DechertOnPoint

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A legal update from Dechert's Financial Services Group

Reminder: Annual US Reporting and Compliance Obligations

The US federal securities laws and the rules of self-regulatory organisations, such as the US Financial Industry Regulatory Authority, impose certain reporting and compliance obligations on investment managers and funds that must be complied with each year and in 2011 several new requirements will apply as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and related rulemaking. Some of these annual requirements apply only to investment managers that are registered in the United States as investment advisers, but others apply to investment managers and funds that are located outside the United States and are not registered in the United States. This *DechertOnPoint* provides a brief description of these requirements and serves as a reminder of the need to comply with these reporting and compliance requirements.

Reporting of Significant Positions in US Equity Securities

Investment managers and funds that have discretion over, or beneficially own, more than certain amounts of US equity securities registered under the US Securities Exchange Act of 1934 (the "Exchange Act") may have to report these holdings to the US Securities and Exchange Commission ("SEC"). Depending on the circumstances, an investment manager and/or fund may be required to file Form 13F, Schedule 13D, Schedule 13G or a combination of these with the SEC.

These reporting obligations apply to all investment managers and funds regardless of whether they are registered with the SEC and regardless of where they are organised.

Form 13F

What needs to be filed?	Form 13F, plus any request for confidential treatment.
Who must file?	Institutional Investment Managers (defined on page 2)[1]

1 Dodd-Frank added a requirement for institutional investment managers to report at least annually how they voted on certain executive compensation-related shareholder votes. The SEC has proposed a rule to implement this requirement. If adopted, the proposed rule would require institutional investment managers to report annually on Form N-PX their proxy voting record for each shareholder vote pursuant to Sections 14A(a) and (b) of the Exchange Act with respect to which the manager, whether directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, had or shared the power to vote, or to direct the voting of, any security.

Form 13F (continued)

When are filings due?

Within 45 days after the end of each calendar year with respect to which the investment manager is an Institutional Investment Manager and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year. Thus, if the investment manager reached the US$100 million threshold to be considered an Institutional Investment Manager as of the last day of any month in 2010, the investment manager will be required to make all four filings in 2011.

In 2011 filings will be due on 14 February 2011, 16 May 2011, 15 August 2011 and 14 November 2011.

Definitions:

"Institutional Investment Managers" are investment managers exercising "investment discretion"[2] with respect to accounts holding Section 13(f) Securities having an aggregate fair market value on the last trading day in any month of any calendar year of at least US$100 million.

"Section 13(f) Securities" are generally US equity securities traded on a US exchange and/or certain other securities such as:

- ADRs;
- certain convertible debt securities;
- swaps and other derivatives if these transactions result in an investment manager exercising investment discretion over an underlying asset which is a traded US equity security; and
- put and call options to the extent that they appear on the SEC's list of reportable securities.

Each quarter a complete list of Section 13(f) Securities is available at www.sec.gov/divisions/investment/13flists.htm. Please also see the "Frequently Asked Questions About Form 13F" available at www.sec.gov/divisions/investment/13ffaq.htm.

Schedule 13D

Who must file?

Investment managers, funds or other persons that are direct or indirect Beneficial Owners of more than 5% of a class of a US Equity Security.

What needs to be filed?

Schedule 13D, unless qualified to file the short form Schedule 13G instead (see below).

2 A person has "investment discretion" with respect to an account if the person (1) is authorised to determine what securities or other property shall be purchased or sold by or for the account, (2) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (3) otherwise exercises such influence with respect to the purchase or sale of securities or other property by or for the account as the SEC, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of the Exchange Act and the rules and regulations thereunder.

Schedule 13D (continued)

When are filings due?

Initial filings: Within 10 days after becoming a direct or indirect Beneficial Owner of more than 5% of a class of a US Equity Security.

Amendments: Promptly (i.e., one day) following any material changes in the information included in a prior filing (e.g., most acquisitions and dispositions of additional securities constituting 1% of the class or where the intent of the filing entity changes).

How is the 5% threshold measured?

When calculating the percentage of a class of a US Equity Security of which it is a Beneficial Owner, an investment manager must aggregate the holdings of the same class of that US Equity Security it holds for all of its client accounts. Where a fund becomes the Beneficial Owner of more than 5% of a class of a US Equity Security, it is likely that its investment manager will also be deemed a Beneficial Owner of those securities for reporting purposes and both entities would be required to file. In some circumstances, US Equity Securities that are beneficially owned by others will also need to be aggregated.

Definitions:

For this purpose, "Beneficial Owner" means an entity with:

- voting power over the US Equity Security (including the power to vote or direct the voting of the US Equity Security); or
- investment power over the US Equity Security (including the power to dispose or direct the disposition of the US Equity Security).

Investment managers with the power to vote or sell a US Equity Security held in client accounts will be deemed to be a Beneficial Owner even if they do not receive any economic benefit from those securities.

"US Equity Security" means an equity security of a US publicly traded company, including a listed closed-end investment company, but excluding any class of non-voting securities.

Schedule 13G

Who must file?

Investment managers, funds or other persons that are direct or indirect Beneficial Owners of more than 5% of a class of a US Equity Security and qualify as either a Qualified Institutional Investor or Passive Investor. Non-US institutions are also permitted to report beneficial ownership of securities on a short-form Schedule 13G instead of the longer Schedule 13D if they meet certain requirements.[3]

What needs to be filed?

Schedule 13G.

[3] In order for a non-US institution to be eligible to file using the shorter Schedule 13G, the non-US institution must be: (a) the non-US equivalent of the kinds of US institutions listed in Exchange Act Rule 13d-1(b)(1)(ii); (b) subject to a regulatory regime that is substantially comparable to the regulatory scheme applicable to the equivalent US institution (provided that the non-US institution includes a certification with the Schedule 13G representing that this is the case, and that it will provide the information that would have been required in a Schedule 13D filing to the SEC staff upon request); and (c) holding the securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer.

Schedule 13G (continued)

When are filings due?

Qualified Institutional Investors:

Initial filings: Within 45 days after the end of the calendar year in which the Qualified Institutional Investor becomes the Beneficial Owner of 5% or more of a class of a US Equity Security.

Amendments: (1) Within 45 days of calendar year end to report any changes, and (2) within 10 days after the end of any calendar month in which (a) the Qualified Institutional Investor becomes the Beneficial Owner of more than 10% of the class of US Equity Security, (b) the percentage beneficially owned increases or decreases by 5% or more of the outstanding securities of the class, and/or (c) there is a change in investment purpose.

When are filings due?

Passive Investors:

Initial filings: Within 10 days of the acquisition which caused the Passive Investor to be the Beneficial Owner of 5% or more of a class of a US Equity Security.

Amendments: (1) Within 45 days of calendar year end to report any changes, (2) promptly if a Passive Investor becomes the Beneficial Owner of more than 10% of a class of US Equity Security, and (3) if the Passive Investor is Beneficial Owner of between 10% and 20%, promptly if beneficial ownership increases or decreases by 5% of the class. A Passive Investor must file a Schedule 13D (see above) within 10 days if the Passive Investor's investment purpose changes or if the Passive Investor acquires beneficial ownership of more than 20% of the class.

How is the 5% threshold measured?

See Schedule 13D discussion above.

Definitions:

"Qualified Institutional Investors" include, *inter alia*:

- US registered broker-dealers;
- US banks;
- US insurance companies;
- US registered investment companies;
- US registered investment advisers; and
- non-US equivalents of the foregoing, subject to certain restrictions (*see footnote 3*).

A "Passive Investor" is a person that:

- is not a Qualified Institutional Investor;
- holds a US Equity Security in the ordinary course of business;
- does not hold the US Equity Security for the purpose of changing or influencing control of the issuer; and
- does not hold more than 20% of the applicable class of US Equity Security.

"Beneficial Owner" and "US Equity Security" have the meanings set out under the Schedule 13D discussion above.

Schedule 13G (continued)

Note on SEC filing codes

Entities that have not previously made any filings with the SEC should allow four to five business days prior to the deadline for the first filing to be made with the SEC (whether on Form 13F, Schedule 13D, Schedule 13G or otherwise) to obtain the necessary SEC filing codes.

Annual Filing Requirement for Continuing US Private Placements (Form D)

Section 5 of the US Securities Act of 1933 (the "Securities Act") generally requires registration of any security offered or sold through the use of any means of United States interstate or international commerce. Section 4(2) of the Securities Act and Regulation D provide a private placement exemption from registration under the Securities Act for any offer or sale of a security by an issuer that does not involve a public offering. Any issuer making a continuing private placement in the United States is required to file, annually during the course of the offering, an updating amendment to its federally filed Form D.

Who must file?

Each issuer, including hedge funds and private equity funds, that makes a private placement offering in the United States pursuant to Regulation D where the offering either begins in 2011 or is continuing in 2011.

What needs to be filed?

Form D with the SEC, plus any additional blue sky filings in the state(s) where the purchase of securities occurred depending on such state's blue sky laws. In addition, New York currently requires that a pre-sale filing be made. For continuing offerings, the filing of the required updating amendment will trigger various state notice filing requirements as well.

When are filings due?

New Offerings: Within 15 days after the first sale of securities. The recently amended Form D makes it clear that the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor's subscription agreement or cheque.

Continuing Offerings: On or before the anniversary of the issuer's last federally filed Form D. As the deadline for the first required electronic filing was March 2009, the anniversary of this filing for many issuers is in March.

How are filings made?

Issuers must submit Form D filings with the SEC electronically via the Electronic Data Gathering, Analysis and Retrieval (EDGAR) system.

Filings with the states must still be made in paper format, however it is likely that in the future state filings will be permitted to be made electronically.

What do I need to make the filing with the SEC electronically?

Issuers that have not previously filed documents with the SEC will need to obtain a Central Index Key ("CIK") number and/or EDGAR access codes before such issuers can file Form D electronically via EDGAR.

Do filings need to be updated?

Amendments to Form D are generally required to be made where:

- a year has passed since the filing of the Form D or the most recent amendment, if the offering is continuing;
- a material mistake of fact or error in a previously filed notice is discovered; or
- a change in information occurs, other than in certain prescribed circumstances.

Form ADV Annual Updating Amendment, Including Part 2

An asset manager registered as an investment adviser with the SEC must update Part 1 and Part 2 (which is comprised of a "Brochure" and a "Brochure Supplement") of its Form ADV on an annual basis. **Please note that the requirement to file the Brochure with the SEC is new this year.** In addition, the format of the Brochure has been revised and a Brochure Supplement has been added, as explained below.

What is Form ADV?

Form ADV is the investment adviser registration form used by the SEC. Form ADV is made up of three parts: Part 1, the Brochure and the Brochure Supplement (both of which comprise Part 2). A registered investment adviser must file amendments to Part 1 of Form ADV and the Brochure electronically on the SEC's Investment Adviser Registration Depository ("IARD") website.

By what date must Part I of Form ADV and the Brochure be updated?

Part 1 of Form ADV and the Brochure must be updated annually within 90 days of a registered investment adviser's fiscal year-end.[4] These updates must be filed electronically on the IARD website.[5] Please note that the requirement to file the Brochure is a change from prior years.

In addition, the format of the Brochure has changed considerably from the former Form ADV Part II and advisers should allocate extra time to prepare the Brochure this year. The Brochure is a fully narrative document (as opposed to a tick-the-box form) and substantive changes to this document (as compared with the former Part II) include requiring a discussion of performance-based fees, a description of investment strategies and related risks, a discussion of any disciplinary information relating to the adviser and a description of limits clients can place on the adviser's investment discretion and a description of voting policies and procedures, among others.

Is there an annual update requirement for the Brochure Supplement?

There currently is no mandatory filing requirement for the Brochure Supplement, but it must be maintained in the registered adviser's records.[6] We recommend that registered investment advisers review their Brochure Supplement periodically, including at the time of the annual update, to ensure that the disclosure is current. As with Part 1 and the Brochure, all advisers are required to update the information in the Brochure Supplement promptly after any disclosure becomes materially inaccurate.

What is the delivery requirement for the Brochure?

An adviser's initial Brochure must be delivered to all existing clients within 150 days of the adviser's fiscal year end that falls on or after 31 December 2010. In following years, the adviser must deliver to clients within 120 days of its fiscal year end a summary of material changes to the Brochure from the prior year with either (i) the updated Brochure, or (ii) an offer to provide the updated Brochure upon request.

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4 The SEC has proposed a rule which, if adopted, will require each investment adviser registered with the SEC as of 21 July 2011 to file an amendment to its Form ADV no later than 20 August 2011 to report the market value of its assets under management determined within 30 days of the filing.

5 Please note that the updating of certain sections of Part 1 and the Brochure cannot wait until the annual update. Information contained in Items 1, 3, 9 and 11 of Part 1 must be amended promptly after any change, and information in Items 4, 8 and 10 must be amended promptly after the information becomes materially inaccurate. Information in the Brochure must be updated promptly after the information becomes materially inaccurate (except for changes to the Summary of Material Changes and the amount of assets under management, which do not require interim updates).

6 Electronic filing of the Brochure Supplement currently is optional.

Form ADV Annual Updating Amendment, Including Part 2 (continued)

Is there a delivery requirement for the Brochure Supplement?

The Brochure Supplement must be delivered to a new or prospective client at or before the time when the supervised person to whom the Brochure Supplement relates begins to provide advisory services to that client. With respect to the initial Brochure Supplement, all registered investment advisers with fiscal year ends between 31 December and 30 April must begin delivering the Brochure Supplement to new and prospective clients by 30 July 2011 and to existing clients by 30 September 2011. The deadlines for newly registered investment advisers (registering between 1 January 2011 and 30 April 2011) are 1 May 2011 for new and prospective clients and 1 July 2011 for existing clients. Delivery of an updated Brochure Supplement to clients is required when there is new disclosure of a disciplinary event, or a material change to disciplinary information already disclosed.

What filing fees are required?

There is a fee payable in connection with filing the annual updating amendment, which ranges from US$40 to US$200 depending on assets under management.

Annual Eligibility Verification for a Fund's Participation in ''New Issues''

"New Issues" involve the initial public offering of securities in which a member of the US Financial Industry Regulatory Authority ("FINRA") (formerly the National Association of Securities Dealers or "NASD") is a part of the underwriting syndicate.

Who may invest in New Issues?

A private investment fund may invest in New Issues only in accordance with the requirements of FINRA Rule 5130 (the "New Issues Rule"),[7] which permits investors to participate in the profits and losses from investments in New Issues subject to certain restrictions. The New Issues Rule provides that persons associated with broker-dealers and other financial-type accounts (such as portfolio managers who manage assets for institutional investors) ("Restricted Persons") are limited in their ability to invest in New Issues. Generally a private investment fund's offering memorandum contains a questionnaire in its application form or subscription agreement designed to ascertain whether any investors are Restricted Persons. This will enable the fund to determine whether it may invest in New Issues in compliance with the New Issues Rule.

What verifications are required?

A private investment fund seeking to invest in New Issues must receive an initial positive affirmation of an investor's eligibility to participate in New Issues before it may specifically allocate profits and losses from New Issues to such investor.

The New Issues Rule also requires that an investor's eligibility to participate in New Issues be confirmed on an annual basis. Many investment managers also ask those investors that have previously been classified as Restricted Persons whether their status has changed over the past year, in which case those investors would be eligible to participate in New Issues in the coming year.

What format is required for an annual verification?

The New Issues Rule allows investment managers to follow a "negative consent" process for annual verification of an investor's status. As such, an investment manager may send a notice asking whether there has been any change in an investor's status. This notice may be provided together with the fund's annual report or other materials sent to investors periodically or in a separate mailing. Provided that an investor has not affirmatively reported a change in its status, the fund is permitted to rely on existing information regarding a particular investor.

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7 Formerly, NASD Conduct Rule 2790, which commonly was referred to as the "Hot Issues Rule".

ERISA – Monitoring Ownership by Benefit Plan Investors

An investment manager is subject to certain restrictions under the US Employee Retirement Income Security Act of 1974 ("ERISA") to the extent that a fund it manages includes "plan assets". When ERISA plans invest in a pooled fund, the fund's assets will only be considered plan assets if "Benefit Plan Investors" own 25% or more of the value of any class of equity interests in the fund. Therefore, an investment manager will not be subject to ERISA if the percentage of Benefit Plan Investors in a fund advised by the investment manager does not exceed 25% or more of any class of equity interests in that fund.

There are no *per se* annual monitoring requirements for ERISA purposes; however, we recommend that private investment funds confirm that ongoing monitoring of fund ownership by Benefit Plan Investors is being conducted appropriately to ensure that a fund does not include plan assets.

Who are "Benefit Plan Investors"?

A "Benefit Plan Investor" is defined to include (i) a plan subject to Part 4 of Title I of ERISA, (ii) a plan to which Section 4975 (the prohibited transaction provisions) of the US Internal Revenue Code of 1986 ("Code") applies, and (iii) entities the assets of which include plan assets by reason of a plan's investment in the entity.

Non-US retirement plans, governmental plans, and other plans that are not subject to Title I of ERISA or Section 4975 of the Code are not Benefit Plan Investors.

What testing must be performed?

An investment manager to a fund wishing to avoid becoming subject to ERISA should ensure that testing is done on a class-by-class basis to ensure that the ownership by Benefit Plan Investors of each class of interests in a fund does not exceed the 25% threshold. In determining whether Benefit Plan Investor ownership exceeds the 25% threshold, the value of any equity interests in the fund held by any person who has discretionary authority or control with respect to the fund's assets, or who provides investment advice for a fee, or any affiliate of such a person, will be disregarded (provided such person is not a Benefit Plan Investor).

In a fund of funds structure or a master-feeder structure, each level of the fund must be tested for compliance with the 25% per class limitation.

When must the testing be performed?

A determination of whether Benefit Plan Investor ownership in a fund class exceeds the 25% threshold must be made after each acquisition of an equity interest in the fund (which has also been interpreted to include each redemption of an interest in the fund). Therefore, we would recommend that testing be performed before (if possible) and after each dealing day.

Each investor should be required to represent whether he or she is a Benefit Plan Investor when making an initial investment. This may be accomplished through a Benefit Plan Investor questionnaire in a fund's subscription agreement and/or application form, as the case may be. We further recommend that an investor be required to make similar representations for subsequent investments, so that testing data is accurate.

Pay to Play

The new "pay to play" rule, Rule 206(4)-5 under the US Investment Advisers Act of 1940 (the "Advisers Act"), comes into effect on 14 March 2011. As of that date, any adviser registered with the SEC or unregistered adviser relying on the "private adviser" exemption from registration (having fewer than 15 clients during the last 12 months and not holding itself out to the US public as an investment adviser) that provides advisory services to a government entity in the United States must comply with certain requirements. These include (i) keeping records of all contributions made by the adviser and "covered associates" to government officials, political action committees and state/local political parties in the United States[8]; (ii) maintaining a list of all "covered associates" of the adviser;

[8] Rule 206(4)-5 contains limits on political contributions made by advisers and their "covered associates" and applies to political contributions made after 13 March 2011.

Pay to Play (continued)

(iii) maintaining records of government entities with whom the firm has done business for the last five years; (iv) keeping a list of all third party placement agents that solicit government entity clients for the adviser[9]; and (v) keeping a list of government entities that invest in the adviser's investment funds (or that invested in such funds in the last five years).

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[9] In accordance with Rule 206(4)-5, advisers covered by the Rule cannot use third party placement agents to solicit government entities after 13 September 2011, unless using a US registered adviser or broker-dealer subject to the Rule.

Practice group contacts

For more information, please contact the author, one of the attorneys listed, or any Dechert attorney with whom you regularly work. Visit us at www.dechert.com/financialservices.

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