

SEC Releases Guidance on Whether Entities Related to a Registered Adviser Need to Register

On January 18, 2012, the staff of the Securities and Exchange Commission (“SEC”) released guidance on various issues regarding the status under the *Investment Advisers Act of 1940* (the “Advisers Act”) of certain private fund general partners and investment advisers that are related to investment advisers that are registered with the SEC.

Registration of General Partner Entities

The SEC staff reconfirmed its earlier position that a special purpose vehicle (“SPV”) established by an investment adviser to a private fund to act as general partner or managing member of such fund does not need to register separately as an investment adviser if:

1. the investment adviser to a private fund establishes the SPV to act as the private fund’s general partner or managing member;
2. the SPV’s formation documents designate the investment adviser to manage the private fund’s assets;
3. all of the investment advisory activities of the SPV are subject to the Advisers Act and the rules thereunder, and the SPV is subject to examination by the SEC; and
4. the registered adviser subjects the SPV, its employees and persons acting on its behalf to the registered adviser’s supervision and control and, therefore, the SPV, all of its employees and the persons acting on its behalf are “persons associated with” the registered adviser (as defined in section 202(a)(17) of the Advisers Act).

The SEC also clarified that (i) this position would apply to advisers with multiple SPVs acting as general partners of funds and (ii) independent directors of an SPV do not need to be subject to the supervision and control of the investment adviser in order for the SPV to rely on the above position.

We note that few arrangements between advisers and general partners will conform to the letter of condition 2. above (as such designation rarely appears in a general partner’s formation documents). We believe it is reasonable for an adviser to rely on the guidance above, so long as the designation is made, directly or indirectly, in any fund-related document (including, without limitation, an advisory agreement between the fund and the adviser, an advisory agreement between the general partner and the adviser, or the fund formation documents themselves). We have reached out to the SEC staff for confirmation of this approach.

Multiple Entities in Control Relationships

The SEC staff stated its position that an investment adviser may file a single Form ADV (“filing adviser”) on behalf of itself and each other adviser that is controlled by, or under common control with, the filing adviser that is registering through a single registration with the filing adviser (each, a “relying adviser”) where the filing adviser and each relying adviser collectively conduct a single advisory business. The SEC staff took the position that, absent other facts suggesting that they conduct different businesses, a filing adviser and one or more relying advisers would collectively conduct a single advisory business for purposes of the letter, and, thus, a single registration would be appropriate, under the following circumstances:

- i. The filing adviser and each relying adviser advise only private funds and separate account clients that are qualified clients (as defined in Advisers Act rule 205-3) and are otherwise eligible to invest in the private funds advised by the filing adviser or a relying adviser and whose accounts pursue investment objectives and strategies that are substantially similar or otherwise related to those private funds.
- ii. Each relying adviser, its employees and the persons acting on its behalf are subject to the filing adviser's supervision and control and, therefore, each relying adviser, its employees and the persons acting on its behalf are "persons associated with" the filing adviser (as defined in section 202(a)(17) of the Advisers Act).
- iii. The filing adviser has its principal office and place of business in the United States and, therefore, all of the substantive provisions of the Advisers Act and the rules thereunder apply to the filing adviser's and each relying adviser's dealings with each of its clients, regardless of whether any client or the filing adviser or relying adviser providing the advice is a United States person.
- iv. The advisory activities of each relying adviser are subject to the Advisers Act and the rules thereunder, and each relying adviser is subject to examination by the Commission.
- v. The filing adviser and each relying adviser operate under a single code of ethics adopted in accordance with Advisers Act rule 204A-1 and a single set of written policies and procedures adopted and implemented in accordance with Advisers Act rule 206(4)-(7) and administered by a single chief compliance officer in accordance with that rule.
- vi. The filing adviser discloses in its Form ADV (Miscellaneous Section of Schedule D) that it and its relying advisers are together filing a single Form ADV in reliance on the position expressed in this letter and identifies each relying adviser by completing a separate Section 1.B., Schedule D, of Form ADV for each relying adviser and identifying it as such by including the notation "(relying adviser)."

The SEC staff added that each filing and relying adviser must not be prohibited from registering with the SEC by section 203A of the Advisers Act. For example, each adviser must separately have sufficient assets under management to register (i.e., generally \$100 million), or be in a control relationship with a registered adviser and have the same principal office and place of business as the registered adviser. A filing adviser and relying adviser must file a single Form ADV that relates to, and includes all information concerning, the filing adviser and each relying adviser (e.g., disciplinary information and ownership information), and must include this same information in any other reports or filing it must make under the Advisers Act (e.g., Form PF).

Finally, the SEC clarified that for purposes of determining whether two advisers are "operationally integrated" (e.g., for purposes of determining whether the assets under management of two advisers must be aggregated for determining whether the advisers satisfy a threshold for a federal registration exemption), an adviser unable to satisfy the conditions above to be a "relying adviser" with respect to a "filing adviser" may, nonetheless, be "operationally integrated" with the "filing adviser."

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If you would like to learn more about the issues raised in this alert, please contact your usual Ropes & Gray adviser.