Private Funds In Focus

Winter 2014

Year End Update – Compliance

Certain Upcoming U.S. Regulatory Deadlines

The list below briefly summarizes various regulatory obligations and filing deadlines for private fund managers under U.S. rules.

What To Do?	Who Must Do It?	Deadline
File updated Form ADV Part 1	SEC-registered advisers and (for certain portions) exempt reporting advisers	90 days after adviser's fiscal year-end
File updated Form ADV Part 2A	SEC-registered investment advisers	90 days after adviser's fiscal year-end
Deliver updated Form ADV Part 2A (or summary of changes) to clients	SEC-registered investment advisers	120 days after adviser's fiscal year-end
Send annual privacy notice to certain investors (generally individuals, 401(k) and IRA investors)	Most advisers	Annually

Annual compliance review	SEC-registered advisers	Annually
File Schedule 13G	Beneficial owner of 5% or more of a class of voting equity of U.S. public company	February 14, 2014
File Schedule 13F	Manager of $100 million or more in U.S. listed equities	No later than 45 days following end of each calendar quarter (i.e., the next filing is due February 14, 2014)
Form 13H Annual Filing	Large trader of U.S. listed equities who trades 2 million shares or $20 million on any day or 20 million shares or $200 million in any month	February 14, 2014 (if a filer's Form 13H has become inaccurate during any calendar quarter, the filer should make an amended filing "promptly" following the end of such quarter)

File Form PF	SEC-registered adviser managing at least $150 million in gross assets under management attributable to private funds	*Hedge fund advisers* with at least $1.5 billion in gross AUM: Quarterly within 60 days after the end of each fiscal quarter *Private liquidity fund advisers* with at least $1.5 billion in gross AUM: Quarterly within 15 days after the end of each fiscal quarter *All other private fund advisers* with at least $150 million in gross AUM: Annually within 120 days after the end of each fiscal year
File Form D Amendment	Funds that have an ongoing offering of interests more than a year after Form D filing	Anniversary date of the previous Form D filing (and other-than annually in the event certain information on the form has changed)

CFTC Form CPO-PQR (and NFA Form PR)	Applies to all CFTC-registered commodity pool operators (CPOs)	Large CPOs (AUM attributable to CFTC Rule 4.7 funds? $1.5 billion): Quarterly, within 60 days of each calendar quarter-end All other CPOs: Quarterly, within 60 days of the quarter-end for each of Q1, Q2 and Q3 and annually, within 90 days of each calendar year-end
CFTC/NFA Form CTA-PR	Applies to all registered commodity trading advisers (CTAs), regardless of size	Quarterly, within 45 days of each quarter-end
File financial statements for private funds operated under CFTC Rule 4.7 with NFA	Applies to all CFTC-registered CPOs	Annually, within 90 days after fiscal year-end
CFTC Rule 4.13(a)(3) annual affirmation filing	Any private fund continuing to rely on the CFTC Rule 4.13(a)(3) "de minimis" exemption	Annually, within 60 days of the end of each calendar year
CFTC Rule 4.14(a)(8) annual affirmation filing	Any CTA continuing to rely on the CFTC Rule 4.14(a)(8) exemption	Annually, within 60 days of the end of each calendar year

File TIC B Monthly and Quarterly Forms	Generally applies to U.S. managers and/or U.S. funds with reportable claims or liabilities in excess of $50 million (or $25 million with respect to an individual country)	Monthly Forms – No later than 15 days following the end of a month Quarterly Forms – No later than 20 days following the end of a calendar quarter
File TIC Form S	U.S. adviser to report at least $50 million of transactions (i.e., purchases, sales, redemptions and new issues) in long-term securities with non-U.S. residents by U.S. clients in any month	Monthly
File Form SLT	U.S. adviser to report at least $1 billion of (i) long-term securities issued by U.S. clients to non-U.S. investors plus (ii) non-U.S. long-term securities owned by U.S. clients	Monthly

Year End Update – Tax

Certain U.S. Tax Filings and Elections

The list below briefly summarizes certain U.S. tax filings and elections (and related deadlines) relevant to private investment funds, their investors and related persons. For key FATCA action items and deadlines, please see "FATCA Update" below.

What To Do?	**Who Does It?**	**Deadline**
Section 83(b) Filings	If an individual filed a Section 83(b) election with the IRS during 2013, that individual must attach a copy of the filed election to his or her U.S. federal income tax return for 2013.	The due date (including any applicable extensions) of that individual's 2013 U.S. federal income tax return
Form 8832 Filings	If an entity filed an IRS Form 8832 (an entity classification election) with respect to 2013, 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 due date (including any applicable extensions) of that person's 2013 U.S. federal income tax return

"Qualified Electing Fund" (QEF) Elections	If a 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.	For PFICs acquired in 2013, the due date (including any applicable extensions) of that U.S. person's 2013 U.S. federal income tax return
"Electing Investment Partnership" (EIP) Elections	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 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 2013 (and subsequent years), the due date (including any applicable extensions) of the fund's 2013 U.S. federal income tax return

Certain U.S. Tax Filings with respect to Non-U.S. Entities	U.S. funds and their U.S. investors may be required to make certain filings with respect to non-U.S. entities owned by the 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 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); 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 due date (including any applicable extensions) of the U.S. person's 2013 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 U.S. 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, private equity funds and hedge funds themselves generally are not considered "financial accounts." Nevertheless, funds and their managers may be required to file FBARs if they have non-U.S. bank or other financial accounts.	Must be filed electronically (no paper filings allowed) by June 30, 2014 using the E-Filing System maintained by the U.S. 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 has been extended again by FinCEN to June 30, 2015.

Anti-Corruption Investigations in the Private Fund World

Mark Biros

As private investment firms expand further into emerging markets seeking greater margins of return, their margin for error narrows. Anti-corruption efforts abound internationally. Careful business and legal planning, employed to enhance the value of a transaction, similarly must be applied to avoid anti-corruption issues that can eviscerate a deal's value. All business decisions require an understanding of the marketplace, identifying the risks, and creating an effective strategy to minimize such risks while maximizing the financial reward. Understanding the interplay between risk and reward is the key to success. The same is true when navigating the anti-corruption legal environment.

High-level officials from the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) speaking at the 30th International Conference on the Foreign Corrupt Practices Act (FCPA) held in late November 2013 boldly stated that international anti-corruption investigations not only are here to stay but also will increase if and when global cooperation expands. The prophesy was self-fulfilling. Over 125 prosecutors, judges, investigators and regulators from 30 countries attended a U.S. government-sponsored conference last year to exchange ideas on best practices to enforce anti-corruption provisions. FCPA investigations are at a historic high. The U.K. Bribery Act has seen steady growth of enforcement. More international enforcement is to come. Brazil added to its legal anti-corruption arsenal the Clean Company Law, which establishes a corporate anti-corruption regime that shares characteristics with the FCPA and the U.K. Bribery Act, effective January 2014. The People's Republic of China took very visible actions against high-level government officials and corporate executives to showcase its efforts.

The FCPA

The FCPA has two general enforcement sections – one directed at anti-bribery; the other at accurate books and records. The former prohibits any corrupt payment to a foreign official to obtain or retain business for or with, or direct business to, any person. It applies to public and private entities that are organized under U.S. law or that have their principal place of business in the United States. Officers, directors, employees, agents or shareholders acting on behalf of any entity covered by the FCPA also may be liable. Proscribed payments may include not only those made in cash but also contributions, gifts, entertainment and travel disbursements. Any payment either directly or through a third-party agent to a foreign official to induce that official to violate his or her lawful duty or to secure any improper advantage is covered by the statute. Payments to persons or entities associated with a foreign official, if made for the same purpose, also are prohibited.

"Knowledge" that the payment is made for a corrupt purpose need not be established directly. It is enough for the government to prove that the purported offending party was aware of a high probability that the payment was corrupt or that the party postured itself to be "willfully blind" or to "recklessly disregard" whether the payment was illegal. This concept places the onus upon the organization to be cognizant of all that is done on its behalf. Claiming unawareness is often not a viable defense.

The FCPA also requires that public issuers maintain accurate books and records as well as adequate internal accounting controls aimed at preventing and detecting FCPA violations. Since no general ledger has a line item for "Bribes Paid," falsifying books to conceal improper payments is the norm when illegal payments are made. This is anathema. Accuracy is the paradigm. And to top it off, parent companies may be liable for false entries in their subsidiaries' books and records as well.

The U.K. Bribery Act

The U.K. Bribery Act is conceptually similar to the FCPA except that it has a broader reach. Offenses committed elsewhere that retain a "close connection" to the U.K. are prosecutable as are those committed in the U.K. An entirely new offense that broadly expands the U.K. Bribery Act's extraterritorial reach has been established: the criminalization of a commercial entity's failure to prevent bribery. Outlining all the other differences between the U.K. Bribery Act and the FCPA is beyond the scope of this article. But in general, the U.K. Bribery Act covers a wider range of offending conduct. For example, unlike the FCPA, it covers commercial bribery, not just improper payments in connection with government commerce. It criminalizes the actions of the recipient of the payment, also unlike the FCPA. "Facilitating" payments, generally defined as nominal payments to secure ministerial governmental action, legal under the FCPA, are not under the U.K. Bribery Act.

New Brazilian Laws

Brazil's Clean Company Law shares characteristics with the FCPA and the U.K. Bribery Act. It imposes strict civil and administrative liability on Brazilian companies, and those international companies with a presence in Brazil, for domestic and foreign bribery. Civil and administrative liability, restitution for damages, administrative fines, and other civil penalties for the acts of its directors, officers, employees and agents may be imposed when such prohibited acts benefit the company. Joint and several liability for fines and restitution for damages extend to the offending company's parent company, controlled entities, affiliates and joint venture partners. Like the FCPA and the U.K. Bribery Act, successor liability in the event of mergers or acquisitions may be imposed in certain circumstances, as a result of which an acquirer may be liable for pre-acquisition corrupt acts of the acquired entity.

Potential Areas of Liability for Private Funds

Private investment funds risk anti-corruption exposure in raising and investing funds. Using placement agents may have its benefits because of the agent's familiarity with various investing entities, but care must be taken that the agent understands and complies with applicable anti-corruption requirements. Private investment firms are not only liable for the acts of their officers, directors and employees, but also the agents they utilize. Consequently, careful due diligence must be done as to the background and practices of any placement agents. After engagement, the agent's conduct should be monitored for compliance.

Another fertile area of U.S. investigation relating to private funds and fundraising efforts is in dealings with sovereign wealth funds (SWF). Individuals employed by a SWF are considered "foreign officials" under the FCPA. Consequently, private investment fund managers should evaluate carefully the FCPA implications of providing anything of value to those who influence the investment decisions of the SWF. Anything of value given to such persons, directly or indirectly, may be deemed an improper inducement to secure or maintain continued investment by the SWF, thereby exposing the private investment fund manager to FCPA liability.

Private fund managers also should consider pre-acquisition due diligence directed at uncovering anti-corruption issues in a company into which a private investment fund is investing. FCPA or other anti-corruption liabilities imposed on a portfolio company could dramatically degrade the value of the investment. Understanding the legal ramifications in the anti-corruption area of the targeted entity's prior business conduct is potentially as critical as any other factor affecting the investment.

The location of the entity into which the fund is investing or where the target company conducts its business may increase anti-corruption concerns. Private investment firms with investments in certain jurisdictions may be at greater risk of confronting serious corruption activity. *Transparency International* publishes a Corruption Perception Index which measures the level of perceived corruption in the public sector of over 175 countries. It provides insight, albeit limited, with which investors may assess the likelihood of potential risks in a particular jurisdiction.

Post-Acquisition Remedial Efforts

Assuming a private investment fund manager discovers an issue in due diligence that may cause liability in the anti-corruption area and nonetheless decides to go forward with the acquisition of a target company, adequate policies and procedures must be instituted to address the matter post-acquisition. The DOJ and the SEC both look with favor upon disclosures and remediation efforts directed at anti-corruption issues by acquiring entities. Offending conduct, though, must be thoroughly investigated and corrected, personnel action must be taken, policies must be evaluated and improved, if necessary, and any remedial action should be complete, or nearly complete, before making any such disclosure. Providing the government with the identification and remediation of the problem renders more likely a favorable response.

Conclusion

Increased enforcement in the anti-corruption area highlights the need for private investment fund managers to be sensitive to issues in this area and to adopt precise policies and procedures to ensure compliance with anti-corruption laws, including a mechanism to detect offending activities, procedures to investigate alleged infractions and policies to devise remedial action.

FATCA Update

The past year has seen a flurry of activity surrounding the rapidly approaching Foreign Account Tax Compliance Act (FATCA), which promises to affect virtually all U.S. and non-U.S. funds.

By way of background, 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 (1) enter into an agreement with the IRS to, among other things, report certain information to the IRS about their U.S. account holders or interest holders, or (2) 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 will be subject to a 30% withholding tax on a wide range of U.S.-source payments beginning July 1, 2014.

Non-U.S. Funds Can Begin Registering Now

Non-U.S. funds are FFIs under FATCA and, accordingly, must register with the IRS and put processes in place to identify and report their U.S. investors or suffer a 30% withholding tax. FATCA registration is done via the IRS's online FATCA portal. FFIs generally must finalize their registration by April 25, 2014 in order to avoid FATCA withholding, but FFIs residing in an IGA jurisdiction are given an extra six months. The FATCA portal is now open, and FFIs can now register.

FATCA Also Affects U.S. Funds

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 noncompliant investors beginning July 1, 2014, and report certain information about any withholdings to the IRS. As of this writing, the IRS still has not yet finalized the revised Forms W-8 on which non-U.S. investors must certify their FATCA status.

IGAs to the Rescue

The U.S. government has collaborated with foreign governments to develop two alternative model 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 still 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 IGA landscape is still evolving. While the U.S. reportedly has engaged with more than 50 jurisdictions on FATCA matters, as of this writing, the U.S. has initialed or signed just 21 IGAs with the countries listed below. These countries are in varying stages of enacting laws to implement their respective IGAs.

Model 1 IGAs	
Cayman Islands	Italy

Costa Rica	Jersey
Denmark	Malta
France	Mexico
Germany	Netherlands
Guernsey	Norway
Hungary	Spain
Ireland	United Kingdom
Isle of Man	
Model 2 IGAs	
Bermuda	Switzerland
Japan	

The U.S. has also signed an IGA with Mauritius, but the U.S. and Mauritian governments have not yet disclosed whether the IGA is based on the Model 1 or Model 2 IGA.

What Can Funds Do Now?

Both U.S. and non-U.S. funds should be prepared to obtain revised Forms W-8 (once finalized) from their investors in order to assess their FATCA status. Non-U.S. funds also should determine which of their entities must register with the IRS and whether such entities will be subject to the FATCA regulations or an IGA. The definition of FFI is broad and can include fund entities, general partners, managers/advisors, carried interest vehicles, AIVs, blockers, and holding companies, among others.

Summary of Key Dates

In July 2013, the IRS pushed most FATCA deadlines back by six months. Below is a summary of some key dates:

April 25, 2014 – Last day on which FFIs can finalize their registration on the FATCA portal to avoid withholding beginning on July 1, 2014 (FFIs residing in an IGA jurisdiction are given an extra six months to register with the IRS).

July 1, 2014 – FATCA withholding begins on "withholdable payments" (e.g., U.S.-source dividends and interest) made to non-compliant FFIs and "non-financial foreign entities" (NFFEs).

January 1, 2017 – FATCA withholding begins on the payment of gross proceeds from the sale of property that produces U.S.-source interest and dividends to non-compliant FFIs and NFFEs.

January 1, 2017 – FATCA withholding begins no earlier than this date (pending guidance) 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.

Update on SEC Examinations of Investment Advisers

The SEC's Office of Compliance Inspections and Examinations recently announced that its ongoing "presence exam" initiative is ahead of schedule and will likely result in examination of a greater number of newly registered investment advisers than previously anticipated. In October 2012, in connection with a substantial increase in investment adviser registrations following implementation of the U.S. Dodd-Frank Act, the SEC notified newly registered investment advisers of its new national exam program, pursuant to which the SEC intended to conduct "focused" examinations (i.e., presence exams) of approximately 25% of the approximately 1,500 newly registered advisers over the following two-year period. One year later, the SEC reported that approximately 250 presence exams had been completed or were in progress, and the SEC believes that it is on pace to examine approximately 40% of the new registrants -- well above the initial 25% target -- by October 2014. The SEC has stated that the presence exams generally focus on five higher-risk areas: marketing, portfolio management, conflicts of interest, safety of client assets (custody) and valuation. Based on the presence exams conducted to date, common deficiencies among private fund managers have included misleading or insufficient marketing information, weaknesses in internal compliance and control regimes, issues with the maintenance of books and records and matters related to conflicts of interest.

The SEC also has announced that in 2014 it will seek to conduct first-time examinations of many registered advisers that have been registered for three or more years or that are domiciled outside of the United States. Similar to "presence exams", these examinations are expected to focus on a limited number of issues, with a goal of establishing contact with a broad number of advisers in this "never-been-examined" group.

State of the Market – Asia

We are pleased to announce the arrival of Yong Ren and Lynn Chan to our Asian Funds Group. Yong has joined our Beijing office as a partner and Lynn has joined our Hong Kong office as a consultant. Both Yong and Lynn have been based in the region for a number of years and have extensive experience acting for fund managers and institutional investors. Their practice includes sponsor-side fund establishment matters in respect of both USD and RMB funds, investor representations and secondary transactions.

The Asian fundraising market has been very interesting of late. RMB fundraising has dried up for a variety of reasons, but in large part due to the lack of interest from Chinese investors following the closure of China's IPO market. As for USD fundraising, there has been a distinct divergence. On the one hand, the vast majority of multi-billion dollar funds in Asia have had no problem reaching their targets, even for some managers raising first-time funds. On the other hand, smaller funds have been faced with a very tough fundraising market, not aided by the fact that a large number of smaller Asian funds are first-time funds. The target sizes of such funds often have been reduced mid-fundraising, and final closings are on average taking 18 months, and in some cases up to 24 months, to complete. Investors committing to a fund at an early closing have been keen to ensure that they are protected in the event the fund does not reach its target. Accordingly, minimum first closing fund sizes and defining an investor's commitment by reference to a percentage of the fund's size rather than a fixed dollar amount have become increasingly common. Investors also have been encouraging fund sponsors to complete a deal or two so that investors can see what the fund's portfolio might look like, thereby diluting the concept of a blind pool investment. It remains to be seen when the overall Asian fundraising climate will improve. However, the recent re-opening of China's IPO market, which has been closed since late 2012, should help to some extent in its recovery.

SEC Staff Provides Guidance on "Bad Actor" Provisions

The SEC staff recently issued interpretive guidance addressing the Regulation D "bad actor" disqualification provisions, primarily focusing on who constitutes a "20% beneficial owner." Effective as of September 23, 2013, Rule 506(d) generally prohibits an issuer from relying on the Rule 506 exemption from registration for private securities offerings if the issuer or certain other "covered persons" -- including any beneficial owner of 20% or more of the issuer's voting equity securities -- is subject to certain enumerated bad act triggering events that occur on or after that date. If the triggering event occurred prior to September 23, 2013, the issuer is required to make disclosure of the bad act to investors under Rule 506(e).

Pursuant to the staff guidance, the term "beneficial owner" should be interpreted in the same manner as under Rule 13d-3 of the Securities Exchange Act. As a result, the term includes any person who directly or indirectly has sole or shared (1) voting power, which includes the power to vote, or direct the voting of, the relevant security, and/or (2) 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 Securities 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.

In prior interpretative guidance, the SEC staff clarified other aspects of the bad actor provisions, including that (1) the term "affiliated issuer", with respect to any issuer and any offering, includes only an affiliate that is issuing securities in the same offering; (2) 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; (3) 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 September 23, 2013 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 (4) the provisions of Rule 506(d) 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.

Recent CFTC Developments

In the crush of dealing with the new rules and mechanisms for trading and clearing swaps, private fund managers may have missed a few developments of particular relevance to Commodity Futures Trading Commission (CFTC) registered commodity pool operators (CPOs) and commodity trading advisors (CTAs).

CPOs Must File Notice with NFA if Records Kept by Third Party

CFTC rules require that a registered CPO maintain certain books and records at its main business office. The CFTC recently amended its recordkeeping rules to allow all CPOs (including CPOs operating pools pursuant to the partial exemption under CFTC Rule 4.7) to maintain required records with a third party, including a pool's administrator or custodian. However, if records are kept by a third party, the CPO must file a notice with the National Futures Association (NFA) and attach a required form of certification from the third party holding the records.

CTAs that Are Members of a Designated Contract Market or Swap Execution Facility Must Record Oral Conversations

The CFTC recently extended until May 1, 2014 the compliance date for new rules that require a registered CTA that is also a member of a Designated Contract Market (DCM) or Swap Execution Facility (SEF), as defined under CFTC rules, to record, and store for a period of one year, oral communications made in the course of the business of dealing in commodity interests and cash commodities. The new rule defines a member of a DCM or SEF to include persons having trading privileges on a registered DCM or SEF. Notably, the new recording requirement does not apply to either funds or managers registered only as CPOs.

New U.S. Person Definition for Cross-Border Swaps

A new definition of the term "U.S. person" for purposes of cross-border swaps came into effect in October 2013, with potentially very broad implications for private fund managers. The new definition is already being challenged by three industry trade groups in U.S. court proceedings. The new definition replaces a narrower interpretation of U.S. person adopted by the CFTC on an interim basis in January 2013. Importantly, the new definition significantly expands the definition of U.S. person to include two new categories applicable to many private funds:

- **a fund with its principal place of business in the United States:** The CFTC for this purpose interprets the "principal office" of a fund as including the principal location of senior personnel responsible for either formation and promotion of the fund, or making investment decisions on behalf of the fund. As a result, many investment funds managed by an investment manager located in the United States will be deemed to be a U.S. person for purposes of the new interpretation, without regard to where the fund was formed or the nationality or residence of its investors.

- **a fund that is majority-owned by U.S. persons:** For this purpose, majority ownership is measured by either vote or equity, and requires a look-through to the owners of any entity that controls or is under common control with the fund.

The consequences to a private fund of being characterized as a U.S. person are complex and can affect, among other things, the willingness of non-U.S. counterparties to deal with the fund, and the reporting obligations applicable to both parties to a swap. Swap counterparties are likely to ask private funds that use swaps either to make new representations under the new interpretation, or to confirm the accuracy of prior representations. Private funds also may need to review existing swap agreements in order to determine whether or not representations previously made need to be updated.

Note that the new definition of U.S. person with respect to cross-border swaps is not the same as the definition of U.S. person in CFTC Rule 4.7, which has traditionally been used for most purposes under CFTC rules.

Recent Client Alerts

Initial TIC B Forms Filing Deadline for Investment Managers on January 15, 2014

Beginning with the period ending December 31, 2013, the U.S. Department of the Treasury expanded the scope of the financial institutions required to report cross-border claims, liabilities and short-term securities holdings on Treasury International Capital (TIC) B Forms to include (i) a U.S. investment manager (on behalf of itself and any U.S. or non-U.S. funds that it manages) and (ii) U.S. resident funds managed by a non-U.S. resident investment manager, in each case if the reporting person is owed "reportable claims" or owes "reportable liabilities" in excess of certain monetary thresholds. This change is explained in greater detail in this alert.

SEC Issues Interpretive Guidance on the Venture Capital Fund Adviser Exemption

On December 2, 2013, the SEC's Division of Investment Management issued a new "Guidance Update" that provides some important interpretive guidance on the exemption from registration under the Investment Advisers Act of 1940 for certain venture capital fund advisers (the VC Exemption). In particular, the Guidance Update clarifies that certain structures and practices common in the venture capital fund industry will not impact the availability of the VC Exemption. Read this alert to learn more about the Guidance Update.

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