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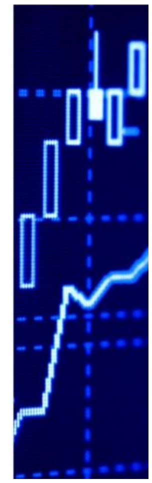
Private Equity Alert: Year-End Reminder

December 2014



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 2015:

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.

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 and pronouncements of the SEC staff – notably for this year, portfolio management and allocation of investment opportunities; use of consultants and

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operating partners; expense allocation generally between the firm and its funds or portfolio companies; and IT network protection and cybersecurity.

Code of Ethics and Compliance Manual

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.

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 should deliver an annual privacy notice to investors, describing privacy policies and practices including the categories of information collected and disclosed. Firms generally use the model privacy notice adopted by numerous federal agencies, which provides a safe harbor under the Gramm-Leach-Bliley Act.

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, as addressed in the Division of Investment Management Guidance Update from June 2014.

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, 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.

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.

AIFMD

Annual Report

The AIFMD requires an Annual Report from non-EU fund managers who market in the EU after July 22, 2014, disclosing among other things financial information and aggregate remuneration broken down between fixed and variable components, and between senior management/investment professionals and staff. For non-EU AIFs with a calendar year-end, the report is due by June 30, 2015.

Annex IV Reporting

The AIFMD also requires reporting to regulators in applicable EU member states (with similarities to Form PF), on a quarterly, semi-annual or annual basis and due as early as January 31.

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 also requires pre-investment disclosure to investors 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 17, 2015. For portfolio companies with initial public offerings during 2014, 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.

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 17, 2015 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 17, 2015 for this coming year, as well as quarterly updates if information changes during the quarter.

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Additional requirements will apply under specific fund agreement or side letter provisions, annual tax and financial reporting generally, Treasury Department and Commerce Department reporting as well as other non-U.S. regulatory and reporting regimes. Willkie advises numerous private equity firms, including emerging managers and middle market and large sponsors, and can assist with reviewing and complying with these various requirements.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Visit us online at www.willkie.com.