



## Registration

# SEC Delays Registration Deadline for Hedge Fund Advisers, and Clarifies the Scope and Limits of Registration Exemptions for Private Fund Advisers, Foreign Private Advisers and Family Offices

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At an open meeting held on June 22, 2011, the Securities and Exchange Commission adopted and amended rules that will directly affect the registration, reporting and disclosure obligations of U.S. and non-U.S. hedge fund managers. While the texts of most of those rules or rule amendments remain to be published as of this writing, comments by SEC commissioners at the open meeting outlined the general scope of the final rules and amendments. Of particular relevance to hedge fund managers, the SEC addressed the following topics at the open meeting: delay of registration and reporting deadlines; who may and must register with the SEC and the states based on assets under management (AUM); the private fund adviser exemption; the foreign private adviser exemption; continuing relevance of the Unibanco no-action letter for global hedge fund sub-advisory relationships; filing, recordkeeping and examination obligations of exempt reporting advisers; and the exemption from registration for family offices. This article offers more detail on the SEC's statements on each of the foregoing topics at the open meeting.

## Delay of Registration and Reporting Deadlines

As anticipated, the SEC delayed the date by which previously unregistered hedge fund advisers will have to register with the SEC as investment advisers, unless they are eligible for an exemption from registration or ineligible to register with the SEC. Specifically, the SEC delayed the registration deadline until March 30, 2012. Absent such a delay, the registration deadline would have been July 21, 2011 – the one-year anniversary of passage of the Dodd-Frank Act. See [“Two Recent Statements from SEC Chairman Mary Schapiro Suggest That Hedge Fund Adviser Registration and Compliance Date Will Be Extended Until the First Quarter of 2012,”](#) *Hedge Fund Law Report*, Vol. 4, No. 16 (May 13, 2011).

For hedge fund advisers that are currently registered with the SEC, the commissioners noted two other relevant dates at the open meeting. First, hedge fund advisers that are currently registered with the SEC and that are permitted to remain registered under the new rules will have to make a filing with the SEC “in the first quarter of 2012” declaring that they are permitted to remain registered. Second, hedge fund advisers that are currently registered with the SEC

and that are not permitted to remain registered under the new rules will have until June 28, 2012 to file the required withdrawal form with the SEC and to register with the relevant states.

## Registration Requirements and Exemptions

At the open meeting, the commissioners discussed the AUM thresholds that will govern whether and where a hedge fund manager may or must register. According to that discussion, hedge fund advisers may fall into one of the following categories, for registration purposes:

- *Less than \$25 million in AUM.* Hedge fund advisers with less than \$25 million in AUM would not be eligible for SEC registration, but may be eligible or required to register in one or more states.
- *Between \$25 million and \$100 million in AUM.* The commissioners referred at the open meeting to hedge fund advisers and other investment advisers with between \$25 million and \$100 million in AUM as “mid-sized advisers.” Generally, a mid-sized adviser will not be eligible to register with the SEC, but will be required to register in the state in which it maintains its principal office and place of business if (1) the adviser would otherwise be required to register in the state and (2) the state has its own examination program.
- *Between \$100 million and \$150 million in AUM.* If a hedge fund adviser has between \$100 million and \$150 million in AUM, whether or not the adviser is required to register with the SEC will depend on the types of investment vehicles it manages. A hedge fund adviser with between \$100 million and \$150 million in AUM that manages solely private funds will not have to register with the SEC. However, a hedge fund manager in the same AUM range that manages private funds and at least one other type of investment vehicle – for example, a managed account – will have to register with the SEC.
- *Over \$150 million in AUM.* As indicated, at the open meeting, the SEC adopted a final rule that will exempt from registration hedge fund advisers that advise solely private funds and that have less than \$150 million in AUM in the United States (Private Fund Adviser Exemption). While the text of the final Private Fund Adviser Exemption has not been published as of this writing, the commissioners indicated that the final Private Fund Adviser Exemption will largely track the proposed rule, which in turn largely tracked the statutory provisions. For purposes of determining eligibility for the Private Fund Adviser Exemption, the commissioners indicated that the final rule will only require advisers to measure AUM annually, rather than quarterly, as proposed.

## Foreign Private Adviser Exemption

At the open meeting, the SEC adopted the Foreign Private Adviser Exemption substantially as proposed. For an in-depth discussion of the foreign private adviser exemption as proposed, see “[Impact of the Foreign Private Adviser Exemption and the Private Fund Adviser Exemption on the U.S. Activities of Non-U.S. Hedge Fund Managers](#),” Hedge Fund Law Report, Vol. 4, No. 16 (May 13, 2011). Also, the commissioners indicated that SEC guidance provided in the [Unibanco no-action letter](#) with respect to registration and regulation of non-U.S. affiliates of SEC-registered advisers would remain substantially in effect. For a discussion of the Unibanco no-action letter and its application to global hedge fund sub-advisory relationships, see “[Consequences for Global Hedge](#)

**Fund Managers of the ‘Foreign Private Adviser’ Exemption Included in the Dodd-Frank Act,”**  
Hedge Fund Law Report, Vol. 3, No. 33 (Aug. 20, 2010).

## Exempt Reporting Advisers

Hedge fund managers that qualify for the Private Fund Adviser Exemption nonetheless will face certain filing, recordkeeping and examination obligations. (By contrast, hedge fund managers that qualify for the Foreign Private Adviser Exemption generally would not be subject to such obligations. We discussed this important distinction for non-U.S. hedge fund advisers in a [prior article](#) in the Hedge Fund Law Report.) At the open meeting, the SEC adopted rules applicable to exempt reporting advisers substantially as proposed. In general, such advisers would be: required annually to file an abbreviated version of Form ADV, Part 1; subject to recordkeeping rules to be adopted; and subject to a limited SEC examination program.

Notably, the version of Form ADV, Part 1 required to be filed by exempt reporting advisers will include disciplinary history of the adviser and its employees and will be publicly available. Exempt reporting advisers will be required to file the first such Form ADV, Part 1s in the first quarter of 2012. For more on Form ADV as it will apply to registered hedge fund advisers (as opposed to exempt reporting advisers), see [“Application of Brochure Delivery and Public Filing Requirements of New Form ADV to Offshore and Domestic Hedge Fund Managers,”](#) Hedge Fund Law Report, Vol. 4, No. 11 (Apr. 1, 2011).

With respect to examinations, Chairman Schapiro noted at the open meeting that the SEC does not currently intend to subject exempt reporting advisers to routine examinations. However, she also noted that the SEC retains the authority to examine exempt reporting advisers in its discretion. Accordingly, one of the most onerous consequences of full registration – the possibility of SEC examinations – may apply to hedge fund managers even if they are exempt from registration because they have less than \$150 million in AUM and manage solely private funds. Accordingly, we would encourage hedge fund managers – even those eligible for the Private Fund Adviser Exemption – to review [our three-part series on preparing for and surviving SEC examinations](#).

## Exemption from Registration for Family Offices

At the open meeting, the SEC adopted a final rule defining “family office” for purposes of the exemption from investment adviser registration available to family offices. The commissioners indicated at the open meeting that the definition in the final rule would be consistent with the definition in the proposed rule, which in large measure tracked prior no-action relief. However, the SEC noted two categories of changes from the proposed rule. First, the final rule will expand the definition of “family client” from the definition included in the proposed rule. Second, the final rule will provide for a later deadline (i.e., by December 31, 2013) by which hedge fund managers must terminate investment advisory relationships with charitable entities that are not exclusively funded by a family. We previously published the first two articles in a three-part series on the definition of “family office.” The first article in the series covered the legal and regulatory guidance on the definition as it existed prior to the proposed rule. See [“Developments in Family Office Regulation: Part One,”](#) Hedge Fund Law Report, Vol. 3, No. 38 (Oct. 1, 2010). The second article in the series discussed the proposed definition of family office. See [“2010 Developments in Family Office Regulation under Dodd Frank: Part Two,”](#) Hedge Fund Law Report, Vol. 3, No. 42 (Oct. 29, 2010). The third article in the series will discuss the definition

of family office included in the final rule, and the implications of that definition for hedge fund managers and investors. We expect to publish that third article soon. For more on marketing to family offices by hedge fund managers, see [“New Rothstein Kass Study Explains the ‘Consultative’ Approach to Marketing to Single-Family Offices and the Importance of That Approach for Smaller Hedge Fund Managers,”](#) Hedge Fund Law Report, Vol. 4, No. 20 (Jun. 17, 2011). For more on tax efficient structuring of investments by family offices in hedge funds, see [“Investments by Family Offices in Hedge Funds through Variable Insurance Policies: Tax-Advantaged Structures, Diversification and Investor Control Rules and Restructuring Strategies \(Part Two of Two\),”](#) Hedge Fund Law Report, Vol. 4, No. 12 (Apr. 11, 2011).

## Pay to Play Rule Amendment

The SEC also announced amendments to the investment adviser pay to play rule in response to changes made by the Dodd-Frank Act. See [“Key Elements of a Pay-to-Play Compliance Program for Hedge Fund Managers,”](#) Hedge Fund Law Report, Vol. 3, No. 37 (Sep. 24, 2010). Specifically, the SEC noted that under the amendment, a hedge fund manager will be permitted to pay a registered municipal advisor to act as a placement agent and solicit government entities on its behalf, so long as the municipal advisor is subject to a pay to play rule adopted by the MSRB that is at least as stringent as the investment adviser pay to play rule. See [“Municipal Securities Rulemaking Board Extends Its Regulatory Reach to Include Hedge Fund Placement Agents,”](#) Hedge Fund Law Report, Vol. 3, No. 44 (Nov. 12, 2010). The SEC also noted that hedge funds managers will continue to be permitted to hire as placement agents SEC registered investment advisers or broker-dealers that are subject to a pay to play rule adopted by FINRA that is at least as stringent as the investment adviser pay to play rule. See [“How Should Hedge Fund Managers Revise Their Compliance Policies and Procedures and Marketing Practices in Light of the SEC’s New ‘Pay to Play’ Rule?,”](#) Hedge Fund Law Report, Vol. 3, No. 30 (Jul. 30, 2010). For a detailed discussion of other law and regulation relevant to municipal advisers or third-party placement agents serving in substantially similar roles, see [“How Can Hedge Fund Managers Structure the Compensation of Third-Party Marketers in Light of the Ban On ‘Contingent Compensation’ Under New York City and California Lobbying Laws? \(Part Two of Three\),”](#) Hedge Fund Law Report, Vol. 4, No. 13 (Apr. 21, 2011).

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