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INVESTMENT MANAGEMENT GROUP

YEAR-END DEVELOPMENTS AND COMPLIANCE CHECKLIST

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LOWENSTEIN SANDLER INVESTMENT MANAGEMENT GROUP CLIENT UPDATE

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) a checklist 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

FinCEN Proposes Anti-Money Laundering Protocols for Investment Advisers

Synopsis: On August 25, 2015, the Financial Crimes Enforcement Network ("FinCEN") issued a notice of proposed rulemaking that extends anti-money laundering ("AML") requirements under the Bank Secrecy Act ("BSA") to federally registered investment advisers ("Registered Advisers"). The BSA and associated regulations are designed to protect the U.S. financial system from money laundering and terrorist financing activities. With more than 11,000 Registered Advisers as of June 2014, the proposed extension of the BSA's requirements is intended to significantly inhibit money launderers' ability to gain access to the U.S. financial system by exploiting investment advisers without AML protocols in place.

Status: The proposal includes three broad components: (1) the definition of "financial institution" under the BSA would be amended to include Registered Advisers, (2) Registered Advisers would be required to establish written AML programs and (3) Registered Advisers would be obligated to file suspicious activity reports ("SARs") through FinCEN. By amending the definition of "financial institution" to include Registered Advisers, they will now be subject to the various BSA requirements generally applicable to financial institutions (including filing FinCEN Currency Transaction Reports and maintaining records related to the transmittal of funds). The proposal requires Registered Advisers to develop and implement a written AML program that protects against money laundering and terrorist financing activities, addresses all aspects of a Registered Adviser's business (regardless of whether the Registered Adviser acts as the primary adviser or sub-adviser), and complies with applicable provisions of the BSA. The AML program requires the written approval of a board of directors or persons with similar functions. Registered Advisers must make available the written program upon request by FinCEN or the Securities and Exchange Commission ("SEC"). The AML program must, at a minimum, contain four elements: (1) risk-based policies, procedures and internal controls; (2) independent testing; (3) a designated AML compliance officer; and (4) ongoing employee training. If passed, the proposal delegates to the SEC the responsibility for examining Registered Advisers for compliance with the BSA's AML requirements. The Lowenstein Sandler LLP Investment Management Group alert analyzing this rulemaking proposal is available **here**.

Commodity Futures Trading Commission Approves National Futures Association Interpretive Notice Expanding Cybersecurity Requirements for Commodity Pool Operators and Commodity Trading Advisors

Synopsis: The Commodity Futures Trading Commission ("CFTC") recently approved the National Futures Association's ("NFA") Interpretive Notice regarding the adoption of customized information systems security programs ("ISSPs") by the NFA's member firms. Member firms are now required to have practices in place reasonably designed to diligently supervise the risks of unauthorized access to or attack of their information technology systems and to respond appropriately should unauthorized access or attack occur. The Interpretive Notice becomes effective on March 1, 2016.

Status: In light of the rapidly changing nature of cybersecurity threats and the differences in the type, size and complexity of operations of NFA member firms' businesses, the Interpretive Notice provides member firms the flexibility to design and implement cybersecurity policies and procedures that are appropriate for their circumstances. However, member firms' customized ISSPs must include a written program, policies and procedures for security and risk analysis and a comprehensive response and recovery plan. To ensure compliance with the Interpretive Notice, each member firm without an existing ISSP should designate a team of personnel, including compliance and information technology personnel, to supervise the development and implementation of an ISSP. Member firms with existing ISSPs should review their existing cybersecurity practices to ascertain whether additional safeguards or revisions are appropriate in light of the scope of the Interpretive Notice. The Lowenstein Sandler LLP Investment Management Group's alerts analyzing the Interpretive Notice are available here and here.

New Exception to Annual Privacy Notice Requirements

Synopsis: On December 4, 2015, newly enacted legislation amended Section 503 of the Gramm-Leach-Bliley Act ("GLB"), adding an important exception to the annual privacy notice requirement for financial institutions.

Status: Under prior law, all financial institutions were required to mail annual privacy notices setting forth how they collect, use and disclose nonpublic personal information ("NPPI"). The new law creates an exception to this requirement where the financial institution (a) only shares such NPPI with nonaffiliated third parties in a manner that does not require an opt-out right be provided and (b) has not changed its policies and practices with regard to disclosing NPPI since its most recent distribution of its privacy notice. Accordingly, certain investment advisers and funds may be able to forgo the burden of providing an annual privacy notice to clients/investors so long as no changes have occurred since the prior distribution.

Commodity Futures Trading Commission Adopts Final Rule for Margin Requirements for Uncleared Swaps

Synopsis: The CFTC recently adopted a Final Rule for Margin Requirements for Uncleared Swaps. The Final Rule applies to swaps that are not cleared by a registered derivatives clearing organization ("DCO") or a DCO that the CFTC has exempted from registration, and that are entered into between certain financial institutions and their swap dealer or major swap participant counterparties after the applicable implementation date. The Final Rule contains requirements regarding the form, calculation, transfer thresholds, and frequency of transfer of initial margin and variation margin, and requires segregation of initial margin. The Final Rule will become effective on April 1, 2016. Initial margin requirements will be phased in starting September 1, 2016, and ending September 1, 2020.

Status: Numerous swap market participants will need to ensure that their swap collateral documentation reflects the requirements of the Final Rule. Although the initial margin requirements will be implemented on a tiered basis, beginning with the largest swap market participants and ending with the smallest, financial institutions should anticipate requests from their swap dealer and major swap participant counterparties to revisit their swap collateral documentation.

SEC Clarification Regarding General Solicitation

Synopsis: The SEC released guidance on August 6, 2015, with respect to Rule 506(b) and Rule 506(c) in the form of a No Action Letter and ten new Compliance and Disclosure Interpretations ("C&DIs").

Status: Under Rule 506(c), implemented in connection with the Jumpstart Our Business Startups Act ("JOBS Act"), private investment funds and people acting on behalf of such funds can now issue and sell securities to the public by using general solicitation or general advertising where all purchasers are accredited investors. In this guidance, the SEC made it clear that private investment funds relying on Rule 506(b) cannot solicit investors and sell securities through unrestricted websites open to the public. This behavior violates the general solicitation and general advertisement prohibition under Rule 502(c), with which Rule 506(b) offerings must comply. However, the SEC also reiterated that Rule 502(c) does not apply to Rule 506(c) offerings.

The SEC appears to have solidified this position through its issuance on August 24, 2015, of the Citizen VC No Action Letter (the "No Action Letter"). In the No Action Letter, the SEC set forth a long list of procedures to ensure "a pre-existing, substantive relationship" for purposes of the general solicitation and general advertising prohibitions in a Rule 506(b) offering, including, among other things, (1) contacting the prospective investor offline and online, (2) utilizing third-party credit-reporting services and (3) generally fostering interactions with the prospective investor both online and offline.

Together, the new guidance appears to narrow the due diligence gap between Rule 506(b) and 506(c) offerings in certain contexts. Details regarding the

No Action Letter and C&DIs can be found in the Lowenstein Sandler LLP Investment Management Group alert available here.

SEC Examination Priorities for 2016

Synopsis: On January 11, 2016, the SEC's Office of Compliance Inspections and Examinations ("OCIE") announced its 2016 examination priorities. The examination priorities reflect several new areas of focus along with a continuing focus on certain previously identified areas.

Status: OCIE's examination priorities reflect certain practices and products that OCIE perceives to present heightened risk to investors and/or the integrity of U.S. capital markets. The 2016 examination priorities fall under three broader categories: (1) retail investors, (2) market-wide risks and (3) utilizing OCIE's evolving data analytics capabilities to identify and examine registrants that may be engaged in illegal activity. With respect to retail investors, areas of focus include (a) continuing a multiyear initiative launched in June 2015 with respect to services offered to investors with retirement accounts, (b) supervision at branch offices, (c) recommendations of account types by investment advisers offering retail investors a variety of fee arrangements and (d) examining advisers to municipalities and other government entities with respect to pay-to-play and other risks to public pensions. Areas of focus with respect to market-wide risks include cybersecurity compliance and controls and liquidity controls in respect of advisers to private funds that have exposure to potentially illiquid fixed income securities. OCIE intends to leverage its data analytics capabilities to examine firms employing individuals with any track record of misconduct and to examine firms that have not previously been examined. The OCIE's official document describing its 2016 examination priorities is available here.

SEC May Begin Routine Examination of Exempt Reporting Advisers

Synopsis: The OCIE may begin routine examinations of "exempt reporting advisers" ("ERAs").

Status: ERAs include advisers solely to private funds with less than $150 million in regulatory assets under management and advisers solely advising venture capital funds. In remarks on November 20, 2015, OCIE Director Marc Wyatt indicated that the OCIE had begun routine inspections of ERAs. Prior to Mr. Wyatt's remarks, the SEC had publicly indicated that it would examine an ERA only in response to particularized information such as tips and complaints. ERAs are advised to review their policies and procedures with respect to all relevant laws and regulations and make any necessary updates and revisions.

Cayman Islands Limited Liability Companies

Synopsis: The Cayman Islands has published legislation to offer a new form of entity, a Cayman Islands Limited Liability Company ("Cayman LLC").

Status: Cayman LLCs are modeled on Delaware limited liability companies and are expected to combine the characteristics of a Cayman Islands exempted company and a Cayman Islands exempted limited partnership. Cayman LLCs will have separate legal existence and limited liability. Management of a Cayman LLC may be given either to its members or to one or more managers. A Cayman LLC will be required to file its register of managers with the Cayman Islands Registrar of Companies. While the legislation has not yet been enacted, reports indicate that it is expected to become law soon. The availability of the Cayman LLC is expected to provide additional flexibility in the structuring of offshore private funds.

Proposed Rule Would Expand Fiduciary Definition under ERISA

Synopsis: On April 14, 2015, the U.S. Department of Labor ("DOL") released a proposed rule expanding when a person who provides investment advice would be a "fiduciary" under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986, as amended (the "Code").

Status: Under the proposed rule, any person who provides investment recommendations, investment management recommendations, appraisals of investments, and recommendations of persons to provide investment advice may be a fiduciary if they either (i) represent themselves as ERISA fiduciaries or fiduciaries under the Code, or (ii) provide the advice under an agreement, arrangement or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or investment management decisions regarding plan assets. The proposed rules would replace a five-part test under which investment advice makes a person a fiduciary only if that person is, among other things, providing advice on a regular basis that serves as the primary basis for investment decisions with respect to plan assets. The proposed rule includes a number of carve-outs and exemptions, including with respect to "mere execution" of a securities transaction. The comment period on the proposed rule closed September 24, 2015, and a final rule has not yet been published.

Regulation Crowdfunding: SEC Adopts Final Rules Opening Door to Internet Sales to Non-Accredited Investors

Synopsis: On October 30, 2015, the SEC adopted final rules implementing Title III of the JOBS Act, which adds

new Section 4(a)(6) ("Regulation Crowdfunding") under the Securities Act of 1933, to provide an exemption from registration for certain crowdfunding transactions conducted through a registered broker-dealer or an online "funding portal."

Status: Crowdfunding is a term used to describe a collective process of raising money, typically done through small individual contributions from a large number of individuals over the Internet. After more than three years since its original formulation with the passage of the JOBS Act, Regulation Crowdfunding has been adopted, allowing an issuer to raise up to $1 million per year online from the general public through crowdfunding portals, subject to specified investment limits and disclosure requirements. Offerings must be conducted through an intermediary that is either a registered broker-dealer or a new type of entity called a "funding portal." The Financial Industry Regulatory Authority ("FINRA") has proposed rules and related forms that would apply to funding portals that become FINRA members. A Section 4(a)(6) offering must be conducted through these intermediaries to ensure that the "crowd" has access to information about the issuer and to ensure that there is a forum available for discussion among offering participants regarding the offering. While the rulemaking provides a mechanism for issuers to reach small investors through fundraising portals or intermediaries, it also imposes upon issuers meaningful initial disclosure and ongoing reporting requirements that will likely require issuers seeking small pools of capital to dedicate significant resources to raise minimal funds. The Lowenstein Sandler LLP Investment Management Group alert analyzing Regulation Crowdfunding is available here.

FATCA Update

Synopsis: The U.S. Foreign Account Tax Compliance Act ("FATCA") regulations impose a 30% withholding tax on certain U.S.-source payments made to foreign financial institutions ("FFIs"), including offshore hedge and private equity funds, that fail to comply with FATCA.

Status: FATCA currently requires withholding on U.S.-source payments of interest and dividends. However, withholding on certain "gross proceeds" has been delayed and is slated to start on January 1, 2019 (rather than January 1, 2017, as has been previously provided). For this purpose, "gross proceeds" includes any gross proceeds from the sale or other disposition occurring after December 31, 2018, of any property of a type that can produce U.S.-source interest or dividends.

OECD's Common Reporting Standard

Synopsis: Starting on January 1, 2016, most non-U.S. master and feeder funds will be required to collect additional information with respect to their investors under the Organisation for Economic Co-operation and Development's Common Reporting Standard ("CRS").

Status: CRS is generally a global version of FATCA (see above). Essentially, like FATCA, CRS establishes information reporting between jurisdictions regarding financial accounts held by taxpayers resident in the signatory countries. So far over 90 countries (including the Cayman Islands, Mauritius and the United Kingdom) have stated that they will adopt CRS. However, as of right now, it appears that the United States has decided not to participate in CRS. Fund documents will require additional disclosures and certain attachments to satisfy CRS requirements.

New Partnership Audit Rules

Synopsis: The Bipartisan Budget Act of 2015 includes provisions that significantly revise the rules applicable to federal income tax audits of all entities treated as partnerships for tax years beginning after 2017 (the "New Partnership Audit Rules"). The New Partnership Audit Rules replace the current "TEFRA audit" system with a new system that, absent an election, imposes partnership-level liability in respect of audit adjustments.

Status: Generally, the New Partnership Audit Rules provide that if there is an Internal Revenue Service ("IRS") adjustment to the amount of any item of income, gain, loss, deduction or credit of a partnership, or of any partner's distributive share of such items, for a tax year (the "Reviewed Year"), the partnership itself is responsible for paying the tax deficiency resulting from the audit in the tax year that the IRS finally determines the adjustment (the "Adjustment Year"). Accordingly, persons who are partners in the Adjustment Year, rather than persons who were partners in the Reviewed Year, will bear the burden of the audit adjustment. The partnership can avoid this potential shifting of economic burden by making a timely election to utilize a special procedure under which the partners in the Reviewed Year will be responsible for their additional tax liability from the adjustment, plus penalties and interest. However, the Reviewed Year partners will be subject to an interest rate on the tax deficiency resulting from the adjustment that is 2% higher than the regular underpayment rate. All partners will generally be bound by tax adjustments determined in partnership proceedings, with a more limited ability to determine their own tax results from the past system. Certain small partnerships will be eligible to elect entirely out of

application of the new rules discussed above (and have adjustments made at the partner level). Additionally, the New Partnership Audit Rules eliminate the role of a "tax matters partner" and introduce the concept of a new "partnership representative" that has the exclusive authority to act on behalf of the partnership in connection with potential adjustment proceedings. Notably, the "partnership representative" does not have to be a member of the partnership.

Bureau of Economic Analysis Releases Another Benchmark Survey with Broad Application and Expands Other Surveys

Synopsis: The Bureau of Economic Analysis ("BEA") released the BE-180 survey for fiscal year 2014. The BE-180 survey is a five-year benchmark survey that collected information on financial services transactions between U.S. financial services providers and foreign persons. The final rule issued by the BEA requiring the survey was published in the "Federal Register" on May 20, 2015, and became effective on June 19, 2015. The BE-180 survey was due on or around October 1, 2015, subject to certain extensions. Previously, the BEA expanded the reach of its BE-10 (Benchmark Survey of U.S. Direct Investment Abroad) and BE-13 (Survey of New Foreign Direct Investment in the United States) surveys such that all U.S. business enterprises must file if applicable, where previously only U.S. business enterprises contacted by the BEA were required to file.

Status: The BE-180 survey was required to be filed in 2015 by each U.S. person who is a financial services provider or intermediary (or a consolidated U.S. enterprise that includes a separately organized subsidiary or part that is a financial services provider or intermediary) and who also (i) had combined sales to or purchases from foreign persons of financial services in excess of $3 million for fiscal year 2014, or (ii) had been contacted by the BEA to file the BE-180 survey. The term "financial services provider" includes investment advisers as well as private investment funds and other financial vehicles. The types of financial services covered by the report are (i) brokerage services related to equity transactions, (ii) other brokerage services, (iii) underwriting and private placement services (related to both equity and debt transactions), (iv) financial management services, (v) credit card services, (vi) credit-related services, (vii) financial advisory and custody services, (viii) securities lending services, (ix) electronic funds transfer services and (x) other financial services. However, the BE-180 survey excludes certain transactions, such as forex transactions, as well as interest and dividend receipts and payments. With the release of the BE-180 survey and the expanded coverage of the BE-10 and BE-13 surveys, the BEA has expanded the coverage of its surveys and may continue to do so in the future. Details regarding the BE-180 survey can be found in the Lowenstein Sandler LLP Investment Management 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 16, 2016.
- ☐ File Schedule 13H year-end amendments by February 16, 2016.
- ☐ File Form 13F for fourth quarter of 2015 by February 16, 2016.
- ☐ 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% 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 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 verify 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 previously filed notice). 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, 2015, from that previously reported, you are generally required to amend the schedule by February 16, 2016. Form 5 must be filed within 45 days of the end of the issuer's fiscal year (February 16, 2016, for issuers with a December 31, 2015, 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 Treasury International Capital ("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.

Form 13H. Section 13(h) of 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 has been 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 as well as the annual update to Form 13H, as long as such filing is made within the period permitted for the fourth-quarter amendment (i.e., by January 11, 2016, for the 2015 fourth-quarter and annual filings).

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 must file your Form 13F for the fourth quarter of 2015 by February 16, 2016.

Form PF. Many smaller private advisers and large private equity advisers will be required to file an annual update to Form PF by April 29, 2016 (120 days after the end of their fiscal year). Quarterly updates to Form PF are required of large hedge fund advisers (by February 29, 2016, or 60 days after the end of their fiscal quarter) and large liquidity fund advisers (by January 15, 2016, or 15 days after the end of their fiscal quarter).

Monitor Compliance with 25% 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% or more of the total value of any class of equity interests in the fund (excluding investments by the fund's managers that are not "benefit plan investors"), the fund will generally be deemed to hold "plan assets" subject to various ERISA requirements and prohibitions, unless

the 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%. If you sponsor such a fund, you should continuously monitor (i.e., upon subscriptions, capital calls, redemptions, transfers, etc.) the level of investments by "benefit plan investors" to ensure the 25% 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 venture capital operating company, or 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% 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% 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% 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, to comply with the custody rule under the Investment Advisers Act of 1940, as amended (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 advisers have ongoing anti-money laundering compliance obligations that necessitate periodic verifications, the frequency of which depends upon such funds' and advisers' operations. The beginning of the calendar year is a good time to assess such obligations and 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. A newly implemented exception effective December 4, 2015, provides that annual notice is not required where an adviser or fund (a) only shares NPPI with nonaffiliated third parties in a manner that does not require an opt-out right be provided and (b) 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 if they can rely upon 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 2015 by February 16, 2016.

☐ 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.

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, 2015 (and with a December 31, 2015, fiscal year-end), must file an annual updating amendment of items on the form by March 30, 2016.

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 only expressly apply 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, 2015, fiscal year-end, such items must be delivered by April 29, 2016.

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 may also 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 appoint a chief compliance officer. If you have not already done so, please contact counsel immediately so that counsel may assist you in creating and/or documenting compliance procedures appropriately tailored to your business. In addition, compliance policies and procedures must be reviewed by the adviser 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 that is 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 recordkeeping 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.

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.
- ☐ Prepare and file certain portions of Form CPO-PQR by February 29, 2016 (CPOs with $1.5 billion or more AUM), or March 30, 2016 (other CPOs).
- ☐ Prepare and file certain portions of Form CTA-PR by February 16, 2016.
- ☐ 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 February 29, 2016.

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 (updated in January 2016 and available here); (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, filing of Form CTA-PR is 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 file Schedules A, B and C by February 29, 2016, and other CPOs must file Schedule A (and Schedule B if AUM exceed $150 million) by March 30, 2016.

Prepare and File Portions of Form CTA-PR. CTAs are required to complete Form CTA-PR by February 16, 2016 (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 affirm such notice of exemption by February 29, 2016, through the NFA's exemption system.

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

- Regulation Crowdfunding: SEC Adopts Final Rules Opening Door to Internet Sales to Non-Accredited Investors
  Investment Management Client Alert, November 10, 2015
  David Goret, Bettina Elstroth, Ted McBride
- Commodity Futures Trading Commission (CFTC) Approves National Futures Association (NFA) Interpretive Notice Expanding Cybersecurity Requirements for Commodity Pool Operators and Commodity Trading Advisors
  Investment Management Client Alert, November 6, 2015
  Scott Moss, Sarah Gore

- FinCEN Proposes Anti-Money Laundering Protocols for Investment Advisers
  Investment Management Client Alert, November 4, 2015
  Scott Moss, Robert Kipnees, Sarah Gore

- Commodity Pool Operators (CPOS) and Commodity Trading Advisors (CTAS) May Become Subject to More Stringent Cybersecurity Protocols
  Investment Management Client Alert, September 11, 2015
  Scott Moss, Sarah Gore

- Fund Managers Take Note: BEA Releases Another Benchmark Survey with Broad Application
  Investment Management Client Alert, September 9, 2015
  Scott Moss, Sarah Saladini

- SEC Further Clarifies What Constitutes General Solicitation, but Lines Remain Blurry
  Investment Management Client Alert, August 24, 2015
  Scott Moss, David Lifshitz, Jeffrey Silberman

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.

- **Lowenstein Sandler's Investment Management Group Breakfast Series**
  February 25, 2016, Lowenstein Sandler's New York Office
  The Hidden Dangers of CCO Liability Today: Proceed with Caution

- **Lowenstein Sandler and ACA Compliance Group Co-Hosted Breakfast Seminar**
  March 10, 2016, Lowenstein Sandler's New York Office
  Our panel of experts from Lowenstein Sandler LLP, ACA Compliance Group and CCOs from leading investment firms will discuss real-time developments in the area of investment management.

- **MFA Compliance 2016**
  May 10, 2016, Metropolitan Club, New York, NY
  Lowenstein Sandler is a sponsor of the 2016 MFA Compliance conference in New York.

- **MFA Outlook 2016**
  October 20–21, 2016, The Pierre Hotel, New York, NY

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