2014

Proskauer Hedge Funds and Other Private Funds Annual Review

Proskauer

In 2014, we saw a flurry of regulatory activity targeting investment advisers and hedge funds, private equity funds and other private funds (collectively, **private funds**). The following annual review (**Annual Review**) is a summary of some of the significant changes and developments that occurred in the past year and certain recommended practices that investment advisers to private funds should consider when preparing for 2015.

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State of Affairs in 2014

SEC Examination Priorities and Examination Initiatives

In 2014, we saw a notable increase in the number of examinations of registered investment advisers by the Office of Compliance Inspections and Examinations (**OCIE**) of the U.S. Securities and Exchange Commission (**SEC**). In particular, we noted numerous examinations of newly-registered investment advisers and first time examinations of investment advisers that have not previously been examined, in both cases consistent with OCIE's publicly-announced priorities. We expect to see both initiatives continue well into 2015, whether or not formally announced as such by the SEC.

Investment advisers have reported a wide range of experiences in recent examinations. OCIE still generally seems to give about one week's advance notice of an examination. The duration of examinations, however, has lasted anywhere from three days to several months in time. In some cases, exams have been conducted entirely off-site through exchanges of documents through the SEC's secure email system. Recently, OCIE staff has not been identifying examinations as "presence" exams, but examinations have tended towards the shorter end of the spectrum. Similarly, we have noted a significant range in the scope and depth of reviews. For example, the SEC's review of emails has ranged from no review to reviewing emails of multiple personnel, and has covered periods ranging from one month to more than one year in time. We have even seen "phone exams" as part of the SEC's outreach program for newly registered investment advisers, where the SEC spends an hour or so on the phone with the chief compliance officer asking questions about Form ADV and the registrant's business.

Key issues that we noted as having been raised in recent examinations and/or mentioned in deficiency letters include:

- Disclosure and appropriateness of specific expenses charged to client accounts, and how expenses are allocated among client accounts and portfolio investments;
- Marketing materials, due diligence materials, responses to requests for proposals, and other material provided to prospective clients and investors (including, in particular, inconsistencies between descriptions of investment strategies and restrictions in marketing materials as compared to actual portfolio investments and experiences);
- Past performance presentations (including accuracy of calculation, adequacy of back-up documentation, presentation of past performance of only selected investments, portability of prior performance at a former employer, accuracy of claims and disclosures about hypothetical or pro forma performance, calculation of composite performance figures and disclosures of material differences among accounts);
- Conflicts of interest (including adequacy of disclosure of potential conflicts, issues related to allocation of investment opportunities and expenses, issues relating to soft dollar practices, and identification and tracking of potential conflicts and other issues related to fund investors who may be affiliated with public companies, broker-dealers, other private funds or other entities with which a fund or adviser may have dealings);
- Adequacy of compliance programs and annual compliance reviews;
- Personal trading by principals and employees, especially by investment personnel;
- Use of social media by principals and employees;
- Portfolio management (including the use of high frequency trading and quantitative trading models);
- Pay-to-Play Rule (as defined below) compliance;
- Custody Rule (as defined below) compliance; and

- Valuation issues.

Interestingly, we have not seen cybersecurity issues or questions regarding Form PF filings raised in recent routine examinations (we have, however, seen questions on these matters come from the SEC in other contexts—*i.e.*, the Risk and Examination Office of the SEC's Division of Investment Management has met with several investment advisers to discuss their Form PF filings), but we expect more questions to come on both issues in the future given recent SEC focus on both topics.

As always, we urge all registered investment advisers to give serious thought and planning as to how to prepare for and respond to an SEC examination by, among other things, carefully reviewing recent OCIE document request lists in order to ensure that all required records can be made available promptly; identifying key personnel who will interact with the SEC staff; preparing key personnel for interviews; reviewing the results of any prior SEC exams (especially any prior deficiency letters); maintaining adequate written documentation of annual compliance reviews; and adequately documenting key risks and responsibilities.

SEC Enforcement Action Highlights

Both the number of SEC enforcement actions and the amount of disgorgements and penalties obtained increased significantly in 2014. In the fiscal year ending September 2014, the SEC filed a record 755 enforcement actions and obtained orders totaling $4.6 billion in disgorgement and penalties, up from 686 and $3.4 billion, respectively, in the 2013 fiscal year.[1] In addition, the SEC brought a number of first-ever enforcement actions, including actions involving the Pay-to-Play Rule, whistleblower retaliation and high frequency trading. The SEC credited its use of innovative data and quantitative analysis as contributing to its success in detecting violations. The increase in the number of enforcement actions is also emblematic of SEC Chairperson Mary Jo White's "Broken Windows" enforcement philosophy, which targets conduct that in the past would likely have been noted in a deficiency letter without publicity or penalty. As Chairperson White remarked at the Securities Enforcement Forum in October 2013, "minor [securities] violations that are overlooked or ignored can feed bigger ones, and, perhaps more importantly, can foster a culture where laws are increasingly treated as toothless guidelines. And so, I believe it is important to pursue even the smallest infractions." We expect this trend of strong SEC enforcement and growing reliance on new investigative tools to continue in 2015.

Below is a summary of some of the notable enforcement actions from 2014:

First SEC Enforcement Action on Pay-to-Play Rule Violations

On June 20, 2014, the SEC announced its first enforcement action brought under Rule 206(4)-5 (**Pay-to-Play Rule**) of the Investment Advisers Act of 1940 (**Advisers Act**). The Pay-to-Play Rule prohibits, among other things, an investment adviser from providing investment advisory services for compensation to a state or local government entity if the investment adviser or any of its "covered associates"[2] had made a political contribution to an elected official, or a candidate for such elective office, within the preceding two years, and the holder of the elective office is in a position to direct or otherwise influence the award of the government entity's investment advisory business. According to the SEC order, the investment adviser violated the Pay-to-Play Rule by continuing to provide advisory services to city and state pension funds after a covered associate had given a total of $4,500 in campaign

[1] The SEC's announcement summarizing its 2014 enforcement actions is available here.

[2] "Covered associates" is defined under Rule 206(4)-5 to include, among other persons, (i) any general partner, managing member or executive officer, or other individual with a similar status or function; and (ii) any employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee.

contributions to a mayoral candidate and the state governor. Without admitting or denying any wrongdoing, the investment adviser agreed to be censured and pay disgorgement, prejudgment interest and a civil penalty totaling $300,000.

This enforcement action highlights the importance of establishing stringent guidelines on political contributions by an investment adviser and persons who may qualify as the investment adviser's "covered associates" under the Pay-to-Play Rule. We note that a Pay-to-Play Rule violation can occur even if the investment adviser had no knowledge of a contribution made by a covered associate. Moreover, as this case demonstrates, even a small political contribution can trigger an enforcement action, so long as the value of the contribution is above the rule's de minimis thresholds. Investment advisers should conduct due diligence on any past contributions prior to onboarding a government entity client, hiring a new employee, promoting an existing employee or engaging a solicitor. Moreover, investment advisers should remain cognizant of any client government plan policies that may restrict or prohibit similar activities.

Please see our June 30, 2014 client alert for more information.

First SEC Enforcement Action on Whistleblower Retaliation

On June 16, 2014, the SEC announced its first enforcement action for violations of the anti-retaliation provisions under Section 21F of the Securities and Exchange Act of 1934 (**Exchange Act**). Section 21F provides that the SEC shall reward whistleblowers who voluntarily provide information on possible federal securities law violations that leads to successful enforcement actions. To encourage whistleblowers to come forward without fear of retaliation, Section 21F(h) prohibits an employer from terminating, demoting, suspending, threatening, harassing or otherwise discriminating against an employee for reporting potential violations to the SEC and/or assisting in any resulting enforcement actions. The SEC order alleged that the investment adviser violated Section 21F(h) by removing the head trader from his trading desk and stripping him of his day-to-day trading and supervisory responsibilities after learning that the head trader had reported improper principal trades to the SEC. The SEC found that the investment adviser had no reason for doing so and concluded that the head trader was marginalized for reporting the principal trades. Without admitting or denying any wrongdoing, the investment adviser and its principal agreed to pay disgorgement, prejudgment interest and civil penalty totaling $2.2 million to settle the principal trading and whistleblower retaliation charges.

We note that on September 23, 2014, the SEC also separately announced a $30 million reward (the largest reward under the SEC's whistleblower program to date) to a whistleblower for providing information that led to a successful SEC enforcement action. Both the June enforcement action and the September reward signal the SEC's determination to exercise its anti-retaliation authority. Investment advisers should be careful when terminating, demoting or otherwise changing the scope or terms of employment of an employee who has acted as a whistleblower, even if the changes are for unrelated reasons, and should be ready to provide a well-documented response in the event that the changes are brought into question.

Please see our June 23, 2014 client alert for more information on the June enforcement action. Information on the SEC's whistleblower program is also available on Proskauer's Whistleblower Defense Blog.

First SEC Enforcement Action on High Frequency Trading

On October 16, 2014, the SEC announced its first high frequency trading manipulation case brought under Section 10(b) and Rule 10b-5 of the Exchange Act. The SEC order alleged that a New York-based high frequency trading firm engaged in fraudulent conduct in connection with the purchase and sale of securities through a practice known as "marking the close." The SEC alleged that, using a sophisticated algorithm, the high frequency trading

firm manipulated the closing prices of thousands of publicly-traded securities in the firm's favor by placing a large volume of rapid-fire trades near the close of trading almost every trading day during a six-month period in 2009. In addition, the high frequency trading firm allegedly implemented additional algorithms to ensure that its orders received priority over other orders when trading imbalances. Without admitting or denying any wrongdoing, the high frequency trading firm agreed to pay a penalty of $1 million to the SEC and to cease and desist from committing or causing any future violations of securities laws.

We note that the SEC's Chairperson, Mary Jo White, and its enforcement chief, Andrew Ceresney, have indicated on separate occasions that the SEC has a number of other investigations targeting manipulative activities by computer-driven trading firms. This enforcement action highlights the SEC's determination to increase its oversight of high frequency trading and other complex computer-driven practices and showcase that it has the expertise to investigate fraudulent algorithmic trading strategies.

SEC Enforcement Action Against Investment Adviser for Misallocation of Expenses

On September 22, 2014, the SEC charged an investment adviser with breaching its fiduciary duty to two private equity funds advised by the investment adviser by improperly allocating expenses between two portfolio companies, each separately owned, although subsequently integrated. The SEC also charged the investment adviser with failing to maintain policies and procedures reasonably designed to prevent violations of the Advisers Act. Neither charge considered the performance of the underlying portfolio company investments or the extent to which the funds' investors were harmed. Without admitting or denying the SEC's findings, the investment adviser agreed to pay penalties and disgorgement totaling $2.3 million and further agreed to cease and desist from committing or causing future violations of the Advisers Act.

This enforcement is a reminder that, increasingly, the SEC is focusing on, and concerned with, the allocation of expenses with respect to private equity fund advisers and the advisers' policies and documentation relating to allocation decision-making.

Mass SEC Enforcement Actions for Failure to File Form 4 and Schedules 13D and 13G

On September 10, 2014, the SEC announced charges against 28 officers, directors and major shareholders for failures to timely file Form 4 and Schedules 13D and 13G with the SEC, as required under Sections 16(a), 13(d) and 13(g) of the Exchange Act, respectively. In addition, the SEC charged several public companies with contributing to the filing failures or neglecting to report the violations. Of the 34 individuals and companies named in the SEC orders, 10 were investment firms. Charges against investment firms primarily stemmed from late, or absence of, reporting with respect to portfolio investments by investment fund clients. Delays in submitting the required filings ranged from weeks to months and even years in certain cases. The SEC focused on repeat late filers and identified them through its use of quantitative data sources and ranking algorithms. Settlement amounts ranged from $25,000 to $100,000 for individuals and $60,000 to $150,000 for public companies and investment firms.

We note that the filing requirements under Sections 16(a), 13(d) and 13(g) apply regardless of the amount of profits or the filer's rationale for the transactions. Furthermore, even an inadvertent lapse in reporting may constitute a violation. For an overview of these filing requirements, please see our discussion on Forms 3, 4 and 5 and Schedule 13D/13G below.

SEC Enforcement Action Against Repeat Offender for Custody Rule Violations

On October 29, 2014, the SEC announced an administrative proceeding against a registered investment adviser, its principals and its chief compliance and operating officer for violating Rule 206(4)-2 of the Advisers Act (**Custody**

Rule). The SEC order alleged that the investment adviser failed to deliver audited financial statements to private fund investors within 120 days of the 2010, 2011 and 2012 fiscal year-ends, as required under the audit provision (**Audit Provision**) of the Custody Rule (please see our discussion below for more details on the provision's requirements). The investment adviser delivered financial statements at least 40 days late for all years and was up to six to eight months late with respect to certain private fund investors. Notably, the SEC found that the investment adviser continued to violate the Custody Rule even though it (and its principals) had already been sanctioned by the SEC in 2010 for violating the Custody Rule. The SEC found that the investment adviser failed to take any remedial action and that the investment adviser's principals and its chief compliance and operating officer aided and abetted the investment adviser's Custody Rule violations by, among other things, failing to implement policies and procedures necessary to prevent further violations.

This enforcement action underscores the risk that persistent non-compliance can lead to SEC enforcement. We note that the SEC has consistently identified Custody Rule compliance as an examination priority for investment advisers. Please contact your regular Proskauer attorney if you have any questions on Custody Rule compliance. Additional information on the enforcement action can be found in our November 6, 2014 client alert.

Insider Trading Developments

The year 2014 included several noteworthy developments in the continuing campaign against insider trading, the most significant of which arose in four cases involving hedge funds. One of the cases was a long running civil enforcement action by the SEC, and the others involved an unsuccessful criminal prosecution and two challenges to prior convictions.

SEC Loss. As noted in a previous article, the SEC announced in early summer that it would begin filing more insider trading cases as administrative proceedings, rather than in federal court. This came within days of it losing two insider trading cases in the space of a week, including its long running case against Nelson Obus, a founding partner of Wynnefield Capital, Inc. Shortly thereafter, the SEC hired two new administrative law judges. This was widely seen as a reaction to the serial defeats the SEC has suffered over the past two years, particularly in insider trading cases, and has been sharply criticized, and even challenged in two pending court cases by parties facing administrative charges, including one for insider trading.

These challenges focus on the fact that the administrative process affords fewer due process protections than a court proceeding under federal procedural, discovery and evidentiary rules. Even a prominent federal judge has encouraged the SEC to reconsider its position. Yet, senior enforcement staff have remained steadfast in public comments that they intend to continue on this path. Decisions in the two pending court challenges may determine whether future subjects of enforcement actions will enjoy the full panoply of due process protections afforded by the federal rules, or have to face the SEC's truncated administrative process, which requires trial within 120 days of filing and a final order within 180 days after trial.

Pending Appeals. The U.S. Attorney's Office for the Southern District of New York also suffered notable setbacks, including a high profile loss against Rengan Rajaratnam, brother of former Galleon Group founder, Raj Rajaratnam, as well as aggressive questioning by a panel of Second Circuit judges in the appeal by Todd Newman, a former portfolio manager at Diamondback Capital Management, and Anthony Chiasson, co-founder of Level Global Investors, of their separate 2012 convictions for trading on information they received as illegal tips. Both men argued that they were "remote tippees," *i.e.*, several layers removed from the original tip and tipper, and did not know the information they received had been tipped, nor whether the tipper received a benefit for passing the tip.

The trial court's jury instruction followed the Second Circuit's opinion reversing summary judgment in the *Obus* case, referenced above, which did not require evidence that the tippee knew of a particular benefit to the tipper—*i.e.*, a quid pro quo—but only that the information had been improperly passed, as the jury in each case believed Newman and Chiasson knew. A central issue on appeal is whether passing material, non-public information in breach of a duty of confidentiality can, alone—in view of the risks attendant to such breach—*imply* a personal benefit sufficient to support a conviction, on the theory that no reasonable insider would risk criminal prosecution and reputational harm without receiving a benefit, which a sophisticated market participant—as Newman and Chiasson were—would know, or have reason to know. A loss for the government could present opportunities for other convicted tippees to challenge their convictions on grounds that the government did not prove they knew the tipping insider in their case received a personal benefit. On the other hand, victory for the government would heighten the risk of receiving information from sources that may have originated with an insider.

In a second case, affirmed by the Second Circuit and appealed to the U.S. Supreme Court, Whitman Capital, LLC founder, Doug Whitman, raised several issues challenging his conviction, including whether material non-public information underlying an insider trading case must be "a substantial factor" in motivating trading, or only "*a* factor," and whether federal or state law defines what fiduciary duty is owed, if any, and breached by an insider who passes such information. Whitman had argued that state law should apply. In his case, California law would have applied, which does not impose a duty of confidentiality on lower level employees, as Whitman argued his tipper was. Hence, passing the information did not breach any duty under California law, and Whitman should not have been convicted.

On November 11, 2014, the Supreme Court denied Whitman's petition for certiorari, meaning that for the foreseeable future, the government will need to prove only that misappropriated or tipped information was one factor in the trader's decision to trade, not *a substantial factor*, and that the government may invoke federal common law to supply the fiduciary duty an insider owes and breaches when s/he misappropriates or tips material non-public information. One benefit of this outcome is that it avoids overlaying on the federal securities laws a patchwork of varying state law duties, which could yield different results in different states, in a manner contrary to the uniform national standard the federal securities laws were designed to achieve.

FCPA Updates: DOJ Targets Private Funds

The growth of the private funds industry has drawn the attention of domestic and foreign law enforcement officials intent on rooting out corrupt activity. Taking proactive steps to minimize anti-corruption exposure can avert headline risks, criminal and civil penalties and other potentially devastating collateral consequences.

Hostile Regulatory Environment. Anti-corruption risks for private funds lie primarily in the enforcement of the U.S. Foreign Corrupt Practices Act (**FCPA**) by the U.S. Department of Justice (**DOJ**) and the SEC. The FCPA prohibits corruptly giving anything of value to a foreign official to obtain or retain business. Under the FCPA, public issuers must maintain accurate books and records, and internal accounting controls to prevent and detect FCPA violations. For over a decade, and more recently as of late, the DOJ and the SEC have made FCPA enforcement a priority.

Patrick Stokes, chief of the Justice Department Fraud Section's FCPA Unit, recently revealed that the department has prosecuted and resolved FCPA cases against 10 corporations and obtained penalties of nearly $800 million since 2013. Stokes, who spoke at the American Bar Association's National Institute on International Regulation and Compliance in Washington on October 2, 2014, said 25 individuals had either been charged or entered guilty pleas during that period. And since 2009, he added, 50 individuals were convicted and more than 50 cases against companies were resolved with penalties amounting to almost $3 billion.

Recently, there has been an increased focus on prosecuting individuals in addition to corporations. Individual prosecutions threaten jail for offenders found guilty and provide a stronger basis for deterrence. Kara Brockmeyer, chief of the SEC Enforcement Division's FCPA Unit, said at the same American Bar Association conference that the SEC will be announcing a number of FCPA actions against individuals before the end of 2014.

Law enforcement officials interpret the statute to cover a range of corrupt payments above and beyond the proverbial "cash in a briefcase," scrutinizing companies' travel and entertainment expenses, gifts and even the hiring of individuals associated with foreign officials. For hedge funds and private equity funds that are expanding their global footprint, perhaps the most alarming is that extraterritorial jurisdiction is routinely exerted over activity with nominal connection to the U.S. Activities performed entirely outside the U.S. by non-U.S. persons have been prosecuted where the only connection to the U.S. was one bank account. Emails routed through a U.S. email server likewise served as the jurisdictional basis for a prosecution of a non-U.S. person for conduct otherwise entirely outside the U.S. The DOJ does not hesitate to investigate foreign nationals working for foreign companies who pay bribes to foreign officials in association with wholly foreign transactions, on the existence of a single minor connection to the U.S.

Compounding the risk for hedge funds and other private funds operating in foreign markets is the challenge of determining whether their business partner or investor is a government official or instrumentality. Corrupt payments are prohibited by the FCPA when offered to foreign officials in the traditional sense, such as ministers, judges and agency employees. But the FCPA also proscribes offers to officials whose government connections are less evident, but prevalent in the private fund industry— employees of pension funds, sovereign wealth funds and other state-owned or state-operated instrumentalities. The definition of an "instrumentality" covered by the FCPA is broadly based upon a host of factors, some of which are counterintuitive. In many countries, such as Russia or China, the government controls a company through a complex chain of subsidiaries, adding layers of difficulty to determining whether the company is an instrumentality.

Seeking to capitalize on the successful extraction of settlement payments under the FCPA, many foreign jurisdictions have enacted and enhanced their own anti-corruption regimes. Global cooperation among law enforcement agencies has skyrocketed.

The U.K.'s Bribery Act 2010 (**U.K. Bribery Act**), a more robust anti-corruption statute than the FCPA, covers individuals and entities that carry on business in the U.K., regardless of where the corrupt activity takes place. Unlike the FCPA, the U.K. Bribery Act prohibits commercial bribery, criminalizes the receipt (not just the offer or provision) of corrupt payments, and does not except nominal payments provided to secure ministerial government actions. The U.K. Bribery Act has even introduced a new criminal offense: the failure to prevent bribery, unless the entity has in place "adequate procedures" to prevent such conduct.

Rapidly expanding economies have crafted anti-corruption statutes commensurate with their growth. Earlier this year, the Brazilian Clean Companies Act came into effect, imposing strict civil liability on companies operating in Brazil for both domestic and foreign bribery. China, Russia and India have similar enforcement efforts underway. Compliance personnel and the anti-corruption bar took note when Canada recently enhanced its Corruption of Foreign Public Officials Act and secured its first conviction. All of this portends vigilance.

Key Risks for Hedge Funds and Other Private Funds. Hedge funds and other private funds share many of the same anti-corruption risks; however, the fundamental differences between their respective business models make some risks, with respect to each type of fund, more acute than others.

The greatest anti-corruption risks for most private funds arise when securing capital from foreign officials and government entities, including sovereign wealth funds and pension funds. Fundraising often is facilitated by local

third-party agents with intimate familiarity with the investing individual or entity. And once a relationship is formed, local agents may be tasked with maintaining it. These interactions can be a primary source of legal risk. Impressive gifts or lavish entertainment are often customary when developing business relationships. Goodwill is generated. Care must be taken to ensure that creating goodwill does not transform itself into paying for business. Breach of that line, itself sometimes hard to find, cannot be the price of admission to do business.

No private fund should engage a local agent to solicit and maintain relationships with foreign government investors with little insight into or protection from that agent's activities. The FCPA imposes liability not only for the actions of one's employees, officers and directors, but also for those of one's intermediaries. Mere knowledge of an agent's actions can trigger liability. Law enforcement officials are quick to take advantage of this risk point. In recent years, the majority of FCPA enforcement actions have arisen from the use of third-party agents.

Earlier this year, law enforcement officials warned private fund personnel that the DOJ is focused on the use of intermediaries and on gifts, entertainment and travel expenses provided when seeking investments. That prophecy proved self-fulfilling, as a large private fund manager recently disclosed in public filings a federal FCPA investigation of its dealings with a sovereign wealth fund. Several private equity funds have also been associated by the press with FCPA investigations.

While all private funds also must take care when using third-party agents to establish potential investments and maintain relationships, control-oriented private equity funds' anti-corruption risks, to a far greater extent than other private funds, arise out of the investments themselves, even when limited to the private sphere. Many private companies in emerging markets have weak or non-existent anti-corruption programs governing their own interactions with foreign government officials. Private equity funds can be held liable for those companies' corrupt activities— past, present and future.

Control-oriented private equity funds, unlike hedge funds and other types of private funds, ordinarily do not hold passive investments, a business approach that may insulate hedge funds and non-control oriented private funds from liability should a corruption issue arise. Many of the methods customarily employed by private equity funds to generate change in a business and increase profitability also increase risk. Managerial control, board seats, voting rights and veto powers are just some of the indicia of control that can confer liability on a private fund for an investment's activities, even when holding a minority interest in that investment. Likewise, actions of joint venture partners can create liability for a private equity fund. A private fund can also inherit successor liability for an acquisition's past wrongs. Even absent liability for the corrupt activities of an investment, significant headline risks may exist. Any anti-corruption investigation or enforcement action can severely impact a private equity fund's ability to sell an investment.

Maximizing Profits by Minimizing Exposure. A targeted investment's prior acts, whistleblowers and even the daily activities of agents located on the other side of the world are largely beyond a private fund's control. However, out of sight should not be out of mind. For a variety of reasons relating to the types of investments in which they engage, many private funds neglect to assess legal risks surrounding corruption issues, thereby compounding possible exposure. But ignoring the legal risk/reward matrix can be catastrophic. Discovering an error in that analysis when law enforcement is at the door is never desirable. By then, whatever excuses one has will typically fall on deaf ears.

Conducting due diligence on agents, business partners and investments; implementing robust anti-corruption compliance programs; training local representatives on anti-corruption compliance and averting whistleblowers by maintaining anonymous hotlines are some of the many ways in which a private fund can protect itself while expanding on a global scale.

For more information on FCPA enforcement and implications for private fund investment advisers, please see our Winter 2014 newsletter and February 13, 2014 client alert.

SEC Guidance and Other Regulatory Updates

New SEC Guidance on Social Media

Testimonial Rule and Social Media. In March 2014, the SEC issued a guidance update applying Rule 206(4)-1 of the Advisers Act (**Testimonial Rule**) to public commentary about an investment adviser posted on a third-party social media site. Use of social media by investment advisers is generally subject to the anti-fraud provisions under Section 206(4) of the Advisers Act. The Testimonial Rule prohibits any advertisement that refers, directly or indirectly, to testimonials of any kind concerning an investment adviser or its services. Such prohibited "testimonials" may include public commentary from a social media site that relates to the investment adviser.

The new guidance provided that an investment adviser may post, forward or link to public commentary about the investment adviser from a third-party social media site if certain conditions are met. First, the social media site must provide content that is independent of the investment adviser. Second, there must not be a material connection between the social media site and the investment adviser that would call into question the independence of the site or the commentary. For instance, the investment adviser may not invite clients to post, or compensate clients for posting, commentary regarding the investment adviser. Third, the investment adviser must include all of the unedited comments appearing on the social media site regarding the investment adviser. The investment adviser may not "cherry pick," rearrange or otherwise edit commentary to highlight favorable commentary or downplay unfavorable commentary.

In the guidance update, the SEC also strongly cautions against the use of community or fan pages, which may be difficult to monitor and increase the risk of deception or fraud.

Recommended Practice for Investment Advisers. Prior to using social media, investment advisers should consider their obligations under the anti-fraud provisions of Section 206(4) and any other applicable state or non-U.S. regulations, as well as any risks presented by their business and operations. Investment advisers should establish policies and procedures governing the use of social media and provide training for firm personnel. Specifically, investment advisers may consider implementing certain prohibitions against the use of social media by firm personnel, including, among other things:

- Prohibiting the use of social media sites, personal email or instant messaging services for business purposes;
- Requiring all business communications to be conducted through firm systems; and
- Requiring firm personnel to acknowledge and consent to the investment adviser's monitoring and review of all electronic communications sent or received through firm devices and systems.

Where the investment adviser allows its personnel to create a social media account (such as a LinkedIn account) identifying his or her employment with the firm, the investment adviser should implement policies and procedures to prohibit any disclosure of the firm's business or any endorsement of the firm.

Investment advisers should also consider any recordkeeping requirements associated with social media communications with prospective and existing clients. In general, Rule 204-2 of the Advisers Act requires an investment adviser to retain written communications with prospective or existing clients, which would include communications conducted through social media. Before communicating with prospective or existing clients

through social media, investment advisers should determine whether they have policies and procedures necessary to retain all required records, and make them available for inspection.

New SEC Cybersecurity Examination Initiative

Cybersecurity Examination Initiative. In a risk alert published on April 15, 2014, OCIE announced an initiative to evaluate cybersecurity preparedness in the securities industry by conducting cybersecurity examinations of over 50 registered investment advisers and broker-dealers. This initiative affirms the SEC's increased interest in the cybersecurity preparedness of regulated firms, an issue which has been identified as an examination priority for 2014 and was the subject of an SEC roundtable in March.

The risk alert included a list of 28 questions that OCIE may use when conducting a cybersecurity examination. Some questions were borrowed from the "Framework for Improving Critical Infrastructure Cybersecurity" released by the National Institute of Standards and Technology (**NIST**). Based on the risk alert, it is anticipated that cybersecurity examinations will target the following areas:

- Cybersecurity governance and identification and assessment of cybersecurity risks;
- Protection of networks and information;
- Risks associated with remote customer access and funds transfer requests;
- Risks associated with vendors and other third parties;
- Detection of unauthorized activity; and
- Experiences with certain cybersecurity threats.

It should be noted that the questions contained in the risk alert are not intended to be exhaustive and that OCIE will tailor its examination based on the specific circumstances of the firm.

Recommended Practice for Investment Advisers. Investment advisers, regardless of whether they are selected for examination, should use the risk alert and the NIST framework as guidelines to develop a plan for regularly testing the adequacy of their cybersecurity infrastructure and policies. For investment advisers to private funds, common problem areas may include, among other things:

- Phishing attacks;
- Rogue employees;
- Unencrypted laptops, thumb drives and other devices taken out of the workplace;
- Weak authentication (*e.g.*, passwords, email and phone inquiries and "forgot my password" procedures);
- Use of personal accounts for business purposes (*e.g.*, consumer grade accounts, email, cloud, etc.); and
- Security patches.

Investment advisers may consider penetrating their internal systems on a test-basis to identify points of vulnerability. They should also (i) implement periodic training for firm personnel and, if applicable, third party vendors and business partners authorized to access firm networks and (ii) document any compliance measures taken, as well as cybersecurity threats encountered by them (including any remedial steps undertaken in response to such threats). They may also consider purchasing insurance for data breaches.

New SEC Guidance on Rule 506(d) Bad Actor Rule

Effective as of September 23, 2013, the SEC amended Rule 506 of Regulation D under the Securities Act of 1933 (**Securities Act**) to preclude felons and other "bad actors" from participating in any offering under Rule 506. Rule 506 previously did not include any such disqualification standards.

The scope of persons whose "bad acts" may have a disqualifying effect is relatively broad. Generally, the rule covers:

- The issuer, as well as any predecessor or affiliated issuer;
- Executive officers, directors, other officers participating in the offering, general partners and managing members;
- Any beneficial owner of 20% or more of the issuer's voting equity securities, calculated on the basis of voting power;
- In the case of a private fund, any investment manager for the fund, and any direct or indirect director, executive officer, officer participating in the offering, general partner or managing member of the investment manager;
- Any promoter connected with the issuer; and
- Any person who will be paid for soliciting purchasers (such as a finder or placement agent) and any direct or indirect director, executive officer, other officer participating in the offering, general partner or managing member of such paid solicitor.

Amended Rule 506 includes a lengthy list of disqualifying events, some of which are limited by look-back periods. Most of the events involve criminal, civil or regulatory rulings and orders related to securities laws or participation in the securities industry, but some also involve rulings of state securities, banking and insurance regulators. If the otherwise disqualifying event occurred prior to the effective date of the amended rule, the issuer is required to make disclosure of the bad act to investors.

Under amended Rule 506, the SEC, or in some cases the regulator that issued the order or ruling that otherwise would have triggered disqualification, may determine that disqualification from using Rule 506 will not apply as a result of the event. The SEC has in some cases granted waiver requests since the effective date of the amended rule.

Pursuant to staff guidance, the SEC staff clarified certain aspects of the bad actor provisions, including that:

- The term "affiliated issuer," with respect to any issuer and any offering, includes only an affiliate that is issuing securities in the same offering;
- If a placement agent becomes subject to a disqualifying event while an offering is still ongoing, the issuer will be permitted to rely on Rule 506 so long as the placement agent is terminated and does not receive any compensation for sales made after the disqualifying event;
- In the case of an offering using multiple placement agents, the issuer must provide disclosure to all investors of bad acts that occurred prior to the effective date with respect to any of such placement agents (not just to the investors that were solicited by the placement agent with the disclosable bad act); and
- The provisions of the amended rule will not be triggered by sanctions imposed by courts or regulators in jurisdictions outside of the U.S., such as convictions or orders by a foreign court or foreign regulatory authority.

In addition, the SEC staff clarified pursuant to staff guidance that the term "beneficial owner" should be interpreted in the same manner as under Rule 13d-3 of the Exchange Act. As a result, the term includes any person

who directly or indirectly has sole or shared (i) voting power, which includes the power to vote, or direct the voting of, the relevant security and/or (ii) investment power, which includes the power to dispose, or direct the disposition of, the relevant security. Beneficial ownership by a "group" and members of a group (such as shareholders that have entered into a voting agreement to elect certain directors) also should be determined in a manner consistent with corresponding Exchange Act rules. As a result, an issuer's 20% beneficial owners may include persons who hold of record less than 20% of the issuer's outstanding voting securities, and the issuer will need to "look through" beneficial owners based on the Rule 13d-3 principles. The staff also clarified that a person who becomes a 20% beneficial owner by purchasing securities in an offering is not a covered person at the time of such sale, but would be a covered person whose bad acts would disqualify the issuer from relying on Rule 506 for any subsequent sales in connection with that offering.

Please see our discussion under "Rule 506(d) Bad Actor Due Diligence" below for an overview of recommended bad actor due diligence practices. For more information on the amended rule generally, please see our July 24, 2013 client alert.

New SEC Guidance on Accredited Investor Determination and Verification

On July 3, 2014, the SEC issued six new Compliance and Disclosure Interpretations (**CDIs**) regarding the determination and verification of accredited investor status for purposes of Rule 506(b) and Rule 506(c) of Regulation D under the Securities Act.

The first two CDIs clarified the application of the income test to income reported in a non-U.S. currency and the net worth test to joint assets held by a purchaser with a person other than his or her spouse:

- **Income Reported in a Non-U.S. Currency.** For purposes of determining whether a purchaser is an accredited investor using the income test, where the purchaser's annual income is reported in a non-U.S. currency, the issuer may use either the exchange rate as of the last day of the year being reported or the average exchange rate for that same year.
- **Joint Assets with a Non-Spouse.** For purposes of determining whether a purchaser is an accredited investor using the net worth test, where the purchaser has assets in an account and/or property held jointly with a person other than his or her spouse, the issuer may consider such account and/or property, but only to the extent of the purchaser's percentage ownership of the account and/or property.

The remaining four CDIs offered guidance on the "safe harbor" accredited investor verification methods under Rules 506(c)(2)(ii)(A) and (B). Adopted by the SEC in 2013 pursuant to the Jumpstart Our Business Startups Act (**JOBS Act**), Rule 506(c) permits an issuer to use general solicitation or general advertising in a Rule 506 private offering if certain conditions are met. Among other things, an issuer must take reasonable steps to verify that all purchasers in the offering are accredited investors. An issuer may do so by adopting a principles-based approach that is tailored to the facts and circumstances of the transaction or, if the purchaser is an individual, by using one of the four non-exclusive "safe harbor" methods under Rule 506(c)(2)(ii) that are deemed to satisfy the verification requirement (for more information on Rule 506(c), please see our July 24, 2013 client alert). The CDIs made clear that each of the safe harbors under Rule 506(c)(2)(ii)(A) and (B) would not be available unless all aspects of the safe harbor are met and that the required supporting documents may not be substituted with other types of documents. An issuer that does not qualify for the safe harbors may instead follow the principles-based approach and take other reasonable steps to verify the purchaser's status.

Please see our July 15, 2014 client alert for more information on the new CDIs.

New SEC Guidance on the Custody Rule

In June 2014, the SEC issued a guidance update on the application of the Custody Rule to (i) special purpose investment vehicles (**SPVs**) used by a pooled investment vehicle client when making investments and (ii) escrow accounts used by a pooled investment vehicle client when selling its interest in a portfolio company. Both are issues that the SEC has identified in examinations of registered investment advisers and inquiries received from the industry.

Special Purpose Vehicles. The new guidance clarified when an investment adviser relying on the Audit Provision may treat an SPV's assets as assets of the pooled investment vehicle clients invested in the SPV (in which case the investment adviser would include the SPV's assets within such participating clients' audited financial statements and would not have to deliver separate audited financial statements with respect to the SPV). Under the new guidance, if the SPV has no owners other than the investment adviser, the investment adviser's related persons or pooled investment vehicle clients that are controlled by the adviser or its related persons, then the investment adviser may treat the SPV's assets as assets of the pooled investment vehicle clients. If, however, the SPV has third-party owners, then the investment adviser must treat the SPV as a separate client and deliver separate audited financial statements with respect to the SPV.

Escrow Accounts. The new guidance also clarified when an investment adviser may (i) use an escrow account to hold proceeds from the sale or merger of a portfolio company owned by the investment adviser's pooled investment vehicle clients and other third parties and (ii) appoint a "sellers' representative" to act on their behalf and maintain their joint escrow account under the representative's name. These practices may potentially violate the Custody Rule, which requires client funds to be maintained either in a separate account for each client under that client's name or in accounts containing only the funds and securities of the investment adviser's clients under the investment adviser's name as agent or trustee.

The new guidance set forth the conditions that an investment adviser must satisfy in order to comply with the Custody Rule:

- The client is a pooled investment vehicle that relies on the Audit Provision and includes in its financial statements the portion of the escrow attributable to it;
- The escrow account is maintained in connection with the sale or merger of a portfolio company owned by the client (*e.g.*, for indemnification or to adjust the purchase price);
- The escrow account contains an amount of money that is agreed upon as part of a bona fide negotiation between the buyer and the sellers;
- The escrow account exists for a period of time that is agreed upon as part of a bona fide negotiation between the buyer and the sellers;
- The escrow account is maintained at a qualified custodian; and
- The sellers' representative is contractually obligated to distribute the funds remaining in the escrow account to the sellers, including the pooled investment vehicle clients, promptly at the end of the escrow period based on a predetermined formula.

Please see our July 8, 2014 client alert for additional information.

New SEC Guidance on Proxy Voting

On June 30, 2014, the SEC issued a staff legal bulletin clarifying the responsibilities of registered investment advisers when voting client proxies and retaining proxy advisory firms. Rule 206(4)-6 of the Advisers Act (**Proxy Voting Rule**) requires a registered investment adviser, among other things, to adopt and implement written

policies and procedures reasonably designed to ensure that the investment adviser votes proxies in the best interests of its clients. To ensure compliance with the Proxy Voting Rule, the bulletin recommended that an investment adviser should, among other things:

- Review, on a periodic basis, sample proxy votes to determine their compliance with the investment adviser's proxy voting policies and procedures;
- Review, at least annually, the adequacy of its proxy voting policies and procedures to determine if such policies and procedures have been implemented effectively and if proxies have been voted in the best interests of clients; and
- Where the investment adviser has engaged a proxy voting firm, determine whether the proxy advisory firm has the capacity and competency to analyze proxy issues adequately and implement policies and procedures to ensure sufficient oversight.

Investment advisers should note that the SEC expects any changes that investment advisers may need to make in light of the staff legal bulletin to be completed prior to next year's proxy season. Please see our July 9, 2014 client alert for additional information.

Potential SEC Focus on Prior Private Equity Fund Performance Disclosure

Although the SEC has not commented on the matter publicly, various sources reported in October 2014 that the SEC is currently examining how private equity firms report the net internal rates of return (**net IRR**) of their prior funds in their marketing materials. Net IRR figures measure returns to the relevant funds after deductions for management fees, performance compensation and expenses; however, it is common for different investors to bear management fees and performance compensation at different rates. The SEC is reportedly focused on whether fund managers have disclosed whether calculations of net IRR as reported in marketing materials include amounts invested by sponsor affiliates, which are typically not subject to management fees or performance compensation. Inclusion of such amounts could inflate net IRR figures.

CFTC Updates

Self-Executing No-Action Relief for CPO Delegation

On October 15, 2014, the U.S. Commodity Futures Trading Commission (**CFTC**) released a no-action relief letter granting self-executing no-action relief to qualifying commodity pool operators (**CPOs**) that delegate their CPO functions to other registered CPOs. This further simplified a streamlined delegation process previously announced by the CFTC in May[3] by removing the need for a delegating CPO to submit a written relief request to the CFTC, provided that certain criteria are met. To rely on this new self-executing no-action relief, the delegating CPO must evaluate internally whether it meets the following criteria:

- The delegation of investment management authority with respect to the commodity pool must be pursuant to a legally binding document[4]; provided, however, that satisfaction of this criterion is not precluded where:

[3] The May no-action letter adopting the streamlined delegation process was issued by the CFTC's Division of Swap Dealer and Intermediary Oversight. Please see our May 20, 2014 client alert for more information on the May no-action letter.

[4] An appropriate legally binding document could include, without limitation, a separate delegation agreement, a constituent document of the commodity pool or an investment management agreement between the delegating CPO and the designated CPO.

- A delegating CPO or the designated CPO appoints one or more third parties to serve as investment manager(s) of the pool; and
- Each such third-party investment manager is registered as a commodity trading advisor (**CTA**) or is exempt from such registration pursuant to the Commodity Exchange Act (**CEA**) or CFTC regulations.

- The delegating CPO does not participate in the solicitation of participants for the commodity pool; provided, however, that satisfaction of this criterion is not precluded where the delegating CPO:
  - Is registered as an associated person (**AP**) of the designated CPO or is exempt from registration as an AP pursuant to the CEA or CFTC regulations; and
  - Participates in the solicitation of pool participants solely in its capacity as an AP of the designated CPO.
- The delegating CPO does not manage any property of the commodity pool; provided, however, that satisfaction of this criterion is not precluded where the delegating CPO:
  - Is a principal or employee of the designated CPO or of a CTA of the pool at issue; and
  - Has management responsibilities over pool property; provided, further, however, that such delegating CPO: (i) exercises these management responsibilities solely in the capacity of a principal or employee of the designated CPO or as a CTA of the pool, and not as the delegating CPO of the pool; and (ii) in connection with exercising these management responsibilities, is subject to supervision as a principal or an employee by either the designated CPO or a CTA of the pool in accordance with CFTC Regulation 166.3.

For purposes of this criterion, management of pool property does not include responsibilities with respect to pool property of an administrative, clerical or ministerial nature.

- The designated CPO is registered as a CPO.
- The delegating CPO is not subject to a statutory disqualification from registration under CEA Sections 8a(2) and 8a(3).
- There is a business purpose for the designated CPO being a separate entity from the delegating CPO that is not solely to avoid registration by the delegating CPO under the CEA and CFTC regulations.
- The books and records of the delegating CPO with respect to the commodity pool are maintained by the designated CPO.
- If the delegating CPO and the designated CPO are each a non-natural person, then one such CPO controls, is controlled by or is under common control with the other CPO.
- If a delegating CPO is a non-natural person, then such delegating CPO and the designated CPO have executed a legally binding document whereby each undertakes to be jointly and severally liable for any violation of the CEA or CFTC regulations by the other in connection with the operation of the commodity pool.
- If a delegating CPO is a natural person and is not an "Unaffiliated Board Member,"[5] then such delegating CPO and the designated CPO have executed a legally binding document whereby each undertakes to be jointly and

[5] The letter defines "Unaffiliated Board Member" as a natural person who is a voting member of the board of directors or an equivalent governing body of the commodity pool who: (i) is not a member of the management or an employee of the designated CPO or any affiliate thereof; (ii) is not a substantial beneficial owner of the designated CPO or any affiliate thereof or of any company holding more than 5% of such designated CPO's beneficial ownership interests or any affiliate thereof; and (iii) has no other interest or relationship that could interfere with his/her ability to act independently of management of the designated CPO or any affiliate thereof or of any company holding more than 5% of such designated CPO's beneficial ownership interests or any affiliate thereof. Whether a director has an interest or relationship under clause (iii) above will be based on the relevant facts and circumstances. For example, interests or relationships that are indicative of an affiliation with the designated CPO that could trigger clause (iii) may include: the director being a material service provider or investment counterparty to the designated CPO or any of its affiliates, or is, or within the past 3 years was, employed in an executive capacity by, or was a principal or employee of, a material service provider or investment counterparty to, the designated CPO or any of its affiliates.

severally liable for any violation of the CEA or CFTC regulations by the other in connection with the operation of the commodity pool.

- If a delegating CPO is an Unaffiliated Board Member, then such delegating CPO must remain fully responsible as a board member in accordance with the laws under which the commodity pool is established.

Pending requests previously submitted under the existing streamlined process will not be reviewed. For CPOs that do not qualify for self-executing no-action relief under the new self-executing process, the CFTC will continue to review no-action relief requests on a case-by-case basis.

Please see our October 20, 2014 client alert for more information.

CFTC Rule 506(c) General Solicitation and General Advertising

On September 9, 2014, the CFTC issued an exemptive letter that permits a CPO relying on an exemption under CFTC Regulation 4.13(a)(3) or 4.7(b) to engage in general solicitation or general advertising under certain circumstances, as permitted under Rule 506(c) of Regulation D.

As discussed above, Rule 506(c) allows an issuer to engage in general solicitation or general advertising in Rule 506 offerings if certain conditions are met. However, prior to the exemptive letter, a CPO of a pool that is engaged in general solicitation or general advertising under Rule 506(c) would not be able to rely on an exemption under Regulation 4.13(a)(3) or 4.7(b). Regulation 4.13(a)(3) provides an exemption from CPO registration with respect to a fund, but only if, among other things, the interests in the fund are "offered and sold without marketing to the public in the United States." Similarly, Regulation 4.7(b) provides relief from certain requirements otherwise applicable to a registered CPO with respect to a fund, but only if, among other things, the interests in the fund are "offered or sold without marketing to the public."

The new letter grants exemptive relief, in certain circumstances, from the marketing prohibitions in Regulations 4.7(b) and 4.13(a)(3) that are incompatible with Rule 506(c). To claim relief offered under the letter, a CPO must file a notice with the CFTC that includes certain basic information regarding the CPO, the pool(s) for which relief is being sought and the exemption upon which the CPO is relying.

Please see our September 12, 2014 client alert for more information.

Anti-Spinning Rule Update

Effective as of February 3, 2014, the Financial Industry Regulatory Authority (**FINRA**) approved a limited exception to FINRA Rule 5131 that eases the information gathering requirements underlying the representations that private fund managers must make to underwriters regarding the ability of certain funds to participate in initial public offerings (**IPOs**).

FINRA Rule 5131 prohibits FINRA member firms from allocating IPO shares to an account for the benefit of executive officers and directors (**Covered Persons**) of companies who may be in a position to direct investment banking business to the member—a practice known as "spinning."[6] To comply with Rule 5131, brokerage firms generally have relied on a certification from the account's beneficial owner(s), or an investment adviser or other person authorized to represent the beneficial owner(s), that the account is eligible to receive IPO shares. Eligibility may be premised either on the fact that no Covered Person holds a beneficial interest in the account, or that the

[6] The prohibition also extends to persons materially supported by such officers and directors.

account has implemented procedures to restrict the total participation of Covered Persons from any one company to a maximum of 25% of any IPO allocation (in accordance with the Rule's *de minimis* exception).

In response to concerns raised about the difficulties experienced by FINRA members and their customers in obtaining information about the indirect beneficial owners of certain types of accounts, such as investors in a fund-of-funds, FINRA amended Rule 5131 to permit broker-dealers to accept a written representation from a fund manager regarding fund account eligibility that is *not* based on a look-through to the ultimate beneficial owners of any unaffiliated private fund invested in the account.[7] To meet the exception, the fund manager must certify that the unaffiliated private fund:

- Is managed by an investment adviser;
- Has assets greater than $50 million;
- Owns less than 25% of the account and is not a fund in which a single investor has a beneficial interest of 25% or more; and
- Was not formed for the specific purpose of investing in the account.

The rationale for the amendment is that broker-dealers typically do not know the identity of the beneficial owners of any fund-of-funds invested in an account; thus, the potential for abuse of the new issue allocation process is limited. The rule change should reduce the burden for fund managers making Rule 5131 certifications, particularly with respect to funds-of-funds, and facilitate their ability to participate in IPOs.

Tax Updates

FATCA Implementation

Background. The Foreign Account Tax Compliance Act (**FATCA**) was enacted in 2010 to help the U.S. Internal Revenue Service (**IRS**) combat perceived tax evasion by U.S. persons holding assets through offshore accounts. FATCA generally requires "foreign financial institutions" (**FFIs**) to register with the IRS and either (i) enter into an agreement with the IRS to, among other things, report certain information to the IRS about their U.S. account holders and investors, or (ii) comply with local laws that implement an intergovernmental agreement (**IGA**) and report similar information to their own government. While compliance with FATCA (but generally not local laws implementing an IGA) technically is optional, FFIs that fail to comply with FATCA are subject to a 30% withholding tax on a wide range of U.S.-source payments.

There are currently two categories of IGAs to streamline FATCA information reporting and reduce compliance burdens for FFIs. An FFI falling within a "Model 1" jurisdiction will be deemed compliant with FATCA and thus not required to enter into an FFI agreement or comply with the FATCA regulations. Instead, the FFI must register with the IRS and comply with local law implementing the IGA and report directly to its own government. The Model 1 jurisdiction will, in turn, exchange information directly with the U.S. government. An FFI falling within a "Model 2" jurisdiction must register and enter into an FFI agreement with the IRS, and generally must comply with the FATCA regulations and report information directly to the IRS.

The U.S. Department of the Treasury's list of jurisdictions treated as having an IGA in effect can be found here.

[7] For purposes of the Rule, an unaffiliated private fund is a private fund whose investment adviser does not have a control person in common with the investment adviser to the account.

Compliance. By June 2014, the IRS had released updated, FATCA-compliant Forms W-8 and corresponding instructions for those filling out the forms. However, pre-FATCA forms may still be accepted until December 31, 2014. The official start date for FATCA withholding on certain "withholdable payments" (*e.g.*, U.S.-source dividends and interest) made to non-participating FFIs and "non-financial foreign entities" (**NFFEs**) was July 1, 2014, with a staggered timeline for FATCA compliance extending into 2017.

Treasury Regulations under FATCA generally provide that, to avoid FATCA withholding, an FFI must register via the IRS's online FATCA portal and obtain a Global Intermediary Identification Number (**GIIN**), unless an exemption applies. The IRS published the first registered FFI list on June 2, 2014, and the list has been updated monthly since then. FFIs must register and appear on the FFI list in order to avoid FATCA withholding.

Transitional Period. To ease compliance obligations, the IRS created a transitional period for FATCA implementation and will take into account good faith efforts to comply with FATCA through 2015. Along these lines, withholding on fixed, determinable, annual or periodical (**FDAP**) income does not start until January 1, 2015 with respect to FFIs in Model 1 IGA jurisdictions, and withholding on gross proceeds from the sale of property that produces U.S.-source dividend or interest income commences on January 1, 2017. Additionally, FFIs subject to an IGA generally will not have to withhold and, if they do, will only have to withhold for FDAP income. Sponsored FFIs[8] will not need to register for their own GIIN and instead may use the GIIN of their sponsoring entity until 2016. And FATCA withholding on "foreign passthru payments" (*i.e.*, the portion of payments from a non-U.S. entity that is treated as U.S.-source for purposes of FATCA) made to non-compliant FFIs and NFFEs will begin on the later of January 1, 2017 or six months following publication of regulations defining foreign passthru payments.

In addition, most non-equity obligations outstanding on July 1, 2014 were eligible for "grandfathering" provisions that exempt certain payments from FATCA withholding. Furthermore, a withholding agent is not required to obtain FATCA documentation or implement FATCA withholding before July 1, 2016 on any "preexisting obligation" to a payee that is neither an obvious FFI nor documented with that withholding agent as a passive NFFE with at least one substantial U.S. owner.

Fund Requirements. Non-U.S. funds are generally FFIs under FATCA and therefore, to avoid the 30% withholding tax, must generally register with the IRS and put processes in place to identify and report their U.S. investors. Although U.S. funds do not have to register with the IRS, they do have to put processes in place to assess the FATCA status of their investors, withhold 30% of certain payments made to non-compliant investors and report certain information about any withholdings to the IRS.

The deadlines for withholding agents to complete due diligence with respect to preexisting obligations (which deadlines vary by the FATCA status of the withholding agent) have been postponed by six months. For example, a withholding agent that is not a participating FFI (such as a U.S. fund) is required to document payees that are "prima facie FFIs" by December 31, 2014, rather than June 30, 2014 as initially intended. Additionally, accounts opened in 2014 are considered preexisting obligations and have until January 1, 2015 to meet FATCA withholding or information reporting requirements.

However, it should be noted that FATCA compliance is ultimately an issue of local law when a Model 1 IGA is in place. One direct consequence of this preemption is that U.K. entities have been required to document FATCA status despite the IRS's year-long delay of FATCA implementation for preexisting obligations, as U.K. law has

[8] A sponsored FFI is an FFI for which another entity (the sponsoring entity) registers with the IRS and agrees to perform the due diligence, withholding, and reporting obligations of the sponsored FFI.

required documentation of FATCA status for new accounts since June 30, 2014. The Cayman Islands and British Virgin Islands, however, have chosen to adopt delayed deadlines.

First FATCA Information Report. The first deadline for participating FFIs to file FATCA information reports with the IRS is **March 31, 2015**. The information report to be filed by this deadline will cover 2014 only. FFIs in Model 1 IGA jurisdictions will have until **September 30, 2015** to file their first FATCA information reports for 2014 with their home jurisdiction.

For more information on developments in FATCA implementation, please see our February 25, 2014 and April 10, 2014 client alerts.

Taxation of Carried Interest

On February 25, 2014, House Ways and Means Committee Chairman Dave Camp (R-MI) issued a sweeping tax reform discussion draft (**Discussion Draft**), which included a proposal to tax certain carried interest as ordinary income.

Camp's Proposal. Very generally, Chairman Camp's proposal, in effect, (i) treats a general partner as having received an interest-free "loan" from the limited partners equal to the partnership's capital that will fund the general partner's carried interest, (ii) tracks an interest-like return on this loan and, (iii) *when realized*, recharacterizes capital gain as ordinary income to the extent the general partner has not otherwise realized ordinary income.

Although the technical rules are quite complicated, as a general matter, if the general partner of a partnership has a 20% carried interest, then it would be treated as having "borrowed" 20% of the partnership's capital contributions at the time such capital contributions are made. The interest-like amount deemed earned on this "loan" would be the amount of capital gain that is subject to recharacterization as ordinary income. The stated intent of the proposal is to approximate the portion of the general partner's earnings that the proposal's drafters view as compensation for managing the partnership's capital. It is unclear, however, whether any management fee income earned by the general partner or related management company might reduce the amount of capital gain subject to ordinary income recharacterization.

Future Implications. The Discussion Draft provides that this provision would be effective for taxable years beginning after December 31, 2014, although the likelihood of this particular tax reform bill being enacted appears low. However, it is still a possibility, and some or all of the Discussion Draft's provisions might resurface in other tax bills to be enacted in the future.

For more information on the taxation of carried interest under Chairman Camp's tax reform proposal, please see our April 2, 2014 alert.

Possible Offshore Deferrals for Hedge Fund Investment Advisers

On June 10, 2014, the IRS issued Revenue Ruling 2014-18 (**Ruling**), which generally confirms that a stock-settled stock option or stock appreciation right that is granted with an exercise/base price of no less than the fair market value of the underlying stock on the date of grant will not be considered "nonqualified deferred compensation" subject to Section 457A of the IRC. Section 457A effectively ended the practice of offshore hedge fund fee deferrals.

Section 457A. Section 457A generally provides that any compensation that is deferred under a "nonqualified deferred compensation plan" (any plan or arrangement pursuant to which a service provider has a legally binding

right to compensation during a taxable year that is or may be payable to the service provider in a later taxable year) of a "nonqualified entity" (certain foreign corporations and partnerships) is includible in gross income when there is no substantial risk of forfeiture of the rights to such compensation. In addition, if the amount of such compensation is "not determinable" at the time that such compensation is required to be includible in income under Section 457A, then such compensation will be includible in income when determinable and will be subject to a 20% additional penalty tax and imputed interest (at the underpayment rate plus 1%) as if such compensation had been includible in income as of the time the income was not subject to a substantial risk of forfeiture.

Section 457A's enactment effectively ended the practice of offshore hedge fund fee deferral arrangements (other than with respect to certain grandfathered arrangements and arrangements that include service-based risk of forfeiture), as the payors under such arrangements typically qualified as "nonqualified entities" and the arrangements themselves typically qualified as "nonqualified deferred compensation plans." Certain fee deferrals made in 2008 or earlier were grandfathered and may remain deferred until no later than the end of the 2017 tax year.

New Ruling. In the Ruling, the IRS confirmed its position that stock options and stock appreciation rights may be structured in a manner such that they will not constitute "nonqualified deferred compensation" for purposes of Section 457A. The Ruling generally provides that such a stock right will not constitute "nonqualified deferred compensation" for purposes of Section 457A if:

- The stock right's terms provide that it must be settled, and it is in fact settled, in "service recipient stock" (*i.e.*, cash-settled stock rights are subject to Section 457A);
- The exercise/base price of the stock right is at all times not less than the fair market value of the underlying stock on the date of grant of the stock right;
- The stock right does not otherwise provide any feature for the deferral of compensation (*e.g.*, any right that would allow for the deferral of compensation beyond the date of exercise/settlement);
- The stock right is granted with respect to a fixed number of shares of service recipient stock; and
- Upon acquiring the service recipient stock pursuant to the exercise/settlement of the stock right, the service provider will have the same redemption rights with respect to such stock as the other shareholders.

Note, however, that any gain from the sale of the shares underlying the stock right, as well as distributions with respect to those shares, may be subject to adverse tax treatment under the "passive foreign investment company" (**PFIC**) rules, which could negate much of the anticipated tax benefit. Further, stock right plans and arrangements can be complicated to administer. Accordingly, it remains unclear how useful such stock rights really will be as a form of deferred compensation for managers of offshore hedge funds.

Please see our June 20, 2014 client alert for more information.

ERISA Updates

Potential "Disclosure Guide" Delivery Requirements under ERISA Section 408(b)(2)

On March 12, 2014, the U.S. Department of Labor (**DOL**) issued a proposed amendment (**Proposed Amendment**) to its final regulations (**Final Regulations**) under the Employee Retirement Income Security Act of 1974 (**ERISA**) Section 408(b)(2) (commonly referred to as the "necessary services exemption"). The proposed amendment would require covered service providers to furnish a "guide" to assist plan fiduciaries in reviewing the initial disclosures

required by the Final Regulations, but only if the required initial disclosures are contained in multiple or "lengthy" documents.

Background. Under the Final Regulations (which became effective July 1, 2012), "covered service providers" (*e.g.*, investment advisers to ERISA-covered pension plans and private investment funds deemed to hold the "plan assets" of ERISA-covered pension plans) must disclose to "covered plans" (*e.g.*, ERISA-covered pension plans) certain information regarding the services they provide and the compensation they receive. In particular, the Final Regulations require that certain initial disclosures be made reasonably in advance of the date on which the applicable investment management or advisory contract or limited partnership agreement is entered into, extended or renewed. In addition, there are special disclosure timing rules in certain situations, including when non-plan asset funds become plan asset funds. The Final Regulations do not require the disclosures to be made in any particular manner or format.

Investment advisers to ERISA-covered pension plans (either directly or as investors in private funds deemed to hold plan assets) typically rely on the "necessary services exemption" under Section 408(b)(2) of ERISA to provide investment-related services to ERISA-covered pension plans for compensation without engaging in a non-exempt "prohibited transaction" under ERISA or the Internal Revenue Code of 1986 (**IRC**). Unless another exemption is available, failure to comply with the Final Regulations could lead to a non-exempt prohibited transaction, the penalties for which can include the imposition of excise taxes and a refund of compensation.

The Proposed Amendment. The DOL has proposed that covered service providers who make their required initial disclosures through multiple or "lengthy" documents must furnish a separate written "guide" to those documents. Such "guide" must specifically identify the document and page number, or use some other "sufficiently specific locator" (*e.g.*, a section reference) that enables the responsible plan fiduciary to quickly and easily find the required initial disclosures. The guide must also identify a person or office (including contact information) that the responsible plan fiduciary may contact regarding the disclosures. The guide must be furnished along with the required initial disclosures, but must be set forth in a separate document. Changes to the information contained in the guide must be disclosed at least annually.

The Proposed Amendment would become effective twelve months after publication of a final rule in the Federal Register, so there will be some time to adjust to the new guide requirement if finalized. We will continue to monitor this issue and will provide updates when appropriate. Please see our April 10, 2014 client alert for more information.

Executive Compensation Trends and Developments

During 2014, we saw a marked increase in hiring activity and lateral movement by senior level portfolio managers and senior executives. In many cases, executives associated with heavily regulated banking institutions moved to less regulated hedge fund and/or private equity investment platforms, or in some cases to boutique investment advisory firms. Some of the trends for 2014 included, among other things:

- **A New Focus by Hiring Entities on the Candidate's Activities at Prior Employers.** This may include "drilling down" on the usual resume blemishes, disqualifications or other "problems" associated with prior workplace history, as well as inquiries regarding the candidate's involvement in investigations or other regulatory activity at a prior employer. Not only does this focus occur for purposes of vetting a candidate, it also was incorporated into "cause" definitions in new employment agreements so that the new employer could terminate the candidate if it turned out that he or she was involved in any investigations or other regulatory activity at a prior employer that could in turn tarnish the reputation of the new employer.

- **State Court Litigation over Vesting Provisions.** We are aware of at least two instances where executives terminated by investment firms brought actions in New York state court to recover "carry" or incentive fees that the sponsor claimed were not vested. In both cases, the sponsor took an aggressive position and lost, and in both cases the state court judges carefully parsed through the vesting language (these cases did not involve simple time vesting; vesting was more complicated and based on the stage in the investment cycle when investments were liquidated). Sponsors should expect these vesting provisions to be read narrowly, with the risk that judges may be sympathetic to former executives if it appears that the sponsor is seeking a windfall based on a strained contract position.
- **Succession Issues.** Numerous succession issues arose in 2014, both in the hedge fund and the private equity space, as co-founders and other senior personnel announced transition arrangements. These situations present highly complicated and sensitive scenarios, in which there can never be enough advance planning and attention. In many cases, the underlying operative documents will provide only a starting point to negotiations, and at all points along the path, careful attention has to be paid to tax issues, handling of investor disclosure and relationships, use of track record and post-termination non-compete, non-solicit and non-disparagement obligations.
- **Guaranteed Payment Provisions.** In recent years, there has also been a development at the state court level, where so-called guaranteed contractual "floors" to newly hired executives or portfolio managers are claimed to be legally protected "wages" if not paid. For example, in New York, there is "wage" law protection against the unlawful deduction or withholding of earned wages. Recent cases in this area have expanded the scope of the law from protecting day laborers (who were the 19th century beneficiaries of the original law) to highly paid executives, including those involved in the investment management industry. Careful attention must be paid to how contractual guaranty provisions are drafted, and the risks involved in repudiating or trying to negotiate out of guaranteed payment obligations. Under these state wage laws, a successful plaintiff may be able to recover additional liquidated damages equal to the amount claimed due, as well as their attorneys' fees, which understandably creates additional leverage.

Reorganization and Chapter 11 Developments

Cramdown Interest Rates

In *Till v. SCS Credit Corp.*, 124 S. Ct. 1951 (2004), in the context of a loan secured by an automobile in an individual's Chapter 13 case, a plurality of the Supreme Court imposed a cramdown interest rate equal to the prime rate plus a risk adjustment ordinarily between 0% and 3%. In footnote 14 of the opinion, the Supreme Court held out the possibility that cramdown interest rates in Chapter 11 would be determined by reference to market rates for Chapter 11 debtor in possession loans when efficient markets exist.

One year after *Till*, the Sixth Circuit ruled in *Bank of Montreal v. Official Committee of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559 (6th Cir. 2005), that "[t]his means that the market rate should be applied in Chapter 11 cases where there exists an efficient market. But where no efficient market exists for a Chapter 11 debtor, then the bankruptcy court should employ the formula approach endorsed by the *Till* plurality. This nuanced approach should obviate the concern of commentators who argue that, even in the Chapter 11 context, there are instances where no efficient market exists." *Id.* at 568.

Then, in *Wells Fargo Bank v. Texas Grand Prairie Hotel Realty, L.L.C. (In re Texas Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324 (5th Cir. 2013), the appellate court affirmed the bankruptcy court's use of the *Till* approach because the parties had stipulated to it. The court observed, however, "we do not suggest that the prime-plus formula is the only—or even the optimal—method for calculating the Chapter 11 cramdown rate." *Id.* at 337.

This year, in *In re MPM Silicones, LLC*, Chapter 11 Case No. 14-22503 (Bankr. S.D.N.Y., Sept. 9, 2014)(Doc No. 979)("Tr."), Bankruptcy Judge Robert Drain ruled:

> In sum, then, footnote 14 should not be read in a way contrary to *Till* and *Valenti*'s first principles, which are, instead of applying a market-based approach, a present value cramdown approach using an interest rate that takes the profit out, takes the fees out, and compensates the creditor under a formula starting with a base rate that is essentially riskless, plus up to a 1 to 3 percent additional risk premium, if any, at least as against the prime rate, for the debtor's own unique risks in completing its plan payments coming out of bankruptcy. Tr. at 79.

Finally, Judge Drain held that because the debtors used the U.S. Treasury note rate, rather than the prime rate, and the Treasury note rate does not contain a risk component, the 1% to 3% increment was insufficient. Tr. at 91. Accordingly, Judge Drain added 0.5% to the first lien cramdown rate and 0.75% to the other cramdown debt security, yielding final cramdown interest rates of 3.6% and 4.1%. Tr. at 92.

To avoid being crammed down with below-market interest rates as was the case in *MPM*, lenders should enter into certain derivative transactions with the borrower at the outset of the transaction, which should fit within safe harbors of the Bankruptcy Code and should also create an enforceable claim to the contract rate of interest.

Enforcing Make-Whole Claims and Subordination Provisions

MPM Silicones, LLC was also notable for its ruling with respect to make-whole claims and subordination provisions. Its lesson, and those of its predecessors, is that the enforceability of subordination provisions depends on specific drafting, and the enforceability of make-whole provisions depends on specific drafting and either solvency or being oversecured.

In short, if a senior claim is supposed to be senior to principal, prepetition interest and postpetition interest on a junior claim, the credit agreement or indenture should say so explicitly. Clauses providing that one debt is senior to "all" obligations is insufficient in some courts. It should not be, but it is. So the loan agreements or indentures should specify that senior claims are senior to postpetition interest on junior claims.

Make-whole claims are susceptible to being disallowed as unmatured interest under Bankruptcy Code Section 502(b)(2), unless the estate is solvent or the make-whole claim is fully secured. If one of those two conditions is satisfied, the credit agreement should specify that the make-whole claim is triggered and enforceable, regardless of whether the holder of the make-whole claim accelerates, requests stay relief, forecloses, or otherwise enforces its claim. The agreement should also provide the make-whole claim is enforceable if the debt is automatically accelerated upon bankruptcy or any other event.

Absence of Fiduciary Duties to Creditors Allows Increased Risk-Taking for Shareholders

The logical extension of Delaware's jurisprudence (*North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007)) that fiduciary duties to creditors should not be imposed on directors at any time (whether the corporation is solvent, insolvent or in the zone of insolvency) is that when a corporation is insolvent, the directors may increase the risk it takes without their being liable to creditors for a breach of the duty of care or loyalty, as long as their decision to do so appears rationally designed to increase the value of the corporation as a whole, regardless of the fact that creditors will lose more if the new ventures lose money. *Quadrant Structured Products Co., Ltd. v. Vertin*, C.A. No. 6990-VCL (Del. Ch., Oct. 1, 2014) (Slip op. at 42, 49). In *Quadrant*, the directors were allowed to increase the risk they took with their corporation's investment portfolio when it was clearly insolvent.

Credit Bidding Is Alive and Well after *Fisker*

In *In re Fisker Automotive Holdings, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014), when the lender holding a $168.5 million claim wanted to credit bid, the court ruled it would only allow the secured lender to credit bid up to its purchase price of the claim ($25 million) on the ground "there will be no bidding—not just the chilling of bidding—if the Court does not limit the credit bid," and that fact is cause to deny credit bidding under Bankruptcy Code Section 363(k). *Id*. at 60. Notably, the court further explained that the secured lender's "drop dead" date "was pure fabrication, designed to place maximum pressure on creditors and the Court." *Id.* at 61n.4. Notably, in *Fisker*, the lender's lien did not cover all the assets being sold. *Fisker* does not stand for the proposition that whenever a claim is undersecured, credit bids will be denied because they may chill the bidding, and the progeny of *Fisker* demonstrate that proposition.

In *In re RML Development, Inc.*, __ B.R. __, 2014 WL 3378578 (Bankr. W.D. Tenn., July 10, 2014), the lender's credit bid against two apartment complexes was limited to the undisputed amount of the claim ($2.35 million vs. $2.54 million), and the secured lender was further directed it would have to post a letter of credit for the full amount of its bid if a challenge to its first lien position was not resolved.

In *In re Charles Street African Methodist Episcopal Church of Boston*, 510 B.R. 453, 455 (Bankr. D. Mass. 2014), the debtor opposed credit bids of approximately $1.19 million and $3.82 million against two parcels on the ground its counterclaims pending in state court would reduce the claims to zero. The counterclaims alleged the lender had intentionally structured the loan to be underfunded and refused to fund the tenth draw request. *Id.* at 456. The court denied the request to bar credit bidding, but did require the lender to bid in cash the amount of the breakup fee the debtor's stalking horse bidder would receive if outbid. *Id.* at 459. The court explained that while some counterclaims may create *bona fide* disputes constituting cause to deny credit bids, these counterclaims did not challenge the underlying secured claims and were not cause to deny credit bids because they did not undercut the existence of the primary claim. *Id.* at 458.

In *In re Free Lance-Star Publishing Co.*, 512 B.R. 798 (Bankr. E.D. Va. 2014), the court found cause to limit the credit bid of the lender in connection with the debtor's proposed sale of four radio stations, related tower assets, a newspaper business and printing business. The lender desired to credit bid $38 million and was limited to credit bids of $1.2 million against the radio station assets it held valid liens against and $12.7 million against the newspaper and printing assets. *Id.* at 808. While the court recognized that credit bidding serves the policy of preventing undervaluation of the secured claim at the auction, *id.* at 804-05, cause existed to limit the credit bids because the lender engaged in such acts as (i) filing financing statements against assets its lien did not encumber, (ii) insisting (unsuccessfully) that the debtor not retain a financial consultant to conduct marketing, (iii) insisting on a short period from case commencement to closing of the sale, (iv) filing a false declaration, and (v) chilling interest in the auction. *Id.* at 805-06.

Equitable Mootness Is Not Automatic, Even If Appellant Fails to Request a Stay Pending Appeal

Plan proponents frequently race to cause a Chapter 11 plan to be effective, in an effort to frustrate appeals by arguing "equitable mootness"—that the appeal should be dismissed because it would be unfair to third parties to reverse confirmation.

In *Samson Energy Resources Co. v. Semcrude, L.P. (In re Semcrude, L.P.)*, 728 F.3d 314 (3d Cir. 2013), the appellate court rejected an equitable mootness claim even though the plan had become effective and the appellant had not requested a stay pending appeal. The court ruled:

> In practice, it is useful to think of equitable mootness as proceeding in two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation.
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> If this threshold is satisfied, a court should continue to the next step in the analysis. It should look to whether granting relief will require undoing the plan as opposed to modifying it in a manner that does not cause its collapse. It should also consider the extent that a successful appeal, by altering the plan or otherwise, will harm third parties who have acted reasonably in reliance on the finality of plan confirmation.
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> . . . Dismissing an appeal over which we have jurisdiction, as noted, should be the rare exception and not the rule. It should also be based on an evidentiary record, and not speculation. To encourage this, we join other Courts of Appeals in placing the burden on the party seeking dismissal. *Id.* at 321 (citations omitted).

Semcrude has company in the Fifth Circuit, which states it "has taken a narrow view of equitable mootness, particularly where pleaded against a secured creditor." *Wells Fargo Bank v. Texas Grand Prairie Hotel Realty, L.L.C. (In re Texas Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324, 328 (5th Cir. 2013); *In re Pacific Lumber Co.*, 584 F.3d 229, 243 (5th Cir. 2009) ("Secured credit represents property rights that ultimately find a minimum level of protection in the takings and due process clauses of the Constitution… Federal courts should proceed with caution before declining appellate review of the adjudication of these rights under a judge-created abstention doctrine.").

European Union Regulatory Updates

Post-2008, European regulators have sought to regulate alternative investment managers and the markets in which they operate through several legislative initiatives, including, among other things, the Alternative Investment Fund Managers Directive (**AIFMD**), amendments to the Markets in Financial Instruments Directive (**MiFID II**), and Basel III. Below is an overview of some of the significant developments with respect to these initiatives in 2014.

AIFMD Implementation

The one-year transition period for AIFMD ended on July 21, 2014. This meant that, as of July 22, 2014:

- Alternative investment fund managers (**AIFMs**) in the European Union (**EU**) are required to comply with all, or in the case of EU AIFMs managing non-EU alternative investment funds (**AIFs**), nearly all, of AIFMD; and
- Non-EU AIFMs marketing their funds into the EU are required to comply with the applicable national private placement regimes (**NPPRs**) of the relevant EU countries and the transparency, disclosure, reporting and EU portfolio company requirements of AIFMD with respect to those EU countries.

The NPPRs require that either notifications or approvals are made to or obtained from the regulator of the relevant country, providing further hurdles to gaining entry to the EU market.

Faced with these obstacles, non-EU AIFMs have adopted four main strategies:

- **Option 1: Avoid Marketing into the EU.** Option 1 has been taken by some smaller AIFMs, for which the cost of compliance with AIFMD is prohibitively expensive when balanced against the significance of their European prospects.

- **Option 2: Utilize Private Placement Regimes.** Option 2 has typically been taken by larger AIFMs for which the EU is strategically important and particularly where they are frequently or continuously involved in fundraising.
- **Option 3: Operate Outside of AIFMD.** Option 3 has been pursued where the AIFM is able to market the AIF in a way that does not trigger AIFMD compliance. For example, the AIFM may have been approached by a prospect in relation to an AIF in such a way that the subsequent marketing of the AIF is not at the initiative of the AIFM. Marketing that occurs at the initiative of the prospect, otherwise known as "reverse solicitation," will not trigger compliance with AIFMD by non-EU AIFMs. Alternatively, the non-EU AIFM may market a single-investor fund or a managed account, both of which are potentially outside the scope of AIFMD. The manner in which a country has chosen to define "marketing" also may provide some latitude to conduct a limited degree of marketing in order to gauge investor interest without triggering AIFMD compliance. For example, in the United Kingdom, marketing under AIFMD does not occur until fund documents are issued to prospective investors in substantially final form.
- **Option 4: A Combination of Options 2 and 3.** In practice, Option 4 is the most prudent and involves a tactical assessment of the opportunities in countries where the interaction with prospects will trigger AIFMD compliance and those where the interaction is outside AIFMD and a determination of the relative merits and risks of complying with NPPRs and AIFMD on the one hand and operating outside of AIFMD on the other.

Most EU countries have fully implemented AIFMD as of July 22, 2014, with a few exceptions such as Poland, Portugal and Spain. AIFMs should note that a range of sanctions are available to regulators for breaching NPPRs. The sanctions across EU countries include imprisonment, fines and investor rescission rights, depending on the EU country concerned.

MiFID II Implementation

MiFID II came into force on July 2, 2014. With certain exceptions, EU countries must adopt, transpose and apply MiFID II by January 2017. Key changes implemented by MiFID II include:

- Creation of a new type of trading venue known as an "organised trading facility" (**OTF**), which is subject to the same transparency rules as other trading venues;
- New safeguards for high frequency algorithmic trading activities, including authorization and supervision;
- New obligations for trading venues, such as circuit breakers and publishing annual data on execution quality;
- A wider definition of systemic internalizers and tighter obligations regarding the publication of firm quotes;
- New trading transparency for non-equity markets (*i.e.*, bonds, structured products and derivatives);
- Reporting obligations relating to the size and purpose of commodity derivatives contracts and monitoring and intervention powers of regulators;
- Harmonized rules for authorization and conduct of business of EU branches of non-EU firms (non-EU firms must provide investment services to retail clients through a branch; however, non-EU firms will have direct access to professional clients subject to the European Securities and Markets Authority (**ESMA**) registration and equivalence/reciprocity status); and
- Regulatory powers to prohibit specific products, services and practices in the interests of investor protection and financial stability.

The year 2014 also saw ESMA publish a consultation paper (ESMA/2014/549) and a discussion paper (ESMA/2014/548), out of which technical guidance and Level 2 regulations will be formulated. The papers covered various issues including investor protection, transparency, data publication and trading venue requirements. ESMA

is required to provide the European Commission with final technical advice on the matters covered by the papers in December 2014.

Basel III

The Basel Committee on Banking Supervision (**BCBS**) has revised its policy framework for the prudential treatment of banks' investments in the equity of investments funds that are held in the banking book. The revised policy framework will take effect from January 1, 2017 and will apply to investments in all types of investment funds, including hedge funds and other private funds. The framework will be applicable to all banks, irrespective of whether they apply the Basel framework's Standardised Approach or an Internal Ratings-Based approach for credit risk.

Basel II outlines the current policy framework for banks' equity investments in investment funds. Under Basel II, equity investments by banks in investment funds are risk weighted using one of two possible approaches:

- **Standardized Approach.** Equity investments by banks in investment funds are classified as claims on "other assets." These receive a 100% risk weight. Regulators may decide to apply a risk weight of 150% or higher reflecting the risks associated with assets such as hedge fund, private equity or venture capital exposures.
- **Internal Ratings-Based (IRB) Approach.** Equity investments by banks in investment funds may be risk weighted by banks using either the treatment applicable to the majority of an investment fund's underlying investments or the "look-through approach," where the investment fund's underlying investments are viewed as being separate and distinct investments. However, banks may instead assess the investment mandate of the investment fund and apply the relevant risk weight assuming that the investment fund has invested, to the maximum extent permitted, in the asset class attracting the highest capital requirements and then, for other asset classes, in descending order of risk weight applied.

The lack of clarity on the manner in which banks should implement these provisions, including the "look-through approach," has led to a variety of approaches being taken across jurisdictions and banks. The BCBS has concluded that the revised policy framework will improve the current policy framework under Basel II by:

- Taking account of an investment fund's leverage when determining risk-based capital requirements associated with banks' investments in an investment fund;
- Clarifying the application of the IRB approaches for credit risk; and
- More appropriately reflecting the risk of an investment fund's underlying investments, including the use of a 1250% risk weight for situations that lack sufficient transparency regarding an investment fund's investment activities.

The revised policy framework is based on the general principle that banks should apply a "look-through approach" to identify the underlying assets when investing in investment funds. The BCBS recognizes that a full look-through approach may not always be feasible and that a staged approach based on different degrees of granularity of the look-through is warranted. The proposed risk-weighting framework, therefore, enables the application of a consistent risk-sensitive capital framework intended to incentivize risk management practices.

Following this principle, the revised policy framework includes three approaches for setting capital requirements for banks' equity investments in investment funds, which have varying degrees of risk sensitivity:

- **The "Look-Through Approach" (LTA).** The LTA is the most granular approach. Subject to meeting the conditions set out for its use, banks employing the LTA must apply the risk weight of the investment fund's underlying exposures as if the exposures were held directly by the bank.
- **The "Mandate-Based Approach" (MBA).** The MBA provides an additional layer of risk sensitivity that can be used when banks do not meet the conditions for applying the LTA. Banks employing the MBA assign risk

weights on the basis of the information contained in an investment fund's mandate or in the relevant national legislation.

- **The "Fall-Back Approach" (FBA).** When neither of the above approaches is feasible, the FBA must be utilised. The FBA applies a 1250% risk weight to a bank's equity investment in the investment fund.

This hierarchy of approaches was instituted to promote due diligence by banks and transparent reporting. To ensure that banks have appropriate incentives to enhance their risk management of their investments, the degree of conservatism increases with each successive approach (as risk sensitivity decreases).

China Regulatory Updates

New Regulations on Chinese Private Investment Funds

On August 21, 2014, the China Securities Regulatory Commission (**CSRC**) promulgated the "Interim Measures on Supervision and Administration of Private Investment Funds" (**Interim Measures**), which became effective on the same day. The Interim Measures are the first set of comprehensive rules governing private funds raised in China since the CSRC was authorized in 2013 to regulate private funds pursuant to the amended Securities Investment Fund Law (**Securities Investment Fund Law**) of the People's Republic of China (**PRC**).

The Interim Measures set forth in detail the rules governing various aspects of private funds formed under PRC law and managed by a PRC-registered manager, including, among other things, requirements on filing and registration, investor eligibility, fundraising and fund operations. Below is an overview of some of the noteworthy provisions:

- **Scope of Application.** The Interim Measures cover private funds that are established in corporate or partnership form for the purpose of investments and which assets are managed by fund managers or general partners. The Interim Measures explicitly stipulate that they also apply to securities companies, public fund management companies, future companies and their subsidiaries carrying out private fundraising activities. A private investment fund may invest in stocks, equity interests, bonds, futures, options, fund units or other investments as defined in the investment agreement.
- **Registration and Filing Requirements.** The Interim Measures adopt the "post-event registration and filing" approach with respect to the funds and their managers. The Interim Measures require the investment advisers to private funds to register with the Asset Management Association of China (**AMAC**) according to the AMAC's requirements. In addition, investment advisers must submit filings as required by the AMAC after fundraising is completed. The registration and filing requirements are laid out in the "Measures on the Private Investment Fund Manager Registration and Fund Filing (Pilot)" issued by AMAC on February 7, 2014.
- **Investor Eligibility.** Under the Interim Measures, private funds should raise funds from "qualified investors." A "qualified investor" is defined as an entity or individual that (i) is capable of identifying and bearing investment risks; (ii) invests no less than renminbi (**RMB**) 1 million (approximately $163,000) in a single private fund; and (iii) has net assets of no less than RMB 10 million (approximately $1.6 million) (if an entity), or financial assets of no less than RMB 3 million (approximately $490,000) or average income of no less than RMB 500,000 per annum (approximately $81,000) over the prior three years (if an individual).

  Notwithstanding the above, the Interim Measures provide that the following entities or persons shall be deemed a qualified investor, regardless of the said threshold requirements: (i) social security funds, annuity funds and charitable funds; (ii) investment schemes legally established and duly filed with the AMAC; (iii) private fund managers or their personnel investing in private funds under their management; and (iv) other investors specified by the CSRC.

The Interim Measures also specify that the total number of investors in a private fund cannot exceed the number specified in the PRC's Securities Investment Fund Law, Company Law or Partnership Law. Where investors directly or indirectly invest in a private fund through the pooling of capital by way of a partnership, investment contractor or other non-legal entity, the fund managers or distributors are required to "look through" to determine the qualifications of the underlying investors and consolidate the number of investors (other than certain qualified investors specified by the Interim Measures).

- **Restrictions on Fundraising.** During fundraising, private fund managers and distributors are prohibited from (i) offering a private fund to non-qualified investors, or advertising or promoting the private fund to mass targets by means of public media (which may include, among other things, newspapers, radios, television, the internet, lectures, press conferences, seminars, announcements or pamphlets, text messages and other forms of instant messaging, microblogs or emails), and (ii) guaranteeing return of the principals or minimum investment returns.
- **Requirements on Fund Operations.** Under the Interim Measures, the operation of private funds must comply with the following rules:
  - Fund contracts must be concluded in compliance with the Securities Investment Fund Law;
  - Custody arrangements must be established unless otherwise provided in fund contracts;
  - Mechanisms must be established to avoid conflicts of interest, unfair treatment of assets of different private funds under management, insider trading, transfer of interests and disclosure of non-public information; and
  - Certain information must be disclosed to fund investors and AMAC.
- **Special Rules for VC Funds.** Venture capital funds receive certain types of special treatment under the Interim Measures. A "venture capital fund" is defined as an equity investment fund that looks to investments in ordinary shares, convertible preferred shares or convertible bonds issued by unlisted growing enterprises. The Interim Measures require that AMAC adopt a separate set of self-disciplinary measures as to the registration, filings, report and membership management.

RQFII Developments

China's Renminbi Qualified Foreign Institutional Investor (**RQFII**) program, as updated in March 2013, offers a window for foreign investors to invest in China's domestic securities market, financial instruments and inter-bank bonds market using RMB raised from abroad. Since its launch in 2011, the RQFII program has been steadily growing in terms of quotas and the number of jurisdictions of eligible institutions. The RQFII program has expanded its scope into Hong Kong, London, Singapore, France, South Korea and Germany with a total investment quota of RMB 640 billion (approximately $104.6 billion). As of September 26, 2014, there were 84 qualified foreign institutional investors with an aggregate approved quota of RMB 250 billion (approximately $40.9 billion).

QDII2 Developments

Launched in 2007, China's Qualified Domestic Institutional Investor (**QDII**) program provides a channel for Chinese individuals to invest in overseas securities markets through eligible Chinese financial institutions. While we have seen a number of media reports stating that the Chinese government has been pressing ahead with the upgrade of QDII to QDII2 (which would allow qualified Chinese individual investors to invest in overseas securities directly), there has yet to be an official launch for QDII2.

In December 2013, the People's Bank of China (**PBC**) issued an opinion on the financial support for Shanghai Free Trade Zone (**FTZ**), which was established in September 2013 to encourage foreign investments and experiments

with liberalizing China's financial service sectors. The opinion made it possible for an eligible individual investor who lands a job in the FTZ to directly engage in various outbound investments, including, among other things, investments in securities. In 2014, the PBC's Shanghai headquarters followed up with a number of measures implementing the PBC's opinion. However, it remains to be seen how successfully the PBC's pilot QDII2 program can be carried out in FTZ.

Shanghai's QDLP Program Updates

Launched in 2013, Shanghai's pilot Qualified Domestic Limited Partner (**QDLP**) program allows foreign hedge funds to raise RMB funds from qualified domestic investors through local units to invest into overseas securities markets. It has been widely reported over the last year that under Shanghai's QDLP program, six international asset managers had been granted a quota of $50 million each to exchange RMB funds raised from Chinese investors to foreign currency for investments in overseas securities markets. More recently in May 2014, it was reported that Citadel LLC became the first international hedge fund approved to raise RMB funds in China through a local unit. There had also been reports in early 2014 that the Shanghai local government has already formulated regulations on QDLP, known as "Several Opinions on Carrying out Pilot QDLP Program in Shanghai." However, no such regulations have been publicly released as of the date of this Annual Review. Thus, it remains to be seen how Shanghai's QDLP program will materialize.

Hong Kong Regulatory Updates

Shanghai-Hong Kong Stock Connect

On April 10, 2014, the CSRC and the Securities and Futures Commission of Hong Kong (**SFC**) jointly announced that they had approved, in principle, the development of a pilot program (**Shanghai-Hong Kong Stock Connect**) for establishing mutual stock market access between Mainland China and Hong Kong. Pursuant to a further joint announcement made on November 10, 2014, the Shanghai-Hong Kong Stock Connect commenced on November 17, 2014.

Prior to the commencement of the pilot program, non-Mainland investors could only invest in A-shares indirectly through Qualified Foreign Institutional Investor (**QFII**) funds, RQFII funds and RQFII A-share Exchange Traded Funds (**ETFs**). The establishment of the Shanghai-Hong Kong Stock Connect program is an unprecedented development, which provides eligible individual Mainland investors with the ability to trade eligible Hong Kong stocks directly through a Southbound Trading Link. Likewise, it provides clients of Hong Kong Stock Exchange (**HKSE**) Participants with the ability to trade eligible A-shares directly on the Shanghai Stock Exchange (**SSE**) through a Northbound Trading Link. Orders in either direction may be made using an order routing arrangement, and for investors using the Northbound Trading Link, may be made by placing orders with their HKSE Participant.

The remainder of this section will focus on the Northbound Trading Link, which provides hedge funds based offshore from Mainland China with an alternative avenue for investing in listed A-shares and presents opportunities to arbitrage A and H shares between the two markets. The program is limited to shares only and does not include any other types of securities or products. Covered short selling and stock borrowing for northbound trading is allowed, subject to a number of requirements set by the SSE. The HKSE has stated that it is currently contemplated that the program will not support IPOs.

- **Quotas.** Quotas are imposed on trading in both directions. For the Northbound Trading Link, there is a daily quota of RMB 13 billion (approximately $2.1 billion) and an aggregate quota of RMB 300 billion (approximately $49 billion). The limits for the Southbound Trading Link are a daily quota of RMB 10.5 billion (approximately

$1.7 billion) and an aggregate quota of RMB 250 billion (approximately $40.8 billion). Views have been expressed that over time, these quotas will be increased in the same way that the QFII limits have been gradually increased.

- **Eligible Investors.** HKSE Participants and their clients (*i.e.*, any non-Mainland investor) are eligible to use the Northbound Trading Link.
- **Eligible A-Shares.** Under the Northbound Trading Link, shares eligible for trading are all constituent stocks of the SSE 180 Index and SSE 380 Index, and shares of all other SSE-listed companies that have shares traded on the HKSE (*i.e.*, as H shares). The HKSE has stated that it is expected that an estimated total of 568 SSE-listed shares will be eligible for trading through the Northbound Trading Link, which as of August 31, 2014, represented 90% of the total market capitalization of the SSE.
- **Currency of Trades.** Northbound investors are required to trade and settle their trades in eligible A-shares in RMB.
- **Differences in Trading Arrangements/Regulations.** It should be noted that there are some significant differences between the HKSE and SSE. Each has its own separate trading rules and operates under separate securities and investor protection laws. The differences also include different trading times and public holidays. We note that during the initial stage of operation of Shanghai-Hong Kong Stock Connect, investors are only allowed to trade on the other market on days where both markets are open for trading. This is intended to ensure that investors and brokers will have the necessary banking support on the relevant settlement days when they are required to make payments.
- **No Day Trading.** Day trading is not allowed for the Mainland A-shares market and therefore, northbound investors buying A-shares may only sell their shares on and after T+1 day.
- **Cross-Border Regulatory Enforcement.** On October 17, 2014, the SFC and the CSRC entered into a Memorandum of Understanding (**MOU**) on strengthening cross-boundary regulatory and enforcement cooperation under the Shanghai-Hong Kong Stock Connect program. The MOU addressed a number of areas of mutual concern between the two regulators including, among other things:
  - Sharing information and data of risks and alerts on potential or suspected wrongdoing in either market under the program;
  - Establishing a commitment and a process for joint investigations;
  - Ensuring that complementary enforcement actions can be taken where there is wrongdoing in both jurisdictions; and
  - Ensuring that enforcement actions in both jurisdictions operate to protect the investing public of both the Mainland and Hong Kong.

  Significantly, the MOU allows the SFC to seek assistance from the CSRC in obtaining compensation for northbound investors in cases of market misconduct by Mainland companies or individuals on the SSE.
- **Tax.** Under Chinese tax laws, gains from the disposal of A-shares should be subject to 10% China withholding income tax. In the case of QFII, it is believed that, to date, the Chinese tax authorities have never in fact collected this tax from QFIIs, leaving QFIIs in a continuous state of uncertainty. In the case of northbound trading, there have been some indications that in a desire to encourage use of the trading link, this tax will not be charged on gains made on the disposal of A-shares. However, as more than one Mainland state agency has an interest in this question, different state agencies may have differing views on the subject.

  Hong Kong's tax system does not impose a capital gains tax. However, profits tax can be imposed on gains broadly if the gains can be characterized as trading receipts.

Introduction of Regime for the Over-The-Counter Derivatives Market

In April 2014, legislation was enacted in Hong Kong (but is not yet in effect) that will implement the 2009 commitment by the G20 leaders to reform the regulation of the Over-The-Counter (**OTC**) derivatives market. The regulators expect that there should be a phased introduction of the different parts of this new regime.

The new regime will introduce mandatory reporting, clearing and trading obligations for certain types of OTC derivatives and will apply only to what qualify as "structured products." The term "structured products" excludes all exchange-traded transactions, securitized products, embedded derivatives and spot contracts.

The new regime will not affect a hedge fund structured as a partnership. However, obligations created by the new regime will extend to any onshore investment adviser of a hedge fund that is licensed to carry on Type 9 regulated activity (asset management) under Hong Kong's licensing regime. Consequently, an investment adviser holding such a license will incur a reporting obligation if, in the course of managing the fund portfolio, it enters into an OTC derivatives transaction on behalf of the fund where the fund is a counterparty to the transaction. Initially, the reporting obligations are proposed to be limited to certain types of plain vanilla interest rate swaps and non-deliverable forward transactions in prescribed currencies and precious metals.

The outline timeline set by the regulators for the implementation of the first phase of the regime for mandatory reporting obligations is to introduce the final rules into the Legislative Council of Hong Kong in the last quarter of 2014. An indicative implementation timetable for other aspects of the OTC derivatives regime will also be published in the same quarter with consultation conclusions to the current round of consultation in relation to the proposed reporting obligations.

Annual Compliance Review and Filing Requirements

Offering Document Updates

As part of their ongoing compliance reviews, investment advisers should regularly assess their private fund offering materials and determine if updates are required or appropriate. Among other things, an investment adviser should consider if there have been any material changes in the investment adviser's or the private fund's business (including, among other things, investment objectives and strategies, risks, conflicts of interest and service provider arrangements) and/or any relevant regulatory changes (including, among other things, changes in tax and ERISA) since the most recent documents update. Before amending a private fund's offering documents, an investment adviser should evaluate if any investor and/or director consent and/or other actions or items would be necessary or appropriate for approving the amendments. You should also consider whether the revised offering documents would need to be filed with or approved by any regulatory authority.

Compliance Policies and Procedures Review and Employee Training

The Advisers Act requires investment advisers to review their compliance policies and procedures annually. This annual review should include, among other things, an assessment of any compliance issues (including, in particular, any known defects from prior years or noted in any SEC examinations), as well as any relevant regulatory changes or guidance and any other changes in the investment adviser's business that may require or otherwise call for changes to the investment adviser's compliance policies and procedures. Investment advisers should document any such reviews in writing.

Investment advisers should adopt and implement employee training policies to educate firm personnel on the investment adviser's compliance programs and procedures, including, among other things, programs and procedures relating to conflicts of interest and insider trading. Training should be provided to firm personnel periodically so that they are familiar with the investment adviser's obligations and policies.

In addition to topics already highlighted elsewhere in this Annual Review (including, without limitation, Custody Rule compliance, cybersecurity preparedness and social media use), below are certain other topics that investment advisers should consider in their compliance review:

Rule 506(d) Bad Actor Due Diligence

As discussed above, a private fund will be precluded from conducting a private offering under Rule 506 if the private fund or any of its covered persons are subject to a disqualifying event occurring on or after September 23, 2013. In addition, the private fund must disclose any pre-September 23, 2013 disqualifying events to prospective investors within a reasonable time before they invest. To comply with Rule 506(d), investment advisers to private funds should implement a program to determine on an ongoing basis whether any covered person is subject to any pre-September 23, 2013 disqualifying events (which again must be disclosed to prospective investors), and any post-September 23, 2013 disqualifying events (which again would disqualify the private fund from relying on Rule 506). Due diligence measures may include, among other things, conducting checks on public databases, requiring covered persons to complete periodic questionnaires or certifications and requiring covered persons to notify the investment adviser and the private fund of any disqualifying events and any facts that may lead to a disqualifying

event.[9] Frequency of due diligence checks will depend on the nature of the private fund's and the investment adviser's business, but should be conducted at least annually.

Broker-Dealer Registration Issues

As noted in a 2013 speech by David Blass, chief counsel of the SEC's Division of Trading and Markets, a number of activities commonly conducted by private fund investment advisers may raise potential broker registration issues under the Exchange Act. The definition of a "broker" under the Exchange Act is quite broad and includes any person "engaged in the business of arranging securities transactions for the account of others." In general, any person engaged in such activities is required to be registered as a broker under the Exchange Act unless a specific exemption applies.

For private fund investment advisers, Mr. Blass identified two types of activities that may trigger broker-dealer registration requirements:

- Capital-raising activities, particularly in circumstances (i) where employees of the investment adviser may be compensated based on how successful they are in selling interests in the investment adviser's private funds, or (ii) where an employee's sole or primary function is to sell interests in the private funds; and
- Receipt of transaction fees relating to one or more of a private fund's portfolio companies for services that could be characterized as investment banking or other broker activities, including investment banking-type services in connection with the acquisition, disposition or recapitalization of the portfolio companies (such as negotiating transactions, identifying and soliciting purchasers and sellers of a portfolio company's securities or structuring transactions).

The determination of whether an investment adviser or its employees are engaged in broker activities can be highly fact-specific. Investment advisers should periodically review their business activities to assess whether any broker-dealer registration requirements are implicated. In addition, investment advisers should be aware that questions related to these issues may be raised in SEC examinations. For more information on Mr. Blass's speech and broker-dealer registration issues, please see our April 26, 2013 client alert.

Identity Theft Red Flags Policies

Under the identity theft red flags rules jointly issued by the SEC and CFTC in 2013, certain SEC- and CFTC-regulated entities are required to adopt written identity theft programs designed to detect, prevent and mitigate identity theft. The red flags rules apply to certain "financial institutions" (including registered investment advisers) and "creditors" that offer or maintain "covered accounts."[10] The identity theft program must include at minimum the following elements:

- Identification of relevant "red flags" that may be indicators of potential identity theft;
- Detection of the relevant red flags;
- Appropriate responses to any red flags that are detected; and
- Periodic review and updates to the identity theft program.

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[9] If a disqualifying event is discovered, an investment adviser that is required to file Form ADV may be required to amend its Form ADV (see below).

[10] In general, "financial institutions" include an entity that holds a transaction account belonging to an individual, whereby the individual may make payments or transfers of money from the account to third parties (or direct the entity to make such payments or transfers); "creditors" include an entity that advances or loans money to consumers; and "covered accounts" include an account that a financial institution or creditor offers or maintains, primarily for personal, family or household purposes, that involves or is designed to permit multiple payments or transactions, or any other account that poses a reasonably foreseeable risk to consumers of identity theft.

Investment advisers should review their business practices to determine whether they might fall within the definition of a "financial institution" or "creditor" (for more details on the red flag rules, please see our May 31, 2013 client alert). Although the red flags rules typically will not apply to investment advisers to private funds, it is nevertheless advisable for all investment advisers to consider adopting an identity theft red flags policy and to periodically review the risk of identity theft with respect to investors in the private funds they advise.

Business Continuity and Disaster Recovery Plans

Under the Advisers Act, investment advisers have a fiduciary obligation to take steps to protect clients' interests from being placed at risk as a result of the investment adviser's inability to provide advisory services after a natural disaster or other emergencies. Following the widespread market disruption caused by Hurricane Sandy, the SEC surveyed the business continuity and disaster recovery plans of investment advisers in the affected region and issued a risk alert in August 2013 identifying some general trends and weaknesses observed in its survey. The risk alert highlighted certain key areas of consideration that investment advisers should evaluate when devising their business continuity plans, including:

- Widespread disruption considerations;
- Alternative locations considerations;
- Vendor relationships considerations;
- Telecommunications services and technology considerations;
- Communication plans considerations;
- Regulatory compliance considerations; and
- Reviewing and testing considerations.

Investment advisers may consider using the SEC's risk alert as a template for assessing the adequacy of their business continuity plans. However, we note that the risk alert's list of considerations is not intended to be exhaustive and investment advisers should design their business continuity and disaster recovery plans in light of the facts and circumstances surrounding their business and operations.

Anti-Money Laundering Policies

Investment advisers should review their anti-money laundering policies and procedures at least annually and update such policies and procedures to account for changes in requirements imposed by the trade and economic sanction programs administered by the Department of Treasury's Office of Foreign Asset Control and any applicable non-U.S. requirements. Investment advisers should also provide training to personnel to ensure they are familiar with the investment adviser's anti-money laundering obligations and practices. Investment advisers should also periodically check with their private fund administrators, if applicable, to ensure that the administrators are properly following their anti-money laundering policies and are conducting sufficient investor due diligence.

Annual and Other Periodic Filing Requirements

Below is a summary of certain key filing requirements applicable to investment advisers to private funds. We note that this list of filings discussed below is not intended to be exhaustive. In addition to the requirements discussed in this Annual Review, investment advisers should examine the nature of their business and operations and

determine whether any other filings or actions will be required pursuant to applicable federal, state and non-U.S. laws and regulations.

Form ADV

Registered investment advisers must file an updated Form ADV Part 1 and Part 2A with the SEC within 90 days after the investment adviser's fiscal year-end (by **March 31, 2015** for investment advisers with a December 31 fiscal year-end). Registered investment advisers must deliver the updated Form ADV Part 2A, or a summary of the changes made, to clients within 120 days following the investment adviser's fiscal year-end (by **April 30, 2015** for investment advisers with a December 31 fiscal year-end). Although underlying investors of private funds managed by the investment advisers are not "clients" of the investment advisers under the Advisers Act, it is generally considered best practice to deliver the updated Form ADV Part 2A to these underlying investors on an annual basis.

In addition to the annual amendments, Form ADV Part 1 must be promptly amended where certain types of information reported, such as the disciplinary history of the investment adviser and/or its personnel, becomes inaccurate or, in certain cases, materially inaccurate. Form ADV Part 2A and Part 2B must be amended promptly whenever information reported becomes materially inaccurate. If the change relates to a disciplinary event, then the updated Form ADV Part 2A and/or Part 2B, as applicable, also must be delivered to clients. While Form ADV Part 2B is not required to be filed with the SEC, investment advisers must maintain copies in their records.

Exempt reporting advisers are subject to similar reporting requirements with respect to sections in Form ADV Part 1 that apply to them. If the exempt reporting adviser is exempt from SEC registration under the "private fund adviser" exemption, the exempt reporting adviser must register with the SEC once it reports in its amended Form ADV that its regulatory assets under management (**RAUM**) attributable to U.S. private funds have reached $150 million. The exempt reporting adviser must apply for registration within 90 days of filing the amendment. If the exempt reporting adviser is exempt from SEC registration under the "venture capital fund adviser" exemption, the exempt reporting adviser must register with the SEC *prior* to the time it may no longer rely on such exemption.

Certain states impose "notice filing" requirements, requiring investment advisers to file their Form ADV with the relevant state securities authorities. Investment advisers may also be subject to additional state requirements where, for example, the investment adviser has a place of business in the state and/or has over five non-exempt clients in that state. Investment advisers may also be subject to certain "blue sky" requirements, as discussed below. An investment adviser should review its business on a periodic basis to determine whether any such additional state requirements have been triggered.

Form PF

A registered investment adviser that advises one or more private funds and has at least $150 million in RAUM attributable to private funds is required to file Form PF with the SEC to report certain information regarding the private funds under its management. The frequency of the reporting obligation and the amount of information that must be reported on Form PF will vary depending on the size of the investment adviser and the type of private funds managed by it.

In general, a registered investment adviser that has at least $150 million in RAUM attributable to private funds is required to file Form PF within 120 days after the end of the investment adviser's fiscal year (by **April 30, 2015** for investment advisers with a December 31 fiscal year-end). However, the reporting requirements for investment advisers with larger RAUMs will be more frequent and/or more extensive. In particular:

- **Large Hedge Fund Advisers.** An investment adviser with at least $1.5 billion in RAUM attributable to hedge funds as of any month-end during the preceding fiscal quarter is subject to more comprehensive quarterly reporting requirements with respect to hedge funds under its management. In addition, the Large Hedge Fund Adviser is required to provide fund-specific information with respect to any "qualifying hedge funds" (*i.e.*, hedge funds with more than $500 million in net asset value). A Large Hedge Fund Adviser must file Form PF within 60 days of each quarter-end (by **March 2, 2015** for the quarter ending December 31, 2014).
- **Large Liquidity Fund Advisers.** An investment adviser with at least $1.0 billion in RAUM attributable to private liquidity funds and registered money market funds as of any month-end during the preceding fiscal quarter will be subject to more comprehensive quarterly reporting requirements with respect to private liquidity funds under its management. Large Liquidity Fund Advisers must file Form PF within 15 days of each quarter-end (by **January 15, 2015** for the quarter ending December 31, 2014).
- **Large Private Equity Fund Advisers.** An investment adviser with at least $2.0 billion in RAUM attributable to private equity funds as of the end of the most recent fiscal year will be subject to more comprehensive annual reporting requirements with respect to private equity funds under its management. Large Private Equity Fund Advisers must file Form PF within 120 days of fiscal year end (by **April 30, 2015** for investment advisers with a December 31 fiscal year-end).

For purposes of determining whether an investment adviser meets any of the large adviser classifications above, the investment adviser may disregard a private fund's equity investments in other private funds.

Exempt reporting advisers are not required to file Form PF.

Form D and Blue Sky Filings

Form D. A private fund conducting an offering under Rule 506 must file a Form D with the SEC on its filer management system, EDGAR, within 15 days of the initial sale of securities in such offering (*i.e.*, the date on which the first investor is irrevocably contractually committed to invest). For any ongoing offering for which a Form D was filed after March 16, 2009, Form D must be amended annually on or before the first anniversary of the last notice filed. Form D must also be amended as soon as practicable to correct a material mistake of fact or error or to reflect a change in the information provided in the previously filed notice. For certain specified types of changes in information, however, such as a change in the amount of securities sold in the offering or the number of investors who have invested in the offering, the private fund is not required to amend Form D until the next annual filing (if any) is due (but may choose to do so at any time).

As a result of the JOBS Act amendments to Rule 506, a private fund conducting a Rule 506 offering must also certify on Form D that it is not disqualified from relying on Rule 506 under the Bad Actor Rule.

Blue Sky Filings. Compliance with Rule 506 is very important for compliance with the state securities or "blue sky" laws, since under Section 18 of the Securities Act, the states are pre-empted from regulating offerings that comply with Rule 506. Without such compliance, unless an applicable self-executing state exemption is available, a state where an investor purchases the issuer's securities can require a pre-sale filing and regulate the required disclosure and other aspects of the offering.

Provided that an offering is made in compliance with Rule 506, the blue sky laws of many states currently require that a hard copy of Form D be filed with the relevant state authority within 15 days following the initial sale of securities (whether interests or shares or whatever security) in that state. In addition, some states' blue sky laws require that copies of amended SEC filings also be filed with the state. A handful of states require annual renewal filings and, in a few cases, the payment of annual renewal fees for ongoing offerings. Please note that the states have been working on a central electronic filing system for Rule 506 offerings, and it is possible that such a system will be in place in the next several months.

Private funds should be aware of requirements that may be triggered when sales of securities are made to investors in states where sales have not been made in the past, and sales in states in which a Form D has not yet been filed. The penalties for failing to make timely filings can be significant. Some states may require payment of a fine, or even demand that an issuer offer rescission to each investor in a state, or the administrator may issue a consent order.

Please note also that although Section 18 of the Securities Act states that covered securities, such as securities offered pursuant to Rule 506 of Regulation D, are not subject to state regulation, an increasing number of states have nevertheless used their authority under broker-dealer and investment adviser regulation and anti-fraud statutes to review and comment on Form Ds filed in connection with Rule 506 offerings. Questions regarding whether a related party listed under item 3 of the Form D is required to be registered as an investment adviser in the state are not unusual. Some states have also requested to see copies of the offering materials to be provided.

Form 13F

An investment adviser is required to file a Form 13F with the SEC if it exercises investment discretion over $100 million or more in Section 13(f) securities as of the last trading day of any month in any calendar year. In general, Section 13(f) securities include U.S. listed equity securities, certain equity options and warrants, shares of closed-end investment companies and certain convertible debt securities. The SEC publishes an official list of Section 13(f) securities at the end of every quarter.

An investment adviser must file a Form 13F for the last quarter of the calendar year during which the reporting threshold is met. In addition, it must file a Form 13F for the first three quarters in the subsequent calendar year, even if its holding level has dropped below $100 million. In each case, Form 13F will be due within 45 days of quarter-end.

For investment advisers that exceeded the reporting threshold in 2014, the first Form 13F filing deadline in 2015 will be **February 17, 2015** (for the quarter ending December 31, 2014).

Schedules 13D and 13G

A person that has direct or indirect beneficial ownership of at least 5% of a class of outstanding voting equity securities of a U.S. public company is required to file Schedule 13D, or Schedule 13G, if eligible, with the SEC. "Beneficial ownership" is defined to include the direct or indirect power to (i) vote the securities or (ii) exercise investment authority over the securities, including the right to acquire the securities within 60 days (such as through the exercise of an option or a convertible security). Under this definition, "beneficial owners" may include a private fund, its investment adviser and certain controlling persons and/or parent companies of the investment adviser.

Schedule 13D. Schedule 13D must be filed within 10 days after crossing the 5% threshold and must be amended promptly following a material increase or decrease in the filer's holding. An increase or decrease is deemed "material" if it equals 1% of the outstanding securities and may, depending on the facts and circumstances, be deemed "material" even if it is less than 1%.

Schedule 13G. A beneficial owner otherwise required to file Schedule 13D may file Schedule 13G if it acquired the securities in the ordinary course of its business and not with the purpose or effect of changing or influencing the control of the issuer or if it met the 5% threshold at the time the issuer went public and subsequently acquired additional shares.

- If the beneficial owner falls within any of the specified categories of "Qualified Institutional Investors" (**QII**), which includes SEC-registered investment advisers, it must file Schedule 13G within 45 days after the end of a calendar year if its holding crossed the 5% threshold during the year and is at least 5% as of year-end (by **February 17, 2015** for 2014). Schedule 13G must be amended within 10 days of a month-end if the holding exceeds 10% of the class of equity securities as of such month-end and if it thereafter increases or decreases by more than 5% of the class of equity securities.
- A beneficial owner that does not qualify as a QII may still use Schedule 13G as a "passive investor," so long as its holding is below 20% of the class of securities. A passive investor must file Schedule 13G within 10 days of crossing the 5% threshold. Schedule 13G must be amended promptly once the holding exceeds 10% of the class of equity securities and if it thereafter increases or decreases by more than 5% of the class of equity securities.

Both QII and passive investor filers must amend Schedule 13G within 45 days of each calendar year-end to report any changes in the information previously reported, provided that no amendment will be required if the only change relates to the filer's percentage holding and is solely due to a change in the underlying aggregate number of outstanding shares in the class. The filing deadline for 2014 amendments will be **February 17, 2015**.

Forms 3, 4 and 5

Form 3. A person, including an investment adviser and/or an employee or representative acting on its behalf, is required to file Form 3 with the SEC within 10 days of (i) acquiring beneficial ownership of more than 10% of a class of equity securities of a U.S. public company (including, among other things, puts, calls, options, warrants, convertible securities or other rights or obligations to buy or sell securities exercisable within 60 days) and/or (ii) becoming an officer or director of a U.S. public company. "Beneficial ownership" is defined in the same way as in the Schedule 13D and 13G context. With respect to an issuer undergoing an IPO, the initial Form 3 filing is due on the effective date of the registration.

Form 4. If a director, officer or 10% beneficial owner effects a transaction which changes the beneficial ownership of securities previously reported on Form 3, such director, officer or beneficial owner must file a Form 4 with the SEC within 2 business days of the transaction.

Form 5. Form 5 must be filed with the SEC within 45 days following the issuer's fiscal year to report any exempt or other insider transactions not previously reported on Form 4 (by **February 17, 2015** if the issuer has a fiscal year-end of December 31).

Form 13H

Large traders of Regulation NMS securities (generally defined to be exchange listed securities, including options) are required to file Form 13H with the SEC. A "large trader" is any person that exercises investment discretion over transactions in Regulation NMS securities that equal or exceed (i) two million shares or $20 million during any day or (ii) 20 million shares or $200 million during any month. Large traders must file Form 13H with the SEC when the thresholds above are met. The initial Form 13H filing must be made "promptly" after reaching the threshold (generally within 10 days). Thereafter, an annual 13H filing must be submitted within 45 days of the end of the calendar year (by **February 17, 2015** for 2014). Amendments to Form 13H must be filed promptly following the end of a calendar quarter if any information on the Form 13H becomes inaccurate.

TIC Form B

A U.S. investment manager (on behalf of itself and any U.S. or non-U.S. funds that it manages) and U.S. resident funds managed by a non-U.S. resident investment manager are required to report cross-border claims, liabilities

and short-term securities holdings on TIC B Forms with the Federal Reserve Bank of New York, in each case if the reporting person is owed "reportable claims" or owes "reportable liabilities" in excess of certain monetary thresholds, as discussed below.

The TIC B Forms require reporting of current obligations (including loans, regardless of their maturity) and short-term securities:

- That are owed by a U.S. resident entity to a non-U.S. resident, or by a non-U.S. resident entity to a U.S. resident,
- That are not held by a U.S. custodian or sub-custodian, and
- That are in excess of the relevant reporting thresholds (determined on an aggregated basis for the top-tier U.S. entity in an affiliated group, and separately for all of the funds that they manage).

TIC B Forms consist of a series of monthly and quarterly forms. Monthly TIC B filings (Forms BC, BL-1, and BL-2) are due no later than 15 days following the end of a month, and the quarterly TIC B filings (Forms BQ-1, BQ-2 (Part 1), BQ-2 (Part 2) and BQ-3) are due no later than 20 days following the end of a quarter. Any financial institutions with "reportable claims" or "reportable liabilities" (as described below) exceeding the monetary thresholds and required to file for a reporting period are also required to file for all subsequent reporting periods in that year (regardless of whether the thresholds are exceeded in the subsequent periods). The reporting threshold for each TIC B Form (except Form BQ-3) is $50 million total ($25 million in any one foreign country). The reporting threshold for Form BQ-3 is $4 billion total (no country limit). A reporter is only required to file the applicable TIC B Forms for which its reportable claims and/or liabilities exceeds the relevant threshold.

"Reportable claims" generally include all claims not held by a U.S.-resident custodian or sub-custodian, including deposit balances due from banks, negotiable certificates of deposit of any maturity, brokerage balances, customer overdrawn accounts, loans and loan participations, resale agreements and similar financing agreements, short-term (original maturity of one year or less) negotiable and non-negotiable securities, money-market instruments, reinsurance recoverables and accrued interest receivables.

"Reportable liabilities" generally include all liabilities not held by a U.S.-resident custodian or sub-custodian, including non-negotiable deposits of any maturity, brokerage balances, overdrawn deposit accounts, loans of any maturity, short-term (original maturity of one year or less) non-negotiable securities, repurchase agreements and similar financing agreements, insurance technical reserves and accrued interest payables.

"Reportable claims" and "reportable liabilities" do not include long-term securities (including equities and any long-term notes, bonds and debentures), derivatives, credit commitments, contingent liabilities, and securities borrowing or lending agreements in which one security is borrowed or lent in return for another. For purposes of the TIC B Forms, a feeder fund's investment into a master fund is considered a non-reportable long-term security and is not a reportable claim.

Representatives of the government agencies responsible for the TIC B Forms have indicated that any claims or liabilities held by a U.S. resident custodian or sub-custodian (such as a bank) or otherwise reportable by another U.S. financial institution (such as an administrative agent) should not be reported by investment managers or funds or used to calculate whether the threshold limits have been exceeded.

A U.S.-resident investment manager reporting on behalf of itself and the entities in its organization should generally file Forms BC, BL-1, BQ-2 (Part 1) and/or BQ-3, as applicable. A U.S.-resident investment manager should generally file consolidated reports on behalf of the funds it manages, including reportable claims and liabilities of

non-U.S. resident funds, on Forms BL-2, BQ-1, BQ-2 (Part 2). Non-U.S. investment managers do not have a reporting obligation, but any U.S. resident fund they manage may be required to make a TIC B filing.

TIC Form S

A U.S.-resident entity, including a U.S. investment adviser, is required to file TIC Form S with the Federal Reserve Bank of New York if its transactions (*e.g.*, purchases, sales, redemptions and new issues) in long-term securities with foreign residents exceed $350 million in the aggregate during a month.[11] Long-term securities are securities without a stated maturity date (such as equities) or with an original term-to-maturity of over a year.

Reportable transactions include, among other things, purchases and sales of newly-issued securities, purchases and sales of existing securities from other investors, and transactions resulting from sinking fund redemptions, called or maturing securities. Long-term securities received or delivered to settle derivative contracts are also reportable as purchases or sales by foreign residents. For U.S. investment advisers, reportable transactions include, among other things:

- Purchases and sales they make for the accounts of their U.S.-resident funds and other clients that are conducted directly with a foreign resident or placed through a foreign-resident broker, dealer or underwriter;
- Purchases and sales made for the accounts of their foreign-resident funds and other clients that are placed through U.S.-resident brokers, dealers or underwriters, if the identity of the underlying account holder had not been fully disclosed to such brokers, dealers or underwriters;
- Redemptions from the accounts of their U.S.-resident funds and other clients that are presented to a foreign-resident intermediary (*e.g.*, foreign-paying agent, foreign-resident broker, foreign-resident dealer or foreign-resident issuer) without the use of a U.S. resident custodian; and
- Purchases and sales of interests in a foreign master fund by a U.S.-resident feeder fund or in a U.S.-resident master fund by a foreign feeder fund.

U.S. investment advisers meeting the reporting threshold in any given month must file TIC Form S no later than 15 days following month-end, and must continue to file TIC Form S monthly for the remainder of the calendar year, regardless of the level of transactions in the subsequent months.

TIC Form SLT

U.S.-resident custodians (including U.S.-resident banks), U.S.-resident issuers (including U.S. private funds) and U.S.-resident end-investors (including U.S. investment advisers, whether or not registered) are required to file TIC Form SLT with the Federal Reserve Bank of New York to report their cross-border ownership of reportable long-term securities, if the fair market value of their reportable holdings and issuances equals at least $1 billion as of the last business day of any month.

Most equity securities and debt securities with a maturity of greater than one year are considered reportable long-term securities for purposes of Form SLT. Certain types of securities are excluded, such as, among other things, short-term securities (original maturity of one year or less), bankers' acceptances and trade acceptances, derivative contracts (including forward contracts to deliver securities), loans and loan participation certificates, letters of credit, bank deposits and annuities.

U.S. investment advisers with aggregate holdings of reportable long-term securities with a fair market value of at least $1 billion by the investment adviser and its clients are likely to be subject to Form SLT reporting. An

[11] The reporting threshold for TIC Form S was previously $50 million but was increased to $350 million in June 2014 pursuant to revisions to TIC Form S.

investment adviser that is subject to the reporting requirement will file one consolidated report for all U.S.-resident parts of its organization and all U.S.-resident entities that it advises. Funds organized under the laws of any U.S. state are included in the "U.S.-resident" portion of a reporting investment adviser's organization, which will subject securities issued by non-U.S. master funds that are held by U.S. feeder funds and holdings of U.S. master fund securities by non-U.S. feeder funds to reporting.

For U.S.-resident holdings of non-U.S. securities, the reporting party would be required to disclose:

- The residence of the non-U.S. issuer; and
- The fair market value and type of non-U.S. security.

For non-U.S.-resident holdings of U.S. securities, the reporting party would be required to disclose:

- The non-U.S. holder's residence;
- The fair market value and type of U.S. security; and
- Whether the non-U.S. holder is a "foreign official institution" (including national governments, international and regional organizations and sovereign wealth funds).

Form SLT must be filed monthly by the 23rd day following the end of each month (by **January 23, 2015** for December 2014). If the $1 billion threshold is crossed as of the end of any month, the reporting person must file Form SLT for all remaining months in that calendar year regardless of the subsequent amount of its reportable holdings.

Certain forms issued by the U.S. Department of Commerce Bureau of Economic Analysis (**BEA**) track cross-border "direct investments," which is the ownership or control of 10% or more of the voting equity securities of an incorporated or unincorporated business. In general, only entities contacted individually by the BEA will be required to report on such BEA forms. However, from time to time, the BEA may propose forms that track direct investments that must be filed by any entity that meets the relevant thresholds. Currently, the BEA has not issued final rules in respect of any such forms.

Annual U.S. Tax Elections and Filings

This section briefly summarizes certain U.S. tax filings and elections (and related deadlines) relevant to private funds, their investors and related persons. For key FATCA action items and deadlines, please see "FATCA Implementation" above.

Section 83(b) Elections. If an individual filed a Section 83(b) election with the IRS during 2014, that individual must attach a copy of the filed election to his or her U.S. federal income tax return for 2014. The deadline will be the due date (including any applicable extensions) of that individual's 2014 U.S. federal income tax return.

Form 8832 Filings. If an entity filed an IRS Form 8832 (an entity classification election) with respect to 2014, that entity must attach a copy of the Form 8832 with its U.S. federal income tax return. If that entity is not required to file a U.S. return, all direct or indirect owners of that entity generally must attach a copy with their U.S. federal income tax returns, if they are otherwise required to file U.S. returns. The deadline will be the due date (including any applicable extensions) of the filer's 2014 U.S. federal income tax return.

"Qualified Electing Fund" (QEF) Election. If a private fund has invested in a non-U.S. portfolio company that is (or may be) a "passive foreign investment company" (**PFIC**), the first U.S. person in the PFIC's ownership chain (*e.g.*, the fund itself, if a U.S. fund, or each U.S. investor, if a non-U.S. fund) may wish to file a QEF election with respect to that PFIC. The QEF election must be filed with that U.S. person's U.S. federal income tax return for the first year

in which the fund invested in the PFIC. The deadline for PFICs acquired in 2014 will be the due date (including any applicable extensions) of that U.S. person's 2014 U.S. federal income tax return.

"Electing Investment Partnership" (EIP) Election. Private funds that satisfy certain requirements may opt out of otherwise mandatory tax basis adjustments (including those that may result from transfers of interests in a fund) by filing an EIP election. The EIP election must be filed with the private fund's U.S. federal income tax return for the first year in which the election is intended to apply. For funds wishing to be treated as EIPs with respect to 2014 (and subsequent years), the deadline will be the due date (including any applicable extensions) of the private fund's 2014 U.S. federal income tax return.

Certain U.S. Tax Filings with respect to Non-U.S. Entities. U.S. private funds and their U.S. investors may be required to make certain filings with respect to non-U.S. entities owned by the private fund. These filings may include, without limitation:

- IRS Form 5471 (with respect to certain non-U.S. corporations, including "controlled foreign corporations," owned by the private fund);
- IRS Form 926 (with respect to certain contributions of property to a non-U.S. corporation);
- IRS Form 8621 (with respect to certain non-U.S. corporations that are PFICs; however, such reporting is generally not required of U.S. tax-exempt investors pursuant to regulations issued on December 30, 2013);
- IRS Form 8865 (with respect to certain non-U.S. partnerships);
- IRS Form 8858 (with respect to certain non-U.S. disregarded entities); and
- IRS Form 8938 (with respect to certain non-U.S. financial assets).

Generally, the deadline will be the due date (including any applicable extensions) of the U.S. person's 2014 U.S. federal income tax return.

Report of Foreign Bank and Financial Accounts (FBAR). With very limited exceptions, a U.S. person who has a financial interest in, or signatory authority over, one or more non-U.S. financial accounts must report those accounts annually to the Department of the Treasury, unless the aggregate value of all such accounts did not exceed $10,000 at any time during the year. Under current law, hedge funds and private equity funds generally are not considered "financial accounts." Nevertheless, such private funds and their investment advisers may be required to file FBARs if they have non-U.S. bank or other financial accounts. FBARs must be filed electronically (no paper filings allowed) by **June 30, 2015** using the E-Filing System maintained by the Department of the Treasury's Financial Crimes Enforcement Network (**FinCEN**). Filers must first register on the FinCEN site, so it is advisable to register well in advance of the June 30 filing deadline. Note that 2013 (and prior year) filings by officers and employees of certain entities who had signatory authority over, but no financial interest in, certain non-U.S. financial accounts are currently due **June 30, 2015**, but FinCEN may again extend this deadline.

CFTC Annual Reaffirmations and Periodic Reports

CPO and CTA Exemption Reaffirmations. Each CPO exempt from CPO registration under CFTC Rule 4.13 and each commodity pool advisor exempt from CTA registration under CFTC Rule 4.14 must submit an annual affirmation of its exemption with the National Futures Association (**NFA**) within 60 days of calendar year-end (by **March 2, 2015** for 2014).

Annual Reports and Account Statement Requirements. Each registered CPO, including a CPO relying on CFTC Rule 4.7, must file financial statements of each commodity pool it operates with the NFA within 90 days after each such commodity pool's fiscal year-end (by **March 31, 2015**, if the fiscal year ends on December 31).

In addition, each registered CPO must distribute monthly account statements to participants of the commodity pool within 30 days of month-end for commodity pools with a net asset value greater than $500,000. For commodity pools with a net asset value of $500,000 or less, or operated under CFTC Rule 4.7, the CPO is instead required to distribute quarterly account statements to pool participants within 30 days of the quarter-end.

CFTC and NFA Form CPO-PQR. A registered CPO will be required to report certain information on CFTC Form CPO-PQR, the CFTC equivalent of Form PF.

CFTC Form CPO-PQR contains three sections: Schedule A, Schedule B and Schedule C. A CPO may not be required to complete all three schedules, depending on the size of the CPO's advisory business and the CPO's SEC reporting obligations (if a dual registrant).

- **Small CPOs.** CPOs with less than $150 million of assets under management will be required to file Schedule A of CFTC Form CPO-PQR annually within 90 days after year-end (by **March 31, 2015** for 2014).
- **Mid-sized CPOs.** CPOs with at least $150 million, but less than $1.5 billion, of assets under management will be required to file Schedules A and B of CFTC Form CPO-PQR annually within 90 days after year-end (by **March 31, 2015** for 2014).
- **Large CPOs.** CPOs with at least $1.5 billion of assets under management will be required to file Schedules A, B and C of CFTC Form CPO-PQR quarterly within 60 days of each quarter-end (by **March 2, 2015** for the quarter ending December 31, 2014).

The CPO may also be required to file quarterly NFA Form CPO-PQR, which incorporates certain portions of CFTC Form CPO-PQR. Small CPOs and Mid-sized CPOs are required to file NFA Form CPO-PQR within 60 days of the first three calendar quarter-ends of each year and may satisfy their fourth quarter NFA filing obligations by filing CFTC Form CPO-PQR (note that Small CPOs would also be required to complete the Schedule of Investment under Schedule B of CFTC Form CPO-PQR, in addition to Schedule A). Large CPOs are not required to file NFA Form CPO-PQR, as their reporting obligations are satisfied by their quarterly CFTC Form CPO-PQR filings.

CPOs that are registered as investment advisers may satisfy certain of their Form CPO-PQR filing obligations by filing Form PF with the SEC. However, if the CPO files Form PF in lieu of CFTC Form CPO-PQR, the CPO will be required to file NFA Form CPO-PQR within 60 days of the first three calendar quarters of each year and an annual report within 60 or 90 days of the last calendar quarter, depending on the size of the CPO (by **March 2, 2015 or March 31, 2015**, as applicable, for the quarter ending December 31, 2014).

Both the CFTC and NFA forms are filed with the NFA electronically.

CFTC and NFA Form CTA-PR. All registered CTAs, regardless of size and dual registration, must file CFTC Form CTA-PR annually within 45 days of the end of the fiscal year (by **February 17, 2015** for 2014). In addition, each registered CTA that is an NFA member must also file NFA Form CTA-PR within 45 days of each quarter-end (in which case, the CTA would not need to separately file CFTC Form CTA-PR). The CFTC and NFA forms are identical and cover certain identifying information about the CTA as well as performance information.

Other Annual Requirements and Considerations

Audited Financial Statements Delivery

The Custody Rule requires registered investment advisers with custody of client assets to implement certain safeguards designed to protect client assets against the risk of loss, misuse or misappropriation. Among other things, it requires assets of an investment adviser's clients to be held by a qualified custodian and to be subject to

surprise annual examinations by an independent public accountant that is registered with and subject to inspection by the Public Company Accounting Oversight Board (**PCAOB**). With respect to private fund clients, however, an investment adviser, rather than complying with the surprise audit requirement, may comply with the Custody Rule by relying on the Audit Provision under part (b)(4) of the Custody Rule. To rely on the Audit Provision, the investment adviser must have an independent public accountant that is registered with and subject to inspection by the PCAOB conduct an annual audit of each private fund client and deliver audited financial statements to all of its private fund investors. The audited financial statements must be delivered:

- Within 120 days of the private fund's fiscal year-end (by **April 30, 2015**, if the fiscal year ends on December 31), or
- Within 180 days of the private fund's fiscal year-end, if the private fund is a fund-of-funds (by **June 29, 2015**, if the fiscal year ends on December 31).

The accountant conducting the annual audit must be registered with and subject to inspection by the PCAOB.

Privacy Policy Delivery

Investment advisers must deliver a privacy notice to clients (including fund investors) who are natural persons (including 401(k) and IRA investors) at least once every 12 months, even if the investment adviser's privacy policy has not changed. If there has been any change to the privacy policy that would permit nonpublic client information to be disclosed to non-affiliated third parties, and the new disclosure is not covered in the existing notice, the investment adviser must deliver an updated notice to clients and provide them a reasonable opportunity to opt out of the new disclosure.

Schedule K-1 Delivery

Under IRS rules, partnerships are required to deliver certain information on Schedule K-1 to their partners on or before the day on which the return for the relevant taxable year is required to be filed. As required by IRS rules issued in 2012, a partnership must obtain a partner's affirmative consent for the partnership to validly deliver Schedule K-1 to the partner electronically (*e.g.*, via email or by posting the Schedule K-1 on a web portal). For the consent to be valid, it must be obtained from a partner in the same electronic manner in which the partnership will deliver the Schedule K-1 to the partner. The applicable IRS rules also prescribe certain other requirements for electronic delivery of Schedule K-1s, including certain disclosures, which must be provided to partners regarding electronic delivery of Schedule K-1s. In addition to these IRS rules, states or other jurisdictions may impose security requirements for maintenance and transmission of sensitive personal information (such as individual social security numbers), which a partnership may need to comply with when delivering Schedule K-1s to its partners.

New Issues Investor Reaffirmations

If a private fund intends to invest in "new issues," the investment adviser will often obtain annual reaffirmations from the private fund's investors relating to each such investor's eligibility to participate in profits and losses from new issues. Reaffirmation may be obtained by sending out notices asking each investor to notify the investment adviser if the investor's new issues status has changed or by including a representation in the investor's subscription agreement whereby the investor agrees to notify the investment adviser of any subsequent change in its new issues status.

ERISA/VCOC Annual Certifications and Compliance

Many private funds that accept investments from investors subject to ERISA are operated in such a manner so that the assets of such private funds do not constitute the "plan assets" of ERISA investors for purposes of ERISA. Typically, such a fund will either be operated as a "venture capital operating company" (**VCOC**) or so that "benefit plan investor" equity participation is not "significant" (*i.e.*, under the ERISA 25% limit), and the sponsor of such a private fund often will contractually agree with its ERISA investors to deliver an annual certification as to the private fund's continued compliance with the VCOC requirements and/or the 25% benefit plan investor limit. Private funds that accept investments from ERISA investors should conduct the VCOC or 25% benefit plan investor limit analysis as applicable, whether or not they are required to annually certify compliance with respect thereto, and should be prepared to deliver any required or requested certifications in a timely manner.

Private funds that are designed to hold "plan assets" and that are actually holding "plan assets" of ERISA investors may need to provide the ERISA investors with certain information relating to any changes to the fees or expenses paid by the fund.

California Finance Lenders Law Requirements

The California Finance Lenders Law (**CFLL**) generally requires lenders (including private funds) "engaged in the business of a finance lender" in California to obtain a license, although there is an exemption for a person making no more than five loans per year, so long as the loans are incidental to the business of the person relying on the exemption (*e.g.*, bridge loans to a portfolio company) and the person is not engaged in the business of making loans. The licensing process is cumbersome and time consuming, but willful violation of the law can result in civil and criminal penalties. A license holder is subject to certain inspection and reporting obligations. Please let us know if you have any questions about the potential applicability of the CFLL to your operations.

Lobbyist Registration

Under a California law that became effective January 1, 2011, "placement agents" hired or engaged to solicit California state plans (*e.g.*, CalSTRS, CalPERS and the University of California pension system) are required to register as lobbyists. Under existing law, lobbyists are restricted in their ability to provide gifts and make campaign contributions and are prohibited from accepting fees contingent upon the success of their lobbying efforts. Under the new law, certain employees of a fund sponsor may be subject to the lobbyist registration requirements and the gift and campaign contribution limits, and sponsors that retain placement agents may have filing and record keeping obligations as "lobbyist employers." If you are contemplating retention of a placement agent or any solicitation of CalSTRS, CalPERS or the University of California pension system, please contact us for more information.

In addition, under New York City's Lobbying Law and based on regulatory guidance issued in 2010-2012, placement agents and/or employees of investment fund managers may be required to register with New York City in connection with the offering of fund interests to any of the New York City pension funds (including New York City Employees' Retirement System, the New York City Police Pension Fund, the New York Fire Department Pension Fund, the New York City Teachers' Retirement System, and the New York City Board of Education Retirement System). Although the Lobbying Law had been in effect for 20 years, it had not previously been interpreted to apply to the marketing activities of investment funds and their agents.

As a reminder, other state and local plans have their own regulations and policies on the use of placement agents (including disclosure or placement agent bans in some circumstances), and lobbyist registration may be relevant for marketing to other state or local plans.

Liability Insurance

Investment advisers should consider purchasing management liability insurance depending on their level of exposure and the extent to which their business and operations warrant such coverage. Given the heightened regulatory scrutiny of the private funds industry, investment advisers may benefit from protection against officer and director liability, fiduciary liability, error and omission liability and employment practice liability.

2015 Federal Filings and Other Document Delivery Calendar

Filing / Delivery	Who Must File	Deadline
December 2014		
Form PF	Large Hedge Fund Advisers	December 1 (for the quarter ending September 31, 2014)
CFTC Form CPO-PQR	Large CPOs	December 1 (for the quarter ending September 31, 2014)
NFA Form CPO-PQR	All registered CPOs, except Large CPOs	December 1 (for the quarter ending September 31, 2014)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	December 15 (for November 2014)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	December 15 (for November 2014)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	December 23 (for November 2014)
Distribution of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	December 30 (for November 2014)
January 2015		
Form PF	Large Liquidity Fund Advisers	January 15 (for the quarter ending December 31, 2014)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	January 15 (for December 2014)

Filing / Delivery	Who Must File	Deadline
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	January 15 (for December 2014)
TIC Form BQ-1, BQ-2 and BQ-3	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country) (Form BQ-1 and BQ-2 Part 1), in excess of $50 million (no country limit) (Form BQ-2 Part 2), or in excess of $4 billion (no country limit) (Form BQ-3)	January 20 (for the quarter ending December 31, 2014)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	January 23 (for December 2014)
Distribution of Quarterly Account Statements to Pool Participants	Registered CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000	January 30 (for the quarter ending December 31, 2014)
Distribution of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	January 30 (for December 2014)
February 2015		
Form 13F	Investment advisers that exercise investment discretion over $100 million or more in Section 13(f) securities	February 17 (for the quarter ending December 31, 2014)
Schedule 13G Annual Amendment	Beneficial owners of at least 5% of a class of outstanding equity securities of a U.S. public company eligible to file Schedule 13G (*i.e.*, Qualified Institutional Investors and/or passive investors)	February 17 (for 2014)
Form 13H Annual Amendment	Large traders of Regulation NMS securities	February 17 (for 2014)

Filing / Delivery	Who Must File	Deadline
Form 5	Insiders required to report any exempt or other insider transactions not previously reported on Form 4	February 17 (if the issuer has a December 31 fiscal year-end)
NFA Form CTA-PR	Registered CTAs	February 17 (for the quarter ending December 31, 2014, respectively)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	February 17 (for January 2015)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	February 17 (for January 2015)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	February 23 (for January 2015)
March 2015		
Form PF	Large Hedge Fund Advisers	March 2 (for the quarter ending December 31, 2014)
CFTC Form CPO-PQR	Large CPOs	March 2 (for the quarter ending December 31, 2014)
CFTC Reg. 4.13 and 4.14 Exemption Annual Reaffirmations	CPOs exempt from CPO registration under CFTC Rule 4.13 and CTAs exempt from CTA registration under CFTC Rule 4.14.	March 2 (for 2015)
Distribution of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	March 2 (for January 2015)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	March 16 (for February 2015)

Filing / Delivery	Who Must File	Deadline
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	March 16 (for February 2015)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	March 23 (for February 2015)
Distribution of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	March 30 (for February 2015)
Form ADV Part 1 Annual Update	Registered investment advisers and exempt reporting advisers	March 31 (for an investment adviser with a December 31 fiscal year-end)
Form ADV Part 2A Annual Update	Registered investment advisers	March 31 (for an investment adviser with a December 31 fiscal year-end)
CFTC Form CPO-PQR	All registered CPOs, except Large CPOs	March 31 (for 2014)
NFA Commodity Pool Annual Financial Statements Filing	Registered CPOs	March 31 (for a pool with a December 31 fiscal year-end)
FATCA Information Report	Participating FFIs (except for FFIs in Model 1 IGA jurisdictions)	March 31 (for 2014)
April 2015		
Form PF	Large Liquidity Fund Advisers	April 15 (for the quarter ending March 31, 2015)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	April 15 (for March 2015)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	April 15 (for March 2015)

Filing / Delivery	Who Must File	Deadline
TIC Form BQ-1, BQ-2 and BQ-3	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country) (Form BQ-1 and BQ-2 Part 1), in excess of $50 million (no country limit) (Form BQ-2 Part 2), or in excess of $4 billion (no country limit) (Form BQ-3)	April 20 (for the quarter ending March 31, 2015)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	April 23 (for March 2015)
Form PF	Registered investment advisers with at least $150 million in RAUM attributable to private funds, including Large Private Equity Fund Advisers	April 30 (for an investment adviser with a December 31 fiscal year-end)
Delivery of Quarterly Account Statements to Pool Participants	Registered CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000	April 30 (for the quarter ending March 31, 2015)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	April 30 (for March 2015)
Delivery of Updated Form ADV Part 2A to Clients	Registered investment advisers	April 30 (for an investment adviser with a December 31 fiscal year-end)
Delivery of Annual Audited Financial Statements to Clients	Registered investment advisers (except with respect to fund-of funds)	April 30 (for private fund with a December 31 fiscal year-end)
May 2015		
Form 13F	Investment advisers that exercise investment discretion over $100 million or more in Section 13(f) securities	May 15 (for the quarter ending March 31, 2015)
NFA Form CTA-PR	All registered CTAs	May 15 (for the quarter ending March 31, 2015)

Filing / Delivery	Who Must File	Deadline
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	May 15 (for April 2015)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	May 15 (for April 2015)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	May 26 (for April 2015)
June 2015		
Form PF	Large Hedge Fund Advisers	June 1 (for the quarter ending March 31, 2015)
CFTC Form CPO-PQR	Large CPOs	June 1 (for the quarter ending March 31, 2015)
NFA Form CPO-PQR	All registered CPOs, except Large CPOs	June 1 (for the quarter ending March 31, 2015)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	June 1 (for April 2015)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	June 15 (for May 2015)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	June 15 (for May 2015)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	June 23 (for May 2015)

Filing / Delivery	Who Must File	Deadline
Delivery of Annual Audited Financial Statements to Clients	Registered investment advisers (with respect to fund-of funds)	June 29 (for a fund-of-funds with a December 31 fiscal year-end)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	June 30 (for May 2015)
FBAR	Hedge funds and private equity funds, and their investment advisers, if they have non-U.S. bank or other financial accounts	June 30
July 2015		
Form PF	Large Liquidity Fund Advisers	July 15 (for the quarter ending June 30, 2015)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	July 15 (for June 2015)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	July 15 (for June 2015)
TIC Form BQ-1, BQ-2 and BQ-3	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country) (Form BQ-1 and BQ-2 Part 1), in excess of $50 million (no country limit) (Form BQ-2 Part 2), or in excess of $4 billion (no country limit) (Form BQ-3)	July 20 (for the quarter ending June 30, 2015)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	July 23 (for June 2015)

Filing / Delivery	Who Must File	Deadline
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	July 30 (for June 2015)
Delivery of Quarterly Account Statements to Pool Participants	Registered CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000	July 30 (for the quarter ending June 30, 2015)
August 2015		
Form 13F	Investment advisers that exercise investment discretion over $100 million or more in Section 13(f) securities	August 14 (for the quarter ending June 30, 2015)
NFA Form CTA-PR	All registered CTAs	August 14 (for the quarter ending June 30, 2015)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	August 17 (for July 2015)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	August 17 (for July 2015)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	August 24 (for July 2015)
Form PF	Large Hedge Fund Advisers	August 31 (for the quarter ending June 30, 2015)
CFTC Form CPO-PQR	Large CPOs	August 31 (for the quarter ending June 30, 2015)
NFA Form CPO-PQR	All registered CPOs, except Large CPOs	August 31 (for the quarter ending June 30, 2015)

Filing / Delivery	Who Must File	Deadline
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	August 31 (for July 2015)
September 2015		
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	September 15 (for August 2015)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	September 15 (for August 2015)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	September 23 (for August 2015)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	September 30 (for August 2015)
FATCA Information Report	Participating FFIs in Model 1 IGA jurisdictions	September 30 (for 2014)
October 2015		
Form PF	Large Liquidity Fund Advisers	October 15 (for the quarter ending September 30, 2015)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	October 15 (for September 2015)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	October 15 (for September 2015)

Filing / Delivery	Who Must File	Deadline
TIC Form BQ-1, BQ-2 and BQ-3	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country) (Form BQ-1 and BQ-2 Part 1), in excess of $50 million (no country limit) (Form BQ-2 Part 2), or in excess of $4 billion (no country limit) (Form BQ-3)	October 20 (for the quarter ending September 30, 2015)
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	October 23 (for September 2015)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	October 30 (for September 2015)
Delivery of Quarterly Account Statements to Pool Participants	Registered CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000	October 30 (for the quarter ending September 30, 2015)
November 2015		
Form 13F	Investment advisers that exercise investment discretion over $100 million or more in Section 13(f) securities	November 16 (for the quarter ending September 30, 2015)
NFA Form CTA-PR	All registered CTAs	November 16 (for the quarter ending September 30, 2015)
TIC Form BC, BL-1 and BL-2	U.S. residents with reportable cross-border claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	November 16 (for October 2015)
TIC Form S	U.S.-resident entities conducting cross-border reportable transactions exceeding $350 million as of any month	November 16 (for October 2015)

Filing / Delivery	Who Must File	Deadline
TIC Form SLT	U.S.-resident custodian, issuer or end-investor having cross-border ownership of reportable long-term securities exceeding $1 billion as of the last day of any calendar month	November 23 (for October 2015)
CFTC Form CPO-PQR	Large CPOs	November 30 (for the quarter ending September 30, 2015)
NFA Form CPO-PQR	All registered CPOs, except Large CPOs	November 30 (for the quarter ending September 30, 2015)
Delivery of Monthly Account Statements to Pool Participants	Registered CPOs (except for CPOs exempt under CFTC Reg. 4.7 or with respect to commodity pools with NAV below $500,000)	November 30 (for October 2015)
Other Floating Deadlines		
Form D	Private funds conducting an offering under Regulation D	*Initial Filing*: Within 15 days of the initial sale of securities *Annual Amendment*: Anniversary date of the previous Form D filing *Interim Amendment:* As soon as practicable after certain changes in information Note: Additional state blue sky filing requirements may apply.
Schedule 13D	Beneficial owners of at least 5% of a class of outstanding equity securities of a U.S. public company	*Initial Filing*: Within 10 days of crossing the 5% threshold *Amendment*: Promptly after any material change in beneficial ownership percentage

Filing / Delivery	Who Must File	Deadline
Schedule 13G	Beneficial owners of at least 5% of a class of outstanding equity securities of a U.S. public company eligible to file Schedule 13G (*i.e.*, Qualified Institutional Investors and/or passive investors)	*Initial Filing*: Generally, within 45 days of year-end (if a QII) or within 10 days of crossing the 5% threshold (if a passive investor) *Annual Amendment*: Within 45 days of year-end (see above) *Interim Amendment*: Within 10 days of month-end (if a QII) or promptly (if a passive investor) if holding exceeds 10% or if it thereafter increase or decrease by over 5%
Form 13H	Large traders of Regulation NMS securities	*Initial Filing*: Promptly (usually 10 days) after reaching reporting threshold *Annual Amendment*: Within 45 days of year-end (see above) *Interim Amendment*: Promptly after quarter-end if there is any change in information
Form 3	Beneficial owners of more than 10% of a class of equity securities of a U.S. public company, or officers or directors of a U.S. public company	Within 10 days of becoming a 10% beneficial owner, officer or director
Form 4	Beneficial owners of more than 10% of a class of equity securities of a U.S. public company or officers or directors of a U.S. public company that effect a transaction changing the beneficial ownership of securities previously reported on Form 3	Within 2 business days of the transaction

Filing / Delivery	Who Must File	Deadline
Hart Scott Rodino Filings	Persons contemplating a business transaction which is not "solely for the purpose of investment" and relates to either: (i) the acquisition of voting securities valued in excess of $75.9 million (adjusted annually) or (ii) the acquisition of a majority of interests in certain unincorporated entities (such as certain partnerships or LLCs). This exemption is available only for holdings not exceeding 10% of an issuer's voting stock	Prior to completion of the proposed business transaction Note: Filers are generally subject to 30-day waiting period after submitting their HSR notice filing
New Issues Affirmations	Private funds that invest in new issues	Annually
Delivery of Privacy Policy Notice to Clients	Most investment advisers	Annually
Delivery of ERISA/VCOC Annual Certification to ERISA Investors	Private funds operating as a VCOC or pursuant to the 25% cap	Annually
Delivery of Schedule K-1	Private funds that are partnerships	Due date (including any applicable extension) of the partnership's U.S. federal income tax return
Section 83(b) Filing	Individuals that filed a Section 83(b) election with the IRS during 2014	Due date (including any applicable extensions) of the individual's 2014 U.S. federal income tax return
Form 8832 Filing	Entities that filed an IRS Form 8832 with respect to 2014	Due date (including any applicable extension) of that entity's 2014 U.S. federal income tax return
QEF Election	In the case of a private fund that has invested in a non-U.S. portfolio company that is (or may be) a PFIC, the first U.S. person in the PFIC's ownership chain (*e.g.*, the fund itself if a U.S. fund, or each U.S. investor if a non-U.S. fund)	Due date (including any applicable extensions) of that U.S. person's 2014 U.S. federal income tax return

Filing / Delivery	Who Must File	Deadline
EIP Election	Eligible private funds wishing to opt out of mandatory tax basis adjustments	Due date (including any applicable extensions) of that private fund's 2014 U.S. federal income tax return
Certain U.S. Tax Filings with respect to Non-U.S. Entities	Private funds and their U.S. investors may be required to make certain filings with respect to non-U.S. entities owned by the private fund, including, without limitation: • IRS Form 5471 • IRS Form 926 • IRS Form 8621 • IRS Form 8865 • IRS Form 8858 • IRS Form 8938	Generally, due date (including any applicable extensions) of the U.S. person's 2014 U.S. federal income tax return

This Annual Review was prepared by Robert G. Leonard, Michael F. Mavrides, Christopher M. Wells, Joyce Y. Ng and Sydney Roth, with contributions from Michael J. Album, Martin J. Bienenstock, Mark J. Biros, Ira G. Bogner, Sean J. Hill, David T. Jones, Scott S. Jones, Jeremy Leifer, Ying Li, Kristen J. Mathews, Peter McGowan, Amanda H. Nussbaum, Geoffrey T. Raicht, Kathy H. Rocklen, Michael R. Suppappola, Ronald E. Wood, Susan L. Wiener, Phillip J. Caraballo-Garrison, Amy G. Drais, Alice G. Dullaghan, Amanda D. Hellenthal, Smriti Kodandapani, Tiffany Kwa, Erica L. Moscarello, Nicholas J. Mullen, Jason R. Nelms, Daniel G. Nelson, Adam W. Scoll, Tao Wang and Hank Zhou.

For additional information on matters discussed in this Annual Review, please contact any of the Proskauer attorneys listed below:

HEDGE FUNDS

Robert G. Leonard
212.969.3355
rleonard@proskauer.com

Michael F. Mavrides
212.969.3670
mmavrides@proskauer.com

Christopher M. Wells
212.969.3600
cwells@proskauer.com

Peter McGowan (London)
+44.20.7539.0669
pmcgowan@proskauer.com

PRIVATE INVESTMENT FUNDS

Howard J. Beber
617.526.9754
hbeber@proskauer.com

Stephanie W. Berdik
617.526.9441
sberdik@proskauer.com

Lynn Chan (Hong Kong)
+852.3410.8018
lchan@proskauer.com

Sarah K. Cherry
617.526.9769
scherry@proskauer.com

Daniel P. Finkelman
617.526.9755
dfinkelman@proskauer.com

Sean J. Hill
617.526.9805
shill@proskauer.com

David T. Jones
617.526.9751
djones@proskauer.com

Ying Li (Hong Kong)
+852.3410.8088
yli@proskauer.com

Bruce L. Lieb
212.969.3320
blieb@proskauer.com

Stephen T. Mears
617.526.9775
smears@proskauer.com

Malcolm B. Nicholls III
617.526.9787
mnicholls@proskauer.com

Charles (Chip) Parsons
212.969.3254
cparsons@proskauer.com

Marc A. Persily
212.969.3403
mpersily@proskauer.com

Robin A. Painter
617.526.9790
rpainter@proskauer.com

Yong Ren (Beijing)
+86.10.8572.1899
yren@proskauer.com

Oliver Rochman (London)
+44.20.7539.0617
orochman@proskauer.com

Kate Simpson (London)
+44.20.7539.0650
ksimpson@proskauer.com

Michael R. Suppappola
617.526.9821
msuppappola@proskauer.com

David W. Tegeler
617.526.9795
dtegeler@proskauer.com

Nigel van Zyl (London)
+44.20.7539.0609
nvanzyl@proskauer.com

TAX

Richard M. Corn
212.969.3553
rcorn@proskauer.com

Michael Fernhoff
310.284.5671
mfernhoff@proskauer.com

Robert Gaut (London)
+44.20.7539.0610
rgaut@proskauer.com

Martin T. Hamilton
212.969.3964
mhamilton@proskauer.com

Scott S. Jones
617.526.9772
sjones@proskauer.com

Mary B. Kuusisto
617.526.9760
mkuusisto@proskauer.com

Arnold P. May
617.526.9757
amay@proskauer.com

Amanda H. Nussbaum
212.969.3642
anussbaum@proskauer.com

Jamiel E. Poindexter
617.526.9773
jpoindexter@proskauer.com

SEC ENFORCEMENT

Robert J. Cleary
212.969.3340
rjcleary@proskauer.com

Ralph C. Ferrara
202.416.5820
rferrara@proskauer.com

Sigal P. Mandelker
212.969.3360
smandelker@proskauer.com

Ronald E. Wood
310.284.5660
rwood@proskauer.com

BROKER-DEALER

Benjamin J. Catalano
212.969.3980
bcatalano@proskauer.com

Charles E. Dropkin
212.969.3535
cdropkin@proskauer.com

Edward A. Kwalwasser
212.969.3515
ekwalwasser@proskauer.com

Kathy H. Rocklen
212.969.3755
krocklen@proskauer.com

CFTC/DERIVATIVES/ SECURITIES LENDING/ REPOS

Charles E. Dropkin
212.969.3535
cdropkin@proskauer.com

Peter McGowan (London)
+44.20.7539.0669
pmcgowan@proskauer.com

Christopher M. Wells
212.969.3600
cwells@proskauer.com

MARKETS AND TRADING/REGULATION

Sandra Matrick Forman
212.969.3248
sforman@proskauer.com

Edward A. Kwalwasser
212.969.3515
ekwalwasser@proskauer.com

Frank Zarb
202.416.5870
fzarb@proskauer.com

ERISA

Ira G. Bogner
212.969.3947
ibogner@proskauer.com

EXECUTIVE COMPENSATION

Michael J. Album
212.969.3650
malbum@proskauer.com

Daniel Ornstein (London)
+44.20.7539.0604
dornstein@proskauer.com

Michael S. Sirkin
212.969.3840
msirkin@proskauer.com

WHISTLEBLOWER

Connie N. Bertram
202.416.6810
cbertram@proskauer.com

Lloyd B. Chinn
212.969.3341
lchinn@proskauer.com

TRUSTS AND ESTATES

David Pratt
561.995.4777
dpratt@proskauer.com

Ivan Taback
212.969.3662
itaback@proskauer.com

Jay D. Waxenberg
212.969.3606
jwaxenberg@proskauer.com

BANKRUPTCY AND RESTRUCTURING

Martin J. Bienenstock
212.969.4530
mbienenstock@proskauer.com

Jeff J. Marwil
312.962.3540
jmarwil@proskauer.com

Geoffrey Raicht
212.969.3165
graicht@proskauer.com

FCPA/OFAC/ANTI-MONEY LAUNDERING

Mark J. Biros
202.416.5804
mbiros@proskauer.com

CYBERSECURITY/ INTELLECTUAL PROPERTY AND TECHNOLOGY

Daryn A. Grossman
212.969.3665
dgrossman@proskauer.com

Kristen J. Mathews
212.969.3265
kmathews@proskauer.com

Jeffrey D. Neuburger
212.969.3075
jneuburger@proskauer.com

MULTI-TRANCHE FINANCE

William P. Brady
212.969.3299
wbrady@proskauer.com

Gary J. Creem
617.526.9637
gcreem@proskauer.com

Steven M. Ellis
617.526.9660
sellis@proskauer.com

CAPITAL MARKETS

Julie M. Allen
212.969.3155
jallen@proskauer.com

Peter Castellon (London)
+44.20.7539.0620
pcastellon@proskauer.com

Jeremy Leifer (Hong Kong)
+852.3410.8048
jleifer@proskauer.com

Frank Lopez
212.969.3492
flopez@proskauer.com

MERGERS & ACQUISITIONS

James P. Gerkis
212.969.3135
jgerkis@proskauer.com

Jeremy Leifer (Hong Kong)
+852.3410.8048
jleifer@proskauer.com

Ronald R. Papa
212.969.3325
rpapa@proskauer.com

Steven M. Peck
617.526.9890
speck@proskauer.com

Peter G. Samuels
212.969.3335
psamuels@proskauer.com

Michael W. Woronoff
310.284.4550
mworonoff@proskauer.com

PRIVATE INVESTMENT FUNDS DISPUTES

David Chu (Hong Kong)
+852.3410.8028
dchu@proskauer.com

Peter Duffy Doyle
212.969.3688
pdoyle@proskauer.com

Timothy W. Mungovan
617.526.9412
tmungovan@proskauer.com

Kevin J. Perra
212.969.3454
kperra@proskauer.com

Beijing
Suite 5102, 51/F
Beijing Yintai Centre Tower C
2 Jianguomenwai Avenue
Chaoyang District
Beijing 100022, China
t: 86.10.8572.1800
f: 86.10.8572.1850

Boca Raton
2255 Glades Road
Suite 421 Atrium
Boca Raton, FL 33431-7360, USA
t: 561.241.7400
f: 561.241.7145

Boston
One International Place
Boston, MA 02110-2600, USA
t: 617.526.9600
f: 617.526.9899

Chicago
Three First National Plaza
70 West Madison, Suite 3800
Chicago, IL 60602-4342, USA
t: 312.962.3550
f: 312.962.3551

Hong Kong
Suites 1701-1705, 17/F
Two Exchange Square
8 Connaught Place
Central, Hong Kong
t: 852.3410.8000
f: 852.3410.8001

London
Ten Bishops Square
London E1 6EG, United Kingdom
t: 44.20.7539.0600
f: 44.20.7539.0601

Los Angeles
2049 Century Park East, 32nd Floor
Los Angeles, CA 90067-3206, USA
t: 310.557.2900
f: 310.557.2193

New Orleans
Poydras Center
650 Poydras Street
Suite 1800
New Orleans, LA 70130-6146, USA
t: 504.310.4088
f: 504.310.2022

New York
Eleven Times Square
New York, NY 10036-8299, USA
t: 212.969.3000
f: 212.969.2900

Newark
One Newark Center
Newark, NJ 07102-5211, USA
t: 973.274.3200
f: 973.274.3299

Paris
374 rue Saint-Honoré
75001 Paris, France
t: 33.1.53.05.60.00
f: 33.1.53.05.60.05

São Paulo
Rua Funchal, 418
26º andar
04551-060 São Paulo, SP, Brasil
t: 55.11.3045.1250
f: 55.11.3049.1259

Washington, D.C.
1001 Pennsylvania Avenue, NW
Suite 400 South
Washington, DC 20004-2533, USA
t: 202.416.6800
f: 202.416.6899

Proskauer

www.proskauer.com