SEC and CFTC Vote to Adopt Reporting Requirement for Private Funds

November 4, 2011

Pursuant to Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), the Securities and Exchange Commission (“SEC”) and Commodity Futures Trading Commission (“CFTC”) have voted to adopt a joint rule requiring certain SEC-registered investment advisers and dually registered CFTC registrants to periodically report information about their private funds to the SEC. The rule applies to advisers managing at least $150 million in private funds and imposes separate reporting requirements based on the type of private fund advised and the adviser’s assets under management. The information collected pursuant to this rule will be used by the Financial Stability Oversight Council (“FSOC”) to monitor risks to the U.S. financial system. The adopting release is available **here.**

Advisers Covered by Rule

Under the new rule, an SEC-registered investment advisor must file **Form PF** if it manages at least $150 million in private funds (i.e., funds relying on an exemption from registration as an investment company pursuant to Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940) as of the end of its most recently completed fiscal quarter. Such an advisor, if dually registered with the CFTC as a commodity pool operator or commodity trading advisor, may substitute Form PF for compliance with certain of the CFTC’s systemic risk reporting requirements or for compliance with reporting requirements related to commodity pools that are not private funds.

For the purposes of whether an adviser meets the $150 million threshold or is a Large Private Fund Adviser under the new rule (see below), the adviser must aggregate (1) assets of managed accounts advised by the firm that pursue substantially the same investment objective and strategy, and invest in substantially the same positions as private funds advised by the firm ("parallel managed accounts") unless the value of those accounts exceeds the value of the private funds with which they are managed and (2) assets of private funds advised by any of the adviser's "related persons" [1] other than related persons that are separately operated.

Advisers with a principal office and place of business outside the United States may exclude from reporting private funds that, during the adviser's last fiscal year, were neither a U.S. person (as defined under Rule 203(m)-1 of the Advisers Act of 1940) nor offered to, or beneficially owned by, any U.S. person.

Large Private Fund Advisers

Under the new rule, "Large Private Fund Advisers" are defined to include (i) advisers with at least $1.5 billion in assets under management attributable to hedge funds [2] as of the end of any month in the prior fiscal quarter ("large hedge fund advisers"); (ii) liquidity fund [3] advisers with at least $1 billion in combined assets under management attributable to liquidity funds and registered money market funds as of the end of any month in the prior fiscal quarter ("large liquidity fund advisers"); and (iii) advisers with at least $2 billion in assets under management attributable to private equity funds [4] as of the last day of the adviser's most recently completed fiscal quarter ("large private equity fund advisers").

Reporting requirements for Large Private Fund Advisers depend on the type of private fund managed by the adviser:

- Large hedge fund advisers will be required to file Form PF within 60 days after the end of each fiscal quarter and will be required to report on an aggregated basis information concerning exposures by asset class, geographical concentration, and turnover by asset class. Large hedge fund advisers will also be required to report certain exposure, leverage, risk profile, and liquidity information for funds with net asset values of at least $500 million.
- Large liquidity fund advisers will be required to file Form PF within 15 days after the end of each fiscal quarter and will be required to report information on the types of assets in each of their liquidity fund's portfolios, information regarding each fund's risk profile, and information concerning compliance with Rule 2a-7 under the Investment Company Act regarding money market funds.
- Large private equity fund advisers will be required to file Form PF

annually within 120 days after the end of each fiscal year and will be required to provide information regarding leverage, the use of bridge financing, and the funds' investments in financial institutions.

Note that advisers who must report on a quarterly basis (i.e., large hedge fund advisers and large liquidity fund advisers) only must do so for the type of fund that caused them to exceed the reporting threshold.

Smaller Private Fund Advisers

Smaller private fund advisers include SEC-registered investment advisers managing at least $150 million in private fund assets but who do not meet the definition of "Large Private Fund Advisers" under the new rule. Smaller private fund advisers are required to file Form PF annually within 120 days after the end of each fiscal year and are required to provide information regarding fund size, leverage, investor types and concentration, and liquidity. The new rule also requires smaller private fund advisers to report information about fund strategy, counterparty risk, and use of trading and clearing mechanisms.

Reporting Requirements Applicable to All Advisers Under Final Rule

Unlike the proposed rule, advisers are not required to certify information provided in Form PF under penalty of perjury. Instead, advisers will be required to sign Form PF confirming that the form is filed with the proper authority. Additionally, the final rule permits advisers to rely on their own internal methodologies when reporting certain information on Form PF.

Although not required, an adviser may report the private fund assets that it manages and the private fund assets that its related persons manage on a single Form PF. Only one adviser should report information on funds that are sub-advised funds.

Phased Implementation

Advisers managing at least $5 billion in assets attributable to hedge funds, liquidity fund advisers managing at least $5 billion in combined assets attributable to liquidity funds and registered money market funds, and advisers managing at least $5 billion in private equity funds will be required to file Form PF following the end of their first fiscal year or fiscal quarter, as applicable, to end on or after June 15, 2012.

All other private fund advisers will be required to begin filing Form PF following the end of their first fiscal year or fiscal quarter, as applicable, to end on or after December 15, 2012.

Advisers will be required to file Form PF electronically, under a system developed and maintained by the Financial Industry Regulatory Authority as an extension of the existing Investment Adviser Registration Depository. The SEC has approved **initial filing fees of $150 per report**.

Use of Information

Information collected under this rule will be provided to the FSOC and will be used by the FSOC to monitor systemic risk in the private fund industry. The SEC and CFTC also intend to use Form PF data in their regulatory programs, including examinations, investigations, and investor protection efforts relating to private fund advisers. Additionally, although the rule provides for confidentiality of the collected information, the SEC may use Form PF information in an enforcement action and may share the information with other federal agencies or self-regulatory organizations.

[1] A "related person" is generally defined to include (a) all of the adviser's officers, partners, or directors; (b) all persons directly or indirectly controlling, controlled by, or under common control with the adviser; and (c) all of the adviser's employees, other than employees performing only clerical, administrative, or support functions.

[2] A hedge fund is a private fund that: (a) may be paid a performance fee that accounts for unrealized gains; (b) may borrow an amount in excess of one-half of its net asset value or may have a gross notional exposure greater than twice its net asset value; or (c) may engage in short selling, other than for the purpose of hedging currency exposure or managing duration. For the purposes of Form PF, a commodity pool that is reported or required to be reported on Form PF is treated as a hedge fund. Vehicles established for the purpose of issuing asset backed securities are excluded from the "hedge fund" definition.

[3] Liquidity funds include any private funds that seek to generate income by investing in a portfolio of short term obligations in order to maintain a stable net asset value per unit or minimize principal volatility for investors.

[4] Private equity funds include funds that are not a hedge fund, liquidity fund, real estate fund, securitized asset fund, or venture capital fund and that do not provide investors with redemption rights in the ordinary course.