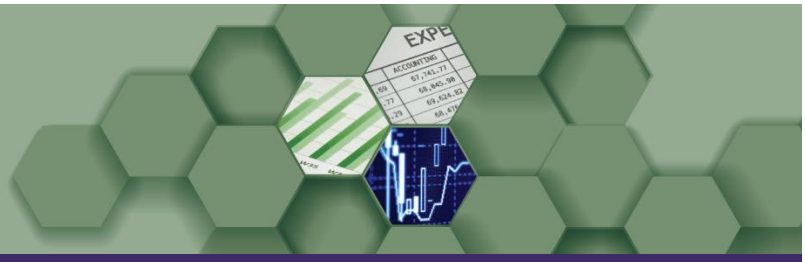
WILLKIE FARR & GALLAGHER LLP

PRIVATE EQUITY ALERT

YEAR-END REMINDER

December 2017



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 2018. In addition, firms should be reviewing tax reform and its potential impact on private equity and investment structuring.

AUTHORS

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I. FIRM REPORTING AND COMPLIANCE

a. 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.

Revised Form ADV Part 1A, required since October 1, 2017, includes a number of important changes with respect to (i) disclosure of separately managed accounts; (ii) new Schedule R to file an "umbrella registration" on a single Form ADV for related advisers; and (iii) additional disclosures about an adviser's client types, branch offices, business operations and use of social media.[1] Advisers with a December 31 fiscal year will need to comply with the new Form ADV no later than the annual amendment due within 90 days of year-end.

[1] *See* Willkie Farr & Gallagher LLP Client Alert, "Reminder: Revised Form ADV to be Used Beginning October 1, 2017" (August 18, 2017), available here.

b. 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, conflicts of interest and disclosure; fee and expense practices generally and the allocation between firms and their funds and portfolio companies; policies and procedures to prevent the misuse of material non-public information; the allocation of co-investment opportunities; valuation process; and cybersecurity.

c. 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.

d. 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. 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.

e. Privacy Notice

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

f. 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.

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[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.

II. FUND LEVEL REQUIREMENTS

a. 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.

b. 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.

c. 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.

d. 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.

e. 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.

III. AIFMD

a. Annual Report

The AIFMD requires an Annual Report from non-EU fund managers who market in the EU, 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, 2018.

b. Reporting to Regulators

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

c. 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.

d. Disclosure to Investors

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

IV. BENEFICIAL OWNERSHIP AND LARGE TRADER REPORTING

a. Schedule 13G

Short-form Schedule 13G, reporting greater than 5% beneficial ownership, is required to be filed by February 14, 2018. For portfolio companies with initial public offerings during the past year, private equity firms may rely on the "founders' stock" exemption to 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.

b. 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, 2018 and quarterly thereafter.

c. 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 ongoing monitoring of the thresholds that would trigger the reporting. Form 13H is required to be updated annually, by February 14, 2018 for this coming year, as well as promptly after the end of each quarter if any reported information changed.

V. TAX REFORM

Congress has passed new tax legislation that, as and when signed by the President, will impact private equity firms and portfolio companies. A three-year holding period will be required before a general partner would be eligible for the long-term rate on capital gains with respect to carried interest. Care should be taken to ensure that investments scheduled to be sold before year-end do in fact close before year-end if such investments are being sold within three years of their purchase. The legislation could also impact how investments are structured and the tax reporting requirements for portfolio companies. The legislation will also impose limitations on interest deductions and result in a reduction of the corporate tax rate. As these changes are enacted, it will be important to review your current portfolio investment structures and determine the optimal structures for new portfolio investments.

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Additional regulatory and compliance 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 non-U.S. regulatory and reporting regimes. 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.