February 21, 2014

Private Equity Alert

Periodic Regulatory Filings and Annual Compliance Obligations Applicable to Private Fund Sponsors

By David Wohl and Venera Ziegler

We would like to remind our private equity clients of important regulatory filings and compliance obligations incumbent upon private fund sponsors during 2014. Where applicable, we have indicated the deadline by which regulatory filings have to be completed for investment advisers having a fiscal year-end of December 31. Private fund sponsors should also review their partnership agreements and side letters with investors for any additional contractual obligations and reporting requirements.[1]

Annual Compliance Filing Requirements

Form ADV
(Annual Amendment due by March 31, 2014)

Investment advisers that are registered with the Securities and Exchange Commission (the SEC) under the Investment Advisers Act of 1940 (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 31 for advisers with a fiscal year-end of December 31).[2]

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 of such adviser's Form ADV. 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 Part 2B brochure supplement to each client.

Form PF
(Annual Amendment due by April 30, 2014)

Registered investment advisers to private equity funds with more than $150 million of assets under management attributable to equity private 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 30, 2014 in the case of an adviser with a fiscal year-end of December 31).[3] Form PF requires disclosure of the adviser's assets under management and information on each private fund it advises.

Weil News

- Weil's Private Equity and Private Funds practices were each ranked Tier 1 in IFLR 1000's 2014 rankings
- Weil advised Berkshire Partners and National Vision Inc. on the sale of National Vision Inc. to KKR
- Weil advised Montagu Private Equity in connection with its acquisition of Rexam's Healthcare Devices and Prescription Retail divisions
- Weil advised The Gores Group on a joint venture agreement with Premier Foods
- Weil advised Providence Equity Partners in connection with the sale of its 25% equity interest in AutoTrader Group to Cox Enterprises
- Weil advised Earthbound Farm (a portfolio company of Kainos Capital) on its sale to The WhiteWave Foods Company
- Weil advised TPG Capital and DLJ Merchant Banking Partners on the sale of 87.5% of Grohe Group
- Weil advised Centerbridge Partners in connection with its substantial minority investment in syncreon Holdings Limited

CFTC Filings
(Annual Affirmation of De Minimis Exemption due by March 3, 2014)

As a result of the rescission of Commodity Futures Trading Commission (CFTC) Rule 4.13(a)(4) and the inclusion of swaps in the definition of commodity interests, private fund sponsors investing in commodity interests should examine their portfolios and determine whether they are subject to registration with the National Futures Association (NFA) or if they are able to claim an exemption from such registration. Many private equity fund sponsors are able to rely on the exemption from registration with the NFA that is available under CFTC Rule 4.13(a)(3) (the *de minimis* exemption) and have claimed such exemption. 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*.[4]

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 (CPOs) and commodity trading advisors (CTAs).

Custody Rule Annual Audit

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.

In August 2013, the SEC provided relief from the requirement to maintain certain privately offered certificated securities held by private funds with qualified custodians subject to certain conditions. For more information on the relief provided by the SEC, please see our August 2013 Private Equity Alert, *SEC Issues Guidance Update With Respect to Privately Offered Securities Under the Custody Rule*.[5]

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 annually based on the results from the annual compliance review.

Identity Theft Prevention Programs

On April 10, 2013, the SEC and CFTC jointly issued identity theft red flag rules, which require certain entities that are regulated by the SEC and the CFTC to adopt comprehensive data security programs designed to detect, prevent, and mitigate identity theft.[6] The SEC and CFTC regulated entities to which the identity theft rule applies are entities that (i) are "financial institutions" or "creditors" and (ii) maintain "covered accounts." The rules were effective on November 20, 2013.

The SEC and CFTC have indicated that a registered investment adviser, CTA, or CPO is a financial institution if it holds transaction accounts belonging to an individual and is permitted to direct payments or transfers out of these accounts to third parties. A registered investment adviser, CTA, or CPO could qualify as a creditor if it advances funds to investors. An entity that advances funds on behalf of a person for expenses incidental to a service provided by the entity to that person would not be considered a creditor. However, a registered investment adviser that provides a bridge loan to an investor prior to receiving its money from a capital call would most likely be deemed a creditor.

A covered account includes: (i) an account maintained by a financial institution or creditor for personal, family, or household purposes that involves or is designed to permit multiple payments or transactions; and (ii) any other account offered or maintained by a financial institution or creditor with respect to which there is a reasonably foreseeable risk of identity theft. A covered account could include a margin account, brokerage account, mutual fund account, or investment advisory account.

While, as a general matter, most private equity fund sponsors will not meet the definition of a financial institution or creditor and do not maintain covered accounts, all SEC and CFTC regulated entities are required to periodically assess whether they meet such definitions and are therefore subject to the rules.

Review of Offering Materials

As a general disclosure matter, and for purposes of US federal and state anti-fraud laws and regulations, 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; fees and expenses; valuation practices; performance and related disclaimers; any mention of specific investments to confirm that there are no "cherry picking" issues; conflicts of interest; risk factors; personnel; service providers; "bad actor" disclosures (as described in further detail below); and any relevant legal or regulatory developments.

Annual Privacy Policy Notice

Private fund sponsors are subject to SEC, CFTC, and Federal Trade Commission regulations governing the privacy of certain confidential information. Under such privacy rules, private fund sponsors are required to send a privacy notice to each limited partner who is an individual at the start of such limited partner's relationship with the fund and annually thereafter. The privacy notice must describe the fund's policy regarding the confidentiality of the limited partner's non-public information.

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 late fees apply for late blue sky filings.

Bad Actor Rules

Rule 506(d) of Regulation D under the Securities Act of 1933 (the Securities Act), which took effect on September 23, 2013, 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.

Rule 506(d) generally applies to the bad acts of the fund and its executive officers, directors, and other officers participating in the offering; the fund's "affiliated issuers" (which include only issuers participating in the same offering, e.g., PIVs and feeder funds); the fund's general partner, manager, any general partner or managing member of such manager and any of their executive officers, directors, and other officers participating in the offering; the fund's direct or indirect 20% beneficial owners; and any promoter or any person that has been or will be paid (directly or indirectly) remuneration for solicitation of limited partners in connection with the sale of interests in the fund and such person's general partner or managing member and its executive officers, directors, or other officers participating in the offering.

Disqualifying events only result from sanctions by US (not foreign) courts and regulators and generally include felonies, misdemeanors, court injunctions, and restraining orders relating to the sale of securities; certain SEC cease-and-desist and disciplinary orders; and securities-related final orders of certain other US regulators.

Any disqualifying event occurring prior to September 23, 2013, will not prevent an issuer from using Regulation D as long as the disqualifying event is adequately disclosed to investors. Any disqualifying event occurring on or after September 23, 2013, will prevent an issuer from using Regulation D. However, an issuer will not be disqualified from using Regulation D if it fails to discover a previous bad act but it establishes that it did not know and, in the exercise of reasonable care, could not have known that the bad act occurred. For more information on Rule 506(d) and the additional guidance provided by the SEC with respect to this rule, please see our July Private Equity Alert, *SEC Adopts Final Rules Permitting General Solicitation in Private Offerings*,[7] and our December 2013 Private Equity Alert, *SEC Issues Guidance on Regulation D "Bad Actor" Rules*.[8]

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 US 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, and sponsors might consider providing such certification as of the end of the year for convenience. Such certification should 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 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. If a new fund has only recently made its first investment, careful consideration should be given to the designation of the 90-day valuation period for the fund. In the absence of any concerns about non-qualifying investments for VCOC purposes, the designation of a 90-day period that includes the end of the year may be convenient. Funds 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 treated as holding 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 fiduciary services, if any, relating to the feeder fund. The circumstances pertaining to each feeder fund differ, and hence counsel should be consulted regarding compliance with such disclosure requirements, if applicable. In the case of a new master fund that intends to rely on the 25% test but has not yet made its first investment, updated disclosure to comply with Section 408(b)(2) of ERISA (if applicable) may be required if expenses or management fees were paid by any ERISA investors before the first investment has been made.

TIC Reporting

Private fund sponsors 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 these transactions on the Treasury International Capital (TIC) system. As described in more detail in our September 2011 Private Equity Alert, *Certain Private Equity Firms To Become Subject to Filing Treasury International Capital Form SLT*,[9] Form SLT requires that US resident entities 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 US 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 or exceeds the reporting threshold. Since January 2012, the reporting requirement for Form SLT is monthly.

The Treasury Department recently amended TIC Form B, which imposes reporting obligations on some investment advisers to private funds. Form B generally requires the reporting of information on certain "claims" and "liabilities" (including loans, short-term securities, and other short-term debt and debt instruments) of non-US entities with US banks, bank holding companies, financial holding companies, securities brokers, dealers and other US financial institutions. The amendment took effect on December 31, 2013, and also provides that investment advisers are no longer required to file Form C. Investment advisers are required to report this information on various monthly and quarterly reports.

Filing obligations would most commonly arise with respect to private funds that have covered cross-border holdings aggregating either over $25 million as to an individual country or over $50 million overall and that (1) invest directly in non-US debt instruments, (2) provide credit to non-US entities, (3) directly hold non-US short-term securities, or (4) maintain credit facilities with non-US financial institutions. However, any claims or liabilities that are serviced by a US entity, or any claims or liabilities for which a US custodian or US sub-custodian is used, do not need to be reported by the private fund adviser.

Additional Regulatory Developments

General Solicitation

On July 10, 2013, the SEC adopted final rules eliminating the prohibition against general solicitation and general advertising (hereinafter referred to as a general solicitation) in certain securities offerings conducted pursuant to Rule 506 of Regulation D under the Securities Act. In addition, the SEC adopted proposed rules imposing additional requirements for issuers engaging in general solicitation. For more information on the final rules eliminating the prohibition against general solicitation, please see our July 2013 Private Equity Alert *SEC Adopts Final Rules Permitting General Solicitation in Private Offerings*.[10]

Registered investment advisers should be aware that they are still subject to applicable advertising regulations under the Advisers Act. In addition, CFTC registered investment advisers relying on CFTC Rule 4.7 and investment advisers that rely on the *de minimis* exemption are still subject to certain CFTC regulations that prohibit marketing to the public and, absent future guidance from the CFTC to the contrary, may not be able to use general solicitation. In addition, when soliciting foreign investors, investment advisers should be aware that general solicitation may be prohibited in certain foreign jurisdictions. Prior to soliciting foreign investors, investment advisers should examine the local laws of such countries with respect to private placements and general solicitation and consult with local counsel from such jurisdictions.

Broker-Dealer Considerations

On April 5, 2013, the SEC published comments of David Blass, Chief Counsel, Division of Trading and Markets, concerning the potential need for broker-dealer registration by private fund advisers in connection with (i) the sale of fund interests by a private fund adviser's internal personnel and (ii) the receipt of transaction-based fees in connection with portfolio company transactions. For more information on Mr. Blass's April speech, please see our April 2013 Private Equity Alert, *SEC Official Provides Guidance on Broker-Dealer Registration by Private Fund Advisers*.[11] On September 26, 2013, Mr. Blass participated in a Practising Law Institute webinar on broker-dealer issues in the private fund industry where he provided an update on the SEC's views. For more information on Mr. Blass's September speech, please see our October 2013 Private Equity Alert, *David Blass Answers Questions with Respect to Broker-Dealer Registration of Private Fund Advisers*.[12]

Additionally, on January 31, 2014, the SEC's Division of Trading and Markets issued a no-action letter that permitted certain business brokers and finders who make introductions and participate in the structuring of sales of controlling stakes in private businesses to receive transaction-based compensation without having to register as broker-dealers. We will keep you updated on developments in this important area.

Municipal Advisor Registration

In September 2013, the SEC adopted final rules establishing a permanent registration regime for municipal advisors. Under the final rules, an investment adviser to a private fund will qualify as a municipal advisor and be required to register with the SEC and the Municipal Securities Rulemaking Board if the assets invested in the private fund contain any proceeds of an issuance of municipal securities. An SEC-registered investment adviser will generally be excluded from the definition of municipal advisor and therefore will have no additional registration obligations.

The adopting release is clear, however, that there is no exemption for exempt reporting advisers and investment advisers that are not registered with the SEC. Because the final rules have raised a number of interpretive issues and questions from industry groups, the SEC extended the compliance date to July 1, 2014. We will continue monitoring developments and keep you apprised of any additional SEC guidance.

European Union Regulation Of The Private Equity Industry

The Directive on Alternative Investment Fund Managers (the AIFM Directive) was due to be implemented into the national laws of all European Economic Area (EEA) member states (which include the European Union and Iceland, Liechtenstein, and Norway) by July 22, 2013. Europe's key fundraising jurisdictions have now implemented the AIFM Directive (including Austria, Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Sweden, and the United Kingdom). However, some member states did not meet this deadline and are expected to implement later this year (including Belgium, Italy, and Norway). Finland is expected to implement during March. The AIFM Directive subjects EEA private fund sponsors or private fund sponsors using EEA fund vehicles to potentially onerous operational and organizational requirements.

The AIFM Directive also impacts US private fund sponsors that market fund interests to investors in the EEA by creating certain reporting and disclosure requirements, restrictions on extracting capital from EEA portfolio companies, and imposing other measures designed to facilitate additional transparency in such private fund sponsors. For example, it is likely that a private equity fund sponsor will have to disclose all side letters to each investor in a fund. The implementation of the AIFM Directive will have an impact on the private placement regimes available in EEA jurisdictions, which will require notification, registration, or approval 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 sponsors. Private fund sponsors will have to carefully plan their marketing campaigns and apply for regulatory approvals in any relevant EEA jurisdictions well in advance of anticipated marketing efforts commencing, with regulators in some EEA jurisdictions expected to take up to four months to approve marketing. In addition, funds will be required to carry out a short form compliance process to ensure they are ready to meet European reporting requirements. We are currently assisting an increasing number of US-based private fund sponsors in making applications to European regulators for approval under the AIFM Directive's private placement regimes.

It is intended that following 2018, all private fund sponsors marketing in the EEA will become subject to the same compliance regime which applies to EEA private fund sponsors. This would include (among other things) requiring private fund sponsors to obtain authorization in an EEA member state to operate and market to investors and to meet various potentially onerous and expensive operational and organizational requirements in connection with the management of their funds. Therefore, we advise private fund advisers to consider how they will strategically respond to the AIFM Directive.

Foreign Account Tax Compliance Act (FATCA)

The Foreign Account Tax Compliance Act, or FATCA, imposes information reporting requirements on foreign financial institutions (FFIs) in regards to financial accounts held by US taxpayers or by foreign entities in which US taxpayers hold a substantial ownership interest. FATCA also imposes withholding, documentation, and certain other requirements with respect to certain payments made to certain foreign entities. FATCA will come into effect in stages, beginning on July 1, 2014. The FATCA registration website is now open and to the extent an FFI finalizes its registration by April 25, 2014, such FFI will be included in the first IRS FFI list that is currently scheduled to be posted by June 2, 2014.

Knowledgeable Employees

On February 6, 2014, the SEC released guidance expanding the categories of individuals who may be deemed "knowledgeable employees" under Rule 3c-5 of the Investment Company Act of 1940 (and who therefore may invest in private funds relying on Section 3(c)(1) or 3(c)(7) of the Act without counting toward the 100 investor limit or meeting the qualified purchaser standard, respectively) to include individuals (such as investor-relations employees or policy-making employees who do not actively manage the fund itself) who meet certain conditions. For more information on this SEC guidance, please see our February 2014 Private Equity Alert, *SEC Issues Guidance Expanding the Scope of Knowledgeable Employee Standard*.[13]

Please do not hesitate to contact us with any questions.

---

1. This Private Equity Alert does not address filings required to be made under the Securities Exchange Act of 1934 and tax-related filings. In addition, 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.
2. In addition, an investment adviser must update its Form ADV promptly if certain information becomes inaccurate as indicated in the instructions to Form ADV.

3. Please note that certain large "hedge fund" advisers and "liquidity fund" advisers are subject to more frequent and extensive reporting requirements and shorter deadlines.
4. Available at http://www.weil.com/files/upload/Private_Equity_Alert_Sept_2012_.pdf
5. Available at http://www.weil.com/files/upload/PE_Alert_August_12_2013.pdf
6. The SEC Release is available at http://www.sec.gov/rules/final/2013/34-69359.pdf
7. Available at http://www.weil.com/files/upload/Private_Equity_Alert_July_2013_.pdf
8. Available at http://www.weil.com/files/upload/PE_Alert_131205.pdf
9. Available at http://www.weil.com/news/pubdetail.aspx?pub=10454
10. See *id*. at footnote 7.
11. Available at http://www.weil.com/files/upload/Private_Equity_Alert_April_2013.pdf
12. Available at http://www.weil.com/files/upload/PE_Alert_131021.pdf
13. Available at http://www.weil.com/files/upload/PE_Alert_Feb_2014.pdf

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.

The Private Equity group's practice includes the formation of private equity funds and the execution of domestic and cross-border acquisition and investment transactions. Our fund formation practice includes the representation of private equity fund sponsors in organizing a wide variety of private equity funds, including buyout, venture capital, distressed debt, and real estate opportunity funds, and the representation of large institutional investors making investments in those funds. Our transaction execution practice includes the representation of private equity fund sponsors and their portfolio companies in a broad range of transactions, including leveraged buyouts, merger and acquisition transactions, strategic investments, recapitalizations, minority equity investments, distressed investments, venture capital investments, and restructurings.

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:

Editors:

Doug Warner (*founding editor*)	Bio Page	doug.warner@weil.com	+1 212 310 8751
Michael Weisser	Bio Page	michael.weisser@weil.com	+1 212 310 8249

Contributing Authors:

David Wohl (NY)	Bio Page	david.wohl@weil.com	+1 212 310 8933
Venera Ziegler (NY)	Bio Page	venera.ziegler@weil.com	+1 212 310 8769