

CLIENT MEMORANDUM

Reminder: Annual Update of Form ADV and Annual Requirement to Confirm Status of Investors Under the New Issue Rules

February 14, 2014

AUTHOR

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Annual Update of Form ADV

The Securities and Exchange Commission (the “SEC”) requires SEC-registered investment advisers and Exempt Reporting Advisers¹ to annually update the information on their Form ADVs. Form ADV is filed electronically on the Investment Adviser Registration Depository (“IARD”) System. As was the case in past years, the annual update filing must be made within 90 days of the adviser’s fiscal year-end and should update responses to all items answered on Form ADV (“Annual Updating Amendment”).²

¹ Exempt Reporting Advisers (“ERAs”), (i) advisers managing only venture capital funds and (ii) advisers managing only private funds with less than \$150 million aggregate regulatory assets under management managed from a place of business in the U.S., are exempt from registration under the Investment Advisers Act of 1940, but are required to file a notice or “report” with the SEC. The reports are made using Form ADV, but with only certain sections completed. ERAs are only required to complete items 1, 2, 3, 6, 7, 10 and 11 of Form ADV and any corresponding schedules.

² In addition to this requirement to update all responses on Form ADV once a year, the instructions for Form ADV require that certain changes to Form ADV be reported by SEC-registered advisers by amendment promptly. ERAs are also required to update all responses to the items in Form

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SEC-registered investment advisers pay a fee determined by the particular adviser's regulatory assets under management³ for filing Annual Updating Amendments.

Regulatory Assets Under Management	Annual Updating Amendment Fee
\$100 million or more	\$225
\$25 million to \$100 million	\$150
Less than \$25 million	\$40

Exempt Reporting Advisers will pay \$150 for filing Annual Updating Amendments.

Fees must be credited to the adviser firm's Daily Account on the IARD before filings may be submitted.⁴ No fee is charged for filing an electronic amendment to Form ADV unless it is an Annual Updating Amendment.

Annual Confirmation of Investors' Status Under the "New Issue" Rules

Financial Industry Regulatory Authority, Inc. ("FINRA") Rule 5130 precludes broker-dealers from selling New Issue securities (generally equity IPO securities) to accounts the beneficial owners of which are Restricted Persons as defined in that Rule. FINRA Rule 5131 restricts broker-dealers from selling New Issues to accounts that are beneficially owned by persons that are executive officers or directors of public companies and certain covered nonpublic companies having specified relationships with the broker-dealer, and persons materially supported by such persons ("Covered Persons").⁵

Because Rules 5130 and 5131 look to the beneficial owners of an account, managers of private investment funds that purchase New Issue securities for their funds are required to ask about the Restricted and Covered Person status of investors in their funds. The Rules also require that the Non-Restricted and Covered Person status of those investors be confirmed every year. Therefore, managers that obtained questionnaires regarding the status of their investors under these rules last year should now confirm the status of such investors again. Rule 5130 only requires that the manager annually reconfirm that an investor is **not** a Restricted Person and is thus able to participate in the profits and losses from

ADV completed by ERAs in their Annual Updating Amendment. Additionally, any changes to items 1, 3 or 11, and material changes to item 10, must be amended promptly by ERAs.

³ As calculated for item 5.F. of Form ADV.

⁴ Every adviser authorized to use the IARD system to make electronic filings of Form ADV has a financial account with the IARD. Firms may submit payments by check, wire transfer or electronic payment via Web CRD/IARD E-Pay. Instructions and relevant addresses are available [here](#). Investment advisers registered with or applying for registration with the SEC will still also be subject to any applicable state notice filing fees.

⁵ Please see our firm's client memorandum *FINRA Anti-Spinning Rule's Impact on Private Funds*, March 8, 2011 [here](#).

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New Issue securities.⁶ Rule 5131 permits allocations of New Issues to an account in which the collective beneficial interests of Covered Persons associated with any one particular public company or covered nonpublic company represent 25% or less of the value of the account. Therefore, a manager may want to ask investors to confirm that they are affiliated with the same company or companies as was the case in the prior year. Both rules allow the annual confirmation of status to be in the form of a negative consent once an initial written confirmation has been obtained.

Thus, managers wishing to purchase New Issue securities should communicate, sometime before the anniversary date of the responses received last year, to each of their investors, advising them, based on the investor's answers from last year, whether the manager has treated the investor as a Covered Person and/or a Restricted Person and asking the investor to inform the manager of any changes in such investor's status. The manager may also state in the mailing that if it does not receive a reply by a certain date, it will assume there has been no change in the investor's status.

Additionally, effective February 3, 2014, Rule 5131 was modified to allow managers to rely on written representations from an investor that is an "unaffiliated private fund," such as a fund of funds, that does not require the unaffiliated private fund investor for purposes of determining status under Rule 5131 to look through to its beneficial owners, other than the control persons of the adviser to the unaffiliated private fund.⁷ Previously, where an investor in a fund was itself a fund, such as a fund of funds, it was often difficult for the manager of the fund to obtain, track and aggregate information about the various company affiliations of the beneficial owners of such fund of funds investors.

The modification to Rule 5131 provides that an "unaffiliated private fund" is a "private fund," as defined in Section 202(a)(29) of the Investment Advisers Act, whose investment adviser does not have a control person in common with the investment adviser to the fund in which it is investing. A control person of an investment adviser is a person with direct or indirect "control" over the investment adviser, as that term is defined in Form ADV.

To rely on this relief, the unaffiliated private fund investor must also: (1) be managed by an investment adviser, (2) have assets greater than \$50 million, (3) own less than 25% of the fund in which it is investing, (4) not be a fund in which a single investor has a beneficial interest of 25% or more, and (5) not have been formed for the specific purpose of investing in the other fund.

This new modification will provide an alternative for private fund managers to comply with the investor diligence required for investing in New Issues. Instead of having to ask about the Covered Person status of all the beneficial owners of unaffiliated funds wishing to invest, and which public or covered non-public companies such indirect beneficial owners are affiliated with, a private fund manager can just ask about the control persons of the adviser to the unaffiliated fund, and

⁶ However, many managers also annually ask investors classified as Restricted if their status has changed.

⁷ See FINRA Regulatory Notice 13-43 (Dec. 2013). Please see our firm's client memorandum *FINRA Eases Compliance for Fund of Funds Under the "Anti-Spinning" Rule*, January 31, 2013 [here](#).

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have the unaffiliated fund make the representations in the new provision and reconfirm annually. We would be pleased to assist our clients in developing appropriate documentation in that regard.

However, please bear in mind that this relief is only for Rule 5131, and the unaffiliated investing fund would still need to provide information about the beneficial interest owned in it by Restricted Persons under Rule 5130.

If you have any questions concerning the foregoing or would like further information, please contact Martin R. Miller at (212-728-8690, mmiller@willkie.com) or the attorney with whom you regularly work.

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