Proskauer

newsletter

February 2012
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Upcoming U.S. Regulatory and Filing Deadlines

The March 30, 2012 deadline for SEC registration of many fund managers (and February 14, 2012 deadline to submit the application to the SEC) has received the most attention in the media, but U.S. rules impose a host of new and old reporting obligations on both SEC registered and unregistered investment advisers and even on many unregistered non-U.S. advisers. The list below briefly summarizes some of these obligations. Given the complexity of many of the regulations and the number of recently adopted reporting requirements, we urge you to contact your Proskauer relationship attorney if you have any questions.

What to Do?	Who Must Do It?	Deadline
Application to register as investment adviser with SEC	Any adviser not within an available exemption[1]	February 14, 2012 (in order to be effective by March 30, 2012)
File Form ADV Part 1A as Exempt Reporting Adviser	Exempt private fund adviser or venture capital adviser[2]	March 30, 2012
File updated Form ADV Part 1	SEC registered advisers	90 days after adviser's fiscal year end
File updated Form ADV Part 2A	SEC registered investment advisers	90 days after adviser's fiscal year end
Deliver updated Form ADV Part 2A (or summary of changes) to clients	SEC registered investment advisers	120 days after adviser's fiscal year end
Annual compliance review	SEC registered advisers	Annually
Schedule 13D and 13G	Beneficial owner of 5% of a class of voting equity of	February 14, 2012

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[1] See our prior advisories here.

[2] See our prior advisories at here.

What to Do?	Who Must Do It?	Deadline
	U.S. public company	
Schedule 13F	Manager of $100 million in U.S. listed equities	February 14, 2012
Form 13H	Large trader of U.S. listed equities who trades 2 million shares or $20 million on any day or 20 million shares or $200 million in any month[3]	Amendment due February 14, 2012 if any changes to report
Send annual privacy notice to clients and investors	Most advisers	Annually
Form SLT	U.S. adviser to report at least $1 billion of (i) securities issued by U.S. clients to non-U.S. investors, plus (ii) non-U.S. securities owned by U.S. clients[4]	Monthly
Form SHC	U.S. adviser managing $100 million in non-U.S. securities held by U.S. clients[5]	March 2, 2012
Form PF	SEC-registered adviser managing $150 million in gross assets under management attributable to private funds[6]	***Hedge fund advisers*** managing at least $5 billion in gross AUM must begin quarterly reporting within 60 days of the end of their first fiscal quarter to end after 6/15/12. Hedge fund managers with at least $1.5 billion in gross AUM must begin quarterly reporting within 60 days after the end of their first fiscal quarter to end after 12/15/12. ***Private liquidity fund***

[3] See our prior advisory at here.

[4] See our prior advisory at here.

[5] See discussion below.

[6] See our prior advisory at here.

What to Do?	Who Must Do It?	Deadline
		advisers managing at least $5 billion in gross AUM must begin quarterly reporting within 15 days of the end of their first fiscal quarter to end after 6/15/12. Private liquidity fund advisers with at least $1.5 billion in gross AUM must begin quarterly reporting within 15 days after the end of their first fiscal quarter to end after 12/15/12. ***Private equity fund advisers*** with at least $5 billion in gross AUM must begin annual reporting within 120 days after the end of their first fiscal year to end after 6/15/12. ***All other private fund advisers*** with at least $150 million in gross AUM must begin reporting annually within 120 days after the end of their first fiscal year to end after 12/15/12.
FBAR	U.S. person with interest in or signature power over non-U.S. bank accounts with more than $10,000. In general, there is currently no FBAR filing requirement in respect of hedge fund and private equity fund interests, although there may be such a requirement in the future.	June 30, 2012

In the last five years (2007-2011), our Private Investment Funds Group has represented sponsors in closing more than 500 funds with over $112 billion in committed capital and closed more than 1800 investments in all types of funds representing over $61 billion. We also advised on over 370 secondary purchases and sales.

SEC Registration of Many Advisers Required by March 30, 2012

Many advisers that were previously exempt from registration with the SEC under the U.S. Investment Advisers Act of 1940 (Advisers Act) must now become registered not later than March 30, 2012. As the SEC may take up to 45 days to review a registration application, advisers should file their application for registration not later than February 14, 2012. The SEC can declare a registration effective at any time after the application is filed, so an adviser should have completed preparation of an appropriate compliance manual and code of ethics and taken other steps to be in compliance with SEC rules when an adviser submits its application. See our prior client alert for a discussion of the new rules and available exemptions.

Exempt Reporting Advisers (Including Many Non-U.S. Advisers) Must File Partial Form ADV Part 1 by March 30, 2012

Many advisers that remain exempt from full registration under the new SEC rules may still qualify as "exempt reporting advisers" and must complete and file portions of Part 1A of Form ADV with the SEC not later than March 30, 2012. Any adviser relying on either the so-called "venture capital adviser" exemption or the $150 million "private fund adviser" is an "exempt reporting adviser."

A non-U.S. adviser relying on the "foreign private adviser" exemption is exempt both from SEC registration and from filing as an "exempt reporting adviser" if the adviser:

- has no place of business in the United States,
- has less than 15 clients or investors in private funds from the United States, and
- manages or advises less than $25 million in aggregate gross assets for U.S. clients and investors.

However, a non-U.S. adviser relying on the "private fund adviser" exemption must file certain information with the SEC on Form ADV Part 1 as an "exempt reporting adviser". A non-U.S. adviser can qualify as a "private fund adviser" if:

- its principal office and place of business is outside the United States,
- it does not manage any separate accounts for any U.S. persons, and
- private funds that it manages from an office in the United States in aggregate have less than $150 million in gross assets.

The information to be filed includes information about the ownership of the investment adviser and the funds that it manages, and will become publicly available through the SEC's website. See our prior client alerts [here] and [here] describing these exemptions in greater detail.

SEC Amends Accredited Investor Definition

In December 2011, the SEC amended the "accredited investor" definition under Rule 501(a)(5) of Regulation D to conform to the requirements of Section 413(a) of the Dodd-Frank Act. The "accredited investor" definition is used to determine an individual's eligibility under the Securities Act of 1933 to invest in certain unregistered securities offerings. The SEC amended the provision that includes as an "accredited investor" an individual who has a net worth, alone or together with a spouse, of at least $1 million. Under the revised rule, the value of an individual's primary residence, net of any mortgage debt, must be excluded from the $1 million net worth calculation. However, debt secured by an individual's primary residence, up to the estimated fair market value of the residence, need not be considered as a liability in the calculation, unless the borrowing occurred within 60 days prior to the purchase of applicable securities and was not connected with acquiring the primary residence.

In some cases, the amended rule allows those who qualified as accredited investors under the prior net worth standard in connection with earlier private placements to continue to use that standard for certain follow-on investments. The amendments take effect on February 27, 2012.

This follows the adoption by the SEC in July 2011 of an order increasing the minimum dollar thresholds used to determine "qualified clients" under Rule 205-3 under the Advisers Act, which is the rule that establishes from which clients SEC registered investment advisers are permitted to receive performance based compensation. Under the order, a registered investment adviser is only permitted to charge performance-based compensation to a client who, at the time of entering into the advisory contract with the adviser, has either (i) $1 million in assets under management with the adviser or (ii) a net worth of at least $2 million. Existing agreements with clients entered into before the rule became effective are "grandfathered" and do not need to be amended or terminated.

The SEC in May 2011 proposed more extensive amendments to the "qualified client" test in Rule 205-3, including automatic indexing of the thresholds for inflation, excluding the value of a primary residence from the calculation of person's net worth and adding certain transitional provisions allowing for the continuation of certain arrangements (including permitting new investments under existing grandfathered arrangements). The proposed amendments are still pending.

U.S. Advisers Managing at Least $100 Million in Non-U.S. Securities Must File Form SHC in Q1 2012

Certain U.S.-resident investment advisers that manage at least $100 million in non-U.S. securities (including interests in non-U.S. master funds) held by U.S.-resident funds and accounts, or that have been notified by the Federal Reserve Bank of New York (FRBNY) that they are subject to a reporting obligation, must file a Report of U.S. Ownership of Foreign Securities, Including Selected Money Market Instruments (Form SHC) with the FRBNY not later than March 2, 2012 with respect to information as of December 31, 2011, unless exempted as described below.

Form SHC collects data on non-U.S. securities held by certain U.S.-resident custodians and "end-investors" (including investment advisers) for the purpose of computing the U.S.

balance of payment accounts. Unlike the annual Form SHCA, which must be submitted by the last business day in August, Form SHC is a benchmark report that is required to be filed by certain larger investment advisers, even if such advisors have not been contacted or directed to file by the FRBNY.

Subject to certain exceptions, Form SHC must be filed by U.S.-resident custodians (including U.S.-resident banks) and U.S.-resident end-investors (including U.S. investment advisers and U.S.-resident funds managed by non-U.S. advisers) that have consolidated holdings of reportable non-U.S. securities with a fair value of at least $100 million as of December 31, 2011. In some circumstances, two entities may share a reporting obligation (such as in the case of a U.S.-resident pension fund and its unaffiliated investment adviser). In such cases, the FRBNY expects the entities that share the reporting obligation to confer with each other and ensure that the reporting obligation is fulfilled by one, but not both, of the responsible parties.

Reportable Securities and Exemptions

In calculating consolidated reportable non-U.S. securities ("reportable securities"), a U.S. investment adviser should aggregate all non-U.S. securities that are held by U.S. funds and accounts. Reportable securities include: equity securities (including partnership interests and interests in master funds), short-term debt securities, long term debt securities and asset-backed securities. Reportable securities do not include assets that are not securities, such as loans and loan participation certificates, direct investments (as defined below) and non-U.S. securities temporarily acquired under reverse repurchase, borrowing, or lending agreements.

Similar to the Form SLT report, "direct investments" are excluded from the definition of reportable securities, and accordingly are not reported on Form SHC. A "direct investment" is defined by Form SHC as any direct or indirect voting interest of 10% or more in a company. Investments in an offshore master fund controlled by the investor will ordinarily be considered direct investments, whereas investments by a typical feeder fund in a master fund will be considered portfolio investments (and not direct investments) due to the lack of control by the feeder fund of the master fund. A limited partnership interest is considered a portfolio investment, whereas a general partner interest is considered a direct investment.

A U.S. feeder fund that holds an interest in a non-U.S. master fund with a fair value greater than $100 million typically will exceed the reporting threshold (and be required to complete Form SHC if not exempt), regardless of the assets held by the master fund.

Form SHC is comprised of three schedules. Schedule 1 requires basic identifying information and a summary of data reported on Schedules 2 and 3. Schedule 1 must be filled out by all persons required to submit Form SHC. Schedule 2 provides details on each reportable security. A filer will need to fill out a separate Schedule 2 for each reportable security. Investment advisers are exempt from Schedule 2 if they manage less than $100 million in reportable securities custodied with a non-U.S. resident custodian or central securities depository (CSD). Schedule 3 provides information aggregated by each U.S. custodian. An investment adviser will be exempt from Schedule 3 unless the adviser has entrusted at least $100 million in reportable securities (from U.S.-resident funds and accounts) to any one unaffiliated U.S.-resident custodian that is not a U.S.-resident CSD.

Investment advisers who have been notified by the FRBNY of an obligation to complete Form SHC must submit Schedule 1 of Form SHC, even if exempt from Schedule 2 and

Schedule 3. Advisers who were not notified by the FRBNY will be exempt from Form SHC in its entirety if exempt from both Schedule 2 and Schedule 3, regardless of the amount of reportable securities such adviser manages.

Recent Developments in Regulation of Placement Agents: California and New York

California

On October 9, 2011, California Governor Jerry Brown signed into law Senate Bill 398 (SB 398), which makes certain clarifying changes to existing laws requiring placement agents to register as lobbyists.

Under California law effective since January 1, 2011 (AB 1743), the term "placement agent" includes both third party solicitors and an investment adviser's in-house marketers who do not spend at least one-third of their time managing the adviser's assets. Placement agents are required to register as lobbyists if they solicit investments from any of California's statewide retirement systems (CalPERS, CalSTRS and the University of California Pension System). Placement agents are further prohibited from accepting compensation that is contingent upon a statewide retirement system's decision to invest. Local California pension systems have the option to require placement agents to register under local lobbying ordinances. See our prior client alert.

AB 1743 also creates a safe harbor from state lobbyist registration for investment advisers that (1) are registered with the SEC as investment advisers or broker dealers, (2) solicited a state retirement systems pursuant to a competitive bidding process, and (3) agreed to be subject to fiduciary obligations imposed on California public pension plan trustees. Under SB 398, placement agents may also avoid *local* requirements to register as lobbyists if they comply with the requirements of the safe harbor.

SB 398 also contains several clarifications of AB 1743:

- Managers of SEC-registered investment companies (such as mutual funds) are not subject to potential lobbyist registration under AB 1743.
- Investment advisers to separate account portfolios are subject to potential lobbyist registration under AB 1743 to the same extent as advisers to pooled investment vehicles.
- Publicly traded investment advisers are not subject to AB 1743 solely because a California retirement system invests in the adviser's own shares.
- "Securities" for purposes of AB 1743 include limited partnership and limited liability company interests.

New York State

On November 10, 2011, the New York State Department of Financial Services issued as an emergency measure a Third Amendment to Regulation No. 85 (11 NYCRR 136), which continues the existing prohibition on the New York State Common Retirement Fund (NYCRF) investing with outside investment advisers who use placement agents or other third-party intermediaries to obtain investments from the NYCRF.

On April 26, 2011, New York Governor Andrew Cuomo had directed state regulators to issue permanent regulations "banning placement agents, lobbyists and, for the first time, elected officials from the pension fund business." As of this writing, however, no such permanent regulations have been circulated for comment. Regulations issued as emergency measures expire after 90 days, unless renewed for another 90 days by the Department of Financial Services.

In addition, a bill written by New York State Comptroller Thomas DiNapoli and introduced in the New York State Assembly on May 23, 2011 would codify the current prohibition on the use of placement agents and other third party intermediaries in connection with soliciting investments from the NYCRF. As of January 4, 2012, the legislation had been referred to committee, but no votes had been taken.

New York City

An Advisory Opinion of the New York City Clerk's Office (2011-3) may provide some limited relief from the requirement of an investment adviser to register as a lobbyist under New York City's Lobbying Law when seeking to manage assets of the New York City Employees' Retirement System, the New York City Police Pension Fund, the New York Fire Department Pension Fund, the New York City Teachers' Retirement System and the New York City Board of Education Retirement System. In the Advisory Opinion, the Clerk concludes that investment advisers who are solicited through the regular procurement process of the Comptroller's Office do not engage in lobbying when communicating with the Comptroller's investment staff. Specifically, advisers may respond to a request for proposal issued by the Comptroller's office, make in-person presentations when requested to do so and answer questions posed by the Comptroller's staff without registering as lobbyists under the Lobbying Law. The Opinion also clarified that communication between an investment adviser and the comptroller's staff in the regular course of administering an existing investment contract did not constitute lobbying. Such communications may include discussing the adviser's performance and general market conditions.

On the other hand, the Clerk's Office also stated in another Advisory Opinion (2011-2) that no exemption from registration existed under the Lobbying Law for "persons who attempt to influence the Pension Funds' decision to enter into limited partnership agreements or contracts for alternative investments" when the adviser does not respond to an RFP and otherwise stay within the confines of the regular procurement process.

SEC and CFTC Oversight of Derivatives: A Status Report

The Dodd-Frank Act established the broad outlines of a new regulatory scheme for the over-the-counter derivatives market. As we explained in a prior alert, the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) were tasked under Dodd-Frank with creating a comprehensive regulatory framework. The combined effort of the two agencies has so far produced over 70 proposed and final rules concerning derivatives.

Both the SEC and CFTC have delayed the adoption of various regulations on derivatives because of the burdens of other Dodd-Frank rulemaking, litigation and public opposition to the rule proposals. In fact, one of the cornerstones of the new rules – the definitions of the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer,"

"major swap participant" and "major security-based swap participant" – has still not been adopted, even while the two agencies proceeded in adopting other derivatives rules.

What Rules Have Been Adopted So Far?

The CFTC had published 17 final rules on derivatives as of January 20, 2012. The most important rulemaking concerning derivatives includes the rules on swap data repositories, the core duties and principles for derivatives clearing organizations and rules for large trader reporting of physical commodity swaps. The controversial rules on position limits for futures and swaps have been finalized and can be accessed on the CFTC website, and litigation challenging the rules was recently dismissed. The CFTC also recently approved final rules on the registration of swap dealers and major swap participants, the protection of cleared swaps customer contracts and collateral and business conduct standards for swap dealers and major swap participants.

The CFTC's final rule on the Protection of Cleared Swaps Customer Contracts and Collateral and Conforming Amendments to the Commodity Broker Bankruptcy Provisions ("segregation rule") has garnered the most attention of the three. The segregation rule requires that derivatives clearing organizations and futures commission merchants (FCMs) segregate customer collateral that supports cleared swaps from their own property. In pre-bankruptcy situations, the new rules permit the FCM to keep cleared swaps customer collateral together in a single omnibus customer account. However, the derivatives clearing organizations may not use the collateral of FCM customers to cover an FCM default. These new rules are intended to build on customer protections included in the rule on core clearinghouse principles that was adopted in October 2011.

The CFTC final rules on the registration of swap dealers and major swap participants (MSPs), as well as the related rules on business conduct standards for swap dealers and MSPs, prohibit fraud, define the duties of swap dealers and MSPs to their counterparties and adopt various requirements relating to recordkeeping and compliance policies and procedures. The final rules also require swap dealers and MSPs to become and remain members of a registered futures association, such as the National Futures Association (NFA).

The SEC proposed many rules on derivatives last year, but has only adopted in final form two rules concerning derivatives. The SEC "readopted" beneficial ownership rules as they apply to security-based swaps, and the SEC adopted rules for interim reporting of security-based swap transactions. The interim rule requires parties to security-based swaps to keep records of all such transactions and to report such information to the SEC or to a registered security-based swap data repository if requested. The SEC has proposed thirteen rules concerning derivatives that are still pending, the most controversial being the concept release on the use of derivatives by registered investment companies and proposed rules (which are similar and proposed in consultation with the CFTC) on swap data repositories. The SEC, like the CFTC, has extended the comment period for many of the proposals and acknowledged that the eventual adoption of derivatives rules would not take place as originally scheduled.

What Are the Agencies Doing Now?

The CFTC has recently proposed rules to establish a process for how designated contract market and swap execution facilities can make a swap available for trade. These proposed rules are still open for comment until February 13, 2012. The CFTC may also vote soon on final regulations that would set business conduct standards between swap

dealers and certain public clients, including pension funds, endowments and state and local governments. On January 11, 2012, the CFTC finally proposed rules on proprietary trading limits for banking entities, the last of the five regulatory agencies to propose limits under the so-called Volcker Rule.

In the first part of 2012, the CFTC intends to finalize eleven new rules, including rules providing for an end-user exemption and regulating commodity options. Later in 2012, the CFTC is scheduled to propose or adopt eleven more rules, including rules on block trades, extraterritoriality, and swap execution facilities.

The SEC scheduled the adoption of six proposed rules on derivatives for the end of 2011, but did not meet this schedule. Most importantly, both agencies are expected to adopt imminently final rules on the definitions of key terms used in Dodd-Frank with respect to derivative products and intermediaries. The SEC had also been scheduled to adopt before the end of 2011 derivatives rules governing real-time public reporting, swap data repositories, mandatory clearing, and end-user exceptions for the mandatory clearing of security-based swaps. However, the SEC failed to adopt or vote on these rule proposals. It is unclear how much further the scheduled adoption of derivatives rules will be delayed this year. Derivatives rules concerning anti-manipulation, security-based swap execution facilities, as well as the registration of swap dealers and conflicts of interest rules, will likely also be delayed from the original scheduled adoption in 2012.

Volcker Rule Status Report

The SEC and other regulators recently extended, until February 13, 2012, the period for submission of comments on the proposed regulations implementing the so-called "Volcker Rule" under the Dodd-Frank Act. The rule would prohibit banking entities from engaging in proprietary trading of securities, derivatives and certain other financial instruments for their own account and also prohibit them from owning, sponsoring or having certain relationships with a hedge fund, venture capital fund or private equity fund, subject to certain exemptions. The proposed rules have been subject to extensive public comment, and there is no clear schedule for adoption of final rules.

FINRA Proposes Rule to Require Disclosure and Notice Filing for Private Placements

The Financial Industry Regulatory Authority (FINRA) has proposed Rule 5123, which, if adopted, would require FINRA members and associated persons that offer or sell certain private placements to provide each investor prior to sale with a private placement memorandum or term sheet that describes the anticipated use of offering proceeds, the amount and type of offering expenses, and the amount and type of offering compensation. FINRA members or associated persons must file the disclosure documents with FINRA within 15 days after the first sale and updated disclosure documents within 15 days of these documents being amended or superseded. These proposed changes may, if adopted, have a significant impact on certain advisers who offer or sell interests in funds through third party marketers or placement agents, nearly all of which are required to be registered as broker-dealers and thus subject to the proposed rule.

The proposed rule would exempt several types of private placements, including offerings sold only to "qualified purchasers", as defined in Section 2(a)(51)(A) of the Investment Company Act of 1940 and offerings to employees and affiliates of the issuer. Therefore, private funds relying on the exemption under Section 3(c)(7) of the Investment Company Act will likely be exempt from the requirements of Rule 5123. However, although FINRA recently modified the proposal to add certain additional categories of exempt offerings, many private funds relying on the exemption under Section 3(c)(1) of the Investment Company Act will be subject to the reporting obligations of the rule as currently drafted.

Rule 5123(d) would accord confidential treatment to all documents and information filed pursuant to the rule and would provide that such documents and information may be used by FINRA solely for the purpose of determining compliance with FINRA rules or other applicable regulatory purposes as "deemed appropriate" by FINRA.

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following SEC approval. The implementation date will be no later than 180 days following SEC approval.

SEC Advisory on Use of Social Media by Investment Advisers

The SEC recently issued a Risk Alert cautioning investment advisers about the use of social media. Among the risks highlighted by the SEC were:

- information posted on social media sites is subject to general anti-fraud rules and principles as well as specific rules and principles governing marketing materials and advertisements used by investment advisers;
- information posted on social media sites relating to private funds may be deemed an improper advertisement of a private fund;
- certain common functions on social media sites might be considered improper "testimonials" about an investment adviser;
- information communicated through social media might be subject to recordkeeping requirements under SEC rules; and
- investment advisers should consider the adoption of policies designed to restrict and/or monitor the use of social media by employees in order to protect against a variety of potential violations, misuses or other improper practices involving social media.

EU Adopts Rules Limiting Short Sales

On November 15, 2011, the European Parliament adopted, with amendments, the European Commission's proposal for an EU Short Selling Regulation (SSR). The SSR now must be formally approved by the European Council before entering into force and is expected to be implemented on November 1, 2012. The SSR will apply directly to EU countries and does not require further local legislation to be passed to make it effective. The SSR has now become the subject of a consultation regarding draft technical advice issued by the European Securities Markets Authority on January 24, 2012. This is a consultation on further detail which must be added to SSR, such as a proposal that net short positions should be presented both as a percentage (rounded to two decimal places) of the issued share capital and as an equivalent number of shares.

The SSR defines a short sale as “any sale of a share or debt instrument which the seller does not own at the time of entering into the agreement to sell including such a sale where at the time of entering into the agreement to sell the seller has borrowed or agreed to borrow the share or debt instrument for delivery at settlement.”

The following are not, per se, a short sale: sale under a repo agreement, a transfer of securities under a securities lending agreement or a futures or derivative contract where it is agreed to sell securities at a specified price at a future date.

The following are exempted under the SSR: market making activities, primary market operations and short sales of shares whose principal market is outside the EU.

Equities

A short sale of listed shares can be made only when one of the following conditions is met:

- the share is borrowed or equivalent;
- an agreement to borrow the share has been made or equivalent; or
- an arrangement has been made with a third party where the third party has confirmed that the share has been located and measures have been taken necessary for a reasonable expectation that settlement can be effected when due.

Sovereign Debt

For short sales of EU sovereign debt, the position is the same as for shares, but instead of the third option above under equities, an arrangement must have been made with a third party where the third party has confirmed that the debt has been located or has otherwise reasonable expectation that settlement can be effected when due.

Reporting Requirements

A reporting regime has been proposed. For this purpose, a short position is defined as either a short sale of a share or entry into a transaction that creates or relates to a financial instrument other than the share, the effect of which is to confer a financial advantage on the person in the event of a decrease in the price or value of the share or debt instrument. Note that securities loans, repurchase agreements, futures and derivatives trades must be taken into account for the purpose of calculating the net short position that must be reported.

The following reporting requirements are proposed for listed shares:

- net short positions must be reported to the relevant national regulator when the position equals 0.2% of the issued share capital;
- a further report must be made at each 0.1 percentage point above the threshold;
- the above will remain confidential until the position reaches 0.5% of issued share capital, when public disclosure will be made;
- further public disclosure must be made at each 0.1 percentage point level above that threshold; and
- the reports and disclosures must include the identity of the person holding the short position.

If a net short position in EU sovereign debt reaches a threshold, a report will need to be made to the relevant national regulator. The threshold is to be stipulated by ESMA. The reporting will not be made public.

Intervention Powers

Wide powers are granted to national regulators and ESMA to be used in stressed market conditions. These powers include prohibiting or restricting short sales and similar trades, requiring lenders to notify regulators of any significant change in the fees requested for lending and temporarily restricting short selling of financial instruments where there has been a significant fall in the market price of an instrument. For liquid shares, this means a fall of at least 10%.

Next Steps

Implementation of the SSR is expected on November 1, 2012. The current consultation closes on February 13, 2012. ESMA expects to issue final recommendations to the EC by March 31, 2012.

EU Financial Transactions Tax

There has been much reported in the press recently about the proposed EU Financial Transactions Tax (FTT) following formal proposals from the EU Commission in October 2011.

The FTT as proposed would be imposed on transactions relating to financial instruments where at least one party to the transaction is a financial institution established in an EU member state. The tax would be imposed at a rate of 0.01% for derivative transactions and 0.1% for all other transactions. Each party to the transaction is jointly and severally liable for the tax. There are certain specific exemptions from the tax, but these are limited.

The terms "financial instruments" and "financial institution" are broadly defined, and the term "established" in the context of a financial institution being "established" in an EU member state also has a very broad reach. Under the proposal, a financial institution would be regarded as established in an EU member state if any of a number of conditions are fulfilled. These include being a party (as principal or agent) to a transaction with a financial or non-financial institution which is established in a member state. This obviously may have implications for institutions and investors outside the EU.

The financial services and hedge fund industries have attacked the proposed measures as presenting an unreasonable burden on their activities that is likely to drive business away from Europe. Some surveys have suggested that many hedge funds would relocate outside the EU if the FTT were to come into force. Opposition to the proposal has been particularly strong in the UK, and it is possible that the UK government will seek to veto the proposal. Recently, other European leaders have admitted that further analysis is required before the measures should be adopted.

Change in New York City Audit Position Could Result in Increase in Unincorporated Business Tax

The New York City Department of Finance (the "Finance Department") is reported to be considering a new audit position regarding the application of the New York City unincorporated business tax ("UBT") to carried interest income received by investment advisers of private investment funds operating in New York City. Many private investment funds are organized with both a general partner or other entity that receives a carried interest in the form of a special performance-based allocation of profits (which generally is not subject to UBT if it does not receive other income) and a management company that receives management fee income (and is subject to UBT). Under the new position reportedly being considered by the Finance Department, carried interest income earned by a general partner will continue to generally be exempt from UBT. However, a portion of the expenses incurred by the management company must be allocated to the general partner. This change will have the effect of decreasing the available deductions usable by the management company against its unincorporated business taxable income, resulting in an increase in the net income of the management company and the amount of UBT payable by the management company. The extent of any potential expense reallocation is unknown. To our knowledge, this position has not yet been asserted on audit, and no official guidance has yet been released on this issue.

Cayman Islands to Require Registration of Master Funds by March 21, 2012

On December 5, 2011, the Cayman Islands legislature passed the Mutual Funds (Amendment) Bill 2011, requiring new and existing master funds in open-ended master-feeder fund complexes to register with the Cayman Islands Monetary Authority (CIMA). Existing master funds organized in the Cayman Islands have until March 21, 2012 to register with CIMA, and all new Cayman Islands master funds are now subject to registration.

Registration with CIMA will not differ significantly from the current registration requirement for open-ended feeder funds organized under the laws of the Cayman Islands, and will include the payment of an initial fee together with the filing of Form MF4. Each registered master fund will then be required on an annual basis to pay a fee and file audited financial statements signed off by a Cayman-approved auditor and an FAR Form within six months of year end.

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IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter that is contained in this document.

Our Private Investment Funds Group comprises more than 100 lawyers and advises clients worldwide on all of the legal and business issues important to private equity, venture capital and hedge funds and their managers, including structuring investment vehicles of all types, portfolio company investments, institutional investor representation and secondary purchases and sales.

This newsletter for clients of our Private Investment Funds Practice discusses recent developments affecting hedge funds and private equity funds.

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This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

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