February 4, 2016

Private Equity Alert

Regulatory Developments and Annual Compliance Obligations Applicable to Private Fund Sponsors

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Through a growing number of enforcement actions, speeches by senior officials and written guidance, the Securities and Exchange Commission (the SEC) has sent a clear message that the fiduciary obligations and compliance programs of investment advisers to private funds will be subject to increased levels of scrutiny.[1] As the new year begins, we would like to highlight some current areas of SEC focus and other regulatory developments, as well as remind our private equity clients of important upcoming regulatory filings and compliance obligations in 2016.[2]

Current Areas of SEC Focus and Other Regulatory Developments

Fees and Expenses

In several recent high-profile enforcement actions against private fund sponsors, the SEC emphasized that it expects clear up-front disclosure regarding all fees and expenses paid by a fund and its investors. Specific subjects of these enforcement actions included:

Accelerated Monitoring Fees: The SEC brought an enforcement action against a fund sponsor for failing to disclose receipt of accelerated monitoring fees. Although the sponsor had disclosed that it may receive monitoring fees from portfolio companies held by the funds it advised, and disclosed the amount of monitoring fees that had been accelerated following the acceleration, it had failed to disclose to its funds' limited partners prior to their commitment of capital that it may accelerate future monitoring fees upon termination of the monitoring agreements. As a result, the sponsor paid nearly $40 million in disgorgement and penalties to settle the proceeding. It is important to note that the SEC's position appears to be that current disclosure and other forward-looking steps (such as ceasing to take accelerated monitoring fees) are not a sufficient remedy for absence of sufficient disclosure prior to a fund's closing.

Misallocation of Broken Deal Expenses: The SEC brought an enforcement action against an investment adviser for failing to fairly allocate broken deal expenses among its "main" private funds and certain co-investors, including vehicles whose investors consisted of senior executives and other personnel of the adviser. For a period of several years, the adviser did not allocate broken deal expenses to these co-investment vehicles even though certain vehicles participated in almost every transaction with the main funds, and the SEC found that main fund investors had not been provided with clear disclosure on this point. Despite the fact that the main funds had provided investors with disclosure stating that they would bear their share of broken deal expenses, the SEC determined that the adviser had failed to expressly disclose that it did not allocate any broken deal expenses to co-investors. Furthermore, the fact that the adviser had voluntarily (and prior to SEC involvement) hired a third-party consultant to review its fund expense allocation policies and subsequently revised its procedures to allocate certain broken-deal expenses to co-investors did not prevent the SEC from bringing the action and requiring the adviser to pay nearly $29 million in disgorgement and penalties to settle the proceeding.

Misallocation of Fees and Expenses: The SEC charged an investment adviser to private funds with, among other things, improperly using fund assets to pay for the adviser's operating expenses, including employee salaries and health benefits, rent, parking, utilities, computer equipment, technology services and other operational costs. The SEC stated that fund investors did not receive clear disclosure regarding such payments and that advisers must be fully transparent regarding the type and magnitude of expenses they allocate to their funds.

In light of these and related SEC actions, it is crucial that advisers review not only their current, but also their past, policies and practices in these areas to ensure that expenses borne by investors are properly disclosed prior to accepting capital commitments and are consistent with fund partnership agreements and the adviser's fiduciary responsibilities. If an adviser identifies issues with its current or prior practices, it should consider if any remedial measures are necessary.

Co-Investments

The SEC has stated that co-investment arrangements should be scrutinized to ensure that opportunities have been allocated in a manner consistent with an adviser's stated policies and fiduciary duties. Advisers should maintain co-investment allocation policies that should be disclosed so that all investors are aware of the methodologies used to allocate both investments and related expenses.

Conflicts of Interest

Through various speeches and enforcement actions, the SEC has emphasized its focus on the adequacy of disclosure of conflicts of interest. For example, the SEC brought an action against an investment adviser for failing to disclose to investors the fact that the adviser and certain of its principals made large loans to portfolio companies managed by the adviser. As a result of these loans, the adviser and its principals in certain cases obtained interests in portfolio companies that were senior to the equity interests held by the funds.

The SEC also brought an action against an adviser for failing to disclose to investors that one of its employees had founded and controlled a company that formed a joint venture with a portfolio company held by a fund for which the employee was a portfolio manager. The SEC found that the adviser lacked sufficient compliance policies concerning the outside activities of its employees, including how they should be assessed and monitored for conflict purposes, and when an employee's outside activity should be disclosed to investors. Importantly, the SEC also charged the adviser's chief compliance officer with causing these violations because he failed to adopt the required compliance policies.

Valuation

While the SEC has stated that it is generally not in the business of second-guessing an adviser's valuation of an asset, it has said that the adviser must clearly disclose to investors the valuation methodologies it will use, and should not change methodologies absent a rational justification. The SEC recently brought several enforcement actions against fund advisers for using inflated valuations or for misrepresentations regarding the valuation methodologies used. Although these proceedings contained fairly egregious facts, they are an indication that the SEC is focused on the issue.

Marketing

The SEC has indicated concern with advisers' use of performance projections in marketing materials without adequate cautionary disclosure, as well as improper or insufficient disclosure regarding management team members, especially situations where an adviser has reason to know that a team member may not stay in his or her current role after fundraising ends.

Cybersecurity

In 2014, the SEC launched a cybersecurity initiative designed to assess cybersecurity preparedness in the securities industry and to obtain information about the industry's recent experiences with certain types of cyber threats. As part of this initiative, the SEC conducted sweep examinations of registered broker-dealers and registered investment advisers focused on cybersecurity governance, identification and assessment of cybersecurity risks, protection of networks and information, risks associated with remote customer access and funds transfer requests, risks associated with vendors and other third parties, detection of unauthorized activity, and experiences with certain cybersecurity threats. Among the SEC's findings was that 88% of examined broker-dealers and 74% of examined advisers reported being the subject of a cyber-related incident directly or through one or more of their vendors. The majority of the cyber-related incidents were related to malware and fraudulent emails.

On September 15, 2015, the SEC published a risk alert pertaining to a second round of cybersecurity examinations aimed at registered investment advisers and broker-dealers. The SEC stated that this initiative will focus on the following areas: (i) governance and risk assessment, (ii) access rights and controls, (iii) data loss prevention, (iv) vendor management, (v) training and (vi) incident response.[3] A few days after the risk alert, the SEC settled an enforcement action arising out of a cybersecurity breach at a registered investment adviser, illustrating that advisers without sufficient cybersecurity policies risk SEC sanction.[4]

Anti-Money Laundering Rule Proposal

In 2015, the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury, proposed rules that would require registered investment advisers to adopt anti-money laundering (AML) programs and report suspicious activity to FinCEN pursuant to the Bank Secrecy Act (BSA). The proposed rules would apply to all advisers registered with the SEC, including those dually registered with the SEC as broker-dealers and registered advisers located outside of the U.S., but would not apply to exempt reporting advisers.

The proposed rules require each investment adviser to develop and implement a written AML program reasonably designed to prevent the adviser from being used to facilitate money laundering or the financing of terrorist activities and to achieve and monitor compliance with the applicable provisions of the BSA and FinCEN's regulations. The AML program must be approved in writing by the adviser's governing body and an adviser would be required to make its AML program available to FinCEN and the SEC upon request. Under the proposal, the four minimum requirements for an AML program are to: (i) establish and implement policies, procedures and internal controls; (ii) provide for independent testing for compliance to be conducted by company personnel or by a qualified outside party; (iii) designate a person responsible for implementing and monitoring the operations and internal controls of the program; and (iv) provide ongoing training for appropriate persons.[5]

Code of Ethics Guidance

The SEC issued guidance regarding an exception to the reporting requirements for personal securities transactions of certain investment advisory employees. Section 204A of the Investment Advisers Act of 1940 (the Advisers Act) requires registered investment advisers to have written policies and procedures reasonably designed to prevent the adviser and its employees from misusing material nonpublic information. Rule 204A-1 thereunder provides that an adviser's Code of Ethics must include requirements that certain advisory personnel with access to nonpublic information regarding clients' securities transactions or holdings or who are involved in making securities recommendations to clients (Access Persons) report personal securities accounts and trading information to the adviser so that the firm and the SEC can identify potential improper activity. However, the rule grants an exception to these reporting requirements when an Access Person's securities are held in an account over which he or she has "no direct or indirect influence or control" (the Reporting Exception).

In the guidance, the SEC stated that a "blind trust" in which a trustee manages assets for the benefit of an Access Person who has no knowledge of the specific management actions taken by the trustee and no right to intervene in the trustee's management would qualify for the Reporting Exception. However, the SEC cautioned that other arrangements, such as when an Access Person establishes other types of trusts, or grants investment discretion over an account to a third-party investment manager, may or may not qualify. The SEC stated its belief that the fact that an Access Person provides a trustee with management authority over a trust for which the Access Person is grantor or beneficiary, or provides a third-party manager discretionary investment authority over a personal account, by itself, is insufficient for an adviser to reasonably believe that the Access Person has no direct or indirect influence or control over the trust or account. In those circumstances, the Access Person could still discuss securities transactions with the trustee or third-party manager, and could potentially direct the trustee or third-party manager to engage in a transaction. The SEC believes that an Access Person's discussions with the trustee or third-party manager concerning account holdings may, in certain circumstances, reflect direct or indirect influence or control.

Foreign Corrupt Practices Act (FCPA)

The SEC has indicated that it will scrutinize private equity sponsors with respect to compliance with the FCPA. The FCPA may be implicated by practices used by fund sponsors (or their agents) when raising money from sovereign wealth funds and other foreign governmental entities. In addition, private equity managers must perform appropriate FCPA diligence on portfolio companies to ensure they are in compliance with the statute.

ILPA Reporting Template

On January 29, 2016, the Institutional Limited Partners Association (ILPA) published its new fee reporting template.[6] The template includes two levels of reporting, Level 1 and Level 2. ILPA considers Level 1 to be the minimum reporting information to be provided to all fund limited partners. Level 2 information is more detailed and includes itemized information with respect to fees subject to offset, partnership expenses and reimbursements received from portfolio investments. ILPA recognizes that many fund limited partners may be satisfied with Level 1 data only, but recommends that fund sponsors seek to provide both levels of information to limited partners. The template is meant to be a supplement to a fund's standard financial disclosure. Although a few large institutional investors[7] have already endorsed the new template, it is unclear whether or how much of the template will become commonplace or market standard.

Compliance Obligations for Private Equity Fund Advisers[8]

Form ADV
(Annual Amendment due by March 30, 2016)

Investment advisers that are registered with the SEC under the Advisers Act, and advisers filing as exempt reporting advisers with the SEC, must file an annual amendment to Form ADV within 90 days of the end of their fiscal year (i.e., by March 30 for advisers with a fiscal year-end of December 31).[9]

Registered investment advisers must file an updated Part 1 and Part 2A brochure of such adviser's Form ADV, while exempt reporting advisers must file an updated Part 1. Registered investment advisers are also required to update, but are not required to file with the SEC, Part 2B brochure supplements of their Form ADV. In addition, registered investment advisers are required to provide a copy of the updated Form ADV Part 2A brochure (or a summary of changes with an offer to provide the complete brochure) and, in certain cases, a Part 2B brochure supplement to each client.

The SEC has proposed amendments to Form ADV that, if adopted, would require registered investment advisers to provide additional information regarding any separately managed accounts they advise. The proposal would also adopt a method for multiple private fund adviser entities operating a single advisory business to register using a single Form ADV. These proposed amendments would codify a 2012 SEC no-action letter permitting "relying advisers" to be part of, and rely on, an affiliated "filing adviser's" SEC registration as long as the relying and filing advisers conduct a single advisory business. The proposed amendments would clarify and expand the disclosure required with respect to the advisers covered by the "umbrella registration" (including adding a new Schedule R for each relying adviser).[10]

Form PF
(Annual Filing due by April 29, 2016)

Registered investment advisers to private equity funds with more than $150 million of assets under management attributable to those funds (as of the last day of their most recent fiscal year) are required to file Form PF with the SEC within 120 days after such adviser's fiscal year-end (i.e., by April 29, 2016 in the case of an adviser with a fiscal year-end of December 31).[11] Form PF requires disclosure of the adviser's assets under management and information on each private fund it advises.

CFTC Filings
(Annual Affirmation of De Minimis Exemption due by February 29, 2016)

Many private equity fund sponsors are able to rely on the exemption from registration with the National Futures Association (NFA) that is available under CFTC Rule 4.13(a)(3) (the *de minimis* exemption) and have claimed such exemption.[12] The *de minimis* exemption is subject to an annual affirmation which must be completed within 60 days after the end of each calendar year. Failure to affirm the exemption is deemed a withdrawal of the exemption once the 60 day period has elapsed. Private fund sponsors that do not qualify for the *de minimis* exemption may be subject to registration with the NFA as commodity pool operators and commodity trading advisors.

Custody Rule

Registered investment advisers to private funds must comply with certain custody procedures, including generally maintaining client funds and securities with a qualified custodian and either (i) undergoing an annual surprise examination of client assets conducted by an independent public accountant or (ii) obtaining an audit of each private fund by an independent public accountant and delivering the audited financial statements, prepared in accordance with generally accepted accounting principles, to fund investors within 120 days of the fund's fiscal year-end. Private fund sponsors should review their custody procedures to ensure compliance with these rules.

Annual Review of Compliance Policies and Procedures

Registered investment advisers are required to perform a review to assess the adequacy of the adviser's compliance policies and the effectiveness of their implementation and, if necessary, to update their compliance policies and procedures on an annual basis. In determining the adequacy of an annual review, the SEC has indicated that it will consider a number of factors, including the persons conducting the review, the scope and duration of the review and the adviser's findings and recommendations resulting from the review. Written evidence of the results of the annual review should be kept and reviewed by the adviser's chief compliance officer, senior management and, if applicable, outside counsel. Employee compliance training should be conducted at least annually based on the results of the compliance review.

Review of Offering Materials

As a general disclosure matter, and for purposes of U.S. federal and state anti-fraud laws, an investment adviser must continually ensure that each of its fund offering documents is kept up to date, is consistent with its other fund offering documents and contains all material disclosures that may be required in order for investors to be able to make an informed investment decision.

Accordingly, it may be an appropriate time for an investment adviser to review its offering materials (including investor newsletters and pitch books) and confirm whether or not any updates or amendments are necessary. In particular, an investment adviser should take into account the impact of recent market conditions on its funds and review its current disclosure regarding: investment objectives and strategies; valuation practices; performance and related disclaimers; any mention of specific investments to confirm that there are no "cherry picking" issues; conflicts of interests; risk factors; personnel; service providers; "bad actor" disclosures (as described in further detail below); and any relevant legal or regulatory developments. In light of the SEC's focus on the allocation of private fund fees and expenses discussed above, managers must take special care in reviewing their practices and disclosure in this area.

Certain Filings Required Under the Securities Exchange Act of 1934

Form 13F

The Securities Exchange Act of 1934 requires investment advisers (whether or not registered) to submit a report on Schedule 13F with the SEC, within 45 days after the last day of any calendar year and within 45 days after the last day of each of the next three calendar quarters following such calendar year, if on the last day of any month of such calendar year the investment adviser exercised discretion with respect to accounts holding Section 13(f) securities (generally, publicly traded securities) having an aggregate fair market value of at least $100 million.

Form 13H

An investment adviser that is a "large trader," i.e., it engages in transactions in National Market System securities equal to or in excess of two million shares or $20 million during any calendar day, or 20 million shares or $200 million during any calendar month, must promptly (within 10 days) file an initial Form 13H after effecting aggregate transactions equal to, or greater than, the applicable activity level. Following this initial filing, all large traders must make an amended filing to update any previously-disclosed information that becomes inaccurate no later than promptly (within 10 days) following calendar quarter end and must separately file an annual amendment within 45 days after calendar year-end.

Privacy Policy Notice

Financial institutions, including, investment advisers and private funds, are subject to SEC, CFTC and Federal Trade Commission regulations governing the privacy of certain confidential information. Under such privacy rules, investment advisers and private funds have been required to provide notice to individual investors regarding their privacy policies and procedures at the start of the relationship with such individual investor and annually thereafter. However, effective December 4, 2015, a financial institution, including an investment adviser or private fund, is no longer required to provide the annual privacy notice (although it must continue to provide the initial notice) if the investment adviser or private fund:

> (a) only discloses nonpublic personal information to nonaffiliated third parties in a manner that does not trigger the right of the individual investor to "opt-out" from such disclosure. The kind of disclosure that does not trigger an "opt-out" right includes, but is not limited to, (i) disclosure to nonaffiliated service providers for the purpose of performing services for the investment adviser or private fund (subject to certain confidentiality and disclosure requirements), (ii) disclosure to service providers as necessary to effect a transaction authorized by the individual investor, (iii) disclosure to protect the confidentiality or security of the investment adviser's or the fund's records pertaining to the individual investor or to protect against fraud and (iv) disclosure as specifically permitted or required by law; and
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> (b) has not changed its privacy policies and practices regarding sharing nonpublic

personal information from those described in its most recent notice sent to individual investors.

Form D and Blue Sky Filings

Form D filings for private funds with ongoing offerings lasting longer than one year need to be amended on an annual basis, on or before the first anniversary of the initial Form D filing. Copies of Form D can be obtained by potential investors via the SEC's website. On an annual basis, private fund sponsors should also review their blue sky filings for each state to make sure they meet any renewal requirements. In some states fees apply for late blue sky filings.

Bad Actor Rules

Rule 506(d) of Regulation D under the Securities Act of 1933 prohibits a private fund from relying on the safe harbor private placement exemption contained in Regulation D if the fund, or certain specified persons or entities associated with the fund, are subject to disqualifying events as a result of bad acts. It is imperative for private fund sponsors that intend to rely on Regulation D to identify all persons and entities subject to the rule and conduct appropriate due diligence (including receiving written certifications) to ensure that none are subject to disqualification. In addition, for funds that are engaging in continuous and/or long-term offerings, the diligence should be periodically refreshed.[13]

State Lobbyist Registrations

Private fund sponsors should look at each state in which a public entity or a public employee retirement plan is an investor or a potential investor to determine if the investment adviser or its personnel are required to register as lobbyists. This may require engaging local counsel with knowledge of state and municipal laws and regulations.

Annual VCOC/Plan Assets Certifications

Many private equity funds limit "benefit plan investors" to less than 25% of any class of equity interest in a fund (the 25% test) so that such fund's assets are not deemed "plan assets" subject to the U.S. Employee Retirement Income Security Act of 1974 (ERISA), and some private equity fund sponsors have agreed to provide an annual certification to that effect. Such certification generally can be made at any time during the year, but typically investors wish to have a certification made as of a specified annual date, often as of the end of the year, for convenience. Such certifications must take into account the impact of transfers and withdrawals of fund interests during the applicable period, as well as the impact of different ownership percentages of any alternative investment vehicle, or investments, due to excuse and exclusion.

Other private equity funds operate as "venture capital operating companies" (VCOCs), and may have agreed to deliver an annual certification or opinion as to the fund's VCOC status. Such certification or opinion will require a determination as to whether at least 50% (based on cost) of the fund's total investments (excluding cash and other temporary investments) constitute "good" venture capital investments during the 90-day valuation period applicable to the fund. Information regarding the cost of each investment held by the fund on one day during the applicable 90-day period, and confirmation of the management rights required for any "good" investment, should be gathered in preparation for such certification or opinion. Usually the 90-day valuation period is established by the fund in connection with its initial investment. The timing of providing the certification is usually tied to the end of the 90-day period, often 60 days following the end of such period. Fund sponsors should conduct the VCOC or 25% test analysis as applicable and deliver the applicable certification to their limited partners.

If a "feeder fund" for investors with a particular tax profile was established to invest in a "master fund," it is possible that the feeder fund might be designed to hold plan assets of ERISA investors. In such case, it may be necessary to update any mandatory disclosure pursuant to Section 408(b)(2) of ERISA (if applicable) regarding direct and indirect compensation for services, if any, relating to the feeder fund.
In the case of a new master fund that intends to operate as a VCOC but has not yet made its first investment, updated disclosure to comply with Section 408(b)(2) of ERISA (and possibly other reporting

requirements applicable to ERISA investors) may be required, particularly if expenses or management fees were paid by any ERISA investors before the first investment has been made. The circumstances pertaining to each master and feeder fund differ, and counsel should be consulted regarding compliance with any applicable disclosure requirements.

TIC Reporting

U.S. private fund sponsors (and non-U.S. private fund sponsors that manage U.S.-domiciled funds) that have portfolio investments in foreign issuers, have issued interests in their funds to foreign residents or have claims on or liabilities to foreign residents may be required to report those transactions to the Federal Reserve Bank of New York on the Treasury International Capital (TIC) system.

TIC Form SLT generally requires U.S. resident entities to report investments in foreign long-term securities (i.e., securities with a maturity of more than one year) and long-term securities issued by such U.S. resident entities to foreign persons equal to $1 billion or more. A private fund adviser is required to consolidate its reportable long-term securities across all funds to determine whether it meets the reporting threshold. The acquisition of 10% or more of the voting securities of an entity is considered a “direct investment” under the form and is excluded for purposes of determining the $1 billion threshold. Form SLT must be filed monthly. Note that sales of U.S.-domiciled fund interests to foreign investors, and sales of foreign-domiciled fund interests to U.S. investors, may count towards the $1 billion reporting threshold.

TIC Form B generally requires (subject to certain thresholds) the reporting of information on certain claims and liabilities (including loans and short-term debt instruments) of U.S. financial institutions with non-U.S. persons. Filing obligations generally may result from private funds that invest directly in non-U.S. debt instruments, provide credit to non-U.S. entities, directly hold non-U.S. short-term securities, or maintain credit facilities with non-U.S. financial institutions. However, any claims or liabilities that are serviced by a U.S. entity, or any claims or liabilities for which a U.S. custodian or U.S. sub-custodian is used, do not need to be reported by the private fund adviser. Form B must be filed monthly, with a separate quarterly filing.

TIC Form S generally requires U.S. resident entities to report purchases and sales of long-term securities with foreign entities if, during any month, such transactions equaled $350 million or more in the aggregate. A private fund adviser is required to consolidate its reportable long-term securities transactions across all funds to determine whether it meets or exceeds the reporting threshold. Once the reporting threshold is met in a given month, Form S must be filed monthly for the remainder of the calendar year. Note that sales of U.S.-domiciled fund interests to foreign investors, and sales of foreign-domiciled fund interests to U.S. investors, may count towards the $350 million reporting threshold.

Form BE-13

The Bureau of Economic Analysis (BEA) requires a U.S. entity, including a private fund domiciled in the U.S., to make a filing on Form BE-13 if a non-U.S. person acquires ownership of 10% or more of its voting securities and the cost of acquiring such securities is more than $3 million.[14] The BEA generally does not consider limited partner interests or non-managing member limited liability company interests to be voting securities, so most U.S. funds with foreign investors would not have to file. However, general partner/managing member interests generally are considered voting securities for purposes of the BE-13. Therefore, a fund domiciled in the U.S. that has a general partner domiciled outside the U.S. generally would be required to file. In addition, if a non-U.S. fund owns 10% or more of the voting securities of a U.S.-domiciled portfolio company, the portfolio company generally would have to file. Reports are required to be filed within 45 days of a reportable transaction. After an initial BE-13 filing is made, the BEA requires quarterly, annual, and five-year benchmark filings. A U.S. person must file a BE-13 for a reportable transaction even if not directly requested to do so by the BEA.

European Union Regulation of the Private Equity Industry

The Directive on Alternative Investment Fund Managers (the AIFM Directive) has now been implemented into the national laws of all key European Economic Area (EEA) member states and the transitional rules terminated in July 2014. Managers bringing funds to the market in the EEA since such date have to comply with the AIFM Directive and its varied implementation across the EEA. The AIFM Directive subjects EEA private fund sponsors or private fund sponsors using EEA fund vehicles to certain operational and organizational requirements.

The AIFM Directive also impacts U.S. private fund managers that market fund interests to investors in the EEA by imposing a subset of the full AIFM Directive rules upon them. In particular, such managers become subject to certain ongoing compliance requirements including disclosure and reporting obligations, restrictions on extracting capital from EEA portfolio companies and other measures designed to improve transparency when acquiring EEA portfolio companies. In each jurisdiction which has implemented the AIFM Directive there is a separate private placement regime which governs the registration requirements for that particular jurisdiction – some require a straightforward notification, while others require an application to be submitted, with approvals from regulators being necessary prior to marketing to investors in the relevant jurisdiction. Some EEA jurisdictions have supplemented the AIFM Directive's minimum requirements for non-EEA private fund sponsors with additional obligations such as, in the case of Denmark and Germany, the appointment of a depositary to oversee the fund's investments and cash flows and, in the case of Austria and France, full AIFM Directive compliance equivalent to that required of EEA private fund managers. Private fund sponsors will have to carefully plan their marketing campaigns and register for marketing (by way of notification or application, as applicable) in any relevant EEA jurisdictions in good time. For those jurisdictions where an approval is required, the applications should be submitted well in advance of anticipated marketing efforts commencing since regulators in some EEA jurisdictions have been taking several months to approve marketing, although in many jurisdictions the process takes a matter of days or weeks. In addition, fund managers will be required to carry out a short form compliance process to ensure they are ready to meet the European reporting requirements. We are currently assisting a significant number of U.S.-based and global private fund managers in making applications to EEA regulators for approval under the AIFM Directive's private placement regimes in a variety of EEA jurisdictions.

It is currently intended that later this year (although implementation has been delayed and may be delayed further) it will become possible for U.S. private fund managers to apply for the full marketing passport that will allow them to select an EEA member state to regulate them and then freely market their funds to professional investors across the EEA. However, this would only be available if U.S. private fund managers were prepared to accept full compliance with the AIFM Directive and a system of dual regulation that may not be attractive. As such, our expectation is that the extension of the full marketing passport to U.S. private fund managers will not dramatically change the market. It might, however, begin to have an impact if it brings forward the date at which some member states remove their private placement regimes. We would be happy to discuss options with you on a case by case basis in due course.

Annual Compliance Obligations

Due Date	Regulatory Filing
February 16, 2016	Annual amendment to ***Form 13H*** ***Form 13F***
February 29, 2016	Annual ***CFTC exemption*** affirmation due for commodity pool operators and commodity trading advisors
March 30, 2016	***Form ADV*** annual amendment
April 29, 2016	As required by the ***Custody Rule***, distribute audited financial statements to investors
April 29, 2016	Distribute updated ***Form ADV*** Part 2A to clients
April 29, 2016	Annual update to ***Form PF*** due for registered investment advisers to private equity funds with more than $150 million of assets under management attributable to private funds

Other Compliance Obligations

TIC Form SLT	Due on 23rd day following last business day of preceding month
TIC Form B	Due on 15th day following month-end and 20th day following quarter-end
TIC Form S	Due on 15th day following last business day of preceding month
Form 13H initial filing	Due prompty (within 10 days) after first effecting transactions equal to or greater than the threshold activity level
Other than annual amendment to Form 13H	Due promptly (within 10 days) following quarter-end in which information became inaccurate
Form 13F	Due within 45 days of the last day of the calendar year and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year
Form BE-13	Due on 45th day after the transaction is completed
Other than annual amendment to *Form ADV*	Due promptly after information becomes materially inaccurate (or, for certain items, after information becomes inaccurate in any way)
Review of compliance policies and procedures	Annually
Employee training	Annually
Notice of changes to privacy policies, if any	Annually
Update of “bad actor” representations	Annually during the fundraising process and as appropriate with respect to placement agents
Lobbying registration and compliance obligations	Prior to marketing to pension funds and in accordance with compliance obligations of the particular jurisdiction

1. Please see our May 2015 PE Alert *OCIE Director Shares Observations From Recent SEC Examinations of Private Equity Advisers* available at http://www.weil.com/~/media/files/pdfs/150367_pe_alert_may2015_v1.pdf
2. This Private Equity Alert is not intended to provide a complete list of an investment adviser’s compliance obligations or to serve as legal advice and, accordingly, has not been tailored to the specific needs of a particular investment adviser’s business.
3. For more information please see our September 2015 Private Equity Alert *OCIE Publishes Risk Alert Regarding Cybersecurity Examination Initiative for Registered Investment Advisers and Broker-Dealers* available at http://www.weil.com/~/media/publications/private-equity-alert/pe_alert_sep_015.pdf
4. For more information please see our September Private Equity Alert *Did the Regulatory Cybersecurity Shoe Just Drop? The SEC Enforcement Action in In re R.T. Jones*

Capital Equities Management, Inc. available at http://www.weil.com/~/media/files/pdfs/150634_pe_alert3_sept2015_v1.pdf

5. For more information please see our September 2015 Private Equity Alert *FinCEN Proposes AML Regulations for Registered Investment Advisers* available at http://www.weil.com/~/media/files/pdfs/150583_pe_alert_sept2015_v3.pdf

6. Available at https://ilpa.org/best-practices/reporting-best-practices/for-consultation-ilpa-fee-reporting-template/

7. A list of the early endorsers can be found at: https://ilpa.org/wp-content/uploads/2016/01/Template-Endorsement-List-February-1-2016.pdf

8. Certain deadlines are calculated based on the assumption that the adviser has a fiscal year-end of December 31.

9. In addition, an investment adviser must update its Form ADV promptly if certain information becomes inaccurate as indicated in the instructions to Form ADV.

10. For more information please see our June 2015 Private Equity Alert *SEC Proposes Amendments to Form ADV Regarding Separately Managed Accounts and Umbrella Registrations* available at http://www.weil.com/~/media/publications/private-equity-alert/pe_alert_june_08_2015.pdf

11. Please note that certain large "hedge fund" advisers and "liquidity fund" advisers are subject to more frequent and extensive reporting requirements and shorter deadlines.

12. For more information on the *de minimis* exemption and the changes made to the Commodity Exchange Act and the CFTC Rules by the Dodd-Frank Act, please see our September 2012 Private Equity Alert *Changes to CFTC Regulations Affecting Private Funds* available at http://www.weil.com/~/media/files/pdfs/Private_Equity_Alert_Sept_2012_.pdf

13. For more information on Rule 506(d) and the additional guidance provided by the SEC with respect to this rule, please see our July 2013 Private Equity Alert *SEC Adopts Final Rules Permitting General Solicitation in Private Offerings* available at http://www.weil.com/~/media/files/pdfs/private_equity_alert_july_2013_.pdf and our December 2013 Private Equity Alert *SEC Issues Guidance on Regulation D "Bad Actor" Rules* available at http://www.weil.com/files/upload/PE_Alert_131205.pdf

14. If the 10% threshold, but not the $3 million threshold, is crossed, a BE-13 Claim for Exemption must be filed.

Private Equity Alert is published by the Private Equity practice group of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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If you have questions concerning the contents of this issue, or would like more information about Weil's Private Equity practice group, please speak to your regular contact at Weil, or to the editors, practice group leaders or contributing authors:

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