

Private Equity Alert

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

by Venera Ziegler

There have been many changes to the regulatory landscape for private fund sponsors since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 (the Dodd-Frank Act). As the new year begins, we would like to remind our private equity clients of important regulatory filings and compliance obligations incumbent upon private fund sponsors during 2013. In addition, we would like to remind our private equity clients that the Securities and Exchange Commission (the SEC) is continuing the process of examining newly registered investment advisers and therefore all registered investment advisers should be prepared for a potential examination. Where applicable, we have indicated the deadline by which regulatory and notice filings have to be completed for investment advisers having a fiscal year end of December 31. Private equity 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, 2013)

Investment advisers that are registered with 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. For more information on registration of investment advisers, please see our June 2011 *Private Equity Alert* "SEC Adopts Final Rules for the Registration of Hedge Fund and Other Private Fund Advisers and Delays Registration Deadline."³

Weil News

- Weil was ranked #1 in announced global private equity deals for 2012 with approximately 16.3% market share and \$67 billion in deal value according to Bloomberg
- Weil was one of only three firms ranked in the top band for private equity in Chambers Global 2012 and one of only three firms ranked in the top band for private equity buyouts in IFLR 2013
- Weil advised Advent International in its acquisition of a majority interest in AOT Bedding Super Holdings, the parent company of National Bedding Company and Simmons Bedding Company
- Weil advised AMC Entertainment Holdings (a portfolio company of Apollo Global Management, Bain Capital, the Carlyle Group, CCMP Capital Advisors, and Spectrum Equity Investors) in connection with its \$2.6 billion sale to Dalian Wanda Group
- Weil advised Centerbridge Partners in connection with its \$1.1 billion take private acquisition of P.F. Chang's China Bistro
- Weil advised CVC Capital Partners in connection with its acquisition of a majority stake of Cunningham Lindsey, a major global loss adjusting and claims management firm, in a recapitalization transaction
- Weil advised Getty Images (a portfolio company of Hellman & Friedman) in connection with its \$3.3 billion sale
- Weil advised Goldman Sachs Capital Partners in connection with the \$2.3 billion sale of its portfolio company USI Insurance Services
- Weil advised Lion Capital in connection with its £1.2 billion sale of a 60% interest in Weetabix Food Co. to China's Bright Food Group
- Weil advised Ontario Teachers' Pension Plan (through its private equity group, Teachers' Private Capital) in connection with its acquisition of a majority interest in Heartland Dental Care

Form PF

(Initial Form PF due by April 30, 2013)

Registered investment advisers to private equity funds with more than \$150 million of assets under management attributable to 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, 2013 in the case of an adviser with fiscal year end of December 31). Form PF requires disclosure of the adviser's assets under management, information for each private fund it advises, a breakdown of the fund's equity held by its five largest investors, and a summary of fund assets and liabilities.⁴ For more information please see our November 2011 *Private Equity Alert* "The SEC and CFTC Adopt Rules for Private Fund Reporting on Form PF."⁵

CFTC Filings

(Annual Affirmation of de minimis Exemption due by March 1, 2013)

(Initial Form CPO-PQR for Registered CPOs With Less Than \$5 billion of Assets due by March 31, 2013)

(Initial Form CTA-PR for Registered CTAs due by February 14, 2013)

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 have examined their portfolios earlier in 2012 and determined whether they are subject to registration with the National Futures Association (NFA) or if they were able to claim an exemption from such registration. Many private equity fund sponsors are able to rely on the exemption from registration with the CFTC 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 recent 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."⁶

Weil News (continued)

- Weil advised Providence Equity Partners in connection with the C\$1.1 billion acquisition of Canadian data center operator Q9 Networks by an investor group comprised of Providence, Ontario Teachers' Pension Plan, Madison Dearborn Partners, and BCE
- Weil advised Providence Equity Partners in connection with the acquisition by News Corporation of a 49% equity stake in the YES Network
- Weil advised Silver Lake Partners and Partners Group in connection with their €1.0 billion acquisition of Global Blue
- Weil advised Thomas H Lee Partners in connection with its acquisition of a majority stake in Party City Holdings in a recapitalization transaction valued at \$2.7 billion

The *de minimis* exemption is subject to 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. On December 3, 2012, the NFA issued Guidance on the Annual Affirmation Requirement for those entities that are currently operating under an exemption or exclusion from commodity pool operator (CPO) or commodity trading advisor (CTA) registration (the Guidance).⁷ According to the Guidance, the first affirmation is due by March 1, 2013 for the calendar year ending December 31, 2012.

Private fund sponsors that do not qualify for the *de minimis* exemption may be subject to registration with the NFA as CPOs and CTAs. Registered CPOs and CTAs are required to complete annual questionnaires and annual registration updates with the NFA, and must pay annual NFA fees. Registered CPOs must also prepare and file an annual report for each commodity pool. Unless eligible to claim relief under CFTC Rule 4.7, registered CPOs and CTAs must update their disclosure documents periodically and provide certain reports to investors.

Form CPO-PQR

All registered CPOs are required to file a Form CPO-PQR through the NFA, but the information required and timing for submission of the form varies depending on the CPO's aggregate assets under management. A large CPO (a CPO with assets under management equal to \$1.5 billion or more at the close of business during the previous quarter) must file a Form CPO-PQR within 60 days after the end of each calendar quarter during which such CPO satisfied the threshold. All other CPOs must file the appropriate parts of Form CPO-PQR within 90 days after the end of the calendar year (i.e., by March 31, 2013).

The initial Form CPO-PQR for registered CPOs with more than \$5 billion in aggregate assets under management was due on November 29, 2012. The initial Form CPO-PQR for all other registered CPOs must be filed within 90 days after the end of the calendar year for the period ending on or after December 15, 2012 (i.e., by March 31, 2013).

Form CTA-PR

All registered CTAs are required to complete Form CTA-PR within 45 days after the end of their fiscal year, beginning with the first fiscal year ending after December 15, 2012 (i.e., by February 14, 2013 for CTAs with a fiscal year end of December 31). Entities registered as both CPOs and CTAs are required to complete Schedule A of Form CTA-PR in addition to completing the applicable schedules of Form CPO-PQR (and Form PF, if applicable).

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 conducted by an independent public accountant or (ii) obtaining an audit by an independent public accountant registered with the Public Company Accounting Oversight Board 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 to private equity funds 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.

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 equity 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 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.

Annual VCOC/Plan Assets Certifications

Many private equity funds limit "benefit plan investors" to less than 25 percent of any class of equity interest in a fund (the 25 percent test) so that such fund's assets are not deemed "plan assets" subject to the US Employee Retirement Income Security Act of 1974, 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 should consider providing such certification as of the end of the year for convenience. 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 percent (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 that 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 percent test analysis, as applicable, and deliver the applicable certification to their limited partners.

Form SLT

Private fund sponsors that have portfolio investments in foreign issuers or have issued interests in their funds to foreign residents may be required to report these transactions on the Treasury International Capital 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,”⁸ 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, reporting entities have had to report on Form SLT monthly.

Additional Regulatory Developments

Jumpstart our Business Startups Act (JOBS Act)

As mandated by the JOBS Act, the SEC issued a proposal to permit advertising and other forms of general solicitation in private offerings made in reliance on Rule 506 of Regulation D so long as the purchasers in the offering are accredited investors. The proposed rules are pending final approval. For

more information please see our September 2012 *Private Equity Alert* “SEC Proposes Amendments to Rule 506 and Rule 144A to Permit General Solicitation in Private Offerings.”⁹

Registered investment advisers should be aware that they will still be subject to applicable advertising regulations under the Advisers Act even after these rules become final. 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 and general advertising pursuant to proposed rules. 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.

European Union Regulation of the Private Equity Industry

The Directive on Alternative Investment Fund Managers (the AIFM Directive) is due to be implemented into the national laws of all EU member states by July 22, 2013. Upon implementation, EU private fund sponsors or private fund sponsors using EU fund vehicles will become subject to potentially onerous operational and organizational requirements. The AIFM Directive will also impact US private fund sponsors that market fund interests to investors in the EU by creating certain reporting requirements 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 may also have an impact on the private placement regimes available in EU jurisdictions. Private fund sponsors will have to carefully plan their marketing campaigns and monitor for changes to “World-Sky” surveys.

It is intended that following 2018, all private fund sponsors marketing in the EU will become subject to the same compliance regime which applies to EU private fund sponsors. This would include (among other things) requiring private fund sponsors to obtain authorization in an EU 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. For investment advisers planning a marketing campaign, this should be addressed as a matter of urgency: there could be significant advantages in completing (or at least in planning and possibly commencing) such marketing prior to July 22, 2013.

Foreign Account Tax Compliance Act (FATCA)

On January 17, 2013, the Treasury Department issued Final Regulations implementing the Foreign Account Tax Compliance Act or FATCA. The Final Regulations provide for some material changes to the regulations proposed in 2012 and establish new effective dates for the implementation of the rules. For more information on the Final Regulations and a summary of the important changes in the Final Regulations from the proposed regulations, please look for our private equity alert on FATCA which will be forthcoming.

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 obligations relating to its compliance with applicable rules and regulations 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, a registered investment adviser must update its Form ADV promptly if certain information becomes inaccurate as indicated in the instructions to Form ADV.
- 3 Available at http://www.weil.com/files/upload/Private_Equity_Alert_June_2011_.pdf.
- 4 Please note that certain large "hedge fund" advisers and large "liquidity fund" advisers have already begun filing Form PF and are subject to more frequent reporting requirements and shorter deadlines.
- 5 Available at http://www.weil.com/files/upload/Private_Equity_Alert_Nov_2011.pdf.
- 6 Available at http://www.weil.com/files/upload/Private_Equity_Alert_Sept_2012_.pdf.
- 7 Available at <http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4158>.
- 8 Available at <http://www.weil.com/news/pubdetail.aspx?pub=10454>.
- 9 Available at http://www.weil.com/files/upload/Corp_Gov_SEC_Alert_September_2012.pdf.

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