KIRKLAND & ELLIS

KIRKLANDPEN
Private Equity Newsletter

November 9, 2011

SEC Adopts Private Fund Reporting Form PF

PENpoints

The SEC recently adopted Form PF, which requires most SEC-registered investment advisers to private funds to file confidential systemic risk reports with the SEC beginning March 2013.

On October 26, 2011, the U.S Securities Exchange Commission ("SEC") adopted Form PF requiring most SEC-registered investment advisers to private funds to file confidential systemic risk reports with the SEC beginning in March 2013.

Filing Threshold

An SEC-registered investment adviser must file Form PF if it had at least $150 million in regulatory assets under management ("AUM")[1] attributable to private funds (*i.e.*, funds relying on Investment Company Act §3(c)(1) (fewer than 100 investors) or §3(c)(7) (all investors are qualified purchasers)) as of the end of its most recent fiscal year. To determine the amount of regulatory AUM for all Form PF thresholds, an investment adviser generally must aggregate:

- assets of all the managed accounts it advises that invest substantially in tandem with the adviser's private funds (unless the value of such managed accounts exceeds the value of such private funds) and
- assets managed by affiliated management companies and general partners unless the affiliates are operated independently.[2]

An adviser may use a combined Form PF for all private funds managed by the adviser and its affiliates (*e.g.*, a private equity management company may file a combined Form PF on behalf of its affiliated general partners).

For purposes of both the reporting thresholds and responding to questions on Form PF, an adviser may exclude equity investments in other private funds. In addition, an adviser with its principal office and place of business outside the U.S. may exclude any private fund that, during the prior fiscal year, was not a U.S. person,[3] was not offered in the U.S. and no part of such private fund was beneficially owned by any U.S. person.

Information Required

Each SEC-registered private fund adviser with at least $150 million in regulatory AUM must, among other things, disclose:

- amount of total and net assets under management;
- aggregate notional value of fund-level derivative positions for each private fund;
- amount of fund-level borrowings for each private fund;
- types of creditors and counterparties for each private fund;
- investor concentration for each private fund; and
- fund performance for each private fund on a monthly or quarterly basis (but only to the extent actually calculated by the private fund).

Certain large advisers to private equity funds[4], hedge funds[5] and liquidity funds[6] must provide additional information. For a private equity manager (other than an adviser to real estate funds[7]) with least $2 billion of regulatory AUM attributable to private equity funds, Form PF requires, on an aggregate basis for each private equity fund:

- information regarding guarantees of, and leverage incurred by, portfolio companies;
- weighted average debt-to-equity ratio of portfolio companies;
- gross assets of portfolio companies; and
- a breakdown of portfolio companies by industry and geography.

INSIDE KIRKLANDPEN

A private fund employing a private equity strategy may nonetheless be categorized as a hedge fund for purposes of Form PF (and hence be subject to a lower threshold for additional reporting than $2 billion of regulatory AUM as well as greater information disclosure requirements) if it possesses characteristics contained in the SEC's definition of a hedge fund (*e.g.*, takes a performance fee based on market value (rather than only on realized gains), employs significant leverage at the fund level or engages in short selling (other than for currency hedging)).

Timing of Filings

A private equity manager (other than a manager of a private equity fund with hedge fund characteristics) has 120 days from the end of its fiscal year to file Form PF, with the initial filing date based on the adviser's regulatory AUM. Most advisers are required to make their initial filing in March 2013.[8]

Confidentiality

The information disclosed on Form PF is non-public, although the SEC may use Form PF information for routine examinations or enforcement. The SEC, as well as any federal agency, department or self-regulatory agency with which it shares Form PF information, cannot be compelled to disclose Form PF information by a Freedom of Information Act request. A link to Form PF may be found here: http://www.sec.gov/rules/final/2011/ia-3308-formpf.pdf.

---

1 The SEC's standard calculation of regulatory AUM for a private fund manager is (1) uncalled fund capital commitments plus (2) the gross fair value of existing investments managed by the adviser, including proprietary and non-fee paying assets or vehicles (*e.g.*, co-invest funds).

2 An adviser is operated independently from an affiliate if the adviser: (1) has no business dealings with the affiliate in connection with its advisory services; (2) does not conduct shared operations with the affiliate; (3) does not refer clients or business to the affiliate, nor does the affiliate refer prospective clients or business to the adviser; (4) does not share personnel or premises with the affiliate; and (5) has no reason to believe that its relationship with the affiliate otherwise creates a conflict of interest with respect to the adviser's private funds.

3 "U.S. person" generally means a natural person resident in the U.S. or an entity organized or incorporated under the laws of the U.S.

4 A "private equity fund" is any private fund that (1) is not a hedge fund, liquidity fund or real estate fund; (2) generally does not issue asset backed securities; (3) does not meet the definition of a "venture capital fund" under the Advisers Act; and (4) does not provide investors with redemption rights in the ordinary course.

5 A "hedge fund" is a private fund with any of the following characteristics: (1) a performance fee or allocation that takes into account market value (instead of only realized gains); (2) leverage in excess of 50% of its net asset value or gross notational exposure in excess of twice its net asset value, in each case including committed capital; or (3) short selling (other than for the purpose of hedging currency exposure or managing duration).

6 A "liquidity fund" is any private fund that seeks to generate income by investing in a portfolio of short-term obligations in order to maintain a stable net asset value per unit or minimize principal volatility for inventors.

7 A "real estate fund" is any private fund that (1) is not a hedge fund; (2) does not provide investors with redemption rights in the ordinary course; and (3) invests primarily in real estate and real estate-related assets.

8 An adviser with more than $5 billion of regulatory AUM attributable to private equity funds must make its initial filing following the first fiscal year end occurring after June 15, 2012. This could result in accelerated filing obligations for large advisers with non-calendar fiscal years. An adviser not exceeding the $5 billion threshold must make an initial filing following the first fiscal year end occurring after December 15, 2012.

If you have any questions about the matters addressed in this *KirklandPEN,* please contact the following Kirkland authors or your regular Kirkland contact.

Scott A. Moehrke, P.C.
http://www.kirkland.com/smoehrke
+1 312-862-2199

Nabil Sabki
http://www.kirkland.com/nsabki
+1 312-862-2369

Benjamin M. Harell
http://www.kirkland.com/bharell
+1 312-862-7321

Section 13H Filings by Large Traders

PENpoints

An adviser, including a non-U.S. adviser, qualifying as a Large Trader on or after October 3, 2011 must file new Form 13H with the SEC by December 1, 2011 and annually thereafter within 45 days of calendar year-end.

On June 26, 2011, the SEC adopted a rule requiring registration and reporting for certain "Large Traders" in order to enhance the SEC's ability to identify large market participants and collect information regarding their trading.

A "Large Trader" is any person that, directly or indirectly (including through persons controlled by such person), exercises investment discretion over transactions in U.S. exchange-listed securities and options[1] in an aggregate amount equal to or greater than either:

- during a calendar day, either two million shares or shares with a fair market value of at least $20 million; or
- during a calendar month, either 20 million shares or shares with a fair market value of at least $200 million.

An adviser, including a non-U.S. adviser, qualifying as a "Large Trader" on or after October 3, 2011 must file new Form 13H with the SEC by December 1, 2011 and annually thereafter within 45 days of calendar year-end. An adviser meeting the definition of "Large Trader" after December 1, 2011 must file Form 13H promptly (generally, within 10 calendar days) after reaching one of the applicable thresholds.[2] An adviser registering as a "Large Trader" will be assigned a unique large trader identification number that must be provided to any registered broker used by the adviser.

A private equity fund manager with one or more financial services portfolio companies (or other portfolio companies engaging in securities trading) must analyze whether the trading activities of such portfolio companies should be aggregated with the private equity fund manager for purposes of Form 13H and, if so, which entity should file such Form 13H.

---

1 The volume and value of options are calculated by reference to the underlying shares.

2 Form 13H is intended to be filed by the ultimate parent of any reporting subsidiaries but may also be filed by a reporting subsidiary.

If you have any questions about the matters addressed in this *KirklandPEN,* please contact the following Kirkland authors or your regular Kirkland contact.

Scott A. Moehrke, P.C.
http://www.kirkland.com/smoehrke
+1 312-862-2199

Nabil Sabki
http://www.kirkland.com/nsabki
+1 312-862-2369

Benjamin M. Harell
http://www.kirkland.com/bharell
+1 312-862-7321

PENnotes

PLI's "Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations, and Restructurings"
Chicago, Illinois
November 15-17, 2011

PLI's Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations and Restructurings will take place on November 15, 2011, in Chicago. This program will focus on a wide range of corporate transactions, from single-buyer acquisitions of a division or subsidiary to multi-party joint ventures, cross-border mergers and complex acquisitions of public companies with domestic and foreign operations. Kirkland partners Jack S. Levin, P.C., Todd F. Maynes, P.C. and Jeffrey T. Sheffield, P.C. will be speaking at this event. Click here for more information or to register for this event.

IBA's "Private Equity Transactions Conference"
London - December 1, 2011
New York - December 6, 2011

The IBA Private Equity Transactions Conference will be held in London and New York, and will feature discussions on the global private equity market; current market issues and predictions for 2012; emerging markets issues; and current issues in financing. Kirkland & Ellis is a sponsor of this event and partner Kirk A. Radke is a co-chair. Additionally, partner David Patrick Eich will be speaking on "Emerging Markets Issues: Themes from Asia and Latin America" and partner Jay Ptashek will speak on "Financing: Current Market Issues and Themes for Next Year." For more information, or to register for this event, please visit: http://www.int-bar.org/conferences/conf399/.

Chicago
300 North LaSalle
Chicago, IL 60654
+1 (312) 862-2000
+1 (312) 862-2200 fax

Hong Kong
26th Floor
Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
+852-3761-3300
+852-3761-3301 fax

London
30 St Mary Axe
London, EC3A 8AF
United Kingdom
+44 20 7469 2000
+44 20 7469 2001 fax

Los Angeles
333 South Hope Street
29th Floor
Los Angeles, CA 90071
+1 (213) 680-8400
+1 (213) 680-8500 fax

Munich
Maximilianstrasse 11
80539 Munich
Germany
+49 89 2030 6000
+49 89 2030 6100 fax

New York
601 Lexington Avenue
New York, NY 10022
+1 (212) 446-4800
+1 (212) 446-4900 fax

Palo Alto
950 Page Mill Road
Palo Alto, CA 94304
+1 (650) 859-7000
+1 (650) 859-7500 fax

San Francisco
555 California Street
San Francisco, CA 94104
+1 (415) 439-1400
+1 (415) 439-1500 fax

Shanghai
11th Floor, HSBC Building
Shanghai IFC
8 Century Avenue
Pudong New District
Shanghai 200120
P.R. China
+8621 3857 6300
+8621 3857 6301 fax

Washington, D.C.
655 Fifteenth Street, N.W.
Washington, D.C. 20005
+1 (202) 879-5000
+1 (202) 879-5200 fax

Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis LLP's nearly 400 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named Best M&A Firm in the United States at World Finance's 2011 Legal Awards and was honored as the "Private Equity Team of the Year" at the 2011 IFLR Americas Awards. Kirkland was also recognized as "Law Firm of the Year" in *Buyouts* magazine's "2010 Deal of the Year Yearbook." Kirkland was ranked in the first tier among law firms for both Private Equity Buyouts and Private Equity Funds by *The Legal 500 U.S. 2010*. Additionally, *Pitchbook* named Kirkland as one of the most active law firms representing private equity firms in its 2010 "Private Equity Breakdown."

The Lawyer magazine recognized Kirkland as one of the "The Transatlantic Elite" in 2008, 2009 and 2010, noting that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

KIRKLANDPEN KIRKLAND & ELLIS LLP

EDITORS
Jack S. Levin, P.C.
Margaret A. Gibson, P.C.
Norbert B. Knapke II

SUBSCRIPTIONS
To subscribe to *KirklandPEN*, please e-mail
kirklandpen@kirkland.com
+1 (312) 862-2894