

Annual Compliance Obligations for U.S. SEC-Registered Investment Advisers

Below is a summary of several of the annual compliance obligations imposed on investment advisers registered with the U.S. Securities and Exchange Commission (the “SEC”), and which are registered with the U.S. Commodity Futures Trading Commission (“CFTC”), or exempt from registration, as commodity pool operators (“CPOs”) or commodity trading advisors (“CTAs”).

Introduction: Key Dates

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| Form 13F (for 12/31/13 quarter-end) | February 14, 2014 |
| Form 13H annual filing | February 14, 2014 |
| Schedule 13G annual amendment | February 14, 2014 |
| Registered CTA Form PR (for December 31, 2012 year-end) | February 14, 2014 |
| TIC Form SLT | Every 23rd calendar day of the month following the report as-of date |
| TIC Form SHCA | March 3, 2014 |
| Affirm CPO exemption | March 3, 2014 |
| Registered Large CPO Form CPO-PQR December 31 quarter-end report | March 3, 2014 |
| Registered CPOs filing Form PF in lieu of Form CPO-PQR December 31 quarter-end report | March 31, 2014 |
| Registered Mid-Size and Small CPO Form CPO-PQR year-end report | March 31, 2014 |
| SEC registered advisers and ERAs pay IARD fee | Before submission of Form ADV annual amendment by March 31, 2014 |
| Annual ADV update | March 31, 2014 |
| FATCA registration | April 25, 2014 |
| Delivery of Brochure | April 30, 2014 |
| Form PF (for advisers required to file within 120 days after December 31, 2013 fiscal year-end) | April 30, 2014 |
| FBAR Form TD F 90-22.1 (for persons meeting the filing threshold in 2013) | June 30, 2014 |
| Form D annual amendment | One-year anniversary from the most recent amendment filed |

Requirements Specific to SEC-Registered Investment Advisers

Funding the Investment Adviser’s IARD Account

SEC-registered investment advisers and “exempt reporting advisers” (“ERAs”) must fund their IARD accounts to pay all applicable registration renewal fees and notice filing fees before submitting their annual Form ADV amendment by March 31.¹

Annual Privacy Notice

Under Regulation S-P, an investment adviser must provide investors or clients who are natural persons with annual notice of the manager’s privacy policy, even if the manager has not changed its privacy policy.

¹ The IARD account must also be funded before the registrant submits its filing on Form PF.

Identity Theft / “Red Flag” Rules

In November 2013, the SEC and CFTC joint “red flag” rules took effect. Under those rules, managers who have the right (e.g., through a power of attorney) to transfer capital (e.g., from processing a redemption request) distributed to an investor who is a natural person to an account in the name of someone other than the investor must comply with the red flag rules, including through the adoption and enforcement of appropriate policies and procedures. The agencies’ rules include specific guidance regarding the elements of a compliant red-flag policy.

Custody / Annual Audit / Surprise Audit

Investment managers to private funds are required to determine whether they have custody of client assets, and, if so, whether they are subject to the SEC’s annual “surprise audit” requirement. SEC-registered investment advisers may avoid the “surprise audit” requirement by retaining a PCAOB-registered independent auditor to provide (a) audited financial statements of their client accounts (i.e., of the fund(s) managed by the adviser), prepared in accordance with U.S. generally accepted accounting principles, (b) to the fund(s)’ investors within one hundred twenty (120) days of the end of the funds’ fiscal year.

“Pay-to-Play”

Investment managers should review their pay-to-play policies and procedures, and any political contributions or other triggering activity by the firm’s staff that could require the firm, or individual employees, to register as lobbyists. Investment managers should include in their pay-to-play review any contributions (including conduct that could result in a deemed contribution) that could trigger state-specific laws which have similar or additional requirements than those imposed under the SEC’s regulations.

Annual Assessment of Compliance Program

An SEC-registered investment adviser is required to conduct a review at least annually of its compliance policies and procedures to assess their effectiveness in preventing fraud and other violations of the securities laws. The review should be documented by the manager’s compliance staff, and should take into account the adviser’s specific business model and staffing. In addition, the review should cover (a) violations by the manager’s staff of firm policies during the period under review; (b) the firm’s code of ethics, including compliance by the firm’s staff with its personal trading policy; (c) the manager’s marketing policies and practices; (d) its valuation policies and procedures; (e) any limitations imposed on “benefit plan investors” under the firm’s policies; (f) the manager’s business continuity / disaster preparedness testing conducted in the period under review; and (g) the firm’s social media policies and procedures.

Form PF

Investment advisers to one or more private funds with aggregate assets under management (“AUM”) of at least \$150 million are obligated to file Form PF with the SEC. A manager may, in addition, have an obligation to file Form PF quarterly, depending on the nature of the funds managed by the adviser and its aggregate AUM. For example, “large liquidity fund advisers”² must file their Form PF within fifteen (15) days of each fiscal quarter-end, “large hedge fund advisers”³ must file Form PF within sixty (60) days of each fiscal quarter-end,

² “Large liquidity fund advisers” are investment managers with at least \$1 billion in aggregate AUM attributable to liquidity funds and registered money market funds.

³ “Large hedge fund advisers” are investment managers with at least \$1.5 billion in aggregate AUM attributable to hedge funds.

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and all other filers must file Form PF with the SEC within one hundred twenty (120) days of each fiscal year-end.⁴

Requirements Specific to CPOs and CTAs (Registered and Exempt)

Affirmation of CPO Exemption / Exclusions

Under changes in CFTC regulations in 2012, a pool operator claiming exemption or exclusion from the requirement that it register as a CPO with the CFTC must affirmatively claim the exemption or exclusion through a filing with the National Futures Association (“NFA”). The exemption or exclusion claims must then be annually updated (“affirmed”) thereafter.

The annual affirmation process for CPOs started in December 2013. Investment managers relying on an exemption or exclusion from CPO registration under CFTC Regulations 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5) or an exemption from CTA registration under 4.14(a)(8), and who filed a notice with the NFA to claim the exemption or exclusion, must affirm the exemption or exclusion annually within sixty (60) days after the end of the calendar year.⁵ Failing to affirm the exemption or exclusion results in the exemption or exclusion being withdrawn at the end of the affirmation period. Accordingly, investment managers seeking to maintain their 2013 exemption or exclusion from CPO registration must affirm their exemption or exclusion by filing the required notice no later than March 3, 2014. Investment advisers who filed (or will file) a notice of exemption or exclusion between December 3, 2013, and March 3, 2014, are required to file their affirmation after December 2014.

Form CTA-PR

CFTC-registered CTAs and members of the NFA are required to file quarterly a Form PR with the NFA. Through filing a Form PR, a CTA reports general information about its business, its trading program(s), pool assets, and the identity of the CPO(s) operating the pool(s). Each Form PR must be filed no later than forty-five (45) days after the quarters ending in March, June and September, and within forty-five (45) days of the calendar year-end – in other words, the applicable deadline for December 31 filings is February 14, 2014. Investment advisers should also note that filing a Form PR with the NFA does not relieve the manager of the requirement to file a Form PF with the SEC.

Form CPO-PQR

All registered CPOs are required to file Form CPO-PQR. The form generally requires CPOs to make substantial disclosures. However, the extent to which the form and its schedules must be prepared and filed by the CPO depends on a number of factors, including, among other things, whether the investment adviser is registered with the SEC, and the size of the pool’s AUM. For example, investment managers who are also registered with the SEC and who file Sections 1 and 2 of Form PF with the SEC are required only to file

⁴ Including, for example, “smaller private fund advisers” and “large private equity fund advisers,” which are advisers with at least \$2 billion in aggregate AUM attributable to private equity funds. All investment managers with at least \$150 million in AUM that are not considered “large hedge fund advisers,” “large liquidity fund advisers,” or “large private equity fund advisers” are considered “smaller private fund advisers.”

⁵ This includes the “de minimis” exemption under Section 4.13(a)(3). That exemption permits the pool to avoid registration with the CFTC where either (a) the aggregate initial margin and premiums required to establish the pool’s commodity interest positions do not exceed five percent (5%) of the pool’s liquidation value, or (b) the aggregate notional value of the pool’s commodity interest positions do not exceed one hundred percent (100%) of the pool’s liquidation value. Determining whether an instrument is a commodity interest may be a complex analysis, and investment managers should proceed cautiously, and with appropriate documentary support, in considering whether the pools they manage satisfy the “de minimis” exemption.

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Schedule A of Form CPO-PQR. In addition, the following are the current AUM thresholds applicable to registered CPOs:

- CPOs with less than \$150 million in pool AUM must file only Form CPO-PQR Schedule A on an annual basis within ninety (90) days of the calendar year-end;
- CPOs with between \$150 million and \$1.5 billion pool AUM must file Form CPO-PQR Schedules A and B on an annual basis within ninety (90) days of the calendar year-end; and
- CPOs with at least \$1.5 billion in pool AUM must file Form CPO-PQR Schedules A, B and C on a quarterly basis within sixty (60) days of each calendar quarter-end.

Taking this information into account, investment advisers should carefully consider their business circumstances when reviewing the filing requirements of Form CPO-PQR.

Other Relevant U.S. Regulatory Considerations: Fund Ownership-Related Filings

Form 13F

An “institutional investment manager” must file Form 13F with the SEC if it exercises investment discretion with respect to \$100 million or more in securities subject to Section 13(f) of the Securities Exchange Act of 1934 (the “Exchange Act”). Section 13(f) securities are not limited to equity securities, but include exchange-traded securities, shares of closed-end investment companies, and certain convertible debt securities. The obligation to file Form 13F applies to managers regardless of whether they are registered with the SEC or a state securities authority. An adviser’s initial filing must occur within forty-five (45) days after the end of the calendar year in which the manager reaches the \$100 million filing threshold, and within forty-five (45) days of the end of each calendar quarter thereafter, as long as the manager continues to satisfy the \$100 million filing threshold.

Form 13H

Rule 13h-1 under the Exchange Act requires “large traders” to register with the SEC and to make certain disclosures on Form 13H thereafter. The term “large trader” is defined as a person that (a) exercises investment discretion over one or more accounts and (b) effects transactions of NMS securities for or on behalf of those accounts (c) in an aggregate amount of at least \$20 million in a day, or \$200 million in a month. The “large trader’s” initial filing must be made within ten (10) days from the date on which it crosses the applicable reporting threshold. In addition, a “large trader” is required to make an annual filing on Form 13H within forty-five (45) days after the end of the calendar year, and submit any amendments to its most recent 13H filing on record promptly after the end of any calendar quarter in which the information included on the form becomes materially inaccurate.

Schedules 13G or 13D

If an investment manager during the calendar year has reported on Schedule 13G filed with the SEC that a client (or clients) or account (or accounts), separately or in the aggregate, are beneficial owners of five percent (5%) or more of a class of a U.S.-registered voting equity security, then the manager is required to update the filing annually within forty-five (45) days of the end of the calendar year. The filing is not required if there has been no change to any of the information reported in the previous filing (other than the account-holder’s percentage ownership due solely to a change in the number of outstanding shares). An adviser reporting on Schedule 13D – which is used where the manager does not qualify to file on Schedule 13G -- is required to

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amend its filings “promptly” upon the occurrence of any “material changes” in the information previously reported on the form.

Section 16

Under Section 16 of the Exchange Act, an investment manager to a fund or account which is the beneficial owner of ten percent (10%) or more of a class of a U.S.-registered voting equity security must monitor its control to determine whether it is subject to any reporting obligations, or potential “short-swing” profit liability or other restrictions. If a fund or account exceeds that ownership threshold, then the manager, on behalf of the fund or account, must file a Form 3 with the SEC to report the ownership information. Changes to that ownership information must be reported on Form 4, and the manager must file a Form 5 within forty-five (45) days of the end of the issuer’s calendar year to report any changes in information not previously reported on Form 4, among other circumstances.

FBAR Reporting

The U.S.-based investment adviser to a private fund organized outside of the U.S. (e.g., a hedge fund or private equity fund) which has title to a foreign bank account, foreign prime brokerage account, or other foreign financial account, may have to file a Report of Foreign Bank and Financial Accounts (“FBAR”) with the U.S. Treasury with respect to each of the accounts over which it has signature authority. In general, a U.S. person is required to file an FBAR if he has a financial interest in or signature authority over a foreign bank, securities or other financial account in another country if the aggregate value of the foreign financial accounts exceeds \$10,000 at any time during the calendar year. Financial accounts of mutual funds or similar pooled entities that issue shares to the general public regularly and that have a regular net asset value determination and regular redemptions are included in the scope of the FBAR filing requirement. The FBAR is a calendar-year report, which means that it must be filed on or before June 30 of the year following the calendar year reported. The Internal Revenue Service has taken the position that extensions of time to file an FBAR will generally not be granted. The failure to timely file a complete FBAR may result in the imposition of significant penalties.

U.S. Treasury International Capital System (“TIC”) Forms

The U.S. Treasury, directly or through the Federal Reserve Bank of New York (“FRBNY”) as its agent, collects certain information from U.S. investment managers. The principal U.S. Treasury forms and their potential relevance to U.S. investment managers are summarized below.

- TIC Form SLT -- Aggregate Holdings of Long-Term Securities by U.S. and Foreign Residents: This form is required to be filed by, among others, investment managers which have investment discretion over funds with consolidated reportable holdings and issuances with a fair market value of at least \$1 billion as of the last day of any month during the reporting year. An investment adviser does not have to be registered with the SEC to be required to file Form SLT. The form must be filed no later than the 23rd calendar day of the month following the record date.
- TIC Form SHC -- Report of U.S. Ownership of Foreign Securities: Form SHC is in the form of a survey conducted every five years by the U.S. Treasury. The survey was last required in March 2012. In general, the survey requests that “end-investors” (which includes investment managers on behalf of the private or registered funds which they manage), among others, report their ownership of (or control over) foreign securities, which includes certain money market instruments. Form SHC must be prepared and filed by investment managers who satisfy the holdings requirements and who are notified by the FRBNY that the filing is required.

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- TIC Form SHCA -- Annual Report of U.S. Ownership of Foreign Securities: Only investment managers who are notified by the FRBNY that they must complete and file the form are required to do so; the FRBNY identifies the “end-investors” who must submit the form based on Form SHC survey data. The deadline for those advisers who were instructed by the FRBNY that they must submit Form SHCA is March 3, 2014.

Other Relevant U.S. Regulatory Considerations: Offering-Related Topics

New Rules 506(c) and 506(d)

Under new Rule 506(c), a private fund may engage in a general solicitation and utilize general advertising when making a securities offering, so long as the fund sells its securities only to “accredited investors,” as defined in Regulation D under the Securities Act of 1933. The new rule, and interpretive statements by the SEC since its enactment, make clear that investment managers to funds engaged in a general solicitation are required to take reasonable actions to verify that each investor is “accredited” under Regulation D. Importantly, the investment manager may no longer rely simply upon the written representation(s) from the investor that the investor is accredited (although reasonable reliance remains permitted for private placements conducted in compliance with Rule 506(b), which do not involve a general solicitation). It is not clear how the investment manager is expected to demonstrate that it has acted “reasonably” under the circumstances – guidance from the SEC indicates only that there are certain non-exclusive methods that a manager may utilize to determine the investor’s accredited status, including by reviewing the investor’s federal tax returns, and obtaining confirmation of the investor’s status from a satisfactory third-party (e.g., broker-dealer or registered CPA) who has conducted business with the investor. On the other hand, it is clear that the burden to demonstrate that the investment manager has acted reasonably falls on the adviser, which should retain documents establishing what it relied on and why that reliance made sense. Investment advisers should also note that the adoption of new Rule 506(c) did not result in modifications to, or the repealing of, the existing components of Rule 506, relating to private placement exemptions; hence the latter exemptions remain available to advisers of private funds who do not seek to raise capital through a general solicitation.⁶

Rule 506(d) – “Bad Actor” Disqualification

Under new Rule 506(d) of Regulation D, a “covered person” who commits a “bad act” on or after September 23, 2013, will disqualify the offering from being able to rely on the Rule 506 private placement exemptions.⁷ Example of “bad acts” that could cause such disqualification include certain categories of criminal convictions, the entry of certain SEC orders, and suspensions or expulsions from membership in FINRA. The SEC may waive the disqualification of the offering, but is anticipated to do so only where the investment adviser to the fund engaged in the private placement is able to demonstrate that it did not know, and should not have reasonably known (i.e., through the exercise of prudence), of the disqualifying event. In other words, investment managers to funds engaged in a private placement should be prepared to produce documentation demonstrating that they made reasonable efforts to identify “bad acts” committed by “covered persons.” This documentation may take the form of a questionnaire, for example. In any case, investment advisers to private

⁶ Note that the “de minimis” exemption for CPOs under CFTC Rule 4.13(a)(3) (and the “registration lite” regime available to registered CPOs) require that the securities to be issued by the pool (i.e., the fund managed by the investment adviser) may not be offered and sold through marketing to the public in the U.S. In other words, there are non-uniform standards applicable to marketing private fund interests under new Rule 506(c) and the existing CFTC registration exemptions. It is not clear when, or if, the CFTC will undertake to harmonize the relevant requirements applicable to the marketing of pool interests with the provisions of new Rule 506(c) of Regulation D.

⁷ “Covered persons” include, among others: (a) the issuer, including its predecessors and any affiliated issuers; (b) directors and officers participating in the securities offering, and general partners and managing members of the issuer; (c) promoters connected with the issuer at the time of sale; (d) persons that have been or will be paid (directly or indirectly) for soliciting investors; (e) investment managers of issuers that are pooled investment funds; and (f) general partners and managing members of such investment managers.

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funds engaged in an ongoing offering intended to comply with Rule 506 should ensure that they periodically update the information collected from “covered persons.”

Offering Materials

As part of its efforts to comply with the anti-fraud provisions of the federal securities laws (including, specifically, the anti-fraud rule under the Advisers Act), an investment adviser should periodically review offering documentation for the funds it manages to confirm that the documents remain consistent with its practices and the fund’s other offering materials, and to identify any needed updates.⁸ Ultimately, the investment manager should focus on satisfying its obligation to disclose all material information regarding the issuer that a reasonable investor would require to make an informed decision regarding whether to invest in the fund. It is a common practice for investment managers to review the offering materials for funds they manage as part of year-end and new-year planning.

New Issues: Rules 5130 and 5131

Under FINRA Rule 5130, member firms (e.g., brokers and dealers) are prohibited from selling new issues (i.e., shares issued in an initial public offering, or “IPO”) to any account in which a “restricted person” has a beneficial interest.⁹ To comply with this requirement, brokers will ask their investment manager clients (that is, on behalf of the funds advised by those managers) to represent that the funds are eligible to receive securities issued in an IPO. Before responding to the broker, the adviser should (a) obtain from each investor an updated representation that the investor’s status has not changed since the certification made by that investor when initially subscribing for interests in the fund, and (b) confirm that the aggregate ownership of the fund by “restricted persons” does not exceed more than ten percent (10%) of the beneficial interests issued by the fund.

In addition, under FINRA Rule 5131, member firms are prohibited from allocating new issues to any account (e.g., an account in the name of a fund managed by the adviser) in which a beneficial interest in excess of twenty-five percent (25%) is held by a “covered person” (or “covered persons” in aggregate).¹⁰ To comply with this requirement, brokers will request that their investment advisory clients represent that the aggregate beneficial interest of “covered persons” in the fund does not exceed the twenty-five percent (25%) threshold; if such interest exceeds that threshold, the investment manager / fund will not be permitted to receive allocations of new shares in the IPO. As with its efforts to comply with broker certification requests made under Rule 5130, the adviser should (a) obtain from each investor an updated representation regarding any changes in the person’s status as a “covered person” (i.e., since the certification made by that investor when initially subscribing for interests in the fund), and (b) confirm that the aggregate ownership by “covered persons” of interests issued by the fund does not exceed twenty-five percent (25%) of the total beneficial ownership interests of the fund.

While the initial Rule 5130 and Rule 5131 certifications must be affirmatively provided by the investor, the subsequent, updated representations may be obtained through the use of a “negative consent” communication provided to the investor.

⁸ In particular, the investment adviser should review the fund’s offering documents to ensure that they continue to include accurate descriptions of the investment manager’s objectives and strategies, valuation practices, redemption / withdrawal policies, and the fund’s service providers, and that the description of the risk factors associated with an investment in the particular fund continues to be accurate.

⁹ The term “restricted person” includes, among others, most categories of “associated persons” of a FINRA member-firm, and most owners and affiliates of a broker or dealer.

¹⁰ A “covered person” includes, among others, (a) an executive officer or director of a public company or a non-public company that is an investment banking client of the broker, or (ii) a person “materially supported” by such person.

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Anti-Money Laundering

An SEC-registered investment manager is expected to have adopted reasonable written policies and procedures intended to comply with the economic sanctions programs administered by the U.S. Treasury's Office of Foreign Assets Control. A manager should review that program no less than annually to confirm that it continues to be reasonably designed, taking into account the manager's business, investor base and office locations.

Electronic Delivery of Schedule K-1s

An investment manager seeking to rationalize the processes by which tax-reporting information is communicated to investors in the funds it manages may deliver Schedule K-1 electronically to investors in partnerships and LLCs that are taxed as partnerships. Electronic distribution of these forms may lessen the amount of time and expense associated with managing this annual process. Affected partners and LLC members must consent in advance to receive Schedule K-1 electronically.

FATCA

The U.S. Foreign Account Tax Compliance Act ("FATCA") is intended to bolster the U.S. government's policy of taxing financial assets and related income in the name of U.S. taxpayers and custodied with financial institutions outside the U.S. FATCA imposes potentially substantial information-reporting requirements on foreign financial institutions ("FFIs"), and withholding, documentation, and reporting requirements with respect to certain payments made to certain foreign entities. In particular, FFIs are required to register or, depending on the circumstances, enter into an agreement with the IRS under which the FFI would be obligated to report information about client relationships with U.S. persons (including, for example, non-U.S. legal entities with U.S. owners).

Investment funds organized outside of the U.S. will generally be considered FFIs under the FATCA regulations. To comply with FATCA, FFIs will be expected to perform certain due diligence and information-gathering responsibilities, and report certain information to the IRS. For example, an offshore feeder fund organized in the Cayman Islands, or its authorized contractual partner (e.g., a bank or broker), must identify and report all investors in that fund with U.S. tax status. If the FFI is not able or willing to collect or report the required information, then the entity is obligated to report that conclusion to the IRS and withhold thirty percent (30%) of any distributions by the FFI to the affected investor.

Foreign financial institutions must complete their registration on the FATCA website no later than April 25, 2014, for inclusion in the list of participating FFIs and deemed-compliant FFIs that the IRS intends to publish in June 2014. Investment managers should note that information submitted by FFIs to the IRS's registration website prior to January 1, 2014, will not be treated as a final submission.

Blue Sky / Form D Filings

As investment managers consider their annual securities laws reporting and filing obligations, they should include in their review the "blue sky" (i.e., state law) and Form D filings made by the funds which they manage. "Blue sky" filings may have to be renewed or revised, and / or an additional submission may have to be made. Form D filed with the SEC in relation to continuous offerings by funds managed by an investment adviser must be amended on an annual basis. Investment managers should note that Form D was amended with the recent enactment of Rule 506(c) (see above): funds engaged in a general solicitation must now check the box indicating that the offering is being made pursuant to Rule 506(c).

Miscellaneous Other Considerations

ISDA / Dodd-Frank Protocols

To support efforts by market-participants to comply with new regulations enacted as part of the Dodd-Frank legislation, the International Swaps and Derivatives Association (“ISDA”) implemented a Dodd-Frank Documentation Initiative. This program provides standardized amendments (“protocols”) intended to supplement existing ISDA master agreements or other documentation. Two protocols under the ISDA documentation initiative had compliance deadlines in 2013.

An investment manager, as part of its review of its annual compliance obligations, should review the trading documentation for the funds and accounts over which it has investment authority to determine the scope and nature of any Dodd-Frank-related obligations, and to assess whether compliance with those obligations will be more efficiently achieved through entering into the ISDA Dodd-Frank protocols. If so, the investment manager should complete the questionnaire for the relevant protocol(s), submit an adherence letter, and pay the required fee (currently \$500 per protocol).

AIFMD

The Alternative Investment Fund Managers Directive (“AIFMD”) was adopted by the European Parliament in 2010 and by the Council of the European Union (“EU”) in 2011. Member states of the EU and certain other jurisdictions where the directive will have effect (collectively, the “Relevant Jurisdictions”) were required under the adopting legislation to transpose the AIFMD into local law no later than July 2013.

The AIFMD establishes uniform requirements applicable to alternative investment funds (“AIF”) and to managers of AIFs (“AIFM”) who seek to market those vehicles in a Relevant Jurisdiction. The definition of an “alternative investment fund” in the AIFMD is broad and includes private funds (including private equity funds) organized in the U.S. and other jurisdictions outside of the EU. More specifically, the AIFMD applies to the marketing efforts of U.S.-based investment managers who market private funds organized in an offshore jurisdiction to an investor in a Relevant Jurisdiction.¹¹

Unless an exemption applies, the AIFMD requires the authorization of AIFMs before they commence operations in a Relevant Jurisdiction. In addition, the directive imposes numerous requirements on how AIFMs conduct their business and how AIFs are marketed. The AIFMD also requires AIFMs to satisfy certain periodic reporting requirements (including, among others, regarding the fund’s income and expenditures, compensation of the manager’s staff, the extent of any carried interest, etc.) to investors and to securities regulators.

There are several exemptions from the application of the AIFMD to a non-EU-based AIFM. Perhaps most important for U.S.-based investment advisers is that the directive does not apply to an AIF that is not “marketed” to investors in a Relevant Jurisdiction. Under the directive, “marketing” is defined as “a direct or indirect offering or placement” by an AIFM of shares of an AIF; in other words, the definition is based on the actual offering or placement, and does not seem to be based on the nature or number of communications which precede the “offering or placement.” Moreover, Recital 70 of the AIFMD states that the directive is not intended to “affect the current situation, whereby a professional investor established in [a Relevant Jurisdiction] may invest in AIFs on its own initiative.” U.S.-based AIFMs would therefore seem to be permitted to rely on “reverse solicitations” or “passive marketing” (i.e., generally, where contacts seeking information about the manager’s services are not initiated by the manager) when communicating with investors in a Relevant Jurisdiction regarding the AIF managed by the adviser.

¹¹ The AIFMD also applies to U.S.-based investment advisers who manage one or more EU-based AIFs.

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Nonetheless, U.S.-based investment advisers should approach whether to rely on these exemptions cautiously. First, there has been very little comment by the EU and the member state regulators suggesting or identifying the acceptable elements of a “reverse solicitation” or “passive marketing” arrangement after the effective date of the AIFMD. Moreover, there has been very little clarity regarding how market-participants are structuring these arrangements to successfully claim that a “reverse solicitation” or “passive marketing” did not involve “marketing” as defined in the AIFMD.

Second, the AIFMD requires that non-EU-based AIFs and AIFMs comply with the private placement regimes of each individual country subject to the directive. In other words, the AIFMD legislation is merely a framework and each Relevant Jurisdiction is independently responsible for integrating the AIFMD’s provisions into its laws and setting its own standards to be applied to private placements. Additionally, a number of Relevant Jurisdictions have yet to transpose the AIFMD into local law, or to revise their respective private placement regimes. Consequently, there is and will continue to be considerable uncertainty regarding private placement requirements in many, if not all, jurisdictions subject to the AIFMD. Accordingly, before speaking with or responding to an investor in a jurisdiction subject to the AIFMD, investment managers should not rely exclusively on the “reverse solicitation” and “passive marketing” exemption from the definition of “marketing,” but should carefully review the private placement legislation of that jurisdiction to determine the scope and nature of any obligations that the manager must satisfy.

Annual State Corporate / LLC / LP Filings and Taxes

An investment adviser or private fund organized in a U.S. state may be required to make annual or other filings and tax payments in the state in which the entity was formed, and in states or non-U.S. jurisdictions in which the entity is qualified to do business. The manager’s staff should review these requirements to determine any applicable deadline and filing requirements, including any payment or assessment obligations owed by the adviser or the fund which it manages.

Liability Insurance

An investment adviser that has obtained management liability insurance (e.g., director / officer or errors / omission coverage) should consider reviewing the adequacy of its existing policy(ies) in view of any changes in its business or operating environment during 2013.

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