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Reminder: Annual Update Of Form ADV And Annual Requirement To Confirm Status Of Investors Under The New Issue Rules

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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

SEC-registered investment advisers pay a fee determined by the adviser’s regulatory assets under management³ for filing their Annual Updating Amendments. See Figure 1.

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

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.

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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 as to 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** Restricted and is thus able to participate in the profits and losses from 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 percent or less of the value of the account. So a manager may want to ask the investor to confirm that their status is 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.

Figure 1

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

Please email the author at mmiller@willkie.com with questions about this article.

1 The Dodd-Frank Wall Street Reform and Consumer Protection Act created two new exemptions from registration under the Investment Advisers Act of 1940 for (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. However, even though such advisers ("Exempt Reporting Advisers" or "ERAs") are exempt from registration with the SEC, they 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 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. See <http://www.iard.com/accounting.asp> for instructions and relevant addresses. Investment advisers registered with or applying for registration with the SEC will also still 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 at http://www.willkie.com/files/tbl_s29_Publications/FileUpload5686/3699/FINRA-Anti-Spinning-Rule-Impact.pdf. FINRA delayed the effectiveness of these provisions of Rule 5131 until September 26, 2011.

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