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Client Update
Reminder – Periodic Filing, Notice and Reporting Requirements for Private Equity Funds

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Private equity funds (and their managers/advisers) are subject to various types of regulation under U.S. federal law, in particular under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), and non-U.S. law. With the new year just around the corner, we want to remind our private equity clients and friends to check their internal compliance policies, fund partnership agreements, side letters and/or "tickler" lists to ensure that they are up-to-date and in compliance with the requirements – including any annual or quarterly reporting requirements – that may be imposed by law or pursuant to those compliance policies, partnership agreements and side letters.

Examples of filing and delivery requirements (in addition to tax reporting and filing and financial reporting obligations) include the following:

FORM ADV

All U.S. and non-U.S. investment advisers that are registered with the U.S. Securities and Exchange Commission (the "SEC") under the U.S. Investment Advisers Act of 1940 (the "Advisers Act") must file with the SEC, within 90 days after the end of the registrant's fiscal year, an updated Part 1 and 2A of the registrant's Form ADV. Registered investment advisers should review Part 2B of Form ADV (which is not required to be filed with the SEC) to determine if it should be updated.

Private equity fund advisers that are not required to register but that are exempt reporting advisers because, for example, they have less than $150 million in assets under management in the United States and only provide advice to private funds, must file with the SEC, within 90 days after the end of the adviser's fiscal year, an updated Part 1A of the adviser's Form ADV.

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FORM PF

Most registered investment advisers who advise one or more private equity funds are required to file an annual update to Form PF, the systemic risk reporting form, within 120 days after the end of the registrant's fiscal year.[1] Our November 16, 2011 Client Update, *SEC and CFTC Adopt Form PF for Registered Investment Advisers to Private Funds*,[2] describes the requirements relating to Form PF in greater detail, and our February 24, 2014 Client Update, *SEC Updates Form PF Guidance*,[3] outlines some of the more significant frequently asked questions updates provided by the SEC.

ANNUAL COMPLIANCE REVIEW

A registered investment adviser must maintain, adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act by the adviser and its employees. The adviser also must review, no less frequently than annually, the adequacy of these policies and procedures and the effectiveness of their implementation. In addition, many unregistered advisers maintain compliance policies and procedures. If they have not already done so, registered and unregistered advisers should begin planning the annual review of their compliance policies and procedures. Any annual compliance review should be based on a risk assessment that is customized for the particular adviser. In designing the annual review, the adviser's Chief Compliance Officer should consider SEC examination priorities, risk alerts issued by the SEC's Office of Compliance Inspections and Examinations, recent SEC enforcement actions and remarks by senior SEC staff members concerning private equity as described in some of our recent Client Updates and publications.[4]

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1 Please note that certain large "hedge fund" advisers and large "liquidity fund" advisers are subject to more frequent reporting and shorter deadlines.

2 Available here.

3 Available here. In addition, the SEC staff recently issued additional guidance with respect to, among other things, the treatment of the filing private fund's investment in other private funds. See Form PF – Frequently Asked Questions, Section F, Q.3.

4 See, for example, (a) *When the SEC Knocks on Your Door, Will You Be Prepared?: Practical Steps PE Firms Should Take to Prepare for an SEC "Presence" Examination* (available here); (b) *SEC Sanctions Private Fund Sponsor for Using Unlicensed Broker to Sell Private Fund Interests* (available here); (c) *SEC Enforcement Action Targets Advisers to Private Equity Funds* (available here); (d) *The SEC's Examination Priorities for 2014* (available here); (e) *SEC Releases Cybersecurity Examination Roadmap* (available here); and (f) *SEC Issues Guidance with Respect to Proxy Advisory Firms and Proxy Voting by Investment Advisers* (available here).

Based on this SEC guidance, we believe that a private equity fund sponsor should consider focusing on the following compliance areas during their annual compliance review: (i) fee and expense allocations, (ii) valuation policies, (iii) marketing and performance presentations (particularly disclosures with respect to the methodology for calculating internal rates of returns), (iv) allocation of investment and co-investment opportunities, and (v) other potential conflicts of interest. An adviser may also wish to consider changes in law and/or new guidance with respect to (i) the treatment of special purpose vehicles under the "Custody Rule" (discussed below), (ii) the qualification of employees as "knowledgeable employees" for investments in private funds, (iii) whistleblower anti-retaliation policies, and (iv) proxy voting and the use of proxy advisory firms.

CUSTODY RULE

Most private equity fund agreements provide for the delivery of annual audited, and sometimes quarterly unaudited, financial reports to limited partners. In addition, a fund sponsor that is a registered investment adviser may avoid certain requirements of Rule 206(4)-2 under the Advisers Act (the "Custody Rule") if it provides fund investors with the fund's audited financial statements, prepared in accordance with U.S. GAAP, within 120 days after the end of the fund's fiscal year (180 days in the case of a fund of funds). A fund sponsor that does not rely on the annual audit exception should confirm that it has retained an accounting firm that will conduct the "surprise" examination required by the Custody Rule. If the fund's custodian is a "related person" of the investment adviser, the auditing firm will also have to deliver an internal control report. Our Client Updates, *SEC Staff Provides Relief under the Custody Rule with Respect to Restricted Stock Certificates Held by Private Funds*,[5] *SEC Staff Raises Important Custody Rule Compliance Issues for Private Fund Sponsors*[6] and *Treatment of SPVs and M&A Escrow Accounts under the Advisers Act Custody Rule*,[7] discuss recent developments relating to the Custody rule.

CFTC FILINGS/EXEMPTIONS

Due to the rescission in February 2012 of an exemption that had previously been available for managers and general partners of certain private funds,[8] most

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[5] Available here.

[6] Available here.

[7] Available here.

[8] In February 2012, the CFTC rescinded an exemption under section 4.13(a)(4) of its Regulations.

managers or general partners of private funds need to rely on the exemption from registration with the U.S. Commodity Futures Trading Commission ("CFTC") that is available under section 4.13(a)(3) of the CFTC Regulations (the "de minimis exemption") if they trade commodity interests. "Commodity interests," for these purposes, include (i) futures and options on futures traded on exchanges, including security futures products that are based on a single security or narrow-based securities index; (ii) options on commodities; (iii) retail forex transactions; and (iv) swaps, including swaps that are traded on a designated contract market or on a swap execution facility and swaps that are traded on a bilateral basis.

In order for the manager or general partner of a fund to qualify for the de minimis exemption with respect to the fund, in addition to certain other requirements, the fund must meet either of the following tests each time a commodity interest position is established:

- the sum of: (i) the initial margin paid for all futures, securities futures and swaps; (ii) the premiums paid for all options on futures and all over-the-counter options; and (iii) the required minimum security deposit for all retail forex transactions that are required to establish such commodity interest positions will not exceed 5% of the liquidation value of the fund (after taking into account unrealized profits and losses from such commodity interest positions, although in the case of an option that was in-the-money at the time of purchase, such in-the-money amount may be excluded); or
- the sum of the notional amount of each commodity interest position does not exceed the liquidation value of the fund (after taking into account unrealized profits and losses from such commodity interest positions).

A manager or general partner of a fund that relies on the de minimis exemption must affirm its exemption filing within 60 days after the end of each calendar year or else the exemption will be deemed withdrawn (after the 60-day period has expired). Private fund management companies that cannot satisfy at least one prong of the de minimis exemption may have to register with the CFTC as commodity pool operators ("CPOs") or commodity trading advisors ("CTAs"), which will result in additional disclosure, recordkeeping and reporting requirements. Specifically, registered CPOs and CTAs must pay annual fees to the National Futures Association ("NFA") and complete annual questionnaires and registration updates with the NFA. A registered CPO must also file an annual report for each commodity pool it operates. Finally, absent a partial exemption under section 4.7 of the CFTC Regulations, registered CPOs and CTAs must periodically update the disclosures in their offering documents and provide certain reports to investors.

A registered CPO must file a quarterly Form CPO-PQR with the NFA.[9] The information required to be included in the form and the timing for submission of the form depends on aggregate assets under management of the CPO. CPOs with assets under management of $1.5 billion or more as of the close of business on any day during the previous calendar quarter must file the form within 60 days after the end of each calendar quarter during which the CPO satisfied the threshold. All other CPOs must file the relevant parts of the form within 60 days after the end of the first three quarters of each year and within 90 days of the calendar year-end.

A registered CTA must file a Form CTA-PR with the NFA within 45 days after the end of each calendar quarter. The information reported in the form includes the total number of "trading programs" offered by the CTA, the total assets and pool assets directed by the CTA and the names of the pools advised by the CTA. An entity dually registered as both a CPO and a CTA must complete Form CTA-PR in addition to the applicable schedules of Form CPO-PQR.

For further details, please refer to our February 13, 2012 Client Update, *Amendments to CFTC Part 4 Regulations Regarding Commodity Pool Operators and Commodity Trading Advisors*,[10] and our August 17, 2012 Client Update, *CFTC Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations*.[11]

EU ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE

In addition to other matters, a non-European fund manager wishing to market a fund in Europe must comply with the AIFMD disclosure rules, including:

- Disclosing certain matters to European investors before they invest in the fund. Further, certain information must be disclosed to European investors on a periodic basis.
- On a regular basis, reporting information in respect of both itself and its fund to the local regulator in the relevant European jurisdiction, for so long as the fund is marketed in that jurisdiction and/or an investor from that jurisdiction is invested in the fund. The regularity with which the fund

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9 Each of the CFTC and the NFA has a Form CPO-PQR. Generally, filing the CFTC form when required will satisfy the corresponding NFA filing requirement.

10 Available here.

11 Available here.

manager must report to the regulator in respect of the fund may differ from the regularity with which it must report to the regulator in respect of itself, and in both cases may vary over time. The reports are due quarterly, semi-annually or annually (in all cases based on the calendar year), depending on a number of factors, including assets under management, investment strategy of funds and leverage.

- Preparing an annual report for each fund that it markets in Europe in respect of each financial year of the fund, for so long as the fund is marketed in Europe and/or an investor from Europe is invested in the fund. The fund manager must make each annual report available to the European investors in the fund and the local regulator in each European jurisdiction in which the fund is marketed within six months after the end of the financial year to which the annual report relates.
- Disclosing certain information where the fund, directly or indirectly, acquires control of, or voting rights in excess of certain thresholds (starting at 10% and continuing in increments up to 75%) in, a company with its registered office in Europe.

Generally, a European fund manager must now be authorized, pursuant to its national laws that implement the European Union Directive on Alternative Investment Fund Managers, to "manage an alternative investment fund." One of the consequences of authorization is that a European fund manager must satisfy broadly equivalent AIFMD disclosure obligations to those described above.

TIC REPORTING

Advisers that have portfolio investments in foreign issuers, have issued interests in their funds to foreign residents or have claims on or liabilities to foreign residents may have obligations to report these interests, claims or transactions on the Treasury International Capital ("TIC") system. As we detailed in our June 28, 2011 Client Update, *New Treasury International Capital Reporting Requirements for Private Funds and Others*,[12] the U.S. Treasury Department instituted a new reporting requirement in 2011 – the TIC SLT – regarding cross-border holdings of long-term securities. This reporting obligation adds to other pre-existing reporting requirements on other TIC forms. More recently, there have been modifications to TIC B and C reporting forms, so that private funds now will be required to transition from filing TIC C Forms to filing TIC B Forms. TIC B Forms are used to report certain claims on, and liabilities to, foreign residents. For the coming year, advisers to private funds will need to monitor

[12] Available here.

their cross-border transactions and ensure that they file the appropriate TIC forms if their transactions in reportable securities, claims or liabilities exceed the various TIC filing thresholds.

FILINGS PURSUANT TO THE U.S. SECURITIES EXCHANGE ACT OF 1934 (THE "EXCHANGE ACT")

In addition to forms, such as Schedule 13D and Form 4 (which must be filed following certain purchases and sales), there are certain additional filings that may need to be made periodically with the SEC, such as:

- Form 5: Directors, officers and 10% stockholders of SEC-registered issuers (*i.e.*, public companies) may be required to file with the SEC an annual statement of beneficial ownership on Form 5 of certain transactions (such as gifts) exempt from the Form 4 "changes in beneficial ownership" filing requirements, as well as for transactions that should have been reported on a Form 4 but were not. If a Form 5 must be filed, it is due within 45 days of the issuer's fiscal year-end.
- Form 13F: Institutional investment managers (including private equity managers) that exercise investment discretion over $100 million or more (by fair market value) of Section 13(f) securities must report their holdings of such securities on Form 13F. For this purpose, Section 13(f) securities are, generally, securities traded on an exchange (including NASDAQ) and restricted securities of the same class. (The SEC publishes a quarterly "Official List of Section 13(f) Securities.")[13] In determining whether a fund manager has discretion over $100 million or more of Section 13(f) securities, a manager should aggregate each fund and other securities, portfolios and accounts over which it exercises investment discretion. However, when determining whether a fund manager has discretion over $100 million or more of Section 13(f) securities, the manager need not count securities issued by a person whom the manager "controls." The 2015 filing requirement will be triggered if, on the last day of any month in 2014, Section 13(f) securities under management are in excess of $100 million. In that case, a Form 13F will need to be filed by February 14, 2015, and thereafter on a quarterly basis.

In 2010, the SEC proposed rules that, if adopted, will require 13(f) filers to also file an annual report on Form N-PX (a form currently used by registered investment companies to report on their proxy voting) to disclose how they voted on executive compensation-related shareholder advisory votes required by

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[13] Available here.

Section 14A of the Exchange Act (enacted as part of the Dodd-Frank Act). These proposals are often referred to as the "say-on-pay," "say-on-frequency" and "say-on-golden parachute" votes. However, these rules have not yet been adopted.

- Schedule 13G: All 5% beneficial owners of SEC-registered issuers that are exempt from the "long-form" filing requirements of Schedule 13D must nonetheless disclose such holdings (and any changes in such holdings that have not been previously reported) on the "short-form" Schedule 13G. Eligible Schedule 13G filers include investors that acquired shares pre-IPO, certain qualified institutional acquirers and investors that are considered "passive" (because they hold less than 20% of the securities and did not acquire the securities with the intent to exercise control with respect to the issuer). If a Schedule 13G must be filed, it is due within 45 days of the end of the calendar year in which the reporting requirement was triggered.
- Form 13H: In 2011, the SEC adopted Rule 13h-1, which requires that certain entities that exercise investment discretion over trading in NMS securities (generally, preferred and common equity securities, and options on equities, that are traded or listed on a U.S. exchange) in excess of stated thresholds file Form 13H with the SEC to identify themselves as "large traders." The relevant trading thresholds are: (1) during any calendar day, two million shares or shares with a fair market value of $20 million; or (2) during any calendar month, 20 million shares or shares with a fair market value of $200 million. For purposes of determining large trader status, a private fund manager must aggregate the trading activity in NMS securities for itself, the funds that it manages, and all persons controlled by it or by such funds (such as controlled portfolio companies) – with a presumption of "control" applying to a 25% or greater stake. Note that any principal who controls the private fund manager, including by having a presumption of control from owning 25% or more of the manager, may also have a filing obligation.

Upon filing of a Form 13H, the SEC issues a Large Trader Identification Number, which must then be provided to registered broker-dealers with whom trades are effected. If a private fund manager wishes to avoid the need to monitor trading activity levels for these purposes, it may also voluntarily elect to file a Form 13H and be treated as a large trader.

Annual updates to the Form 13H are required, as well as quarterly updates if information on the Form 13H has changed during a given calendar quarter. The annual update must be filed within 45 days of calendar year-end (for this year, by February 14, 2015).

ANNUAL PRIVACY NOTICES

Certain private equity funds are required by U.S. law to send a privacy notice to each limited partner who is an individual at the start of the partner's relationship with the fund and annually thereafter. The privacy notice must describe the fund's policy regarding disclosure of current and former limited partners' non-public information and, in certain cases, must permit any limited partner who is an individual to opt out of the fund's disclosure of such information. Firms may wish to consider using the model privacy form adopted by various federal regulations to make privacy disclosures. Use of the model form is not mandatory, but firms that elect to use the two-page model benefit from a regulatory safe harbor.[14]

ERISA-RELATED FILING OBLIGATIONS

- Annual VCOC/Plan Assets Certifications: Many private equity funds operate as "venture capital operating companies" ("VCOCs") in order to avoid being deemed "plan assets" subject to the U.S. Employee Retirement Income Security Act of 1974 ("ERISA"), and have agreed with some or all limited partners to deliver an annual certification as to the fund's VCOC status. Other funds have agreed to ensure that the capital commitments of "benefit plan investors" not exceed 25% of the fund's total capital commitments (the "25% test") so that the fund's assets are not deemed "plan assets" subject to ERISA, and some of these have agreed with some or all limited partners to certify that this is the case. Funds should conduct the VCOC or "25% test" analysis as applicable, whether or not they are required to certify compliance with the test; and should prepare to deliver any required certifications in a timely manner. Funds that are intended to be VCOCs should also be regularly exercising their contractual management rights with respect to their portfolio companies.
- Form 5500: Some private funds are operated as "plan assets" subject to ERISA. Such funds typically agree either to (a) file as a direct filing entity ("DFE") on IRS Form 5500 or (b) provide ERISA investors with the necessary information concerning the fund to include on the investor's IRS Form 5500. If a fund files as a DFE, the return (Form 5500) is generally due 9½ months after the end of the fund's fiscal year.

Under current Department of Labor guidance, a private fund that relies on the "25% test" described above is also required to provide information to its ERISA investors concerning direct and indirect compensation received by its manager

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[14] Available here.

or general partner as well as placement fees paid in connection with a plan's purchase of an interest in the fund. This information is reported on the Form 5500 of the ERISA investor. Private funds should comply with requests by ERISA investors (including those set forth in side letter provisions) because ERISA investors are required to identify on Form 5500 each service provider, such as a fund manager, that fails to provide the necessary information.

OTHER CONTRACTUAL REQUIREMENTS

Private equity fund agreements as well as side letters often also include a number of additional annual and/or quarterly non-financial reporting or certification requirements. Be sure to check your partnership agreements and side letters carefully for any additional contractual obligations.

In addition to the obligations addressed above, there are various tax filing and reporting obligations that we would be happy to discuss with you. Also, although this Client Update focuses mainly on contractual and U.S. federal legal requirements, many other jurisdictions (*e.g.*, the jurisdictions where a non-U.S. fund and/or its manager is organized or operates) impose or are in the process of implementing additional filing and regulatory requirements, which we can also assist our clients in evaluating.

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Please do not hesitate to contact us with any questions.