



INVESTMENT FUNDS UPDATE

SEC and CFTC Adopt Form PF Confidential Information Reporting Requirements

Form PF and Who Reports

The Securities and Exchange Commission (the “SEC”) and Commodity Futures Trading Commission (the “CFTC”) have established new confidential information reporting requirements with respect to private funds, set forth in new Form PF.¹ These requirements apply to investment advisers that

- are registered (or required to be registered) with the SEC and commodity pool operators (“CPOs”) or commodity trading advisors (“CTAs”) that are dually registered with the SEC and the CFTC, and
- advise one or more private funds (*i.e.*, funds that rely on the exclusion from the definition of investment company provided by Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 (the “Investment Company Act”), and
- collectively with related persons² (other than related persons that are separately operated), have regulatory assets under management (“RAUM”)³ of \$150 million or more attributable to private funds as of the end of the most recently completed fiscal year.

Advisers that are exempt from registration with the SEC, including exempt reporting advisers, are not required to file Form PF.

The information collected on Form PF will be primarily for the use of the Financial Stability Oversight Council (“FSOC”) in monitoring and assessing systemic risk in the U.S. financial system. Form PF filings will be made on a confidential basis, and the information collected through Form PF by the SEC and used by FSOC generally is required to be kept confidential (see “Confidentiality of Form PF Data” below). Information filed on Form PF will supplement

¹ “Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF,” Investment Advisers Act Release No. IA-3308 (October 31, 2011) (“Adopting Release”), *available at* <http://www.sec.gov/rules/final/2011/ia-3308.pdf>.

² “Related person” is defined generally as: all of the adviser’s officers, partners or directors (or any person performing similar functions); all persons directly or indirectly controlling, controlled by, or under common control with the adviser; and all of the adviser’s employees (other than employees performing only clerical, administrative, support or similar functions).

³ Advisers Act Rule 204(b)-1 requires advisers to calculate the value of private fund assets under management pursuant to instructions in Form ADV, which provide a uniform method of calculating assets under management for regulatory purposes under the Advisers Act.

the information the SEC collects from registered investment advisers on the recently revised and expanded Form ADV.

Although the SEC indicated it sought to minimize the amount of data calculation specifically for Form PF and confine the requirements to information a private fund adviser would already otherwise have, identifying and coordinating the sources of that data can be a time consuming and challenging effort. Filers should begin that process now.

To implement the Form PF reporting requirements, the SEC adopted Rule 204(b)-1 under the Investment Advisers Act of 1940 (the “Advisers Act”) on October 26, 2011, and the CFTC adopted Rule 4.27 under the Commodity Exchange Act on October 31, 2011. The SEC and the CFTC proposed their rules, which were mandated by Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act, on January 26, 2011.⁴

Categories of Reporting Advisers; Frequency of Reporting and Filing Deadlines

Filing requirements differ based on the size of the adviser (determined by RAUM) and whether the adviser advises hedge funds, liquidity funds or private equity funds, defined as follows:

- “Hedge fund” is 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 or may have gross notional exposure in excess of twice its net asset value (in each case, including any committed capital); or (3) may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration).
- “Liquidity fund” is 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.
- “Private equity fund” is any private fund that is not a hedge fund, liquidity fund, real estate fund, securitized asset fund or venture capital fund and does not provide investors with redemption rights in the ordinary course.

Large private fund advisers that advise one or more hedge funds are subject to the most onerous reporting requirements. Commodity pools are classified as “hedge funds” solely for purposes of Form PF (see “Commodity Pool Reporting” below).

The reporting frequency and deadlines for different categories of reporting advisers are summarized below. The initial filing deadline dates shown in the table are for advisers with a December 31, 2011 fiscal year-end.

⁴ “Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisers on Form PF,” Investment Advisers Act Release No. IA- 3145 (January 26, 2011), available at <http://www.sec.gov/rules/proposed/2011/ia-3145.pdf>.

	LARGE HEDGE FUND ADVISER	LARGE LIQUIDITY FUND ADVISER	LARGE PRIVATE EQUITY FUND ADVISED	SMALLER PRIVATE FUND ADVISED
RAUM THRESHOLD	\$1.5 billion or more attributable to hedge funds as of the end of any month during the preceding fiscal quarter	\$1.0 billion or more in combined liquidity fund and registered money market fund assets as of the end of any month during the preceding fiscal quarter	\$2.0 billion or more attributable to private equity fund assets as of the end of the most recent fiscal year	\$150 million or more (but less than the applicable “large” adviser threshold) attributable to private funds as of the end of the most recent fiscal year
REPORTING FREQUENCY	Quarterly	Quarterly	Annually	Annually
REPORTING DEADLINE	60 days from end of fiscal quarter	15 days from end of fiscal quarter	120 days from fiscal year end	120 days from fiscal year end
APPLICABLE FORM PF SECTIONS	Sections 1 and 2	Sections 1 and 3	Sections 1 and 4	Section 1
INITIAL FILING DEADLINE ⁵ DATE	If RAUM is \$5 billion or more attributable to hedge funds on March 31, 2012: August 29, 2012 If RAUM is less than \$5 billion attributable to hedge funds on March 31, 2012: March 1, 2013	If RAUM is \$5 billion or more attributable to liquidity funds and registered money market funds on March 31, 2012: July 16, 2012 If RAUM is less than \$5 billion attributable to liquidity funds and registered and money market funds on March 31, 2012: January 15, 2013	April 30, 2013	April 30, 2013

Calculation of Regulatory Assets Under Management

An adviser must calculate its RAUM on a gross basis, without deduction of any outstanding indebtedness or other accrued but unpaid liabilities. RAUM must be calculated based on the current market value (or fair value where market value is unavailable, including with respect to illiquid or hard to value assets), determined using the same method used to report account values to clients or calculate fees for advisory services.

⁵ Reflects the SEC’s two-stage phase-in reporting compliance period.

Non-U.S. Advisers and Non-U.S. Funds

If the adviser's principal office and place of business is outside the United States, the adviser may exclude for all purposes of Form PF any private fund that during the last fiscal year was neither a United States person nor offered to, or beneficially owned by, any United States person.⁶ A non-U.S. fund advised by a non-U.S. adviser that has never used U.S. jurisdictional means in the offering of its securities is not a private fund and is not required to be reported on Form PF.

Reporting Requirements and Filing Deadlines for Advisers to More Than One Type of Fund

Large hedge fund advisers and large liquidity fund advisers are required to file Form PF quarterly, within 60 days of the end of each fiscal quarter for large hedge fund advisers and 15 days for large liquidity fund advisers. For its first three fiscal quarters, such an adviser need update only information for the hedge funds or liquidity funds, as applicable, that it advises and is not required to update information for its other private funds, if any. For example, a large hedge fund adviser that also advises other private funds must file a Form PF for its fourth fiscal quarter within 60 days of the end of the quarter, updating information related to its hedge funds. The adviser may include the required information for its other private funds in that filing or may subsequently file an amendment to its Form PF updating information on its other private funds within 120 days of the end of the fourth fiscal quarter. In such amendment, the adviser is not required to update the information it provided in good faith earlier in response to questions regarding other types of funds. An adviser that is both a large hedge fund adviser and a large liquidity fund adviser would be required to do quarterly updates with respect to both types of funds observing the filing deadlines applicable to each type of fund.

Filing Deadlines for New Registrants

Newly SEC-registered private fund advisers are subject to the same Form PF reporting deadlines as currently registered advisers but are not required to file Form PF for any period that ended prior to the effective date of their registrations. For example, a large liquidity fund adviser that registers during its third fiscal quarter must file Form PF within 15 days following the end of that quarter but need not file for the preceding fiscal quarter. Whether an adviser is a large hedge fund or large liquidity fund adviser would be determined by the date specified in Form PF, not the effective date of the adviser's SEC registration.

Deadline for Transition Filings

An adviser that is transitioning from filing Form PF quarterly to filing only annually because it is no longer a large hedge fund adviser or a large liquidity fund adviser must file a Form PF with Item A of Section 1a completed to indicate it is making its final quarterly filing, no later than the last day on which its next quarterly report would be timely. An adviser that is no longer required to file Form PF must make a final filing no later than the last day on which the its next Form PF update would be timely.

Commodity Pool Reporting

CFTC-registered CPOs and CTAs dually registered with the SEC are required to file Form PF and submit information with respect to each advised commodity pool that also is a private fund. Because commodity pools are considered hedge funds for purposes of Form PF, CPOs and CTAs that are required to file Form PF must complete only the sections of the Form applicable to hedge fund advisers. Thus, sections 1 and 2 of Form PF are a joint form for dually registered private fund advisers. A dually-registered adviser must complete section 2, however, only if it meets the threshold for large hedge fund advisers.

⁶ "United States person" has the meaning provided in proposed Rule 203(m)-1 under the Advisers Act, and "principal office and place of business" has the same meaning as in Form ADV. See Form PF Glossary of Terms.

CPOs and CTAs also will have the option of using Form PF to satisfy certain reporting requirements with respect to commodity pools that are not private funds in lieu of completing certain sections of the CFTC's proposed Forms CPO-PQR and CTA-PR, if the CFTC adopts the proposed forms and the CPO or CTA reports permissively the information on Form PF regarding commodity pools that are not private funds. This would allow for consolidation of certain reporting obligations for such dually registered advisers to private funds and commodity pools. Regardless of any reporting on Form PF, however, all private fund advisers that are also registered as CPOs and CTAs with the CFTC would be required to file Schedule A of proposed Form CPO-PQR and CTA-PR, as applicable, if adopted.

Equity Investments in Other Private Funds; Funds of Funds

An adviser may exclude any private fund assets invested in the equity of other private funds but must do so consistently for purposes of both the reporting thresholds and responding to questions (except for Question 10). The adviser may not, however, disregard liabilities, even if incurred in connection with the private fund investments.

Any "fund of funds" (*i.e.*, any private fund that invests substantially all of its assets in the equity of other private funds and, aside from those investments, holds only cash, cash equivalents and instruments intended to hedge currency risk), is required to be reported only in section 1b and otherwise should be disregarded.

Significant Industry-Friendly Changes in Final Form PF from the Proposal

Final Form PF and related requirements include a number of significant changes from the proposed requirements such as:

- postponement of the compliance deadlines;
- a minimum threshold for filers of \$150 million in private fund RAUM;
- the removal of the requirement to certify Form PF under penalty of perjury; and
- permitting an adviser to use its own internal methodologies and conventions of its service providers, provided that the methodologies are consistently applied and consistent with Form PF instructions and guidance.⁷

Aggregation Requirements for Form PF

Aggregation for Purposes of Reporting Thresholds

Reporting advisers are required to follow certain aggregation rules for purposes of determining whether or not they meet the *de minimis* \$150 million private fund asset threshold for reporting on Form PF as well as the large private fund adviser thresholds with respect to hedge funds, liquidity and money market funds and private equity funds.

Aggregation also is required for large hedge fund advisers to determine whether any hedge fund is a "qualifying hedge fund" (see below) subject to additional information reporting requirements. For these purposes, the adviser must aggregate:

- private funds that are part of the same master-feeder arrangement, subject to instructions intended to avoid double-counting;
- "dependent parallel managed accounts," which, generally, are any managed accounts or other pools of assets that pursue substantially the same investment objective and strategy and invest side by side in substantially the same positions as a private fund and do not exceed the size of that fund;

⁷ See Sidley Client Update, "SEC Adopts Form PF with a Number of Industry-Friendly Changes" (October 27, 2011), *available at* <http://www.sidley.com/SidleyUpdates/Detail.aspx?news=4982>.

- private funds that are part of the same “parallel fund structure,” private funds that pursue substantially the same investment objective and strategy and invest side by side in substantially the same positions as another private fund; and
- assets of private funds or parallel managed accounts advised by any of the adviser’s “related persons,” other than related persons that are separately operated, to the same extent required if they were advised by the adviser.

Aggregating Master-Feeder Funds, Parallel Funds and Parallel Managed Accounts for Purposes of Responding to Questions in the Form and Reporting on Individual Funds

When reporting on individual funds (as opposed to aggregation for reporting threshold purposes), an adviser may report with respect to master-feeder funds or parallel fund structures either in the aggregate or separately, so long as it follows one approach consistently throughout Form PF. The aggregate value of parallel managed accounts related to each reporting fund will be reported as a separate item in Section 1b, as noted below.

Related Persons

An adviser may choose whether to file a consolidated Form PF for itself and its related persons. The option allows related persons that share reporting and risk management systems to report jointly while permitting related persons that operate separately to report separately.

Sub-advised Funds

To avoid duplicative reporting, Form PF information regarding sub-advised funds should be reported by only one adviser. The adviser that completes information in section 7.B.1. of Schedule D to Form ADV with respect to any private fund is also required to report that fund on Form PF. If, however, the adviser reporting the private fund on Form ADV has no requirement to file Form PF (*e.g.*, an exempt reporting adviser), then another adviser, if required to file Form PF, must report the fund on Form PF.

INFORMATION REQUIRED ON FORM PF

Section 1

Section 1a: Identifying information about the adviser and its related persons

Must be completed by: All private fund advisers required to file Form PF.

Section 1a requires general identifying information about the adviser and basic aggregate information about the private funds it advises, such as the portion of gross and net assets under management attributable to certain types of private funds.

Section 1b: Information about private funds advised

Must be completed by: All private fund advisers required to file Form PF.

Section 1b elicits certain identifying and other basic information about each private fund the adviser manages. The adviser must report, with respect to each fund:

- gross and net asset value;
- value of investments in other private funds;
- value of parallel managed accounts managed alongside the fund;

- basic information about borrowings, including a breakdown showing whether a given creditor is based in the United States and/or is a financial institution;
- aggregate gross notional value of derivative positions;
- assets and liabilities broken down using categories based on the GAAP fair value hierarchy, which provides information indicating the illiquidity and complexity of the fund's portfolio;
- percentage of the fund's equity held by the five largest equity holders, which provides information regarding investor base concentration;
- approximate percentage beneficially owned by certain types of investors; and
- fund performance, both on a gross basis and net of management fees and incentive fees and allocations. The adviser generally may rely on its existing procedures for calculating and reporting fund performance. Monthly and quarterly performance results must be provided only if such results already are calculated for the fund.

Section 1c: Information about hedge funds advised

Must be completed by: All private fund advisers that are required to file Form PF and advise one or more hedge funds.

Section 1c requires the adviser to report information regarding each hedge fund it manages, including:

- investment strategies;
- percentage of assets managed using computer-driven trading algorithms;
- significant counterparty exposures (including the identity of the most significant counterparties); and
- trading and clearing practices.

Section 2

Must be completed by: Large hedge fund advisers.

Section 2 requires additional information regarding the hedge funds managed by large hedge fund advisers.

Certain data in the Form, while filed with the SEC on an annual or quarterly basis, must be tracked on a monthly basis to provide sufficiently granular data to allow FSOC to better identify trends and to mitigate "window dressing."

Section 2a: Aggregated information about hedge funds advised

Section 2a requires certain aggregate information about the hedge funds advised by a large private fund adviser, including:

- value of assets invested (on a short and long basis) in different types of securities, derivatives and commodities, as of the last day in each month of the reporting period;
- duration, weighted average tenor or 10-year bond equivalent of fixed income portfolio holdings (including asset backed securities);
- for each month of the reporting period, the value of turnover in certain asset classes in the hedge funds' portfolios; and
- geographical breakdown of portfolio investments.

Section 2b: Information about “qualifying hedge funds” advised

Section 2b requires certain additional information about any hedge fund managed that has a net asset value (“NAV”) of at least \$500 million as of the end of any month in the prior fiscal quarter (a “qualifying hedge fund”). In determining whether a private fund is a qualifying hedge fund, the adviser must aggregate any parallel funds and funds that are part of the same master-feeder arrangement and, to the extent required by instructions to the Form, any dependent parallel managed accounts and relevant funds of related persons.

Fund exposures and trading

The adviser must report, with respect to each qualifying hedge fund:

- the same information as that requested in Section 2a regarding exposure to different types of assets, but on a per fund basis;
- information regarding the fund’s portfolio liquidity, holdings of unencumbered cash and position concentration;
- information regarding the fund’s collateral practices; and
- whether the fund cleared any trades directly through a central clearing counterparty (“CCP”) during the reporting period.

Fund risk metrics

Section 2b also requires, for each qualifying hedge fund, data regarding certain hedge fund risk metrics. The adviser must report, for example:

- value at risk (“VaR”) for each month of the reporting period, and certain information regarding the method of calculating VaR, but only if, during the reporting period, a VaR metric was regularly calculated;
- any risk metrics other than, or in addition to, VaR, that it considers important in managing the fund’s risk; and
- the impact on the fund’s portfolio from specified changes to certain identified market factors, if regularly considered in formal testing in the fund’s risk management.

Financing information

The adviser must report certain financing information for each qualifying hedge fund, including, for each month of the reporting period:

- value of secured and unsecured borrowing;
- value of the collateral and other credit support posted;
- types of creditors;
- aggregate value of all derivatives positions; and
- for transactions that are not cleared by a CCP, the net mark-to-market value of uncleared derivatives positions and the value of the collateral and other credit support posted in respect of those uncleared positions.

The adviser also must provide:

- breakdown of the terms of available financing; and
- identity of, and amount owed to, each creditor to which the fund owed an amount equal to or greater than 5 percent of the fund’s NAV as of the reporting date.

Investor information

The adviser also must report information about each qualifying hedge fund's investor composition and liquidity. For example, the adviser must report:

- information regarding side-pocket and gating arrangements; and
- breakdown of the percentage of the fund's NAV that is locked in for different periods of time.

Section 3

Must be completed by: Large liquidity fund advisers.

Section 3 requires that the adviser report certain information for each liquidity fund it manages, including:

- valuation methodology;
- whether the fund, as a matter of policy, is managed in compliance with certain provisions of Rule 2a-7 under the Investment Company Act;
- for each month of the reporting period, net asset value, net asset value per share, market-based net asset value per share, weighted average maturity, weighted average life, 7-day gross yield, amount of daily and weekly liquid assets and amount of assets with a maturity greater than 397 days;
- amount of assets invested in different types of instruments, broken down by maturity;
- information regarding each open position that represents 5 percent or more of NAV;
- information regarding any secured or unsecured borrowing, broken down by creditor type and maturity profile, and any committed liquidity facilities; and
- investor information, including concentration of investor base, percentage of fund equity purchased using securities lending collateral, gating and redemption policies and investor liquidity.

Section 4

Must be completed by: Large private equity fund advisers

The SEC acknowledged in the Adopting Release that “several potentially mitigating factors suggest that private equity funds may have less potential to pose systemic risk than some other types of private funds, and this has been taken into account in requiring substantially less information with respect to private equity funds than with respect to hedge funds or liquidity funds.” However, the SEC noted, targeted information regarding private equity leverage practices may be important to FSOC's monitoring of systemic risk.

Because leverage in private equity structures is generally incurred at the portfolio company level, most Section 4 reporting relates to portfolio companies, and the majority of the required information is available from portfolio company financial statements or relates to the fund's own portfolio company investments. Much of the reporting is limited to “controlled portfolio companies,” rather than portfolio companies generally, to ensure that advisers are able to obtain the relevant information without incurring potentially substantial additional burdens. A “controlled portfolio company” is defined as a portfolio company that is controlled by the private equity fund, either alone or together with the private equity fund's affiliates.

Reporting fund financing and investments

The adviser must report, for each private equity fund advised:

- information about the amount of guarantees that the adviser, the reporting fund or any other related person of the adviser issues in respect of any portfolio company's obligations;

- weighted average debt-to-equity ratio of controlled portfolio companies and the range of that ratio among these portfolio companies;
- aggregate gross asset value of the reporting fund's controlled portfolio companies;
- maturity profile of controlled portfolio companies' debt;
- portion of controlled portfolio companies' borrowing that is payment-in-kind or zero coupon;
- whether the fund or any of its controlled portfolio companies experienced an event of default on any of its debt during the reporting period;
- bridge financing to controlled portfolio companies; and
- certain information regarding, if applicable, the fund's control of any financial industry controlled portfolio company.

The adviser also must provide a breakdown of the fund's investments by industry and by geography. Regulators will be able to use this information to monitor global and industry concentrations among private equity funds.

Confidentiality of Form PF Data

The SEC states in the Adopting Release that it does not intend to make Form PF information public in a way that identifies particular investment advisers or private funds, although the information may be used in examinations or an enforcement action. The Dodd-Frank Act provides that the SEC, FSOC and any other department, agency or self-regulatory organization that receives information from Form PF is exempt from the provisions of the Freedom of Information Act with respect to such information and amends the Advisers Act to preclude the SEC from being compelled to disclose this information except in very limited circumstances. Section 204(b)(8) of the Advisers Act exempts the SEC from being compelled under any other provision of law to disclose any information collected through Form PF, except that nothing

- authorizes the SEC to withhold information from Congress, upon an agreement of confidentiality or
- prevents the SEC from complying with—
 - a request for information from any other Federal department or agency or self-regulatory organization requesting the report or information for purposes within the scope of its jurisdiction or
 - an order of a court of the United States in an action brought by the United States or the SEC.

The Dodd-Frank Act further requires the CFTC and any other Federal departments or agencies or self-regulatory organizations to maintain the confidentiality of information collected on Form PF in a manner consistent with the level of confidentiality established for the SEC.

Filing Fees and Systems

The SEC announced on September 30, 2011 that FINRA would develop and maintain the filing system for Form PF as an extension of the existing Investment Adviser Registration Depository. The system will be programmed to reflect the heightened confidentiality of Form PF information and will allow secure access by the FSOC and other regulators. Advisers will be able to file Form PF either through a fillable form on the Form PF system website or through a batch filing process using the eXtensible Markup Language ("XML").

Advisers required to file Form PF will pay a filing fee of \$150 for either quarterly or annual reports filings.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

The Investment Funds Practice of Sidley Austin LLP

Sidley has a premier, global practice in structuring and advising investment funds and advisers. We advise clients in the formation and operation of all types of alternative investment vehicles, including hedge funds, fund-of-funds, commodity pools, venture capital and private equity funds, private real estate funds and other public and private pooled investment vehicles. We also represent clients with respect to more traditional investment funds, such as closed-end and open-end registered investment companies (*i.e.*, mutual funds) and exchange-traded funds (ETFs). Our advice covers the broad scope of legal and compliance issues that are faced by funds and their boards, as well as investment advisers to funds and other investment products and accounts, under the laws and regulations of the various jurisdictions in which they may operate. In particular, we advise our clients regarding complex federal and state laws and regulations governing securities, commodities, funds and advisers, including the Dodd-Frank Act, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Act of 1933, the Securities Exchange Act of 1934, the Commodity Exchange Act, the USA PATRIOT Act and comparable laws in non-U.S. jurisdictions. Our practice group consists of approximately 120 lawyers in New York, Chicago, London, Hong Kong, Singapore, Shanghai, Tokyo, Los Angeles and San Francisco.

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