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THE PROCESS OF REGISTRATION UNDER THE ADVISERS ACT

This is one of a series of memos issued by the Investment Funds Practice Group of Gibson Dunn to investment advisers to “private funds” that may be required to register under the Investment Advisers Act of 1940 as a result of amendments included in the Dodd-Frank Wall Street Reform and Consumer Protection Act. [Click here](#) to access the other memos.

The Registration Process

As a consequence of the Dodd-Frank Act, advisers to many hedge funds and private equity funds will be required to register as investment advisers with the SEC no later than July 21, 2011. An investment adviser registers with the SEC by filing a disclosure document (Form ADV¹) electronically through the IARD² and paying a modest fee.³ SEC-registered advisers are not subject to regulatory capital requirements; however, some states impose capital requirements on state-registered advisers.

Upon initial filing, the SEC reviews the Form ADV to confirm that (a) the application is complete, (b) the applicant is eligible to register and (c) the application is in compliance with the Advisers Act. In many cases, the SEC reviewer requests additional information regarding the adviser’s owners or affiliates, or copies of the adviser’s Code of Ethics, compliance policies and procedures, or other evidence to indicate that it will have in place an effective compliance program. Within 45 days of filing (or such period as to which the adviser consents), the SEC must either approve the registration or institute proceedings to determine whether registration should be denied.

Section 206 of the Advisers Act is deemed to impose on investment advisers a fiduciary duty to their advisory clients. Generally, this means that advisers must act in the best interests of their clients and, among other things, requires advisers to make full and fair disclosure of all material facts to their clients and prospective clients, particularly with respect to conflicts of interest or potential conflicts of interest. This duty applies to disclosures made in Form ADV and other materials provided to clients. In addition, under Section 207 of the Advisers Act, it is unlawful for any person willfully to make any untrue statement of a material fact in any

¹ The current Form ADV may be obtained at <http://www.sec.gov/about/forms/formadv.pdf>. Advisers registering on or after January 1, 2011 should refer to the Form ADV amendments available beginning on page 132 of the Final Rule release, which is available at <http://www.sec.gov/rules/final/2010/ia-3060.pdf>.

² The IARD is the Investment Adviser Registration Depository, which is a web-based system created by the SEC and the North American Securities Administrators Association (“[NASAA](#)”) to facilitate SEC and state registration of investment advisers. The IARD is operated by the Financial Industry Regulatory Authority in accordance with the requirements specified by the SEC and NASAA. Information on how to file with the Investment Adviser Registration Depository is available at <http://www.sec.gov/iard>.

³ Until January 1, 2011, new registrants may file paper copies of Part 2 of Form ADV with the SEC. For more information on filing electronically and registration fees, please refer to <http://www.sec.gov/divisions/investment/iard.shtml>.

registration application or report filed with the SEC or omit to state any material fact that is required to be stated therein.

During inspections, the examination staff review an adviser's filings with the SEC and other materials provided to clients to ensure that the adviser's disclosures are accurate, timely, and do not omit material information.

Form ADV

The SEC recently approved significant amendments to Form ADV. Advisers registering with the SEC after January 1, 2011 will be required to file the amended Form ADV⁴. The following discussion is based on Form ADV, as recently amended.

Form ADV consists of four parts: 1A, 1B, 2A and 2B. These parts (other than Part 1B, which is applicable only to state-registered advisers) are discussed in greater detail below.

Form ADV Part 1A

A registering adviser must file Part 1A and related schedules with the SEC. Once reviewed and accepted by the SEC, the filing is publicly available. Part 1A requires basic disclosure, mostly in check-the-box format, about the investment adviser and its business, including about its organization, compensation and business practices, owners, affiliates, executive officers, investment managers (including sub-advisors), actual and potential conflicts of interest, interests in client transactions, custody of clients' assets and the disciplinary history of itself and its "advisory affiliates".⁵

A registered adviser must keep Part 1A of its Form ADV current. Advisers are required to file an amended Part 1A with the SEC promptly to reflect certain changes in the information provided on Form ADV, for example, with respect to organizational changes or material disclosure events. At a minimum, an adviser must file an updated Part 1A with the SEC within 90 days after the end of its fiscal year.

Form ADV Part 2A (the Brochure)

A registered adviser must file with the SEC Part 2A, also referred to as the "brochure." Once reviewed and accepted by the SEC, the filing is publicly available. The adviser must deliver Part 2A to each client and prospective client before or at the time it enters into an advisory contract. The brochure must include plain English narrative disclosure regarding 18 disclosure items about the adviser, including its services, compensation, fees, business practices

⁴ An existing registrant whose fiscal year ends on or after December 31, 2010 must file a brochure that meets the requirements of amended Form ADV as part of its next annual updating amendment by no later than March 31, 2011.

⁵ "Advisory affiliates" are: (a) all of the adviser's officers, partners or directors (or any person performing similar functions); (b) all persons directly or indirectly controlling or controlled by the adviser; and (c) all of the adviser's current employees (other than employees performing only clerical, administrative, support or similar functions).

and policies, types of clients, investment strategies, disciplinary actions, custody, conflicts of interest and, potentially, certain financial information about an adviser if the adviser requires prepayment of fees.⁶

A registered adviser must file an updated brochure with the SEC within 90 days of the end of its fiscal year and, generally, promptly if the adviser's disclosures become materially inaccurate.⁷ In addition, within 120 days of the end of its fiscal year, the adviser must deliver to each client, without charge, either a current brochure or a summary of material changes to the brochure that includes an offer to deliver, and information on how to obtain, the current brochure. Interim amendments to Form ADV filed with the SEC are not required to be delivered to clients unless the amendment includes information regarding new or revised disciplinary actions.⁸

Form ADV Part 2B (the Brochure Supplement)

Part 2B, also referred to as the "brochure supplement", requires plain English narrative disclosure about the advisory personnel on whom the particular client relies for investment advice.⁹ Among other things, the brochure supplement must contain information on the educational background, business experience and disciplinary history, if any, of the relevant personnel. A brochure supplement must initially be provided to each client at or before the time that a specific supervised person begins to provide advisory services to that client. The brochure supplement may be a separate, stand-alone disclosure document that is not filed with the SEC, or may be included as part of the brochure filed with the SEC. In either case, the brochure supplement must be maintained in the adviser's files for examination by the SEC and, subject to certain limited exceptions, delivered to each client before or at the time the person covered in the brochure supplement begins to provide advisory services to the client.

The brochure supplement must be updated if any of the information therein becomes materially inaccurate but must be delivered to an adviser's clients only if the changes involve new disclosure of a disciplinary event or a material change to previously disclosed disciplinary information.

⁶ An advisers may omit disclosure of its fee schedule and certain other information to clients who are "qualified purchasers" as defined in section 2(a)(51)(A) of the Investment Company Act. "Qualified purchasers" generally are natural persons who own \$5 million or more in investments and persons who manage \$25 million or more in investments for their account or other accounts of other qualified purchasers.

⁷ An interim amendment will not be required to be filed if the previous filing is materially inaccurate solely as a result of changes in the amount of assets under management or small changes to the adviser's fee schedules. However, if an amendment is filed, and the amounts of assets under management, fees or other information is materially inaccurate, the adviser should amend this disclosure.

⁸ Even if delivery of an interim amendment is not required by the rules, advisers should consider whether their disclosure is appropriate either because of the adviser's fiduciary obligations or client relationships.

⁹ This includes any supervised person who formulates investment advice for that client and has direct client contact, or who makes discretionary investment decisions for that client's assets even if the person has no direct client contact.

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Additional Filing by Non-U.S. Residents

Each general partner and managing agent of a registered adviser that is “non-resident” in the United States must file an additional form — Form ADV-NR — at the time of the adviser’s initial application for registration. The form includes a consent to service of process and a power of attorney with the SEC as agent for service of process in civil actions.¹⁰

State Filings

Generally, an SEC-registered investment adviser must also file a notice with each state in which it has an office and may be required to file a notice in additional states depending on the make-up of its clients. Further, SEC-registered advisers should assess state licensing issues.¹¹

[Click here](#) for a discussion of the requirement for investment advisers to register with the SEC and the limited set of exemptions from registration.

[Click here](#) for a discussion of the principal regulatory consequences that follow from SEC registration.

[Click here](#) for a summary checklist of some of the key compliance obligations of SEC-registered investment advisers.



Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact any of the following, or the Gibson Dunn lawyer with whom you work:

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¹⁰ Form ADV defines a “non-resident” as (a) an individual who resides in any place not subject to the jurisdiction of the United States; (b) a corporation incorporated in and having its principal office and place of business in a place not subject to the jurisdiction of the United States; and (c) a partnership or other unincorporated organization or association that has its principal office and place of business in any place not subject to the jurisdiction of the United States.

¹¹ The adviser’s personnel who provide personalized investment advice may be required to pass the Series 65 or 66 qualification exam and be licensed in one or more states in which the person has a place of business and at least six clients who are natural persons and do not meet the net worth or investments test of the relevant state.

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