Lowenstein Sandler

Client Alert

Investment Management

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2018/2019 Developments and Compliance Checklists

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Lowenstein Sandler's Investment Management Group is pleased to provide you with (i) a summary of recent legislative and regulatory developments that impact the investment management community and (ii) checklists of annual considerations for private investment funds, investment advisers, commodity trading advisors, and commodity pool operators. The checklists appear after the legislative and regulatory summary. For more information regarding any matter covered in this update, please contact one of the attorneys in our Investment Management Group.

SELECT LEGISLATIVE AND REGULATORY DEVELOPMENTS

CFTC Streamlines Regulations for Commodity Pool Operators and Commodity Trading Advisors

Synopsis: On October 9, 2018, the Commodity Futures Trading Commission ("CFTC") unanimously approved proposed rules streamlining regulations for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs"). These rules are part of the CFTC's Keep It Simple, Stupid (KISS) Initiative, which seeks to simplify and modernize the CFTC's rules. These rules ease reporting requirements on CPOs and CTAs.

Status: The rules codify long-standing staff advisories and no-action letter relief and include the following changes:

- CPOs that only solicit and/or accept funds from non-U.S. persons for participation in offshore commodity pools may claim an exemption from CPO registration and compliance requirements with respect to such pools, while maintaining registration with respect to commodity pools for which CPO registration is required.
- U.S.-based CPOs of offshore commodity pools that have U.S. participants are now able to maintain the commodity pool's original books and records in the offshore location of the pool.
- A person who would be statutorily disqualified from registering with the CFTC as a CPO is prohibited from claiming or affirming an exemption from CPO registration.
- Registration relief is granted for CPOs and CTAs of entities qualifying as family offices.
- Investment advisers to business development companies are now excluded from the definition of CPO under 17 CRF § 4.5, in the same manner as investment advisers to registered investment companies.
- Qualifying CPOs are able to engage in general solicitation with respect to their pool offerings, as envisioned by the JOBS Act of 2012.
- CPOs that operate only commodity pools exempt or excluded under 17 CRF §§ 4.5 and 4.13 are granted relief from filing Form CPO-PQR, which requires CPOs to periodically report detailed information regarding pools and other funds that the CPOs operate.
- Certain CTAs are granted relief from filing Form CTA-PR, which requires CTAs to report general information about the CTA and its trading programs.
- CTAs that do not direct trading of any commodity interest accounts are granted relief from filing.
- Registered CTAs that advise only pools in which the CTA is also a CPO are granted relief from filing.

The Lowenstein Sandler LLP Investment Management Group alert analyzing the modified CFTC rules is available here.

Department of Labor's Fiduciary Rule Vacated

Synopsis: On March 15, 2018, the U.S. Court of Appeals for the 5th Circuit vacated the U.S. Department of Labor ("DOL") regulation regarding who would be treated as a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") (the "Fiduciary Rule"), which decision became effective on June 21, 2018.

Status: The Fiduciary Rule went into effect on June 9, 2017, though the effectiveness of certain provisions was delayed until July 1, 2019. On March 15, 2018, the U.S. Court of Appeals for the 5th Circuit in a 2-1 decision held that the DOL exceeded its legal authority in establishing the Fiduciary Rule, and vacated the Fiduciary Rule in its entirety. The majority found that the DOL expanded the definition of "investment advice fiduciary" beyond the intent of Congress. The Department of Labor declined to appeal to the U.S. Supreme Court, and the 5th Circuit issued its formal mandate vacating the Fiduciary Rule on June 21, 2018. As a result, the Fiduciary Rule no longer exists. Advisors, fund managers, and others who made

changes to agreements, policies, and procedures in order to comply with the Fiduciary Rule should consider whether to unwind such measures.

Given the demise of the Fiduciary Rule, advisors will be held to the prior standard of who is considered a fiduciary under ERISA, which required applying a five-part test. Under that test, an advisor is considered a fiduciary if the advisor makes investment recommendations on a regular basis pursuant to a mutual understanding that the advice will serve as a primary basis for investment decisions and be individualized to the particular needs of the plan.

However, be aware that even though the Fiduciary Rule is no longer in effect, the U.S. Securities and Exchange Commission ("SEC") and some individual states have indicated that they may create their own fiduciary standards governing brokers. Advisors should keep an eye on these developments.

The Lowenstein Sandler LLP Investment Management Group alert regarding the 5th Circuit's decision is available here.

SEC OCIE Issues Guidance on Record-keeping Requirements for Electronic Messaging

Synopsis: On December 14, 2018, the SEC's Office of Compliance Inspections and Examinations ("OCIE") published its "Observations from Investment Adviser Examinations Relating to Electronic Messaging" risk alert. OCIE's observations focused on whether and to what extent advisers complied with the Books and Records Rule and adopted and implemented policies and procedures as required by the Compliance Rule. The key takeaway of the examinations was that use of electronic messaging by advisers is "pervasive," and thus advisers should implement policies and procedures to monitor and capture electronic communications consistent with certain best practices enumerated by OCIE in the risk alert.

Status: Many registered investment advisers prohibit the use of personal social media and email accounts for business purposes. While prohibiting the use of personal social media and email accounts for business purposes, advisers typically implement (i) training, (ii) limited testing of personal accounts, and (iii) required periodic certifications of adherence covering such prohibition. Where the investment adviser uses social media and email for business purposes, it is typically done through firm-provided, -recorded, and -monitored email and social media handles. In addition, the use of electronic messaging platforms can be uneven among investment advisers, with digital advisers leading the way in novel uses of electronic messaging platforms for business purposes. Among different types of investment advisers, many firms do not provide employees with laptops or cellphones, allowing employees to access firm systems from personal devices.

In light of the proliferation of electronic messaging platforms in recent years and the variety of ways in which advisers use these platforms, the SEC has sharpened its focus on the use of electronic messaging as a core element of the compliance programs of registered investment advisers. While electronic messaging presents new and unique challenges to advisers and compliance personnel, the universe of tools, services, and service providers available to oversee electronic messaging has also grown. For that reason, compliance professionals should carefully consider the OCIE recommendations contained in the risk alert and, as with all elements of a modern compliance program, leverage personnel and technology to promote, monitor, and ensure that any permitted use of electronic messaging complies with the requirements of the Investment Advisers Act of 1940 ("Advisers Act"). The full text of the OCIE's risk alert can be found here.

The Lowenstein Sandler LLP Investment Management Group alert analyzing the OCIE's risk alert is available here.

SEC's OCIE Releases 2019 Examination Priorities for Investment Advisers, Broker-Dealers, and Other Financial Industry Professionals

Synopsis: On December 20, 2018, the OCIE published its 2019 Examination Priorities (the "2019 Exam Priorities") for its National Exam Program. As compared to recent years, OCIE's priorities have largely stayed consistent. The six themes for OCIE's 2019 Exam Priorities, which OCIE considers "perennial risk areas and developing products and services," are (i) retail investors, (ii) compliance and risks regarding critical market infrastructure, (iii) FINRA and MSRB, (iv) digital assets, (v) cybersecurity, and (vi) anti-money laundering.

Status: OCIE emphasized that while these six themes will drive many of its examinations, "the scope of any examination is determined through a risk-based approach that includes analysis of the registrant's operations, products offered, and other factors." The most notable change in examination priorities is that, because digital assets continue to grow in both volume and importance, OCIE has now established Digital Assets as a stand-alone category, as opposed to a subtopic heading as it was in 2018. With both institutional and retail investors continuing to show interest in these assets, OCIE will closely monitor and determine when certain digital assets can be considered securities. We have also been advised of instances in which OCIE has taken the rare step of examining Exempt Reporting Advisers to digital asset funds to determine, among other things, whether the assets are securities and how the assets are being custodied. In light of this new paradigm, financial industry professionals–including investment advisers, broker-dealers, and traders–should ensure that they are complying with all existing and applicable regulations.

OCIE highlighted that the examination program has continued to grow in recent years, with examinations in 2018 increasing by 10 percent as compared to 2017. Notably, examinations regarding investment advisers "increased to approximately 17 percent of SEC-registered investment advisers, up from approximately 15 percent in 2017."

Investment advisers and broker-dealers should be aware that a number of new subtopic headings have been featured in OCIE's 2019 Exam Priorities for the first time:

Broker-Dealers Entrusted With Customer Assets. OCIE will monitor to make sure broker-dealers that hold customer cash and securities are abiding by applicable rules and regulations, including the Customer Protection Rule, which places restrictions on how broker-dealers can use customer assets.

Conflicts of Interest. As fiduciaries to their clients, investment advisers must act and advise with the best interests of their clients in mind. Among other things, OCIE will review firm policies and procedures regarding the use of affiliated service providers and products, securities-backed non-purpose loans and lines of credit, and borrowing funds from clients.

Microcap Securities. For firms selling stocks of companies below a $250 million market capitalization, among other things, OCIE will monitor for manipulative schemes, such as "pump and dump" schemes.

Portfolio Management and Trading. OCIE will examine portfolio management processes with an emphasis on fair allocation of investment opportunities among clients, consistency between investments and client objectives, disclosure of material information to clients, and regulatory compliance. OCIE will also monitor to make sure that portfolio recommendations are in the best interests of clients.

The full text of the OCIE's examination priorities can be found here. The Lowenstein Sandler LLP Investment Management Group alert analyzing the OCIE's examination priorities is available here.

Financial Industry Regulatory Authority ("FINRA") Risk Monitoring and Examination Priorities for 2019

Synopsis: On January 22, 2019, FINRA announced its 2010 risk monitoring and examination priorities. The examination priorities reflect several materially new areas of emphasis for FINRA's risk monitoring and examination programs that member firms should consider as they identify opportunities to improve their compliance, supervisory, and risk management programs.

FINRA will continue to use its regulatory program to monitor other areas aside from those addressed in these examination priorities, such as anti-money laundering issues. FINRA member firms should also familiarize themselves with past guidance on examination priorities and other FINRA guidance in order to ensure compliance with applicable rules and regulations and an understanding of the areas relating to their business lines that FINRA is prioritizing.

Status: FINRA's 2019 risk monitoring and examination priorities reflect guidance for FINRA-regulated members regarding areas that it will pay most attention to this year, falling under several broader categories: (i) certain highlighted items, (ii) sales practice risks, (iii) operational risks, (iv) market risks, and (v) financial risks.

The full text of FINRA's 2019 Risk Monitoring and Examination Priorities Letter can be found here. The Lowenstein Sandler LLP Investment Management Group alert analyzing FINRA'S risk monitoring and examination priorities is available here.

National Futures Association (the "NFA") Interpretive Notice re: CPO Internal Controls Systems

Synopsis: On December 10, 2018, the NFA published an interpretive notice regarding CPO internal controls systems. Each CPO must implement an internal controls system that is designed to deter fraudulent activity by employees, management, and third parties in order to address the safety of customer funds and provide reasonable assurance that a CPO's commodity pool's financial reports are reliable and that the CPO is in compliance with all CFTC and NFA requirements. The interpretive notice provides guidance on designing and implementing an adequate internal controls system and the minimum components that must be included.

Status: The interpretive notice emphasizes the need for: (i) written policies and procedures that fully explain the internal controls framework, (ii) demonstrated management commitment to integrity and ethical values and emphasizing the importance of establishing and following internal controls, (iii) no employee inappropriately circumventing internal controls, and (iv) an escalation policy for employees to report senior management (including procedures to escalate to a regulator).

The interpretive notice goes on to highlight several generally applicable risk areas: (i) the importance of separation of duties, (ii) pool subscriptions, redemptions and transfers, (iii) risk management and investment and valuation of pool funds and (iv) use of administrators.

The full text of the interpretive notice can be found here.

Key Tax Reform Provisions Affecting Hedge Funds, Private Equity Funds and Other Investment Vehicles

Synopsis: The Tax Cuts and Jobs Act (the "Act") passed in December 2017 included a number of provisions of particular importance to the investment management industry.

Status: Among other changes, the Act (i) imposes additional time-based restrictions on the recognition of long-term capital gains in respect of carried interest; (ii) subject to limitations, provides a new 20 percent deduction to individuals, trusts, and estates that receive income from certain S corporations, sole proprietorships, and partnerships (generally not available to investment funds or investment managers, but could be used by partners in a real estate investment fund); (iii) taxes corporate income at a flat 21 percent rate, resulting in less tax leakage in connection with an investment in a fund through a domestic blocker; (iv) restricts the deductibility of interest paid or accrued by certain investment funds that are engaged in a trade or business; (v) subjects to U.S. graduated income tax rates the gain on the sale of a partnership interest by a foreign person (including a foreign blocker), which may result in increased withholding responsibilities; and (vi) eliminates miscellaneous itemized deductions for expenses that were previously subject to the 2 percent floor. In addition, the Act created the ability to defer tax on certain capital gains and sometimes even avoid those taxes by investing in a qualified opportunity

fund. The IRS recently released guidance on qualified opportunity funds.

The Lowenstein Sandler LLP Tax Group alert analyzing the Act's impact on hedge funds, private equity funds, and other investment vehicles is available here, and alerts discussing qualified opportunity funds are available here and here.

Markets in Financial Instruments Directive II ("MiFID II")

Synopsis: MiFID II is a cornerstone financial services regulation for financial institutions providing services in the European Union ("EU") which was implemented on January 3, 2018. MiFID II replaces MiFID I, which became effective in November 2007. MiFID II consists of the MiFID II Directive and the Markets in Financial Instruments and Amending Regulation.

Status: Among other requirements, MiFID II provides (i) conduct of business and organizational requirements for investment firms, (ii) authorization requirements for regulated markets, (iii) regulatory reporting requirements to avoid market abuse, (iv) trade transparency obligations, and (v) rules on the admission of financial instruments to trading.

MiFID II impacts a broad spectrum of areas, including providing specific rules and/or guidance with respect to (i) investor protection; (ii) best execution; (iii) complex and non-complex financial instruments for purposes of appropriateness requirements; (iv) the definition of advice; (v) the provision of speculative products to retail investors; (vi) intermediaries; (vii) transparency; (viii) commodity derivatives; (ix) data reporting; (x) market structures; (xi) secondary markets; (xii) cross selling; (xiii) complex debt instruments and structured deposits; (xiv) transaction reporting, order record-keeping, and clock synchronization; (xv) trading halts; (xvi) market operators and data reporting service providers; (xvii) assessment of knowledge and competence; and (xviii) position limits.

MiFID II impacts all U.S. investment advisers to some extent, but particularly those having EU-based sub-advisors, brokers, or clients or trading in the EU.

General Data Protection Regulation ("GDPR")

Synopsis: On May 25, 2018, after four-plus years of negotiation and a two-year phase-in period, the GDPR became effective and replaced the prior Data Protection Directive (95/46/EC). **The GDPR has extraterritorial jurisdiction over any entity that collects, receives, or otherwise processes the personal data of individuals located in the European Economic Area ("EEA"), regardless of the entity's location of processing. Failure to comply with the GDPR may subject an entity to stiff penalties, including fines up to 2-4 percent of global annual turnover (revenue) or 10-20 million euros, whichever is higher.**

Status: The GDPR impacts a myriad of operational and strategic programs for U.S. entities that fall within its jurisdiction. In addition to its extraterritorial reach, the GDPR expands the concept of personal data to specifically include data that indirectly identifies a natural person (such as IP address, device identifiers, or similar data that entities may consider "alternative data"), provides for "joint and several liability" for data misuse among controllers and processors, and requires appointment of a data protection officer by any organization that monitors the behavior of data subjects or processes sensitive data as a "core activity" and on a "large scale."

The GDPR cites lack of valid consent, data transfer violations (including breach or lack of standard contract clauses or binding corporate rules, as applicable), inability to fulfill data subject rights (e.g., access, correction, deletion, portability), and certain profiling violations as among those eligible for the maximum 4 percent penalty or 20 million euros, whichever is higher. Untimely or improper data breach notifications, failure to conduct data protection impact assessments, and insufficient data protection addendums (and violations of such addendums by processors) count among the many violations subject to a maximum fine of 2 percent or 10 million euros, whichever is higher.

Any entity that **collects, receives, or processes the personal data of individuals located in the EEA** (or is otherwise subject to GDPR, such as certain entities that have a physical presence in the EEA) should have an implementation and compliance plan with respect to GDPR which should include (i) a mapping of data flows within or through the entity, including when, how, and where personal data is collected, processed, and stored, and documenting a valid legal basis for processing; (ii) identifying and documenting the nature and scope of notices to, and consents from, data subjects to determine whether they satisfy the GDPR's particular standard; (iii) ensuring the permitted purpose(s) consented to by the data subject are aligned with internal data use practices; and (iv) assessing whether any changes may be required in connection with contracts and relationships with customers, controllers, processors, and subprocessors.

Details regarding the GDPR can be found in the Lowenstein Sandler LLP Privacy and Information Security Group alert available here.

COMPLIANCE CHECKLISTS

Private Investment Funds and Their Advisers

- ☐ **Conduct periodic review of compliance policies.**
- ☐ **Provide/collect new issues certifications regarding whether funds/investors are "restricted persons."**
- ☐ **Conduct periodic review and update of offering documents.**
- ☐ **Consult counsel regarding annual Form D amendments and blue-sky and local securities matters in connection with offers or sales.**
- ☐ **File Schedule 13G year-end amendments by February 14, 2019.**
- ☐ **File Schedule 13H year-end amendments by February 14, 2019.**
- ☐ **File Form 13F for fourth quarter of 2018 by February 14, 2019.**
- ☐ **File Form PF quarterly updates and annual updates.**

- ☐ **Conduct periodic review of Section 13 and Section 16 filings.**
- ☐ **Conduct periodic review of BEA and TIC forms.**
- ☐ **Monitor compliance with 25 percent ERISA limitation with respect to benefit plan investors.**
- ☐ **Prepare annual VCOC Certification (if required) for benefit plan investors.**
- ☐ **Prepare Form 5500 Schedule C fee disclosures for ERISA plan investors.**
- ☐ **Prepare year-end audits and distribute financial statements as appropriate.**
- ☐ **Collect annual holdings reports and annual certifications from access persons and other personnel.**
- ☐ **Renew "bad actor" questionnaires, and conduct placement agent verifications.**
- ☐ **Conduct annual training of personnel.**
- ☐ **Update risk assessment.**
- ☐ **Conduct periodic anti-money laundering verifications (e.g., OFAC verifications).**
- ☐ **Distribute privacy notices, if required.**

Discussion:

Compliance Policies. The compliance and operating requirements pertaining to registered investment advisers and unregistered advisers (including exempt reporting advisers) have continued to merge, and more and more unregistered managers are adopting best practices and upgrading their compliance policies to meet the demands of regulators and/or investors. Whether your firm is currently federally registered or will be required to register in the future, you should review your compliance policies periodically to verify that they are adequate and appropriately tailored to your business risks and that your firm is adhering to them.

New Issues Certifications. If you purchase "new issues" (i.e., equity securities issued in an initial public offering), your broker (or, if you are a fund-of-funds that invests indirectly in new issues, the underlying funds) will require that you certify each year as to whether the fund is a "restricted person" within the meaning of FINRA Rules 5130 and 5131.

To make the certification, you must determine the status of investors in your fund as either restricted persons or unrestricted persons.

Offering Documents. Offering documents should be reviewed from time to time to verify that they (i) contain a current, complete, and accurate description of the fund's strategy, management, and soft-dollar and brokerage practices; (ii) comply with current laws and regulations; and (iii) reflect current disclosure best practices.

Form D Amendments and Blue Sky and Local Securities Matters. You should continue to inform counsel of all offers or sales of fund interests. Ongoing offerings may necessitate an amendment to a private fund's Form D (typically required on an annual basis on or before the first anniversary of the most recent notice previously filed). Additionally, offers to U.S. persons may trigger filing obligations in a given investor's state of residence, while offers to foreign persons may require filings in the country of an investor's residence.

Beneficial Ownership Reporting Requirements. If you have filed Schedule 13G and the information reflected in the schedule is different as of December 31, 2018, from that previously reported, you are generally required to have amended the schedule by February 14, 2019. Form 5 must be filed within 45 days of the end of the issuer's fiscal year (February 14, 2019, for issuers with a December 31, 2018, fiscal year-end). Year-end serves as a convenient time to confirm that all relevant Section 13 and Section 16 filings are current and complete.

BEA and TIC Forms. The beginning of the calendar year is a good time to conduct a review of the applicable BEA and TIC forms and filing requirements applicable to your firm. TIC forms may be due on a monthly, quarterly, or annual basis and are subject to frequent updates. BEA forms may be due, as applicable, within 45 days of a relevant transaction or quarterly, annually, or every five years. The BEA provides a webpage offering specific guidance to private funds here.

Form 13H. Section 13(h) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), established a reporting system and filing requirements for "large traders," i.e., persons effecting transactions in certain securities in amounts equal to 2 million shares or $20 million (determined by fair market value of the shares) in one calendar day, or 20 million shares or $200 million in one calendar month. Persons meeting these thresholds must file Form 13H no later than 10 days after the identifying activity level is reached. Amended filings must be effected promptly after the end of a calendar quarter during which any of the information contained in Form 13H becomes outdated or inaccurate. Large traders may file amended filings more often than quarterly but are not required to do so. Annual amendments (regardless of the number of amended filings previously effected) are due within 45 days of the end of each calendar year. Persons may now satisfy both the amended fourth-quarter filing and the annual update to Form 13H, as long as such filing is made within the period permitted for the fourth-quarter amendment (i.e., promptly after the fourth quarter's end).

Form 13F. Section 13(f) of the Exchange Act requires "institutional investment managers" with investment discretion over $100 million or more of certain equity securities to file quarterly reports on Form 13F. Form 13F must be filed within 45 days of the end of each calendar quarter. An initial Form 13F must be filed at the end of the first year in which an institutional investment manager exceeds the $100 million threshold. To the extent that you have a Form 13F filing obligation, you were required to file your Form 13F for the fourth quarter of 2018 by February 14, 2019.

Form PF. Many smaller private advisors and large private equity advisors will be required to file an annual update to Form PF by April 30, 2019 (120 days after the end of their fiscal year). Quarterly updates to Form PF are required of large hedge fund advisors (by March 1, 2019, or 60 days after the end of their fiscal quarter) and large liquidity fund advisors (by January 15, 2019, or 15 days after the end of their fiscal quarter).

Monitor Compliance With 25 Percent ERISA Limitation on Benefit Plan Investors. If the aggregate amount invested in a fund by "benefit plan investors" (e.g., employee benefit plans, individual retirement accounts, Keogh plans and entities–the underlying assets of which include "plan assets"–but excluding governmental plans, foreign plans, and certain church plans) equals 25 percent or more of the total value of any class of equity interests in the fund (excluding investments by the fund's managers who are not benefit plan investors), the fund will generally be deemed to hold plan assets subject to various ERISA requirements and prohibitions, unless the venture capital operating company ("VCOC") exception (described below) or another regulatory exception applies. Accordingly, many funds (particularly those that do not qualify as VCOCs, such as hedge funds) limit equity participation by benefit plan investors to less than 25 percent. If you sponsor such a fund, you should continuously monitor (i.e., upon subscriptions, capital calls, redemptions, transfers) the level of investments by benefit plan investors to ensure the 25 percent threshold is not exceeded.

Annual VCOC Certification. Prior to investing in a venture fund or a private equity fund, ERISA plan investors often require the fund to provide an annual VCOC certification stating that the fund qualifies as a VCOC. A venture fund or a private equity fund that qualifies as a VCOC will not be deemed to hold plan assets subject to ERISA, even if equity participation by benefit plan investors exceeds the 25 percent threshold (described above). In general, a fund will qualify as a VCOC if (i) at any time during the fund's annual valuation period, at least 50 percent of the fund's assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, are invested in venture capital investments in operating companies for which the fund has management rights; and (ii) the fund, in the ordinary course of its business, actually exercises substantial management rights with respect to one or more of the operating companies in which it invests on an annual basis.

FORM 5500 Schedule C Fee Disclosures. Funds that have ERISA plan investors (including funds that do not allow equity participation by benefit plan investors to exceed the 25 percent threshold (described above) and thus are not subject to ERISA), excluding VCOCs and other entities treated as operating companies, are required to provide plan administrators of their ERISA plan investors with certain fee-related information that is necessary for the completion of Schedule C to the plan's annual report on Form 5500 in advance of the filing deadline for the annual report. The Lowenstein Sandler LLP alert analyzing the Form 5500 Schedule C rules is available here.

Year-End Audit. Now is the time to begin all necessary year-end audits so that funds can distribute financials to investors on a timely basis as required by relevant governing documents and, in certain instances, as required to comply with the custody rule under the Advisers Act and/or CFTC requirements.

Annual Holdings Reports and Annual Certifications. The beginning of the calendar year is a good time for investment advisers to have all "access persons" provide their annual holdings reports regarding securities ownership required pursuant to Rule 204A-1 of the Advisers Act. It is also a good time to have all personnel provide their annual certifications of compliance with firm policies and conflict-of-interest questionnaires.

"Bad Actor" Questionnaires and Placement Agent Verifications. The beginning of the calendar year is a good time to have certain personnel and service providers (e.g., directors of offshore private funds) recertify their status with respect to the SEC's "bad actor" rules in order to rely on the private placement exemption under Rule 506. This bad actor certification is often combined with the annual certification of compliance with firm policies discussed above. It is also a good time to have placement agents recertify their status with respect to such rules and certain other disciplinary matters.

Conduct Annual Training of Personnel. As a best practice under the Advisers Act, investment advisers should hold annual training sessions with existing employees to remind them of their obligations under the firm's compliance manual and code of ethics.

Update Risk Assessment. As a best practice under the Advisers Act, investment advisers should annually re-evaluate their "risk assessment" (i.e., evaluation of how the firm's activities, arrangements, affiliations, client base, service providers, conflicts of interest, and other business factors may cause violations of the Advisers Act or the appearance of impropriety) to determine that new, evolving, or resurgent risks are adequately addressed.

Periodic Anti-Money Laundering Verifications. Private investment funds and their advisors have ongoing anti-money laundering compliance obligations that necessitate periodic verifications, the frequency of which depend upon such funds' and advisers' operations. The beginning of the calendar year is a good time to assess such obligations and to conduct renewed verifications such as comparing investor bases with the U.S. Treasury Department's Office of Foreign Assets Control lists.

Privacy Notices. In accordance with applicable federal law, investment advisers and investment funds must have a privacy policy in place. In addition to being provided at the time of initial subscription, privacy notices must generally be distributed at least annually, and more frequently if there are any changes to the policy/notice. An exception provides that annual notice is not required where an adviser or fund (i) only shares non-public personal information ("NPPI") with non-affiliated third parties in a manner that does not require an opt-out right be provided and (ii) has not changed its policies and practices with regard to disclosing NPPI since its most recent distribution of its privacy notice. Now is an opportune time for advisers and funds to determine whether they can rely on this exception. We believe that the best time for the annual distribution of the notice, if required, is with a fund's annual financial statements and/or tax reports. Additionally, some states have privacy regulations in place that may subject investment advisers and investment funds to additional or, in some cases, more stringent privacy requirements.

REGISTERED INVESTMENT ADVISERS AND EXEMPT REPORTING ADVISERS (WHERE INDICATED)

- ☐ **Prepare annual updating amendments to Form ADV (for registered investment advisers and certain "Exempt Reporting Advisers").**
- ☐ **Deliver Form ADV Part 2A (or portions thereof) to clients and fund investors (for registered investment advisers).**
- ☐ **Comply with state annual filing requirements.**
- ☐ **Conduct periodic review of compliance policies and code of ethics.**
- ☐ **Comply with custody rule annual surprise examination.**
- ☐ **File Form 13F for fourth quarter of 2018 by February 14, 2019.**
- ☐ **Distribute privacy notices, if required.**
- ☐ **Prepare Form 5500 Schedule C fee disclosures for ERISA plan accounts.**
- ☐ **Comply with ERISA Section 408(b)(2) fee disclosure requirements for Covered Plans.**
- ☐ **Conduct periodic vendor due diligence updates.**

Discussion:

Annual Updating Amendments to Form ADV. An investment adviser that (i) is registered with the SEC or (ii) is considered an "Exempt Reporting Adviser" (i.e., an investment adviser relying on the private fund adviser exemption or the venture capital adviser exemption), in each case as of December 31, 2018 (and with a December 31, 2018, fiscal year-end), must file an annual updating amendment of items on the form by March 31, 2019. Please be advised that the Investment Adviser Registration Depository (IARD) system will be open on Sunday, March 31, 2019, from 10 a.m. to 6 p.m. Eastern time to accommodate Form ADV filings.

Deliver Form ADV Part 2. An investment adviser that is registered with the SEC and whose Form ADV Part 2A has materially changed since such adviser's last annual amendment must deliver either an amended Part 2A (which must include a summary of such material changes) or a summary of such material changes (which must include an offer to provide a copy of the amended Part 2A). Although such delivery requirements expressly apply only to "clients" (as defined in federal securities laws), we recommend that advisers to private funds deliver such items to their fund investors. For advisers with a December 31, 2018, fiscal year-end, such items must be delivered by April 30, 2019.

State Filing Requirements. Applicable state law may require a federally registered investment adviser to make notice filings and to pay fees in the state if he or she has clients or a place of business therein. Laws vary significantly from state to state. There also may be certain licensing or qualification requirements for representatives of investment advisers. Please contact counsel with any state-specific questions.

Compliance Policies and Code of Ethics. Federally registered investment advisers must adopt and maintain comprehensive compliance policies and a code of ethics and also must appoint a chief compliance officer. If you have not already done so, please contact counsel immediately for assistance in creating and/or documenting compliance procedures appropriately tailored to your business. In addition, compliance policies and procedures must be reviewed by the advisor at least annually. The compliance policies and procedures review should focus on an evaluation of the effectiveness of the policies and procedures in light of current risks and the need for revisions as a result of (i) any compliance issues that arose during the prior year, (ii) any changes in the business activities of the investment adviser, and/or (iii) any regulatory changes. We recommend that this review be conducted relatively early in the year or staggered throughout the year so that it does not interfere with other time-sensitive activities when quarter-end or year-end matters are pressing. Policies that are materially changed as a result of such review should be redistributed to all appropriate personnel. In addition, Item 11 of Form ADV Part 2A must contain a current description of the code of ethics and a statement that the investment adviser will provide the code of ethics to any current or prospective client upon request.

Custody Rule Annual Surprise Examination. With certain limited exceptions, where the adviser (or its related person) possesses or may possess client funds and securities, the adviser is required to undergo an annual surprise examination by an independent public accountant.

FORM 5500 Schedule C Fee Disclosures. Advisers managing ERISA plan accounts are required to disclose certain fee-related information necessary for plan administrators to complete Schedule C to the plan's annual report on Form 5500 in advance of the date such annual report is required to be filed. The Lowenstein Sandler LLP alert analyzing the Form 5500 Schedule C rules is available here.

Compliance With ERISA Section 408(b)(2) Fee Disclosure Requirements. Advisers providing services directly to an ERISA-covered defined contribution or defined benefit plan as either a fiduciary or a registered investment adviser (as well as fiduciary services to a first-tier ERISA "plan asset" fund in which a covered plan has a direct investment, brokerage and record-keeping services to certain participant-directed plans to which investment alternatives are made available, and certain other services) are generally required to make detailed fee disclosures to a plan fiduciary in advance of the date the underlying contract or arrangement is entered into, extended, or renewed. Additionally, changes to such required fee disclosures must be disclosed as soon as practicable, but in no event more than 60 days from the date on which the adviser becomes informed of such change. Advisers providing such services should monitor ongoing compliance with the ERISA Section 408(b)(2) disclosure requirements. The Lowenstein Sandler LLP alert analyzing the Section 408(b)(2) Fee Disclosure Requirements is available here.

Vendor Due Diligence Updates. As part of an effective third-party risk management program, advisers are encouraged to implement an effective due diligence process with respect to service providers utilized by the adviser, consisting of both an initial due diligence assessment and periodic reviews thereafter. Such periodic reviews may include tailored certifications from the vendor in light of the services provided by each such vendor; review of the vendor's regulatory

history, public filings, registrations, and licenses (as applicable); a review of the vendor's financial statements; and (as necessary) conference calls and on-site visits. Advisers should document the due diligence process and results.

COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

- ☐ **Registered CPOs and CTAs must conduct annual regulatory compliance reviews and complete certain regulatory requirements, which include preparation of annual questionnaires and annual registration updates (applies to registered CPOs and CTAs).**
- ☐ **Prepare and file certain portions of Form CPO-PQR by March 1, 2019 (applies to CPOs with $1.5 billion or more AUM), or April 1, 2019 (applies to other CPOs).**
- ☐ **Prepare and file certain portions of Form CTA-PR by February 14, 2019.**
- ☐ **Annual affirmation of CPO registration exemption under Sections 4.5, 4.13(a)(1)-(3), or 4.13(a)(5), or exemption from CTA registration under Section 4.14(a)(8), by March 1, 2019.**
- ☐ **Review CPO delegations in connection with annual pool financial statement filings.**

Discussion:

Annual Compliance Reviews/Regulatory Requirements. Registered CPOs and CTAs must conduct annual compliance reviews. These reviews and requirements include (i) the preparation and filing with the NFA of Annual Questionnaires and Annual Registration Updates within 30 days of the anniversary date of their registration; (ii) completion of the NFA's Self-Examination Checklist; (iii) sending Privacy Policies to every current customer, client, and pool participant; (iv) testing disaster recovery plans and making necessary updates; (v) providing ethics training to staff, and inspecting the operations of branch offices; (vi) for registered CPOs, preparation of Pool Quarterly Reports within 45 days after the end of the year (and within 45 days after the end of each quarter); and (vii) for registered CTAs that are NFA members, the filing of Form CTA-PR, required within 45 days after the end of the year (and within 45 days after the end of each quarter). Finally, unless the applicable fund(s) qualify for an exemption, registered CPOs and CTAs must update their disclosure documents periodically, as they may not use any document dated more than 12 months prior to the date of its intended use. Disclosure documents that are materially inaccurate or incomplete must be promptly corrected, and the correction must be promptly distributed to pool participants. The NFA's Notice to Members regarding these regulatory compliance matters is available here.

Prepare and File Portions of Form CPO-PQR. CPOs with AUM exceeding $1.5 billion must have filed Schedules A, B, and C by March 1, 2019, and other CPOs must file Schedule A (and Schedule B if AUM exceeds $150 million) by April 1, 2019.

Prepare and File Portions of Form CTA-PR. CTAs are required to have completed Form CTA-PR by February 14, 2019 (45 days after the end of the calendar quarter for CTAs who are NFA members, and 45 days after the end of the calendar year for other CTAs).

Annual Affirmation of CPO or CTA Exemption. Each person who has filed a notice of exemption from CPO registration under Sections 4.5, 4.13(a)(1)-(3), or 4.13(a)(5), or exemption from CTA registration under 4.14(a)(8), must have affirmed such notice of exemption by March 1, 2019, through the NFA's exemption system.

Review of CPO Delegations. All CPO delegation agreements entered into by registered CPOs must comply with specific criteria set forth by the CFTC and must be retained as part of the relevant CPO's records. As part of their annual pool financial statement filings through the NFA website, CPOs should ensure that all necessary CPO delegations are in place and appropriately documented.

RECENT PUBLICATIONS AND COMMENTARY

Below are links to recent articles and publications featuring or authored by members of the Investment Management Group.

CLIENT ALERTS AND NEWSLETTERS

- FINRA 2019 Monitoring and Examination Priorities Letter
  Investment Management Client Alert
  Ethan L. Silver, William Brannan, and Brian Nistler
  February 4, 2019

- SEC's OCIE Releases 2019 Examination Priorities for Investment Advisers, Broker-Dealers, and Other Financial Industry Professionals
  Investment Management Client Alert
  Ethan L. Silver, Scott H. Moss, and Joseph S. Hendricks
  January 7, 2019

- SEC OCIE Issues Guidance on Record-keeping Requirements for Electronic Messaging
  Investment Management Client Alert
  Peter D. Greene, David L. Goret, Scott H. Moss, Benjamin Kozinn, and Joseph S. Hendricks
  December 21, 2018

- SEC Division of Enforcement Announces 2018 Results
  Investment Management Client Alert
  David L. Goret, Scott H. Moss, and Joseph S. Hendricks
  November 14, 2018

- CFTC Streamlines Regulations for Commodity Pool Operators and Commodity Trading Advisors
  Investment Management Client Alert
  Scott H. Moss and Lauren E. Killeen
  October 12, 2018

- Fiduciary Rule Vacated by 5th Circuit Court of Appeals
  Investment Management and Employee Benefits & Executive Compensation Client Alert
  Andrew E. Graw, Scott H. Moss, and Megan Monson
  April 2, 2018

- Lessons From Merit Management: The Settlement Payment Defense Lives … if You Are a 'Financial Institution'
  Lowenstein Sandler Client Alert
  Jeffrey Cohen, Richard Bernstein, Michael A. Brosse, Paul Kizel, Benjamin Kozinn, Jonathan C. Wishnia, and Gabriel L. Olivera
  March 7, 2018

- The SEC's 2018 Examination Priorities
  Investment Management Client Alert
  Benjamin Kozinn and Scott H. Moss
  February 14, 2018

UPCOMING EVENTS

Below is information regarding upcoming events sponsored by or featuring members of the Investment Management Group. For more information regarding any of these events, please contact events@lowenstein.com.

MFA Legal & Compliance Conference 2019
April 24, 2019
The Plaza, New York, New York
Peter D. Greene

GAIM: Ops Cayman 2019
April 28 - May 1, 2019
Ritz-Carlton, Grand Cayman
Benjamin Kozinn, panelist
Expenses: Manager-Investor debate on the grey areas and whether they can be charged

100 Women in Finance
May 7, 2019
New York, New York
Eileen Overbaugh, moderator
Reputational Risk

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