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**SEC Registration of Investment Advisers:  
New No-Action Letter Permitting Related Advisers to  
File Single Form ADV**

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Telephone Seminar/Audio Webcast

**SEC Registration of Investment Advisers:  
New No-Action Letter Permitting Related Advisers to File Single Form ADV**

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**SEC Registration of Investment Advisers:  
New No-Action Letter Permitting Related Advisers to File Single Form ADV  
February 7, 2012  
Outline by Marc E. Elovitz, Schulte Roth & Zabel LLP**

**I. Registration of Investment Advisory Affiliates (*American Bar Association, Business Law Section, SEC Staff Letter (Jan. 18, 2012) (the "Letter")*)**

- A. Fund General Partners, Managing Members and Similar SPVs generally do not need to separately register.
1. The Letter confirms earlier guidance in ABA Subcommittee on Private Investment Entities, SEC staff letter (Dec. 8, 2005) that an SPV does not need to separately register subject to the 2005 Conditions:
    - a. The investment adviser to a private fund establishes the SPV to act as the private fund's general partner or managing member
    - b. The SPV's formation documents designate 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 SEC examination
    - d. 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"
  2. The Letter also expands and clarifies the Staff's previous position
    - a. This position applies to registered advisers with single or multiple SPVs.
    - b. An SPV with independent directors may also rely on this position provided that those independent directors are the only persons acting on the SPV's behalf that the registered adviser does not supervise and control, and thus are not persons associated with the registered adviser

## B. Investment Advisory Affiliates -- Single Registration

1. The Staff's response permits a registered adviser (the filing adviser) to file a single Form ADV -- for the filing adviser and its affiliates (the relying advisers) -- provided that the filing adviser's affiliates are controlled by or under common control with the filing adviser and the filing adviser and each relying adviser collectively conduct a single advisory business as set forth in the no-action letter.
  - a. Many registered advisers have advisory affiliates formed to manage different funds, to permit different compensation arrangement structures or formed for tax, liability or other purposes.
  - b. Many U.S. advisers also have international affiliates (in the UK, Hong Kong or elsewhere)
    - i. International affiliates may provide research, advice or trading services to the U.S. registered adviser and/or the private funds
    - ii. May be structured as wholly-owned subsidiaries with branch offices in these countries or local entities
  - c. The response may permit a registered adviser to include these relying adviser affiliates in one single registration on Form ADV
  - d. The Staff's response applies only in situations where the filing adviser has its principal office and place of business in the U.S.
2. A filing adviser and relying advisers would, in the Staff's view, collectively conduct a single advisory business and thus a single registration would be appropriate under the following circumstances (absent other facts suggesting that they conduct different businesses)
  - a. 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.

- b. Each relying adviser, its employees and the persons acting on its behalf are subject to the filing adviser's supervision and control and are thus "persons associated with the filing adviser.
  - c. 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 rules thereunder apply to the filing adviser's and each of the 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.
  - d. 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.
  - e. The filing adviser and each relying adviser operate under a single code of ethics and compliance policies in accordance with Advisers Act and administered by a single chief compliance officer.
    - i. The Staff noted, however, that a relying adviser operating in a different jurisdiction may have obligations that differ from the filing adviser or another relying adviser.
  - f. 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).
3. Filing a single registration is permitted subject to the conditions -- it is not required and advisers have the option to separately file if they otherwise qualify
- a. The filing adviser and each relying adviser must not be prohibited from registering with the SEC by section 203A of the Advisers Act. Accordingly, the filing adviser and each relying adviser must, for example, individually have sufficient assets under management to

qualify to register or qualify for an exemption from section 203A's prohibition.

- b. For example, a relying adviser with assets under management of less than \$100 million would not be entitled to rely on the Letter (unless the relying adviser's principal office and place of business is in a state such as New York that does not examine state-registered advisers).
- c. A relying adviser exempted from section 203A by rule 203A-2 would be entitled to rely on the letter (i.e. an adviser under the control of or under common control with the filing adviser that shares the same principal office and place of business or an adviser that expects to be eligible for registration within 120 days).

## II. Form ADV Part 1A - Key Changes Impacting Private Fund Managers

### A. Deadlines

- 1. February 14, 2012 - New registering advisers need to file both the new Form ADV Part 1A and Part 2A Client Brochure
- 2. March 30, 2012
  - a. Existing registered advisers need to file new Form ADV Part 1A as part of annual update. All RIAs this year must file new Part 1A by March 30 regardless of fiscal year
  - b. Existing registered advisers with 12/31 fiscal year must also file annual update to Part 2A Client Brochure
  - c. Exempt Reporting Advisers need to complete and file applicable sections of Part 1A

### B. CCO contact information requested upfront (Items 1J and 1K)

- 1. Additional Regulatory Contact Person - if an additional person is authorized to receive information *and respond to questions*, may provide an additional contact
- 2. Exempt Reporting Advisers not required to have CCO, but if not must include a regulatory contact person in 1K
  - a. Important consideration for firms who do not have a dedicated CCO

- C. Investment Advisers with \$1 billion or more of assets on last day of most recent fiscal year (Item 1O)
  - 1. Dodd-Frank requires additional oversight of certain incentive compensation arrangements
  - 2. Based on most recent balance sheet of the adviser
- D. Legal Entity Identifier (Item 1P)
  - 1. Legal Entity Identifier standard is still in development
- E. SEC Registration Categories (Item 2A)
  - 1. Large advisory firms -- generally Regulatory AUM of \$100m or more
  - 2. Mid-sized advisory firms -- Regulatory AUM of \$25m or more but less than \$100m and either (a) not required to register with state securities authority or (b) not subject to examination by state (e.g., New York)
- F. Exempt Reporting Advisers (Item 2B)
  - 1. Exemptions
    - a. Venture Capital Adviser Exemption
    - b. Private Fund Adviser Exemption -- Advisers solely to private funds managing less than \$150m from an office in the U.S.
      - i. Non-US Advisers
        - 1. only AUM with respect to which the adviser provides continuous and regular supervisory or management services *from a place of business in the US* are counted toward the \$150m
        - 2. Non-US Adviser could manage more than \$150m of US fund assets from outside the US and still qualify
        - 3. Cannot have US clients or investors other than in private funds
  - 2. Complete only the following items on Part 1A:
    - a. Item 1 (Identifying Information)
    - b. Item 2.B (SEC Reporting by Exempt Reporting Advisers)
    - c. Item 3 (Form of Organization)
    - d. Item 6 (Other Business Activities)
    - e. Item 7 (Financial Industry Affiliations and Private Fund Reporting)

- f. Item 10 (Control Persons)
  - g. Item 11 (Disciplinary Disclosure)
  - h. Corresponding sections of Schedules A, B, C and D
- 3. Continue to be subject to the Adviser's Act's antifraud provisions under Section 206
- 4. SEC has authority to require ERAs to maintain records and provide reports
  - a. Recordkeeping requirements for ERAs will be addressed by the SEC in a future release
- 5. SEC has not sought to apply to ERAs most of the prophylactic rules adopted for registered advisers
- G. Foreign Private Adviser Exemption -- Exempt from any SEC registration or ADV filing requirement
  - 1. No place of business in US
  - 2. Fewer than 15 clients and investors in US in total
  - 3. Less than \$25m Regulatory AUM from US clients and investors in total
  - 4. Does not hold itself out to public in US as an investment adviser
  - 5. Does not act as adviser to registered investment company or business development company
- H. Information About Your Advisory Business (Item 5).
  - 1. Must now report actual numbers of employees -- not just ranges
  - 2. Break the number down by those that perform investment advisory functions
  - 3. From a practical perspective, turnover from year to year will be more transparent
  - 4. Also more detailed breakdown of types of clients required
- I. Regulatory Assets Under Management (Item 5F)
- J. Financial Industry Affiliations (Item 7A and Section 7.A. of Schedule D)
  - 1. Requires information about the registrant and Related Persons, *including foreign affiliates*
    - a. Related persons = advisory affiliates + any person that is under common control with you
  - 2. Foreign regulated entities would be disclosed in 7A of Schedule D
- K. Private Funds (Item 7B and Section 7.B.(1) of Schedule D)

1. Each Private Fund requires a separate Section 7.B.(1) of Schedule D
  - a. Unless another adviser reports this fund in Section 7.B.(1) (you are the subadviser) -- then you just complete Section 7.B.(2)
2. Can preserve anonymity of private funds - using numerical or alphabetical code
  - a. Some single investor funds with the investor name in the fund may want this option
3. For non-US advisers can disregard any private fund that is not a US person, not offered in US and not beneficially owned by any US person
  - a. Standalone Offshore Funds
4. Must acquire a private fund ID# via IARD website - ID#s required for each feeder
5. Different series with different securities portfolios generally regarded as different funds and require separate reporting (not side pockets)
6. Can complete one Section 7.B.(1) for each master/feeder structure.
  - a. Provided that answers to questions 8, 10, 21 and 23-28 are the same for all feeders
7. Fund of Funds -- includes a fund that invests 10% or more of its assets in other pooled investment vehicles
8. Regulatory AUM of private fund
9. Approximate number of fund's beneficial owners
  - a. Count in same manner as you would count for 3c1 or 3c7 purposes
10. Percent of private fund beneficially owned by you and related persons
11. Subadviser to private fund (17(a) and (b))
12. Other Investment Advisers to private fund (18(a) and (b))
13. Service Providers -- now have to disclose auditors, PBs, Custodians, *Administrators and Marketers*
14. Valuation - During your last fiscal year, what percentage of the fund's assets was valued by a person/administrator that is not a related person

L. Disclosure Information (Item 11)

1. Added new question - do any of the events below involve you or any of your supervised persons?



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