



Financial Services Alert

www.BlankRome.com

November 2011 No. 1

Reporting Thresholds under New Form PF for Registered Investment Advisers Managing Hedge Funds, CLOs and CDOs

CDO and CLO Managers are assessing reporting requirements under Form PF, jointly promulgated by the SEC and the CFTC as required under the Dodd-Frank Act.¹ One recent issue raised by some managers who are registered investment advisers is whether assets held in CDOs and CLOs must be included for purposes of determining Form PF reporting thresholds for "private funds," "hedge funds" and "private equity funds."

On October 31st, the Commodity Futures Trading Commission (the "CFTC") and the Securities and Exchange Commission (the "SEC") jointly announced final rules relating to new reporting requirements for advisers of certain private funds, commodity pool operators and commodity trading advisers.² The new rule will require filing of Form PF (for "private fund") by investment advisers registered with the SEC that advise private funds having at least \$150 million in assets under management. Most registered investment advisers are expected to make annual filings; however, certain large fund advisers, including those with at least \$1.5 billion in assets under management attributable to hedge funds, will be required to file more detailed information on a quarterly basis. These new reporting requirements are primarily intended to provide the Financial Stability Oversight Committee, the SEC and the CFTC with important information about systemic risk in the private fund industry.

The primary threshold for filing Form PF is any investment adviser that (i) is registered or required to register with the SEC, (ii) advises one or more private funds (see seven types of private funds below) and (iii) had at least \$150 million in regulatory assets under management attributable to private

funds at the end of its most recently completed fiscal year. For purposes of determining assets under management, the key phrase is assets "attributable to private funds." This clause is broad as it encompasses any issuer that would be an investment company but for Section 3(c)(1) or 3(c)(7) of the Investment Company Act. Collateralized debt obligation ("CDO") and collateralized loan obligation ("CLO") issuers typically rely on one of these exemptions from registration under the Investment Company Act; therefore, registered investment advisers who manage investments for CDO or CLO issuers would need to include the assets of those issuers in determining whether they meet the basic filing threshold.

An adviser meeting that initial threshold will be required to complete section 1 of Form PF, including certain basic information regarding the private funds (see seven types below) advised and information about the assets under management, fund performance and use of leverage.

Large private fund advisers will be subject to more extensive quarterly reporting requirements. These reporting requirements will apply to, among others, advisers who have at least \$1.5 billion in assets under management attributable to hedge funds. Unlike the initial threshold, with reference to assets attributable to "private funds," the higher reporting obligation will attach based on assets attributable to "hedge funds." The final rules identify seven types of private funds: (i) hedge funds, (ii) liquidity funds, (iii) private equity funds, (iv) real estate funds, (v) securitized asset funds, (vi) venture capital funds and (vii) other private funds. The definition of hedge funds expressly excludes securitized asset funds. The definition of private equity funds includes private

funds that are not hedge funds, liquidity funds, real estate funds, securitized asset funds or venture capital funds.

As defined in the final rule, securitized asset funds encompass any private fund “whose primary purpose is to issue asset backed securities and whose investors are primarily debt-holders.” CLOs and CDOs would appear to fit within that definition. The adopting release does not provide any greater details of how an adviser should determine whether a private fund is a securitized asset fund. The determination may be significant as the determination that a CDO or CLO is a securitized asset fund (and thereby excluding it as a hedge fund or private equity fund) will exclude the related assets in determining whether the adviser is subject to the increased quarterly reporting obligations.

In the proposed rule, securitized asset funds would have been defined as any private fund that is not a hedge fund and that issues asset backed securities and whose investors are primarily debt-holders.³ One commenter requested that the SEC clarify that hedge funds do not include securitized asset funds.⁴ In adopting the final rules, the SEC and the CFTC have expressly excluded securitized asset funds from the definition of hedge funds and private equity funds.

The same commenter suggested that there was a risk that CDOs could be classified as private equity funds under the

proposed rule, even though the definition in the proposed rules expressly excluded securitized asset funds. While the SEC declined to adopt the proposed revisions offered by this commenter, it left open the issue of whether CDOs might properly be classified as private equity funds on the basis that CDOs often invest in asset backed securities. As CDOs and CLOs are primarily used to issue asset backed securities (similar to other types of securitizations) and whose investors are primarily debt-holders, the better reading is that CDOs and CLOs are securitized asset funds and should be excluded from hedge funds and private equity funds when determining whether the registered investment adviser is subject to the higher reporting standards of a large private fund adviser.

The deadlines for initial filings of Form PF will vary among advisers. The first annual filings for smaller advisers will be within 120 days of the fiscal years ending on or after December 15, 2012 (or April 30, 2013 for advisers with a December 31st yearend). Larger advisers subject to quarterly reporting may need to file initial reports as early as August 29, 2012. Later filing deadlines may apply to newly registered advisers. Advisers should confirm the applicable deadlines based on their particular circumstances.

1. See Section 406 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2. *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 (Oct. 31, 2011).

3. See *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF*, Investment Advisers Release No. IA-3145 (Jan. 26, 2011), 76 FR 8,068 (Feb. 11, 2011).

4. Comment letter of TCW Group, Inc. (Apr. 12, 2011), available at <http://www.sec.gov/comments/s7-05-11/s70511.shtml>.

For further information on this topic, contact

Grant E. Buerstetta

212.885.5454

GBuerstetta@bBlankRome.com

Thomas R. Westle

212.885.5239

TWestle@BlankRome.com

Stephen T. Whelan

212.885.5191

SWhelan@BlankRome.com