

SEC Issues No-Action Letter Regarding Registration of Affiliates of Investment Advisers

January 23, 2012

With the February 14 deadline for many unregistered investment advisers to submit applications for registration rapidly approaching, on January 18, 2012, the Securities and Exchange Commission ("SEC") issued a no-action letter (the "ABA Letter") clarifying the registration requirements under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), that apply to certain affiliates of registered investment advisers.

General Partners and Managing Members of Private Funds:

In the ABA Letter, the SEC confirmed its prior position regarding certain general partners and managing members of private funds, as described in a 2005 no-action letter addressed to the American Bar Association's Subcommittee on Private Investment Entities.

In the 2005 letter, the SEC staff stated that it would not take enforcement action against a registered adviser and an affiliated general partner or managing member that it formed (each such entity, an "SPV") if the SPV did not separately register under the Advisers Act, provided that (a) the investment adviser established the SPV to act as the general partner or managing member of a private fund; (b) the SPV's formation documents designated the investment adviser to manage the private fund's assets; (c) 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 (d) the registered adviser subjects the SPV, its employees and persons acting on its behalf to the registered adviser's supervision and control.

In the ABA Letter, the SEC also confirmed that its position is not limited to a registered adviser with a single SPV, but is also a no-action position with respect to an adviser that has multiple SPVs. The SEC further confirmed that if an SPV has certain directors who are independent of the registered adviser and the SPV, and who are, therefore, not "persons associated with" the registered adviser, the SPV may still avoid registration if all of the other conditions are satisfied.

Commonly-controlled Investment Advisers:

The ABA Letter also addresses the circumstances under which several commonly-controlled investment advisers will be deemed to conduct a single advisory business and may file a single registration application on Form ADV under the Advisers Act. An investment adviser may file a single Form ADV (the "filing adviser") on behalf of itself and each other adviser that is registering through such Form ADV and that is controlled by or under common control with the filing adviser (each, a "relying adviser"), if both the filing adviser and the relying advisers collectively conduct a single advisory business.

The SEC staff stated that, in order to file a single Form ADV on behalf of a filing adviser and one or more relying advisers, both the filing adviser and each relying adviser must be eligible to register with the SEC, either because each adviser (i) has sufficient assets under management to register, (ii) is otherwise eligible under the Advisers Act (for example, because the group of advisers is commonly-controlled and shares a principal place of business), or (iii) is part of an "operationally integrated" group of advisers that taken together would be required to register. The Form ADV must contain all information related to the filing adviser and all relying advisers, including ownership and disciplinary information. This information also must be included in all reports and filings made by the adviser under the Advisers Act (for example, Form PF).

Absent other factors suggesting that they conduct different businesses, a filing adviser and its relying advisers collectively conduct a single advisory business (and may file a single registration application) under the following circumstances:

(1) The filing adviser and each relying adviser advise only private funds, and separate account clients that (i) are "qualified clients" (as defined in Rule 205-3 under the Advisers Act), (ii) are otherwise eligible to invest in such private funds and (iii) whose accounts pursue investment objectives and strategies that are substantially similar or otherwise related to those private funds.

(2) 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).

(3) The filing adviser has its principal office and place of business in the United States.

(4) 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 SEC.

(5) The filing adviser and each relying adviser operate under a single code of ethics and a single set of written policies and procedures adopted and implemented in accordance with the Advisers Act, and administered by a single chief compliance officer.

(6) The filing adviser discloses in its Form ADV (in the 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 the ABA Letter, and identifies each relying adviser by completing a separate Section 1.B. of Schedule D for each relying adviser and identifying it as such by including the notation "(relying adviser)."

The SEC also stated that two or more related advisers that do not meet all the criteria to file a single Form ADV may nonetheless be "operationally integrated" and may be required to register using separate Form ADVs.

Although an adviser with a principal place of business outside of the United States may not be the "filing adviser" on behalf of a group under the ABA Letter, such adviser may be a "relying adviser", or may structure its advisory business in reliance on the *Unibanco* and other no-action letters previously issued by the SEC. Please contact your Proskauer relationship attorney if you have any questions about the issues associated with investment adviser registration.

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