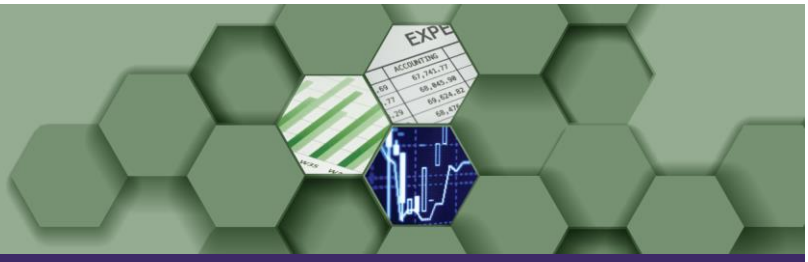
WILLKIE FARR & GALLAGHER LLP

PRIVATE EQUITY ALERT: YEAR-END REMINDER

December 2019



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 2020.

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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 out in the General Instructions to Form ADV.

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 led by the CCO and consider OCIE examination priorities, enforcement actions and pronouncements of the SEC staff – notably for this past year: protection of "retail" investors, including seniors and those saving for retirement; FINRA and MSRB operators, programs, and policies; offering, selling, trading and managing digital assets; cybersecurity and AML compliance by broker-dealers.

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 could 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 or more of AUM.

e. Data Privacy

US federal law generally requires private equity firms to provide privacy notices to natural person investors and to safeguard their personal information. The data privacy laws of certain states and non-US jurisdictions may also be applicable, including those enacted within the past year. The laws generally require that firms provide privacy notices and safeguard personal information, while also imposing additional requirements in the event of data breaches. Private equity firms should review their outgoing privacy notices, their internal data privacy procedures and their contracts with service providers that process the personal information of natural person investors.

f. State and Local Lobbying and Political Contributions 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 may be reviewed for continued applicability or termination. With the upcoming 2020 elections, advisers that are subject to the SEC's pay-to-play rule should be mindful of and review the requirements under both the rule and their own internal policies related to political contributions.

g. SEC Regulatory Updates

In conjunction with its adoption of the new Regulation Best Interest ("Reg BI"), the SEC published interpretive guidance regarding the standard of conduct that applies to investment advisers.[1] The interpretive release

[1] Please see our client memorandum entitled "SEC Issues Important Guidance on the Advisers Act" (July 3, 2019), available here.

reiterated the federal fiduciary duty for state and SEC-registered investment advisers, as well as for exempt reporting advisers, and clarified the component duties of care (e.g., duty to provide advice that is in the best interest of clients) and loyalty (e.g., duty to provide full and fair disclosure of all conflicts of interest). Private equity firms should consider whether their operational and compliance processes and procedures will need to change in light of the interpretive release. Willkie has advised both investment advisers and broker-dealers regarding Reg BI and the interpretive release, should you have any questions.

The SEC also recently proposed amendments to Rules 206(4)-1 (the "Advertising Rule") and 206(4)-3 (the "Solicitation Rule") that, if adopted, would make extensive changes to both rules.[2] For example, the amendments to the Advertising Rule would broaden the definition of advertisement to explicitly include communications that are intended for existing and prospective investors in a pooled investment vehicle advised by the investment adviser. The amendments to the Solicitation Rule would likewise broaden the definition of solicitation to cover solicitation of investors in private funds (which represents a change from the current position that the requirements of the Solicitation Rule do not apply where a registered investment adviser pays fees to a solicitor solely for soliciting investors for funds advised by the adviser and not for separately managed accounts). The amendments have not yet been finalized, so no changes are necessary at this time; however, if the proposed rules are adopted as proposed, private equity firms will need to update their compliance policies and procedures, as well as their marketing and soliciting materials, offering and subscription documents, solicitor due diligence procedures and recordkeeping practices.

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 (i.e., by February 29, 2020). The window for making such reaffirmations has already begun, so firms can satisfy this obligation before the new year, if they wish.

[2] Please see our client memorandum entitled "SEC Proposes Amendments to Update the Investment Adviser Advertising and Solicitation Rules" (December 6, 2019), available here.

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. Annual Confirmation of Status under the FINRA New Issue Rules

Private equity funds interested in purchasing New Issue securities (generally, equity IPOs) and allocating the profits and losses from New Issue securities to the funds' beneficial owners must confirm the status of their beneficial owners as not being Restricted or Covered Persons under FINRA Rules 5130 and 5131 at least once a year. Both rules allow the annual confirmation of status to be in the form of a negative consent once an initial written confirmation has been obtained.

Effective sometime after the new year, the FINRA rules will be amended to revise the types of persons and entities that are considered Restricted or Covered Persons and thus the types of investors to whom profits and losses from New Issue securities may be allocated.[3] Private equity firms should review their form questionnaires and other documents used to determine the status of investors as Restricted or Covered Persons to make any updates to reflect these changes.

d. Fund Compliance Certificate

Fund agreements and side letters often require one or more annual certifications of the general partner and/or investment manager. Such certifications typically accompany the audited financial statements, and state 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.

e. 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.

[3] Please see our client memorandum entitled "SEC Approves Amendments to the FINRA New Issue Rules" (Nov. 25, 2019), available here.

f. Credit Agreements

Funds that make use of a credit facility to bridge capital calls or for other purposes will typically have a requirement to deliver audited financial statements to the lender, along with one or more compliance certificates 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, 2020.

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, 2020. 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, 2020 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, 2020 for this coming year, as well as promptly after the end of each quarter if any reported information has changed.

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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.