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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 2024.

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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 with the Securities and Exchange Commission (the "SEC"). Advisers that are "exempt reporting advisers" (advisers solely to (i) venture capital funds or (ii) private funds with assets under management 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 out in the General Instructions to Form ADV.

b. Annual Compliance Review under Rule 206(4)-7

Advisers that are registered with the SEC should review, no less frequently than annually, the adequacy of their compliance policies and procedures and the effectiveness of their implementation. Of particular note, effective as of November 13, 2023, the new private funds rules that were adopted on August 23, 2023 amended Rule 206(4)-7 under the Investment Advisers Act of 1940 (the "Advisers Act") and now require all SEC-registered investment advisers (including those that do not advise private funds) to document in writing the annual review of their compliance policies and procedures. This review should be coordinated by the chief compliance officer and

consider the SEC's Division of Examinations exam priorities,[1] enforcement actions and pronouncements of the SEC staff – notably for this past year: marketing practices and overall compliance with the Advisers Act marketing rule; compensation arrangements and conflicts of interest and disclosures; valuation processes and assessments; safeguarding confidential client information including material non-public information and cybersecurity more generally.

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 confirm no "bad actor" disqualification that would prohibit use of the private placement exemption in fundraising.

d. Form PF

Registered investment advisers that 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 private equity funds and underlying investments for large private equity advisers with $2 billion of AUM.[2]

e. Form PF – GP-Led Secondaries and Other Reporting

Following the December 11, 2023 compliance date, private equity advisers required to report on Form PF must file a private equity event report under new Section 6 upon (i) the completion of an adviser-led secondary transaction and (ii) an investor election to remove a fund's general partner, terminate a fund's investment period or terminate a fund. The new reporting is due 60 days after the end of the private equity adviser's fiscal quarter.[3] Of particular note, the first Section 6 reporting will generally now be filed for adviser-led transactions that were closed in Q4 of 2023.

f. 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.

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[1] See the link here for our Client Alert highlighting the SEC's 2024 Examination Priorities.
[2] See the link here for our Client Alert highlighting the amendments to Form PF enhancing private fund reporting.
[3] See the link here for our Client Alert highlighting the amendments to Form PF enhancing private fund reporting.

g. 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.

h. New Private Fund Rules

On August 23, 2023, the SEC adopted new rules and amendments to the Advisers Act that substantially modified existing regulatory requirements. The compliance date applicable to large private fund advisers with assets under management equal to or exceeding $1.5 billion is September 14, 2024 for the rules that relate to restricted activities, adviser-led secondaries and preferential treatment (March 14, 2025 is the compliance date applicable to smaller private fund advisers with assets under management less than $1.5 billion). All private fund advisers will need to comply with (i) the new annual audit rule (which requires an annual independent financial statement audit (as defined under Regulation S-X) of a private fund) and (ii) the new quarterly statement rule (which requires investment advisers to prepare and distribute quarterly statements for any private fund they advise) by March 14, 2025. Private fund advisers will need to review their business and disclosure practices and begin implementation of these new rules.[4]

i. Corporate Transparency Act

Under the Corporate Transparency Act many entities will be required to report information electronically about their beneficial owners to the Treasury Department's Financial Crimes Enforcement Network through a secure filing system. While certain entities may qualify for reporting exemptions (including certain securities reporting issuers, broker or dealers, investment companies, investment advisers and pooled investment vehicles), each entity in an organization must be identified and reviewed individually to determine its reporting status. Unless otherwise exempt, (i) entities created before January 1, 2024 must file by January 1, 2025; (ii) entities created on or after January 1, 2024 during the 2024 calendar year will have 90 days from the date of formation or registration, as applicable, to file; and (iii) entities created on or after January 1, 2025 will have 30 days from the date of formation to file.

Complex organizational structures that involve pooled investment vehicles, joint ventures and other similar investment vehicles and related arrangements with investment advisers and other managers will likely require a detailed analysis to determine whether an exemption is available and which beneficial owner(s), if any, need to be reported. Please consult your Willkie attorney with any questions.

[4] See the link here for a comprehensive summary of these rules and their considerations.

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 in Rule 206(4)-2 under the Advisers Act 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, political contributions and ESG matters.

d. ERISA/VCOC Requirements

Firms that operate private equity funds as "venture capital operating companies," in order to avoid holding "plan assets" within the meaning of ERISA or Section 4975 of the Internal Revenue Code of 1986, as amended (the "Code"), 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" (within the meaning of ERISA) hold less than 25% of each class of the fund's equity interests, 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.

In December 2022, the U.S. Department of Labor (the "DOL") released a regulation governing the consideration of environmental, social, and governance ("ESG") factors in ERISA plan investments, including "plan assets" funds in

which ERISA investors participate. Broadly speaking, this regulation permits ERISA plan investors and ERISA plan investment managers to incorporate ESG considerations into their investment decisions when doing so enhances investment return or reduces investment risk. Firms that operate private equity funds whose assets are deemed to be plan assets should review carefully their approach to complying with this regulation.

In November 2023, the DOL released a proposed regulation that would amend the definition of "fiduciary" (for purposes of ERISA and Section 4975 of the Code) in the context of providing certain types of investment advice to ERISA plan investors and individual retirement account investors. Although the proposed regulation, if finalized in its current form, will likely not impact the day-to-day operation of private equity funds, the regulation could affect the manner in which private equity fund sponsors market their funds to such investors. The proposal is likely to undergo certain changes before it is finalized, likely in the first half of 2024. We are watching developments closely.

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 fund managers that market an alternative investment fund ("AIF") in the EU and/or the UK, disclosing among other things financial information and remuneration on a quantitative and qualitative basis. For AIFs with a calendar year end, the report is due by June 30, 2024. The annual report must also include any periodic reports required under the Sustainable Finance Disclosure Regulation (SFDR).

b. Reporting to Regulators

The AIFMD requires periodic Annex IV reporting to regulators in EU member states and/or the UK where an AIF has been marketed (with similarities to Form PF), on a quarterly, semi-quarterly, semi-annual or annual basis depending on assets under management, among other factors. For the period ending December 31, 2023, the reports must be filed by January 31, 2024. The exact formatting of the report and the process for submission varies for each regulator.

IV. BENEFICIAL OWNERSHIP AND LARGE TRADER REPORTING

a. Schedule 13G and Schedule 13D

The SEC amended the deadlines for beneficial ownership reporting requirements under the Securities Exchange Act of 1934. The amendments revised the then current deadlines for Schedule 13D and Schedule 13G filings. The amendments reduce the filing deadline for an initial Schedule 13D to five business days (from 10 calendar days) after the date on which a person acquires more than 5% of a covered class of equity securities. The amendments shortened the deadline for an initial Schedule 13G filing to within 45 days after the last day of the calendar quarter in which beneficial ownership first exceeds 5% of a covered class of equity securities (from 45 days after the calendar year-end).[5]

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, 2024 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, 2024 for this coming year, as well as promptly after the end of each quarter if any reported information changed.

V. New Proxy Voting and Say-on-Pay Disclosure Compliance Requirements

On November 2, 2022, the SEC adopted new proxy voting disclosure requirements for registered investment companies ("Funds") and for institutional investment managers subject to reporting under Section 13(f) of the Securities Exchange Act of 1934. Those managers will be required to disclose on Form N-PX their voting records regarding executive compensation and "golden parachute" arrangements, known as "say-on-pay votes." An institutional investment manager is required to report a say-on-pay vote for a security if the manager: (1) has the power to vote, or direct the voting of, a security; and (2) "exercises" this power to influence a voting decision for the security (including when a manager

[5] See the link here for our Client Alert highlighting the amendments to the beneficial ownership reporting rules.

exercises its authority not to vote on a say-on-pay matter). The new requirements are effective on July 1, 2024, and managers and Funds will be required to file their first reports on amended Form N-PX by August 31, 2024, which covers the reporting period of July 1, 2023 to June 30, 2024.

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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.