


Anchin Alert

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Accountants and Advisors



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Client Alert: Dodd-Frank Requirements for an Exempt Reporting Adviser

Additional regulations under the Dodd-Frank Act (the “Act”) impacting advisers have been recently issued and more are expected to come. This alert summarizes highlights of these new regulations and focuses on the effects on an exempt reporting adviser.

The United States Securities and Exchange Commission (“SEC”) adopted new rules under the Investment Adviser Act to implement certain provisions of the Act. These rules:

- Postpone the registration deadline with the SEC to March 30, 2012;
- Adopt an exemption for investment advisers that solely manage private funds and have less than \$150 million in assets under management in the U.S. (“exempt advisers”);
- Provide definitions and requirements for exemption from registration for non- U.S. advisers;
- Define venture capital fund advisers for purposes of the venture capital exception;
- Provide family offices an exemption from investment adviser registration;
- Amend Form ADV to require additional information about private funds managed by an adviser and provides a uniform method of calculating regulatory assets under management (described below); and
- Implement reporting requirements for exempt advisers, including information about the adviser’s owners and affiliates, business activities that may present a conflict of interest, any disciplinary information regarding the adviser or its employees, etc.

Regulatory assets under management include (1) proprietary assets, (2) assets managed without compensation, (3) uncalled capital commitments and (4) assets of non-U.S. clients. Regulatory assets under management must be calculated on a gross basis, which means that accrued but unpaid liabilities and short positions may not be deducted for purposes of this calculation.

Prior to the Act, advisers could avoid registration by advising fewer than fifteen funds. The new threshold ignores the number of funds that are advised, instead focusing on regulatory assets under management. Advisers with less than \$25 million in regulatory assets under management are considered small advisers and are not allowed to file with either the state or the SEC. Mid-sized advisers, which are those with \$25 – 100 million in regulatory assets under management, are required to file with the state in which it maintains its principal office as long as it is subject to inspection by the state; otherwise, they too must register with the SEC (New York does not have inspection capabilities). Advisers with greater than \$100 million in regulatory assets under management are required to file with the SEC unless they are an exempt adviser

Much of the industry focus on the effects of the Act has been on registered advisers. However, it is imperative that exempt advisers be aware of the new regulatory requirements they will face. In the past, if an investment adviser was exempt from SEC registration, it did not have to meet SEC requirements nor file any information with the SEC.

This is no longer the case. As mandated by the Act, **the SEC requires private fund advisers that are exempt from registration to maintain certain records**. These exempt advisers must provide the SEC with reports the SEC determines necessary or appropriate for public interest. There will be an even stronger focus on compliance, so although exempt advisers are not required to have a compliance officer, they will still need to focus on recordkeeping, reporting, valuation, insider trading issues, etc. Compliance programs will be mandatory for all advisers.

The SEC will be using Form ADV as the principal means to accumulate data from exempt reporting advisers. Therefore, they will be required to complete several items on Form ADV, including:

- Item 1 – Identifying information;
- Item 2B – Basis for exemption;
- Item 3 - Form of organization;
- Item 6 – Other business activities;
- Item 7 – Financial services industry affiliations and private fund reporting;
- Item 10 – Control persons; and
- Item 11 – Disclosure information.

These reports will be publicly available. Form ADV must be completed by the investment adviser within 60 days of relying on the exemption from registration. The investment adviser is required to amend Form ADV annually within 90 days of its fiscal year end. It will be vital to have a process in place to determine if the exempt adviser has exceeded any of the thresholds for registration.

The SEC has stated that it anticipates putting into effect record-keeping requirements for exempt advisers, but has not provided specific details. We will update you as these rules are issued. It is essential that all investment advisers: 1) become familiar with the Act's various rules and requirements and 2) allocate the resources necessary to be diligent in meeting those requirements. The bottom line is: exemption from SEC registration is not a free pass from SEC oversight.

Should you have any questions about these new regulations, please contact your Anchin relationship partner.