

## Bullet Point <sup>®</sup>

### SEC Guidance Regarding Investment Adviser Affiliates <sup>1</sup>

On January 18, 2012, the Securities and Exchange Commission's ("SEC") Division of Investment Management issued a no-action letter (the "No-Action Letter") providing additional relief from registration for certain related affiliates of a registered investment adviser. The SEC issued the No-Action Letter in response to a request from the American Bar Association's Subcommittee on Hedge Funds (the "ABA Subcommittee"). The ABA Subcommittee requested clarification on whether certain SEC precedents relating to the treatment of affiliates of a registered investment adviser would be upheld in light of recent amendments to the Investment Advisers Act of 1940, as amended (the "Advisers Act") pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The SEC staff confirmed in the No-Action Letter that it will consider certain related affiliated entities of a registered investment adviser to be part of a single advisory business for registration purposes (as detailed below).

The SEC has not previously required certain natural persons associated with a registered investment adviser to separately register with the SEC (i.e. file a separate Form ADV) and has treated the registration of the adviser entity as "covering the associated persons." In a 2005 letter to the ABA's Subcommittee on Private Investment Entities (the "2005 Letter"), the SEC staff set forth its position on the registration status of associated entities of a registered investment adviser with respect to a private fund's general partner, managing member or other special purpose vehicles ("SPVs"). The 2005 Letter noted that the SEC would not recommend enforcement action against a registered investment adviser and any related, unregistered SPV as long as the following conditions are met:

1. The investment adviser to a private fund establishes the SPV to act as the private fund's general partner or managing member;
2. The SPV's formation documents designate the investment adviser to manage the private fund's assets;
3. All of the investment 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 registered adviser subjects the SPV, its employees and persons acting on its behalf to the registered adviser's supervision and control and, therefore, the SPV, all of its employees and the persons acting on its behalf are "persons associated with" the registered adviser (as defined in section 202(a)(17) of the Advisers Act.

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<sup>1</sup> This memorandum provides general information on the subject matter described, should not be relied on for legal advice in any jurisdiction and may constitute attorney advertising.

According to the 2005 Letter, if all of the above conditions are met, an associated SPV could rely on the registered investment adviser's registration and avoid separate registration for itself.

In the recent No-Action Letter, the SEC staff stated that it plans to uphold the precedents set forth in the 2005 Letter with regards to related SPVs. The SEC staff also expanded upon its guidance from the 2005 Letter in several ways. First, the conditions of the 2005 Letter only applied in limited circumstances where an SPVs, its employees and the persons acting on its behalf were subject to the supervision and control by the registered adviser and therefore were deemed to be "persons associated with"<sup>2</sup> the registered adviser. The SEC staff expanded on this guidance by stating that an SPV with independent directors who are not necessarily "persons associated with" the registered adviser" can also rely on the guidance from the 2005 Letter so long as those independent directors are the only persons acting on the SPV's behalf that are not supervised and controlled by the SPV.

The No-Action Letter also stated that several related investment advisers affiliates who conduct a "single advisory business" along with a registered adviser could all report on the same Form ADV as the registered adviser (and not have to register independently) so long as the following conditions are met:

1. The filing adviser and each relying adviser advise only private funds and separate account clients that are qualified clients<sup>3</sup> 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;
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 U.S. 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 clients, regardless of whether any client or the filing adviser or relying adviser providing the advice is a U.S. person;
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 adopted in accordance with Advisers Act Rule 204A-1 and a single set of written policies and procedures adopted and implemented in accordance with Advisers Act Rule 206(4)-(7) and administered by a single chief compliance officer in accordance with that rule; and

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<sup>2</sup> See Advisers Act Section 202(a)(17).

<sup>3</sup> See Advisers Act Rule 205-3.

6. The filing adviser discloses in its Form ADV (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 this letter 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).”

Of note for all non-U.S. advisers is item 3 above which limits the applicability of this relief from registration to U.S.-based filing advisers only. However, a U.S.-based adviser with non-U.S. advisory affiliates would still be able to include its non-U.S. advisory affiliates on its Form ADV (so long as all of the other above qualifications are met).

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Should you have any questions regarding the implications of the SEC’s No-Action Letter on related entities of an investment adviser, please feel free to contact Michael G. Tannenbaum ((212) 508-6701 or [Tannenbaum@thsh.com](mailto:Tannenbaum@thsh.com)), Ricardo W. Davidovich ((212) 508-6710 or [Davidovich@thsh.com](mailto:Davidovich@thsh.com)) or Richard E. Strohmenger ((212) 508-7520 or [Strohmenger@thsh.com](mailto:Strohmenger@thsh.com)).

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