FundsTalk

May 2012

We are pleased to offer this issue of FundsTalk, Kramer Levin's newsletter devoted to discussing legal issues facing alternative asset managers and funds. Since 2008, the alternative asset market has seen a broad convergence of previously distinct asset classes and strategies, such as private equity, hedge funds, debt and claims trading, etc., into a single class – alternative assets. Extending that theme of convergence, this newsletter focuses on multi-disciplinary themes that affect all asset managers, with particular attention paid to new developments and changes in the legal landscape in which the industry operates. We hope you find the information contained in this newsletter to be helpful and profitable, and welcome your thoughts and suggestions.

In this Issue

1 **Structuring Your Venture Capital Fund to Qualify for the Advisers Registration Exemption**

2 **Form PF: The Next Dodd-Frank Hurdle for Advisers**

4 **Proposed Volcker Rule: Potential Perils to the Municipal Bond Market**

5 **Using Restrictive Covenants to Protect Alternative Asset Managers**

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The contents of this FundsTalk are intended for general informational purposes only, and individualized advice should be obtained to address any specific situation.

Structuring Your Venture Capital Fund to Qualify for the Advisers Registration Exemption

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Before the Dodd-Frank Act, fund managers generally did not register as investment advisers under the Investment Advisers Act of 1940 (the "Advisers Act") because they relied on the private adviser exemption. Title IV of the Dodd-Frank Act eliminated the private adviser exemption, but added a new exemption for managers of venture capital funds. If a manager is forming a venture capital fund, the manager should consider the factors set forth below to reduce the manager's registration burden under the Advisers Act.

Title IV of the Dodd-Frank Act eliminated the private adviser exemption, but added a new exemption for managers of venture capital funds.

Background

Under Section 203(*l*) of the Advisers Act, as amended by the Dodd-Frank Act, an adviser to a fund is not required to register under the Advisers Act if it advises solely one or more "venture capital funds," as defined by the SEC. Rule 203(*l*)-1 defines a "venture capital fund" as a private fund that: (1) represents to current and prospective investors that it pursues a venture capital strategy; (2) primarily invests in "qualifying investments"; (3) does not borrow, issue debt obligations, provide guarantees or otherwise incur leverage in excess of 15% of its capital contributions and uncalled committed capital; (4) does not offer redemption or liquidity rights to investors; and (5) is not registered under the Investment Company Act of 1940 and has not elected to be treated as a business development company.

continued on page 6

Form PF: The Next Dodd-Frank Hurdle for Advisers

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Background

In October 2011, the Securities and Exchange Commission ("SEC") and Commodities Futures Trading Commission ("CFTC") jointly adopted rules requiring some investment advisers to periodically report detailed information about private funds that they manage on new Form PF (Rule 204(b)-1 under the Investment Advisers Act of 1940 and Rule 4.27 under the Commodity Exchange Act). Although Form PF is a non-public filing, the information reported may be shared with other federal departments or agencies or self-regulatory organizations and used in examinations, investigations and enforcement proceedings. Broadly speaking, Form PF is intended to provide the Financial Stability Oversight Council, SEC and CFTC with a baseline of empirical data to assess and monitor systemic risks to U.S. financial markets posed by private funds and their advisers. While the final rules and Form PF are less oppressive than originally proposed, Form PF still imposes a significant burden on advisers to collect and report data about their funds to regulators. Although the regulators dropped the requirement that Form PF be certified "under penalty of perjury," the antifraud provisions of the Advisers Act still apply.

Who Files Form PF?

Registered investment advisers with $150 million in "regulatory assets under management" ("RAUM") from one or more private funds (issuers that would be investment companies but for Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940) must file Form PF. The frequency of the filing, and the extent of detail, varies based on the assets under management. Large private fund advisers have the greatest burdens and include, among others, advisers to "hedge funds" with at least $1.5 billion in RAUM and advisers to "private equity funds" with at least $2 billion in RAUM.

To determine whether a registered adviser meets the $150 million minimum reporting threshold or the large private fund adviser threshold for purposes of the Form PF reporting, the adviser must aggregate:

- "parallel managed accounts" (assets of managed accounts advised by the adviser that pursue substantively the same investment objective and strategy and invest side by side in substantially the same positions as the private funds advised by the adviser), unless the value of those accounts is above the value of the private funds;
- parallel funds (managed side by side, pursuing substantially the same objectives, strategy and positions);
- private fund assets advised by "related persons" of the reporting adviser other than related persons that are "separately operated" (as defined in the Instructions to Section 7.A. of Schedule D to Form ADV); and
- private funds in the same master-feeder structure.

Reporting Obligations

Form PF is broken into the following sections, for:

- All Reporting Advisers — Sections 1(a), 1(b), and 1(c)
  - Section 1a — Information about the reporting adviser and related persons
  - Section 1b — Information about the private funds advised by the reporting adviser (completed separately for each fund, unless the adviser elects or is required to aggregate)
  - Section 1c — Information about the hedge funds advised by the reporting adviser
- Large Advisers to Hedge Funds — Sections 2(a) and 2(b)
  - Section 2a — Aggregated information about hedge funds advised by the reporting adviser
  - Section 2b — Information about "qualifying hedge funds" (hedge funds having a net asset value greater than $500 million)
- Large Advisers to Liquidity Funds — Section 3 (quantitative data, provided separately for each fund)
- Large Advisers to Private Equity Funds — Section 4 (quantitative data, provided separately for each fund)

continued on next page

Clearly State Your Assumptions

Form PF has numerous instructions and definitions, calls for substantial information and, unfortunately, has some ambiguities. Advisers should review the form's extensive glossary, which reflects the SEC's interpretation of terms commonly used in the private fund sector. After carefully reviewing Form PF and assessing filing and data obligations, reporting advisers may need to amend their subscription documentation, alter their approach to recordkeeping, and/or consider revisions to their compliance manuals in order to create a system that appropriately accounts for this critical new regulatory demand. In addition, some portions of Form PF allow for discretion and, for example, permit an adviser to voluntarily aggregate data for reporting purposes. Reporting advisers should clearly set out, in the "miscellaneous" section provided in the form, the assumptions they make and methodologies they adopt in responding to any questions in Form PF. These assumptions and methodologies must be applied consistently throughout the form and be consistent with any instructions or guidance relating to the form. ■

Adviser Timeline: Some advisers have a filing due August 29, 2012

Small Private Funds, Large Hedge Funds and Large Private Equity Funds

Form PF Entity	Regulatory AUM Tier	Filing Frequency	Compliance Date	Initial Filing Date (assumes Dec. 31 fiscal year end)*
Small private fund advisers	Greater than $150 million of private fund AUM but less than "large" threshold	Annually, within 120 days after the adviser's fiscal year end	December 15, 2012	**April 30, 2013**
Large hedge fund advisers	At least $1.5 billion but less than $5 billion in hedge fund AUM as of the end of any month in the fiscal quarter most recently completed prior to December 15, 2012	Quarterly, within 60 days after the adviser's fiscal quarter end	December 15, 2012	**March 1, 2013**
Large hedge fund advisers	At least $5 billion in hedge fund AUM as of the last day of the fiscal quarter most recently completed *prior to* June 15, 2012 (*i.e.*, as of March 31, 2012)	Quarterly, within 60 days after the adviser's fiscal quarter end	June 15, 2012	**August 29, 2012**
Large private equity fund advisers	At least $2 billion but less than $5 billion in private equity AUM as of the most recently completed fiscal year ending on or after December 15, 2012	Annually, within 120 days after the adviser's fiscal year end	December 15, 2012	**April 30, 2013**
Large private equity fund advisers	At least $5 billion in private equity AUM as of the last day of the fiscal year to end *on or after* June 15, 2012	Annually, within 120 days after the adviser's fiscal year end	June 15, 2012	**April 30, 2013, *but earlier if*** the fund's fiscal year ends between June 15 and December 31

* Reporting advisers that do not have a December 31 fiscal year-end may have filing dates that vary from the chart.

Proposed Volcker Rule: Potential Perils to the Municipal Bond Market

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In November 2011, under Section 619 of the Dodd-Frank Act, also known as the "Volcker Rule," the SEC, the OCC, the FDIC and the FRB (collectively, the "Agencies") jointly issued a notice of proposed rulemaking (the "Proposal") containing certain prohibitions and restrictions on the ability of a banking entity and nonbank financial company supervised by the FRB to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund. Under the Dodd-Frank Act, the Volcker Rule is scheduled to go into effect on July 21, 2012, whether or not the Agencies have a final rule in place. Given the approximately 17,000 comments received, the Agencies have noted that it is not likely that a version of the Volcker Rule will be ready to implement by the July deadline. In order to avoid confusion regarding complying with a rule that does not yet exist, legislation is being proposed to push back the start date of the Volcker Rule until one year after the rule is finalized. If the Proposal were to be accepted in its current form, it would have the effect of prohibiting banks from proprietary trading in more than half of outstanding municipal bonds[1] and would prohibit banks from sponsoring tender offer bond ("TOB") trusts and providing liquidity for TOB trusts. This would increase funding costs to municipal bond issuers and virtually decimate the market for short-term municipal debt.

The Volcker Rule includes an exemption to the proprietary trading restrictions for "obligations of any State or of any political subdivision thereof."[2] However, in the Proposal, the Agencies take a very narrow interpretation and note that the exemption does not extend "to transactions in obligations of *any agency* of any State or political subdivision thereof."[3] Such a narrow interpretation is not consistent with existing Federal statutes. For example, the National Bank Act lists State agencies and authorities as examples of political subdivisions of States. The National Bank Act states:

> "In addition to the provisions in this paragraph for dealing in, underwriting or purchasing securities, the limitations and restrictions contained in this paragraph as to dealing in underwriting, and purchasing investment securities for the national bank's own account shall not apply to obligations (including limited obligation bonds, revenue bonds, and obligations that satisfy the requirements of section 142(b)(1) of title 26) issued by or on behalf of any State or political subdivision of a State, *including* any municipal corporate instrumentality of 1 or more States, *or any public agency or authority* of any State or political subdivision of a State, if the national bank is well capitalized (as defined in section 1831 of this title). [emphasis added]"[4]

This provision of the National Bank Act permits well-capitalized banks to deal in, underwrite or purchase securities issued by public agencies and authorities. If the Proposal is adopted, it would have the effect of repealing this provision.

The Volcker Rule's exemption for government-issued securities, as interpreted by the Proposal, would bifurcate municipal securities based on a meaningless distinction. The primary source of financing for important government projects, such as health care facilities, housing developments, and universities, is the issuance of municipal obligations. Revenue-generating projects of States or political subdivisions will often be financed by bonds backed by the revenues instead of the taxes. For a variety of reasons, a political subdivision may choose to issue debt through a local agency. In any case, the debt is supported by revenue-generating projects — the credit risk does not differ whether a State, a political subdivision or an agency thereof is the issuer. The Proposal would yield a result where determining whether municipal securities are subject to the Volcker Rule would be based solely on whether or not the issuer is an agency of a State or political subdivision thereof, a distinction which is not otherwise made in the municipal bond market or in other Federal statutes and which has no relation to the level of credit risk associated with the municipal securities.

The Proposal refers to hedge funds and private equity funds together as "covered funds," but then goes further to define covered funds to include entities that would be investment companies under the Investment Company Act of 1940, but for the exemptions in sections 3(c)(1) and 3(c)(7). Applying the Volcker Rule using this broad definition of "covered funds" would subject TOB trusts to the Volcker Rule — another unintended and undesirable consequence of the Proposal.

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The TOB structure was designed to preserve the tax-exempt character of the interest on a municipal bond while creating short-term municipal debt which money market funds can invest in. In a TOB program, one or more highly rated tax-exempt municipal bonds are put into a trust that issues two classes of securities: (1) a floating rate class ("Floaters") and (2) an inverse floating rate, or residual, class ("Inverse Floaters"). A key feature of the Floaters is that the holders have the option to put the Floaters for purchase at par plus accrued. This feature is made possible by a remarketing agreement and a liquidity agreement by a highly rated bank to provide liquidity in case the bonds cannot be remarketed. Traditionally, national banks invest in, sponsor and provide liquidity for TOBs.

If the Proposal is adopted, national banks would not be able to invest in or sponsor TOBs, which would have a detrimental effect on the municipal bond market. Another consequence of being a "covered fund" is that a bank is prohibited from purchasing assets from, extending credit to, or investing in a covered fund. As noted above, an essential feature of the TOB structure is a liquidity arrangement with a highly rated bank. If TOBs are considered covered funds, then banks would not be able to provide the requisite liquidity required for these structures.

While many advocates of the Volcker Rule want to leave it as is, it seems likely, and certainly just, that exceptions for municipal securities and TOB programs will be made. Without these exceptions, there will be increased costs in borrowing for State and local governments, the municipal bond market will be disrupted, and a key class of short-term debt available for money market investors will be eliminated. ■

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[1] Based on data set forth in comment letter dated January 27, 2012 submitted by Citigroup Global Markets, Inc. to the SEC re: Restrictions on Propriety Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds.

[2] 12 U.S.C. §1851(d)(1).

[3] 76 Fed Reg. 68846, 68878 n.165.

[4] 12 U.S.C. §24 (Seventh).

Using Restrictive Covenants to Protect Alternative Asset Managers

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Alternative asset managers know that today's valued employee may become tomorrow's competitor. How do you stop departing employees from usurping your confidential information and goodwill? A wise employer will prepare in advance for the eventual departure of employees who may be in a position to do competitive harm when they leave. Restrictive covenants such as non-competition and non-solicitation agreements can help to ameliorate the risks and damage of such competition.

The Basis for an Enforceable Restrictive Covenant

Unlike typical commercial agreements, which generally are enforced in accordance with their terms, restrictive covenants will be enforced only where there is a legitimate business justification for doing so. Restrictive covenants are viewed as anti-competitive arrangements that limit employees' ability to freely market their services and earn a living in their chosen profession, and accordingly are enforced only where the court finds a legitimate business justification for doing so. Two typical bases that can support a restrictive covenant are the protection of confidential information and the protection of goodwill arising out of client relationships.

Protection of confidential information can serve as a proper basis supporting the enforcement of a restrictive covenant where the employee had access to proprietary or confidential information belonging to the employer that could readily

continued on page 7

Structuring Your Venture Capital Fund to Qualify for the Advisers Registration Exemption *continued from page 1*

Factors to Consider When Forming a Venture Capital Fund

In order to qualify for the exemption from registration, the manager must consider the following factors in structuring a venture capital fund:

- Representations to Investors: The fund must represent to current and prospective investors that it is pursuing a "venture capital strategy." The SEC will analyze this requirement under a "facts and circumstances test" based on all of the statements (or omissions) made by the manager to the fund's investors. The SEC has identified certain characteristics of venture capital investing and activities, such as the lack of leverage; the non-public, start-up nature of the portfolio companies; and the manager's intent that the fund be used to provide capital for the operation and expansion of businesses, as opposed to buying out prior investors. Whether a fund represents itself as a "venture capital fund" will be reflected in the fund's offering materials. Notably, "managerial assistance" to portfolio companies is not essential under the "venture capital fund" definition, but would help demonstrate that a fund is a venture capital fund.

- 80% in "Qualifying Investments": At least 80% of the fund's investments must be made in "qualifying investments." "Qualifying investments" are generally equity securities issued by a "qualifying portfolio company" in exchange for direct investment by the fund. In limited circumstances, "qualifying investments" may also include equity securities issued by a "qualifying portfolio company" in a corporate reorganization or equity securities issued by an acquirer of a "qualifying portfolio company." A "qualifying portfolio company" is defined as any company that: (1) is not a reporting or foreign-traded company and does not have a control relationship with a reporting or foreign-traded company at the time of the investment by the fund; (2) does not incur leverage in connection with the investment by the fund and distribute to the fund the proceeds of the leverage in exchange for the investment; and (3) is not itself a fund or commodity pool.

- Basket for Non-Qualifying Investments: A venture capital fund may still hold up to 20% of its aggregate capital contributions and capital commitments in non-qualifying investments (other than certain short-term holdings), measured immediately after the acquisition of any asset, valued at cost or fair value, consistently applied. The 20% basket provides some flexibility in making investments, but this 20% limit is intended to prevent hedge funds or private equity funds from relying on the venture capital fund adviser exemption by adding venture capital investments to their portfolios. Examples of non-qualifying investments include:

  > Non-Equity Securities: The fund must principally hold equity securities (*e.g.*, common stock, preferred stock, warrants, other securities convertible into equity and limited partnership interests). Investments in non-equity securities, including non-convertible bridge loans and other debt securities, are outside the scope of a venture capital fund's typical investment activities.

  > Buyouts: Under the definition of a "qualifying investment," the fund must invest capital directly in the qualifying portfolio company and cannot buy out existing security holders. The SEC views this as an important distinction between venture capital funds and other types of funds.

  > Leveraged Buyout Transactions: A portfolio company that incurs debt in connection with an investment by a fund and distributes the proceeds of the borrowing to the fund in exchange for the investment is not a "qualifying portfolio company" for purposes of the exemption. This restriction is intended to distinguish a venture capital fund from a leveraged buyout fund.

  > Investments in Funds or Pooled Investment Vehicles: Generally, a fund or other pooled investment vehicle is not a "qualifying investment," unless it is a wholly

continued on next page

The fund cannot borrow or otherwise incur leverage in excess of 15% of its aggregate capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage must be for a non-renewable term of no longer than 120 calendar days.

owned intermediate holding company formed for tax, legal or other regulatory reasons to hold the venture capital fund's investments in a "qualifying portfolio company." The SEC has not addressed other forms of intermediate investment vehicles.

- Limitation on Leverage: The fund cannot borrow or otherwise incur leverage in excess of 15% of its aggregate capital contributions and uncalled committed capital, and any such borrowing, indebtedness, guarantee or leverage must be for a non-renewable term of no longer than 120 calendar days. The fund can guarantee any obligations of a "qualifying portfolio company" up to the value of its investment in the portfolio company for more than 120 calendar days but such guarantee would count toward the 15% limit. This exception allows a fund to accomplish its venture capital objective by helping its portfolio companies obtain access to credit facilities and working or operating capital.

Limited Registration and Reporting Requirements

The new registration exemption for advisers to venture capital funds is significantly narrower than the former private adviser exemption. Even if a fund meets the requirements of a "venture capital fund" as set forth above, the adviser may still need to register as an "exempt reporting adviser" for purposes of the Advisers Act and SEC rules, and may be required to file a partial Part 1A of Form ADV. Additionally, the adviser and the fund must maintain records as required by SEC rules, which are generally ordinary business records. Finally, the SEC anticipates it will only "examine" an "exempt reporting adviser" where there are indications of wrongdoing (normally, these "cause" examinations are prompted by tips, complaints and referrals). Advisers to funds that cannot meet the venture capital fund exemption should consider whether other exemptions under the Advisers Act may apply.

Conclusion

Although the Dodd-Frank Act eliminated the private adviser exemption, managers can form a venture capital fund and be exempt from registration under the Advisers Act. If the manager considers the factors set forth above, the manager will be able to manage, market and operate the venture capital fund without being subject to the registration requirements of the Advisers Act. ■

Using Restrictive Covenants to Protect Alternative Asset Managers *continued from page 5*

be used by the employee or a successor employer to unfairly compete against the employer after his departure. In the financial services industry, confidential trading strategies, software programs for high speed trading, and black box strategies may be sufficiently confidential to support the enforcement of restrictive covenants.

Alternatively, an employee's contact with clients may support the enforcement of a non-competition or non-solicitation covenant restricting that employee from contacting or doing business with those clients following termination of his employment. Because the employee was able to develop these relationships only through the introduction of, or at the expense of, the employer, case law supports the proposition that an employer should be afforded a reasonable amount of time to substitute another individual in that relationship before the employee may seek to compete.

Note that generalized knowledge of industry information does not justify the enforcement of restrictive covenants. Nor does the fact that the employee knew nothing about the industry before working for a particular employer and is in a position to obtain alternative employment and compete against the employer only because of the knowledge that was imparted to him during his employment. Conduct that seems disloyal is simply not enough, unless the employee engages in other truly wrongful conduct, such as theft of confidential information or other property.

Even where supported by a legitimate business justification, a restrictive covenant will be enforced only to the extent it is narrowly tailored — in terms of geography, duration, and the activities prohibited — to protect the interests identified as the legitimate business justification underlying the covenant. The less restrictive a provision is, the more likely it is to be enforced.

continued on page 8

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Using Restrictive Covenants to Protect Alternative Asset Managers *continued from page 7*

While courts will occasionally enforce longer restrictions, one-year restrictions are common, and some courts have limited restrictions to six months even where a legitimate business justification exists because the confidential information at issue quickly becomes stale. In the financial services industry, broad geographical restrictions are commonly enforced, given that such work typically can be performed anywhere in the country or, indeed, the world.

Types of Restrictions to Consider

The broadest type of restriction is a true non-compete — a restriction by which the employee agrees not to compete with the employer following termination of his employment for some defined period of time. Even here, however, the scope of the restriction must carefully be considered. Is "competition" to be defined as working in the financial services industry? Or being associated with any hedge fund? Such a restriction runs significant risk of being found to be too broad in most circumstances. Consider instead whether the restriction can be tailored to address the particular strategies pursued by the employer, or a particular product or industry focus.

Alternatively, a customer restriction may be used. Thus, for example, the employee may agree to forego engaging in business with certain specified clients of the firm, or with any clients of the firm with whom he communicated on behalf of the firm, or some other formulation that protects some or all of the client relationships of the employer. Such restrictions are often viewed as more reasonable than full non-competition covenants because they allow the employee to continue working in his profession and use his expertise and merely prohibit the employee from doing so on behalf of a limited number of clients. This type of restriction is most appropriate for employees in marketing roles and portfolio managers who have become known to a firm's clients.

Finally, most employers will want to restrict employees' ability to solicit, hire, or otherwise engage their co-workers and the consultants, referral sources, and vendors of their employer. Because such provisions are often viewed as less anti-competitive than the other restrictions discussed above, they are more easily enforced by courts and more commonly complied with by departing employees.

Using Restrictive Covenants to Protect Your Business

Restrictive covenants are part of an employer's arsenal of weapons to protect against the loss of confidential information and client relationships that may ensue in the wake of the departure of valued employees. While restrictive covenants may not be appropriate for the most junior employees in an organization, particularly non-professionals, firms should consider using restrictive covenants to ensure the protection of confidential information and client relationships. When combined with nondisclosure agreements and deferred compensation arrangements, such agreements can go a long way toward avoiding — or at least reducing the damage from — unfair competition by departing employees.

As a final note, restrictive covenants generally must comply with the law of the state in which the employee works. There is significant variation among states in terms of their approach to restrictive covenants. Thus, for example, in New York, reasonable restrictive covenants are enforceable to the extent they are supported by a legitimate business justification, while California has a specific statutory provision that prohibits the enforcement of restrictive covenants in the employment context (although it does permit the use of restrictive covenants in connection with the sale of a business). Employers must be cognizant of the particular jurisdiction(s) in which they operate and ensure that their use of restrictive covenants is in compliance with local law. ■

Practice Areas

This publication is a collaboration of the following practice areas:

- Capital Markets
- Claims Trading and Distressed Investment Advice
- Corporate
- Corporate Restructuring and Bankruptcy
- Electronic Discovery
- Employment Law
- Executive Compensation
- Financial Services/ Investment Management
- Intellectual Property
- Litigation
- Mergers and Acquisitions/ Joint Ventures
- Private Equity and Hedge Funds
- Securitization
- Swaps & Derivatives
- Tax

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