

Under Rubric of Systemic Risk, Joint SEC-CFTC Proposal Would Dramatically Expand Reporting by Private Fund Managers

By Nathan J. Greene and Janet Choi

Introduction

For firms that will be subject to the full range of the proposed reports, there is little to like about the package of proposals just unveiled by the US Securities and Exchange Commission and the US Commodity Futures Trading Commission. If adopted as is, these reports by SEC-registered advisers will be:

- Broad-based in scope, providing for over 60 different high-level categories of reported information and literally hundreds of sub-categories of information;
- Intrusive, in that the reports will collect information that firms rightly view as highly sensitive and proprietary (listing, for example, a fund's lenders and derivative counterparties by name and exposure); and
- Administratively demanding, in that the reports will be both complex (the proposed instructions run more than 50 pages) and prepared on an essentially "real-time" basis, quarterly with only a 15-day lag (or annually for smaller managers).

As brief background, Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act amends the Investment Advisers Act of 1940 to require that many more advisers to hedge funds and other private funds register with the SEC¹. Title IV also directs the SEC to require that SEC-registered advisers to private funds maintain records and file reports containing such information as is necessary and appropriate for the assessment of systemic risk by the newly-organized Financial Stability Oversight Council (FSOC). These latest proposals respond to that Congressional systemic risk mandate.

Specifically, it is proposed that a new Form PF would be filed by (i) SEC-registered investment advisers of private funds and (ii) commodity pool operators (CPOs) and commodity trading advisers (CTAs) that are also SEC-registered investment advisers and advise one or more private funds.² Detailed below are the contents of Form PF and how it differentiates among firms that manage different types of funds and among firms of different sizes.



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The Coming Comment Period; Likely Critiques

Before turning to further details, it is worth noting that a regulatory proposal is just that. It remains a proposal and subject to change until finalized. Interested parties have the opportunity to react to and influence the process by submitting written comments to the SEC and/or CFTC or through meetings with agency officials during the proposal's public comment period, which will last 60 days from the date of its publication in the Federal Register (so presumably into early April). Obvious "big picture" concerns that we can expect to be raised during that public comment process include:

- Whether the manifest burdens on fund managers in complying with a reporting regime of this scale and accelerated timing are justified by the value of the information requested
- Whether the reporting requirements adequately take into account special considerations for non-US fund managers and their non-US private funds
- Whether the information will be appropriately secured once collected – confidentiality of electronic information is of special concern in the wake of the Wikileaks State Department cables fiasco
- Whether and how the information will be used once collected, e.g., what governmental monitoring will be conducted and what types of remedial steps might be taken by the FSOC/SEC/CFTC if a fund is determined to pose a systemic risk³
- Whether these apparently "disclosure-based" rules will morph into implicit or explicit regulation of the industry's investment practices
- Whether this is a tip-of-the-iceberg phenomenon pursuant to which the regulators will continuously add to the volume of information requested
- Whether all of the information requested is relevant to ongoing systemic risk monitoring
- Whether this reporting proposal presages similar initiatives targeted at other large institutional money managers, e.g., mutual funds and pension plans (and if not, at least from the perspective of private fund managers, why the difference in treatment)
- Whether, as a practical matter, the reports really can be prepared on the accelerated timetable

demanded (considering that many private fund managers simply cannot calculate final net asset value (NAV) information within 15 days after the quarter-end)

Timing

The proposed compliance date for filing Form PF is December 15, 2011. For Large Private Fund Advisers (as defined below), the first filing is due 15 days after the first quarter-end after that compliance date, so on January 15, 2012, and quarterly thereafter.⁴ Smaller firms would file annually instead of quarterly and have until 90 days after the end of their first fiscal year occurring on or after the compliance date. This would mean that most smaller firms would file their first Form PF by March 30, 2012 (90 days after their December 31, 2011 fiscal year-ends) and each March 30th or 31st thereafter.

A firm that transitions from the smaller firm reporting level to that for larger firms as a result of changed circumstances (most likely arising from an increase in the firm's assets under management) will switch from annual reporting to quarterly reporting effective at the next quarter-end falling on or after the occurrence of the relevant change in circumstances. A firm switching from quarterly to annual filings will file an "exit report" confirming its new eligibility for annual reporting. That report is filed within 15 days after the first quarter-end falling after the relevant change in circumstances justifying annual reporting.

After the compliance date, each newly registered adviser will file an initial Form PF within 15 days of the end of the next occurring calendar quarter after registering. Smaller firms would then default to year-end annual filings and larger firms will proceed with quarterly filings.

Proposed Form PF

In general

Under proposed Advisers Act Rule 204(b)-1, SEC-registered investment advisers would be required to report information to the SEC on Form PF if they advise one or more private funds. SEC-registered private fund advisers that are also registered as CPOs or CTAs with the CFTC would file the same Form PF to satisfy parallel CFTC requirements. Fil-

ing Form PF for CPOs and CTAs would be deemed a filing with both the SEC and the CFTC.

To clarify, the new proposed category of firms to be classed as “exempt reporting advisers” (certain smaller firms and venture capital fund advisers) would not file Form PF, nor would advisers registered only with the states.⁵

Information reported on Form PF will be confidential. That said, both the SEC and CFTC envision – in addition to passing the information to the FSOC and other governmental actors – using this data to assist them in their general regulatory programs, presumably including examinations and investigations and investor protection efforts relating to private fund advisers.

That this information could be used in the course of regulatory examinations raises a host of practical concerns. At the top of the list is the likely reality that examiners would, once armed with the sort of granular Form PF data we describe below, be tempted to second guess such basic decisions as to how much investment and counterparty risk or leverage an adviser considers it prudent to accept. The resulting implicit regulation of fund manager investment practices would be all the more worrisome in that it would be unchecked by formal rules and could instead be driven by a culture of informal “regulation by query” and “regulation by suggestion.”

Application of the Form to Different Types of Fund Managers

The information to be reported would vary based on both the size of the reporting firm and the type of funds it advises. Larger firms will file more detailed reports more frequently than will smaller firms. Hedge fund managers will file more information than will managers to other types of funds.

A. Size of the Adviser

Most private fund advisers would complete only Section 1 of Form PF (the contents of which are discussed below), providing basic identifying information on each private fund they advise in addition to information about their private fund assets under management (AUM) and more generally about their funds’ performance and use of leverage. Three types of what are defined as Larger Private Fund Advisers (LPFAs) would then go on to complete additional sections of Form PF, as follows:

- Advisers that manage hedge funds that collectively have at least \$1 billion in assets as of the close of business on any day during the reporting period for the required report;
- Advisers that manage liquidity funds (unregistered money market funds) and have combined liquidity fund and registered money market fund assets of at least \$1 billion as of the close of business on any day during the reporting period for the required report; and
- Advisers that manage private equity funds that collectively have at least \$1 billion in assets as of the close of business on the last day of the quarterly reporting period for the required report.

The regulators set these thresholds with the goal of limiting the group of LPFAs required to provide additional information on Form PF, thereby sparing smaller firms and focusing on the firms presumed to have the potential for the most market impact. The intent is that LPFAs would be relatively small in number but represent the very large majority of their respective industries based on AUM. For example, the SEC understands that approximately 200 US-based advisers manage at least \$1 billion in hedge fund assets and that those firms represent over 80% of the US hedge fund industry based on AUM, and that approximately 250 US-based advisers manage over \$1 billion in private equity fund assets and that those firms represent approximately 85% of the US private equity fund industry based on committed capital.

In calculating AUM, advisers would aggregate (1) parallel managed accounts, which are assets of managed accounts under the firm’s advisement that pursue substantially the same investment objective and strategy and invest in substantially the same positions as a corresponding private fund and (2) assets of that type of private fund advised by any of the adviser’s “related persons”.⁶ Also, advisers would be required to measure whether the applicable \$1 billion in assets thresholds have been crossed “daily” for hedge funds and liquidity funds, and quarterly for private equity funds. (How, in practice, daily reviews would work is not discussed.)

An adviser would be permitted, but not required, to file a consolidated Form PF for itself and its related persons. This would allow joint reporting for affiliated entities that share reporting and risk management systems, but also permit separate re-

porting for affiliated entities that operate separately. The SEC is proposing that if an adviser completes information on Form ADV's Schedule D with respect to any private fund, that adviser would be responsible for reporting on Form PF with respect to that fund.⁷ These proposed related person aggregation requirements are designed to prevent an adviser from avoiding the additional LPFA reporting requirements through internal restructuring.

In order to avoid duplicative reporting, the adviser would exclude any assets in internal or external fund of funds arrangements. As a simple example, master-feeder assets are counted only once rather than twice as otherwise might be the case when a separate form is prepared for each fund. In the

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fund-by-fund sections of the proposed form, there would be substantial carve-backs in the level of informational detail requested of a fund whose only assets are represented by underlying private funds, as would be the case for many funds of funds. The SEC queries whether funds of funds should be excluded from Form PF reporting altogether.

B. Types of Funds

As already suggested, Form PF would divide the world of private funds subject to reporting among (1) hedge funds, (2) liquidity funds, and (3) private equity funds. The form would require more information from advisers managing a large amount of hedge fund or liquidity fund assets, and less information from advisers managing a large amount of private equity fund assets, as the latter are considered to pose less risk to US financial stability.⁸

Proposed Form PF would define a "hedge fund" as any private fund that has the following characteristics:

(i) Performance Fee Using Market Value: Has a performance fee or allocation calculated by taking into account unrealized gains; or

(ii) High Leverage: Borrows an amount in excess of one-half of its NAV (including any committed capital) or has gross notional derivatives exposure in excess of twice its NAV (including any committed capital); or

(iii) Short Selling: Sells securities or other assets short.⁹

Proposed Form PF would define a "liquidity fund" as a 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 investors.

Proposed Form PF would define a "private equity fund" as any private fund that is not a hedge fund, liquidity fund, real estate fund, securitized asset fund or venture capital fund and does not provide investors with redemption rights in the ordinary course.

C. Non-US Managers

If an adviser's principal office and place of business is outside the United States, the adviser would be eligible to exclude any private fund that during the last fiscal year was itself not a US person and that was neither offered to, nor beneficially owned by, any US persons. For a non-US firm, this puts an obvious premium on controlling access to one's non-US funds by US persons and would likely result in limiting the availability of many funds to US investors.

Filing Mechanics

Form PF would be filed electronically on a platform to be determined by the SEC. One proposed platform is the current Investment Adviser Registration Depository (IARD), which is the platform for filing Form ADV filings and is administered by the Financial Industry Regulatory Association (FINRA).

Filing fees will be paid to the operator of the Form PF filing system in an amount to be approved by the SEC at a later date. Filing fee schedules likely will take into account the volume of data that different types of managers report.

Data tagging, in which reported information is formatted for electronic searching, is under consideration, but not proposed at this time.

Contents of the Form

Proposed Form PF is divided into four sections. The SEC and CFTC are jointly proposing sections 1 and 2, and the SEC is proposing sections 3 and 4. In summary, Section 1 asks for general information about the investment adviser and the private funds it advises and applies to all advisers required to file Form PF. Sections 2 through 4 apply only to LPFAs and seek information on hedge funds (Section 2), liquidity funds (Section 3), and private equity funds (Section 4) managed by LPFAs. See Appendix A for a more detailed item-by-item summary of the proposed Form PF contents.¹⁰

Conclusion and Practical Considerations

Proposed Form PF requires unprecedented and extensive disclosure – albeit on a largely confidential basis – of proprietary information of private funds managed by SEC-registered advisers. These coming reporting burdens therefore must be considered when evaluating whether a firm will register as an adviser (or remain registered) with the SEC or seek an exemption, whether to restructure affiliate or other operations, whether new service arrangements

will be necessary, and whether non-US advisers will sever ties that may subject their advised funds to such reporting.

Advisers subject to filing Form PF presumably will find it prudent to take at least preliminary steps towards gathering the required information and engaging in informal testing of whether the data can be collected on the required timetable – bearing in mind that the form remains subject to change. To the extent coordination with affiliates is required, this type of informal testing may be even more pressing.

Under proposed Advisers Act Rule 204(b)-1, SEC-registered investment advisers would be required to report information to the SEC on Form PF if they advise one or more private funds.

Finally, as always, firms may find it appropriate to participate in the public comment process regarding the proposed requirements. This can be done either directly or through an intermediary like a law firm or trade association.

ENDNOTES

¹ Shearman & Sterling's summary of the SEC's proposed rules on new exemptions and disclosure requirements for investment advisers is available at <http://www.shearman.com/dodd-frank-act-rulemaking--sec-proposes-new-exemptions-and-disclosure-requirements-for-investment-advisers-11-30-2010/>. A "private fund" for this purpose is any fund that would be required to register under the US Investment Company Act of 1940 but for exemptions under that statute's Sections 3(c)(1) and 3(c)(7).

² Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Release No. IA-3145 (Jan. 26, 2011), available at <http://www.sec.gov/rules/proposed/2011/ia-3145.pdf>. In conjunction with the joint-release on Form PF, the CFTC has proposed a rule with additional reporting requirements for CTAs and CPOs for which Shearman & Sterling will prepare a separate summary shortly. The proposed rule applies to CFTC-registered CPOs and CTAs who would be required to file a new proposed Form CPO-PQR (for CPOs) or proposed Form CTA-PR (for CTAs). CPOs and CTAs

that are required to file Form PF for private funds would be deemed to have satisfied some of the reporting requirements. However, to the extent that they operate or advise commodity pools that are not "private funds" as defined in Form PF, private fund advisers that are also registered as CPOs or CTAs would still be required to file the applicable proposed Form CPO-PQR or Form CTA-PR. See, Commodity Pool Operators and Commodity Trading Advisers: Amendments to Compliance Obligations, RIN 3038-AD30, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister012611b.pdf>.

³ As context, the SEC Inspector General, in its report on the agency's Section 13(f) reporting requirements, found that "despite Congressional intent that the SEC would be expected to make extensive use of the Section 13(f) information for regulatory and oversight purposes, no SEC division or office conducts any regular or systematic review of the data filed on Form 13F." Review of the SEC's Section 13(f) Reporting Requirements, Report No. 480 (September 27, 2010), available at <http://www.secoig.gov/Reports/AuditsInspections/2010/480.pdf>.

⁴ This extremely rapid turnaround will be particularly challenging for hedge fund managers for whom the first half of the month is, in the normal course of business, the most administratively intense period, involving subscription and redemption processing and reconciliation and NAV calculations. In addition, the 15-day turnaround is unusually short compared to the 45-day turnaround for filing current forms such as Form 13F and Schedule 13G. Finally, it is worth noting that, after taking into account weekends and holidays, there can be as few as nine business days in these 15-day periods.

⁵ For an explanation of which firms will be "exempt reporting advisers," you may wish to refer to Shearman & Sterling's client alert cited at footnote 1.

⁶ The SEC's proposed definition of "related persons" parallels the term as defined in Form ADV: (1) all of the adviser's officers, partners, or directors (or any person performing similar functions); (2) all persons directly or indirectly controlling, controlled by, or under common control with the adviser; and (3) all of the adviser's employees (other than employees performing only clerical, administrative,

support or similar functions). Notably, this Form ADV definition is based on a broader definition of “control” than that used in the Advisers Act itself.

⁷ It appears that a registered adviser will be required to report on related persons’ funds of the same type even if the related person is fully exempt from Advisers Act registration and reporting, such as a foreign private adviser, and functions independently from the Form PF filer.

⁸ This view reflects the SEC’s review of available

literature and consultation with staff representing FSOC’s members.

⁹ These definitional prongs are very broad in scope. The first (performance fees) will capture many “long-only,” unleveraged managers that will find many sections of proposed Form PF, e.g., those addressing derivatives and leverage, to be irrelevant to them. The second (“high” leverage) contemplates a leverage ratio of 2:1, which is considered fairly low for private funds. The third (short selling) is especially odd in that it includes no de minimis threshold. It

appears that one short sale is, by itself, sufficient to classify a private fund as a hedge fund for purposes of the proposed Form PF. The form’s instructions may even be read to suggest that the mere authority to engage in either “high” leverage or short sales – even if never exercised – is sufficient.

¹⁰ While we summarize the proposed form, there is no substitute for reviewing the form’s instructions directly. Those instructions represent the final approximately 50 pages of the SEC release cited at footnote 2 above.

Appendix A

Contents of the Form

Proposed Form PF is divided into four sections. The SEC and CFTC are jointly proposing sections 1 and 2, and the SEC is proposing sections 3 and 4. (For ease of reference, we italicize terms in this section that are specially defined for purposes of Form PF.)

Section 1. General Information about the Investment Adviser and the Private Funds It Advises.

Section 1 would apply to all investment advisers required to file Form PF. In addition to general information about an adviser, this section requires information on each private fund the firm advises (on an aggregated basis for private funds that are part of a master-feeder arrangement).

<p>Section 1a: Information about the adviser and its <i>related persons</i></p>	<p><i>Item A. Information about you:</i> Name of the adviser and names of any of its related persons whose information is also reported on the adviser's Form PF.</p> <p><i>Item B. Information about assets of private funds that you advise:</i> Basic aggregate information about the private funds managed by the adviser, such as total and net AUM and the amount of those assets that are attributable to certain types of private funds.</p> <p><i>Item C. Miscellaneous:</i> Any assumptions used by the adviser in responding to any questions in Form PF.</p>
<p>Section 1b: Information about the private funds the firm advises – A separate Section 1b is prepared for each private fund</p>	<p><i>Item A. Reporting fund identifying information:</i> Name and identification number for each private fund under advisement (identification numbers must be applied for).</p> <p><i>Item B. Assets, financing and investor concentration:</i> For each private fund, (i) gross and net assets and the aggregate notional value of its derivative positions, (ii) borrowings, including breakdown of the fund's borrowing based on whether the creditor is a US or a non-US financial institution as well as the identity of, and amount owed to, each creditor to which the fund owed an amount equal to or greater than 5% of the fund's NAV as of the reporting date, and (iii) level of concentration of the fund's investment base, such as number of beneficial owners of the fund's equity and the percentage of the fund's equity held by the five largest equity holders. (We note that, as a practical matter, this investor information may not be available to funds whose interests are sold through intermediaries.)</p> <p><i>Item C. Reporting fund performance:</i> Monthly, quarterly and 12-month performance information for each fund, including the change in the fund's NAV and the fund's performance, with and without deducting performance fees or charges. (If past practice is any guide, producing what the regulators view as "outlier" performance is certain to draw scrutiny.)</p>
<p>Section 1c: Information about the <i>hedge funds</i> the firm advises – A separate Section 1c is prepared for each private fund</p>	<p><i>Item A. Reporting fund identifying information:</i> Name and identification number of each hedge fund under advisement.</p> <p><i>Item B. Certain information regarding the reporting fund:</i> Information about each hedge fund's investment strategies, percentage of the fund's assets managed using computer-driven trading algorithms, significant trading counterparty exposures (including identity of counterparties), and trading and clearing practices (including information on the percentage of NAV attributable to different market sectors, trading venues, categories of derivatives, etc.).</p>

Section 2. Information about Hedge Funds that the Investment Adviser Advises.

Section 2 would only apply to LPFAs for hedge funds. These, again, are advisers that manage *hedge funds* that collectively have at least \$1 billion in assets as of the close of business on any day during the reporting period for the required report.

Also, Section 2 would require additional information about “*qualifying hedge funds*”, which are

hedge funds with an NAV of at least \$500 million as of the close of business on any day during the reporting period. To determine whether a fund meets that threshold, the adviser would aggregate any parallel managed accounts, parallel funds, and funds that are part of the same master-feeder arrangement, and would have to treat any private funds managed by its related person as if they were managed by the filing adviser.

<p>Section 2a: Aggregated information about <i>hedge funds</i> that the firm advises</p>	<p><i>Item A. Exposure of hedge fund assets:</i> Aggregate information about the hedge funds such as (i) the market value of assets invested (on a short and long basis) in different types of securities and commodities, (ii) duration of fixed income portfolio holdings (including asset backed securities) to indicate the assets’ interest rate sensitivity, (iii) the turnover rate of the firm’s aggregate portfolios during the reporting period to provide an indication of the adviser’s frequency of trading, and (iv) a geographic breakdown of investments held by the hedge funds under the firm’s advisement.</p>
<p>Section 2b: Information about <i>qualifying hedge funds</i> that the firm advises</p>	<p><i>Item A. Reporting fund identifying information:</i> Name and identification number of each qualifying hedge fund.</p> <p><i>Item B. Reporting fund exposures and trading:</i> For each qualifying hedge fund, (i) exposure to different types of assets, (ii) portfolio liquidity, (iii) concentration of positions, (iv) collateral and credit practices with significant counterparties, and (v) the identity of, and clearing relationships with, the three central clearing counterparties to which the fund has the greatest net counterparty credit exposure.</p> <p><i>Item C. Reporting fund risk metrics:</i> If calculated regularly, (i) a value at risk (VaR) for each month of the reporting period and (ii) impact on the fund’s portfolio from specified changes to certain identified market factors such as equity prices and credit spreads, broken down by the long and short components of the qualifying hedge fund’s portfolio. (We note that the inclusion of references to VaR may be read as an implicit suggestion that VaR calculations are “good” and “useful.” We can easily envision a regulator’s personnel querying a firm on why it does not regularly calculate VaR measures. Even more significantly, the various market and event impact calculations that are required are, effectively, stress testing mandates, a highly unexpected addition to what was expected to be a pure reporting framework.)</p> <p><i>Item D. Financing information:</i> A monthly breakdown of secured and unsecured borrowing and derivatives exposures as well as information about the value of the collateral and letters of credit supporting the secured borrowing and derivatives exposures and the types of creditors, and a breakdown of the terms of the fund’s committed financing.</p> <p><i>Item E. Investor information:</i> Information about each qualifying hedge fund’s investor composition and liquidity, including side pocket and gating arrangements, and the percentage of the fund’s NAV that is locked in for different periods of time.</p>

Section 3. Information about Liquidity Funds that the Investment Adviser Advises.

Section 3 would only apply to LPFAs of liquidity funds. These, again, are advisers that manage

at least \$1 billion in combined liquidity fund and registered money market fund assets as of the close of business on any day in the reporting period for the required report.

<p>Section 3: Information about <i>liquidity funds</i> that the firm advises</p>	<p><i>Item A. Reporting fund identifying and operational information:</i> For each liquidity fund, (i) name and identification number of the fund, (ii) whether the fund uses the amortized cost method of valuation and/or the penny rounding method of pricing in computing its NAV per share, and (iii) whether, as a matter of policy, the fund is managed in compliance with certain provisions of rule 2a-7 under the US Investment Company Act of 1940.</p> <p><i>Item B. Reporting fund assets:</i> Information regarding the fund's portfolio, including (i) monthly NAV, NAV per share, and market-based NAV per share, (ii) weighted average maturity (WAM), weighted average life (WAL), 7-day gross yield, amount of daily and weekly liquid assets, and amount of assets with maturity greater than 397 days, (iii) amount of assets invested in different types of instruments, broken down by maturity, and (iv) information for each open position of the fund that represents 5% or more of the fund's NAV.</p> <p><i>Item C. Financing information:</i> Information on (i) any secured or unsecured borrowing, broken down by creditor type and the maturity profile of that borrowing, and (ii) whether the fund has a committed liquidity facility in place.</p> <p><i>Item D. Investor information:</i> Concentration of the fund's investor base, gating and redemption policies, investor liquidity, and a good faith estimate of the percentage of the fund purchased using securities lending collateral.</p>
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Section 4. Information about Private Equity Funds that the Investment Adviser Advises.

Section 4 would only apply to LPFAs of private equity funds. These, again, are advisers that manage

private equity funds that collectively have at least \$1 billion in assets as of the close of business on the last day of the quarterly reporting period for the required report.

<p>Section 4: Information about <i>private equity funds</i> that the firm advises</p>	<p><i>Item A. Reporting fund identifying information:</i> Name and identification number of each private equity fund.</p> <p><i>Item B. Reporting fund financing and investments:</i> For each fund, (i) outstanding balance of the fund's borrowings and guarantees, (ii) weighted average debt-to-equity ratio of controlled portfolio companies the fund invests in and the range of that debt-to-equity ratio among these portfolio companies, (iii) maturity profile of the fund's portfolio companies' debt, the portion of the debt that is payment-in-kind or zero coupon, and whether the fund or any of its portfolio companies experienced an event of default on any of its debt during the reporting period, (iv) identity of the institutions providing bridge financing to the fund's portfolio companies and the amount of that financing, (v) information about the fund's investments in any financial industry portfolio company, and (vi) a breakdown of the fund's investments by industry and by geography.</p>
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ENDNOTES

- ¹ Shearman & Sterling's summary of the SEC's proposed rules on new exemptions and disclosure requirements for investment advisers is available at <http://www.shearman.com/dodd-frank-act-rulemaking-sec-proposes-new-exemptions-and-disclosure-requirements-for-investment-advisers-11-30-2010/>. A "private fund" for this purpose is any fund that would be required to register under the US Investment Company Act of 1940 but for exemptions under that statute's Sections 3(c)(1) and 3(c)(7).
- ² Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Release No. IA-3145 (Jan. 26, 2011), available at <http://www.sec.gov/rules/proposed/2011/ia-3145.pdf>.
- In conjunction with the joint-release on Form PF, the CFTC has proposed a rule with additional reporting requirements for CTAs and CPOs for which we will prepare a separate summary shortly. The proposed rule applies to CFTC-registered CPOs and CTAs who would be required to file a new proposed Form CPO-PQR (for CPOs) or proposed Form CTA-PR (for CTAs). CPOs and CTAs that are required to file Form PF for private funds would be deemed to have satisfied some of the reporting requirements. However, to the extent that they operate or advise commodity pools that are not "private funds" as defined in Form PF, private fund advisers that are also registered as CPOs or CTAs would still be required to file the applicable proposed Form CPO-PQR or Form CTA-PR. See, Commodity Pool Operators and Commodity Trading Advisers: Amendments to Compliance Obligations, RIN 3038-AD30, available at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister012611b.pdf>.
- ³ As context, the SEC Inspector General, in its report on the agency's Section 13(f) reporting requirements, found that "despite Congressional intent that the SEC would be expected to make extensive use of the Section 13(f) information for regulatory and oversight purposes, no SEC division or office conducts any regular or systematic review of the data filed on Form 13F." Review of the SEC's Section 13(f) Reporting Requirements, Report No. 480 (September 27, 2010), available at <http://www.sec-oig.gov/Reports/AuditsInspections/2010/480.pdf>.
- ⁴ This extremely rapid turnaround will be particularly challenging for hedge fund managers for whom the first half of the month is, in the normal course of business, the most administratively intense period, involving subscription and redemption processing and reconciliation and NAV calculations. In addition, the 15-day turnaround is unusually short compared to the 45-day turnaround for filing current forms such as Form 13F and Schedule 13G. Finally, it is worth noting that, after taking into account weekends and holidays, there can be as few as nine business days in these 15-day periods.
- ⁵ For an explanation of which firms will be "exempt reporting advisers," you may wish to refer to our earlier client alert cited at footnote 1 above.
- ⁶ The SEC's proposed definition of "related persons" parallels the term as defined in Form ADV: (1) all of the adviser's officers, partners, or directors (or any person performing similar functions); (2) all persons directly or indirectly controlling, controlled by, or under common control with the adviser; and (3) all of the adviser's employees (other than employees performing only clerical, administrative, support or similar functions). Notably, this Form ADV definition is based on a broader definition of "control" than that used in the Advisers Act itself.
- ⁷ It appears that a registered adviser will be required to report on related persons' funds of the same type even if the related person is fully exempt from Advisers Act registration and reporting, such as a foreign private adviser, and functions independently from the Form PF filer.
- ⁸ This view reflects the SEC's review of available literature and consultation with staff representing FSOC's members.
- ⁹ These definitional prongs are very broad in scope. The first (performance fees) will capture many "long-only," unleveraged managers that will find many sections of proposed Form PF, e.g., those addressing derivatives and leverage, to be irrelevant to them. The second ("high" leverage) contemplates a leverage ratio of 2:1, which is considered fairly low for private funds. The third (short selling) is especially odd in that it includes no *de minimis* threshold. It appears that one short sale is, by itself, sufficient to classify a private fund as a hedge fund for purposes of the proposed Form PF. The form's instructions may even be read to suggest that the mere authority to engage in either "high" leverage or short sales – even if never exercised – is sufficient.
- ¹⁰ While we summarize the proposed form, there is no substitute for reviewing the form's instructions directly. Those instructions represent the final approximately 50 pages of the SEC release cited at footnote 2 above.

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