

SEC and CFTC Adopt Private Fund Adviser Reporting Form

BY [THE INVESTMENT MANAGEMENT PRACTICE](#)

In late October 2011, the U.S. Securities and Exchange Commission (the "SEC") and the U.S. Commodity Futures Trading Commission (the "CFTC", and collectively with the "SEC", the "Commissions") jointly adopted Form PF and accompanying rules under the Investment Advisers Act of 1940 and the Commodity Exchange Act of 1936 ("Final Rules") to implement certain provisions of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").¹ The information to be collected on Form PF is intended to assist the Financial Stability Oversight Council ("FSOC") in monitoring the potential systemic risks posed by private funds by providing empirical data to FSOC with which it may make determinations about such risks.

The new SEC rule² requires an investment adviser to file Form PF if it (1) is registered or required to register with the SEC,³ (2) advises one or more "private funds," and (3) has at least \$150 million in regulatory assets under management⁴ attributable to private funds as of the end of its most recently completed fiscal year ("Private Fund Advisers"). For these purposes, "private fund" is defined as any issuer that would be defined as an investment company but for Sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, as amended ("1940 Act"), including hedge funds⁵, liquidity funds (*i.e.*, unregistered money market funds),⁶ private equity funds,⁷ real estate funds,⁸ venture capital funds⁹ and securitized asset funds.¹⁰

The new CFTC rule¹¹ requires Private Fund Advisers that are also registered as commodity pool operators and/or commodity trading advisors with the CFTC to file Form PF in respect of any private funds advised by such dual registrants. Furthermore, it would permit such dual-registered Private Fund Advisers to file Form PF in respect of any commodity pools (which are not themselves private funds) in lieu of filing certain other reports as may be required under relevant CFTC rules.

Under the Final Rules, information reported on Form PF will remain confidential, although the information would be available to the Commissions generally, including for the purposes of rulemaking, examinations, investigations and investor protection efforts. In addition, information collected on Form PF may be shared with other Federal agencies, organizations or self-regulatory bodies, although such entities would be required to represent to the SEC that they have sufficient controls in place to use and handle the information in a manner consistent with the protections established under the Dodd-Frank Act.

Reporting Requirements

The reporting requirements for Form PF separate Private Fund Advisers into two broad groups: Large Private Fund Advisers (comprising Large Hedge Fund Advisers,¹² Large Liquidity Fund Advisers¹³ and Large Private Equity Advisers¹⁴) and all other Private Fund Advisers (“Small Private Fund Advisers”). Membership in one of these groups determines the amount of information required to be reported and the frequency of the reporting by the adviser. It is anticipated that most Private Fund Advisers will be regarded as Small Private Fund Advisers and therefore subject to the lower reporting requirements.

Both Small Private Fund Advisers and Large Private Equity Advisers will be required to file Form PF periodically as described below and provide information regarding their operations and the private funds they advise. More detailed reporting is required for Large Hedge Fund Advisers, Large Liquidity Fund Advisers and Large Private Equity Advisers. In addition, all Private Fund Advisers managing hedge funds will be required to make certain additional disclosures about the hedge funds they advise.

In calculating its assets under management for purposes of determining whether it qualified as a small Private Fund Adviser or a Large Private Fund Adviser, an adviser will be required to aggregate (1) the assets of managed accounts advised by the adviser that pursue substantially the same investment objective and strategy and invest in substantially the same positions as its private funds¹⁵ and (2) the assets of private funds advised by any of the adviser’s “related persons”,¹⁶ other than related persons that are separately operated.¹⁷ For purposes of Form PF, advisers may exclude any assets invested in the equity of other private funds. If a Private Fund Adviser’s principal office and place of business are outside the United States, the adviser may exclude any private fund that during the last fiscal year was neither a United States person nor was offered to, or beneficially owned by, any United States person.¹⁸

Information Required To Be Disclosed On Form PF

Form PF has four sections with Section 1 required for all Private Fund Advisers and Sections 2, 3 and 4 required for certain Large Private Fund Advisers. With respect to the information provided on Form PF, Private Fund Advisers may rely on the same internal reporting procedures and practices (including performance calculations) that they use when reporting to advisory clients (unless such allowance is directly contradicted by the instructions of the form), provided that such internal methodologies are consistently applied in answering questions. When providing information regarding funds in a master-feeder or parallel fund structure, a Private Fund Adviser may choose whether to provide information in the aggregate for each structure or individually for each fund within the structure, so long as it provides the information consistently throughout the form.

Section 1 – All Private Fund Advisers

All Private Fund Advisers will be required to disclose information regarding each private fund they manage, including gross and net asset value, value of investments in other private funds, value of parallel managed accounts to the private fund, aggregate value of derivative positions, borrowings and leverage, investor concentration, and fund performance on a monthly and quarterly basis. Private Fund Advisers managing hedge funds will also be required to report additional information regarding investment strategy, counterparty exposure and trading and clearing practices for each hedge fund they advise.

Section 2 – Large Hedge Fund Advisers

Large Hedge Fund Advisers will be required to provide information on an aggregated basis regarding exposure by asset class in different securities and commodities (e.g., different types of equities, fixed income securities, derivatives, structured products, etc.), geographical concentration, portfolio turnover and the duration, weighted average tenor or 10-year bond equivalent of fixed income holdings. In addition, for each Hedge Fund having a net asset value of at least \$500 million as of the end of any month in the prior fiscal quarter (a “Qualifying Hedge Fund”),¹⁹ Large Hedge Fund Advisers are required to report the same information noted above for each Qualifying Hedge Fund, as well as information concerning portfolio liquidity, unencumbered cash positions, position concentration, collateral practices, value at risk (VaR) metrics and/or any other risk metrics utilized, financing information, borrowing and derivatives exposure, effect of market factors on the fund’s portfolio and the identity of (and clearing relationships with) the three central clearing counterparties to which the Qualifying Hedge Fund has the greatest net counterparty credit exposure. Information regarding any restrictions on investor redemptions, side pockets and lock-up periods with respect to each Qualifying Hedge Fund must also be provided.

Section 3 – Large Liquidity Fund Advisers

Large Liquidity Fund Advisers will be required to provide information on the valuation methods used (e.g., amortized cost, penny rounding), types of assets, liquidity profile and risk profile of each fund, as well as the extent to which each Liquidity Fund has a policy of complying with all or some aspects of the rule regulating registered money market funds (i.e., Rule 2a-7 under the 1940 Act). Section 3 also requires Large Liquidity Fund Advisers to report any secured or unsecured borrowings (classified by creditor type and maturity), investor concentration, investor liquidity and redemption policies in respect of their Liquidity Funds.

Section 4 – Large Private Equity Advisers

Large Private Equity Advisers will be required to disclose the extent of leverage incurred by their funds’ portfolio companies, the use of bridge financing (including the identity of institutions providing the financing), information regarding the debt-to-equity ratio of controlled portfolio companies, industry and geographical breakdown, and the amount of current and long-term borrowings on the portfolio companies’ balance sheets. Section 4 also requires the disclosure of each private equity fund’s investment in financial institutions, including the institution’s name, debt-to-equity ratio and percentage beneficial ownership by the fund.

Filing Form PF

The SEC has directed the Financial Industry Regulatory Authority to extend the capabilities of the current Investment Adviser Registration Depository (“IARD”) to allow for the filing of Form PF. Filings will be allowed either through a fillable form on the website or through a batch filing process utilizing the eXtensible Markup Language (“XML”) tagged data format.

Small Private Fund Advisers will only be required to complete Form PF on an annual basis, while certain Large Private Fund Advisers will have to update portions of Form PF on a more frequent basis. The periodic reporting deadlines for the filing of Form PF by various Private Fund Advisers are as follows:

<u>Private Fund Adviser Type</u>	<u>Filing Deadlines</u>
Small Private Fund Advisers	120 calendar days after fiscal year end
Large Hedge Fund Advisers	60 calendar days after fiscal quarter end ²⁰
Large Liquidity Fund Advisers	15 calendar days after fiscal quarter end ²¹
Large Private Equity Advisers	120 calendar days after fiscal year end

Advisers that are transitioning from being Large Hedge Fund Advisers or Large Liquidity Fund Advisers to Small Private Fund Advisers, or advisers that are no longer required to file Form PF (as they have ceased to meet the definition of a Private Fund Adviser), must file a Form PF indicating the change in status no later than the last day on which the adviser's next Form PF update would be timely.

Compliance Dates

The effective date of the Final Rules is March 31, 2012.

For all Small Private Fund Advisers and many Large Private Fund Advisers, the compliance date for the new rules is December 15, 2012. For those Small Private Fund Advisers operating with a December 31 fiscal year end, this means that the initial filing of Form PF will be required on or before April 30, 2013.

The compliance date for the new rules is June 15, 2012 for (1) Private Fund Advisers having at least \$5 billion in assets under management attributable to hedge funds as of the end of their most recently completed fiscal quarter prior to June 15, 2012; (2) Private Fund Advisers having at least \$5 billion in assets under management attributable to liquidity funds (including registered money market funds) as of the end of their most recently completed fiscal quarter prior to June 15, 2012; and (3) Private Fund Advisers having at least \$5 billion in assets under management attributable to private equity funds as of the end of their first fiscal year to end on or after June 15, 2012.

Although most advisers will not be required to file their first Form PF until early 2013, legal and compliance departments should begin now to evaluate whether an adviser and its funds meet any of the relevant thresholds and consider the information they will be obligated to provide. In particular, advisers should closely review Form PF to determine if there is any information requested that they do not currently collect (*e.g.*, fund investor information). Any adviser that determines it will be required to file Form PF should initiate discussions with its administrator to discuss the necessary information production and frequency of reporting that will be required.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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¹ "Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF," CFTC RIN 3038-AD03, SEC Rel. No. IA-3308 (the "Release"). See <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister103111.pdf> for a copy of Form PF attached to the Release. The Release finalizes the proposed rules and Form PF previously proposed by the Commissions in January 2011 (the "Proposed Rule"). See <http://www.sec.gov/rules/proposed/2011/ia-3145.pdf> for a copy of the Proposed Rule.

² Rule 204(b)-1 under the Investment Advisers Act of 1940, as amended (the "Advisers Act").

³ This means that advisers exempt from SEC registration (*e.g.*, foreign private advisers), including exempt reporting advisers (*e.g.*, advisers to venture capital funds), are not required to complete and file Form PF.

⁴ Defined as assets under management gross of outstanding indebtedness and other accrued but unpaid liabilities.

⁵ Any private fund (other than a securitized asset fund) that (1) has a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses); (2) may borrow an amount in excess of one half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or (3) may sell securities or other assets short (other than for hedging currency exposure or managing duration). A private fund would not be considered a hedge fund solely because its organizational documents fail to prohibit the private fund from utilizing leverage or selling short, provided that, (i) the private fund does not actually engage in those practices and (ii) a reasonable investor would understand, based on the fund's offering documents, that the fund will not engage in these practices.

⁶ Any private fund that seeks to generate income by investing in a portfolio of short-term obligations in order to maintain a stable net asset value per unit or minimize principal volatility for investors.

⁷ Any private fund that (1) is not a hedge fund, liquidity fund, real estate fund, securitized asset fund or venture capital fund; and (2) does not provide investors with redemption rights in the ordinary course of business.

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- ⁸ Any private fund that (1) is not a hedge fund; (2) does not provide investors with redemption rights in the ordinary course; and (3) invests primarily in real estate and real estate assets.
- ⁹ Any private fund meeting the definition of a venture capital fund in Rule 203(1)-1 of the Advisers Act.
- ¹⁰ Any private fund whose primary purpose is to issue asset backed securities and whose investors are primarily debt-holders.
- ¹¹ CFTC Rule 4.27.
- ¹² Private Fund Advisers that had at least \$1.5 billion in hedge fund assets under management as of the last day of any month in the fiscal quarter immediately preceding the adviser's most recently completed fiscal quarter.
- ¹³ Private Fund Advisers that had at least \$1 billion in liquidity fund assets under management (including the assets of any registered money market funds) as of the last day of any month in the fiscal quarter immediately preceding the adviser's most recently completed fiscal quarter.
- ¹⁴ Private Fund Advisers that had at least \$2 billion in private equity fund assets under management as of the last day of the adviser's most recently completed fiscal year.
- ¹⁵ Managed accounts may be excluded from the calculations if, in the aggregate, the asset value of those accounts exceeds the asset value of the adviser's private funds.
- ¹⁶ "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). See Form ADV for the complete definition of "related person."
- ¹⁷ For purposes of Form PF, a related person is "separately operated" if an adviser is not required to complete Section 7.A of Schedule D to Form ADV with respect to that related person.
- ¹⁸ "United States person" is defined in Rule 203(m)-1 under the Advisers Act, which includes any natural person resident in the United States.
- ¹⁹ Calculated by aggregating the net asset value of any private funds that are part of the same master-feeder structure, dependent parallel managed accounts, and parallel funds and treating any funds managed by related persons as though they were managed by the Large Private Fund Adviser. Note that, unlike the aggregation rules regarding how information on master-feeder and parallel fund structures may be presented (as discussed above), aggregation for purposes of determining if a private fund is a Qualifying Hedge Fund is mandatory.
- ²⁰ Update filings made following the 1st, 2nd and 3rd fiscal quarters need only contain information regarding the hedge funds advised by the Large Hedge Fund Adviser, and may omit information on other types of private funds.
- ²¹ Update filings made following the 1st, 2nd and 3rd fiscal quarters need only contain information regarding the liquidity funds advised by the Large Liquidity Fund Adviser, and may omit information on other types of private funds.