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The SEC Publishes Final Rule Requiring Hedge Fund And Certain Other Private Fund Advisers To Register

The U.S. Securities and Exchange Commission ("SEC") has issued its long awaited release[1] *adopting a new rule and rule amendments under the Investment Advisers Act of 1940 requiring hedge fund and certain other private fund advisers to register as investment advisers. The final rule requires hedge fund advisers with more than 14 investors and $30 million or more under management to register with the SEC; smaller advisers would potentially be subject to state registration requirements.*

The final rule excludes from the federal registration requirements advisers to private equity and venture capital funds, by excluding funds that do not provide redemption rights within two years following an investment.

In addition, advisers to non-U.S. mutual funds are generally excluded, regardless of the jurisdiction in which the adviser is located. Special rules apply to non-U.S. advisers, which would be permitted to avoid many of the requirements of SEC registration if their only U.S. clients are investors in offshore funds.

The final rule also includes provisions designed to facilitate the transition to registration by extending the deadline under the custody rule for registered advisers electing to provide a fund of funds' audited financial statements to investors. Finally, the final rule includes several changes to Form ADV.

Summary of the Rule

The new rule and rule amendments ("Final Rule") require an investment adviser whose principal office and place of business is in the United States to count every investor in a "private fund" as a "client" for the purpose of determining whether an adviser is exempt from registration under the "private adviser exemption." That exemption applies to investment advisers with fewer than fifteen clients in a twelve-month period. The Final Rule requires an investment adviser whose principal office and place of business is located outside the United States to count only U.S. investors as clients for the purpose of determining eligibility under the exemption. In an effort to include hedge funds, but exclude private equity and venture capital funds which typically do not permit early redemptions because of the need for stable capital, "private fund" is defined in the Final Rule as an unregistered investment fund sold in reliance on Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 ("Investment Company Act"), that permits redemptions of any portion of an investor's interest within two years of purchase (with certain exceptions for reinvested dividends and extraordinary circumstances). The definition also excludes foreign funds that make a public offering of their securities outside the United States and that are regulated as public investment companies in a foreign jurisdiction.

The Final Rule also includes several related changes to existing U.S. Securities and Exchange Commission ("SEC") requirements for investment advisers that are intended to ameliorate the transition to registration for advisers with respect to recordkeeping and

1 *Registration Under the Advisers Act of Certain Hedge Fund Advisers,* Rel. No. IA-2333 (December 2, 2004) ("Adopting Release"), *available at* http://www.sec.gov/rules/final/ia-2333.htm.

charging performance fees. The Final Rule provides relief to investment advisers to funds of funds under the custody rule by permitting audited financial statements to be provided to investors within 180 days rather than the current requirement of 120 days after a fiscal year-end. Finally, the Final Rule includes certain revisions to Form ADV that would require additional information with respect to private funds managed by a registered investment adviser.

Background

Many hedge fund advisers have not had to register under the Investment Advisers Act of 1940 ("Advisers Act") by relying on the "private adviser" exemption contained in Section 203(b)(3) of the Advisers Act. Under this Section, an investment adviser is not required to register with the SEC if it has had fewer than fifteen clients during the preceding twelve months and neither holds itself out to the public as an investment adviser nor acts as the investment adviser to a mutual fund or a business development company registered with the SEC under the Investment Company Act. A hedge fund has historically been counted as one client for these purposes. Current Rule 203(b)(3)-1 under the Advisers Act provides, for the purpose of Section 203(b)(3), that an entity that receives investment advice based on its collective objectives rather than those of the individual investors is treated as a single client.[2] As a result, investment advisers that advise hedge funds were able under the old rule to treat each fund managed as a single client, which effectively enabled many hedge fund managers to avoid registration, if they confined their activities to advising fewer than fifteen hedge funds.

Providing investment advice based on the collective objectives of the fund is no longer sufficient to avoid registration. On December 2, 2004, the SEC published amendments to Rule 203(b)(3)-1 and published a new Rule 203(b)(3)-2 under the Advisers Act (collectively, the "Final Rule"), along with certain other revisions that now require an investment adviser to "look through" certain funds to count the number of investors in the fund as clients of the investment adviser for purposes of this exemption. The Final Rule follows a process that included the SEC Hedge Fund Roundtable in May 2003 (the "Hedge Fund Roundtable"),[3] followed by the report on the "Implications of the Growth of Hedge Funds" (the "Staff Hedge Fund Report")[4] released by the Staff of the SEC ("SEC staff") in September 2003, the principal recommendations of which led to the proposing release in July 2004 ("Proposing Release")[5] on which the Final Rule is based.

In the Staff Hedge Fund Report, the SEC staff outlined the nature of the hedge fund industry, the current regulatory framework that applies to hedge funds, the SEC staff's concerns with hedge fund practices, and recommendations to the SEC for modifying the regulation of hedge funds and hedge fund managers. The Staff Hedge Fund Report stressed that one of the SEC staff's greatest areas of concern is the SEC's limited ability to obtain comprehensive and reliable information about hedge funds absent mandatory registration of their advisers. These concerns led the SEC to propose the amendments to Rule 203(b)(3)-1 and the new Rule 203(b)(3)-2 (the "Rule Proposal"), which, among other things, requires hedge fund managers, both domestic and offshore, to register as investment advisers under the Advisers Act and amends the Form ADV to customize the disclosure provided by hedge fund managers to investors. After considering 161 comment letters it received, many in opposition to the Final Rule, the SEC, with some modifications, adopted the Final Rule.

Rationale of the Rule

The SEC in the Adopting Release states that the Final Rule is based on the following considerations, many of

2 Rule 203(b)(3)-1 indicates that an investment adviser whose principal office and place of business is in the United States must count each such investor as a client but that an investment adviser whose principal office and place of business is located outside the United States must only count U.S. persons as clients for the purpose of determining eligibility under the exemption.

3 *See* Dechert Financial Services Update 2003-28 (May 20, 2003) ("SEC Holds Hedge Fund Roundtable").

4 *Implications of the Growth of Hedge Funds*, Staff Report to the SEC, (September 2003), *available at* http://www.sec.gov/news/studies/hedgefunds0903.pdf.; *see also* Dechert Financial Services Update 2003-68 (October 23, 2003) ("SEC Releases Staff Report on Hedge Funds").

5 *Registration Under the Advisers Act of Certain Hedge Fund Advisers*, Rel. No. IA-2266 (July 20, 2004) ("Proposing Release"), *available at* http://www.sec.gov/rules/proposed/ia-2266.htm; *see also* Dechert Financial Services Update 2004-19 (July 15, 2004); Dechert Financial Services Update 2004-22 (August 1, 2004) ("The SEC Proposal to Register Hedge Fund Advisers").

which echo the Staff Hedge Fund Report and the release giving notice of the Rule Proposal:

> **Growth of Hedge Funds.** The Adopting Release notes that there are now approximately $870 billion of assets in approximately 7,000 hedge funds, stating that in the last five years hedge fund assets have grown 260 percent, and hedge fund advisers are now significant players in the equity markets. However, due to their unregulated nature and the absence of registration requirements for hedge fund managers, the SEC notes in the Adopting Release that it lacks reliable information about the hedge fund industry.
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> **Growth in Fund Fraud.** The SEC states in the Adopting Release that the growth in hedge funds has been accompanied by a significant growth in the number of hedge fund fraud enforcement cases. In the last five years, the SEC has brought over fifty cases against hedge fund advisers. Hedge fund fraud involves, in particular: investment advisers that overstate the performance of their hedge funds; advisers that cause hedge funds to pay unnecessary and undisclosed commissions; advisers that misappropriate client assets; and advisers to hedge funds that have allegedly been key participants in the recent scandals involving mutual fund late trading and inappropriate market timing.
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> **Broader Exposure to Hedge Funds.** The SEC notes in the Adopting Release that there is a growing exposure of smaller investors, pensioners, and other market participants, directly or indirectly, to hedge funds. For example, the development of retail "funds of hedge funds" in recent years has made hedge funds more broadly available to the public, and a growing number of public and private pension funds, as well as foundations and charitable organizations, have begun to invest in hedge funds or have increased their allocations to hedge funds. In addition, the SEC in the Adopting Release points out the trend in other jurisdictions toward retailization may create additional pressures in the U.S. market.

In considering these issues, the SEC emphasized the following points:

> **Need for SEC Action.** The SEC's current regulatory program, which relies almost entirely on enforcement actions brought after the malfeasance has occurred, is inadequate. By subjecting hedge fund managers to the SEC's inspection program, the SEC believes compliance problems could be identified at an early stage and unlawful conduct could be deterred.
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> **Census Information.** The SEC lacks basic information about hedge fund advisers and the hedge fund industry and it must rely on less reliable third party data. Hedge fund adviser registration would provide the SEC with important information about this segment of the industry. The SEC notes in the Adopting Release that there is legislative history showing that collecting information about the nation's investment advisers is one aim of the Advisers Act.
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> **Deterrence of Fraud.** Hedge fund adviser registration enables the SEC to initiate examinations and identify problems at an early stage. The SEC states that the prospect of SEC examination will deter wrongdoers, which is important given the substantial growth in the number of hedge fund fraud enforcement cases.
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> **Keeping Unfit Persons from Using Hedge Funds to Perpetrate Fraud.** The SEC believes that registration with the SEC would help to prevent unfit persons from using hedge funds to perpetrate frauds by screening individuals associated with the adviser and denying registration if they have been convicted of a felony.
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> **Adoption of Compliance Program.** Registration would obligate hedge fund advisers to comply with the new compliance rules and require these advisers to adopt policies and procedures that are reasonably designed to prevent violations of the Advisers Act and to designate a chief compliance officer. The Adopting Release acknowledges the limitations of the SEC's examination program in preventing and detecting fraud and states that registration will create a culture of compliance and, in effect, place the chief compliance officer in the position of a private enforcer of federal securities laws.
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> **Limitation on Retailization.** Registration would help limit the retailization of hedge funds. In particular, it would require all direct and indirect investors to meet the "qualified client" standards of Rule 205-3 (*i.e.,* a net worth of at least $1.5 million or at least $750,000 under management

with the adviser) if the adviser wants to charge a performance fee to a Fund.[6]

Proper Administration of the Advisers Act. The SEC maintains that the Final Rule is consistent with the "private adviser" exemption, which was not intended to exempt advisers from registration whose clients are limited to wealthy or sophisticated clients, as is sometimes argued by opponents of the Rule.[7] The SEC notes that wealthy and sophisticated investors were the primary clients of many investment advisers in 1940 when Congress enacted the Advisers Act and that the exemption appears to reflect Congress' view that there is no federal interest in regulating investment advisers with only a small number of clients. Today, however, many investment advisers take advantage of the exemption to operate pooled investment vehicles such as hedge funds with a large number of investors and no SEC oversight.

Specific Provisions of the Final Rule

Amendment of the 14 Client Safe Harbor Exemption for Private Fund Managers

Currently, Rule 203(b)(3)-1(a)(2)(i) permits an investment adviser to consider as a single client, "a corporation, general partnership, limited partnership, limited liability company, trust..., or other legal organization" to which investment advice is provided based on the organization's investment objectives rather than the individual investment objectives of an underlying investor. New Rule 203(b)(3)-1(b)(6) explicitly excludes "private funds" as defined thereunder from the Rule 203(b)(3)-1 safe harbor. As a result, under new Rule 203(b)(3)-2 an investment adviser whose principal office and place of business is in the United States needs to count each investor, including foreign persons, in any "private fund" as a client for the purpose of determining whether an adviser is exempt from registration under Section 203(b)(3).

If a registered investment company invests in a private fund, the Final Rule requires the investment adviser to look through the registered fund and count each shareholder in the registered investment company as an individual client. Similarly, if a fund of funds that is itself a "private fund" invests in a hedge fund, the adviser to the underlying hedge fund must look through the "top tier" private fund and count the investors in the fund of funds as clients for purposes of Rule 203(b)(3).[8]

As might be expected, an investment adviser that advises individual clients directly must count those clients together with the investors in any private fund it advises for purposes of Section 203(b)(3).[9]

In response to comments, the SEC made several clarifications to Rule 203(b)(3)-2(a). First, an investment adviser does not have to count itself as a client even if it invests in the private fund.[10] Second, an investment adviser to a private fund is allowed to exclude certain knowledgeable personnel of the investment adviser who are "qualified clients" from being counted as a client if they invest in the private fund.[11] Finally, an adviser must count the investors in a private fund for which the adviser acts as subadviser, even if the adviser is one of many subadvisers or participates in a "manager of managers" structure.[12]

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6 As noted, there would be a grandfather provision for existing investors.

7 Hedge funds generally avoid registration under U.S. laws by being offered privately only to certain wealthy and/or sophisticated investors. Certain opponents of the Rule Proposal argued that wealthy and sophisticated investors do not require the protections that could be provided if hedge fund advisers were registered with the SEC under the Advisers Act and subject to the SEC's inspection program.

8 *See* Adopting Release, *supra* note 1, at n. 196 and accompanying text.

9 *See id.* at n. 186 (providing clarification on counting investors when looking through private funds). If an adviser provides advisory services to a number of private funds that have, in the aggregate, more than 14 investors, it must register. Similarly, if an adviser manages only one private fund that has 10 investors and provides direct advisory services to five or more individual clients, it must also register.

10 Rule 203(b)(3)-2(a).

11 Rule 203(b)(3)-2(a). Pursuant to Rule 205-3(d)(1)(iii) under the Advisers Act certain knowledgeable employees of an investment adviser may pay a performance fee even if they have not otherwise met the qualification requirements under that Rule.

12 *See* Adopting Release, *supra* note 1, at n. 246.

Non-U.S. Advisers

The Final Rule requires an investment adviser whose principal office and place of business are both located outside the United States to count only investors that are U.S. residents for the purpose of determining eligibility under the exemption.[13] Otherwise, the same counting rules apply, including those applicable to funds of funds and subadvisory structures.

However, the Final Rule permits an offshore adviser to treat an offshore private fund as its client (and not the investors) for all purposes under the Advisers Act other than determining the availability of the private adviser exemption and compliance with the antifraud provisions of the Advisers Act, Sections 206(1) and 206(2). Moreover, because such an offshore fund would not be a U.S. client of the offshore adviser, under current SEC staff guidance, the Advisers Act's substantive provisions generally would not apply to the adviser's dealings with the fund, although the offshore adviser, among other things, would have to comply with certain of the Advisers Act's recordkeeping requirements with respect to the fund and its other clients and would have to undertake to promptly provide such records and any records kept under foreign law to the SEC upon request and make its personnel available for testimony before, or questioning by, the SEC or its staff.[14] Furthermore, an offshore adviser remains subject to SEC examinations. Finally, the Adopting Release provides clarification that if an investor is a non-U.S. client at the time of investment, the investment adviser may continue to count the investor as such even if the investor subsequently relocates to the United States.[15]

Definition of Private Fund

Under the Final Rule, Rule 203(b)(3)-1(d)(1) defines "private fund" as a company (i) that would be an investment company under Section 3(a) of the Investment Company Act, but for the exceptions provided in Sections 3(c)(1) or 3(c)(7) of the Investment Company Act,[16] (ii) that permits owners to redeem any portion of their ownership interests within two years of the investment, and (iii) which offers interests based on the investment advisory skills, ability or expertise of the investment adviser.

In mitigation of the two year "lock-up" provision, the Final Rule excludes from the definition of "private fund" a company that permits its owners to redeem their ownership interests within two years in the case of:

- (i) events found after reasonable inquiry to be extraordinary; and
- (ii) interests acquired through reinvestment of distributed capital gains or income.

The two-year lock-up requirement is designed to have the effect of excluding private equity and venture capital funds but does not depend upon the character of the fund beyond the lock-up provision. The two-year lock-up applies only to investments made on or after February 1, 2006.

The definition also excludes as private funds companies with a principal office and place of business outside the

13 *See* Adopting Release, *supra* note 1, at n. 201. While Rule 203(b)(3)-2(a) requires an offshore advisor to look through the private fund, Rule 203(b)(3)-1(b)(5) provides that only U.S. residents need to be counted as clients towards the private adviser exemption. Since there is no definition of the term "U.S. Resident" in the Adopting Release, the SEC provided the following guidance on who should be considered a U.S. client: (i) in the case of individuals, look to the location of their residence, (ii) in the case of corporations and other business entities, look to the location of their principal office and place of residence, (iii) in the case of personal trusts and estates, look to the rules set out in Regulation S, and (iv) in the case of discretionary or non-discretionary accounts managed by another investment adviser, look to the location of the person for whose benefit the account is held. The Adopting Release indicates that further consideration of this issue is possible.

14 *See, e.g., Uniao de Bancos de Brasileiros S.A.* , SEC No-Action Letter (pub. avail. July 28, 1992); *see also* Adopting Release, *supra* note 1, at n. 211 and accompanying text.

15 Rule 203(b)(3)-1(b)(7). If the non-U.S. investor transfers his or her interest to a U.S. investor at that time the investment adviser should count the transferee as a U.S. client.

16 Hedge funds generally are structured to come under the "private" investment company exceptions from the definition of investment company found in Section 3(c)(1) and 3(c)(7) of the Investment Company Act in order to avoid registration and regulation thereunder. In order to satisfy Section 3(c)(1) and 3(c)(7), the hedge fund entity must not conduct a public offering of its shares and generally must, for 3(c)(1) purposes, limit its number of investors to less than 100 persons, and, for 3(c)(7) purposes, limit its investors to persons who are "qualified purchasers." Offshore funds may generally apply the counting or qualification requirements just to their U.S. investors and limit the private offering requirement to their U.S. offering. The Adopting Release clarified that such offshore funds are 3(c)(1) and 3(c)(7) funds. *See* Adopting Release, *supra* note 1, at n. 226.

United States that make a public offering of their securities outside the United States and that are regulated as a public investment company under the laws of another country. This provision is intended to exclude non-U.S. mutual funds, such as UCITS. It likewise does not depend upon the nature of the fund beyond the determination by any non-U.S. government to permit its public offering and regulate it as a fund. However, the Adopting Release indicated that this provision would not extend to publicly offered "hedge funds" but offered no guidance on identifying such funds other than looking to local practice.[17]

Change to Recordkeeping Requirements under Rule 204-2(e)(3)(ii)

The Final Rule amends current recordkeeping requirements to permit advisers that are subject to the Advisers Act registration requirements for the first time as a result of the Final Rule, to utilize performance information for periods that predate the adviser's registration without having the records for the period of time that would otherwise be required to support the performance claims. The Final Rule also explicitly provides that the books and records of a private fund managed by an adviser shall be deemed to be the records of the adviser for purposes of Section 204 of the Advisers Act.

Change to Performance Fee Rules

The Final Rule includes a new section in Rule 205-3, that permits advisers that were previously exempt from registration to charge performance fees to current clients in existing funds as of the effective date of the Final Rule, notwithstanding the prohibitions of Rule 205-3(b), which places limitations on the ability of managers to charge performance fees.

Change to Custody Rules

Under the Final Rule, Rule 206(4)-2(b)(3) has been amended to permit an adviser to a fund of funds to provide the fund's audited financial statements to investors in lieu of a quarterly account statement within 180 days (rather than 120 days) of the end of its fiscal year. The Proposing Release had made this longer time period available to all pooled investment vehicles. However, the SEC has only made the extension available to funds of funds[18] in response to commenters' suggestions that if all funds (including underlying funds) were given the extension this would in effect leave the fund of funds in no better position to comply than they were previously.

Changes to Rule 222-2

With the Rule Proposal there was a concern that certain U.S. investment advisers not registered with the SEC who rely on Section 222 of the Advisers Act and Rule 222-2 thereunder to avoid registration with the States (the "blue sky pre-emption") may also have to look through certain funds to count the number of clients they have in a State for purposes of determining whether they are eligible for the blue sky pre-emption. The Final Rule amends Rule 222-2 to clarify that investment advisers may count clients without giving regard to the look through requirements in Rule 203(b)(3)-2.[19]

Changes to Form ADV

The Final Rule adopts the changes to the Form ADV as proposed in the Rule Proposal. These changes include the requirement for the Form ADV to contain a new Item 7 that requires the investment adviser to disclose if it is a general partner or manager or adviser to a private fund and, if so, the investment adviser must provide information regarding the private funds advised by it and certain other information regarding investors in the private funds. In response to comments, the SEC confirmed that the listing of advised funds in the investment adviser's Form ADV will not prevent the investment adviser from relying upon Regulation D with respect to the offering of interests in the funds.

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17 *See* Adopting Release, *supra* note 1, at n. 209.

18 *See* Adopting Release, *supra* note 1, at n. 266. A "fund of funds" under the amended rule is any limited partnership (or limited liability company or other type of pooled investment vehicle) that invests at least 10 percent of its total assets in other pooled investment vehicles that are not related persons of the fund of funds, or related persons of the adviser or general partner of the fund of funds.

19 Advisers not registered with the SEC generally may be required to register with the states where they do business. Section 222 under the Advisers Act, however, provides, among other things, that no U.S. State may require an investment adviser to register with the State if the adviser has no place of business located within the State and has had fewer than six clients who are residents of that State in a 12-month period. Rule 222-2 provides that for purposes of this part of Section 222, an investment adviser may rely upon the definition of "client" provided by Rule 203(b)(3)-1.

Dissenting Opinion

The approval of the Final Rule was not unanimous. Two of the five SEC Commissioners, Cynthia A. Glassman and Paul S. Atkins, voted against it, as well as against the Rule Proposal.[20] The dissenting Commissioners contended that there are more effective methods to obtain information about the hedge fund industry and that the SEC should have explored alternative approaches. They argued that the case for new registration requirements had not been made: the SEC should not necessarily increase its regulatory requirements because of the growth in the hedge fund industry; registration would not have prevented the violations in the enforcement cases cited in support of the Final Rule; and that the SEC staff did not cite evidence of retailization or an increase in hedge fund fraud in the Staff Hedge Fund Report. They again questioned the proposed definition of "private fund" by reference to a two-year lock-up period because hedge fund managers are likely to lengthen the current redemption periods of their hedge funds, which would not benefit investors. Finally, the two dissenting Commissioners argued that the Final Rule will result in increased costs to hedge fund investors and will require the SEC to invest substantial resources and expertise to monitor the hedge fund industry that, arguably, it does not yet have.

Court Challenge

The Final Rule has been challenged in federal court by a private plaintiff.[21]

Timeline for Registration

The Final Rule is effective as of February 10, 2005. Advisers must register and comply with the Final Rule by February 1, 2006, but may elect to comply sooner. By February 1, 2006, each investment adviser must (a) have an effective registration on Form ADV; (b) have in place all policies and procedures that address rules under the Advisers Act such as the books and records rule, the custody rule, the proxy voting rule, the compliance rule and the code of ethics rule; (c) designate a chief compliance officer; and (d) ensure compliance with the custody rules. The effective date with respect to the amendments to the Custody Rule and Form ADV is January 10, 2005. The changes to Form ADV will be incorporated in the IARD filing system on March 8, 2005, and the new information must be supplied on new registrations and amendments from that date. Advisers must provide the updated information no later than February 1, 2006.

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20 Dissenting opinions by Commissioners are uncommon, but not unprecedented. Commissioners Glassman and Atkins also published a dissenting opinion to the Final Rule Release on Investment Company Governance, SEC Rel. No. IC-26520 (July 27, 2004). Prior to the two recent Glassman-Atkins dissents, we are only aware of ten dissenting opinions that have been published since the SEC was established, the most recent in 1998.

21 *See Opportunity Partners L.P. v. U.S. Securities and Exchange Commission*, No. 04-1434 (D.C. Cir. filed Dec. 21, 2004).

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