Client Alert

pillsbury

Annual Compliance Obligations

What you Need to Know

3.12.18

By Pillsbury's Investment Funds Team

This alert contains a summary of the primary annual and periodic compliance-related obligations that may apply to investment advisers registered with the Securities and Exchange Commission (the "*SEC*") or with a particular state ("*Investment Advisers*"), and commodity pool operators ("*CPOs*") and commodity trading advisors ("*CTAs*") registered with the Commodity Futures Trading Commission (the "*CFTC*") (collectively with Investment Advisers, "*Managers*").[1] Due to the length of this Alert, we have linked the topics to the Table of Contents and other subtitles for easy click-access.

[1] This summary is not intended to be a comprehensive review of a Manager's securities, tax, partnership, corporate or other annual requirements, nor an exhaustive list of all of the obligations of an Investment Adviser under the Investment Advisers Act of 1940, as amended (the "*Advisers Act*") or applicable state law. State–registered Investment Advisers should contact us for additional information regarding their specific obligations under state law.

This summary consists of the following segments: (i) List of Annual Compliance Deadlines; (ii) New Developments; (iii) 2018 National Exam Program Examination Priorities; (iv) Continuing Compliance Areas; and (v) Securities and Other Forms Filings.

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FORM ADV	
State registered advisers and ERAs pay IARD fee	November-December (of every year)
SEC registered advisers and ERAs pay IARD fee	Before submission of Form ADV annual amendment
Annual ADV updating amendment	March 31, 2018
Delivery of Brochure	April 30, 2018
Delivery of audited financial statements (for December 31, 2017 year–end)	April 30, 2018
FORM PF	
Form PF filers pay IARD fee	Before submission of Form PF
Form PF for large liquidity fund advisers (for December 31, 2017 quarter end)	January 15, 2018
Form PF for large hedge fund advisers (for December 31, 2017 quarter end)	March 1, 2018
Form PF for smaller private fund advisers and large private equity fund advisers (for December 31, 2017 fiscal year–end)	April 30, 2018
ANNUAL SECURITIES FILLINGS	
Form 13F (for 12/31/17 quarter–end)	February 14, 2018
Form 13H annual filing	February 14, 2018
Schedule 13G annual amendment	February 14, 2018
Form D annual amendment	One year anniversary from last amendment filing.
CPO AND CTA	
Affirm CPO exemption	March 1, 2018
Legal Entity Identifier (LEI) Renewal	One year anniversary from last renewal.
Registered Large CPO Form CPO–PQR December 31, quarter–end report	March 1, 2018

Registered CPOs filing Form PF in lieu of Form CPO–PQR December 31, quarter–end report	April 2, 2018*
Registered Mid–Size and Small CPO Form CPO–PQR year–end report	April 2, 2018*
Registered CTA Form PR (for December 31, 2017 year–end)	February 14, 2018
BUREAU OF ECONOMIC ANALYSIS FILING	
BE–12 Benchmark Survey–Foreign Direct Investment in the United States (15–year survey)	May 31, 2018
Form BE–13 Surveys (BE–13A, BE–13B, BE–13C, BE–13D and BE–13E) New Foreign Direct Investment Surveys	Due not later than 45 days after a triggering acquisition; quarterly and annual follow-on filing.
US TREASURY FILLINGS	
TIC Form S	Monthly (if triggered)
TIC Form SLT	January 23, 2018 (for December 2017)
TIC Form SHCA (Report data as of December 31, no later than the first Friday of March)	March 2, 2018
TIC B Forms	Monthly report (December 2017) – by January 15, 2018
TIC FORM D	Quartly Report (December 31, 2017) – by February 20, 2018)
OTHER FILINGS	
California Finance Lender License annual report (for December 31, year–end)	March 15, 2018
FATCA/CRS information reports filing for 2017, by participating FFIs	March 31, 2018
FBAR Form FinCEN Report 114, **6-month automatic extension permitted**	April 15, 2018* *October 15 (with auto extension)
GDPR	May 25, 2018

*Reflects an extended due date under Exchange Act Rule 0-3. If the due date of filing falls on a Saturday, Sunday or holiday, a report is considered timely filed if it is filed on the first business day following the due date.

New Developments

- Tax: New partnership audit rules are in effect (action recommended)
- EU MiFID II is now in force (action recommended)
- EU General Data Protection Regulation ("GDPR") will take effect on May 25 2018 (action recommended)
- Update on Brexit
- Form ADV changes and new recordkeeping requirements are now in effect
- Custody Rule Developments – SEC Risk Alert in 2017
- Advertising Rule Guidance – SEC Risk Alert 2017
- Volcker Rule Update
- Update on Fiduciary Rule

New Partnership Audit Rules in Effect

The Bipartisan Budget Act of 2015 changed significantly the Federal income tax audit rules for partnerships, including most investment funds and domestic feeders. The rules are effective for tax returns filed by partnerships for 2018 and later years. The most significant change and departure from the previous TEFRA rules is that the fund itself may be liable for Federal income taxes. The new rules represent a concerted effort of minimizing the IRS' administrative burden in auditing investment funds and other partnerships, which burden has historically led to very low partnership audit rates. The new rules effectively shift this administrative burden to investment funds which presumably would free up IRS resources and lead to more audits in the future.

The new rules are complex and are laid out mostly in proposed regulations that could be changed or finalized in their current form soon. The rules offer various elections, such as a "push-out" election which could transfer the economic burden of the federal income tax from the investment fund to its partners, thus, de facto putting the parties in a somewhat similar position to the one under the old TEFRA rules. Without making any of these available elections, such as the "push-out" election, or addressing the issues upfront in the investment fund operating agreement, the current partners of the fund may be economically responsible for taxes attributable to investors who have already left the fund.

It is recommended that fund GPs obtain necessary LP approvals and amend existing partnership agreements to address the new audit rules. Specifically, issues that could be address include partner notices, settlement rights, rights to make BBA elections, indemnification, investor obligations to cooperate and provide information, survival of BBA provisions and statutes of limitations.

MIFID II: Key Implications for Asset Managers

On 3 January 2018, the recast Markets in Financial Instruments Directive (2014/65/EU) and the EU Markets in Financial Instruments Regulation (EU No. 600/2014) (together, "MiFID II") came into force. MiFID II is intended to be the "single rule book" for financial services in Europe and covers a wide range of functions, including trading, product development, client services, human resources, and IT infrastructure.

What are the key changes?

MiFID II has introduced a number of new or enhanced rules in relation to the following key areas (among others) that asset managers should consider:

- *Inducements*: Investment firms are not permitted to accept and retain fees, commissions or any monetary benefits from third parties such as issuers and product providers relating to services provided to clients. In addition, disclosure on a generic basis is not allowed and the payment of placing fees is within the scope of the inducements regime.

- *Dealing Commissions*: Investment firms are prohibited from paying for research with dealing commissions (i.e. soft dollar arrangements). Research must be paid for either by managers directly out of profit and loss or by clients through research payment accounts (RPAs) funded either by a specific research charge to the client or out of dealing commissions (where the research and execution elements of the commission are "unbundled").
- *Best Execution*: Execution and order-placing policies must contain more detail on the venues and brokers used for particular classes of instrument (and selection criteria) and consider total costs associated with trading methods. There is also a new obligation on investment firms that execute client orders to publish annually the top five execution venues by trading volume used for each class of instrument.
- *Client Reporting*: The frequency of reporting portfolio statements to clients has been increased from six monthly to quarterly. The report must also include valuations, if necessary on a best efforts basis, a review of activities and performance during the relevant period, any depreciation in the value of the portfolio that exceeds 10%, and certain prescribed information on ownership issues such as assets subject to title transfer or security arrangements.
- *Transaction Reporting*: The scope of transaction reporting requirements have been extended to instruments admitted or traded on EU regulated markets, multilateral trading facilities and organized trading facilities and new post-trade transparency rules have been introduced requiring the public reporting of the volume, price and the conclusion time of transactions, in both equity and non-equity instruments (that are traded on a trading venue), once per transaction.. The so-called portfolio manager exemption that enabled asset managers to rely on MiFID firms to report on their behalf is no longer available, and instead, has been replaced by a limited exemption for firms "transmitting orders" to rely upon the executing broker (subject to certain requirements).
- *Remuneration*: New high-level requirements on the governance and design of remuneration policies, including the balance between fixed and variable remuneration, applicable to all persons who can have a material impact, directly or indirectly, on the investment firm's services.
- *Governance*: New formalized requirements for the composition and qualifications of an investment firm's management body and its responsibilities, as well as the introduction of prescriptive rules on the organization and duties of internal compliance and its interaction with other business functions.
- *Compliance*: The extension of complaints handling rules, including formal requirements to establish a complaint management policy and function, publish details of the policy and provide reports to national regulators.
- *Electronic Communications*: Enhanced record-keeping requirements regarding telephonic and electronic-based communications relating to client orders and new requirements for records to be kept of face-to-face client meetings, relevant internal communications and to monitor call recordings.
- *Other*: Other changes under MiFID II include new rules on product governance (for both manufacturers and distributors of investment products), additional requirements for firms providing direct electronic access (DEA) to a trading venue and/or engaging algorithmic trading, amendments to the rules on client cash and custody, more prescriptive conflict-management procedures, a formal requirement to provide suitability reports to advised retail clients, and new requirements for the content of client agreements.

Who does it apply to?

Asset managers authorized in the EU to provide investment advice and portfolio management services within the definition of a MiFID investment firm will be directly subject to all aspects of MiFID II in relation to these activities.

AIFMs and UCITS management companies that solely carry out collective portfolio management are not within the scope of MiFID II itself. However, to the extent that they are also authorized to carry on advisory and portfolio management activities, these activities will be subject to the MiFID II rules. Certain EU member state regulators (such as the FCA) have also "gold-plated" specific provisions of MiFID II such that they apply to AIFMs and UCITS management companies (for example, in relation to inducements and telephone recordings). In addition, where an AIFM or UCITS management

company markets or distributes its products through MiFID firms it will need to assist those firms in meeting a range of new disclosure and compliance requirements.

Third country investment firms (such as US asset managers) may also be directly or indirectly impacted by MiFID II depending on their activities in Europe, including where they operate European subsidiaries, provide investment services to MiFID firms, trade on European trading venues or with European counterparties or market or distribute their products through MiFID firms.

The General Data Protection Regulation

The new EU data protection framework, called the General Data Protection Regulation ("GDPR"), will take effect from 25 May 2018. These new laws will significantly impact any originations doing business in Europe, even those without a physical EU presence (e.g. U.S. funds targeting EU investors). The new, very high fine levels for breaches and the need to be able to prove compliance mean funds, regardless of size, must take steps now to prepare regardless of where they are based.

Who is caught by the GDPR?

Organizations (including funds) operating in the EU will be caught. Importantly, the following organizations will also be caught:

- **Organizations outside the EU who nevertheless process personal data relating to "data subjects" based in the EU**. "Data subject" means an identified or identifiable natural person. In a funds context, this is most likely to be investors or officers and employees of the management company;
- **Organizations which offer goods and services to data subjects within the EU**. This would include organizations which seek investment from individuals based in the EU; and
- **Organizations which monitor the behavior for data subjects within the EU through marketing or online tracking technology**. This does not need to be intentional.

The GDPR applies to "controllers" and "processors". Fund management companies are likely to be "controllers" whereas fund administrator or other service providers are more likely to be "processors". Processors have significantly more legal liability under the GDPR than was the case under the prior Directive and new obligations which do not currently exist.

What about the UK after Brexit?

The GDPR will have direct effect in the UK roughly 12 months before Brexit is expected to happen. After Brexit, the GDPR will be incorporated into UK law by Clause 3 of the proposed European Union (Withdrawal) Bill, which incorporates all direct EU legislation into domestic law. The UK government has also published its new Data Protection Bill which will fill the blanks where required. Therefore, funds purely based in the UK, or outside the UK but targeting UK data subjects, will still need to comply with the requirements of the GDPR.

What are the key changes?

- Accountability – data controllers must show compliance, e.g. (i) maintain certain documents; (ii) carry out Privacy Impact Assessments; (iii) implement Privacy by Design and Default (in all activities).
- Data Protection Officers (DPOs) – in many circumstances, controllers and processors will need to appoint DPOs.
- Data Processors – will have direct liability/obligations for the first time. The GDPR also requires prescribed clauses to be included in all contracts between controllers and processors. Vendor and administration agreements will need to be reviewed and updated.

- Consent – new rules are introduced relating to the collection of data, e.g., consent must be "explicit" for certain categories. Existing consents may no longer be valid. Other legal grounds for processing personal data may be more appropriate, i.e. where processing is in the "legitimate interest" of a data controller. For example, processing personal data for anti-money laundering.
- Privacy Policies – fair processing notices now need to be more detailed, e.g., new information needs to be given about new enhanced rights. Policies will need updating.
- Enhanced Rights for Individuals – new rights are introduced around (i) subject access; (ii) objecting to processing; (iii) data portability; and (iv) objecting to profiling, amongst others.
- International Transfers – BCRs for controllers and processors as a means of legitimising transfers are expressly recognised.
- Breach Notification – new rules requiring breach reporting within 72 hours (subject to conditions) are introduced.

What key things should I do now to prepare?

- Review Privacy Notices and Policies – ensure these are GDPR compliant. Do they provide for the new rights individuals have?
- Prepare/Update the Data Security Breach Plan – to ensure new rules can be met if needed.
- Audit your Consents – are you lawfully processing data? Will you be permitted to continue processing data under the GDPR?
- Set Up an Accountability Framework – e.g., monitor processes, procedures, train staff.
- Appoint a DPO where required.
- Consider if you have new obligations as a Processor – is your contractual documentation adequate? Review contracts and consider what changes will be required.
- Audit your International Transfers – do you have a lawful basis to transfer data?

Why is this important? Huge Fines

A failure to comply could attract a fine of up to the greater of 20m Euros or 4% of annual worldwide revenue (whichever higher), not to mention reputational damage, and so consequences for non-compliance are severe.

Brexit: Potential Impact on UK Investment Managers

The U.K. government's road to giving notice on 29 March 2017 under Article 50 of the Treaty of Lisbon to leave the European Union ("EU") has not been a smooth one. Nearly a year on, not much has changed. In January 2018, the House of Commons voted by 324 to 295 (a majority of 29 votes) in favor of the European Union (Withdrawal) Bill at its third reading, with members of U.K. parliament spending in excess of 80 hours considering the Bill, including more than 500 proposed amendments and new clauses. The next stage is for the Bill to appear before the House of Lords by the end of January, where it is expected to receive a rocky ride as it continues its journey through parliament. The U.K. government has also confirmed that it will put the "final" Brexit deal covering both the withdrawal agreement and the terms of the future U.K.-EU relationship to a vote in both Houses of Parliament as soon as possible after Brexit negotiations have been concluded.

The U.K. is the second largest asset management center in the world, managing a reported £8.1tn of assets as at December 2017. According to the Total Tax report commissioned by the City of London, the financial services sector contributed £72.1bn of tax revenue in the year to March 2017 (up from £71.4bn in the year to March 2016 and the highest since the survey began in 2007) amounting to 11% of the U.K. Government's total tax receipts. Approximately 1.1m employees are engaged in the financial services sector. Evidently there is a very clear interest for the U.K. to preserve its access to

European investors and for European asset managers to be able to continue to access the U.K.'s investor pool and talent.

To date, the UK government has not published a white paper or a position paper on Brexit that specifically relates to financial services. The key elements of the U.K.'s approach to Brexit and financial services are therefore the following points set out in Prime Minister May's speech of January 2017:

- The U.K. will not seek to be a member of the single market following its departure from the EU. This means that UK financial institutions will lose passporting rights currently available under single market financial services legislation, subject to any bespoke deal agreed concerning access to financial markets.
- The U.K. will seek to agree a free trade agreement with the EU, which the government intends for this agreement to cover the financial services sector.
- The U.K. will seek to agree transitional arrangements following the conclusion of the two year withdrawal process initiated by the triggering of Article 50.

There are a multitude of possible outcomes of the Brexit negotiations and we could endlessly debate them. However, what appears to be clear from the key recommendations of various U.K. parliamentary committee, trade body and regulator reports in relation to financial services is that if the current passporting regime is not maintained, any bespoke deal should seek to secure stable and predictable equivalence arrangements for U.K. third-country access comparable to the existing passporting regime to safeguard the stability of cross-border financial services between the UK and the EU. In addition, the reports advocate that the U.K. government should seek agreement prior to Brexit that the U.K. will be determined to be equivalent at the point of withdrawal and should ensure the continuation of equivalence decisions as financial services regulation develops.

On the one hand, this approach may not appear problematic on the basis that the U.K.'s AIFMD and MiFID II regimes (among others) are currently compliant and therefore equivalent. However, anti-EU campaigners may successfully lobby the U.K. government to trim what is viewed, correctly or otherwise, as overbearing EU legislation and unnecessary red tape. The cost of doing so may be to weaken the argument of equivalency. Furthermore, as we are aware, the European Securities and Markets Authority (ESMA) moves to the beat of its own drum.

In addition, although there is currently no equivalence regime under UCITS legislation, those U.K. managers with bases in Dublin or Luxembourg for the purposes of their mutual fund offerings (UCITS) should be able to still sell those funds into the EU without issue following Brexit. There have been suggestions that the European Commission could impose tougher rules on those funds domiciled in Dublin or Luxembourg but run by U.K. managers—however, this issue still remains unsettled.

In the meantime, managers are taking steps to move some staff and establish fund ranges outside of the U.K. in anticipation of an unsatisfactory outcome to Brexit discussions.

Amendments to Form ADV and Recordkeeping – Revised Form ADV in Effect Now!

The amendments to the Form ADV that were adopted in a **Final Rule** on August 25, 2016 took effect on October 1, 2017. Accordingly, advisers (including exempt reporting advisers) filing an amendment or initial Form ADV on or after said effective date must complete the revised Form ADV. The significant changes require advisers to provide additional information on Part 1A of Form ADV. Below are some of the noteworthy changes:

- **Enhanced disclosure of Separately Managed Accounts ("SMAs")** – Item 5. K and Schedule D, Section 5.K require advisers to provide additional information regarding SMAs, including regulatory assets under management ("RAUM"), custodians, type of assets held and use of derivatives and borrowings.

- **Umbrella Registration** – this allows an adviser to file for itself and on behalf of other investment advisers (each, a "Relying Adviser"), subject to certain conditions, to file one Form ADV. If filling under umbrella registration, Item 1.B.(2) should be checked off and a new Schedule R must be completed for each Relying Adviser.
- **Other Disclosures:**
  - Branch Office – List the number of offices other than the principal office and place of business on Item 1.F and Section 1.F of Schedule D.
  - Wrap Fee Program – The amount of RAUM is required to be listed on Item 5.I if the adviser participates in a wrap fee program. Section 5.I of Schedule D requires additional information to be listed for the sponsor.
  - Chief Compliance Officer – Item 1.J now requires an adviser to provide the name and EIN of the CCO who is employed or compensated by a person other than the adviser, its related person, or a registered investment company that is advised by the adviser.
  - Social Media Accounts – Item 1.I and Section 1.I of Schedule D now require an adviser to include its website address and each publicly available social media account where the adviser has presence and control of its content.
  - Balance Sheet Assets – Item 1.O now requires advisers with more than $1 billion assets to provide a range of their total assets. Assets is also defined, for purposes of this item only, as the total assets shown on an adviser's balance sheet for the most recent fiscal year end, not the assets under management.
  - Advisory Business (Clients) – Instead of ranges of client percentages, Item, 5.D. now requires advisers to specify the number of clients and amount of RAUM attributable to each client type.
- **Clarifying Amendments** – All throughout the revised Form ADV are clarifying and technical changes, including a notation to Question 19, Section 7.B.(1) of Schedule D that advisers should not consider feeder funds as clients in answering the question whether the adviser's clients are solicited to invest in the private fund.

A sentence has also been added to Item 8, Participation or Interest in Client Transactions, clarifying that newly-formed advisers should respond to the questions considering the types of participation and interest they expect to engage in during the next year.

- **Changes to Recordkeeping Rule** – Amendments to the Advisers Act Recordkeeping Rule 204-2 (the Books and Records Rule) became effective on October 1, 2017:
  - All communications containing performance information must be retained

Historically, investment advisers were only required to maintain records supporting performance claims for communications that were distributed to 10 or more persons. The Recordkeeping Rule removes the "10 or more persons" condition and now requires the retention of all communications (whether distributed directly or indirectly) to any person demonstrating calculation of performance or rate of return.

- Written Material Related to Performance Information

The amended Recordkeeping Rule adds a new category of communications that must be maintained: originals of all written communications received and copies of written communications sent by the adviser relating to the performance or rate of return of any or all managed accounts or securities recommendations. Investment advisers will now be required to ensure that all communications by the investment adviser and its employees are retained and that any e-mails or other communications by employees that use performance information (including that generated prior to the amendments) have appropriate books and records back-up so as to comply with the amended Rule.

For a full list of changes to Form ADV, check out the SEC's Summary of Changes to Form ADV **here**.

SEC Custody Rule Guidance

The Division of Investment Management released its three-part guidance on the Custody Rule in February 2017: an update to the SEC's FAQs about the Custody Rule; a no-action letter response; and a Guidance Update obligations under the Custody Rule where a RIA has authority to transfer client assets from a client's custodial account:

- *Transfer to the client's own account(s) with the same or different custodian(s)*. FAQ II.4 clarifies that a RIA's authority regarding such transfers will not establish custody if (i) the client provides a written and signed authorization to effect such transfers and (ii) a copy of the authorization, specifying certain details regarding the client's account(s) (except where the transfer involves accounts at a single custodian or at related custodians and both custodians already have access to this information) is provided to the sending custodian(s).
- *Transfer to a third party based on a standing letter of instruction or similar authorization (SLOI) from a client to its custodian.* The no-action letter clarifies that a RIA's authority under a SLOI to transfer assets to a third party for any purpose other than authorized trading constitutes "custody," but the SEC staff would not recommend enforcement if the RIA did not obtain a surprise examination, provided the arrangement meets certain conditions.
- *Transfers based on broad authority indicated in the client's agreement with its custodian to which the RIA is not a party* ("inadvertent custody"). The **Guidance Update** states that a custodial agreement between a client and its custodian that permits the custodian to accept instructions from a RIA to transfer assets from the custodial account for any purpose other than authorized trading establishes the RIA's custody of such assets. The SEC suggested that a separate and clear written understanding between the RIA and the custodian limiting the RIA's authority to "delivery versus payment" trading is one way a RIA could avert having custody.

SEC Advertising Rule Guidance

A **Risk Alert the SEC issued in September 2017** highlights the topic areas related to Advisers Act Rule 206(4)-1 (the Advertising Rule) most frequently associated with deficiencies identified in OCIE examinations of RIAs. The topics include misleading performance results; misleading one-on-one presentations; misleading claims of compliance with voluntary performance results, such as (GIPS); cherry-picked profitable stock selections; misleading selection of recommendations; and failure to implement compliance policies and procedures in connection with advertising practices and materials.

Volcker Rule Developments

Relief for Certain Foreign Funds until July 21, 2018

In July 2017, a joint statement by the Federal Reserve Board, the FDIC and the Office of the Comptroller of the Currency addressed concerns regarding some potential unintended consequences and extraterritorial impact of Section 13 of the Bank Holding Company Act and its implementing regulations (the Volcker Rule). Although foreign funds that are excluded from the "covered fund" definition (foreign excluded funds) may nonetheless be subject to the Volcker Rule's proprietary trading restrictions by virtue of falling within the definition of "banking entity" as a result of being affiliated with a foreign banking entity (controlled foreign excluded funds).

While the three agencies are weighing options to address these concerns, they have proposed not to take any action for a one-year period that will end on July 21, 2018 against (i) a foreign banking entity (based on the attribution of the activities and investments of controlled foreign excluded funds to such foreign banking entity) or (ii) controlled foreign excluded funds as "banking entities," where the foreign banking entity's relationship with the controlled foreign excluded fund would meet the Volcker Rule requirements for permitted covered fund activities and investments solely outside the US, as if such foreign excluded fund were a covered fund.

See the Federal Reserve Board's **7/21/17** release regarding "foreign excluded funds" under the Volcker Rule.

Extension of Seeding Period for Covered Funds

In July 2917, the Federal Reserve Board also issued a letter regarding procedures for submitting an application for an extension of the one-year seeding period for a covered fund. Under the Volcker Rule, a banking entity is permitted, subject to certain requirements, to acquire and retain an ownership interest in a covered fund in connection with organizing and offering such fund for the purpose of (i) establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors (seed investment) or (ii) making a *de minimis* investment, subject to several limitations. The Volcker Rule requires a banking entity that is making a seed investment to actively seek unaffiliated investors to reduce its investment in the covered fund to an amount that is not more than 3% of the total outstanding ownership interests in the fund (the per-fund limitation) within one year after the date of establishment of the fund. A banking entity is permitted to request an extension for up to two additional years to conform an investment to the per-fund limitation. Extension requests should be submitted to the Applications Unit of the Federal Reserve Bank in the district where the top-tier banking entity is headquartered at least 90 days prior to the expiration of the applicable time period.

See the **Fed Reserve Board procedures** on extension of the one-year seeding period for a hedge fund or private equity fund (referred to as a "covered fund").

The Volcker Rule prohibits banks from engaging in proprietary trading and from owning or sponsoring certain hedge funds and other private funds. See Investment Fund Law Blog article **here**.

ERISA Fiduciary Duty Rule—Further Delayed

On April 6, 2016, the U.S. Department of Labor ("DOL") issued its long-awaited final rule (the "**Fiduciary Rule**") on who is a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA"). The Fiduciary Rule and related guidance would expand the types of advice and services that are considered "fiduciary" in nature, and would expand the types of plans and accounts to which fiduciary duties apply to include individual retirement accounts, individual retirement annuities and health savings accounts.

On November 24, 2017, the DOL adopted the **Proposed Amendments** announced on August 31, 2017 without change, thereby extending the Transition Period for 18 months until **July 1, 2019**.

The Fiduciary Rule, together with the prohibited transaction rules of ERISA and the Internal Revenue Code, generally prohibit fiduciary advisors from receiving compensation that varies depending on the particular investments made or recommended by the advisor (the DOL views such compensation arrangements as potential conflicts of interest). However, the DOL issued a new "Best Interest Contract Exemption" and modified other existing exemptions to provide a way to continue using such compensation arrangements if the advisor can demonstrate the arrangement is in the best interest of the plan or account holder. These exemptions impose significant disclosure and record-keeping requirements on the advisor.

The Fiduciary Rule and related exemptions were scheduled to go into effect on April 10, 2017, with a delayed effective date of January 1, 2018 for some of the new exemption requirements. However, on February 3, 2017, President Trump issued a **Presidential Memorandum** to the Secretary of Labor directing the DOL to re-examine the Fiduciary Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. The DOL is supposed to consider whether the anticipated applicability of the Fiduciary Rule (1) has harmed or is likely to harm investors due to reduced access to retirement savings offerings, retirement product structures, retirement savings information or related financial advice, or (2) has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees. The DOL is also supposed to consider whether the Fiduciary Rule is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to again access to retirement services.

In response to the Presidential Memorandum, the DOL has sent a proposal to the Office of Management and Budget ("OMB") to delay the Fiduciary Rule.

The full text of the rule can be found **here** and the full text of the Extension of the Transition Period can be found **here**.

2018 National Exam Program Examination Priorities

For 2018, the Office of Compliance Inspections and Examinations (OCIE) of the SEC has stated its top priorities are to promote compliance, prevent fraud monitor market risk and protect retail investors including seniors and those saving for retirement. Of particular interests to the SEC will be matters involving critical market infrastructure, duties to retail investors, and developments in cryptocurrency, initial coin offerings, and secondary market trading. The SEC continued to emphasize the goal of using data analytics to identify industry practices and/or specific registrants with high-risk profiles. The following are some of the priority examination and enforcement items of interest for Managers:

Private Fund and Other Investment Advisers

- **Disclosure of Costs of Investing:** focus on the proper disclosure and calculation of fees, expenses and other charges paid by investors.
- **Conflicts of Interest:** continued focus on disclosure of conflicts as well as actions that appear to benefit the adviser to the detriment of investors.
- **Cybersecurity:** focus on governance and risk assessment, access rights and controls, data loss prevention, vendor management, training and incident response; continued testing and assessments of firms' implementation of cybersecurity procedures and controls. See also our detailed summary under "Continuing Compliance Areas" **here**.
- **Never-Before-Examined Investment Advisers and Investment Companies:** program will continue to make risk-based examinations of advisers that have elevated risk profiles (e.g., newly registered advisers and advisers registered for longer periods without examination).
- **Wrap Fee Programs:** continued focus on ensuring advisers are acting in accordance with their fiduciary duties and meeting contractual obligations with an emphasis on—wrap account suitability, effectiveness of disclosures, conflicts of interest, best execution, and disclosure of costs.
- **Anti-Money Laundering:** continued focus on examining adaptation of the AML programs to address obligations and the programs robustness, and timely and accurate filing of Suspicious Activity Report (SAR) procedures. A summary of the May 2016 Final Rule on Customer Due Diligence Requirements can be found in an article posted in our Blog.
- **Senior Investors and Retirement Accounts:** focus on internal controls to identify financial exploitation of seniors; continued focus on recommendations and sales of variable insurance, sales and management of target date funds, and facilitation and involvement in retirement vehicles serving state and local government employees and non-profit employees including 403(b) and 457 plans.

Other Market Participants

- **Robo-Advisers:** continued focus on advisers and broker-dealers that provide electronic investment advice, primarily interact with clients online, and firms that use automation as a component of their services while offering access to financial professionals, review of compliance programs including oversight of computer program algorithms. *See* **SEC Guidance** regarding automated (robo) advisers.
- **Broker-Dealers:**
  - **FINRA**: enhanced oversight of the quality of FINRA examinations of individual broker-dealers.
  - **Fixed Income Order Execution**: examine whether broker-dealers have implemented execution policies/procedures consistent with regulatory requirements for municipal bond and corporate bond transactions.

- **Exchange Traded Funds (ETFs):** focus on funds that have little secondary market trading value or possible delisting, and analyzing whether the investing risks are adequately disclosed.
- **Mutual Funds:** focus on poor performance funds, funds with inexperienced managers or funds that hold securities that are difficult to value during market stress.
- **Cryptocurrency, Initial Coin Offerings (ICOs), Secondary Market Trading, and Blockchain:** focus on whether financial professionals have adequate safeguards/controls to protect assets from theft/misappropriation, and that they are providing investors with disclosure of risks including risk of investment loss liquidity, price volatility and potential fraud.

The SEC 2018 Examination Priorities can be found **here**.

See also the **SEC Five Most Frequent Compliance Topics, identified in SEC examinations:**

- Compliance Rule
- Regulatory Filings
- Custody Rule
- Code of Ethics Rule
- Books and Records Rule

Additional SEC Guidance:

- **Observations for Municipal Advisor Examinations**
- **Holding Companies and the Application of 3a-2**

Continuing Compliance Areas

Annual Assessment of Compliance Program

At least annually, an Investment Adviser must review its compliance policies and procedures to assess their effectiveness in preventing fraud and other violations. The SEC has stated among its examination and enforcement priorities cracking down on superficial annual compliance reviews. The review should be conducted with special focus on the Investment Adviser's specific business model and operating environment, any changes to it during the reviewed year, and all the actual and potential conflicts of interest that might result from that business model and those changes. In addition, the SEC will test whether the annual review has really taken into consideration all the regulatory changes and what has happened in the industry. The annual assessment process should be documented and those document(s) should be presented to the Investment Adviser's chief executive officer or executive committee, as applicable, and maintained in the Investment Adviser's files. At a minimum, the annual assessment process should entail a detailed review of all topics applicable to a Manager under the "2017 Examination and Enforcement Priorities."

Cybersecurity

Cybersecurity remains a focus of concern for the SEC under the "**2017 Examination and Enforcement Priorities**."

The OCIE first began to focus on cybersecurity in 2014 with its first round of cybersecurity examinations. OCIE issued its second and third cybersecurity risk alerts in February 2015 and September 2015 respectively.

The February 2015 risk alert, **Cybersecurity Examination Sweep Summary**, provided a summary of the OCIE's examination observations of the broker-dealers and investment advisers that were examined pursuant to the Cybersecurity Initiative.

The September 2015 risk alert, **OCIE's 2015 Cybersecurity Examination Initiative**, conducted information gathering on cybersecurity controls and tested those controls to assess implementation. The additional areas of focus for the OCIE's second round of cybersecurity examinations included (i) governance and risk assessment, (ii) access rights and controls, (iii) data loss prevention, (iv) vendor management, (v) training, and (vi) incident response. The alert also included an appendix with a sample OCIE document request.

In its August 7, 2017 Risk Alert, **Observations From Cybersecurity Examinations**, OCIE provided a summary of observations from its examinations conducted pursuant to the September 2015 Examination Initiative, including the following issues the staff observed on which firms could improve their policies, procedures and practices:

- Policies and procedures were not reasonably tailored
- Firms did not appear to adhere to or enforce policies and procedures, or the policies and procedures did not reflect the firms' actual practices

See also the SEC's **Cybersecurity: Ransomware Alert** that was released on May 17, 2017 in response to the WannaCry ransomware incident.

Fund IARD Account

An Investment Adviser must ensure that its IARD account is adequately funded to cover payment of all applicable adviser registration renewal fees and notice filing fees. SEC-registered advisers and Exempt Reporting Advisers (ERAs) must pay their annual IARD fees before submitting their annual Form ADV amendment or annual ERA report by April 2, 2018. The annual IARD fee of an SEC-registered adviser is based on the adviser's AUM. The current applicable fees for SEC-registered advisers are:

- $40 for advisers with AUM below $25 million;
- $150 for advisers with AUM of $25 million but less than $100 million; and
- $225 for advisers with AUM of $100 million or more.

The annual fee of an ERA is $150. SEC-registered advisers pay their state notice filing fees and state investment adviser representative fees during the IARD's renewal program in November–December of each year. State-registered advisers also pay their annual fees during the IARD's renewal program in November–December of each year.

For Form PF filers, your IARD account must also be funded with the annual ($150) or quarterly ($150) fees before submitting Form PF.

Form ADV Updates and Distribution

Annual Updates. An Investment Adviser, including an ERA, must file an annual amendment to Form ADV within 90 days of the end of its fiscal year. Part 1 and Part 2 of Form ADV must be filed with the SEC through the electronic IARD system. Accordingly, if you are an SEC-registered adviser whose fiscal year ended on December 31, 2017, you must file Part 1A and the Part 2A Brochure as part of your annual updating **amendment by April 2, 2018**. If you are a state-registered adviser whose fiscal year ended on December 31, 2017, you must also file Part 1A, Part 1B, the Part 2A Brochure and the Part 2B Brochure Supplement as part of your annual updating amendment by April 2, 2018. ERAs with a December 31, 2017 fiscal year-end must also file their annual report on short Form ADV Part 1 by April 2, 2018. The new changes to the Form ADV took effect on October 1, 2017. Accordingly, all advisers filing an annual amendment for year ended December 31, 2017 must complete the revised Form ADV. See Amendments to Form ADV under New Developments above.

Brochure Rule. On an annual basis, an Investment Adviser must provide its clients with a copy of its updated Form ADV Part 2A or provide a summary of material changes and offer to provide an updated Form ADV Part 2A. An adviser could meet its delivery obligation to a hedge fund client by delivering its brochure to a legal representative of the fund, such as the fund's general partner. Delivery is required within 120 days of the end of the adviser's fiscal year, or by **April 30, 2018**.

Ongoing Updates. Investment Advisers, including ERAs, must amend Part 1 of their Form ADV promptly during the year if certain information becomes inaccurate. The brochure and supplement must also be updated promptly during the year if any information becomes materially inaccurate unless the material inaccuracies result solely from changes in the amount of client assets managed or changes to the fee schedule.

No Longer Eligible as an ERA. An investment adviser who no longer qualifies as an ERA must submit a final report on Form ADV as an ERA and apply for registration with the SEC or the relevant state securities agency within 90 days after the filing of its annual amendment report.

State Notice Filings/Investment Adviser Representatives

An Investment Adviser should review its advisory activities in the various states in which it conducts business and confirm that all applicable notice filings are made and fees are paid through IARD. In addition, an Investment Adviser should confirm whether any of its personnel need to be registered as "investment adviser representatives" in any state and, if so, register such persons or renew their registrations with the applicable states.

Form PF

The **deadline** for advisers required to file Form PF within 120 days after the December 31, 2017 fiscal year end is **April 30, 2018**. See more detailed information about Form PF below.

Annual Affirmation. Advisers who relied on an exemption or exclusion from CPO registration under CFTC Regulation 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5) or an exemption from CTA registration under 4.14(a)(8) and filed a notice with the NFA must affirm the exemption or exclusion annually within 60 days of the calendar year-end. Failure to affirm the exemption or exclusion will result in the exemption or exclusion being withdrawn at the end of the affirmation period. Accordingly, those who filed a notice of exemption or exclusion by the end 2017 have **until March 1, 2018 to affirm the exemption or exclusion or face losing their exemption or exclusion**. To obtain information about the annual affirmation process and filing, please visit the **NFA website**.

Note that, in assessing whether your activities keep you within the *de minimis* exemption,[2] the following instruments generally fall under the definition of "**commodity interests**" as defined by the Commodity Exchange Act of 1936 (CEA): (i) commodities for future delivery, securities futures products or swaps, (ii) agreements, contracts, or transactions in foreign currency interests, (iii) commodity options, and (iv) certain authorized leverage transactions.

CFTC Rules—CPO and CTA Registrations, Exemptions and Filings

Deadline to affirm your CPO exemption for calendar year 2017: **March 1, 2018**.

Annual Affirmation. Advisers who relied on an exemption or exclusion from CPO registration under CFTC Regulation 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5) or an exemption from CTA registration under 4.14(a)(8) and filed a notice with the NFA must affirm the exemption or exclusion annually within 60 days of the calendar year-end. Failure to affirm the exemption or exclusion will result in the exemption or exclusion being withdrawn at the end of the affirmation period. Accordingly, those who filed a notice of exemption or exclusion by the end 2017 have **until March 1, 2018 to affirm**

[2] The *de minimis* exemption under Section 4.13(a)(3) provides exemption from CPO registration in cases where the pool trades minimal amounts of futures and covered swap positions such that at all times either (a) the aggregate initial margin and premiums required to establish the fund's commodity interest positions may not exceed 5% of the fund's liquidation value or (b) the aggregate notional value of the fund's commodity interest positions may not exceed 100% of the fund's liquidation value.

the exemption or exclusion or face losing their exemption or exclusion. To obtain information about the annual affirmation process and filing, please visit the **NFA website**.

Note that, in assessing whether your activities keep you within the *de minimis* exemption, the following instruments generally fall under the definition of "**commodity interests**" as defined by the Commodity Exchange Act of 1936 (CEA): (i) commodities for future delivery, securities futures products or swaps, (ii) agreements, contracts, or transactions in foreign currency interests, (iii) commodity options, and (iv) certain authorized leverage transactions.

Deadline to affirm your CPO exemption for calendar year 2017: **March 1, 2018**.

Form CTA-PR

Deadline for filing Form CTA–PR for December 31, 2017 year end: February 14, 2018

CFTC Regulation 4.27 requires that all CFTC-registered CTAs and members of the NFA file a Form PR by February 14, 2018.

Form PR requires each CTA to report on a quarterly basis general information about the CTA, its trading programs, any pool assets and the identity of the CPOs operating the pools. Form PR must be filed within 45 days after the quarters ended March, June and September and within 45 days of the calendar year-end. Form PR filing does not eliminate the requirement to file a Form PF.

The Form PR report for the year ended December 31, 2017 will be due by February 14, 2018 and must be filed electronically using **NFA's EasyFile System**. The CTA's security manager must first set up security settings in order to access the EasyFile System.

Form CPO-PQR

The following are the filing requirements for registered CPOs:

- Small CPOs (less than $150 million pool AUM) must file Form CPO-PQR Schedule A on an annual basis within 90 days of the calendar year-end.
- Mid-size CPOs ($150 million to $1.5 billion pool AUM) must file Form CPO-PQR Schedules A and B on an annual basis within 90 days of the calendar year-end.
- Large CPOs (at least $1.5 billion pool AUM) must file Form CPO-PQR Schedules A, B and C on a quarterly basis within 60 days of each calendar quarter-end.

CPOs that file Form PF and include information on all relevant pools in Form PF need only file Schedule A.

Legal Entity Identifiers (LEIs)

Deadline to renew your LEI for calendar year 2017: Annually based on the date of creation of the LEI

LEIs are required for all swap market participants. The CFTC's regulation provides that each counterparty to any swap subject to CFTC jurisdiction must be identified in all recordkeeping and all swap data reporting by means of a single LEI. To register for your LEI or renew your LEI please use the Global Markets Entity Identifier (GMEI) utility **here**.

Offering Materials

As a general securities law disclosure matter, and for purposes of U.S. federal and state anti-fraud laws, including Rule 206(4)-8 under the Advisers Act, an Investment Adviser must continually ensure that each of its fund offering documents

is kept up to date, is consistent with its other fund offering documents and contains all material disclosures that may be required in order for the fund investor to be able to make an informed investment decision.

Accordingly, it may be an appropriate time for an Investment Adviser to review its offering materials and confirm whether or not any updates or amendments are necessary. In particular, an Investment Adviser should take into account the impact of recent market conditions on its funds and review its funds' current investment objectives and strategies, valuation practices, performance statistics, redemption or withdrawal policies, risk factors (including disclosures regarding market volatility, counterparty risk and conflicts of interest), personnel, allocation policies, conflicts policies and procedures, service providers and any relevant legal or regulatory developments.

Annual Privacy Notice

Under certain federal and state privacy laws, you may be required to provide to your fund investors or clients who are natural persons notice of your privacy policy on an annual basis, even if there are no changes to the privacy policy. Note that the new exemptions discussed in the "FAST ACT" section below may apply.

New Issues

An Investment Adviser that acquires "new issue" IPOs for a fund or separately managed client account must obtain written representations every 12 months from the fund or the account's beneficial owner confirming their continued eligibility to participate in new issues. This annual representation may be obtained through "negative consent" letters.

Custody; Annual Audit or Surprise Audit

Private fund Investment Advisers should have their funds audited by a PCAOB-registered independent accountant and provide audited financial statements of their fund(s), prepared in accordance with U.S. generally accepted accounting principles, to the fund(s)' investors within 120 days of the end of the funds' fiscal year. Investment Advisers that do not have their private funds audited should determine whether they are deemed to have custody of those funds' assets and therefore are subject to an annual surprise audit and other requirements.

All investment advisers licensed or required to be licensed in California must comply with California's custody rule 10 C.C.R. Section 260.237. For explanation of the requirements and more details about the California Custody Rule, please read the article that we have previously posted on our Investment Fund Law Blog **here**. Also, see section above on the SEC's Custody Rule Guidance that was released on February 2017.

"Pay-to-Play" – Political Contributions; Placement Agent and Lobbyist Regulation

Investment Advisers should review any political contributions or other activity by the Investment Advisers' personnel, as well as their related policies and procedures addressing the prohibition on soliciting, or coordinating campaign contributions from others for, elected officials in a position to influence the selection of an adviser before onboarding a public client or investor.

Investment Advisers should also be aware of state and local placement agent and lobbyist regulations that may be triggered by paying an employee or third party for soliciting public clients, such as a state, county or municipal retirement system or fund. With regard to California, generally employees of "external managers" fall under the definition of "placement agent" requiring lobbyist registration. There are exceptions. Specifically, employees who spend at least 1/3 of their time during a calendar year managing assets do not fall under the "placement agent" definition. County and municipal regulations may differ from parallel state laws, and should be examined before a Manager reaches out to a county or municipal client.

Please contact us if you have politically active personnel in your organization.

An Update on U.S. Managers Marketing In The European Economic Area – AIFMD

The European Commission is expected to start a review during 2018 on the application and the scope of the AIFMD, which includes a general survey on the functioning of the AIFMD's rules in relation to the marketing by non-EU AIFMs and of non-EU AIFs thereunder. The European Commission has the power to propose appropriate amendments to the AIFMD as a consequence of this review; however, it is unclear when the review will be completed, since a call for tender for the work was only published in March 2017

Not much progress was made in 2017 on the proposed extension of the EU-wide marketing passport to non-EU alternative investment managers ("AIFMs") managing and non-EU alternative investment funds ("AIFs"). At present, only EU AIFMs and AIFs can access the passport, which allows marketing to occur across the European Economic Area having registered in one country, rather than marketing in each jurisdiction under the national private placement regimes ("NPPR") of each member state.

Equally, the European Commission to date has not adopted delegated legislation specifying the date on which the NPPR under Articles 36 and 42 will be terminated. Although the requirements of NPPR can vary between member states and there remains differing interpretations among EU regulators as to what activities constitute "marketing", it appears that market practice in relation to AIFMD marketing pursuant to NPPR in key EU member states is largely settled. Based on our recent experiences, certain jurisdictions remain difficult, including Italy, and other jurisdictions have hardened their position. For example, the German regulator now takes the view that a fund is ready for distribution if the fund vehicle is legally in existence or all major terms and conditions for the shares/partnership interests are finally agreed and not negotiable. Furthermore, offering the shares/partnership interests for a named AIF is considered as evidence that the terms and conditions are finally agreed.

Although reliance on reverse solicitation prior to (or absent) notification under Articles 36 or 42 of the AIFMD remains a prima facie option, it should be noted that market practice in this area is currently untested by the courts of EU member states and therefore any proposed reliance on reverse solicitation should be carefully analysed in light of the prevailing facts and circumstances.

FATCA

Foreign Account Tax Compliance Act (FATCA), consisting of sections 1471 through 1474 (Chapter 4) of the Internal Revenue Code, was enacted in March 2010 as part of the Hiring Incentives to Restore Employment (HIRE) Act. FATCA imposes information reporting requirements on foreign financial institutions (FFIs) and withholding, documentation and reporting requirements with respect to certain payments made to certain foreign entities. The provisions of FATCA are in many cases modified as a result of intergovernmental agreements ("IGAs") implementing FATCA in various non-U.S. jurisdictions. FFIs that fail to comply with FATCA may be subject to a 30% withholding tax on certain U.S. source payments (as specially defined for FATCA purposes).

Most non-U.S. funds will generally be FFIs and accordingly are required to register with the IRS and obtain a GIIN to avoid FATCA withholding. U.S. funds generally are not required to register with the IRS but will be required to comply with the withholding and due diligence procedures required by FATCA.

Generally FFIs must register on the IRS online FATCA portal and obtain a GIIN to avoid withholding, unless another exception applies. FATCA withholding started July 1, 2014 subject to some exceptions but is now required in all cases. Rules regarding additional classes of payments subject to withholding, and transitional rules relating to particular situations, will be phased in at later dates.

The deadline for participating FFIs and Model 2 FFIs to file FATCA information reports with the IRS is **March 31, 2018** (with respect to the 2017 calendar year). FFIs in Model 1 IGA jurisdictions will have until **September 30, 2018** to file their

first FATCA information reports for 2017 with their home jurisdiction. See IRS Summary of FATCA Timelines **here** for a more detailed timeline.

CRS

Like FATCA, the Organization for Economic Cooperation and Development's (OECD) Common Reporting Standard (CRS), imposes information reporting requirements on financial institutions (broadly defined). Under CRS, financial institutions are obligated to provide information to their local jurisdictions regarding their accountholders and equity-holders. Those local jurisdictions then provide such information to other CRS participating jurisdictions. Currently, over 100 jurisdictions have agreed to participate, with the first exchange of information having occurred in 2017 for certain jurisdictions, with other jurisdictions committed to an exchange of information in 2018. A list of jurisdictions, along with their implementation dates, can be found **here**. Funds organized in participating jurisdictions will be subject to the CRS reporting requirements.

California Finance Lenders License

A California Finance Lenders licensee is required to file an annual report **by March 15th of each year**, whether or not business has been conducted with the issued license. Failure to file the annual report will result in the summary revocation of the license. A new license application can be filed after one (1) year from the date of revocation.

Liability Insurance

Due to an environment of increasing investor lawsuits and regulatory scrutiny of fund managers, an Investment Adviser may want to consider obtaining management liability insurance or review the adequacy of any existing coverage, as applicable.

Rules 506(c) and 506(d)

Rule 506(c) – General Solicitation

Any fund that uses general solicitation or general advertising in connection with a Rule 506(c) private placement is required to take reasonable steps to verify that the purchasers of the securities are accredited investors. Fund managers that are using or planning to use general solicitation or general advertising in connection with a Rule 506 private placement should establish, review and periodically update methods for verifying that purchasers of securities sold in a generally advertised or solicited offering are accredited investors. Rule 506(c) contains a non-exclusive list of non-mandatory methods for verifying the status of a natural person purchaser as an accredited investor.

Rule 506(d) – Annual Reaffirmation of Bad Actor Disqualification

Fund managers should ensure that representations previously provided by "covered persons" pursuant to Rule 506(d)[3] are reaffirmed as part of the factual inquiry establishing reasonable care to determine whether a disqualification exists. Private funds that rely on the Rule 506 private offering exemption should have documented evidence that they made reasonable efforts to know of the past "bad acts" committed by their "covered persons," typically through a questionnaire (such as in the subscription documents). If a Rule 506 offering is ongoing, the private fund must update the inquiry periodically and should include a requirement in the questionnaire that the Covered Person inform the issuer if any Bad Acts occur.

Securities and Other Forms Filings

Form 13F

Deadline for filing Form 13F for the December 31 quarter: February 14, 2018

An "institutional investment manager," whether or not an (SEC or state-registered) Investment Adviser, must file a **Form 13F** with the SEC if it exercises investment discretion with respect to $100 million or more in securities subject

[3] Rule 506(d) prohibits private funds from relying on any Rule 506 private placement exemption if any of the private fund's "covered persons" (as defined in the Rule) is disqualified as a result of committing a "Bad Act" (as defined in the Rule).

to Section 13(f) of the Exchange Act (e.g., exchange-traded securities, shares of closed-end investment companies and certain convertible debt securities). The first filing must occur within 45 days after the end of the calendar year in which the Investment Adviser reaches the $100 million filing threshold and within 45 days of the end of each calendar quarter thereafter, as long as the Investment Adviser meets the $100 million filing threshold.

Form 13H

Deadline for filing an annual Form 13H: February 14, 2018

Rule 13h-1 under the Exchange Act requires "Large Traders" to identify themselves to the SEC and make certain disclosures to the SEC on Form 13H. "Large Traders" are defined as persons that exercise investment discretion over one or more accounts and effect transactions of NMS securities for or on behalf of such accounts in an aggregate amount of at least $20 million in a day or $200 million in a month. In addition to an initial filing, which must be filed within 10 days from the transaction date, all Large Traders must submit an annual filing on Form 13H within 45 days after the end of the calendar year and submit any amendments promptly after the end of any calendar quarter where information in the form becomes materially inaccurate.

Form PF

Deadline for filing Form PF (for advisers who are not large liquidity or large hedge fund advisers): April 30, 2018

The Advisers Act requires Investment Advisers that advise one or more private funds and have at least $150 million in private fund AUM to file Form PF with the SEC. CEA Rules require CPOs and commodity trading advisors registered with the CFTC to satisfy specific filing requirements with respect to private funds by filing Form PF with the SEC in certain circumstances. Form PF has quarterly and annual filing requirements based on a number of factors, including amounts and types of assets, as follows:

- Large liquidity fund advisers[4] must file Form PF within 15 days of each fiscal quarter-end.
- Large hedge fund advisers[5] must file Form PF within 60 days of each fiscal quarter-end.
- All other filers[6] must file Form PF within 120 days of each fiscal year-end.

For additional information about Form PF, see the SEC's updated **Frequently Asked Questions on Form PF**.

Schedules 13G or 13D

Deadline for filing annual amendment to Schedule 13G: February 14, 2018

An Investment Adviser whose client or proprietary accounts, separately or in the aggregate, are beneficial owners of 5% or more of a registered voting equity security and who have reported these positions on Schedule 13G must update these filings annually within 45 days of the end of the calendar year unless there is no change to any of the information reported in the previous filing (other than the holder's percentage ownership due solely to a change in the number of outstanding shares). An Investment Adviser reporting on Schedule 13D is required to amend its filings "promptly" upon the occurrence of any "material changes."

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[4] Large hedge fund advisers are advisers with at least $1.5 billion under management attributable to hedge funds.

[5] Large liquidity fund advisers are advisers with at least $1 billion in combined AUM attributable to liquidity funds and registered money market funds.

[6] This group includes smaller private fund advisers and large private equity fund advisers, which are advisers with at least $2 billion in AUM attributable to private equity funds. All advisers with at least $150 million in AUM that are not considered large hedge fund advisers, large liquidity fund advisers, or large private equity fund advisers are considered smaller private fund advisers.

Section 16 Filings

In addition, an Investment Adviser whose client or proprietary accounts are beneficial owners of 10% or more of a registered voting equity security must determine whether it is subject to any reporting obligations, or potential "short-swing" profit liability or other restrictions, under Section 16 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Individuals or entities that beneficially own ten percent of any class of equity securities registered under Section 12 of the Exchange Act, and officers or directors of the issuers of these securities, may be required to file Forms 3, 4, and 5 regarding their ownership of and transactions in these securities.

FBAR Reporting

Deadline for receipt by Treasury Department of FBAR FinCEN Report 114: April 15, 2018

FinCEN will grant filers failing to meet the FBAR annual due date of April 15 an automatic extension to October 15 each year. See FinCen's clarification **here**.

A U.S. person is required to file a Report of Foreign Bank and Financial Accounts ("FBAR") if he or she has a financial interest in or signature authority over a foreign bank, securities or other financial account (e.g., a prime brokerage account) in another country if the aggregate value of the foreign financial accounts exceeds $10,000 at any time during the calendar year. Failure to file this form when required can result in significant penalties. Financial accounts that may be subject to FBAR reporting include accounts of a mutual fund or similar pooled fund that issues shares available to the general public and that has a regular net asset value determination and regular redemptions. Private offshore funds, such as hedge funds and private equity funds, are not deemed to be foreign financial accounts, and therefore investment advisers are not required to file an FBAR with respect to these funds. However, if these private funds have a foreign bank account, foreign prime brokerage account, or other foreign financial account and the adviser has signature authority over those accounts, then the adviser may have to file an FBAR with respect to those accounts.

FBAR **FinCEN Report 114** supersedes the previous years' form TD F 90-22.1 and is filed only electronically via FinCEN's **BSA E-Filing system**. For additional information on filing FBAR, see the Treasury Department's **FBAR E-filing FAQs**. Current FBAR Guidance and other FBAR information are available in the **IRS website**.

Bureau of Economic Analysis (BEA) Forms

BEA Summary of all Forms is available **here**. A Guide to BEA's Direct Investment Surveys is available **here**. See also the Treasury TIC Forms (below), which are coordinated with the BEA Forms.

On October 20, 2016,the BEA of the U.S. Department of Commerce published the final rule to amend the foreign direct investment reporting requirements for specific U.S. based private investment funds—those private funds with characteristics of "portfolio investment" rather than "direct investment". Additionally, Form BE-13 has been revised to combine Form BE-13A and Form BE-13C and the effective date was November 21, 2016.

Under the amended rule, private investment funds will not have to report investments made by a foreign entity or person unless the foreign entity or person owns more than 10% of the voting interests in an operating company indirectly via the private investment fund. The revised BEA rule is implemented through private investment funds that file the following forms: Form BE-605 Quarterly Survey of Foreign Direct Investment in the United States; Form BE-15, Annual Survey of Foreign Direct Investment in the United States; Form BE-13, Survey of New Foreign Direct Investment in the United States; **Form BE-12, Benchmark Survey of Foreign Direct Investment in the United States** will also be impacted. Changes to Form BE-12 are addressed in a separate proposed rule issued on July 27, 2017.

The BEA also amended the regulations and survey forms for the BEA Survey BE-13. The BEA will combine Form BE-13A, Report for Acquisition of a U.S. Business Enterprise That Remains a Separate Entity and Form BE-13-C, Report for Acquisition of a U.S. Business Enterprise That is Merged with an Existing U.S. Affiliate, into one form and discontinue the

use of Form BE-13C.

The revised version of Form BE-13A is a report for U.S. business enterprises when (i) a foreign entity acquires a voting interest (directly or indirectly through an existing U.S. affiliate) in a U.S. business enterprise, (ii) the total cost of the acquisition is greater than $3 million, and (iii) by the acquisition, the foreign entity now owns at least 10 percent of the voting interest (directly or indirectly through an existing U.S. affiliate) in the acquired U.S. business enterprise.

- Form BE-180

Form BE-180 is a mandatory survey of U.S. financial services providers and foreign persons from the BEA that occurs every five years and collects data on cross-border trade and financial services transactions of U.S. financial services providers, including investment advisers and other asset managers, broker-dealers and banks. The next BE-180 will be conducted in 2020 and will cover fiscal year 2019 transactions.

The Investment Fund Law Blog article on Form BE-180 can be found **here**.

- Form BE-10

Form BE-10 is a mandatory survey to obtain economic data on the operations of U.S. parent companies and their foreign affiliates. The BE-10 survey is conducted every five years pursuant to the International Investment and Trade in Services Survey Act, and the next BE-10 will be conducted in 2020 and will cover fiscal year 2019 transactions.

The Investment Fund Law Blog article on Form BE-10 can be found **here**.

- Form BE-12

The **BE-12 benchmark survey** is a comprehensive set of annual data on foreign direct investment in the United States which is collected once every 5 years in place of the BE-15 annual survey. A response is required for entities subject to Form BE-12 even where the entity has not been contacted by the BEA. BE-12 reports for 2017 are due on **May 31, 2018**. New BE-12 survey forms for fiscal year ending 2017 will be available in early 2018 and reporters will be able to file online with BEA's eFile system.

- Form BE–12A. Filed for a majority-owned U.S. affiliate with total assets, sales or gross operating revenues, or net income of more than $300 million (positive or negative).
- Form BE–12B. Filed for U.S. affiliates that meet the following criteria:
  - A majority-owned U.S. affiliate that has total assets, sales or gross operating revenues, or net income between $60 million (positive or negative) and $300 million (positive or negative).
  - A minority-owned U.S. affiliate that has total assets, sales or gross operating revenues, or net income of more than $60 million (positive or negative).
- Form BE–12C. Filed for a U.S. affiliate that has total assets, sales or gross operating revenues, or net income of $60 million or less (positive or negative). Only selected data items on this form are filed for a U.S. affiliate that has total assets, sales or gross operating revenues, or net income of less than $20 million (positive or negative).
- Form BE-13

Form BE-13 is a mandatory survey of new foreign direct investment in the United States. A U.S. entity is required to report if (1) a relationship of foreign direct investment in the United States is created or (2) an existing U.S. affiliate of a foreign

parent establishes a new U.S. legal entity, expands its U.S. operations or acquires a U.S. business enterprise. Form BE-13 is due no later than 45 days after an acquisition is completed, a new entity is established or expansion has begun.

Information regarding Form BE-13 can be found **here** and information regarding which version of Form BE-13 to file can be found **here**.

Treasury International Capital System ("TIC") Forms:

TIC Forms and Instructions Resource Center - See also the BEA Forms (above), which are coordinated with the TIC Forms.

- **TIC FORM S**—Purchases and Sales of Long-Term Securities by Foreign-Residents. Form S is a monthly report used to cover transactions in long-term marketable securities undertaken directly with foreigners by, among others, certain private funds, and other individuals and institutions. A US-resident entity is required to file the form if the total value of its purchases and sales of US or foreign long-term securities directly from or to foreign residents exceeds $50 million in any month. If the level of an entity's transactions meets or exceeds the reporting threshold in any month, the entity must report for the remainder of that calendar year. To minimize the reporting burden, a US-resident entity is not required to report transactions conducted through a US-resident financial intermediary, such as a US-resident broker or dealer.
- **TIC Form SLT**—Aggregate Holdings of Long-Term Securities by U.S. and Foreign Residents. Form SLT is required to be submitted by entities with consolidated reportable holdings and issuances with a fair market value of at least $1 billion as of the last day of any month. Form SLT must be filed no later than the 23rd calendar day of the month following the report as-of date. Form SLT applies to all U.S.-resident custodians (including U.S.-resident banks), U.S.-resident issuers (such as a U.S. fund) and U.S.-resident end-investors (such as a U.S. investment adviser, whether or not registered).
- **TIC Form SHC**—Report of U.S. Ownership of Foreign Securities. Form SHC is a mandatory survey of the ownership of foreign securities, including selected money market instruments, by U.S. residents as of December 31 of each year and is conducted every 5 years. The next full Benchmark survey will be as of December 31, 2021.
- **TIC Form SHCA**—Annual Report of U.S. Ownership of Foreign Securities. Form SHCA is the annual report that must be filed only by entities that were notified by the FRBNY. Those required to report on Form SHCA are determined based upon the data submitted during the previous Benchmark survey and TIC SLT report as of December of the preceding year. Form SHCA must be filed with the FRBNY no later than the first Friday of March.
- **TIC B Forms** – NEW: electronic filing is now mandatory. Multiple Forms.

Hedge funds and private funds are may be required to file TIC B Forms (as "all other financial institutions). TIC B Forms require a fund manager or investment adviser to report certain information concerning "claims" and "liabilities" of the reporting institution to or from foreign residents. Filing obligations may arise for private funds that provide credit to foreign entities, invest directly in foreign debt instruments, directly hold foreign short-term securities, or have a foreign credit facility. There are a number of different TIC B Form reports and generally advisers or managers with total claims or liabilities under $50 million in all geographical regions, or $25 million in an individual country, are exempt from filing. The Federal Reserve Bank of New York requires investment advisers who have reportable claims or liabilities to report this information on certain monthly and quarterly reports. Reportable claims and liabilities to be reported monthly (Forms BC, BL-1 and BL-2) are due no later than the 15th calendar day following the last day of the month. Reportable claims and liabilities to be reported quarterly (Forms BQ-1, BQ-2 and BQ-3) are due no later than the 20th calendar day following a quarter end. Detailed filing requirements and descriptions of each B Form can be found here.

- **TIC Form D** – TIC Form D is a quarterly report used to cover holdings and transactions in derivatives contracts undertaken between foreign resident counterparties and major U.S.-resident participants in derivatives markets. TIC Form D must be submitted if the exemption level is exceeded which occurs when: (1) the total notional value of derivatives holdings for the reporter's own account and the account of the reporter's customers exceeds $400 billion as of

the reporting date or (2) the total value of net settlements during a quarter exceeds $400 million. Once either exemption level has been exceeded, the reporter should submit the TIC Form D for that calendar quarter, for the remaining quarters in the same calendar year, and for each quarter of the following calendar year. Detailed filing requirements and instructions for TIC Form D can be found **here**.

Blue Sky Filings/Form D

Many state securities "blue sky" filings expire on a periodic basis and must be renewed. Accordingly, now may be a good time for an Investment Adviser to review the blue sky filings for its fund(s) to determine whether any updated filings or additional filings are necessary.

All Form D filings for continuous offerings need to be amended with the SEC on an annual basis.

Annual State Corporate/LLC/LP Filings and Taxes

Investment advisors and private funds are required to make annual filings and tax payments in the state of formation, as well as states in which the entities are qualified to do business. There may be corporate filing and/or tax requirements in foreign jurisdictions where the fund is formed or qualified.

If you have any questions regarding the summary above or would like us to assist you in meeting any of these requirements, please feel free to contact us.

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