

Morgan Lewis

VENTURE CAPITAL & PRIVATE EQUITY FUNDS DESKBOOK SERIES

Checklist for a New Adviser

This is a checklist of the tasks needed to register an investment adviser with the SEC and to ensure that it is in compliance with the Advisers Act when it begins to do business as a registered adviser.

Step 1: Set Up an IARD Account

Begin this process at least three weeks before you intend to submit your registration to the SEC as an adviser. The Investment Adviser Registration Depository (IARD) is the electronic filing system for all SEC- and state-registered advisers. Print an IARD Entitlement Packet from the SEC's website and complete the three forms in hard copy (User Account Acknowledgment Form, Account Administrator Entitlement Form, and IARD Participant Acknowledgment Form). Return the completed forms to FINRA.

When FINRA receives and processes these forms (it takes about two weeks), it will set up an IARD user account, grant access to the individuals you designated as Authorized Persons so they can make electronic filings for the firm, set up an IARD Financial Account for billing and payment of fees, and send you a confirmation packet containing a confidential user ID, and instructions on how to make an electronic filing on IARD and pay fees. When you receive payment instructions, send funds by check or wire transfer to your IARD Financial Account. Once funds are credited to your IARD Financial Account (allow 48 hours), you can submit your electronic filing.

While waiting for FINRA to process the IARD forms, begin to complete the remaining steps set out below.

Currently, the SEC is waiving initial set-up and annual IARD filing fees for investment advisers registered with the SEC or applying for registration with the SEC, through December 31, 2009. States, however, are still charging notice filing fees.

Step 2: Draft a Form ADV

You (and/or Morgan Lewis) can begin to complete Form ADV in hard copy. Form ADV has two parts. Part 1A is completed and filed electronically. Part II is completed in paper only, and is not filed with the SEC; it is given to clients and prospective clients, along with the adviser's privacy policy (see step 5 below). Once you have submitted Part 1A electronically, the SEC has 45 days to review your registration form. In practice, the SEC usually declares new advisers effective in one to two weeks after filing.

If the adviser must make a notice filing in one or more states (because it has a place of business and expects to have clients in that state), check the appropriate box(es) on Part 1A. State notice filing fees will be deducted from the adviser's IARD Financial Account.

Some of the questions on Form ADV will require you to make decisions about the business. For example, will the firm have custody of client assets? Will it engage in principal trades with clients? Will it charge performance fees?

Step 3: Determine Whether Firm Personnel Must Register With a State

The SEC does not require the registration of advisory employees.

An adviser may have an obligation to register an advisory employee with one or more states. Generally, if any employee or officer of the firm has or will have more than five natural person clients *and* more than 10% of his or her clients are or will be natural person clients, that person may need to register as an investment adviser representative of the firm in the state(s) in which he or she has a place of business. However, do not count for the five-client or 10% tests any natural person who has at least \$750,000 under the adviser's management, or who has a net worth, together with assets held jointly with a spouse, of more than \$1.5 million. In other words, wealthy clients do not count when determining whether firm personnel must register with a state.

State rules on registration vary; we can advise you on a particular state's requirements.

Step 4: Determine Whether the Firm Must Notice File with One or More States

SEC-registered advisers are not required to register with a state, but they may have to make "notice filings" of their Forms ADV and pay filing fees, generally \$200–\$400 per state.

Notice filing rules vary, but generally depend on one or more of the following: place of business in the state, number of clients resident in the state, and number of noninstitutional clients resident in the state. We can advise you on a particular state's requirements.

Step 5: Determine the Form of Contracts to Be Used

Decide on the forms of client contracts the firm will use (e.g., ERISA vs. non-ERISA, performance fee or not). No form of agreement need be filed with the ADV. If the firm will use paid solicitors, it will need an agreement for each solicitor. Consider whether to use a client questionnaire or other form to elicit investment goals, risk tolerance, time horizon, etc.

Step 6: Draft and Adopt Compliance Policies and Procedures

Rule 206(4)-7 requires that a registered adviser adopt and implement compliance policies and procedures reasonably designed to prevent violations of the federal securities laws by the adviser and its supervised persons. These typically include personal trading rules; portfolio management and trade execution guidelines; and policies on soft dollars, error correction, and trade allocations, as well as more general policies such as limits on gifts, misuse of firm property, etc. The SEC expects an adviser to have a disaster recovery plan.

In addition, the firm will need to adopt a privacy policy for its clients, as well as a policy governing the misuse of material nonpublic information. Anti-money laundering rules have not yet been adopted for investment advisers, but advisers should check prospective client names against the Office of Foreign Asset Control list of Specially Designated Nationals and Blocked Persons, available online at www.treas.gov.

Step 7: Appoint a Chief Compliance Officer

A Chief Compliance Officer (CCO) need not be an attorney. However, the SEC has stated that the CCO should be "competent and knowledgeable regarding the Advisers Act and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the firm." According to the SEC, he or she "should have a position of sufficient seniority and authority within the organization to compel others to adhere to the compliance policies and procedures."

A person may serve as CCO and have other duties at the advisory firm.

Step 8: Create Marketing Materials; Gather Records of Past Performance

Create marketing materials and ensure that they comply with SEC advertising guidelines. If past performance at a prior firm will be used, ensure that it complies with the SEC's guidance on portability and substantiation (and the Global Investment Performance Standards on portability, depending on the type of client the firm expects to attract). The most important task is to obtain records documenting past performance at a prior firm. Assuming past performance can be used, engage an accountant to verify performance.

Step 9: Set Up a Recordkeeping System

Using the Advisers Act recordkeeping rule (Rule 204-2) as a checklist, set up a recordkeeping system for all records an adviser is required to create and maintain. Generally, records must be kept in an easily accessible place for five years from the end of the fiscal year in which the last entry was made, the first two years of which must be in an appropriate office of the adviser.

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For more information on the issues discussed here, please contact your Morgan Lewis [Private Investment Funds Practice](#) attorney.

About Morgan Lewis's Private Investment Funds Practice

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