February 1, 2012

SEC Provides Expanded Relief from Registration for Certain Affiliates of an SEC-Registered Investment Adviser

I. Introduction

On January 18, 2012, the Division of Investment Management of the U.S. Securities and Exchange Commission (the "SEC") issued a no-action letter[1] (the "2012 NAL") in response to a request for no-action relief from the American Bar Association's Subcommittee on Hedge Funds.[2]

The 2012 NAL provides expanded relief from registration under the U.S. Investment Advisers Act of 1940, as amended (the "Advisers Act"), to certain entities affiliated with an SEC-registered investment adviser (an "RIA"). The 2012 NAL authorizes an RIA to (i) have affiliates that serve as general partner or managing member of a private fund without registration of the affiliates as RIAs (the "SPV route") or (ii) maintain a "network" of related entities that conduct a single advisory business (which entities may not necessarily serve as general partner of a private fund) without registration of these entities as RIAs (the "common relationship route").

This memorandum highlights certain practical implications that arise as a result of the 2012 NAL. We initially address some of the practical implications of certain common structures (see Section II below) and thereafter provide an analysis of the 2012 NAL (see Section III below).

II. Practical Implications to Certain Common Structures

A. Common Structures

Set forth below are examples of the application of the guidance set forth in the 2012 NAL to certain private fund advisory structures.

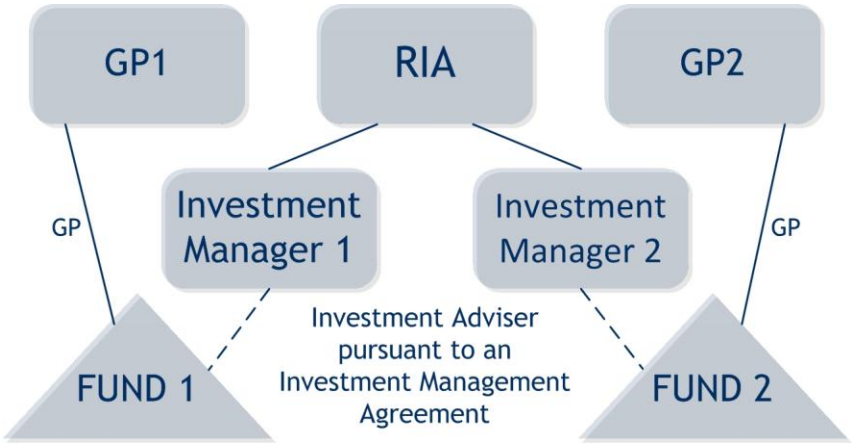
[1] http://sec.gov/divisions/investment/noaction/2012/aba011812.htm
[2] http://www.sec.gov/divisions/investment/noaction/2012/aba01182012-incoming.pdf

- *A U.S. private fund business has a single RIA that serves as adviser to all funds that it sponsors, with a separate general partner (or managing member) entity for each private fund (each such general partner or managing member entity, an "SPV").* Based on the SEC guidance in the 2012 NAL, none of the SPVs needs to separately register as an RIA so long as the SPV Conditions (as discussed in Section III. A. of this memorandum) are satisfied.

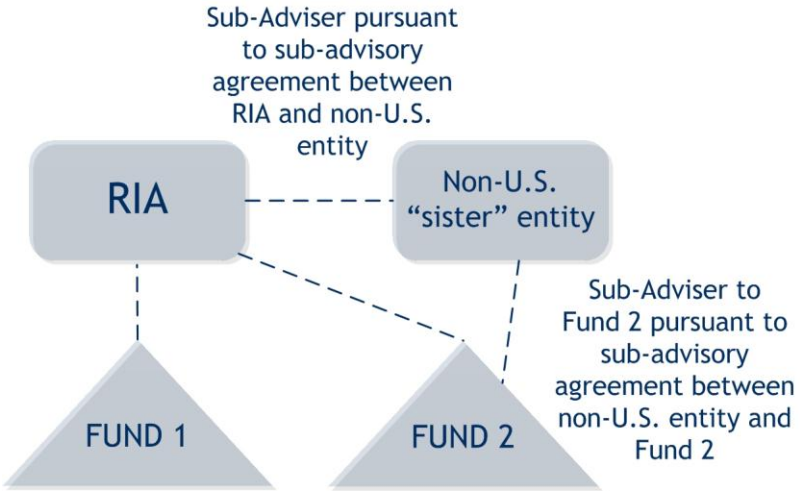
Structure Example #1 – An RIA and its non-registered SPVs

- *A U.S. private fund business has a single RIA, with one or more entities that are controlled by the RIA to serve as investment advisers to private funds.* Subject to satisfying the "single advisory business" condition as described in more detail in Section III. B. of this memorandum, the investment advisers controlled by the RIA would not need to separately register with the SEC.

Structure Example #2 – An RIA and its non-registered affiliates



Structure Example #3 – An RIA and its non-U.S. "sister" or "related" entities



- *A U.S. private fund business has a single RIA and such RIA engages one or more of its non-U.S. "sister" or "related" entities to serve as sub-advisers with respect to the RIA or the private fund it manages.* Subject to satisfying the "single advisory business" condition as described in more detail in Section III. B. of this memorandum and the considerations noted in the bullet points below, the sub-advisers would not need to separately register with the SEC.
- In deciding whether to utilize a single registration where the non-U.S. entities are structured to address certain tax, regulatory or other legal considerations in non-U.S. jurisdictions, thought should be given to whether the required "supervision and control" by the filing adviser may undermine or weaken the purposes for which such structures were created.
- When the non-U.S. entity is not controlled by the RIA by virtue of ownership, consideration should be given to whether the required "supervision and control" can be satisfied contractually. The staff of the Division of Investment Management of the SEC has confirmed orally to us that "supervision and control" can be achieved by having the employees of the non-U.S. entity and persons acting on its behalf subject to the RIA's code of ethics and compliance procedures and practices.

B. Other Practical Implications

The staff of the Division of Investment Management of the SEC agreed with the view that a "relying adviser" (i.e., one that relies on the related adviser's registration) is considered "an investment adviser registered with the [SEC]." It is not clear whether this view applies solely with respect to compliance with the Advisers Act or whether a relying adviser can be considered an RIA for other purposes, such as qualifying as a qualified professional asset

manager[3], considered a qualified institutional buyer[4] or being treated as an RIA for purposes of Rule 13d-1 of the Securities Exchange Act of 1934, as amended (the "Exchange Act").[5]

III. Analysis of the 2012 NAL

The 2012 NAL provides RIAs with two separate paths to have their related entities not be subject to separate registration as an RIA with the SEC.

A. The SPV Route[6]

This route is available under the following circumstances (collectively, the "SPV Conditions"):

1. The SPV is established to act as general partner or managing member of a private fund;
2. The SPV's formation documents designate the RIA to manage the private fund's assets;
3. All of the advisory activities of the SPV are subject to the Advisers Act and the rules thereunder and the SPV is subject to examination by the SEC; and
4. The SPV, all of its employees and the persons acting on its behalf are "persons associated with" the RIA.[7]

B. The Common Relationship Route[8]

Many fund managers establish a "network" of entities, not all of which serve as the general partner or managing member of a particular private fund.

The 2012 NAL noted that it may be appropriate for related advisers to use a single registrant adviser (the "filing adviser") which would file a single Form ADV for purposes of all of the related advisers (such non-filing advisers, the "relying advisers"), *where the filing adviser and relying advisers conduct a single advisory business*. The 2012 NAL sets forth the following six factors that, in the absence of other facts suggesting otherwise, would indicate that a filing adviser and one or more relying advisers conduct a single advisory business:

1. The filing adviser and each relying adviser advise only private funds and separate account clients that are qualified clients 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.

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[3] Pursuant to Prohibited Transaction Class Exemption 84-14 issued by the U.S. Department of Labor, an investment manager may qualify as a "qualified professional asset manager" or QPAM if such investment manager is, among other things, an investment adviser *registered under the Advisers Act*.

[4] Pursuant to Rule 144A of the Securities Act of 1933, as amended, the definition of a "qualified institutional buyer" includes any investment adviser *registered under the Advisers Act*.

[5] Under Rule 13d-1 of the Exchange Act, a *registered investment adviser* is permitted to file a short-form statement on Schedule 13G in connection with the disclosure to the SEC with respect to the beneficial ownership of more than 5% of certain equity securities.

[6] See Structure Example #1 above.

[7] The SPV Conditions were originally set forth in a 2005 no-action letter (http://www.sec.gov/divisions/investment/noaction/aba120805.htm) and were restated in the 2012 NAL. Further, the 2012 NAL provides that the SEC's position with respect to SPVs applies to multiple SPVs of an RIA, including those SPVs which have independent directors.

[8] See Structure Examples #2 and #3 above.

- Note that where a fund advisory business encompasses different investment objectives and strategies that are not related, separate registration may be required.

2. Each relying adviser, its employees and the persons acting on its behalf are subject to the filing adviser's supervision and control and, therefore, each relying adviser, its employees and the persons acting on its behalf are "persons associated with" the filing adviser.
3. 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 the rules thereunder apply to the filing adviser's and each relying adviser's dealings with each of its U.S. and *non-U.S. clients* alike.
4. 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.
5. The filing adviser and each relying adviser operate under a single code of ethics and a single set of written policies and procedures, as administered by a single chief compliance officer.
6. The filing adviser discloses in its Form ADV (in the 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 the 2012 NAL 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)."

We note that the 2012 NAL provides that the filing adviser and each relying adviser must not be prohibited from registering with the SEC by Section 203(a) of the Advisers Act. As an example, the 2012 NAL provides that each of the filing adviser and each relying adviser must individually have sufficient assets under management to qualify to register or qualify for an exemption under Section 203(a) of the Advisers Act. With respect to the exemption from Section 203(a), the 2012 NAL cited Advisers Act Rule 203A-2(b), which permits an adviser to register with the SEC that would otherwise be prohibited from doing so under Section 203(a) if the adviser is in a control relationship with a registered adviser and has the same principal office and place of business as the registered adviser.

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This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to:

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