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PRIVATE EQUITY ALERT
Year-End Reminder

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With the new year upon us, a reminder that private equity firms should review annual filing requirements, compliance obligations, fund agreements and side letter provisions, including the following items and deadlines for 2017:

FIRM REPORTING AND COMPLIANCE

Form ADV

Registered investment advisers must file an annual amendment to Part 1 and Part 2A (the brochure) of Form ADV within 90 days of the end of the fiscal year. Advisers that are "exempt reporting advisers" (advisers solely to (i) venture capital funds or (ii) private funds with AUM less than $150 million) must file an annual amendment to the applicable items of Part 1 within 90 days of the end of the fiscal year. This is in addition to the requirement to amend Form ADV promptly if certain information becomes inaccurate, as set forth in the General Instructions to Form ADV.

In August 2016, the SEC adopted changes to Form ADV and additional rules that will (i) require detailed information regarding an investment adviser's separately managed accounts, (ii) require additional information on an adviser's operations including with respect to use of social media, branch offices and "outsourced" Chief Compliance Officers; (iii) provide a streamlined "umbrella registration" for certain affiliated private fund advisers and (iv) require enhanced recordkeeping related to written communications regarding adviser performance.[1] Although the effective compliance date for annual amendment filings for advisers with a December 31 fiscal year end is not until the end of March 2018, we suggest that firms plan ahead in compiling the information needed for the updated requirements.

RELEVANT PUBLICATIONS / NEWS

- SEC Adopts Amendments to Form ADV to Add Separately Managed Account Disclosure and "Umbrella Registration" for Relying Advisers
- Treasury Department Proposes Anti-Money Laundering Regulations for Investment Advisers
- SEC Enforcement Action Relating to Private Equity Transaction Fees and Broker-Dealer Registration
- ILPA Finalizes Fee Reporting Template for Private Equity

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[1] See Willkie Farr & Gallagher LLP Client Memorandum, "SEC Adopts Amendments to Form ADV to Add Separately Managed Account Disclosure and "Umbrella Registration" for Relying Advisers" (Sept. 28, 2016), available here.

Annual Compliance Review under Rule 206(4)-7

Advisers should review, no less frequently than annually, the adequacy of their compliance policies and procedures and the effectiveness of their implementation. This review should be coordinated by the CCO and consider OCIE examination priorities, enforcement actions and pronouncements of the SEC staff – notably for this past year, fee and expense practices generally and the allocation between firms and their funds and portfolio companies; the allocation of co-investment opportunities among investors; conflicts of interest and disclosure; valuation process; and cybersecurity.

Code of Ethics and Compliance Manual/Employee Certifications

Firms should review internal requirements under their Code of Ethics and Compliance Manual, including obtaining annual certification of compliance from Supervised Persons and Access Persons. In addition, employee certifications should be obtained and updated regarding any disciplinary history for Form ADV disclosure and confirming no "bad actor" disqualification that would prohibit use of the private placement exemption in fundraising.

Form PF

Registered investment advisers who advise one or more private equity funds and have at least $150 million of AUM are required to file Form PF, a confidential filing used to assess systemic risk. Private equity firms generally file on an annual basis, within 120 days of the end of the fiscal year, with additional information required regarding funds and underlying investments for large advisers with $2 billion of AUM.

Privacy Notice

Private equity firms provide an annual privacy notice to investors, describing privacy policies and practices including the categories of information collected and disclosed.[2]

State and Local Lobbying Requirements

Advisers should review their fundraising plans to identify potential investors that are public employee retirement systems or other governmental bodies and determine whether communicating with such entities is covered by a state or local lobbying law and/or an ethics code regarding gifts and business entertainment. Existing lobbyist registrations can be reviewed for continued applicability or termination.

AML Proposals

In 2015, the Treasury Department's Financial Crimes Enforcement Network (FinCEN) proposed anti-money laundering regulations that would require investment advisers to have written AML programs meeting certain minimum requirements,

[2] The FAST Act in 2015 amended the Gramm-Leach-Bliley Act by removing the requirement for financial institutions to deliver annual privacy notices to their investors under certain circumstances. Various agencies have not adopted corresponding amendments to their regulations, however, and as such many private equity advisers continue to provide a privacy notice.

including independent audit of their program and filing of Suspicious Activity Reports at certain levels.[3] The regulations could be issued at any time and may require advance planning by advisers that have not already adopted a best practices AML program.

Broker-Dealer Issues

Private equity firms should review their practices with respect to services provided on behalf of portfolio companies – and transaction-based compensation with respect to such services – in light of the SEC enforcement action with Blackstreet Capital in June 2016.[4]

FUND LEVEL REQUIREMENTS

CFTC Exemptions

Many private equity firms trading in commodity interests rely on an exemption from registration with the CFTC as a commodity pool operator, based on the *de minimis* exemption in CFTC Rule 4.13(a)(3). This exemption requires that either (i) the aggregate initial margin and premiums required to establish commodity interest positions does not exceed 5% of the liquidation value of the fund's investment portfolio or (ii) the aggregate net notional value of the fund's commodity interest positions does not exceed 100% of the liquidation value of the fund's investment portfolio. The claim of exemption for applicable funds must be reaffirmed via the National Futures Association's website within 60 days of the end of the calendar year.

Custody Rule

Private equity firms generally rely on the "audit exception" to requirements under Rule 206(4)-2 relating to reporting and a surprise custody examination. Audited financial statements should be delivered to fund investors within 120 days of the end of the fiscal year (180 days for fund-of-funds). Special purpose vehicles may also require delivery of audited financial statements.

Fund Compliance Certificate

Fund agreements and/or side letters are increasingly requiring an annual certification of the general partner, typically accompanying the audited financial statements, stating that the fund is in compliance with the terms of the fund agreement in all material respects. Annual certification or reporting may also extend to other areas including FCPA, AML and ESG matters.

ERISA/VCOC Requirements

Firms that operate private equity funds as "venture capital operating companies," in order to avoid being deemed plan assets under ERISA, should review fund agreements and side letters for annual certification or opinion requirements and the timing for delivery of such certificates or opinions to limited partners. Private equity funds in which benefit plan investors do not exceed 25% of the fund's total capital commitments, such that fund assets are not deemed to be plan assets, should also review any certification requirements to limited partners with respect to this 25% test.

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[3] See Willkie Farr & Gallagher LLP Client Memorandum, "Treasury Department Proposes Anti-Money Laundering Regulations for Investment Advisers" (August 28, 2015), available here.

[4] See Willkie Farr & Gallagher LLP Client Memorandum, "SEC Enforcement Action Relating to Private Equity Transaction Fees and Broker-Dealer Registration" (June 2, 2016), available here.

Credit Agreements

Funds that make use of a credit facility to bridge capital calls or for other purposes will have a requirement to deliver audited financial statements to the lender, along with a compliance certificate with respect to financial covenants and certain organizational matters.

ILPA Fee Reporting Template/State Initiatives

In January 2016, the Institutional Limited Partners Association (ILPA) finalized its fee reporting template, intended to standardize specific fund reporting for a range of fee and expense items.[5] In addition, in September 2016, California's new fee disclosure rule became law, for disclosure of fees and expenses paid by California pensions plans and retirement systems invested in private equity funds. Additional state initiatives are pending.

AIFMD FOR NON-EU MANAGERS MARKETING IN EU

Annual Report

The AIFMD requires an Annual Report disclosing among other things financial information and remuneration on a quantitative and qualitative basis. For non-EU AIFs with a calendar year-end, the report is due by June 30, 2017. The report is provided to EU investors and regulators in each country where the AIF has been marketed.

Reporting to Regulators

The AIFMD requires reporting to regulators in applicable EU member states (with similarities to Form PF), in most cases on a quarterly or semi-annual basis.

Disclosure Regarding Certain EU Investments

The AIFMD requires disclosure of EU portfolio company holdings at designated ownership thresholds, as well as disclosure of future plans (subject to the "asset-stripping" restrictions) for EU "control" investments.

Disclosure to Investors

The AIFMD requires pre-investment disclosure to investors (in a PPM supplement or EU wrapper) and periodic updates of information.

BENEFICIAL OWNERSHIP AND LARGE TRADER REPORTING

Schedule 13G

Short-form Schedule 13G, reporting greater than 5% beneficial ownership, is required to be filed by February 14, 2017. For portfolio companies with initial public offerings during 2016, private equity firms may rely on the "founders' stock" exemption to

[5] See Willkie Farr & Gallagher LLP Client Memorandum, "ILPA Finalizes Fee Reporting Template for Private Equity" (Feb. 1, 2016), available here.

file Schedule 13G rather than long-form Schedule 13D, assuming no acquisition of 2% or more of the outstanding class in the preceding 12 months.

Form 13F

Institutional investment managers (including private equity firms) exercising investment discretion over $100 million or more of "Section 13(f) securities" must report their holdings of such securities on Form 13F. Section 13(f) securities are generally a class of securities that trade on a U.S. exchange. Notably for private equity firms, where a firm "controls" the issuer, those shares are excluded for purposes of determining the $100 million threshold. Form 13F is required to be filed by February 14, 2017 and quarterly thereafter.

Form 13H

Rule 13h-1 of the Exchange Act requires "large traders" whose activity exceeds certain thresholds to file Form 13H, including a list of broker-dealers used and services provided, and to provide a Large Trader Identification Number to broker-dealers. Many private equity firms active in public markets file voluntarily, to avoid on-going monitoring of the thresholds that would trigger the reporting. Form 13H is required to be updated annually, by February 14, 2017 for this coming year, as well as promptly after the end of each quarter if any reported information changed.

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Additional requirements will apply under specific fund agreement or side letter provisions, annual tax and financial reporting generally, Commerce Department (BEA) and Treasury Department (TIC) reporting as well as other federal, state and non-U.S. regulatory and reporting regimes. The impact of the new administration on the rulemaking and regulatory environment for private equity generally remains to be seen. Willkie advises numerous private equity firms, including large and middle market sponsors and emerging managers, and can assist with reviewing and complying with the various applicable requirements.

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