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SEC Clarifies Registration Obligations of Advisory Affiliates

By Stephanie Thomas

In an interpretive letter dated January 18, 2012, the Office of Investment Adviser Regulation of the Division of Investment Management clarified the registration requirements of certain investment advisory affiliates.[1] The "no-action" guidance effectively permits investment advisers to private funds to include certain affiliated advisers on the adviser's Form ADV when they are considered a single advisory business.

MULTIPLE ADVISERS ENGAGED IN A SINGLE ADVISORY BUSINESS

The staff considered a situation when private fund advisers may advise their funds through a structure involving multiple entities, created for a variety of reasons (including tax, legal and regulatory). Though organized as separate legal entities, these advisers conduct a "single advisory business" because they:

- are subject to a unified compliance program;
- advise only private funds and certain separate accounts maintained on behalf of qualified clients;
- use the same or similar names; and/or
- hold themselves out to current and prospective private fund investors and advisory clients as conducting a single advisory business.

The staff said that it would not recommend enforcement action if only one of the advisers filed a single Form ADV that would cover other advisers that it controls or that are under common control when the advisers effectively conduct a single advisory business. The staff said that affiliated advisers could rely on this guidance ("relying advisers") when they comply with six conditions that evidenced the fact that the group was conducting a single advisory business. Advisers that are willing to comply with these conditions may, but are not required to, rely on this guidance. (That is, all the advisers may continue to file separate registration statements on Form ADV.)

Filing advisers and relying advisers must comply with the following conditions:

- Each of the filing adviser and relying adviser advises only private funds and certain separate account clients that are "qualified clients."
- Each relying adviser, along with its employees and others under its control, would be considered "persons associated with" the filing adviser.

[1] *American Bar Association, Business Law Section,* No-Action Letter (January 18, 2012), available at http://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm

- The filing adviser must have its principal place of business in the U.S., and all the substantive provisions of the Investment Advisers Act would apply to the dealings of the adviser and its affiliates with each of their clients, regardless of whether any client or the filing adviser or relying adviser providing the advice is a "United States person."
- The advisory activities of each relying adviser would be subject to the Investment Advisers Act and its rules, and they would be subject to examination by the SEC.
- A single compliance officer would be responsible for applying a single code of ethics and written compliance policies and procedures to all the relying advisers.
- The filing adviser discloses in its Form ADV that it and its relying advisers are together filing a single Form ADV in reliance on the staff's guidance.

SPVS ESTABLISHED BY AN ADVISER

In addition, the staff expanded its December 8, 2005, guidance concerning the registration obligations of special purpose vehicles (SPVs) created by an adviser.[2] In the 2005 letter, the staff took the position that a single SPV formed to act as a private fund's general partner or managing member need not register as an investment adviser, subject to certain conditions.[3] In the January 18, 2012, letter, the staff confirmed that its 2005 guidance also applied to a registered adviser with multiple SPVs.

The staff also expanded its 2005 guidance to address situations when an SPV has independent directors who are not subject to the supervision and control of the adviser that created the SPV. The staff confirmed that it would not recommend enforcement action when the SPVs do not separately register as an adviser if the adviser and the SPVs meet all of the conditions established in 2005, except that the only persons acting on their behalf that the registered adviser does not supervise and control are directors who are independent of the adviser.

[2] *American Bar Association Subcommittee on Private Investment Entities,* No-Action Letter (December 8, 2005), available at http://www.sec.gov/divisions/investment/noaction/aba120805.htm

[3] In the 2005 letter, the staff said that it would not recommend enforcement action if an SPV does not separately register as an investment adviser, provided:

- the investment adviser to a private fund establishes the SPV to act as the private fund's general partner or managing member;
- the SPV's formation documents designate the investment adviser to manage the private fund's assets;
- all of the investment advisory activities of the SPV are subject to the Investment Advisers Act and the rules thereunder, and the SPV is subject to examination by the SEC; and
- 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 Investment Advisers Act).

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