# 2019-20 Compliance Developments and Calendar for Private Fund Advisers

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## Introduction

While the Securities and Exchange Commission (SEC) brought several enforcement actions in 2018-19, the most significant new developments were published interpretations and alerts. Other agencies, such as the Commodity Futures Trading Commission (CFTC), also provided new guidance and brought significant enforcement actions.

## Fiduciary Interpretation

In June of 2019, the SEC adopted a new interpretation (the "Fiduciary Interpretation") defining fiduciary duties for investment advisers as consisting of a duty of loyalty and a duty of care, requiring investment advisers to provide advice that is in the best interests of the relevant client without putting the adviser's interests ahead of the client's. The Fiduciary Interpretation specifically defines the duty of loyalty, requires precise disclosure regarding conflicts and establishes a duty of care. For private fund and institutional clients, the Fiduciary Interpretation acknowledges a difference between retail and institutional clients.

The Fiduciary Interpretation further defines the duty of loyalty as an obligation not to subordinate the relevant client's interests to its own. Advisers must try to eliminate conflicts of interest[1] if possible or obtain informed consent after full and fair disclosure.[2] Because of the difference in the ability of retail versus institutional clients, it may be difficult to obtain effective informed consent from retail clients for complicated conflicts of interest under the Fiduciary Interpretation.

As part of the duty of care, the Fiduciary Interpretation requires that advice be in the best interest of the client, based on a reasonable understanding of the client's interests, seeking best execution and provide advice and monitoring over the course of the relationship. The duty of care can be varied by contract.

However, while the duties can be shaped through disclosure and through contractual language, the fiduciary duties cannot be waived or wholly disclosed away. The Fiduciary Interpretation also clarifies that any use of hedge clauses, especially with retail clients, is inconsistent with the antifraud prohibitions if they create the impression of waiver.

For further information, see our alert at https://www.akingump.com/en/news-insights/sec-adopts-new-interpretation-of-fiduciary-duty.html.

## Voting Interpretation

The SEC adopted a new interpretation (the "Voting Interpretation") in August of 2019, determining that voting obligations apply by default if the investment adviser has investment discretion and applying the concepts of the Fiduciary Interpretation to investment advisers' obligations to vote securities. The Voting Interpretation requires investment advisers to adopt written policies that are reasonably designed to ensure that (i) votes are cast in the best interests of clients in light of the client needs and (ii) the investment adviser does not place the adviser's interests ahead of the client's interests. Investment advisers should also ensure that they are making investment decisions with complete and accurate information. While the voting obligation can be structured through agreement, the costs involved in voting decisions may also, depending on the strategy of the client, favor not voting. The Voting Interpretation applies similar requirements and supervision obligations for investment advisers in their retention of proxy advisory firms.

For further information, see our alert at https://www.akingump.com/en/news-insights/sec-applies-fiduciary-duties-analysis-to-voting-obligations.html.

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[1] A conflict of interest is defined as an interest of the adviser that could incline the investment adviser, consciously or unconsciously, to favor its own interests over those of the client.

[2] Disclosure must be made in a manner that provides adequate notice to the client that a conflict is currently occurring (i.e., "may" is not effective disclosure), and the consent must be delivered in an effective manner.

### Form ADV Part 3/Form CRS

At the same time it adopted the Fiduciary Interpretation,[3] the SEC also adopted new rules requiring investment advisers to file a Form CRS that complies with Form ADV Part 3 if (and only if) they provide advice to a retail investor.[4] A Form CRS will typically be limited to two pages consisting of a prescribed summary of the adviser-client relationship, conflicts of interest and disciplinary information.

Registered investment advisers providing investment advice to retail clients may file Form CRS starting on May 1, 2020, and must file a Form CRS that complies with Form ADV Part 3 by no later than June 30, 2020. After June 30, 2020, the SEC will not accept any new registrations that do not contain a Form CRS that complies with Form ADV Part 3 (if applicable).

After it is filed, Form CRS must be posted to the adviser's website in an easily accessible location. It also must be delivered to new clients before entering into an advisory contract, and must be delivered to existing clients if any new account, service or rollover is recommended. Otherwise, investment advisers must deliver to existing clients within 30 days of filing.

If there are any changes that would make the Form CRS materially inaccurate, the investment adviser must file an amendment within 30 days and must communicate changes within 60 days to retail investors, highlighting the changes.

### OCIE Staff Alerts and Exam Priorities

The SEC's Office of Compliance Inspections and Examinations (OCIE) has published multiple risk alerts during 2018 and 2019 that are meant to identify recurrent issues in examinations of registered investment advisers and remind investment advisers of their obligations under SEC rules. In 2018 and 2019, OCIE published alerts regarding:

- Best execution issues (including the failure to document reviews or involve employees with intimate knowledge of broker performance, such as traders, in the review of brokers).[5]
- The cash solicitation rule (provides a summary of the requirements for retention of persons that may locate managed account clients).[6]
- Registered investment advisers' (and exempt reporting advisers') obligations with respect to electronic books and records under the books and records rules.[7]
- Obligations to provide privacy notices and implement policies to protect personal information.[8]

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[3] The other two releases—(i) an interpretation of what constitutes "solely incidental services" for the purposes of qualifying for the exclusion from being regulated as an investment adviser and (ii) "Regulation Best Interest" which applies fiduciary obligations when making a recommendation to a retail client—apply only to registered broker-dealers and are not described in this alert.

[4] A "retail investor" is a natural person (or his or her legal representative) who seeks to receive investment advisory services primarily for personal, family or household purposes. If the investment adviser does not have any retail investor clients, the investment adviser does not need to prepare or file one. Registered broker-dealers providing recommendations to retail clients are required to file Form CRS, which is the same as Form ADV 3. An investor in a private fund is not a "client" for these purposes.

[5] See the compliance calendar for 2018-19 for a more complete discussion.

[6] See https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Cash%20Solicitation.pdf.

[7] See https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Electronic%20Messaging.pdf.

[8] See https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Regulation%20S-P.pdf.

Obligations to properly use safeguards and third-party security features for customer records and information in network.[9]

Its findings on supervision and disclosure of conflicts of interest (with a focus on disclosure and supervision of employees with disciplinary histories) (the "Supervision Initiative Alert").[10]

Obligations to provide disclosure and obtain consent for agency and principal cross transactions.[11]

While each of the above is notable for the fact that OCIE is alerting registered investment advisers to focus on these areas, the alerts on (i) electronic books and records, (ii) the Supervision Initiative Alert, (iii) Regulation S-P and (iv) network storage solutions provide significant additional guidance in those areas.

The electronic books and records risk alert provides a list of best practices with respect to electronic messaging that OCIE observed in its limited-scope examination initiative. OCIE recommended that advisers limit electronic communications to certain expressly permitted applications, and it identified particularized risks associated with so-called ephemeral messaging apps and apps that allow for anonymous communication. Relatedly, the electronic books and records risk alert addresses monitoring, review and retention of social media posts and activity, personal websites and personal email that relate to adviser business. The electronic books and records alert also focused on the additional risks posed by the use of non-firm-owned computer equipment in an adviser's information technology environment. Accordingly, the risk alert identifies the benefits of security applications or other software that allow advisers to: (i) automatically load cybersecurity tools and patches on employee-owned devices; (ii) monitor employee-owned devices for prohibited applications; (iii) remotely delete locally stored information from the device if it is lost or stolen; and (iv) require the use of virtual private networks or other security applications when employees access firm email servers or other business applications. See https://www.akingump.com/en/news-insights/sec-ocie-issues-guidance-on-advisers-recordkeeping-requirements.html for further information.

The Supervision Initiative Alert summarizes OCIE's findings of 50 examinations of investment advisers that have employed individuals with disciplinary events, focusing on whether their compliance programs were designed to detect and prevent violations of the Investment Advisers Act of 1940 ("Advisers Act") and its supervised persons, whether the disclosures were full and fair, and whether conflicts of interest were properly identified, addressed and disclosed. OCIE noted that several investment advisers relied on the supervised persons to self-report violations, did not provide complete information regarding violations (such as the number of violations or fines imposed) or promptly report those violations and did not have policies and procedures that were reasonably designed to ensure that the self-reporting was accurate and complete. OCIE also observed that investment advisers did not clearly set forth expectations for supervised persons or have adequate oversight over those supervised persons, especially supervised persons in remote locations. OCIE recommended policies and procedures to specifically address (i) diligence requirements before hiring, including background checks,[12] social media and internet searches, contacting references and verifying educational claims, (ii) establishing heightened supervision practices for supervised persons with disciplinary histories, (iii) adopting written policies for addressing client complaints and (iv) oversight of persons operating out of remote offices.

The risk alerts relating to Regulation S-P and third-party safeguards are described under the privacy and cybersecurity section below.

The SEC also published its 2019 Examination Priorities (available at https://www.sec.gov/files/OCIE%202019%20Priorities.pdf). High on the list of priorities for fund managers are (i) fees and expenses, including disclosure and accuracy of calculations and adequacy of disclosure of brokerage practices, (ii) conflicts of interest, including the use of affiliated service providers and "non-purpose" loans and lines of credit that are secured by a securities account but cannot be used for acquiring or trading securities, (iii) portfolio management and trading, including suitability, style drift (especially

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[9] See https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Network%20Storage.pdf.

[10] See https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Supervision%20Initiative.pdf.

[11] See https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Principal%20and%20Agency%20Cross%20Trading.pdf.

[12] Note that background checks may not be permitted in certain jurisdictions under local law.

without disclosure) and appropriate monitoring, (iv) digital assets, including the offer and sale, trading and management of assets, safety of client funds and assets, pricing of portfolio and internal controls and (v) the identification and management of cybersecurity risks, including configuration of network storage devices, information security governance and policies and procedures related to retail information security, governance, risk assessment, access rights and controls, data loss protection, vendor management, training and incident response. In addition, the staff will continue to focus on examining microcap trading and never-before examined investment advisers and retail investors.

**Privacy and Cybersecurity Updates**

The principal changes to privacy and cybersecurity issues this year occurred at the state level, including California and New York, and in offshore jurisdictions, such as the Cayman Islands. The SEC's staff also provided more detailed guidance on the SEC's principal privacy and cybersecurity regulation, Regulation S-P, in two separate risk alerts.

On the state level, the California Consumer Privacy Act of 2018 (CCPA) is scheduled to go into effect on January 1, 2020, and the New York Stop Hacks and Improve Electronic Data Security (SHIELD) Act will begin to go into effect, in part, in October of 2019.

***California***

The CCPA will provide California residents with sweeping privacy rights, imposing restrictions and requirements on businesses and creating a private right of action for California residents. Fund managers that are doing business in California, have California-resident natural person investors in the funds that they manage or that otherwise possess personal information regarding California natural person residents will need to:

- Notify applicable natural person consumers of (i) the categories of personal information that is collected, (ii) the right to request deletion of personal information under the CCPA and (iii) the right to opt out of sale of personal information to third parties.
- Map the personal information collected to be prepared to respond to consumer requests for what specific personal information has been collected from the consumer and deletion requests.
- Ensure that reasonable security practices and procedures have been adopted.
- Add provisions to contracts with persons who are providing services to the fund so that they can be treated as "service providers" as opposed to "third parties."

California recently adopted a temporary carve-out for consumer rights for employees and narrowed the scope of the definition of personal information to exclude certain de-identified personal information (unless it is capable of being re-identified), which should help with the scope of CCPA implementation. For further information on the CCPA, see https://www.akingump.com/en/news-insights/california-passes-landmark-consumer-privacy-act-what-it-means.html.

***New York***

New York recently enacted the SHIELD Act, which expands data breach notification requirements and imposes new data security obligations on businesses that own, license or, in some cases, maintain computerized data that includes any New York resident's private information.[13] Starting in October 2019, persons that own, license or maintain computerized data that includes any New York resident's private information that is affected by a breach will be subject to notice to the affected residents, with a copy of the notice to be provided to the New York Attorney General, Department of State, the Division of Police and, if more than 5,000 residents are required to be notified, consumer reporting agencies. Starting in March 2020, the new "reasonable security requirement" will require businesses that are not regulated by and compliant with another state or federal data security regime to

[13] The SHIELD Act will protect New York residents' personal information without regard to whether the owner of personal information is located in or doing business in New York.

adopt a program that includes certain data security safeguards. Registered investment advisers are subject to Regulation S-P, among other requirements and are not subject to a separate set of data security rules and regulations under the SHIELD Act.[14] For further information on the New York SHIELD Act, see https://www.akingump.com/images/content/1/0/v2/107771/New-York-Enacts-SHIELD-Act-with-Expansive-Data-Breach-Notificati.pdf.

***Cayman Islands***

The Cayman Data Protection Law, 2017 (the "CDPL") will apply protections that are similar to many of the protections in European General Data Protection Regulation (GDPR) (i) to entities established in Cayman Islands where personal data is collected in connection with the establishment of that entity and (ii) to entities that are not established in the Cayman Islands but have data that is processed in the Cayman Islands. The CDPL is scheduled to become effective on September 30, 2019. Entities that are subject to the CDPL should contact their Cayman Islands counsel to amend their policies to address the requirements, discuss the appropriate notice to clients and investors, add appropriate language to the subscription documents and amend or enter into new agreements to address the CDPL with certain service providers.

*Federal Guidance*

In April 2019, OCIE published an alert regarding violations that it noted in its examinations regarding Regulation S-P, including investment advisers' failure to deliver privacy notices on the commencement of a relationship or annually thereafter,[15] and having inadequate policies and procedures. In particular, OCIE noted that many policies failed to address:

The use of personal devices for customer information and configuring them to safeguard customer information.

Sending unencrypted email with personal information, especially if without training or monitoring.

Use of unsecure networks.

Failing to follow policies regarding outside vendors and requiring them to secure data.

Failing to terminate access rights upon termination of employees.

The SEC also noted that investment advisers frequently had an inadequate inventory of personally identifiable information and inadequate protections for the physical premises.

In May 2019, OCIE published additional guidance regarding the use of network storage solutions, including the cloud. The staff reminded registrants to ensure that they enable protections such as encryption, password protection and other security controls and other baseline settings are configured adequately. OCIE suggested policies and procedures to support installation, maintenance and review of the network storage solution and to inventory differing types of data stored electronically and the appropriate controls. Advisers also must develop vendor management policies and procedures that include patches and updates, along with a review of the effect of changes. For further information, see our alert at https://www.akingump.com/en/news-insights/sec-ocie-issues-guidance-on-advisors-and-broker-dealers-cloud.html.

After several companies were the victim of fraudulent transfer requests, the SEC also reminded public company issuers that it is the responsibility of management to devise and maintain internal accounting controls to ensure that transactions are authorized. The SEC cautioned issuers to (i) follow

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[14] Registered investment advisers are subject to breach notice requirements.

[15] The SEC noted that the Fixing America's Surface Transportation Act amends the obligation to provide an annual notice for advisers that do not share personal information, have previously provided a notice and have not changed their policies.

policies for payments, such as dual authorizations, (ii) provide clarity regarding the authority of each member of the accounting group and (iii) provide training regarding controls and information technology.[16]

### *NFA*

The National Futures Association (NFA) supplemented its interpretive notice regarding information systems security programs (ISSP) for members to have policies and procedures to supervise the risks of unauthorized access to, or attack of, their systems and to respond appropriately to incidents (the "NFA ISSP Interpretive Notice"). In 2019, the NFA ISSP Interpretive Notice was supplemented to clarify that written notification of a cybersecurity incident must be provided to the NFA if there is any loss of customer or counterparty funds or loss of member's own capital (or notice is required to be provided to customers or counterparties under other applicable law). In addition, ISSPs must include training of employees upon hiring and at least annually thereafter relating to information security, including social engineering tactics and other threats. The NFA also required ISSPs be written and approved by the firm's CEO or other senior official with responsibility for information security or authority to supervise the member's execution of its ISSP and that a self-examination questionnaire, which includes cybersecurity questions, be completed on an annual basis and retained in the member's files.[17]

### *CFTC*

The CFTC brought and settled an action against a futures commission merchant (FCM) in September 2019 for its transfer of funds after its IT engineer fell for a phishing email from a hacked financial security organization account. The hackers then posed as two of the FCM's clients and requested wire transfers, including one successful request for $1 million. Despite the fact that the FCM reimbursed the client for the $1 million loss, the CFTC fined the FCM $500,000 and found that the FCM had failed to (i) consult or follow its ISSP for appropriate responsive steps, (ii) consult or follow its disbursement policies to independently confirm the wire request, (iii) train its employees, including its chief compliance officer (CCO) and IT specialists, adequately regarding cybersecurity, (iv) tailor its policies and procedures to its risks and (v) disclose the breach to its customers as "information regarding its business, operations, risk profile. . . that would be material to the customer's decision to entrust the customer's funds and otherwise do business with the [FCM]."[18]

## SEC Enforcement Actions

### *Actions Against CCOs*

The SEC upheld a Financial Industry Regulatory Authority (FINRA) decision suspending for one year a CCO for providing false documentation to FINRA and failure to supervise.[19] Once the CCO learned that his signature had been falsified on at least some forms that were submitted to FINRA, he failed to investigate the matter, thereby violating FINRA Rules 8210 and 2210. In another case, the District of Massachusetts entered a final judgment against the managing partner and CCO of an adviser for a cherry-picking scheme involving waiting until the end of the trading day to determine whether to allocate certain trades made during the day to his personal accounts or clients' accounts, depending on the earnings announcements made by the underlying traded companies that day.[20]

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[16] See https://www.sec.gov/litigation/investreport/34-84429.pdf.

[17] For further information see https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5085 and https://www.akingump.com/en/news-insights/nfa-issues-interpretive-notices-for-cpos-regarding-internal.html.

[18] See https://www.cftc.gov/PressRoom/PressReleases/8008-19 and https://www.cftc.gov/media/2476/enfphillipcapitalincorder091219/download.

[19] Exchange Act Release No. 86404 (Jul. 17, 2019) available at https://www.sec.gov/litigation/opinions/2019/33-10662.pdf.

[20] *United States v. Breton*, No. 1:17-cv-10125 (Sep. 6, 2019).

### *Cryptocurrency*

The cryptocurrency space remains a popular target with the regulators. The SEC brought and settled two enforcement actions against celebrities for touting an initial coin offering (ICO) on their social media accounts without disclosing that they received compensation for doing so, or the amount of the compensation.[21] The SEC also settled an enforcement action with an online platform used to buy and sell tokens in a secondary offering, taking the position that the platform was an "exchange" under the Exchange Act and, therefore, should have been registered or exempt from registration thereunder.[22] Finally, the SEC settled a case against a company and its director for fraudulent activity in connection with an unregistered ICO for a coin the SEC determined was a security, and the promoter of which claimed that an investment in the coin would yield over 1,000 percent return in less than 29 days.[23]

### *Misrepresentation regarding the Market for a Security*

The SEC brought and settled three actions regarding misrepresentations and omissions in connection with the sale of securities (and the materiality thereof). In one action, traders allegedly misrepresented to both buyers and sellers fabricated price negotiations with the current owner of the securities in order to increase the firm's profits on the transactions.[24]

### *Other Misrepresentation Focus Areas*

The Supreme Court held in March 2019 that dissemination of false or misleading statements with intent to defraud falls within the scope of subsections (a) and (c) of Rule 10b-5, as well as the relevant statutory provisions, even if the disseminator is not the "maker" of the untrue statement. By sending emails that the defendant knew to contain material untrue statements, he "employ[ed]" a "device," "scheme" and "artifice to defraud" within the meaning of subsection (a) of the Rule, §10(b) and §17(a)(1) and engaged "in a[n] act, practice or course of business" that "operate[d]…as a fraud or deceit" under subsection (c) of the Rule. See our alert at https://www.akingump.com/en/news-insights/u-s-supreme-court-disseminators-of-false-statements-with-intent.html for further information regarding this case.

In another enforcement action, the investment adviser touted false assets under management (AUM) numbers and claimed to be eligible for registration when, in fact, the adviser was not registered and its fund clients had not received any contributions of capital.[25]

### *Valuation*

The SEC continues to make valuation concerns an enforcement focus, settling enforcement actions for (i) failing to have valuation policies or adequate due diligence and controls over clients' and traders' valuation models and determinations,[26] (ii) improper pricing by traders to inflate earnings or through purposely undervaluing and subsequently marking up to the true value to "manage" earnings[27] and (iii) using a "home-brewed" valuation model that

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[21] Securities Act Release Nos. 10578 (Nov. 29, 2018) and 10579 (Nov. 29, 2018) available at https://www.sec.gov/litigation/admin/2018/33-10578.pdf and https://www.sec.gov/litigation/admin/2018/33-10579.pdf.

[22] Exchange Act Release No. 84553 (Nov. 8, 2018) available at https://www.sec.gov/litigation/admin/2018/34-84553.pdf.

[23] *SEC v. Plexcorps, et al.*, No. 1:17-cv-07007 (August 9, 2019) available at http://agweb/fundslistoflaws/main/docs/plexcorps.pdf.

[24] Exchange Act Release No. 86372 (Jul. 15, 2019) available at https://www.sec.gov/litigation/admin/2019/34-86372.pdf.

[25] Advisers Act Release No. 5302 (Jul. 17, 2019) available at https://www.sec.gov/litigation/admin/2019/ia-5302.pdf.

[26] The SEC seems to be especially concerned when traders have the ability to determine values even for a small portion of the portfolio or fail to ensure that information known to the adviser was incorporated. Advisers Act Release Nos. 5070 (Dec. 3, 2018) and 5245 (Jun. 4, 2019) available at https://www.sec.gov/litigation/admin/2018/33-10581.pdf and https://www.sec.gov/litigation/admin/2019/ia-5245.pdf.

[27] Advisers Act Release No. 5303 (Jul. 18, 2019) available at https://www.sec.gov/litigation/admin/2019/ia-5303.pdf.

radically departed from generally accepted accounting principles and artificially inflated the purported values of the structured notes that its clients owned.[28]

### *Cross Transactions*

The SEC brought and settled an enforcement action against an investment adviser and its CCO for improperly coordinating with brokers in an effort to acquire an illiquid asset in a cross transaction but give the appearance of an auction process, as required in the relevant documents.[29]

### *Disclosure of Conflict of Interest*

Disclosure of conflicts of interest in a full and fair manner remains a key focus for the SEC. The SEC brought and settled an enforcement action against a registered investment adviser for failing to disclose that an issuer the adviser recommended several of its clients invest in had provided a loan and line of credit to the control person of the issuer, which created an incentive for the adviser to recommend investments in the entity.[30] The SEC settled another enforcement action against the founder and majority owner of an investment adviser for failing to disclose to investors that he was receiving fees from a separate fund based on the amount invested in that fund by the investment adviser.[31] The SEC also brought and settled enforcement actions for adviser misrepresentations of services and prices offered by an in-house broker that led clients to choose the in-house broker instead of other significantly less expensive options.[32] In yet another case, the SEC charged an investment adviser for violating its fiduciary duties to its client because even though the adviser disclosed that it would receive revenue sharing in a no-transaction fee program offered by its clearing firm, it did not disclose that this revenue sharing arrangement meant that the adviser had differing financial incentives depending on which products it selected for its customers.[33]

The SEC also settled an enforcement action with a registered investment adviser who agreed to pay over $37 million to settle charges that it failed to disclose conflicts of interest arising from (i) investing certain clients' assets in higher-cost share classes of mutual funds (when lower-cost share classes were available) for which it received a portion of a revenue share from its clearing broker, (ii) investing approximately 50% of its clients' assets in proprietary mutual funds and (iii) failing to perform diligence on its proprietary mutual funds selected for the account in the same manner as for unaffiliated mutual funds.[34]

Finally, the SEC brought and settled an action against an investment adviser of a collateralized debt obligation (CDO) for purchasing a junior debt tranche of another CDO after acceding to a request from its structuring bank despite having previously negatively commented on the junior note.[35]

### *Adviser Fees and Expenses*

The SEC also continues to focus on adviser allocation and disclosure of fees and expenses. The SEC brought and settled three enforcement actions for failures to (i) adequately disclose pass through of expenses to funds or that the expenses related to the pass-through of internal employees'

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[28] See https://www.sec.gov/news/press-release/2019-201 and linked complaint.

[29] Advisers Act Release No. 5202 (Mar. 15, 2019) available at https://www.sec.gov/litigation/admin/2019/ia-5202.pdf.

[30] Advisers Act Release No. 5263 (Jul. 1, 2019) available at https://www.sec.gov/litigation/admin/2019/33-10655.pdf.

[31] Advisers Act Release No. 5338 (Sep. 4, 2019) available at https://www.sec.gov/litigation/admin/2019/ia-5338.pdf.

[32] Advisers Act Release No. 5119 (Mar. 5, 2019) available at https://www.sec.gov/litigation/admin/2019/34-85249.pdf.

[33] *SEC v. Commonwealth Equity Services, LLC*, No. 1:19-cv-11655 (Aug. 1, 2019) available at https://www.sec.gov/litigation/complaints/2019/comp24550.pdf.

[34] Advisers Act Release No. 5377 available at https://www.sec.gov/litigation/admin/2019/34-87145.pdf.

[35] Advisers Act Release No. 5376 available at https://www.sec.gov/litigation/admin/2019/33-10705.pdf.

compensation,[36] (ii) adjust amount of expenses allocated to a fund for investment professionals who did not spend all of their time for that fund[37] and (iii) proportionately reduce management fee for co-investment managed fees.[38] In addition, the SEC brought and settled two enforcement actions against investment advisers for overcharging client advisory fees.[39]

***Duty of Care***

The SEC continues its focus on adviser fiduciary duties with enforcement cases. Since the release of the Fiduciary Duty Interpretation, the SEC brought its first case under the duty of care against an adviser charged with negligence-based fraud and breach of its duty of care for failing to exercise sufficient due diligence before investing client assets in what turned out to be a fraudulent scheme.[40] By contrast, the SEC brought and settled another matter prior to the adoption of the Fiduciary Interpretation against an adviser for negligence-based fraud and breach of fiduciary duty for failing to conduct sufficient diligence in connection with a client investment but did not explicitly base the claim on the breach of the duty of care.[41]

***Advertising***

Although it has taken a bit of a backseat this year, the SEC continues to enforce its advertising rules for investment advisers. The SEC brought and settled an enforcement action against an investment adviser that paid bloggers to advertise their experience with the adviser and then retweeted the bloggers' tweets, which the SEC determined constituted prohibited testimonials.[42]

***Custody Rule***

The SEC continues to focus on both technical and substantive violations of Rule 206(4)-2 of the Advisers Act (the "Custody Rule"). The SEC brought and settled an enforcement action against an investment adviser for failure to distribute annual audited financial statements to limited partners within the required timeframe, in violation of the independent verification requirement of the Custody Rule.[43]

In December 2018, the staff of the SEC also issued conditional no-action relief to an adviser, clarifying guidance for investment advisers that also act as administrative agents for loan syndicates made up, at least in part, of their advisory clients.[44] The adviser established a single bank account in its own name as agent for the loan syndicate participants, which was maintained by a separate bank that satisfied the "qualified custodian" definition under the Custody Rule. The adviser did not have authority to determine how the cash in the account was used but did have access to the funds in the account and was, therefore, concerned that it would be deemed to have custody. Moreover, the account commingled all loan syndicate participants' funds (including some of the adviser's advisory clients), and the adviser was concerned this would run afoul of the Custody Rule's requirements to maintain custody of funds in a separate account for each client under that client's name or in accounts that contain only the adviser's clients' funds under the adviser's name as agent for the client. The staff provided conditional no-action relief to the adviser, so long as extensive conditions are satisfied,

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[36] Advisers Act Release No. 5074 (Dec. 13, 2018) available at https://www.sec.gov/litigation/admin/2018/ia-5074.pdf.

[37] Advisers Act Release No. 5079 (Dec. 17, 2018) available at https://www.sec.gov/litigation/admin/2018/ia-5079.pdf.

[38] The co-investment funds caused an even more pronounced conflict of interest here because they were exclusively funded by employees. Advisers Act Release No. 5096 (Dec. 26, 2018) available at https://www.sec.gov/litigation/admin/2018/ia-5096.pdf.

[39] Advisers Act Release Nos. 5229 (May 6, 2019) and 5242 (May 28, 2019) available at https://www.sec.gov/litigation/admin/2019/ia-5229.pdf and here.

[40] *SEC v. Duncan*, No. 1:19-cv-11735 (D. Mass. Aug. 12, 2019) available at http://agweb/fundslistoflaws/main/docs/1187000-1187662-sec%20v.%20duncan.pdf.

[41] Advisers Act Release No. 5226 (Apr. 23, 2019) available at https://www.sec.gov/litigation/admin/2019/ia-5226.pdf.

[42] Advisers Act Release No. 5086 (Dec. 21, 2018) available at https://www.sec.gov/litigation/admin/2018/ia-5086.pdf.

[43] Advisers Act Release No. 5047 (Sep. 25, 2018) available at https://www.sec.gov/litigation/admin/2018/ia-5047.pdf.

[44] See https://www.sec.gov/investment/madison-capital-funding-122018-206-4.

including the preparation of an expensive internal controls report. For further information regarding this no-action letter, see https://www.akingump.com/en/news-insights/custody-concerns-for-investment-advisers-as-loan-agents.html.

### *Pay-to-Play*

The SEC continued to focus on technical violations of the pay-to-play rule, bringing and settling an enforcement action against an investment adviser that provided advisory services to a public pension system and public university in a state within two years after two of the adviser's covered associates made campaign contributions to the state governor.[45]

### Auditor Independence

The SEC was also focused on auditor independence, settling an action against a prominent accounting firm for violating the SEC's auditor independence rules by performing prohibited non-audit services during an audit engagement, including exercising decision-making authority in the design and implementation of software relating to an audit client's financial reporting and engaging in management functions.[46] The SEC noted that the auditor's actions caused at least one audit client to violate its obligation to have its financial statements audited by independent public accountants. This should be a cautionary warning not to rely solely on the auditor to determine the appropriate scope of its services.

### Expanded "Test-the-Waters" Communications

On September 25, 2019, the SEC adopted new Rule 163B under the Securities Act of 1933 (Securities Act) to allow all issuers to engage in "test-the-waters" communications in connection with a contemplated registered offering starting on December 3, 2019. Specifically, Rule 163B will permit any issuer or person authorized to act on behalf of an issuer, including an underwriter, to engage in oral or written communications with certain potential investors that are, or are reasonably believed to be, qualified institutional buyers (QIBs) or institutional accredited investors (IAIs), either prior to or following the filing of a registration statement, to gauge interest in a contemplated registered securities offering. Rule 163B will extend the accommodations currently available to emerging growth companies (EGCs) under Section 5(d) of the Securities Act to all issuers, including non-reporting issuers, non-EGC, well-known seasoned issuers and investment company issuers. For further information, see our blog entry at https://www.akingump.com/en/experience/practices/corporate/ag-deal-diary/sec-adopts-new-rule-163b-to-permit-test-the-waters.html.

### FINRA Rules 5130 and 5131

FINRA proposed amendments to its Rules 5130 and 5131 to ease restrictions on initial equity public offerings and new issue allocations and distributions.[47] The proposal amends Rules 5130 and 5131 to exclude from the definition of "new issue" offerings that are conducted pursuant to Regulation S of the Securities Act of 1933 ("Securities Act") and other offerings outside of the United States. If adopted, the proposal would also amend Rule 5130 to exempt foreign employee retirement benefit plans from the new issue rules, exclude sovereign entities that own broker-dealers from the definition of "restricted persons" and expand the definition of "family investment vehicle" to include the definitions of "family member" and "family client" from the Advisers Act "family office" exclusion into the "family investment vehicle" definition and permit more family member portfolio managers (so long as they are not key employees) to be able to participate in new issues.

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[45] Advisers Act Release No. 5077 (Dec. 18, 2018) at https://www.sec.gov/litigation/admin/2018/ia-5077.pdf.

[46] Exchange Act Release No. 87052 available at https://www.sec.gov/litigation/admin/2019/34-87052.pdf.

[47] *See* FINRA proposal at https://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2019-022.pdf.

### Securities-Based Swaps

On June 21, 2019, the SEC adopted a package of rules regarding the regulation of securities-based swaps (SBS) as required under the Dodd-Frank Wall Street Reform and Consumer Protection Act.[48] These rules primarily focus on four key areas:

- Capital requirements. The rules establish minimum capital requirements for securities-based swap dealers (SBSDs) and major security-based swap participants for which there is not a prudential regulator (nonbank SBSDs and major SBS participants (MSBSPs)). They also increase the minimum net capital requirements for broker-dealers that use internal models to compute net capital (ANC broker-dealers). In addition, the rules establish capital requirements tailored to SBSs for broker-dealers that are not registered as an SBSD or MSBSP to the extent they trade these instruments.
- Margin Requirements. The rules establish margin requirements for nonbank SBSDs and MSBSPs with respect to noncleared SBSs.
- Segregation. The rules also establish segregation requirements for SBSDs and stand-alone broker-dealers for cleared and noncleared SBSs.
- Cross-border. These rules amend the Commission's existing cross-border rule to provide a means to request substituted compliance with respect to the capital and margin requirements for foreign SBSDs and MSBSPs, and provide guidance discussing how the Commission will evaluate requests for substituted compliance.

On September 19, 2019, the SEC adopted an additional package of rules relating to recordkeeping and reporting rules for broker-dealers, SBSDs and MSBSPs.[49] Following the adoption of those rules, there is only one final set of rules that remains to be adopted—the rules for the cross-border application of SBS requirements. The compliance date for all of the new rules and all other SEC rules for SBSs (such as reporting of SBSDs to data repositories) will be 18 months the effective date of final rules addressing the cross-border application.

### Insider Trading

On May 7, 2019, a new bill was introduced by the Democrats in Congress, amending insider trading laws under Section 10(b) of the Securities Act.[50] The bill expands the "duty" element of current insider trading law, using a "wrongfully obtained" standard instead of the current breach of fiduciary duty standard. In addition, the bill lowers scienter requirements for insider trading, imparting liability if an individual was "aware, consciously avoided being aware or recklessly disregarded that such information was wrongfully obtained or communicated."

### Anti-Money Laundering Regulations

#### *FATF Applies "Travel Rule" to Cryptocurrency Transactions*

In July 2018, G20 finance ministers and central bank governors called on the Financial Action Task Force (FATF) to articulate, by October 2018, how its global anti-money laundering and counter-terrorism financing (AML/CTF) standards apply to cryptocurrencies and related assets. In response, the FATF issued a revised Recommendation 15 explicitly clarifying that FATF recommendations apply to "virtual currency" and adding two definitions to the FATF Glossary: "virtual asset" and "virtual asset service providers." The FATF subsequently issued interpretive guidance on June 21, 2019, clarifying how the FATF recommendations apply to such assets and providers. In effect, the FATF adopted an interpretation applying the Financial Crimes Enforcement Network's (FinCEN) long-standing "travel rule," see FinCEN Advisory 7 (Jan. 1997), incorporated in FATF's Recommendation 16, to cryptocurrency transactions—effectively obligating transaction participants to "obtain, hold and transmit required originator and beneficiary information" to facilitate the screening of prohibited transactions. The FATF notably acted over strong opposition from industry stakeholders claiming that the adopted rules and

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.[48] Available at https://www.sec.gov/rules/final/2019/34-86175.pdf.

[49] See https://www.sec.gov/news/press-release/2019-182.

[50] HR 2534 (Insider Trading Prohibition Act), available at https://www.govinfo.gov/content/pkg/BILLS-116hr2534ih/pdf/BILLS-116hr2534ih.pdf.

guidance are “pointless” if not “impossible to follow,” particularly in the case of peer-to-peer transactions. The FATF recommendation, while not strictly binding, is nevertheless likely to garner support among the organization’s 39 member jurisdictions where it is not already reflected in local law.

### *EU Adopts 6AMLD, Increasing Punishments for AML Offenses, among Other Amendments*

On November 12, 2018, the European Parliament published its 6th EU Money Laundering Directive (2018/1673) (6AMLD), requiring member states to adopt the law by December 3, 2020, and implement it via regulation by June 3, 2021. Key amendments include (but are not limited to):

- A harmonized list of 22 predicate offenses for money laundering, including environmental offenses and cybercrime.
- The addition of “aiding and abetting” to the scope of money laundering.
- The extension of liability to corporate entities or their representatives, including where offenses were enabled by a lack of supervision or control.
- Harsher punishments, including an increase in the minimum prison sentence for money laundering offenses from one to four years, temporary or permanent occupational bans, and mandatory wind-downs, among others.

### *No Action on FinCEN Proposed Rule including RIAs in List of Covered “financial institutions” under the Bank Secrecy Act of 1970*

FinCEN has yet to finalize or express renewed interest in its still-pending proposed rule[51] to include certain registered investment advisers (RIAs) in the definition of “financial institutions” that are subject to the AML requirements of the Bank Secrecy Act (most notably the requirement to establish an AML compliance program). That said, RIAs may experience some new demands from other covered financial institutions arising from FinCEN’s revised customer due-diligence (CDD) rule, which became effective May 11, 2018.

## Sanctions

### *Treasury Restrictions on “U.S. Banks” Concerning Certain Dealings with Russia*

On August 2, 2019, pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, the U.S. Department of Treasury, Office of Foreign Assets Control (OFAC) prohibited the following activities by “U.S. banks,” including foreign branches, absent a license from OFAC: (1) participation in the primary market for non-ruble denominated bonds issued by the “Russian sovereign” after August 26, 2019; and (2) lending nonruble denominated funds to the Russian sovereign after August 26, 2019. OFAC broadly defines “U.S. bank” to include any entity organized under the laws of the United States or any jurisdiction within the United States (including its foreign branches), or any entity in the United States, that is engaged in the business of accepting deposits, making, granting, transferring, holding, or brokering loans or credits, or purchasing or selling foreign exchange, securities, commodity futures or options, or procuring purchasers and sellers thereof, as principal or agent. Further, OFAC defines “Russian sovereign” to mean “any ministry, agency or sovereign fund of the Russian Federation, including the Central Bank of Russia, the National Wealth Fund and the Ministry of Finance of the Russian Federation,” but not to include state-owned enterprises of Russia. These restrictions do not prohibit U.S. banks from participating in the secondary market for Russian sovereign debt.

### *Trump Administration Places Comprehensive Sanctions on Government of Venezuela and Authorizes Certain Dealings in Venezuela Bonds*

On August 2, 2019, the Trump administration issued Executive Order 13884, “Blocking Property of the Government of Venezuela,” which imposes new economic sanctions that broadly prohibit U.S. persons from dealing with the Government of Venezuela or its property, absent a license issued by OFAC. Relatedly, OFAC has also issued general licenses authorizing U.S. persons to engage in certain transactions related to specified Government of Venezuela bonds (General License 3F) and certain Petroleos de Venezuela (“PdVSA”) debt or equity (General License 9E). Any company wishing to do

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[51] 80 Fed. Reg. 52680 (Sep. 1, 2015).

business in Venezuela should engage in robust diligence, given the Venezuelan Government's significant role in the country's economy. For further information, see our alert available at https://www.akingump.com/en/news-insights/trump-administration-imposes-broad-sanctions-on-the-government.html.

### Commodities Updates

The NFA proposed or adopted several new or enhanced requirements for registered commodity pool operators (CPOs) and commodity trading advisors (CTAs), among others, such as (i) new swaps-focused proficiency examinations for associated persons (APs) of CPOs and CTAs who engage in swaps activity, (ii) requirements for internal controls for its members and (iii) additional changes to information systems securities programs (ISSP) requirements and notification of breaches. The CFTC also proposed codifications of existing no-action relief, and its staff extended the ability for CPOs and CTAs to file position limit disaggregation notices upon request, rather than prospectively, and permitted exempt CTAs to continue to rely upon the "independent account controller" disaggregation exemption until August 12, 2022. The CFTC's enforcement focus has also expanded in 2018-19, with increased requests for whistleblower tips in 2019.

#### *NFA*

In 2012, the NFA exempted APs of member CPOs from the requirement to pass the Series 3 proficiency examination if they either transacted only in either swaps or swaps plus a de minimis amount of futures. In March 2019, the NFA adopted a new swap-proficiency-exam obligation that will require all swaps APs to take and pass this new swaps proficiency exam by January 31, 2021. For further information, see our alert at https://www.akingump.com/images/content/1/0/v2/103263/NFA-to-Require-Swap-Proficiency-Testing-for-Associated.pdf and https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=5105.

The NFA also adopted a new initial controls interpretation that requires CPOs to (i) adopt written supervisory procedures, (ii) separate duties of personnel so that no person is responsible for each stage of subscription, transfer or redemption processes or customer funds, trade execution, financial records and risk management, (iii) perform risk assessments regarding pool subscriptions, redemptions and transfers, risk management and investment and valuation of pool funds, and use of administrators, (iv) maintain records and (v) monitor the effectiveness of their controls. For further information, see our alert at https://www.akingump.com/en/news-insights/nfa-issues-interpretive-notices-for-cpos-regarding-internal.html. At approximately the same time, the NFA also amended its cybersecurity requirements, which are described above under "Privacy and Cybersecurity Updates."

#### *CFTC*

In October 2018, the CFTC proposed to codify in Part 4 of its rules, several existing staff letters and advisories concerning registration exemptions as well as reporting and recordkeeping requirements applicable to certain CPOs and CTAs. In addition, the proposal, if adopted, would also require any person claiming the de minimis exemption from registration as a CPO pursuant to § 4.13(a)(3) (among others) to certify that neither it nor any of its principals is subject to any statutory disqualifications under the Commodity Exchange Act (CEA), section 8a(2) or 8a(3)2. The codification efforts would, among other things:

- Replace previous relief under Advisory 18-96 for offshore pools administered outside of the United States that lack U.S.-sourced capital or investors with a new codified exemption in Regulation 4.13(a)(4).
- Replace previous relief under No-Action Letter 12-37 and 4-143 for CPOs and CTAs to family offices with a new codified exemption in Regulation 4.13(a)(8) and 4.14(a)(11), respectively.
- Replace previous relief under No-Action Letter 14-116 for CPOs to pools that engage in general solicitation under Rule 506(c) or 144A through slight tweaks to Regulation 4.13(a)(3) and 4.7(b).

The proposal would also add carve outs from Form CPO-PQR filings for registered CPOs that only advise pools that satisfy Regulations 4.5 or 4.13 and CTA-PR filings for registered CTAs who would be exempt under CFTC Regulation 4.14(a)(4) or 4.14(a)(5). For further information, see our alert at https://www.akingump.com/en/news-insights/cftc-proposes-to-codify-existing-staff-issued-relief-from.html.

The CFTC has remained active during 2018-19 in bringing enforcement actions. In September of 2019 alone, the CFTC has brought enforcement actions regarding, for example, (i) failure to register as a CPO and CTA and misappropriation of funds,[52] (ii) binary off-exchange options,[53] (iii) spoofing,[54] (iv) failure to disclose and have policies and procedures to prevent a cyber-incident that resulted in the theft of $1 million,[55] and (vi) violations of speculative position limits.[56] To aid its enforcement actions, the CFTC has requested tips regarding currency fraud, foreign corrupt practices, improper use of information and AML violations.[57]

**EU Tax Update**

Limitations on tax efficiency of acquisition leverage and availability of EU Tax Treaties – In 2018-19, the EU Anti-Tax Directive (ATAD), coupled with the introduction of the principal purpose test (the PPT) in certain double tax treaties, resulted in significant changes to the European tax landscape. In 2019-20, key changes in respect of the hybrid rules (under the next iteration of ATAD, “ATAD 2”), and the introduction of the PPT into key European fund jurisdictions’ double tax treaties, will limit the efficiency of certain historic tax structures which include EU-based entities. Both asset managers with long-only strategies that utilize EU holding companies (such as the Luxembourg S.a r.l. or the Irish “Section 110” company), and managers with more liquid strategies with EU trading activities should consider reviewing their asset portfolio to ensure that their holding structures continue to achieve the intended benefit.

ATAD 2 – EU Member States are required to implement a number of wide-ranging provisions to counter the effect of international structures taking advantage of hybrid mismatches (i.e. exploiting differences in the local tax treatment of certain instruments), typically utilized in so-called “blocker” structures, and entities by two or more different taxing jurisdictions, by January 1, 2020 (or, in the case of the rules relating to “reverse hybrids,” by January 1, 2022).

DAC6 – The commencement of reporting requirements under the EU Mandatory Disclosure Regime (under the EU Directive commonly referred to as “DAC6”), which requires EU Intermediaries (including most advisers, as well as fund managers) to disclose certain “cross-border arrangements” (which is broadly defined) to local tax authorities. The first reporting obligations arise on August 31, 2020, when all relevant transactions dating back to June 25, 2018 must be reported.

PPT – The PPT will be introduced into the next wave of double tax treaties on January 1, 2020, including certain double tax treaties entered into by Luxembourg, Ireland and the Netherlands. Broadly, the PPT operates to deny treaty benefits if obtaining treaty benefits is a principal purpose of an arrangement.

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[52] See https://www.cftc.gov/PressRoom/PressReleases/8020-19 and https://www.cftc.gov/PressRoom/PressReleases/8004-19.

[53] See https://www.cftc.gov/PressRoom/PressReleases/8018-19.

[54] See https://www.cftc.gov/PressRoom/PressReleases/8014-19, https://www.cftc.gov/PressRoom/PressReleases/8015-19, https://www.cftc.gov/PressRoom/PressReleases/8013-19.

[55] See https://www.cftc.gov/PressRoom/PressReleases/8008-19.

[56] See https://www.cftc.gov/PressRoom/PressReleases/8002-19.

[57] See https://www.whistleblower.gov/.

## AIFMD

In June of 2019, the EU Parliament adopted the EU Directive and Regulation on the EU cross-border distribution of collective investment funds. This includes a new definition of "pre-marketing" and new rules allowing EU alternative investment fund managers (AIFM) to "pre-market" in EU member states in certain situations. These new rules are currently only directed at EU managers, and their ultimate application to non-EU managers is unclear. It is likely, however, that the new rules will have an impact on the marketing and pre-marketing practices of non-EU managers.[58]

## Securities Financing Transaction Regulation

The Securities Financing Transactions Regulation (SFTR), which has direct effect throughout the EU, officially came into effect in January 2016, but the reporting requirements – which are likely to have the most significant impact on asset managers – have been subject to delays in final implementation. The reporting obligations will commence on April 11, 2020 for investment managers and other financial institutions, and are staged through to market-wide compliance by January 2021. Funds (AIFs and UCITS) will be required to start reporting from October 11, 2020. Finally, all non-financial counterparties will become subject to the requirement from January 11, 2020. While asset managers are likely to have reporting infrastructure already in place to comply with the European Market Infrastructure Regulation (EMIR), some adaptation for the SFTR will be necessary.

## EU Sustainable Finance Initiative

The EU Commission adopted the Sustainable Finance Action Plan in 2018, and it is expected to take effect in Q1 2021. The plan is applicable to non-EU AIFMs, at least in respect of AIFs marketed in the EU. Firms will be required to disclose on their websites information on policies on the integration of sustainability risks in the investment decision-making and remuneration process and precontractual disclosures including in relation to the manner in which sustainability risks are integrated into investment decisions, the results of the assessment of likely impacts of sustainability risks on returns and an explanation why particular sustainability risks have been determined not to be relevant.[59]

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[58] Directive (EU) 2019/1160 of the European Parliament and of the Council of 20 June 2019 available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1160; Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1156.

[59] Communication from the Commission to The European Parliament, The European Council, The Council, The European Central Bank, The European Economic and Social Committee and The Committee of the Regions. Action Plan: Financing Sustainable Growth, COM/2018/097 available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097.

## September 2019

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| **1** | **2**<br>**Labor Day** | **3** | **4** | **5** | **6** | **7** |
| **8** | **9** | **10** | **11** | **12** | **13**<br>TIC Form S due for TIC S Filers | **14** |
| **15** | **16**<br>(A) TIC Form BC due for TIC BC Filers<br>(B) TIC Form BL-1 due for TIC BL-1 Filers<br>(C) TIC Form BL-2 due for TIC BL-2 Filers | **17** | **18** | **19** | **20** | **21** |
| **22** | **23**<br>TIC Form SLT due date for TIC SLT Filers | **24** | **25** | **26** | **27** | **28** |
| **29** | **30**<br>Cayman DPL goes into effect | | | | | |

## October 2019

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | **1** Amendment to Form 13H due promptly[60] if any changes to information for Form 13H Filers | **2** | **3** | **4** | **5** |
| **6** | **7** | **8** | **9** | **10** | **11** | **12** |
| **13** | **14** **Columbus Day** | **15** (A) TIC Form S due for TIC S Filers (B) TIC Form BC due for TIC BC Filers (C) TIC Form BL-1 due for TIC BL-1 Filers (D) TIC Form BL-2 due for TIC BL-2 Filers | **16** | **17** | **18** | **19** |
| **20** | **21** (A) TIC Form BQ-1 for TIC BQ-1 Filers (B) TIC Form BQ-2 for TIC BQ-2 Filers (C) TIC Form BQ-3 for TIC BQ-3 Filers | **22** | **23** (A) TIC Form SLT due date for TIC SLT Filers (B) NY SHIELD Act breach notification amendments take effect | **24** | **25** | **26** |
| **27** | **28** | **29** | **30** (A) Due date for distribution of quarterly report of net asset value (NAV) for 4.7 Exempt CPOs* (B) Due date for quarterly transaction reports from access persons of RIAs, unless exception or alternate reporting method is used. (C) Due date for Form BE-577 for all BE-577 Filers*. (D) Due date for Form BE-605 for all BE-605 Filers* | **31** | | |

[60] The Form 13H amendment is due promptly if there are any changes. Some have interpreted "promptly" as up to 10 days under certain other filing regimes, but neither the SEC nor its staff has provided guidance on the definition of "promptly" for Form 13H.

## November 2019

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | | | **1** | **2** |
| **3** | **4** | **5** | **6** | **7** | **8** | **9** |
| **10** | **11**<br>**Veteran's Day** | **12** | **13** | **14**<br>(A) Form 13F due for Form 13F Filers<br>(B) Form CTA-PR due for all registered CTA Filers<br>(C) Form BE-185 due for BE-185 Filers* | **15**<br>(A) TIC Form S due for TIC S Filers<br>(B) TIC Form BC due for TIC BC Filers<br>(C) TIC Form BL-1 due for TIC BL-1 Filers<br>(D) TIC Form BL-2 due for TIC BL-2 Filers | **16** |
| **17** | **18** | **19**<br>TIC D report submission due date for TIC D Filers | **20** | **21** | **22** | **23** |
| **24** | **25**<br>TIC Form SLT due date for TIC SLT Filers | **26** | **27** | **28**<br>**Thanksgiving Day** | **29**<br>(A) Form PF due date for Large Hedge Fund Advisers *<br>(B) NFA Form CPO-PQR for all but Large CPOs<br>(C) CFTC Form CPO-PQR due date for Large CPOs* | **30** |

## December 2019

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
| --- | --- | --- | --- | --- | --- | --- |
| **1** | **2** | **3** | **4** | **5** | **6** | **7** |
| **8** | **9** FCA Senior Managers and Certification Regime becomes effective | **10** | **11** | **12** | **13** | **14** |
| **15** | **16** (A) TIC Form S due for TIC S Filers (B) TIC Form BC due for TIC BC Filers (C) TIC Form BL-1 due for TIC BL-1 Filers (D) TIC Form BL-2 due for TIC BL-2 Filers | **17** | **18** | **19** | **20** | **21** |
| **22** | **23** Form SLT due date for TIC SLT Filers | **24** | **25** **Christmas Day** | **26** | **27** If adviser is an RIA, ensure that independent public auditor that is registered with, and subject to inspection by, the Public Company Accounting Oversight Board (PCAOB) is engaged for next year for audited financial statements and satisfies independence tests. | **28** |
| **29** | **30** | **31** | | | | |

## January 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | [61] | **1**<br>**New Year's Day**<br>California Consumer Protection Act goes into effect | **2**<br>Amendment to Form 13H due promptly if any changes to information for Form 13H Filers | **3** | **4** |
| **5** | **6** | **7** | **8** | **9** | **10** | **11** |
| **12** | **13** | **14** | **15**<br>(A) TIC Form S due for TIC S Filers<br>(B) TIC Form BC due for TIC BC Filers<br>(C) TIC Form BL-1 due for TIC BL-1 Filers<br>(D) TIC Form BL-2 due for TIC BL-2 Filers | **16** | **17** | **18** |
| **19** | **20**<br>**Martin Luther King, Jr. Day** | **21**<br>(A) TIC Form BQ-1 for TIC BQ-1 Filers<br>(B) TIC Form BQ-2 for TIC BQ-2 Filers<br>(C) TIC Form BQ-3 for TIC BQ-3 Filers | **22** | **23**<br>TIC Form SLT due date for TIC SLT Filers | **24** | **25** |
| **26** | **27** | **28** | **29** | **30**<br>(A) Due date for quarterly transaction reports from access persons of an RIA, unless exception or alternate reporting method is used<br>(B) Due date for distribution of quarterly report of NAV for 4.7 Exempt CPO* | **31**<br>Phase in of NFA swaps proficiency examination. | |

[61] According to Response 2.5 to the SEC's "Frequently Asked Questions Concerning Large Trader Reporting," Form 13H Filers may file an amendment and an annual amendment together if any changes occurred during the fourth quarter to the information contained in Form 13H.

## February 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | | | | **1** |
| **2** | **3** | **4** | **5** | **6** | **7** | **8** |
| **9** | **10** | **11** | **12** | **13** | **14**<br>(A) Due date for amendments to Schedule 13G if any changes have occurred<br>(B) Form 13F due for Form 13F filers<br>(C) Due date for Form 5 (likely inapplicable)<br>(D) Due date for annual amendment to Form 13H[62]<br>(E) Form CTA-PR due for all registered CTAs<br>(F) Due date for Form BE-577 for BE-577 Filers*<br>(G) Due date for Form BE-605 for all BE-605 Filers* | **15** |
| **16** | **17**<br>**Presidents' Day** | **18**<br>(A) TIC Form S due for TIC S Filers<br>(B) TIC Form BC due for TIC BC Filers<br>(C) TIC Form BL-1 due for TIC BL-1 Filers<br>(D) TIC Form BL-2 due for TIC BL-2 Filers | **19**<br>TIC D report submission due date for TIC D Filers | **20** | **21** | **22** |
| **23** | **24**<br>TIC Form SLT due date for TIC SLT Filers | **25** | **26** | **27** | **28** | **29**<br>Form PF due date for Large Hedge Fund Advisers* (but may file for only hedge funds and file for other funds by amendment 120 days after the fiscal year) |

[62] Not required if quarterly amendment was filed for the fourth quarter.

## March 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| 1 | 2<br>(A) CFTC Form CPO-PQR (all schedules) due date for all Large CPOs<br>(B) Deadline to reaffirm exemptions under 4.13(a)(3) and 4.14(a)(8) | 3 | 4 | 5 | 6<br>TIC Form SHCA due date (if requested) | 7 |
| 8 | 9 | 10 | 11 | 12 | 13 | 14 |
| 15 | 16<br>(A) TIC Form S due for TIC S Filers<br>(B) TIC Form BC due for TIC BC Filers<br>(C) TIC Form BL-1 due for TIC BL-1 Filers<br>(D) TIC Form BL-2 due for TIC BL-2 Filers | 17 | 18 | 19 | 20 | 21<br>NY SHIELD Act new data security requirements go into effect |
| 22 | 23<br>TIC Form SLT due date for TIC SLT Filers | 24 | 25 | 26 | 27 | 28 |
| 29 | 30<br>(A) Form ADV annual updates due date for RIAs and ERAs*<br>(B) CFTC Form CPO-PQR Schedule A due date for all registered CPOs other than Large CPOs<br>(C) NFA Form CPO-PQR for all other NFA members (other than Large CPOs)<br>(D) Form BE-185 due for BE-185 Filers<br>(E) CFTC Form CPO-PQR Schedule B* due date for Mid-Sized CPOs according to the CFTC<br>(F) 4.7 Exempt CPOs must electronically file audited annual reports, including statements of financial condition, statements of operations and appropriate footnotes, for their pools with the NFA and distribute them to their investors* | 31 | | | | |

## April 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | **1** Amendment to Form 13H due promptly if any changes to information for Form 13H Filers | **2** | **3** | **4** |
| **5** | **6** | **7** | **8** | **9** | **10** | **11** SFTR reporting obligations EU/UK investment managers |
| **12** | **13** | **14** | **15** (A) TIC Form S due for TIC S Filers<br>(B) TIC Form BC due for TIC BC Filers<br>(C) TIC Form BL-1 due for TIC BL-1 Filers<br>(D) TIC Form BL-2 due for TIC BL-2 Filers<br>(E) FinCEN Form 114 must be filed by FBAR Filers by April 15 following the year being reported | **16** | **17** | **18** |
| **19** | **20** (A) TIC Form BQ-1 for TIC BQ-1 Filers<br>(B) TIC Form BQ-2 for TIC BQ-2 Filers<br>(C) TIC Form BQ-3 for TIC BQ-3 Filers | **21** | **22** | **23** Form SLT due date for TIC SLT Filers | **24** | **25** |
| **26** | **27** | **28** | **29** (A) Delivery Date for ADV Part 2A brochure<br>(B) Form PF due date for all RIAs with more than $150 million in AUM attributable to private funds (including Large Private Equity Fund Advisers)*<br>(C) Required date for RIAs who are not registered CPOs of funds to have delivered annual audited financial statements (other than funds of funds)*[63] | **30** (A) Due date for quarterly transaction reports from access persons of RIA, unless exception applies or alternate reporting method is used<br>(B) Due date for distribution of quarterly report of NAV for 4.7 Exempt CPOs*<br>(C) Due date for Form BE-577 for all BE-577 Filers*<br>(D) Due date for Form BE-605 for all BE-605 Filers* | | |

[63] If annual audited financial statements are not prepared and distributed to investors, or if the client is not a limited partnership, limited liability company or other pooled investment vehicle, an RIA with custody over the client's account must (A) arrange for a surprise inspection by an independent public accountant, (B) take reasonable steps at least each quarter to ensure that statements are delivered and (C) notify clients/investors of the opening of new accounts.

## May 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | | | **1**<br>Opening of window to file Form CRS satisfying ADV Part 3 for investment advisers who are already registered or have an application pending and are required to file | **2** |
| **3** | **4** | **5** | **6** | **7** | **8** | **9** |
| **10**<br>. | **11** | **12** | **13** | **14** | **15**<br>(A) Form 13F due for Form 13F Filers.<br>(B) Form BE-185 due for BE-185 Filers*<br>(C) TIC Form S due for TIC S Filers<br>(D) TIC Form BC due for TIC BC Filers<br>(E) TIC Form BL-1 due for TIC BL-1 Filers<br>(F) TIC Form BL-2 due for TIC BL-2 Filers<br>(G) Form CTA-PR due for all registered CTAs | **16** |
| **17** | **18** | **19** | **20**<br>TIC D report submission due date for TIC D Filers | **21** | **22** | **23** |
| **24** | **25**<br>**Memorial Day** | **26**<br>TIC Form SLT due date for TIC SLT Filers | **27** | **28** | **29**<br>(A) Due date for Form BE-10 for all BE-10 Filers (estimated)<br>(B) Due date for Form BE-15 for all BE-15 Filers if filing paper copy (estimated) | **30**<br>Form PF due date for Large Hedge Fund Advisers* |
| **31** | | | | | | |

## June 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | **1**<br>(A) NFA Form CPO-PQR for all but Large CPOs<br>(B) CFTC Form CPO-PQR due date for Large CPOs | **2** | **3** | **4** | **5** | **6** |
| **7** | **8** | **9** | **10** | **11** | **12** | **13** |
| **14** | **15**<br>(A) TIC Form S due for TIC S Filers<br>(B) TIC Form BC due for TIC BC Filers<br>(C) TIC Form BL-1 due for TIC BL-1 Filers<br>(D) TIC Form BL-2 due for TIC BL-2 Filers | **16** | **17** | **18** | **19** | **20** |
| **21** | **22**<br>TIC Form SLT due date for TIC SLT Filers | **23** | **24** | **25** | **26** | **27** |
| **28**<br>(A) Required date for RIAs to have delivered audited financial statements to fund of funds clients*<br>(B) Required date for 4.7 Exempt CPOs to fund of funds that have filed for an extension to electronically file and distribute audited annual reports(to their investors* | **29** | **30**<br>(A) Due date for BE-10 filers if e-filing (estimated)<br>(B) Due date for BE-15 filers if e-filing (estimated)<br>(C) Due date for Form CRS satisfying ADV Part 3 for investment advisers who are already registered or have an application pending and are required to file | | | | |

## July 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | **1** Amendment to Form 13H due promptly if any changes to information for Form 13H Filers | **2** | **3** | **4** **Independence Day** |
| **5** | **6** | **7** | **8** | **9** | **10** | **11** |
| **12** | **13** | **14** | **15** (A) TIC Form S due for TIC S Filers (B) TIC Form BC due for TIC BC Filers (C) TIC Form BL-1 due for TIC BL-1 Filers (D) TIC Form BL-2 due for TIC BL-2 Filers | **16** | **17** | **18** |
| **19** | **20** (A) TIC Form BQ-1 for TIC BQ-1 Filers (B) TIC Form BQ-2 for TIC BQ-2 Filers (C) TIC Form BQ-3 for TIC BQ-3 Filers | **21** | **22** | **23** TIC Form SLT due date for TIC SLT Filers | **24** | **25** |
| **26** | **27** | **28** | **29** | **30** (A) Due date for distribution of quarterly report of NAV for 4.7 Exempt CPOs (B) Due date for quarterly transaction reports from access persons of RIA, unless exception applies or alternate reporting method is used (C) Due date for Form BE-577 for all BE-577 Filers* (D) Due date for Form BE-605 for all BE-605 Filers (E) Due date for delivery of Form CRS satisfying Form ADV Part 3 to clients of investment advisers **[64] | **31** | |

[64] **Delivery required within 30 days of filing the Form CRS, which may be on a date other than June 30.

## August 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | | | | **1** |
| **2** | **3** | **4** | **5** | **6** | **7** | **8** |
| **9** | **10** | **11** | **12** | **13** | **14**<br>(A) Form 13F due for Form 13F Filers<br>(B) Form CTA-PR due for all registered CTAs<br>(C) Form BE-185 due for BE-185 Filers* | **15** |
| **16** | **17**<br>(A) TIC Form S due for TIC S Filers<br>(B) TIC Form BC due for TIC BC Filers<br>(C) TIC Form BL-1 due for TIC BL-1 Filers<br>(D) TIC Form BL-2 due for TIC BL-2 Filers | **18** | **19**<br>TIC D report submission due date for TIC D Filers | **20** | **21** | **22** |
| **23** | **24**<br>Form SLT due date for TIC SLT Filers | **25** | **26** | **27** | **28** | **29**<br>Form PF due date for Large Hedge Fund Advisers* |
| **30** | **31**<br>(A) Form SHLA due date (if requested)<br>(B) NFA Form CPO-PQR for all but Large CPOs<br>(C) CFTC Form CPO-PQR due date for Large CPOs | | | | | |

## September 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| 6 | 7<br>Labor Day | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15<br>(A) TIC Form S due for TIC S Filers<br>(B) TIC Form BC due for TIC BC Filers<br>(C) TIC Form BL-1 due for TIC BL-1 Filers<br>(D) TIC Form BL-2 due for TIC BL-2 Filers | 16 | 17 | 18 | 19 |
| 20 | 21 | 22 | 23<br>TIC Form SLT due date for TIC SLT Filers | 24 | 25 | 26 |
| 27 | 28 | 29 | 30 | | | |

## October 2020

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| | | | | **1**<br>(A) Amendment to Form 13H due promptly if any changes for Form 13H Filers<br>(B) Form 180 due for BE-180 Filers | **2** | **3** |
| **4** | **5** | **6** | **7** | **8** | **9** | **10** |
| **11**<br>SFTR reporting obligations for AIFs and UCITS | **12**<br>**Columbus Day** | **13** | **14** | **15**<br>(A) TIC Form S due for TIC S Filers<br>(B) TIC Form BC due for TIC BC Filers<br>(C) TIC Form BL-1 due for TIC BL-1 Filers<br>(D) TIC Form BL-2 due for TIC BL-2 Filers | **16** | **17** |
| **18** | **19** | **20**<br>(A) TIC Form BQ-1 for TIC BQ-1 Filers<br>(B) TIC Form BQ-2 for TIC BQ-2 Filers<br>(C) TIC Form BQ-3 for TIC BQ-3 Filers | **21** | **22** | **23**<br>TIC Form SLT due date for TIC SLT Filers | **24** |
| **25** | **26** | **27** | **28** | **29** | **30**<br>(A) Due date for distribution of quarterly report of NAV for 4.7 Exempt CPOs*<br>(B) Due date for quarterly transaction reports from access persons of RIAs, unless exception or alternate reporting method is used.<br>(C) Due date for Form BE-577 for all BE-577 Filers*<br>(D) Due date for Form BE-605 for all BE-605 Filers* | **31** |

## List of Floating Compliance Dates

| Requirement | Timing |
|---|---|
| Review the adequacy of the policies and procedures and the effectiveness of their implementation (including, but not limited to, Regulation S-ID) and make a written record of the review and any actions taken as a result | No less frequently than annually. |
| Annual Amendment to Form D | Annually on or before the first anniversary of the last filed Form D or amendment. |
| Annual holdings requirement from “access persons” of RIA | Once every 12-month period. |
| Request new “covered associates” to report prior political contributions | Prior to hiring. |
| Retain PCAOB registered and inspected independent auditor to prepare internal control report within six months and once per calendar year | If related person serves as qualified custodian for an RIA. |
| Distribution of annual privacy notice | RIAs must distribute a clear and conspicuous notice to customers, not less frequently than annually, that accurately reflects the RIA’s policies and practices. RIAs may determine when they will distribute the notice, but must apply to the customer on a consistent basis. An exception applies to these annual delivery obligations if the RIA does not share nonpublic personal information (other than to certain necessary service providers) and has not changed its policies or practices since the privacy notice was previously distributed to customers. The CFTC formally amended Part 160 of the CFTC’s regulations to include the exception. |
| New issue certification under FINRA Rules 5130 and 5131 | A person wishing to receive an allocation of an initial public offering that is a “new issue,” as defined under FINRA rules, from a broker-dealer must be able to represent to the broker-dealer that it is not (i) a “restricted person,” consisting of financial industry insiders; (ii) a “covered person,” consisting of persons that are executive officers or directors of public companies or covered nonpublic companies that are, or may be, investment banking clients of the “broker-dealer”; or (iii) an entity with direct or indirect ownership by persons described in (i) or (ii) above the limits described in the FINRA rules. A fund manager must receive a certification at least every 12 months from the relevant fund’s investors that they do not fall into the above restricted categories. The certification may be by “negative consent.” |
| NFA Self-Examination Checklist | NFA members must complete a self-examination checklist at least once per year and retain it in their records. |
| NFA Annual Update of Registration Information and Payment of Dues | NFA members must update their NFA registration information via NFA’s online registration system and pay annual NFA dues on or before the anniversary date that the CPO’s or CTA’s registration became effective. |

| Requirement | Timing |
| --- | --- |
| Follow-Up Confirmation of Bad-Actor Status | Staff interpretations require that issuers conducting long-term offerings periodically confirm that persons that could cause a “bad-actor” disqualification have not committed a bad act. This confirmation may be by “negative consent” or, depending on the potential bad actor, by database searches. |
| Initial filing of partial Form ADV Part 1A for ERAs | Sixty days after relying on the exemption for private fund advisers in Section 203(m) or venture capital advisers in Section 203(l) of the Advisers Act. |
| Transition from ERA to RIA status | Mid-sized fund advisers generally must apply for registration within 90 days after filing first annual ERA update showing fund Regulatory Assets under Management (RAUM) in excess of $150 million, but must be fully registered prior to accepting any client that is not a private fund. Venture capital advisers must be registered prior to accepting any client that is not a venture capital fund. |
| State Blue Sky Filings | Within 15 days of sale, depending on requirements of state of residence of investor. |

## List of Forms Without Fixed Filing Dates

| Filings Not Included on Calendar or Above List | Timing |
|---|---|
| **Exchange Act Forms** | |
| Form 3 | Either (i) within 10 days after a person becomes (a) a 10 percent beneficial owner of a class of voting equity securities that is registered under Section 12 of the Exchange Act or (b) a director or executive officer of the issuer of such securities, or (ii) in the case of an issuer that is registering securities for the first time under the Exchange Act, no later than the effectiveness of the registration statement under the Exchange Act. |
| Form 4 | By the end of the second business day following a reportable transaction. |
| Initial Schedule 13D | Within 10 days after a direct or indirect acquisition of a voting equity security of a class that is registered under the Exchange Act that results in the beneficial ownership of more than 5 percent of the class. Note that a Schedule 13D or 13G may be required, depending on the facts and circumstances surrounding the investment. See Regulation 13D-G. |
| Schedule 13D Amendment | Promptly[65] after a material change. |
| Initial Schedule 13G | Varies, depending on type of filer, from 45 days after calendar year to 10 days after date of acquisition. |
| Interim Schedule 13G Amendment | Depending on type of filer, amendment is required either 10 days following the end of the month or promptly after a reporting person's beneficial ownership exceeds 10 percent, and subsequently for any increase or decrease in beneficial ownership by 5 percent. |
| Initial Form 13H | Promptly after being a Form 13H Filer. |
| Form BE-13 | Within 45 days of establishment of position or increase in investment to $3 million. |
| **Securities Act Forms** | |
| Initial Form D | Within 15 days after sale to SEC and many states. |
| Form 144 | Filed with the SEC on the trade date if selling as an affiliate under Rule 144 under the Securities Act. |
| **Advisers Act Forms** | |
| ADV Part 1A Other-Than-Annual Amendment | If Items 1 (except 1.O. and Section 1.F. of Schedule D), 3, 9 (except 9.A.(2), 9.B.(2), 9.E., and 9.F.) or 11 of Part 1A or Items 1, 2.A. through 2.F., or 2.I. of |

[65] The materiality of the change dictates the required promptness of the amendment.

| Filings Not Included on Calendar or Above List | Timing |
| --- | --- |
| **Exchange Act Forms** | |
| | Part 1B or Sections 1 or 3 of Schedule R becomes inaccurate in any way or information you provided in response to Items 4, 8, or 10 of Part 1A, or Item 2.G. of Part 1B, or Section 10 of Schedule R becomes materially inaccurate, promptly file electronic amendment. |
| ADV Part 2A Other-Than-Annual Amendment | If the brochure becomes materially inaccurate, promptly electronically file amendment and, if it involves disciplinary matters, deliver to clients. |
| ADV Part 2B | If the brochure supplement becomes materially inaccurate, promptly amend the brochure supplement. |
| ADV Part 3 | If the information in the Form CRS becomes materially inaccurate, electronically file amendment within 30 days and deliver summary of changes within 60 days of when it is required to be filed. Form CRS is also required to be posted to the registered investment adviser's website. |
| **Hart–Scott–Rodino Antitrust Improvements Act of 1976 (HSR)** | |
| HSR Filings | Prior to purchasing securities in excess of filing threshold. |

## List of Forms and Obligations in Future Years

| Form or Obligation | Due | Description |
|---|---|---|
| TIC SHC | March 2022 | Report of U.S. Ownership of Foreign Securities (as of December 31, 2021). |
| TIC SHL | August 2024 | Foreign Residents' Holdings of U.S. Securities (as of June 2024). |
| BE-11 | May 2021-24 | Annual Survey of U.S. Direct Investment Abroad (Form BE-11). |
| BE-12 | May 2023 | Benchmark Survey of Foreign Direct Investment in the United States. |

## List of Defined Terms

"***4.7 Exempt CPO***" means a registered CPO that has filed for reporting disclosure and recordkeeping relief under Regulation 4.7.

"***4.13 Exempt CPO***" means any person who claims an exemption from registration under CFTC Regulation 4.13 and has made the appropriate notice filing with the NFA.

"***BE-10 Filer***" means any all U.S. persons that own or control more than 10 percent of the voting securities of a "foreign" business enterprise. Presumably, this will be subject to an exception for a U.S. feeder fund's investment in a foreign master fund unless the foreign master fund directly or indirectly owns an operating company.

"***BE-11 Filer***" means any person contacted by the Bureau of Economic Analysis (BEA) and informed that it is required to file an "Annual Survey of U.S. Direct Investment Abroad (Form BE-11)."

"***BE-12 Filer***" means any U.S. person (other than private funds) whose voting securities are more than 10 percent owned by a foreign person at the end of calendar year.

"***BE-13 Filer***" means a U.S. person that (i) has a non-U.S. person acquire a more than 10 percent interest or (ii) such foreign person makes a new investment, in each case, resulting in a value of $3 million.

"***BE-180 Filer***" means a U.S. person that sold or "purchased" more than $3 million in financial services to or from a non-U.S. person.

"***BE-185 Filer***" means any person contacted by the BEA and informed that it is required to file a "Quarterly Survey of Financial Services Transactions between U.S. Financial Services Providers and Foreign Persons."

"***BE-577 Filer***" means any person contacted by the BEA and informed that it is required to file a "Quarterly Survey of U.S. Direct Investment Abroad (Form BE-577)."

"***BE-605 Filer***" means any person contacted by the BEA and informed that it is required to file a "Quarterly Survey of Foreign Direct Investment in the United States (Form BE-605)."

"***ERA***" or "***Exempt Reporting Adviser***" means an investment adviser that qualifies for exemption from registration as an investment adviser with the SEC under either (i) Section 203(l) of the Advisers Act because it is an adviser solely to one or more venture capital funds, as defined in Rule 203(l)-1 under the Advisers Act, or (ii) Rule 203m-1 under the Advisers Act because it is an adviser solely to private funds and has regulatory AUM in the United States of less than $150 million.

"***FBAR Filer***" means any U.S. person having certain financial interests in, or signatory or other authority over, a bank, securities or other type of financial account in a foreign country and that must electronically file a FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).

"***Form 13F Filer***" means any entity with investment discretion over at least $100 million in Section 13(f) securities (set forth on list) on the last trading day of any month in the prior year.

"***Form 13H Filer***" means any person with investment discretion over accounts with transactions of (i) 2 million shares, or $20 million in fair market value in NMS securities; or (ii) 20 million shares, or $200 million in fair market value in NMS securities.

"***FRBNY***" means the Federal Reserve Bank of New York and its staff.

"***Hedge Fund***" means any private fund that (i) has a performance fee or allocation, calculated by taking into account unrealized gains (other than unrealized gains taken into account for only the purpose of reducing fees or allocations to reflect unrealized losses), that is paid to an investment adviser (or its related person); (ii) may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or (iii) may sell securities or other assets short, other than short-selling,

that hedge currency exposure or manage duration of investments. Vehicles established for the purpose of issuing asset-backed securities are explicitly excluded from the above definition, but commodity pools are included if they are also private funds.

"***Large CPOs***" means any registered CPO that had at least $1.5 billion in aggregated pool AUM as of the close of business on any day during the calendar quarter.

"***Large Hedge Fund Advisers***" means RIAs that have $1.5 billion[66] or more in regulatory AUM attributable to hedge funds (including private fund commodity pools) as of the end of any month in the fiscal quarter immediately preceding the most recently completed fiscal quarter.

"***Large Private Equity Fund Advisers***" means RIAs that have $2 billion or more in regulatory AUM attributable to private equity funds as of the last day of the most recent fiscal year.

"***Liquidity Fund***" means any private fund that seeks to generate income by investing in a portfolio of short-term obligations to maintain a stable net asset value per unit or minimize volatility.

"***Mid-Sized CPOs***" means any registered CPO that had at least $150 million in aggregated pool AUM as of the close of business on any day during the calendar year.

"***Private Equity Fund***" means any fund that does not provide redemption rights in the ordinary course and is not a hedge fund, liquidity fund, venture capital fund, real estate fund or securitized asset fund.

"***TIC BC Filers***" means any U.S. resident financial institution that has either $25 million or more in U.S. dollar-denominated claims against persons in any one foreign country or $50 million in total claims against all foreign residents. The FRBNY has provided guidance that the claims reportable on Form BC for investment managers to private funds are the claims of the investment managers themselves. The claims may include, among others, loans and loan participations, foreign brokerage accounts and short-term securities.

"***TIC BL-1 Filers***" means any U.S. resident financial institution (including, but not limited to, private equity funds, hedge funds, investment advisers, broker-dealers and banks) that has either $25 million or more in U.S. dollar-denominated liabilities to persons in any one foreign country or $50 million in total liabilities to all foreign residents. The FRBNY has provided guidance that the liabilities reportable on Form BL-1 for investment managers to private funds are the liabilities of the investment managers themselves. Liabilities may include loans and loan participations from a foreign resident person and issuance of short-term securities.

"***TIC BL-2 Filers***" means any U.S. resident financial institution with customer accounts or managed foreign branches (including, but not limited to, investment advisers, broker-dealers and banks) that have either $25 million or more in U.S. dollar-denominated liabilities to persons in any one foreign country or $50 million in total liabilities to all foreign residents. Liabilities may include (i) short-term securities and negotiable certificates of deposit, which are liabilities of U.S. resident customers to a foreign resident and are held by the reporting person as custodian; (ii) liabilities of U.S. residents to foreign managed offices of the reporting person; (iii) liabilities to U.S. residents pursuant to loans serviced by the reporting person; and (iv) short-term negotiable securities issued by the reporter directly into a foreign market. The FRBNY has provided guidance that a foreign fund managed by a U.S. manager is a "managed foreign office" of the manager.

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[66] The monetary value of the above thresholds must be calculated in accordance with the aggregation rules in Form PF. Under those rules, (1) assets attributable to funds with a similar strategy, (2) assets managed by related persons that are not separately operated, (3) any parallel managed accounts (unless greater in value than the relevant fund assets individually or in the aggregate) and (4) private funds in a master-feeder arrangement must be combined with the fund assets being determined. Investments in other private funds, however, may be excluded. For further information relating to aggregation, see Form PF Frequently Asked Questions (available at https://www.sec.gov/divisions/investment/pfrd/pfrdfaq.shtml).

"***TIC BQ-1 Filers***" means any U.S. resident financial institution with customer accounts or managed foreign branches (including, but not limited to, investment advisers, broker-dealers and banks) that have either $25 million or more in U.S. dollar-denominated claims against persons in any one foreign country or $50 million in total claims against all foreign residents. Claims may include (i) short-term securities and negotiable certificates of deposit, which are liabilities of foreign residents to U.S. residents and are held by the reporting person as custodian; (ii) claims of U.S. residents against managed foreign offices of the reporting person; (iii) claims of U.S. residents against foreign offices of the reporting person due to sweep accounts; and (iv) brokerage balances of U.S. residents placed abroad through the reporting person. The FRBNY has provided guidance that a foreign fund managed by a U.S. manager is a "managed foreign office" of the manager.

"***TIC BQ-2 Filers***" means any U.S. resident financial institution with direct claims or liabilities or customer accounts with claims or liabilities (including, but not limited to, investment advisers, broker-dealers and banks) that has either $25 million or more in foreign currency-denominated claims or liabilities to persons in any one foreign country or $50 million in total claims or liabilities against all foreign residents. Claims and liabilities are as defined above and include those for the investment manager itself and for its client funds.

"***TIC BQ-3 Filers***" means any U.S. resident financial institution with $4 billion in amounts reported on Forms BC, BL-1 and BQ-2.

"***TIC D Filers***" means all entities resident in the United States that have derivative contracts that exceed the following exemption levels: (i) the total notional value of worldwide holdings of derivatives (including contracts with U.S. and foreign residents, measured on a consolidated worldwide basis) for the reporter's own account exceeds $400 billion; or (ii) the amount reported by a TIC D reporter for grand net total settlements (as defined in the form) exceeds $400 million (either a positive or negative value).

"***TIC S Filers***" means U.S. entities who, during the reporting month, (i) conduct transactions in U.S. long-term securities directly from or to foreign residents; and/or (ii) conduct transactions in foreign long-term securities directly from or to foreign residents or have foreign-resident agents conduct transactions in these securities on their own behalf or on behalf of customers, if the total reportable transactions in purchases or sales of long-term securities amount to $350 million or more during the respective month.[67] If a reporting person's repayable transactions exceed the $350 million threshold for any month, it must report for the remainder of the year.

"***TIC SLT Filer***" means any person, when consolidated with any U.S. parts of its organization and any U.S. persons that it advises, that has $1 billion in (i) foreign long-term securities (including equity securities) that it owns, (ii) foreign long-term securities that it holds for others and (iii) long-term securities that it has issued to other persons.

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[67] U.S. resident entities should consolidate all of their subsidiaries, except for foreign-resident offices and subsidiaries, in accordance with U.S. GAAP. If the level of transactions meets or exceeds the exemption level in any month, reporting is required for the remainder of the calendar year, regardless of the level of transactions in subsequent months, and for both purchases and sales even if only one meets or exceeds the exemption level. For further information, see Instructions for the Monthly TIC Form S (available at https://www.treasury.gov/resource-center/data-chart-center/tic/Pages/forms-s.aspx).

## Contact Information

If you have any questions regarding this alert, please contact the Akin Gump lawyer with whom you usually work or

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Akin Gump
STRAUSS HAUER & FELD LLP

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