November 4, 2011

Newly Adopted Fund Manager Reporting Obligations

On October 26, 2011, the Securities and Exchange Commission (the "SEC") adopted new Rule 204(b)-1 under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), which requires certain federally registered investment advisers that serve as managers to hedge funds and private equity funds to make periodic filings on new Form PF with the SEC. The rule, along with companion Rule 4.27 under the Commodity Exchange Act, had been jointly proposed by the SEC and the Commodity Futures Trading Commission ("CFTC") to implement Sections 404 and 406 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted July 21, 2010 ("Dodd-Frank"). The SEC and CFTC stated that the design of Form PF is intended to provide the Financial Stability Oversight Council (the "FSOC") with information important to the FSOC's understanding and monitoring of systemic risk in the private fund industry. **Who Must File?** New Rule 204(b)-1 imposes reporting obligations on "Private Fund Advisers," defined as SEC-registered investment advisers with at least $150 million in private fund assets under management ("AUM").[1] Only Private Fund Advisers that are registered with the SEC (including those that are also registered with the CFTC) must file Form PF. Dodd-Frank created exemptions from SEC registration under the Advisers Act for advisers solely to venture capital funds and for advisers solely to private funds that in the aggregate have less than $150 million in AUM in the United States. Such exempt advisers are not required to file Form PF. Private Fund Advisers are divided by size into two broad groups - large advisers and smaller advisers. The amount of information reported and the frequency of the reporting depends on the group to which the adviser belongs. "Large Private Fund Advisers" are (i) advisers with at least $1.5 billion in AUM attributable to hedge funds, (ii) advisers with at least $2 billion in AUM attributable to private equity funds, or (iii) advisers to liquidity funds and registered money market funds with at least $1 billion in AUM. Smaller Private Fund Advisers are all other advisers to private funds having at least $150 million in AUM. To determine whether an adviser meets the $150 million AUM threshold or is a Large Private Fund Adviser for purposes of Form PF, advisers must aggregate together (i) assets of managed accounts advised by the firm that pursue substantially the same investment objective and strategy and invest in substantially the same positions as private funds advised by the firm unless the value of those accounts exceeds the value of the private funds with which they are managed; and (ii) assets of private funds advised by any of the adviser's "related persons" other than related persons that are separately operated.[2] Notably, for purposes of both the reporting thresholds and for responding to questions on Form PF, an adviser may exclude any assets under its management invested in the equity of other private funds. Further, if an adviser's principal office and place of business is outside of the United States, the adviser may exclude the assets of any private fund it manages that, during the adviser's last fiscal year, the interests in which were not a United States person, was not offered in the United States, and was not beneficially owned by a United States person. **Frequency and Contents of Reporting Obligations** Smaller Private Fund Advisers will be required to file Form PF annually, within 120 days of the end of the adviser's fiscal year. Such advisers are required to disclose information on Form PF regarding size, leverage, investor types and concentration, liquidity, and fund performance. Smaller Private Fund Advisers that manage hedge funds must also report on Form PF information regarding fund strategy, counterparty credit risk, and the use of trading and clearing mechanisms. Large Private Fund Advisers have more detailed reporting obligations on Form PF than do Smaller Private Fund Advisers, and, depending on the type of private fund the adviser manages, may be required to report such information more frequently. Large Private Fund Advisers that advise hedge funds must file Form PF within 60 days of the end of each fiscal quarter. Such advisers must, in addition to the basic reporting obligations for Smaller Private Fund Advisers, report on Form PF information regarding exposure by asset class, geographical concentration, and turnover by asset class. For each hedge fund with a net asset value of at least $500 million that is managed by a Large Private Fund Adviser, such adviser must also report information regarding that fund's exposures, leverage, risk profile and liquidity. Large Private Fund Advisers that advise private equity funds must file Form PF within 120 days of the end of the adviser's fiscal year. In addition to the basic reporting

obligations for Smaller Private Fund Advisers, Large Private Fund Advisers to private equity funds must also report information related to the extent of leverage incurred by their funds' portfolio companies, the use of bridge financing, and the funds' investments in financial institutions. Large Private Fund Advisers that advise liquidity funds must file Form PF within 15 days of the end of such advisers' fiscal quarter. In addition to the basic reporting obligations for Smaller Private Fund Advisers, such advisers must also respond to questions regarding the types of assets in each of their liquidity funds' portfolios, certain information relevant to the risk profile of each fund, and the extent to which the fund has a policy of complying with all aspects of the Investment Company Act of 1940's Rule 2a-7 regarding registered money market funds. **Initial Compliance Deadlines** Rule 204(b)-1 will be phased in during a two-stage period. Advisers with $5 billion or more in AUM managed in private funds must begin filing Form PF following the end of their first fiscal quarter or year, as applicable, which ends on or after June 15, 2012. All other Private Fund Advisers must begin filing Form PF following the end of their first fiscal quarter or year, as applicable, which ends on or after December 15, 2012. **Confidentiality** The SEC stated that it intends to keep the information reported on Form PF confidential, although the SEC may use such information in an enforcement action. Dodd-Frank amended the Advisers Act to preclude the SEC and CFTC from being compelled to reveal the Form PF information except in very limited circumstances. Dodd-Frank also contemplates the information on Form PF may be shared with other federal departments, agencies and self-regulatory organizations; however, any such department, agency or self-regulatory organization would be exempt from being compelled under the Freedom of Information Act to disclose to the public any information collected through Form PF. **Filing Fees and Format** Form PF must be filed through an electronic system designed by the SEC. The SEC has determined that the Financial Industry Regulatory Authority will develop and maintain the Form PF filing system through an extension of the Investment Adviser Registration Depository. The filing fee for initial and updating reports filed on Form PF is $150. **Definition of Hedge Fund, Liquidity Fund and Private Equity Fund** Form PF defines "hedge fund" generally to include any private fund having any one of three common characteristics of a hedge fund: (a) a performance fee that takes into account market value (instead of only realized gains); (b) high leverage (defined as borrowing in excess of one-half the fund's net asset value or having notional exposure in excess of twice the fund's net asset value); or (c) short selling. For purposes of Form PF, a commodity pool that is reported or required to be reported on Form PF is treated as a hedge fund. Expressly excluded from the definition of hedge fund are vehicles established for the purpose of issuing asset-backed securities ("securitized asset funds"). For purposes of Form PF, a "liquidity fund" is any private fund that seeks to generate income by investing in portfolios of short-term obligations in order to maintain a stable net asset value per unit or seeks to minimize principal volatility for investors. Form PF defines "private equity fund" as any private fund that is not a hedge fund, liquidity fund, real estate fund, securitized asset fund or venture capital fund and does not provide investors with redemption rights in the ordinary course. Form PF's Glossary of Terms defines "real estate fund" as "any private fund that is not a hedge fund, that does not provide investors with redemption rights in the ordinary course and that invests primarily in real estate and real estate related assets." A "venture capital fund" is any private fund meeting the definition of venture capital fund in Rule 203(l)-1 of the Advisers Act.[3] **Conclusion** Form PF imposes substantial new reporting obligations on Private Fund Advisers. Although such advisers have time before they must comply with the new SEC and CFTC Rules, advisers are strongly encouraged to familiarize themselves with the applicable reporting requirements soon in order to be sure all aspects are adequately addressed by filing time. The Day Pitney attorneys listed to the right are available to discuss any issues you may have regarding compliance with Form PF. Please see the following link for a copy of Form PF: http://www.sec.gov/rules/final/2011/ia-3308-formpf.pdf

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[1] A "private fund" is defined as an issuer that would be an investment company under the Investment Company Act of 1940 but for Section 3(c)(1) or 3(c)(7) of that Act.

[2] "Related Person" is defined generally as (1) all of the adviser's officers, partners, or directors (or any person performing similar functions); (2) all persons directly or indirectly controlling, controlled by, or under common control with the adviser; and (3) all of the adviser's employees (other than employees performing only clerical, administrative, support or similar functions).