

SEC Confirms Guidance on Registration of Affiliates of Registered Investment Advisers

The Securities and Exchange Commission (the “SEC”) recently released a no-action letter regarding various issues regarding the status under the U.S. Investment Advisers Act of 1940 (the “Advisers Act”) of certain private fund general partners and investment advisers that related to investment advisers that are registered with the SEC.

Registration of Affiliated Entities

In a December 8, 2005 letter addressed to the American Bar Association’s Subcommittee on Private Investment Entities (“2005 Staff Letter”), the SEC took the position that certain special purpose vehicles (“SPVs”) created by a registered adviser are not required to register under the Investment Advisers Act of 1940 as a result of their activities as associated persons.¹ In that letter, the SEC took the position that it would not recommend enforcement action to the Commission under section 203(a) or section 208(d) of the Advisers Act against a registered adviser and an SPV if the SPV does not separately register as an investment adviser, subject to the following representations and undertakings (collectively, the “2005 Conditions”):

- 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 assets²;
- 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 Commission; and
- the registered adviser subjects the SPV, its employees and persons acting on its behalf to the registered adviser’s supervision and control³ 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).

¹ See American Bar Association Subcommittee on Private Investment Entities, SEC Staff Letter (Dec. 8, 2005) at Question and Answer G.1. References to the 2005 Staff Letter in this response refer only to the position of the staff expressed in Question and Answer G.1.

² We note that rarely would an SPV’s formation documents include a provision compliant with clause (ii). We anticipate that further guidance from the SEC will allow compliance with clause (ii) based on advisory agreements between the investment advisers and the SPV.

³ The SEC noted that, for example, all of the employees of the SPV and persons acting on its behalf would be subject to the registered adviser’s code of ethics (see Advisers Act rule 204A-1) and compliance policies and procedures (see Advisers Act rule 206(4)-7).

Subject to the 2005 Conditions, the SPV would look to and essentially rely upon the registered adviser's registration with the Commission in not submitting a separate Form ADV.

Multiple Entities in Control Relationships

The SEC stated its position that an investment adviser may file (or amend) 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. Absent other facts suggesting that they conduct different businesses, a filing adviser and one or more relying advisers would in the SEC's view collectively conduct a single advisory business for purposes of this letter, and thus a single registration would be appropriate,⁴ under the following circumstances:

- 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.
- 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).
- 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.
- 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
- 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.
- 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)."

Finally, the SEC clarified that for purposes of determining whether two advisers are "operationally integrated" (e.g. for purposes of determining whether assets under management of two advisers must be aggregated for determining whether the advisers satisfy a threshold for 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."

⁴ To satisfy the requirements of Form ADV while using a single registration, the filing adviser must file, and update as required, a single Form ADV (Parts 1 and 2) that relates to, and includes all information concerning, the filing adviser and each relying adviser (e.g., disciplinary information and ownership information on Schedules A and B), and must include this same information in any other reports or filings it must make under the Advisers Act or the rules thereunder (e.g., Form PF).

If you would like to learn more about the issues raised in this alert, please contact your Kaye Scholer adviser.

Chicago Office
+1.312.583.2300

Frankfurt Office
+49.69.25494.0

London Office
+44.20.7105.0500

Los Angeles Office
+1.310.788.1000

New York Office
+1.212.836.8000

Palo Alto Office
+1.650.319.4500

Shanghai Office
+86.21.2208.3600

Washington, DC Office
+1.202.682.3500

West Palm Beach Office
+1.561.802.3230

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