Lowenstein Sandler

Client Alert / January 2013

INVESTMENT MANAGEMENT GROUP

YEAR-END DEVELOPMENTS AND COMPLIANCE CHECKLISTS

Lowenstein Sandler's Investment Management Group is pleased to provide you with (i) a summary of recent legislative and regulatory developments that impact the investment management community; and (ii) checklists of year-end considerations for private investment funds, investment advisers, commodity trading advisors, and commodity pool operators. The checklists appear after the legislative and regulatory summaries. For more information regarding any matter covered in this update, please contact one of the attorneys in our Investment Management Group.

SELECT LEGISLATIVE AND REGULATORY DEVELOPMENTS

Congress Passes the American Taxpayer Relief Act of 2012

Synopsis: On January 1, 2013, Congress passed the American Taxpayer Relief Act of 2012, which relates to its ongoing discussion regarding the "fiscal cliff."

Status: Among other things, the American Taxpayer Relief Act of 2012 (i) adds a new 39.6 % bracket applicable to taxable income exceeding $450,000 for married individuals filing jointly or $400,000 for individual filers, and (ii) raises the maximum rate of tax on "long-term capital gains" (generally, gains from the sale or exchange of capital assets held for more than one year) to 20 % for individuals whose taxable income exceeds the thresholds for the 39.6 % bracket. The American Taxpayer Relief Act of 2012 did not modify the current treatment of "carried interest" (also known as "performance allocations"). The Lowenstein Sandler LLP Business Tax Counseling and Structuring Group alert analyzing this Act is available here.

CFTC Issues Interpretive and No-Action Relief to Certain Securitization Vehicles with Respect to Commodity Pool Regulation

Synopsis: The Commodity Futures Trading Commission (the "CFTC") recently issued certain interpretations and no-action letters relating to commodity pool regulatory matters for certain securitization vehicles.

Status: These CFTC interpretations and no-action letters (i) provide exclusions from commodity pool regulation for some securitization vehicles; (ii) provide no-action relief with respect to such regulation for certain securitization vehicles that were formed prior to October 12, 2012; and (iii) extend no-action relief until March 31, 2013, for certain securitization vehicles that cannot otherwise benefit from the relief discussed in clauses (i) and (ii).

CFTC Extends Compliance Date to May 1, 2013, for Dodd-Frank Protocol and Swaps Transactions

Synopsis: On December 18, 2012, the CFTC issued an interim final rule extending the compliance date with respect to certain business conduct standards and documentation rules for swap dealers and major swap participants that were issued as part of the CFTC's Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") rulemaking initiative.

Status: The CFTC's extension now provides certain swaps transaction participants additional time to comply with certain swaps documentation and exchange information, including completion of the International Swaps and Derivatives Association's August 2012 Dodd-Frank Act Protocol and swaps transactions reporting obligations using the LEI/CICI participant identifier numbers. Please contact one of the attorneys listed for assistance with these matters.

Jumpstart Our Business Startups (JOBS) Act and General Solicitations

Synopsis: The JOBS Act is an amalgam of various provisions intended to stimulate the economy, including:

- amending Rule 506 of Regulation D under the Securities Act of 1933, as amended (the "Securities Act"), to permit general solicitations and general advertising in connection with certain private fund offerings;
- increasing the record owner limit under Section 12(g) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to 2,000 record holders;
- crowdfunding provisions (not available to most private funds) allowing offerings up to $1 million;
- a new category of "emerging growth company" (which can include business development companies) having annual gross revenues of less than $1 billion subject to more flexible disclosure requirements and Sarbanes-Oxley compliance requirements; and

- increasing the offering exemption under Regulation A of the Securities Act from $5 million to $50 million.

As required by the JOBS Act, the Securities and Exchange Commission ("SEC") has proposed a new Rule 506(c) of Regulation D and Rule 144A under the Securities Act that will allow issuers to conduct general solicitation and general advertising in securities offerings, provided that actual sales are limited to accredited investors and, in the case of Rule 144A, qualified institutional buyers. Issuers must reasonably believe, and take reasonable steps to verify, that the purchasers are accredited investors or qualified institutional buyers. There will be a box to check on Form D for issuers to indicate whether or not the offering was conducted pursuant to the proposed new rule once effective.

The SEC indicates in its proposing release that private funds relying on exemptions under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act of 1940, as amended (the "Investment Company Act") (which exemptions do not permit public offerings), may engage in general solicitations under the proposed new Rule 506(c) without losing such exemptions. Less certain is the effect that the JOBS Act amendments to Regulation D would have on the exemption from registration as a commodity pool operator ("CPO") provided under CFTC Rule 4.13(a)(3), which does not allow marketing to the public in the United States.

Status: While other provisions of the JOBS Act took effect promptly, the SEC has missed the deadline to repeal the ban on general solicitation and general advertising in private placements as required by the JOBS Act and has not yet proposed crowdfunding rules. The existing ban on general solicitation and general advertising remains in effect until the proposed new Rule 506(c) is finalized. While the SEC has addressed the continuing availability of exemptions under Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act, certain other rules, including those adopted by the National Futures Association ("NFA") and the CFTC, will continue to prohibit marketing to the public unless and until repealed or modified. The Lowenstein Sandler LLP Investment Management Group alerts analyzing the JOBS Act and related rules are available here and here.

Dodd-Frank Final Derivatives Product Definition Rules; Certain Swaps Transactions Now Considered "Commodity Interests" Transactions

Synopsis: On July 18, 2012, the CFTC and SEC jointly released final derivatives product definition rules (the "Derivatives Rules") which represent a first step in the establishment of a new regulatory regime for derivatives. Through the Derivatives Rules, the CFTC and SEC sought to, among other things: (i) clarify the definitions of swap, security-based swap, security-based swap agreement, and mixed swap; and (ii) assist market participants in determining whether particular agreements, contracts, and transactions fall within or outside of these definitions. The Derivatives Rules implement provisions of the Dodd-Frank Act, establishing a comprehensive framework for the regulation of over-the-counter derivatives. While the CFTC is charged with regulating swaps, the SEC has authority to regulate security-based swaps. In addition, the CFTC will regulate single-definition credit default swaps, whereas the SEC will regulate index credit default swaps. Both agencies will have regulatory authority over mixed swaps.

A security-based swap is defined as a swap based on a single security or loan, or a narrow-based group or index of securities (including any interest therein or the value thereof), or events relating to a single issuer or issuers of securities in a narrow-based security index. The CFTC has stated that a guarantee of a swap is an integral part of a swap, so therefore the term swap includes a guarantee of such swap, to the extent that a counterparty to a swap position would have recourse to the guarantor in connection with the position. The Derivatives Rules should provide some further clarity to CPOs and CTAs as to what types of agreements, contracts, and transactions are excluded from the definition of swap for purposes of falling under the jurisdiction of the CFTC and satisfying the CFTC Rule 4.13(a)(3) de minimis trading thresholds.

Insurance products will not be considered swaps or security-based swaps if they satisfy any of three specified safe harbors (grandfather provision, product safe harbor and enumerated product safe harbor) and the provider of such insurance product meets a specified "provider test." Insurance products failing to satisfy such safe harbors will be subject to a facts-and-circumstances analysis to determine whether such product is a swap, a security-based swap, or insurance.

The Derivatives Rules make clear that loan participations in which the purchaser is acquiring a current or future direct or indirect ownership interest in the related loan or commitment that is the subject of the loan participation (and certain other conditions are satisfied) are not swaps or security-based swaps and therefore are not subject to the Derivatives Rules.

Recognizing that it is not always simple to categorize a contract as a swap, a security-based swap, or a mixed swap, the Derivatives Rules specify procedures to assist market participants in making this determination with respect to a particular instrument.

Status: The Derivatives Rules became effective on October 12, 2012, triggering the effectiveness of a number of

other Dodd-Frank Act rules (including registration of certain swap dealers before December 31, 2012). The Derivatives Rules play an important role in implementing the Dodd-Frank Act rules and defining boundaries between the SEC and CFTC in respect to derivatives. The Lowenstein Sandler LLP Investment Management Group alert analyzing the Derivatives Rules is available here.

CFTC Issues Final Rules Amending Registration and Compliance Obligations for CPOs and CTAs

Synopsis: On February 9, 2012, the CFTC issued final rules adopting significant revisions to regulations involving regulatory compliance obligations for CPOs and CTAs. The final rules (i) rescind an exemption from CPO registration set forth in CFTC Rule 4.13(a)(4), which many advisers to private funds have previously relied upon to avoid CPO registration; (ii) significantly impact the ability of registered investment companies to claim an exclusion from the definition of CPO provided under CFTC Rule 4.5; (iii) adopt new data collection forms for CPOs and CTAs; and (iv) require persons relying upon exemptions established by CFTC Rules 4.5, 4.13, and 4.14 to affirm on an annual basis the accuracy of their original notice of exemption. While the CFTC had proposed to rescind the exemption from CPO registration under Rule 4.13(a)(3) (i.e., the de minimis futures activity exemption), the final rules have kept that exemption in place.

The final rules rescind the exemption from registration as a CPO set forth in CFTC Rule 4.13(a)(4), which provided an exemption from registration for pools whose participants are either qualified eligible persons or institutional accredited investors.

CFTC Rule 4.5 provides an exclusion from the term CPO for certain operators of trading vehicles registered under the Investment Company Act. To qualify for the exclusion, operators must now (i) restrict their commodities and futures marketing activity, (ii) limit commodity futures and options activity to bona fide hedging transactions, and (iii) limit certain margins and premiums to 5% of the liquidating value of the applicable portfolio or satisfy an alternative trading threshold test based upon the net notional value of futures positions.

The final rules implement new data reporting obligations for CPOs and CTAs on Forms CPO-PQR and CTA-PR, respectively. CPOs that are dually registered as investment advisers with the SEC and that file Form PF must still file Form CPO-PQR but are required to complete and file only Schedule A to such form. The assets-under-management threshold for reporting on Form CPO-PQR is $150 million, but the threshold for large CPOs (which are required to report additional information on Schedule C of Form CPO-PQR) is $1.5 billion.

With respect to funds of funds, the final rules specify that a fund investing in unaffiliated commodity pools is a commodity pool for purposes of the Commodity Exchange Act ("CEA") and should not be relieved of any applicable reporting obligations. Accordingly, the final rules added a question to Schedule A of Form CPO-PQR that requests the names of investee funds. The final rules, however, permit a CPO of a fund of funds to exclude any assets invested in the equity interests of other commodity pools or private funds for purposes of determining the CPO's reporting obligations, so long as these assets are treated consistently for purposes of Form CPO-PQR.

With respect to Form CTA-PR, the final rules have adopted only Schedule A of that Form, which contains basic identifying information and asks the CTA to disclose the pools under its advisement.

Status: The final rules enacted substantial changes in the investment management industry. By rescinding the exemption from CPO registration previously set forth in CFTC Rule 4.13(a)(4), advisers who relied upon the exemption are now required to register or claim another exemption such as CFTC Rule 4.13(a)(3). Managers need to determine whether their advised pools are considered "commodity pools," thereby causing the manager and/or its affiliates to be considered a CPO and/or CTA and whether an exemption from registration is available.

Managers registered as investment advisers with the SEC or any state (or exempt from registration or excluded from the definition of investment adviser) who advise commodity pools whose CPOs rely upon CFTC Rule 4.13(a)(3) may continue to rely upon an exemption from registration as a CTA. Additionally, Section 4m(1) of the CEA provides an exemption from registration as a CTA for any manager that, in the preceding 12 months, has not furnished commodity trading advice to more than 15 persons and that does not hold itself out generally to the public as a CTA. Section 4m(3) of the CEA provides an exemption from registration as a CTA for a manager (i) that is registered with the SEC as an investment adviser, (ii) whose business does not consist primarily of acting as a CTA, and (iii) that does not act as a CTA to any pool that is engaged primarily in trading commodity interests. To the extent that a manager is unable to avail itself of any exemptions, registration as a CPO and/or CTA is required (typically taking two to three months). Managers who register must also comply with new reporting requirements implemented with respect to Forms CPO-PQR and CTA-PR, even, notably, managers that are registered as investment advisers with the SEC and that are required to file Form PF. The Lowenstein Sandler LLP Investment Management Group alert analyzing the final rules for CPOs and CTAs is available here.

Commodity Futures Trading Commission Provides Answers to Frequently Asked Questions Regarding CPOs/CTAs to Private Commodity Pools

Synopsis: On August 14, 2012, the CFTC's Division of Swap Dealer and Intermediary Oversight ("DSIO") provided written responses to a number of frequently asked questions (the "FAQs") relating to the CFTC's February 2012 final rules discussed above addressing compliance obligations for CPOs and CTAs. The FAQs provide guidance regarding (i) wholly owned trading subsidiaries operated by a parent registered as a CPO; (ii) providing a "reasonable time to comply" with trading thresholds where a swap is entered into before another position (and only needing to comply with such thresholds at the time a position is established); (iii) filing of 2012 annual reports for pools that had their exemption withdrawn on January 1, 2013; (iv) whether the liquidation value of a pool's portfolio includes cash, as well as the commodity pool's commodity interest positions; (v) whether commodity options with the same underlying instrument can be netted; (vi) determining the notional value for cleared and uncleared swaps; and (vii) grandfathering of certain offers, sales, participants, and advice under the CFTC Rule 4.7 exemption.

Status: The FAQs provide some guidance and clarification on certain items that may assist managers in their endeavors relating to CPO and CTA registration and applicable exemptions therefrom. The Lowenstein Sandler LLP Investment Management Group alert analyzing the FAQs for CPOs and CTAs is available here.

CFTC Grants No-Action Relief to Certain Family Offices and Funds of Funds from Registration as CPOs

Synopsis: The DSIO provided no-action relief to certain family offices and certain managers of funds of funds from registration as CPOs. Eligible pool operators were required to file a claim for relief with the DSIO by email prior to December 31, 2012. The CFTC also provided additional guidance on the annual exemption recertification requirements and process under CFTC Rules 4.5, 4.13, and 4.14.

The CFTC removed Appendix A to CFTC Rule 4.13(a)(3) earlier this year and replaced it with Form CPO-PQR (a reporting form for registered CPOs). For managers of funds of funds, Appendix A to CFTC Rule 4.13(a)(3) had previously served as some guidance to the applicability of CFTC Rule 4.13(a)(3) in the fund-of-funds context. Since that removal, the CFTC has stated that the removed Appendix A may still be utilized by pool operators until updated by the CFTC.

Upon a written request from the Managed Funds Association and the Investment Adviser Association, the DSIO granted no-action relief to certain operators of funds of funds that may otherwise have been required to register with the CFTC as CPOs by December 31, 2012, but lack adequate information from the funds in which they invest, which is necessary to determine whether registration is in fact required. The relief delays the registration date for eligible operators until the later of June 30, 2013, or six months from the date the DSIO issues revised guidance (or the compliance date, if later) on the application of the calculation of de minimis thresholds in the context of CFTC Rules 4.5 and 4.13(a)(3).

Status: Each applicable exemption must be affirmed on an annual basis within 60 days after December 31, using the NFA's Exemption System. Failure to affirm an active exemption from CPO or CTA registration will result in the exemption being withdrawn after the 60-day period has ended. For registered CPOs or CTAs, withdrawal of the exemption will result in the firm being subject to Part 4 Requirements for that pool regardless of whether the firm otherwise remains eligible for the exemption. For nonregistrants, the withdrawal of the exemption may subject the entity to enforcement action by the CFTC. Funds of funds may continue to utilize the removed Appendix A to CFTC Rule 4.13(a)(3), and many funds of funds have relief from CPO registration through at least June 30, 2013. The Lowenstein Sandler LLP Investment Management Group alert analyzing the no-action relief for family offices and funds of funds is available here.

IRS Issues Revised FATCA Implementation Deadlines, Announces Foreign Financial Institution Registration Plans

Synopsis: On October 24, 2012, the IRS announced revisions to implementation process for certain compliance obligations relating to the Foreign Account Tax Compliance Act ("FATCA"), which was enacted in 2010 as part of an effort to combat tax evasion by U.S. taxpayers holding investments in offshore accounts and through offshore intermediaries. The IRS is also expected to issue FATCA regulations in the near future regarding registration of foreign financial institutions ("FFIs"), such as offshore hedge and private equity funds.

Status: Generally, compliance with FATCA obligations such as required withholding on "gross proceeds" has been pushed back from January 1, 2015, to January 1, 2017. However, required withholding on U.S.-source payments of interest and dividends under FATCA is still slated to begin on January 1, 2014. The Lowenstein Sandler LLP Business Tax Counseling & Structuring Group alert providing comprehensive details on the revised FATCA compliance obligations is available here. Also, in June 2012, the IRS announced plans to build an online "FFI Registration Process" that will

enable FFIs to register and enter into an FFI agreement to become participating FFIs or to certify to become registered deemed-compliant FFIs. The online FFI Registration Process is not yet open for registration but is expected to be operational soon. Details relating to this process are available here.

SEC Issues No-Action Letter Interpretive Guidance Regarding "Umbrella Registrations" of Related Entities

Synopsis: On January 18, 2012, the SEC issued a no-action letter (the "2012 Staff Letter") providing interpretive guidance with respect to the registration of related entities of an investment adviser registered under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), in light of the Dodd-Frank Act. The 2012 Staff Letter reaffirms and refines certain previously provided guidance and provides relief to certain groups of affiliated advisers conducting a single advisory business, allowing all such affiliated advisers to register with the SEC via a single Form ADV.

Filing of a single Form ADV is permitted on behalf of an adviser and each other adviser that is controlled by or under common control with the filing adviser (each, a "relying adviser") where the filing adviser and each relying adviser, collectively, conduct a single advisory business. The filing adviser and each relying adviser must, individually, determine whether they are prohibited from registering with the SEC by Section 203A of the Advisers Act (e.g., whether each has sufficient assets under management or is otherwise eligible to register federally as an investment adviser). The single Form ADV filing must include all information regarding the filing adviser and each relying adviser as if separately filed. The 2012 Staff Letter provides guidance on factors to consider in determining whether advisers are a "single advisory business."

Status: In addition to confirming (and refining) the guidance provided in a December 8, 2005, staff letter based on the prior rules, the 2012 Staff Letter memorializes a common practice in the investment management industry of utilizing "umbrella registrations" on Form ADV to cover multiple related advisers while providing important factors to consider when determining if an "umbrella registration" is appropriate. The 2012 Staff Letter will impact new registrations on Form ADV and year-end amendments and could result in restructuring for some advisers. Advisers may wish to revisit their structure if a new umbrella registration is desired. Alternatively, in applicable circumstances, related advisers may prefer to file multiple registrations. The Lowenstein Sandler LLP Investment Management Group alert analyzing the 2012 Staff Letter is available here.

The European Union's Alternative Investment Fund Managers Directive ("AIFMD") to Be Implemented by July 2013

Synopsis: On December 19, 2012, the European Commission released its Level 2 regulations for the implementation of AIFMD.

Status: AIFMD introduces a broad regulatory framework for entities involved in the management of alternative investments operating in the European Union. AIFMD includes regulations relating to, among other items, remuneration, transparency and reporting and risk management. The regulations will apply beginning on July 22, 2013. The European Commission's Level 2 regulations relating to AIFMD are available here.

COMPLIANCE CHECKLISTS

Private Investment Funds and Their Advisers

- ☐ Conduct periodic review of compliance policies.
- ☐ Provide/collect new issues certifications from brokers regarding whether funds/ investors are "restricted persons."
- ☐ Conduct periodic review and update of offering documents.
- ☐ Consult counsel regarding blue-sky and local securities matters in connection with offers or sales.
- ☐ File Schedule 13G year-end amendments by February 14, 2013.
- ☐ File Schedule 13H year-end amendments by February 14, 2013.
- ☐ File Form 13F for fourth quarter of 2012 by February 14, 2013.
- ☐ File Form PF quarterly updates and annual updates.
- ☐ Conduct periodic review of Section 13 and Section 16 filings.
- ☐ Monitor compliance with 25% ERISA limitation with respect to benefit plan investors.
- ☐ Prepare annual VCOC Certification (if required) for benefit plan investors.
- ☐ Prepare Form 5500 Schedule C fee disclosures for ERISA plan investors.
- ☐ Prepare year-end audits and distribute financial statements as appropriate.
- ☐ Distribute privacy notices.
- ☐ Annual affirmation of CPO registration exemption under Sections 4.5, 4.13(a)(1)-(3), 4.13(a)(5) and 4.14 by March 1, 2013.

Discussion

Compliance Policies. The compliance and operating requirements pertaining to registered investment advisers and unregistered advisers have continued to merge, and more and more unregistered managers are adopting best practices and upgrading their compliance policies to meet the demands of regulators and/or investors. Whether your firm is currently federally registered or will be required to register in the future, you should review your

compliance policies periodically to verify that they are adequate and appropriately tailored to your business risks and verify that your firm is adhering to them.

New Issues Certifications. If you purchase "new issues" (i.e., equity securities issued in an initial public offering), your broker (or if you are a fund of funds that invests indirectly in new issues, the underlying funds) will require that you certify each year as to whether the fund is a "restricted person" within the meaning of Rules 5130 and 5131. To make the certification, you must determine the status of investors in your fund as either restricted persons or unrestricted persons.

Offering Documents. Offering documents should be reviewed from time to time to verify that they (i) contain a current, complete and accurate description of the fund's strategy, management and soft-dollar and brokerage practices; (ii) comply with current laws and regulations; and (iii) reflect current disclosure best practices.

Blue-Sky and Local Securities Matters. You should continue to inform counsel of all offers or sales of fund interests. Offers to U.S. persons may trigger filing obligations in a given investor's state of residence. Offers to foreign persons may require filings in the country of an investor's residence.

Beneficial Ownership Reporting Requirements. If you have filed Schedule 13G and the information reflected in the schedule is different as of December 31, 2012, from that previously reported, you are generally required to amend the schedule by February 14, 2013. Year-end also serves as a convenient time to confirm that any Section 13 and Section 16 filings are current and complete.

Form 13H. Section 13(h) of the Exchange Act established a reporting system and filing requirements for "large traders" (i.e., persons effecting transactions in certain securities in amounts equal to 2 million shares or $20 million (determined by fair market value of the shares) in one calendar day or 20 million shares or $200 million in one calendar month). Persons meeting these thresholds must file Form 13H no later than 10 days after the identifying activity level has been reached. Amended filings must be effected promptly after the end of a calendar quarter during which any of the information contained in Form 13H becomes outdated or inaccurate. Large traders may file amended filings more often than quarterly but are not required to do so. Annual amendments (regardless of the number of amended filings previously effected) are due within 45 days of the end of each calendar year.

Form 13F. Section 13(f) of the Exchange Act requires "institutional investment managers" with investment discretion over $100 million or more of certain equity securities to file quarterly reports on Form 13F. Form 13F must be filed within 45 days of the end of each calendar quarter. An initial Form 13F must be filed at the end of the first year in which an institutional investment manager exceeds the $100 million threshold. To the extent that you have a Form 13F filing obligation, you must file your Form 13F for the fourth quarter of 2012 by February 14, 2013.

Form PF. Form PF was introduced under the Dodd-Frank Act to allow the collection of risk exposure information from private funds. Many smaller private advisers and large private equity advisers will be required to make their first filing on Form PF by April 30, 2013 (120 days after the end of their fiscal year). Many large hedge fund advisers with under $5 billion in AUM will be required to make their first filing on Form PF by March 1, 2013, (60 days after the end of their fiscal year). Quarterly updates are required of other large hedge fund advisers (by March 1, 2013 or 60 days after the end of their fiscal quarter) and large liquidity fund advisers (by January 15, 2013, or 15 days after the end of their fiscal quarter).

Monitor Compliance with 25% ERISA Limitation on "Benefit Plan Investors". If the aggregate amount invested in a fund by "benefit plan investors" (e.g., employee benefit plans, individual retirement accounts and entities the underlying assets of which include "plan assets") equals 25% or more of the aggregate investments in any class of equity interests in the fund (excluding investments by the fund's managers that are not "benefit plan investors"), the fund will generally be deemed to hold "plan assets" subject to various ERISA requirements and prohibitions, unless the VCOC exception (described below) or another regulatory exception applies. Accordingly, many funds (particularly those that do not qualify as VCOCs, such as hedge funds) limit equity participation by "benefit plan investors" to less than 25%. If you sponsor such a fund, you should continuously monitor (e.g., upon subscriptions, capital calls, redemptions, transfers, etc.) the level of investments by "benefit plan investors" to ensure the 25% threshold is not exceeded.

Annual VCOC Certification. Prior to investing in a venture fund or a private equity fund, ERISA plan investors often require the fund to provide an annual venture capital operating company, or VCOC, certification stating that the fund qualifies as a VCOC. A venture fund or a private equity fund that qualifies as a VCOC will not be deemed to hold "plan assets" subject to ERISA, even if equity participation by "benefit plan investors" exceeds the 25% threshold (described above). In general, a fund will qualify as a VCOC if (i) at any time during the fund's annual valuation period, at

least 50 % of the fund's assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, are invested in venture capital investments in operating companies for which the fund has management rights; and (ii) the fund, in the ordinary course of its business, actually exercises substantial management rights with respect to one or more of the operating companies in which it invests on an annual basis.

Form 5500 Schedule C Fee Disclosures. Funds that have ERISA plan investors (including funds that do not allow equity participation by "benefit plan investors" to exceed the 25 % threshold (described above) and thus are not subject to ERISA, but not VCOCs and other entities treated as operating companies) are required to provide plan administrators of their ERISA plan investors with certain fee-related information that is necessary for the completion of Schedule C to the plan's annual report on Form 5500 in advance of the filing deadline for the annual report. The Lowenstein Sandler LLP alert analyzing the Form 5500 Schedule C rules is available here.

Year-End Audit. Now is the time to begin all necessary year-end audits so that funds can distribute financials to investors on a timely basis as required by relevant governing documents and, in certain instances, to comply with the custody rule under the Advisers Act and/or CFTC requirements.

Privacy Notices. In accordance with applicable federal law, investment advisers and investment funds must have a privacy policy in place. In addition to being provided at the time of initial subscription, privacy notices must be distributed at least annually and more frequently if there are any changes to the policy/notice. We believe that the best time for the annual distribution of the notice is with a fund's annual financial statements and/or tax reports. Additionally, some states have privacy regulations in place that may subject investment advisers and investment funds to additional or, in some cases, more stringent privacy requirements.

REGISTERED INVESTMENT ADVISERS AND "EXEMPT REPORTING ADVISERS" (WHERE INDICATED)

- ☐ Prepare annual updating amendments to Form ADV (for registered investment advisers and Exempt Reporting Advisers).
- ☐ Comply with state annual filing requirements.
- ☐ Conduct periodic review of compliance policies and code of ethics.
- ☐ Comply with custody rule annual surprise examination.
- ☐ File Form 13F for fourth quarter of 2012 by February 14, 2013.
- ☐ Distribute privacy notices.
- ☐ Prepare Form 5500 Schedule C fee disclosures for ERISA plan accounts.
- ☐ Comply with ERISA Section 408(b)(2) fee disclosure requirements for covered plans.

Discussion

Annual Updating Amendments to Form ADV. An investment adviser who (i) is registered with the SEC, or (ii) is considered an "Exempt Reporting Adviser" (i.e., an investment adviser relying on the private fund adviser exemption or the venture capital adviser exemption) in each case as of December 31, 2012, (and with a December 31, 2012, fiscal year-end), must file an annual updating amendment of items on the form by March 31, 2013.

State Filing Requirements. Applicable state law may require a federally registered investment adviser to make notice filings and to pay fees in the state if he or she has clients or a place of business therein. Laws vary significantly from state to state. There may also be certain licensing or qualification requirements for representatives of investment advisers. Please contact counsel with any state-specific questions.

Compliance Policies and Code of Ethics. Federally registered investment advisers must adopt and maintain comprehensive compliance policies and a code of ethics and appoint a chief compliance officer. If you have not already done so, please contact counsel immediately so that counsel may assist you in creating and/or documenting compliance procedures appropriately tailored to your business. In addition, compliance policies and procedures must be reviewed by the adviser at least annually. The first review is required to be conducted within 18 months after the adoption of the compliance policies. The compliance policies and procedures review should focus on an evaluation of the effectiveness of the policies and procedures in light of current risks and the need for revisions as a result of (i) any compliance issues that arose during the prior year, (ii) any changes in the business activities of the investment adviser, and/or (iii) any regulatory changes. We recommend that this review be conducted relatively early in the year or staggered throughout the year so that it does not interfere with other time-sensitive activities when quarter-end or year-end matters are pressing. Policies that are materially changed as a result of such review should be redistributed to all appropriate personnel. In addition, Item 11 of Form ADV Part 2A must contain a current description of the code of ethics and a statement that the investment adviser will provide the code of ethics to any current or prospective client upon request.

Custody Rule Annual Surprise Examination. Where the adviser (or

its related person) possesses or may possess client funds and securities, the adviser is required to undergo an annual surprise examination by an independent public accountant absent an applicable exemption.

Form 5500 Schedule C Fee Disclosures. Advisers managing ERISA plan accounts are required to disclose certain fee-related information that is necessary for plan administrators to complete Schedule C to the plan's annual report on Form 5500 in advance of the date such annual report is required to be filed. The Lowenstein Sandler LLP alert analyzing the Form 5500 Schedule C rules is available here.

Compliance with ERISA Section 408(b)(2) Fee Disclosure Requirements. Advisers providing services directly to an ERISA-covered defined contribution or defined benefit plan as either a fiduciary or a registered investment adviser (as well as fiduciary services to a first-tier ERISA "plan asset" fund in which a covered plan has a direct investment, and brokerage and recordkeeping services to certain participant-directed plans to which investment alternatives are made available) are generally required to make detailed fee disclosures to a plan fiduciary in advance of the date the underlying contract or arrangement is entered into, extended or renewed. Additionally, changes to such required fee disclosures must be disclosed as soon as practicable but in no event more than 60 days from the date on which the adviser becomes informed of such change. Advisers providing such services should monitor ongoing compliance with the ERISA Section 408(b)(2) disclosure requirements. The Lowenstein Sandler LLP alert analyzing the Section 408(b)(2) Fee Disclosure Requirements is available here.

REGISTERED COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

- ☐ Registered CPOs and CTAs must conduct annual regulatory compliance reviews and complete certain regulatory requirements, including preparation of annual questionnaires and annual registration updates.
- ☐ Prepare and file certain portions of Form CPO-PQR by March 1, 2013 (CPOs with $1.5 billion or more AUM), or March 31, 2013 (other CPOs).
- ☐ Prepare and file certain portions of Form CTA-PR by February 14, 2013.
- ☐ Annual affirmation of CPO registration exemption under Sections 4.5, 4.13(a)(1)-(3), 4.13(a)(5) and 4.14 by March 1, 2013.

Discussion

Annual Compliance Reviews/ Regulatory Requirements. Registered CPOs and CTAs must conduct annual compliance reviews. These reviews and requirements include (i) the preparation and filing with the NFA of Annual Questionnaires and Annual Registration Updates within 30 days of the anniversary date of their registration; (ii) completion of the NFA's Self-Examination Checklist (available here); (iii) sending Privacy Policies to every current customer, client, and pool participant; (iv) testing disaster recovery plans and making necessary updates; (v) providing ethics training to staff and inspecting the operations of branch offices; and (vi) for registered CPOs, preparation of Pool Quarterly Reports within 45 days after the end of the year (and within 45 days after the end of each quarter). Finally, unless the applicable fund(s) qualify for an exemption, registered CPOs and CTAs must update their disclosure documents periodically, because they may not use any document dated more than nine months prior to the date of its intended use. Disclosure documents that are materially inaccurate or incomplete must be promptly corrected, and the correction must be promptly distributed to pool participants. The NFA's Notice to Members regarding these regulatory compliance matters is available here.

Prepare and File Portions of Form CPO-PQR. CPOs with AUM exceeding $1.5 billion must file Schedules A, B, and C by March 1, 2013, and other CPOs must file Schedule A (and Schedule B if AUM exceeding $150 million) by March 31, 2013.

Prepare and File Portions of Form CTA-PR. Most CTAs are required to complete Form CTA-PR by February 14, 2013 (or 45 days after the end of their fiscal year).

Annual Affirmation of CPO Exemption. Each person who has filed a notice of exemption from CPO registration under Sections 4.5, 4.13(a)(1)-(3), 4.13(a)(5) or 4.14 must affirm such notice of exemption by March 1, 2013, through the NFA's exemption system.

UPCOMING EVENTS

Below is information regarding upcoming Investment Management Group events in the first quarter of 2013. For more information regarding any of these events, please contact events@lowenstein.com.

PEI CFOs and COOs Forum 2013

January 23-24, 2013, Plaza Hotel, New York, NY

Lowenstein Sandler's Investment Management Group is a proud sponsor of the 10th annual Private Equity CFO and COO Forum. Scott H. Moss, Partner and Chair of Regulatory and Compliance will present "Frontline – Tales from the SEC Audit Trail." Ira L. Sorkin, Partner, is the luncheon keynote speaker and will present "The Evolution of Financial Industry Oversight and What's Next on the Horizon." This event brings together the world's leading financial, operational, and compliance professionals from all sectors of the private equity and venture capital industry.

MFA Network 2013

January 28-30, 2013, The Ritz, Key Biscayne, FL

Lowenstein Sandler is proud to be a Platinum Series Sponsor of MFA's Network 2013 conference. MFA's Network series is the alternative investment industry's top networking conference and exposition. Network, launched in January 1995, is MFA's flagship conference event and draws approximately 800 delegates. The conference features a substantive educational agenda, ample networking events and concurrent business meetings with top delegates from the industry's leading alternative investment funds.

Breakfast Briefing - US and European Compliance

February 28, 2013 - 8:30 AM to 10:30 AM - Lowenstein Sandler Conference Center, New York, NY

Lowenstein Sandler and the UK law firm of Osborne Clarke are conducting a compliance breakfast program to discuss the most recent European and US regulatory issues affecting private investment funds. A significant portion of the presentation will focus on the Alternative Investment Fund Managers Directive (AIFMD). US-based managers of alternative investment funds will need to be aware of the Directive if they either manage or provide other services to EU-based funds, or wish to market their funds to EU-based investors.

CCO Roundtable - Lowenstein Sandler and ACA Compliance Update

March 20 , 2013 - 8:30 AM to 11:00 AM - Lowenstein Sandler Conference Center, New York, NY

Lowenstein Sandler, along with ACA Compliance, are hosting a roundtable for CCOs, CFOs and other high-level compliance professionals to discuss regulatory issues affecting the private investment community as well as their investment advisors and broker-dealers. Our panel of experts from Lowenstein Sandler, ACA and leading investment firms will discuss recent developments in the area of investment management and broker-dealer regulation. The topics to be discussed include Last Minute Form PF Questions; Ongoing CFTC/NFA Compliance; New Swaps and Derivatives Regulations; Enforcement, Regulatory and Examination Updates; and the JOBS Act.

contacts

Robert G. Minion
Chair
646.414.6930
rminion@lowenstein.com

Allen B. Levithan
973.597.2406
alevithan@lowenstein.com

Marie T. DeFalco
646.414.6945 (NY),
973.597.6180 (NJ)
mdefalco@lowenstein.com

Peter D. Greene
646.414.6908
pgreene@lowenstein.com

Elaine M. Hughes
973.422.6502
ehughes@lowenstein.com

Scott H. Moss
646.414.6874
smoss@lowenstein.com

David L. Goret
646.414.6837
dgoret@lowenstein.com

Matthew A. Magidson
646.414.6952
mmagidson@lowenstein.com

Richard Bernstein
646.414.6842 (NY),
973.422.6714 (NJ)
rbernstein@lowenstein.com

Co-Authors:

Scott H. Moss
646.414.6874
smoss@lowenstein.com

Cole Beaubouef
973.597.2322
cbeaubouef@lowenstein.com

George Danenhauer
646.414.6879
gdanenhauer@lowenstein.com

Lowenstein Sandler makes no representation or warranty, express or implied, as to the completeness or accuracy of this Client Alert and assumes no responsibility to update the Client Alert based upon events subsequent to the date of its publication, such as new legislation, regulations, and judicial decisions. Readers should consult legal counsel of their own choosing to discuss how these matters may relate to their individual circumstances.

© 2013 Lowenstein Sandler LLP.