policies and practices;
- types of assets held;
- side arrangements or side letters (under which certain investors in private funds obtain more favorable terms than other investors);
- trading practices; and
- such other information as the SEC in consultation with the Financial Stability Oversight Council (“Council”)<sup>5</sup> may determine, which may vary based on the type of or size of the private fund advised by the investment adviser.

The Advisers Registration Act also requires the SEC to issue rules requiring private fund advisers to establish, maintain and file reports with the SEC “containing such information as the [SEC] deems necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.”<sup>6</sup> Such information may include, but will not necessarily be limited to, the categories set forth above.

<sup>5</sup> The Council is established by the Act to identify potential risks to U.S. financial stability and manage such risks through measures such as increased monitoring and enhanced prudential standards applicable to systemically important financial services companies. The Act provides that the Council will be chaired by the U.S. Secretary of the Treasury and will include representatives from key U.S. regulators.

<sup>6</sup> See Section 404(2) of the Act (to be codified as Section 204(b)(5) of the Advisers Act). Additionally, Section 406 of the Act (to be codified as Section 211(e) of the Advisers Act) requires the SEC and the CFTC, following consultation with the Council, to jointly promulgate rules to establish the form and content of the reports required to be filed with the SEC (under Section 204(b) of the Advisers Act) and the CFTC with respect to private fund advisers that are registered under both the Advisers Act and the Commodity Exchange Act.

Additionally, the Advisers Registration Act requires the SEC to periodically examine all records maintained by registered investment advisers to private funds, in accordance with a schedule established by the SEC. The Advisers Registration Act also requires the SEC to perform additional, special or other examinations of private fund advisers as the SEC may prescribe as necessary or appropriate in the public interest and for the protection of investors or for the assessment of systemic risk. Registered private fund advisers must make available to the SEC any copies or extracts from a private fund’s records as may be prepared without undue effort, expense, or delay, as the SEC may reasonably request. While this requirement may not pose much difficulty for a primary adviser to a domestic private fund, advisers to a non-U.S. private fund or private fund advisers who serve as a sub-adviser or provide advice only as to a portion of a private fund’s assets may have more difficulty accessing the private fund’s records. The Advisers Registration Act expresses the view that the records of a private fund advised by a registered investment adviser are the records of the adviser, including for the purposes of Rule 204-2 under the Advisers Act. For a non-U.S. fund, such a provision may be inconsistent with the laws of the jurisdiction in which the fund has been established.

Under the Advisers Registration Act, the SEC is required to share with the Council such records and information filed with or provided to the SEC as the Council may consider necessary and appropriate for purposes of assessing the systemic risk posed by a private fund. This information must also be shared, in certain circumstances, with Congress (subject to an agreement of confidentiality) or any federal department, agency, or self-regulatory organization, or in connection with an order of a court of the United States in an action brought by the United States or the SEC. Such information, to the extent shared with the SEC, the Council, and any other department, agency, or self-regulatory organization, shall not be considered public information (and generally will not be subject to FOIA requests).<sup>7</sup> In addition, certain “proprietary information” of advisers to private funds, as ascertained by the SEC from any report required to be filed with the SEC, will be subject to the same limitations on public disclosure as any facts determined during an examination, as provided in Section 210(b) of the Advisers Act.

<sup>7</sup> Notwithstanding the Adviser Registration Act’s promises of confidentiality, it may be advisable for a private fund adviser to request FOIA confidential treatment of any records provided to the SEC, to the extent consistent with FOIA.

“Proprietary Information” (as specified in the Advisers Registration Act) includes sensitive, non-public information regarding:

- investment or trading strategies;
- analytical or research methodologies;
- trading data;
- computer hardware or software containing intellectual property; and
- any additional information that the SEC determines to be proprietary.

### Exemption for Venture Capital Fund Advisers

An investment adviser whose clients consist solely of one or more “venture capital funds” (as such term will be defined in final rules adopted by the SEC within one year of enactment of the Act) (each, a “venture capital fund adviser”) will be exempt from registration as an investment adviser with the SEC. There likely will be some controversy as to what the final meaning of the term “venture capital funds” will be.

However, venture capital fund advisers will be required to maintain and provide the SEC with such annual or other reports as the SEC deems necessary or appropriate in the public interest or for the protection of investors. Additionally, because a venture capital fund adviser is exempted from registration as (rather than excepted from the definition of) an investment adviser, venture capital fund advisers will continue to be subject to certain provisions of, and rules under, the Advisers Act. Such provisions include, most importantly, the general anti-fraud provisions under Section 206 of the Advisers Act as well as Rule 206(4)-8 thereunder, which extends certain anti-fraud protections to investors in investment companies and private funds managed by an investment adviser, whether or not the adviser is required to be registered with the SEC.

### Foreign Private Adviser Exemption

The Advisers Registration Act includes a new exemption from registration for any investment adviser that is a “foreign private adviser.” The Advisers Registration Act defines a “foreign private adviser” as any investment adviser that:

- has no place of business in the United States;

- has, in total, fewer than 15 clients and investors in the United States in private funds advised by the investment adviser;
- has aggregate AUM attributable to: (1) clients in the United States (including U.S.-domiciled private funds) and (2) investors in the United States in non-U.S. private funds of less than \$25 million (which dollar threshold may be increased by the SEC); and
- neither (1) holds itself out generally to the public in the United States as an investment adviser nor (2) advises registered investment companies or registered BDCs.

Presumably, a non-U.S. adviser that becomes ineligible to rely on the foreign private adviser exemption could rely on the Private Fund Adviser Exemption if its only clients are private funds. In this respect, we note that the \$150 million AUM threshold is qualified by the requirement that such AUM be in the United States. Although the Adviser Registration Act is silent on this point, it is reasonable to expect that AUM calculations for purposes of the \$150 million threshold would be calculated in the same manner as those for the foreign private adviser exemption set forth above.

### Exception of Family Offices from the Definition of an “Investment Adviser”

The Advisers Registration Act excludes “family offices” from the definition of “investment adviser” under the Advisers Act (which generally places family offices outside of the scope of the Advisers Act). The Advisers Registration Act requires that the SEC define “family offices” for this purpose in a manner that: (1) is consistent with the previous exemptive orders granted to family offices; and (2) recognizes the range of organizational, management, and employment structures and arrangements employed by family offices. The Advisers Registration Act also contains a “grandfathering” provision that will provide an exemption to certain advisers to family offices. This “grandfather” provision would be available to advisers that were not registered or required to be registered with the SEC on January 1, 2010, to the extent they were providing investment advice prior to January 1, 2010 to: (1) certain natural persons; (2) any company owned exclusively and controlled by members of the family of the family office or as the SEC may prescribe by rule; and (3) any investment adviser registered under the Advisers Act that provides investment advice to the family office and who identifies investment opportunities to the family office, and invests in such transactions on substantially the same terms as the family office invests,

but does not invest in other funds advised by the family office, and whose assets as to which the family office directly or indirectly provides investment advice represent, in the aggregate, not more than five percent of the value of the total assets as to which the family office provides investment advice.

Although family offices will generally be excluded from the definition of an “investment adviser” such that they generally will not be subject to the Advisers Act, certain of the anti-fraud provisions of the Advisers Act will apply to family offices falling under this “grandfather” clause. Specifically, such family offices will be subject to the general anti-fraud provisions of Section 206 as well as to Section 206(4), which generally provides the SEC with rulemaking authority with respect to potentially fraudulent activities, but not to Section 206(3) which imposes limitations on principal and agency cross transactions.

### **Small Business Investment Company Advisers**

The Advisers Registration Act exempts from registration any adviser, other than an investment adviser that is a BDC (*i.e.*, an internally managed BDC), whose clients consist solely of: (1) small business investment companies (“SBICs”) that are licensees under the Small Business Investment Act of 1958; (2) entities that have received notice from the Small Business Administration (“SBA”) to proceed to qualify for a license from the SBA and which notice or license has not been revoked or (3) entities that are affiliated with one or more licensed SBICs and have pending an application for an SBIC license (“SBIC Exemption”).<sup>8</sup>

### **Other Provisions**

#### **Disclosure of Client Information to the SEC**

The Advisers Registration Act expands the authority of the SEC to require investment advisers to disclose to the SEC the identity, investments or affairs of clients. Whereas before this amendment, the SEC was permitted

<sup>8</sup> It is not uncommon for internally managed BDCs to establish and advise one or more SBIC subsidiaries. In these cases, the BDC could not rely on the SBIC Exemption. However, where a BDC forms a separate subsidiary to manage a SBIC, without the SEC’s establishment of the SBIC Exemption, that subsidiary might be required to register since it would no longer be able to rely on the “private adviser exemption” discussed above. The SBIC Exemption, thus, preserves the unregistered status of such advisers.

to require such disclosure only “insofar as such disclosure may be necessary or appropriate in a particular proceeding or investigation having as its object the enforcement of a provision or provisions of” the Advisers Act, the SEC will now be able to mandate such disclosure “for purposes of assessment of potential systemic risk.”

#### **Definition of Client**

The Advisers Registration Act makes clear that the SEC may not define the term “client,” for purposes of paragraphs (1) and (2) of Section 206 of the Advisers Act, to include an investor in a private fund managed by such investment adviser, if such private fund had entered into an advisory contract with such adviser.<sup>9</sup>

#### **Adjustment of the Accredited Investor Standard for Natural Persons**

The Advisers Registration Act requires the SEC to periodically review the definition of “accredited investor,” as set forth in Rule 501(a) of Regulation D under the Securities Act of 1933, as it applies to natural persons, to determine if changes or modifications are necessary in the public interest, and in light of the economy. The Advisers Registration Act mandates that, for the four years following its enactment, the net worth requirement under the definition of “accredited investor” for a natural person (or joint net worth with the spouse of that person) will be \$1,000,000, excluding the value of the primary residence of such natural person.<sup>10</sup> During this initial period, the SEC has the option to review other aspects of the accredited investor standard and may make other changes to the accredited investor standard.

Upon the expiration of this initial period, the SEC must conduct a similar review at least once every four years and may make similar adjustments; provided that no such adjustment may reduce the net worth standard to an amount at or below the \$1,000,000 threshold (exclusive of the value of the investor’s primary residence). The Advisers Registration Act does not, however, explicitly require that any such adjustments be tied to inflation.

<sup>9</sup> As the provision would not prevent the SEC from defining investors in private funds as clients for purposes of other provisions of, or rules under, the Advisers Act, and since Rule 206(4)-8 under the Advisers Act effectively extends the anti-fraud provisions of Section 206(1) and (2) to investors in private funds, it is not apparent whether this provision will have any practical effect.

<sup>10</sup> Currently, the value of an investor’s principal residence is included in determining that investor’s net worth.

Although the Advisers Registration Act does not require current natural person investors in private funds to satisfy this new net worth requirement in order to retain their interest in such fund, if any such investors seek to make an additional investment in the fund, they will need to either meet this new net worth standard or satisfy the income required of accredited investors (*i.e.*, currently individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years, along with a reasonable expectation of reaching the same income level in the current year).

### **Inflationary Adjustment of Qualified Client Standard**

The Advisers Registration Act also requires periodic adjustments to the dollar thresholds applicable to the exception from the Advisers Act prohibition on certain performance fees provided by Rule 205-3 under the Advisers Act ("Qualified Client Exception"). Currently, the Qualified Client Exception allows an adviser to charge a performance fee to, among others, any natural person who: (1) has a net worth in excess of \$1.5 million (individually, or jointly with a spouse) or (2) has AUM with the adviser, immediately after entering into a contract that includes a performance based fee, of at least \$750,000.

In contrast to the provision, described above, with respect to the accredited investor net worth standard, adjustments to the dollar thresholds associated with the Qualified Client Exception would: (1) occur on a five (rather than four) year cycle; (2) be tied to the effects of inflation; (3) apply to entities as well as natural persons; and (4) not be required to exclude the value of a client's primary residence. Adjustments would be rounded up to the nearest multiple of \$100,000. The Advisers Registration Act does not amend Section 2(a)(51) of the 1940 Act, which sets forth sophistication thresholds based on the value of a person's "investments," applicable to investors in companies that rely on the exception provided by Section 3(c)(7) of the 1940 Act, nor does it require the SEC to review its rules under Section 2(a)(51) or Section 3(c) of the 1940 Act, although such requirements would be the subject of a study by the Comptroller General of the United States (as discussed below).

### **Governmental Studies**

The Advisers Registration Act requires the Comptroller General of the United States to study: (1) the appropriate criteria for determining the financial thresholds or other criteria needed to qualify as accredited investors and for

eligibility to invest in private funds; (2) the feasibility of creating a self-regulatory organization governing private funds; and (3) the compliance costs associated with Rules 204-2 and 206(4)-2 under the Advisers Act regarding custody of funds or securities of clients by investment advisers, and the additional cost if the "operational independence" provisions<sup>11</sup> of subsection (b)(6) of Rule 206(4)-2 were eliminated.

In addition, the Advisers Registration Act requires the SEC's Division of Risk, Strategy, and Financial Innovation to study: (1) the state of short selling on national securities exchanges and over-the-counter markets and the impact of recent rule changes and the incidences of failure to deliver shares sold short or shares delivered on the fourth day following the short sale transaction; (2) the feasibility benefits and costs of requiring real time reporting of short sale positions in publicly listed securities to the public, or only to the SEC and FINRA; and (3) the feasibility of conducting a pilot program in which public companies will agree to have all trades of their shares marked "short," "market maker short," "buy," "buy-to-cover," or "long," and reported in real time through the consolidated tape. The results of these studies will likely be of interest to private fund advisers as they may result in new statutes, rules or regulations that could have a significant impact on how advisers to the private funds conduct their business.

### **Conclusion**

The Advisers Registration Act reflects the government's reaction to the recent financial crisis and the real and perceived roles in such financial crisis played by financial institutions, including private fund advisers. As a result of the Advisers Registration Act, many private fund advisers that are not currently registered with the SEC will be required to register and they, along with private fund advisers that are currently registered with the SEC, will be subject to greatly increased regulation and SEC scrutiny. Thus, the Advisers Registration Act will greatly increase the costs of doing business for private fund advisers, including the development, refinement and implementation of compliance programs reasonably

<sup>11</sup> For purposes of Rule 206(4)-2, the operational independence provisions exempt an adviser from the obligation to obtain an independent verification of client funds and securities, if the adviser is deemed to have custody of such funds and securities because one of its affiliates (which affiliate is operationally independent from the adviser) has the ability to obtain possession of such funds and securities in connection with the advisory services provided by the adviser.

designed to ensure compliance with the Advisers Act and SEC rules thereunder. In addition, given the recent attention to private funds by regulators and other governmental officials, it is also likely that private funds and private fund advisers will be subject to further and increasingly significant regulatory scrutiny.

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