

TECHNICAL

Will you need to register with the SEC??

The new Dodd-Frank legislation in the US will require many non-US Fund Managers to register with the SEC. As a result Managers will fall under US legislation and have to be compliant with SEC rules. Will this apply to you?

The Dodd-Frank legislation, which came into force in the US in July 2010, will require many non-US Managers to register with the SEC. The registration process must be completed by 21st July 2011 and there are considerable penalties for not doing so. We set out below who will need to register and the processes and timings involved.

Will you need to register?

All Fund Managers will need to register unless they have:

- No place of business in the US
- Fewer than 15 US clients/investors and
- Less than \$25 million of assets under management attributable to US clients/investors

There is an exemption for "Venture Capital Fund" advisers – however the SEC has yet to define "Venture Capital" and this clarification

is not expected probably until late November/early December. There are mixed views as to how "accommodating" the SEC will be to Managers and a number of advisers are recommending that unless Managers only make early stage investments they should commence preparations for SEC registration.

For Property/Real Estate Managers the situation remains uncertain. The rules apply to firms that advise on "securities" and it is not yet clear whether real estate holding structures will bring firms within scope.

What happens if you should have registered and you don't?

The SEC are likely to take serious action against those that haven't registered. This, given past track record, is likely to include financial penalties which will amount to a number of years of management fees.

In addition, failure to register will void any contract with investors and investors could therefore, in theory at least, seek repayment of all management fees and carried interest.



J.P. Harrop
Managing Partner

As a consequence the potential financial penalties for non-registration are great.

What should you do?

A suggested timeline for a plan of action is shown below and over.

Which entity to register?

This will need to be reviewed in conjunction with your lawyers/advisers – but the answer is basically any entity that makes investment recommendations or decisions or has the power to appoint or terminate a Manager of the fund. This is therefore likely to include any GP entities. This aspect needs careful consideration by Managers and offshore Directors alike.

continued overleaf

Example Timeline

October	November	December	January 2011
<ul style="list-style-type: none"> - Begin registration process; develop workplan - Analyze adviser structure and determine registrants - Select CCO - Circulate Form ADV diligence questionnaire to personnel - Collect relevant documents for review, including PPMs fund, GP and Management Co agreements, etc 	<ul style="list-style-type: none"> - Review advertising practices in websites, PPMs, pitchbooks, etc. - Conflict and risk assessment: review advisory contracts, fund agreements and practices for Advisers Act compliance, evaluate necessary changes - Perform change of control analysis and determine whether organizational changes advisable 	<ul style="list-style-type: none"> - Complete initial draft Forms ADV, Compliance Program - Assess custody arrangements - Assess books and records requirements - Consider service providers/ programs for e-mail retention, tracking personal securities trading, etc. 	<ul style="list-style-type: none"> - Work toward finalization of Forms ADV, Compliance Program - Formally appoint CCO - Determine "access persons" and reporting accounts under code of ethics for personal securities transactions

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The Registration Process

It is likely that Managers will want to seek assistance in the completion of the relevant forms (Forms ADV 1 and 2) prior to their filing with the SEC. In addition, these forms will need to be filed on an annual basis and also promptly on a "from time to time" basis in the event of information changing.

Compliance with SEC rules

Once registered, Managers and other registered entities will need to comply with the SEC rules – in addition to the rules of any other regulator. This is likely to require a review of any compliance manuals prior to the completion of any application to the SEC. In addition there will be a need to appoint a Compliance Officer for SEC purposes – which can be the same person as for other regulatory regimes.

Custody Requirement

As in the anticipated AIFM Directive, there is a requirement for assets (both cash and securities) to be held in segregated custody accounts with a qualified Custodian. Where, however, the fund holds "Privately Offered Securities" there is an exemption from most of the custody requirements as long as:

- Funds are audited in accordance with US GAAP (or IFRS with US GAAP reconciliation)
- Audited statements are distributed to investors within 120 days (180 days

- in respect of a Fund of Funds) and
- Investors are notified of any Custodians used

The definition of a "Privately Offered Security" is one that:

- Is acquired directly from the issuer and not via a public offering
- Is uncertified and is only registered in the books of the issuer in the name of the investor and
- Is only transferable with the prior permission of the issuer

Whilst it does appear that most private equity holdings will fall within the scope of this definition (and therefore not need to be held in formal custody), the additional need for the production of audited US GAAP accounts may lead to the production of multiple sets of accounts to be used for different purposes.

Way forward

It is imperative that all Managers with US investors in their portfolio consider the impact of the legislation and consider, with their advisors, what action needs to be taken. Failure to register by 21st July 2011 could have serious impacts.

View from Fund Counsel:

Although there can be a substantial amount of legwork involved, the SEC registration process itself should be relatively straightforward for most firms. However, ongoing SEC compliance involves some traps for the unwary, and it is worth reviewing your structure and fund documentation with fund counsel in advance of registration to avoid any nasty surprises. In some cases, LPA provisions can trigger an obligation for registered firms to file a publicly available U.S. GAAP audited balance sheet with the SEC. In addition, under SEC rules, a change in control of the Fund Manager requires investor consent, and pre-planning is required to identify likely change of control scenarios and manage investor consent rights. With sufficient advance notice, the impact of many of these issues can be mitigated by structural or fund document amendments.

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Example Timeline

February

- Begin formal implementation of political contribution policy for March 2011 compliance date
- Begin rollout of key policies on a test basis
- Prepare employee training materials
- Work on any fund/Manager agreement amendments

March

- Confirm and update as necessary personnel Form ADV diligence questionnaire
- Finalize appropriate changes to control structure prior to registration
- Amend and restate or supplement PPM or other advertising materials to comply with advertising rules

April

- Updated and finalize Forms ADV, Compliance Program
- File Forms ADV with SEC
- Formal employee training
- Implement Compliance Program

May-June

- Investor communication, including Form ADV Part 2
- Address any SEC comments on Form ADV

21 July 2011

- **SEC-Registered**

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MORE INFO

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