Lowenstein Sandler

Client Alert

Investment Management

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Material Investment Management Developments and Template Annual Compliance Checklists for Registered Investment Advisers, Exempt Reporting Advisers, Commodity Pool Operators, Commodity Trading Advisors, and Private Fund Managers

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Lowenstein Sandler's Investment Management Group is pleased to provide you with the summaries and checklists described below.

Summaries of recent legal developments with respect to:

- SEC's 2023 Examination Priorities
- Collapse of Silicon Valley Bank: Resources
- Enforcement Actions Against Investment Advisers
- SEC Adoption of Amendments to Proxy Rules Governing Proxy Voting Advice
- Penalties for Violations of Electronic Communications Rules
- Proposed New Rules Regarding Service Provider Due Diligence and Monitoring
- SEC Examinations Focused on the New Investment Adviser Marketing Rule
- SEC Releases Guidance Affecting Certain Pre-IPO Liquidity Products
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- CFTC Swap Clearing Requirements
- SEC Proposal to Redesignate Custody Rule as Safeguarding Rule
- SEC Release of Three Simultaneous Rule Proposals Related to Cybersecurity
- SEC Rulemaking Calendar 2023
- Rules Regarding Private Fund Managers and Amended Annual Review Requirements
- Amended PF Requirements for Private Fund Managers
- Changes to Regulations 13D and 13G Beneficial Ownership Reporting
- Final Rule Regarding Definition of Dealer
- SEC Fiscal Year 2022 Enforcement Results
- CFTC Fiscal Year 2022 Enforcement Results
- Insider Trading Plans and Related Disclosures
- Management Fee Offsets and Step-downs
- QPAM Exemption for Managing ERISA Assets
- 2022 Tax Developments and Future Considerations

Checklists of compliance considerations for:

- Private Investment Funds and Their Advisers
- Registered Investment Advisers and Exempt Reporting Advisers
- Commodity Pool Operators and Commodity Trading Advisors

The checklists appear after the legal developments summary. For more information regarding any matter covered in this update, please contact one of the attorneys in our Investment Management Group.

SELECT LEGAL AND REGULATORY DEVELOPMENTS

SEC Releases 2023 Examination Priorities for Registered Investment Advisers and Broker-Dealers

Synopsis: In February 2023, the Securities and Exchange Commission's ("SEC") Division of Examinations released its annual examination priorities report for upcoming examinations of registered investment advisers and broker-dealers. The Division of Examinations identified various priorities, including those relating to standards of conduct, conflicts of interest, and information security. The Division of Examinations has also accounted for recent trends and developments by establishing priorities pertaining to crypto assets, emerging financial technologies, and environmental, social, and governance ("ESG") investing.

Status: The Division of Examinations identified the following areas of focus for registered investment advisers and broker-dealers.

<u>Mutual Areas of Focus for Registered Investment Advisers and Broker-Dealers</u>

Standards of Conduct. The Division of Examinations continues to prioritize examining firms for compliance with applicable standards of conduct, including fiduciary duties for registered investment advisers and Regulation Best Interest for broker-dealers. The Division of Examinations will also assess firms' processes for making best-interest evaluations, including those for reviewing reasonably available alternatives, evaluating costs and risks, and identifying and addressing conflicts of interest.

Conflicts of Interest. The Division of Examinations is concerned with identifying and understanding the economic incentives of firms and their financial professionals based on the source and structure of compensation, revenue, and other benefits associated with recommending certain products, services, and account types. The Division of Examinations will assess whether firms have written policies and procedures to identify conflicts of interest and whether those policies and procedures are tailored to the firms' particular businesses.

Crypto Assets and Emerging Financial Technology. The Division of Examinations continues to focus on crypto assets and their associated products and services, along with emerging financial technology, including broker-dealer mobile applications and automated digital investment advice. The Division of Examinations is focused on new practices that include technological and online solutions for compliance, marketing, and investor services, and it will emphasize reviewing digital engagement practices.

Information Security. The Division of Examinations will review firms' practices used to prevent interruptions to critical services and those used to protect the information, records, and assets of investors. The Division of Examinations noted that cybersecurity is a heightened risk area, and therefore it plans to assess the policies, procedures, and governance practices of firms in relation to cybersecurity along with firms' responses to cyber-related events. The Division of Examinations will also focus on compliance with Regulation S-P and Regulation S-ID.

<u>Specific Priorities for Registered Investment Advisers</u>

Compliance Practices. The Division of Examinations will focus on the compliance practices of advisers, including whether they have appropriately adopted and considered current market factors, including factors that may impact valuation and the accuracy of regulatory filings. The Division of Examinations will typically review compliance programs and related disclosures across several areas, including custody and safeguarding of client assets, valuation and portfolio management, and brokerage and execution. The Division of Examinations will also focus on policies and procedures for retaining and monitoring electronic communications and the use of third-party service providers.

New Marketing Rule. The Division of Examinations will assess whether advisers have adopted and implemented written policies and procedures reasonably designed to prevent violations of the recently-adopted new Marketing Rule. The Division of Examinations will also assess whether advisers have complied with the substantive requirements of the rule, including the reasonable basis requirement for substantive material statements of fact and the requirements for performance advertising, paid testimonials and endorsements, and third-party ratings.

Advisers to Private Funds. The Division of Examinations is emphasizing examinations of advisers to private funds, considering the growth in this area in recent years. The Division of Examinations will consider conflicts of interest, calculations and allocations of fees and expenses, and compliance with the new Marketing Rule as well as policies and practices regarding the use of alternative data and compliance with the Custody Rule.

ESG Investing. The Division of Examinations will continue to focus on ESG-related advisory services and fund offerings, including whether funds are operating in a consistent manner as set forth in their disclosures to investors, whether ESG products are appropriately labeled, and whether recommendations of such investments are in the best interest of retail investors.

<u>Specific Priorities for Broker-Dealers</u>

Compliance Programs. The Division of Examinations will continue to focus on ensuring broker-dealers have robust compliance and supervisory programs, especially relating to using electronic communications for firm business and the recordkeeping of same. The Division of Examinations will also prioritize examining broker-dealers to ensure customer cash, securities, and other assets are safeguarded.

Trading Practices. The Division of Examinations will continue to examine the trading practices of broker-dealers in both equity and fixed-income securities and will specifically assess conflicts of interest in order routing and execution that may negatively affect retail investors. The Division of Examinations will also assess broker-dealer compliance with Regulation SHO for short sales, the operations of alternative systems for compliance with Regulation ATS, and Form ATS-N's required disclosures.

Types of Securities. The Division of Examinations will focus on specific types of securities (including municipal and other fixed-income securities) due to concerns over the fairness of pricing, compliance with confirmation disclosure requirements, and issuer disclosure obligations for municipal securities dealers and underwriters.

Anti-Money Laundering ("AML") Compliance. Due to the geopolitical environment and increased international sanctions, the Division of Examinations has noted the importance of examining broker-dealer AML programs and will accordingly plan to assess whether firms have established appropriate customer identification programs and satisfy Suspicious Activity Report filing obligations (as required by relevant AML laws). The Division of Examinations will also consider whether broker-dealers are conducting ongoing customer due diligence, complying with beneficial ownership requirements, and independently testing their AML programs.

The Lowenstein Sandler Investment Management Group alert analyzing the Division of Examinations 2023 Examination Priorities report is available here. The 2023 Examination Priorities report is available here.

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Resources Related to the Collapse of Silicon Valley Bank

Synopsis: Lowenstein Sandler attorneys have been closely monitoring developments surrounding the recent collapse of Silicon Valley Bank ("SVB"), which has caused significant disruptions in the technology and startup communities. We will continue to provide timely insights and analysis on the impact of this event as well as guidance on how our legal team can assist with regulatory compliance, litigation, and other issues that may arise.

Status: To date, Lowenstein Sandler attorneys have published various resources and insights on issues related to the collapse of SVB, including:

- How businesses can manage their obligations to pay team members during a period when the company's bank accounts have been frozen
- A timeline and summary of critical events leading to the collapse of SVB, how regulators have responded, and what we expect to occur next
- A summary of the Chapter 11 bankruptcy filing by SVB Financial Group, the former holding company of SVB
- Insurance considerations for policyholders to protect against the anticipated uptick of cybercriminal activity and commencement of increased regulatory and enforcement actions following the collapse of SVB
- Information for depositors regarding the Federal Deposit Insurance Corporation ("FDIC") and FDIC claims process in light of the FDIC becoming receiver of SVB.

The complete list of Lowenstein Sandler thought leadership on the impact of the collapse of SVB is available here.

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SEC Brings Variety of Enforcement Actions Against Numerous Investment Advisers

Synopsis: Throughout September 2022, there was a surge of SEC enforcement activity alleging violations of Rule 206(4)-2 (the "Custody Rule"), Rule 206(4)-5 (the "Pay-to-Play Rule"), and Rule 206(4)-6 (the "Proxy Voting Rule") under the Investment Advisers Act ("Advisers Act"), many of which were innocuous and technical in nature but nevertheless resulted in substantial monetary penalties.

Status: The SEC's enforcement actions alleged the following types of violations.

Custody Rule Violations

In September 2022, the SEC announced charges against multiple investment advisers for violating the Custody Rule, which requires advisers to maintain their client funds with a "qualified custodian" and to obtain either (1) a surprise examination of custodied assets annually from an independent public accountant or (2) an annual audit of pooled investment vehicle clients' financial statements by an independent public accounting firm and then to distribute those statements to their investors within a prescribed time frame. The SEC alleged the advisers failed to perform the audits or deliver the audited statements to investors within the required time frame. In another action, the SEC alleged the adviser failed to obtain surprise examinations for its clients' assets over a six-year period and failed to implement policies and procedures reasonably designed to prevent such violations.

Pay-to-Play Rule Violations

Also in September 2022, the SEC announced charges against four advisory firms for violations of the Pay-to-Play Rule, which prohibits investment advisers from providing their advisory services for compensation to a state or local government entity if the adviser or one of its associates has made a political contribution in the prior two years to certain government officials whose office has the authority to influence the hiring of the investment adviser. Each of the advisers charged made prohibited contributions of only $1,000 or less, but the resulting penalties ranged from $45,000 to $95,000.

Proxy Voting Rule Violations

Also in September 2022, the SEC consented to a six-figure settlement with a registered investment adviser for allegedly violating the Proxy Voting Rule by failing to act in its client's best interests when voting proxies on behalf of registered investment company ("RIC") clients and failing to develop and implement policies and procedures reasonably designed to ensure votes were cast in that manner. The adviser had engaged a third-party service provider to cast proxy votes on behalf of RICs managed by the adviser but allegedly advised the service provider to always vote in favor of proposals put forth by the security issuer's management and against shareholder proposals.

The Lowenstein Sandler Investment Management Group alert analyzing these enforcement actions is available here.

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SEC Adoption of Amendments to Proxy Rules Governing Proxy Voting Advice

Synopsis: On July 13, 2022, the SEC voted to adopt amendments to its rules governing proxy voting advice as proposed in November 2021.

Status: The final amendments aim to avoid burdens on proxy voting advice businesses that may impair the timeliness and independence of their advice. The amendments also address misperceptions about liability standards applicable to proxy voting advice, while also preserving investors' confidence in the integrity of such advice.

The final amendments rescind two rules applicable to proxy voting advice businesses that the SEC adopted in 2020. Specifically, the final amendments rescind conditions to the availability of two exemptions from the proxy rules' information and filing requirements on which proxy voting advice businesses often rely. Those conditions require that (a) registrants that are the subject of proxy voting advice have such advice made available to them in a timely manner and (b) clients of proxy voting advice businesses are provided with a means of becoming aware of any written responses by registrants to proxy voting advice.

The final amendments also delete the 2020 changes made to the proxy rules' liability provision. Although the 2020 changes were intended to clarify the application of this liability provision to proxy voting advice, they instead created a risk of confusion regarding the application of this provision to proxy voting advice, undermining the goal of the 2020 changes. The final amendments address the confusion while affirming that proxy voting advice generally is subject to liability under the proxy rules.

Finally, the adopting release rescinds supplemental guidance that the SEC issued in 2020 to investment advisers regarding their proxy voting obligations.

The final rule is available here, and the SEC's press release discussing the adoption of the final rule is available here.

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SEC and CFTC Impose Fines for Violations of Electronic Communications Rules

Synopsis: On September 27, 2022, the SEC and the Commodity Futures Trading Commission ("CFTC") each fined various financial institutions more than $1.8 billion for violations of rules governing electronic communications after finding employees of the institutions regularly used messaging applications to discuss business matters.

Status: The SEC and the CFTC fined the financial institutions for violating recordkeeping and books-and-records laws under the Securities Exchange Act of 1934 (the "Exchange Act") and the Advisers Act after finding the institutions' employees regularly used off-channel messaging applications to discuss business matters and the institutions failed to preserve those communications. Some of the financial institutions will pay $200 million or more in fines.

The announcement comes after the SEC released guidance on the issue of recordkeeping and electronic messaging in a 2018 Risk Alert, which reminded advisers of their obligations under the Advisers Act.

<u>2018 Risk Alert</u>

The 2018 Office of Compliance Inspections and Examinations Alert recommended the following practices, among other things, to help advisers avoid communication retention violations:

- Only permitting electronic communications for business purposes that can comply with books and records requirements
- Prohibiting technologies that allow users to send messages anonymously or to automatically destroy messages
- Implementing procedures to move any messages that an employee receives on a prohibited channel to a system that complies with the Advisers Act
- Notifying employees that violations of communication retention policies can result in discipline or dismissal
- Providing regular reminders to employees about what is permitted in terms of electronic messaging

The Lowenstein Sandler Investment Management Group and White Collar Criminal Defense alert analyzing these regulatory actions is available here. The full text of the 2018 Risk Alert can be found here.

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SEC Proposes New Rules Regarding Service Provider Due Diligence and Monitoring

Synopsis: On October 26, 2022, the SEC issued a rule release proposing a new rule under the Advisers Act that seeks to establish an oversight framework across registered investment advisers that outsource "covered functions" to third-party service providers

Status: The SEC has identified certain risks presented by advisers outsourcing necessary advisory functions without appropriate oversight. Those risks include, among others, the disruption or interruption of outsourced services, an adviser's poor oversight of such outsourced services, and compliance gaps that could enable fraudulent activity.

<u>Scope of the Proposed Rule</u>

The proposed rule would apply to covered functions that are outsourced to third-party service providers. The proposed rule defines "covered functions" as services or functions that (1) are necessary to provide advisory services in compliance with the federal securities laws and (2) would be reasonably likely to cause a material negative impact on the adviser's clients or on the adviser's ability to provide investment advisory services if not performed or if performed negligently. "Service providers" are defined as persons or entities that (1) perform one or more covered functions and (2) are not "supervised persons" of the adviser. The proposed rule sets forth a variety of examples and factors relevant to determining whether a particular service or function meets the definition of a covered function and whether a particular person or entity meets the definition of a service provider.

<u>Required Oversight Framework</u>

The proposed rule would require advisers to determine through due diligence whether outsourcing the covered function to a service provider is appropriate in each instance, considering the following factors: (i) the nature and scope of the covered function; (ii) the potential risks resulting from the service provider performing the covered function, including how to mitigate and manage such risks; (iii) the service provider's competence, capacity, and resources necessary to perform the covered function; (iv) the service provider's material subcontracting arrangements related to the covered function; (v) coordination with the service provider for federal securities law compliance; and (vi) the orderly termination of the performance of the covered function.

If the adviser utilizes third-party recordkeepers, the adviser must conduct due diligence and monitoring of those recordkeepers consistent with the foregoing due diligence requirements. Specifically, the advisers must obtain reasonable assurances that the recordkeeper will be able to (i) adopt and implement internal processes and/or systems for making and keeping records that meet the requirements of Rule 204-2 under the Advisers Act (the "Books and Records Rule") for the books and records it keeps on behalf of the adviser; (ii) make and keep records that meet all the requirements of the Books and Records Rule; (iii) provide access to electronic records; and (4) ensure the continued availability of records if the third-party recordkeeper's relationship with the adviser or its operations cease.

The adviser would also need to make and keep records of the covered functions that it has outsourced, along with the providers' names and documentation supporting its decisions to outsource to them. The proposed rule would also amend Form ADV to include a new Item 7.C. in Par 1A and Section 7.C. in Schedule D, where the advisers would identify outsourced covered functions and provide certain information about the corresponding service providers.

The Lowenstein Sandler Investment Management Group alert analyzing this proposed rule is available here. The text of the proposed rule can be found here.

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SEC Examinations Focused on the New Investment Adviser Marketing Rule

Synopsis: The SEC's Division of Examinations published a risk alert to inform SEC-registered investment advisers, including advisers to private funds, about upcoming review areas during examinations focused on amended Advisers Act Rule 206(4)-1 (the "Marketing Rule"). The compliance date for the Marketing Rule was November 4, 2022. The SEC is withdrawing certain staff statements relating to the previous advertising and cash solicitation rules.

Status: The Division of Examinations provided that advisers should consider whether they need to update or revise their written policies and procedures, as required by Advisers Act Rule 206(4)-7, to ensure they are reasonably designed to prevent Marketing Rule violations by the advisers and their supervised persons. The Division of Examinations further reminds advisers that the Books and Records Rule will require investment advisers to make and keep certain records, such as records of all advertisements they disseminate, including certain internal working papers, performance-related information, and documentation for oral advertisements, testimonials, and endorsements.

The Division of Examinations indicated it would conduct a number of specific national initiatives as well as a board review through the examination process for compliance with the Marketing Rule that will focus on the following areas:

- Marketing Rule Policies and Procedures:
  - The staff will review whether investment advisers have adopted and implemented written policies and procedures that are reasonably designed to prevent violations by the advisers and their supervised persons of the Advisers Act and the rules thereunder, including the Marketing Rule.
  - In the Marketing Rule Adopting Release, the SEC stated that "… for these compliance policies and procedures to be effective, they should include objective and testable means reasonably designed to prevent violations of the final rule in the advertisements the adviser disseminates." Examples of objective and testable means could include but are not limited to conducting an internal pre-review and approval of advertisements, reviewing a sample of advertisements based on risk, or preapproving templates.
- Substantiation Requirement:
  - The staff will review whether investment advisers have a reasonable basis for believing they will be able to substantiate material statements of fact in advertisements.
  - The Marketing Rule prohibits advertisements that "[i]nclude a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by [the SEC]." The SEC has stated "[a]dvisers would be able to demonstrate this reasonable belief in a number of ways. For example, they could make a record contemporaneous with the advertisement demonstrating the basis for their belief." An adviser might also choose to implement policies and procedures to address how this requirement is met.
  - However, if an adviser is unable to substantiate the material claims of fact made in an advertisement when the SEC demands it, this will lead to an adverse presumption.
- Performance Advertising Requirements:
  - The staff will review whether investment advisers are in compliance with performance advertising requirements in the Marketing Rule.
- Books and Records. The staff will review for compliance with the added recordkeeping requirements and disclosure requirements in Form ADV related to marketing practices (required of most advisers with their next annual Form ADV amendment, unless they file an other-than-annual amendment beforehand).

The SEC's Division of Examinations risk alert is available here.

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SEC Releases Guidance Affecting Certain Pre-IPO Liquidity Products

Synopsis: On June 9, 2022, the SEC released compliance and disclosure interpretations ("C&DIs") that question the continued commercial viability of secondary market forward contracts ("forward contracts").

Status: Forward contracts are a popular type of pre-initial public offering ("IPO") liquidity solution and are often targeted at early investors and existing or former employees holding private stock ("private securities") of late-stage technology companies. In a typical forward contract transaction, the private securities holder agrees to sell the private securities to a buyer for an upfront price. Because the private securities are typically subject to transfer restrictions, the holder/seller agrees to physically deliver the private securities once they become freely tradeable (typically after an IPO of the company for which the private securities were issued).

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") amended Section 5 of the Securities Act of 1933 (the "Securities Act") to make it unlawful for any person to trade any security-based swap to another person or entity that is not an "eligible contract participant" ("ECP") (i.e., an individual with at least $10 million in total assets invested on a discretionary basis) without registering with the SEC. Though most employees holding private securities in their companies are not ECPs, forward contracts with those individuals are typically structured to avoid the ECP requirement by relying on the "physical delivery" exclusion from the definition of security-based swaps. Specifically, the forward contract won't constitute a security-based swap (and thus won't be subject to the ECP requirement) if it is "intended to be physically settled."

SEC Guidance

The SEC clarified it does not consider a forward contract to be "intended to be physically settled" if, at the time the parties enter the contract, the underlying private securities (1) cannot be legally transferred or (2) the transfer of the underlying private securities is restricted by the contract. Almost all private securities are subject to some form of transfer restrictions. Thus, the SEC guidance implies forward contracts on most private securities will face significant regulatory and practical restrictions. As a result, market participants engaging in forward contract transactions must either (1) seek the issuer's waiver of the transfer restrictions imposed on the private securities, (2) limit their forward contract counterparties to ECPs, or (3) seek alternative structures. Alternative structures could include, for example, traditional lending solutions or private financing arrangements, which are unaffected by this guidance.

The Lowenstein Sandler Investment Management Group alert analyzing this guidance is available here. The SEC guidance, in the form of a C&DI, is available here.

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SEC Proposes Rules to Enhance ESG Disclosures

Synopsis: On May 25, 2022, the SEC proposed rules to (i) enhance and standardize the disclosures made by advisers and registered funds related to the incorporation of ESG factors in their investment strategies and (ii) expand Rule 35d-1 under the Investment Company Act of 1940 (the "Names Rule") to further prevent the misleading use of names by registered funds.

Status: The SEC's new proposed rules would impose new disclosure requirements on advisers, registered investment companies, and business development companies (registered investment companies and business development companies, together, "registered funds") pursuant to the Advisers Act and Investment Company Act of 1940 ("Company Act") as described below

Proposed Disclosures for Advisers

The proposed rules would amend Form ADV Part 1A to require advisers to provide the following information about separately managed account clients and private funds they manage:

- With respect to Item 5.K. and the corresponding sections of Schedule D, the adviser must address whether it considers ESG factors as part of a significant strategy in the advisory services it provides to separately managed account clients, including in its selection of other investment advisers and/or as part of its advisory services, when requested by such clients. If it does, the adviser must provide additional information regarding the type of ESG approach it uses for such strategies.
- With respect to Section 7.B.(1) of Schedule D, the adviser must indicate whether it considers ESG factors as part of a significant strategy in the advisory services it provides to each private fund it manages. If it does, the adviser must provide additional information regarding the type of ESG approach it uses for such strategies.
- With respect to Item 5.M., the adviser must report whether it follows any third-party ESG framework in connection with its advisory services and, if so, it must disclose additional information about that framework.

The proposed rules would further amend Form ADV Part 2A (the "Disclosure Brochure") and Part 2A – Appendix (the "Wrap Brochure") to require advisers to provide the following ESG-related disclosures if they consider ESG factors as part of their investment strategies:

- With respect to Item 8 of the Disclosure Brochure, the adviser must describe the factors it considers for each significant ESG investment strategy or other analysis concerning ESG factors. The adviser must also disclose how and to what extent ESG factors are integrated into its strategies as well as any criteria or methodology it employs to exclude certain investments based on ESG factors.
- With respect to Item 10 of the Disclosure Brochure, the adviser must describe any relationships it has with any related person that is an ESG consultant or other ESG service provider.
- With respect to Item 17 of the Disclosure Brochure, the adviser must describe the ESG factors considered if it has specific proxy voting policies and procedures that include ESG considerations when voting client securities.
- With respect to Item 4 of the Wrap Brochure, the adviser must indicate any ESG factors considered and how such factors are analyzed when recommending portfolio managers.

Proposed Disclosures for Registered Funds

The proposed rules would require registered funds that implement ESG factors in their principal investment strategies to provide additional detail in prospectuses and annual shareholder reports regarding those ESG strategies. The proposed rules would impose the following requirements on registered funds:

- For a registered fund the proposed rules define as an "Integration Fund," the prospectus must describe how the fund incorporates ESG factors into its investment selection process. If it considers greenhouse gas ("GHG") emissions as an ESG factor, then it must discuss how it considers such emissions and what data sources it uses.
- For a registered fund the proposed rules define as an "ESG-Focused Fund," the prospectus must contain an "ESG Strategy Overview" table that

sets forth its ESG strategy disclosures. If the fund uses proxy voting as a significant means of implementing its ESG strategy, then it must disclose that arrangement in the table. Moreover, if the fund considers environmental factors in its investment strategy, it must disclose in its annual shareholder report certain information regarding GHG emissions associated with its investments.
- Registered funds that the proposed rules define as "Impact Funds" must provide the same disclosures as ESG-Focused Funds. In addition, an Impact Fund must disclose in its prospectus (i) how it measures progress toward its specific ESG impact, including the key performance indicators it analyzes; (ii) the time horizon used to analyze progress; and (iii) the relationship between the ESG impact it is seeking to achieve and the fund's financial return.

Proposed Names Rule for Registered Funds

The proposed rules also seek to expand the Names Rule under the Company Act to require registered funds with names suggesting they focus on a particular type of investment to invest at least 80 percent of their assets in that type of investment.

The Lowenstein Sandler Investment Management Group alert analyzing these proposed rules is available here. The proposed rules can be found here.

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SEC Adoption of Rules to Require Electronic Filing for Investment Advisers and Institutional Investment Managers

Synopsis: On June 23, 2022, the SEC adopted amendments to require certain documents filed by investment advisers, institutional investment managers, and certain other entities to be filed or submitted electronically. The amendments also make technical amendments to modernize Form 13F and enhance the information provided.

Status: The amendments are intended to promote efficiency, transparency, and operational resiliency by modernizing how information is filed or submitted to the SEC and disclosed to the public. Electronic filings will be more readily accessible to the public and available on websites in easily searchable formats.

The final rule is available here, and the SEC's press release discussing the adoption of the final rule is available here.

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An Epic Year for OFAC Sanctions and Compliance

Synopsis: The U.S. Office of Foreign Assets Control ("OFAC") imposed new sanctions in 2022 on Russia, Belarus, and regions of Ukraine as well as on Iran, China, Cuba, Venezuela, Burma, North Korea, and cyber and humanitarian crime actors. The U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") and the Department of Commerce issued a joint alert highlighting that financial institutions must ensure they are not servicing or financing any transactions that violate U.S. national security laws. This joint alert points out that AML compliance is not sufficient to meet sanctions and export control regulatory requirements. Moreover, Justice Department Deputy Attorney General Lisa Monaco called sanctions the "new FCPA" [Foreign Corrupt Practices Act] and announced that the department is hiring 25 new prosecutors just for sanctions and export enforcement.

Following up on the sanctions of several virtual currency exchanges in 2021, OFAC sanctioned Hydra Market and Garantex in 2022 for operating financial services in Russia, and it designated Blender, a virtual currency mixer, for money laundering and cyber activities related to the processing of more than $20 million on behalf of a North Korean entity. OFAC also designated Tornado Cash for laundering more than $7 billion on behalf of North Korea. OFAC will continue to prosecute attempts to evade Russian sanctions in 2023, including against China, and it has increased restrictions on exports to Russia for "luxury" items like fans, air conditioners, appliances, electronics, office equipment, types of spark ignition and compression ignition piston engines, various turbojet and other aircraft parts and turbines, and household bearings, gears and pulleys. Meanwhile, OFAC authorized Chevron to resume some natural gas extractions in Venezuela, based on a changing political climate, and authorized a general license for internet services, software, and hardware that supports open communication in Iran.

Status: OFAC's 2022 enforcement decisions are loud and clear; sanctions compliance programs must be based on the company's risk profile. New companies should start out with sanctions compliance initially, especially if attracting a global customer base or using an online platform. Companies must ensure that subsidiaries (and portfolio companies) comply with all sanction programs during transaction deal diligence and must train, monitor, and audit post-merger/sale/investment activities.

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FINRA Provides Update on Its Targeted Exam Sweep Regarding Options Accounts

Synopsis: In November 2022, the Financial Industry Regulatory Authority ("FINRA") provided an update on the targeted exam sweep it launched in August 2021 related to the opening, supervision, and disclosure of options accounts. The update highlights various topics that firms should consider as they evaluate their options account opening and approval processes to determine whether their supervisory systems are reasonably designed to address risks related to supervising the approval of and trading activity in those accounts.

Status: FINRA's update identified three areas for consideration: (1) approving options trading, (2) options disclosure, and (3) options trading supervision. With respect to approving options trading, FINRA found that firms must ensure that their account opening and approval processes comply with FINRA Rule 2360, among other rules. With respect to options disclosure, firms must ensure that their communications regarding options contain proper risk disclosures and comply with FINRA rules 2210 and 2220. With respect to options trading supervision, firms must ensure that their supervisory systems, processes, and controls for options trading are sufficient in light of the firm's overall risk profile. FINRA also noted that broker-dealers providing options trading generally utilize either manual, automated, or a combination of both review processes with respect to the approval, disclosure, and supervision of options accounts.

The Lowenstein Sandler Investment Management Group alert analyzing this FINRA update is available here. FINRA's update on its targeted exam sweep is available here.

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SEC Releases Risk Alert Regarding Identity Theft Prevention Programs

Synopsis: On December 5, 2022, the SEC's Division of Examinations issued a risk alert regarding recently observed compliance issues with respect to Regulation S-ID, which requires certain registered investment advisers, broker-dealers, and investment companies to establish a written program designed to detect, prevent, and mitigate identity theft related to the opening of covered accounts and maintenance of preexisting accounts.

Status: In the risk alert, the Division of Examinations identified the following primary compliance issues.

<u>Failure to Identify Covered Accounts</u>

Regulation S-ID requires certain investment advisers and broker-dealers to periodically reassess whether they offer or maintain covered accounts. The Division of Examinations found that some firms failed to identify covered accounts and failed to conduct risk assessments of covered accounts. Since some firms failed to perform assessments of whether they have covered accounts, they failed to implement identity theft programs under Regulation S-ID. Other firms did initially identify covered accounts, but they either failed to conduct any periodic assessments or did conduct periodic assessments but did not properly identify all or new types of accounts.

<u>Failure to Establish an Appropriate Identity Theft Program</u>

Regulation S-ID also requires certain investment advisers and broker-dealers to develop and implement programs based on their size, complexity, and activities. The SEC found that some firms failed to properly tailor their programs based on these factors. Some firms' programs simply relied on templates that were never adjusted to their particular needs, while others' programs merely restated the requirements of Regulation S-ID without including policies and procedures to comply with the regulation.

<u>Lack of Required Elements of an Identity Theft Program</u>

Regulation S-ID also requires certain investment advisers and broker-dealers to implement reasonable policies and procedures to (1) identify, detect, and respond to red flags relevant to identity theft and (2) ensure there are periodic updates to adapt to changes in theft-related risks to customers, financial institutions, and creditors. The SEC found that some firms either failed to list any red flags or failed to identify red flags that were specific to their covered accounts. Other firms did not establish procedures, or did not follow existing procedures, to determine whether additional red flags should be added to their written programs. Other firms failed to periodically update their programs to address changes to theft-related risks.

<u>Improperly Administering an Identity Theft Program</u>

Regulation S-ID also requires firms to administer their programs by (1) obtaining board or senior management approval of their written programs, (2) having board or senior management oversight, (3) adequately training staff, and (4) overseeing service provider arrangements. The Division of Examinations found that some firms provided information to their boards or senior management insufficient to properly evaluate their programs, provided inadequate training to staff, and failed to evaluate the controls of service providers used to monitor identity theft.

The Lowenstein Sandler Investment Management Group alert analyzing this risk alert is available here. The risk alert is available here.

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SEC Publishes Guidance on Advertising Gross and Net Performance

Synopsis: On January 11, 2023, the SEC issued an FAQ response addressing how investment advisers must use gross and net performance information in their marketing of private funds in compliance with the new Marketing Rule under the Advisers Act. The SEC guidance clarified that displaying gross performance (e.g., in a case study) about a private fund's single investment or group of investments also requires the adviser to disclose the corresponding net performance of such investment(s) in its marketing materials.

Status: The Marketing Rule provides that the presentation of gross investment performance requires also presenting net performance with at least equal prominence calculated for the same time period and using the same type of return and methodology as in the gross performance. The new guidance clarifies that an adviser may not present gross performance of one particular investment or group of investments in marketing materials without also presenting the net performance of such single investment or group of investments.

The SEC explained that under the Marketing Rule, displaying the performance of one investment or group of investments in marketing materials constitutes "extracted performance," which is defined as the "performance results of a subset of investments extracted from a portfolio." The SEC is concerned that extracted performance without additional disclosures may mislead investors regarding the adviser's performance.

The Lowenstein Sandler Investment Management Group alert analyzing this SEC guidance is available here. The SEC guidance, in the form of a FAQ response, is available here.

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FinCEN Issues Order Against Virtual Currency Exchange

Synopsis: On January 18, 2023, FinCEN took its first action pursuant to Section 9714 of the Combating Russian Money Laundering Act ("Section 9714") against a convertible virtual currency ("CVC") exchanger and peer-to-peer service provider. This is also the first time FinCEN has identified a CVC exchanger as a primary money laundering concern.

Status: In its Section 9714 enforcement action, FinCEN designated Bitzlago Limited, a CVC exchanger and peer-to-peer service provider, as a "primary money laundering concern" in connection with Russian illicit finance. FinCEN documented numerous transactions between known Russia-based ransomware groups and Bitzlago and found that between 2019 and 2021, Bitzlago received CVC worth nearly $500 million from illicit activity and a majority of its top receiving and sending counterparties were associated with darknet markets or scams.

FinCEN found Bitzlago failed to take meaningful actions to stop its users' abuse of its services or implement an effective AML compliance program. Under the Bank Secrecy Act of 1970 and its amendments, AML compliance programs of financial institutions must be designed to detect and prevent money laundering and any activity that facilitates money laundering or the funding of terrorist activities. Included in AML compliance programs are the collection and verification of customer information to that end, known as "Know Your Customer" ("KYC"). FinCEN's order prohibits certain financial institutions from transmitting funds from or to Bitzlago or from or to any account or CVC address administered by Bitzlago except as otherwise set forth in the order.

The Lowenstein Sandler Investment Management Group alert analyzing this enforcement action is available here. A copy of FinCEN's order is available here. FinCEN's FAQs issued with the order are found here.

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AML Best Practices for Private Fund Managers

Synopsis: Advisers to U.S. private funds (i.e., U.S. hedge funds, private equity funds, and venture capital funds) should consider implementing an AML compliance program and providing a high-level description of a model AML compliance program.

Status: Although U.S. private funds are not directly subject to the requirements of the Bank Secrecy Act, advisers to private funds are nonetheless increasingly implementing limited AML programs that conform to certain Bank Secrecy Act requirements as a matter of good business practice and to align with industry standards.

Relevant Regulatory Regimes and Recent Developments

The Bank Secrecy Act was enacted to prevent bad actors from using financial institutions to hide and launder money, and multiple amendments to the Bank Secrecy Act have further facilitated law enforcement and regulatory agencies' efforts to combat money laundering and terrorist financing. Significant developments to the U.S. AML regulatory regime since the Act include the USA Patriot Act in 2001 (requiring financial institutions to implement AML compliance programs that include certain minimum requirements) and the Anti-Money Laundering Act of 2020 (providing for new and increased penalties under the Bank Secrecy Act, among other provisions). Moreover, the regulatory framework for OFAC, which applies to all U.S. persons, has evolved to facilitate U.S. foreign policy and national security goals.

Why Advisers Should Consider Implementing an AML Compliance Program

AML compliance programs, among other benefits, can help advisers more effectively conduct business with financial institutions because, if an adviser does not have a program in place prior to onboarding with a financial institution, the financial institution may decide to either onboard the private fund as a high-risk client subject to enhanced due diligence reviews or even refuse to establish the relationship altogether.

Adviser AML Compliance Program Best Practices

Advisers seeking to establish or enhance their AML compliance programs should, among other things, (1) designate a qualified individual responsible for overseeing the AML compliance program, (2) ensure the program documents all of the adviser's risk-based AML compliance policies and processes, (3) implement risk-based transaction monitoring, and (4) clearly articulate internal reporting and escalation procedures. Advisers that outsource their AML compliance program to a fund administrator should also review the administrator's AML compliance program to ensure it aligns with their own policies and procedures, and they should have procedures for reviewing/auditing the administrator's performance of the AML program. AML programs should be independently tested every twelve months, and personnel should undergo periodic and event-driven training.

Once an investor is onboarded, AML reviews should be conducted periodically either at risk-based intervals or in response to trigger events (e.g., deal transactions with the private fund, changes in investor information).

The Lowenstein Sandler Investment Management Group alert analyzing AML best practices is available here.

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CFTC Modifies Swap Clearing Requirement in Support of Transaction From LIBOR to Alternative Reference Rates

Synopsis: On August 12, 2022, the CFTC amended its interest rate swap clearing requirement regulations adopted under applicable provisions of the Commodity Exchange Act ("CEA") in light of the global transition from reliance on certain interbank offered rates ("IBORs") (e.g., the London Interbank Offered Rate ("LIBOR")) that have been or will be discontinued as benchmark reference rates to alternative reference rates, which are predominantly overnight, nearly risk-free reference rates ("RFRs").

Status: The amendments revise the set of interest rate swaps that are required to be submitted for clearing pursuant to the CEA and the CFTC's regulation of a derivatives clearing organization ("DCO") that is registered under the CEA ("registered DCO") or a DCO that has been exempted from registration under the CEA ("exempt DCO"). Among other things, the amendments modify the CFTC's interest rate swap clearing requirement to reflect the market shift away from swaps that reference IBORs to swaps that reference RFRs.

The CFTC's press release regarding the final rule is available here.

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SEC Proposal to Redesignate Custody Rule as New Safeguarding Rule Under the Investment Advisers Act

Synopsis: In February 2023, the SEC issued a rule release proposing to redesignate the current Custody Rule as the new Safeguarding Rule under the Advisers Act. The proposed rule seeks to enhance protections relating to advisory client assets by, among other things, dramatically expanding the scope of the Custody Rule to apply to a broader array of assets and advisory activities and enhancing the custodial protections that assets currently receive under the rule.

Status: The SEC proposes the following significant changes by redesignating the Custody Rule as the new Safeguarding Rule.

Expansion of Covered Assets

The proposed rule would expand the current rule's definition of "assets" to include "funds, securities, or other positions held in a client's account," which would encompass new investment types as they continue to evolve. The SEC takes the position that the entirety of the client's account positions, holdings, and investments (and not just funds and securities, as the current rule provides) should receive the protections of the rule.

New Meaning of Custody

The proposed rule would expand the circumstances under which an adviser is considered to have custody of client assets. The current rule's definitional elements include (i) situations where the adviser has physical possession of the assets, (ii) arrangements where the adviser is authorized or permitted to withdraw the assets maintained with a custodian, and (iii) situations where the adviser is in a capacity that gives it legal ownership of or access to the asset. The proposed rule's definition of "custody" would also include arrangements where the adviser has the discretionary authority to transfer beneficial ownership of the assets.

Enhanced Custodial Protections

The proposed rule would continue to generally require advisers with custody of client assets to maintain those assets with a custodian, but it would clarify that the custodian will be considered maintaining those assets only when it has "possession or control" of them. It would also require the adviser and custodian to enter into a written agreement that contains certain enumerated provisions, and it would require the adviser to obtain certain enumerated reasonable assurances in writing from the custodian.

Exception to Custodial Requirement for Privately Offered Securities and Physical Assets

The proposed rule would continue to apply an exception to the current rule's general requirement to maintain assets with a qualified custodian for certain "privately offered securities," but it would expand the exception to also apply to physical assets. But the proposed rule would impose various additional conditions on the adviser to rely on this exception, including, among other conditions, requiring the adviser to reasonably determine and document that ownership cannot be recorded and maintained in a manner in which a qualified custodian can maintain possession, or control transfers of beneficial ownership, of such assets.

Client Asset Segregation Requirement for Advisers

The proposed rule would also impose on advisers who have custody of client assets a new obligation to segregate client assets from the adviser's own assets by requiring the adviser to follow certain enumerated procedures in maintaining the client assets.

Change to Surprise Examination Requirement

The proposed rule would continue to generally require advisers with custody of client assets to arrange by written agreement for an independent public accountant to verify the assets through an annual surprise examination and follow certain enumerated procedures in doing so. But the proposed rule would allow the adviser to satisfy this requirement with respect to any advisory client entity assets if those assets are subject to annual audit and the client distributes its audited financial statements to investors (a mechanism for satisfying the surprise examination requirement currently available to advisers only for pooled investment vehicle client assets). The proposed rule would also provide two new exceptions to this requirement.

Updated Recordkeeping and Reporting Requirements

The rule proposal also seeks to update the recordkeeping requirements under Rule 204-2 of the Advisers Act and to amend Form ADV to align with the proposed rule's changes.

The Lowenstein Sandler Investment Management Group alert analyzing this proposed rule is available here. The text of the proposed rule can be found here. An SEC fact sheet accompanying the proposed rule can be found here.

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SEC Release of Three Simultaneous Rule Proposals Related to Cybersecurity

Synopsis: On March 15, 2023, the SEC issued three releases proposing (i) amendments to Regulation S-P ("Regulation S-P Proposal"), (ii) amendments to Regulation SCI ("Regulation SCI Proposal"), and (iii) new Rule 10 under the Exchange Act ("Proposed Rule 10"), which would affect the cybersecurity-related compliance obligations of investment advisers, broker-dealers, and other financial industry participants in various ways.

Status: The three proposals would apply to specific financial industry participants and impose numerous requirements to address the risks of cybersecurity failures.

Regulation S-P Proposal

Regulation S-P currently applies to brokers, dealers, investment companies, and SEC-registered investment advisers. The Regulation S-P Proposal would, among other things, have the following effects:

- Require covered institutions to incorporate "incident response programs" in their policies and procedures to respond to the unauthorized access of customer information
- Extend the current Safeguards Rule under Regulation S-P (which requires covered institutions to implement policies to safeguard customer information) to also apply to registered "transfer agents"
- Require the Regulation S-P Safeguards Rule as well as the Disposal Rule (which requires covered institutions to securely dispose of consumer report information) to apply to all customer information in the covered institution's possession and all consumer information that the covered institution possesses for business purposes

Regulation SCI Proposal

Regulation Systems Compliance and Integrity ("SCI") currently governs "SCI entities" (certain self-regulatory organizations, alternative trading systems, plan processors, exempt clearing agencies, and competing consolidators) and their use of technology systems supporting their core securities market functions. The Regulation SCI Proposal, among other things, would have the following effects:

- Expand the definition of SCI entity to also include certain registered security-based swap data repositories, registered broker-dealers exceeding an asset or transaction activity threshold, and additional clearing agencies exempted from registration
- Require SCI entities to establish policies and procedures with certain enumerated features that are reasonably designed to ensure their SCI systems maintain their operational capacity in light of the risk of cybersecurity events

Proposed Rule 10

Proposed Rule 10 would apply to broker-dealers, clearing agencies, major securities-based swap participants, the Municipal Securities Rulemaking Board, national securities associations, national securities exchanges, security-based swap data repositories, security-based swap dealers, and transfer agents that each meet specific requirements (collectively, "market entities"). It would require those entities to, among other things, adopt policies and procedures reasonably designed address cybersecurity risks specific to their businesses. Certain of those market entities that meet the heightened definition of "covered entities" (each market entity having its own criteria for qualifying as a covered entity) must have those policies cover certain elements enumerated in the proposed rule.

The Lowenstein Sandler Investment Management Group alert analyzing these proposals is available here. The text of the Regulation S-P Proposal is available here, the text of the Regulation SCI Proposal is available here, and the text of Proposed Rule 10 is available here.

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SEC Rulemaking Calendar

Synopsis: On January 4, 2023, the SEC released its Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions ("Reg Flex Agenda"), which reflects the SEC's rulemaking priorities for the 2023 calendar year. The Reg Flex Agenda references rules that are in both the proposed and final rule stages and provides associated time frames for their respective publications.

Status: The Reg Flex Agenda reveals that a significant number of rules are scheduled to become final in either the spring or the fall of this year. The rules span a variety of topics, and many are relevant to investment advisers and private funds, including, for example, the rules addressing private fund advisers, amendments to Form PF, changes to beneficial ownership reporting, and the clarified definition of "dealers" under the Exchange Act (all covered in more detail below). The complete list of rules set forth in the Reg Flex Agenda is available here.

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Finalization of New Rules for Private Fund Managers and Amended Annual Review Requirements

Synopsis: In February 2022, the SEC proposed a number of rules seeking to impose new obligations on advisers to private funds. Those proposed rules were covered by a Lowenstein Sandler client alert published in February 2022 and, per the Reg Flex Agenda, are scheduled to become final in April 2023.

Status: The proposed rules consist of the following:

- Proposed Rule 211(h)(1)-2 ("Quarterly Statement Rule") would require a private fund adviser to distribute a quarterly statement to the underlying investors in each private fund the adviser manages within 45 days of the relevant quarter-end. The statement would contain a detailed accounting of all fees and expenses paid by the private fund to the adviser, information regarding compensation or other amounts paid by the private fund's portfolio investments/companies to the private fund adviser or any of its related funds, and certain information regarding the performance of the private fund.
- Proposed Rule 206(4)-10 ("Mandatory Private Fund Adviser Audits Rule") would require a private fund adviser to cause the private funds it advises to undertake a financial statement audit at least annually and upon liquidation.
- Proposed Rule 211(h)(2)-2 ("Adviser-Led Secondaries Rule") would require a private fund adviser to obtain a fairness opinion in connection with a secondary transaction (i.e., a transaction in which existing investors are offered the option to sell or exchange their interests in the private fund for interests in another vehicle) that the adviser proposes to lead. It would also require the adviser to prepare and distribute to investors a summary of any material business relationships between the opinion provider and the manager within the past two years in order to enable investors to assess any potential conflicts of interest associated with the opinion.
- Proposed Rule 211(h)(2)-1 ("Prohibited Activities Rule") sets forth a list of activities and practices by private fund advisers that the SEC believes are contrary to the protection of investors and would thus be prohibited by the rule. The list includes, among other activities, an adviser charging fees and expenses to a private fund or its portfolio investments/companies for unperformed services and fees associated with an examination or investigation of such adviser.
- Proposed Rules 211(h)(2)-3(a)(1) and (2) ("Preferential Treatment Rule") would prohibit a private fund adviser from providing preferential terms (typically found in side letters) to particular investors unless disclosures are made to current and prospective investors. Under the rule, a private fund adviser would be prohibited from (i) providing information about the portfolio holdings or exposures of a private fund if the adviser reasonably expects that providing such information would have a material, negative effect on the other investors and (ii) providing preferential terms relating to redemptions to an investor in a private fund that the adviser reasonably expects to have a material, negative effect on other investors or a substantially similar pool of assets.

- A proposed amendment to Rule 206(4)-7(b) under the Advisers Act, applicable to all SEC-registered investment advisers, would require such advisers to document in writing their annual review of compliance policies and procedures.

The Lowenstein Sandler Investment Management Group alert addressing these proposed rules is available here. The proposal setting forth these proposed rules is available here.

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Amended Form PF Requirements for Private Fund Managers

Synopsis: In January 2022, the SEC released a proposal seeking to amend Form PF to, among other changes, require certain private fund advisers to file current reports after certain reporting events. On August 10, 2022, the SEC proposed amendments to Form PF designed to enhance the Financial Stability Oversight Council's ability to assess systemic risk as well as to bolster the SEC's regulatory oversight of private fund advisers and its investor protection efforts in light of the growth of the private fund industry.

Status: As proposed, the amendments would result in the following significant changes to Form PF and its associated filings requirements.

<u>New Current Reporting Requirement for Large Hedge Funds and Private Equity Funds</u>

The proposed amendments to Form PF would require private fund advisers having at least $1.5 billion in regulatory assets under management attributable to hedge funds to file current reports within one business day of the occurrence of any of the following reporting events:

- Extraordinary investment losses
- Significant margin and counterparty default events
- Material changes in prime broker relationships
- Changes in unencumbered cash
- Operations events
- Any event associated with withdrawals and redemptions

The proposed amendments would also require advisers to private equity funds to file current reports within one business day of the occurrence of any of the following reporting events:

- Execution of secondary transactions led by such advisers
- Implementation of general partner or limited partner clawbacks
- Removal of a private fund's general partner
- Termination of a private fund's investment period, or termination of a private fund

<u>Large Private Equity Fund Reporting</u>

The proposed amendments to Form PF would reduce the threshold for advisers reporting as large private equity advisers from $2 billion to $1.5 billion in private equity fund regulatory assets under management.

<u>Large Liquidity Fund Reporting</u>

The proposed amendments to Form PF would require advisers to large liquidity funds to report substantially the same information as money market funds (on Form N-MFP).

<u>Enhanced Reporting by Large Hedge Fund Advisers on Qualifying Hedge Funds</u>
The proposed amendments would enhance how large hedge fund advisers report investment exposures, borrowing and counterparty exposure, market factor effects, currency exposure reporting, turnover, country and industry exposure, central clearing counterparty reporting, risk metrics, investment performance by strategy, portfolio correlation, portfolio liquidity, and financing liquidity to provide better insight into the operations and strategies of these funds and their advisers and improve data quality and comparability.

<u>Enhanced Reporting on Basic Information About Advisers and the Private Funds They Advise</u>

The proposed amendments would require additional basic information about advisers and the private funds they advise, including identifying information, assets under management, withdrawal and redemption rights, gross asset value and net asset value, inflows and outflows, base currency, borrowings and types of creditors, fair value hierarchy, beneficial ownership, and fund performance to provide greater insight into private funds' operations and strategies, assist in identifying trends, including those that could create systemic risk, improve data quality and comparability, and reduce reporting errors.

<u>Enhanced Reporting Concerning Hedge Funds</u>

The proposed amendments would require more detailed information about the investment strategies, counterparty exposures, and trading and clearing mechanisms employed by hedge funds, while also removing duplicative questions, to provide greater insight into hedge funds' operations and strategies, assist in identifying trends, and improve data quality and comparability.

The Lowenstein Sandler Investment Management Group alert addressing the proposed amendments from January 2022 is available here. The SEC proposals setting forth these proposed amendments are available here and here.

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Changes to Regulation 13D and 13G Beneficial Ownership Reporting

Synopsis: In February 2022, the SEC proposed rules that would alter certain aspects of beneficial ownership reporting under sections 13(d) and 13(g) of the Exchange Act and Regulation 13D-G thereunder. These proposed rules were covered by a Lowenstein Sandler client alert published in February 2022 and, per the Reg Flex Agenda, are scheduled to become final in April 2023.

Status: The rules as proposed would have the following effects.

<u>Accelerated Filing Deadlines for Schedules 13D and 13G</u>

For Schedule 13D, the initial filing would be required within five (rather than ten) days of acquiring 5 percent beneficial ownership or losing Schedule 13G eligibility, and amendments would be required within one business day. Schedule 13G filing requirements would be similarly accelerated, depending on the type of filer.

Cash-Settled Derivative Securities

The amendments would deem holders of certain cash-settled derivative securities to be beneficial owners of the reference equity securities if the derivative is held with the purpose or effect of changing or influencing the control of the issuer. In addition, amendments to Item 6 to Schedule 13D would require disclosure of all interests in derivative securities (including cash-settled derivative securities) that use the issuer's equity security as a reference security.

Formation of "Group"

A person who shares information about an upcoming Schedule 13D filing that such person will be required to make, to the extent the information is not yet public and communicated with the purpose of causing others to make purchases, and a person who subsequently purchases the issuer's securities based on this information will be deemed to have formed a "group" within the meaning of Section 13 of the Exchange Act.

The Lowenstein Sandler Investment Management Group alert addressing these proposed rules is available here. The SEC proposal setting forth these proposed rules is available here.

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Changes to Definition of "Dealer"

Synopsis: In March 2022, the SEC proposed rules that would further define certain terms in the definitions of "dealer" in Section 3(a)(5) and "government securities dealer" in Section 3(a)(44) of the Exchange Act. These definitions would affect the market participants required to register as "dealers" and "government securities dealers" pursuant to sections 15 and 15C of the Exchange Act. Per the Reg Flex Agenda, these proposed rules are scheduled to become final in April 2023.

Synopsis: The operative concept in the definitions of dealer and government securities dealer under the Exchange Act that distinguishes them from unregulated traders is that dealers (and government securities dealers) are defined as engaging in buying and selling securities (or government securities) for their own accounts "as part of a regular business." Proposed rules 3a5-4 and 3a44-2 (the "proposed rules") would expand on these definitions to identify certain activities that would generally indicate the trading is part of the participant's regular business, thus requiring such participants to register as dealers or government securities dealers absent an exception or exemption.

The proposed rules would accomplish this by introducing three qualitative standards to assess whether the person is engaged in a regular business of buying and selling securities for its own account. Those standards consider whether the person is

1. "[r]outinely making roughly comparable purchases and sales of the same or substantially similar securities (or government securities) in a day";
2. "[r]outinely expressing trading interests that are at or near the best available prices on both sides of the market and that are communicated and represented in a way that makes them accessible to other market participants"; and
3. "[e]arning revenue primarily from capturing bid-ask spreads, by buying at the bid and selling at the offer, or from capturing any incentives offered by trading venues to liquidity-supplying trading interests."

Additionally, Proposed Rule 3a44-2, which would apply only to government securities dealers, would set forth a bright-line *quantitative* standard. That standard provides that a person who in each of four out of the past six calendar months engaged in buying and selling more than $25 billion of trading volume in government securities would be deemed to be buying and selling securities as part of a regular business irrespective of whether the person meets any of the above three qualitative standards.

The proposed rules would also provide clarification to the term "own account" in the definitions of dealer and government securities dealer by defining that term as any account (subject to certain exceptions) (i) "held in the name of that person"; (ii) "held in the name of a person, over whom that person exercises control or with whom that person is under common control"; or (iii) "held for the benefit of those persons identified in (i) and (ii)."

A market participant that is not currently registered as a dealer or a government securities dealer that comes within the scope of the proposed rules would need to, absent an exception or exemption, register with the SEC as such and become a member of a self-regulatory organization ("SRO"). This would involve filing Form BD with the SEC and completing the SRO's processes for new members.

The SEC proposal setting forth these proposed rules is available here.

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SEC Announces Enforcement Results for Fiscal Year 2022

Synopsis: In November 2022, the SEC issued a press release summarizing the results of its enforcement activity for fiscal year 2022. Enforcement activity resulted in a record high amount of ordered monetary penalties and spanned an array of alleged misconduct, including in relation to crypto, cybersecurity, ESG, and private funds.

Status: In fiscal year 2022, the SEC filed 760 enforcement actions, representing a 9 percent increase over the previous fiscal year. These actions included 462 new (or "stand alone") enforcement actions, 129 actions against issuers alleging they were delinquent in making required SEC filings, and 169 "follow-on" administrative proceedings seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions, or other orders.

Money ordered in the enforcement actions, comprising civil penalties, disgorgement, and prejudgment interest, totaled more than $6.4 billion. This is the largest amount on record in SEC history and represents an increase from approximately $3.85 billion in fiscal year 2021. Of the total money ordered, civil penalties totaled nearly $4.2 billion, which is also the highest on record.

Focus on Deterrence and Enhancing Public Accountability

In a number of actions, the SEC imposed certain prophylactic remedies and required admissions by respondents in an effort to deter future misconduct and enhance public accountability. The SEC cited a matter in which its remedy required a company to adopt and implement certain policies designed to effect compliance with certain provisions of the Securities Act and another matter in which its remedy required a company to admit findings in an SEC order acknowledging its conduct violated certain securities laws.

Individual Accountability

The SEC stated that in fiscal year 2022, more than two-thirds of the SEC's stand-alone enforcement actions involved at least one individual defendant or respondent. Those individuals included senior public company executives and senior individuals in the financial industry.

Use of Data Analytics

The SEC's Division of Enforcement utilized sophisticated analytic work to assist in a broad array of enforcement actions involving a wide variety of misconduct. In various alleged insider trading schemes brought to enforcement, the Division of Enforcement used data analytics to detect what it deemed to be suspicious trading patterns. The Division of Enforcement also reviewed and triaged more than 38,500 tips, complaints, and referrals submitted by the public, self-regulatory organizations, and others.

Whistleblower Rewards

The SEC issued approximately $229 million across 103 whistleblower rewards, the second-highest amount awarded (both in dollar amounts and number of awards) in a year on record. The SEC's whistleblower program also received a record high number of tips – more than 12,300. The release highlighted various ways in which the SEC sought to pursue individuals and entities that took steps to impede or retaliate against whistleblowers.

Breadth of Alleged Misconduct

The SEC emphasized that its enforcement actions spanned a wide variety of alleged violations and violators in the securities markets, including the following:

- **Financial Fraud and Issuer Disclosure.** The SEC continued to place a high priority on pursuing issuers who make materially inaccurate disclosures as well as auditors and other professionals who violate laws in connection with such disclosures.
- **Crypto.** The release states the SEC remains focused on the rapidly evolving crypto assets securities space and plans to increase its staffing dedicated to this area.
- **Cybersecurity and Compliance.** The SEC brought significant enforcement actions concerning failures by major firms to comply with core obligations concerning recordkeeping and safeguarding customer information.
- **ESG.** The release noted that ESG concerns have grown increasingly important to many investors and that as a result, the SEC has focused its attention on these issues with respect to public companies and investment products and strategies. The release states the efforts dedicated to this area even led to a number of enforcement actions.
- **Private Funds.** The release noted that recent years had experienced significant growth in the amount of assets managed by advisers to private funds and that unique features of private fund investment may lend themselves to certain recurring issues, including undisclosed conflicts of interest, fees and expenses, valuation, custody, and controls regarding material nonpublic information.

The full text of the SEC's press release is available here.

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CFTC Releases Annual Enforcement Results

Synopsis: On October 20, 2022, the CFTC released its annual enforcement results for its fiscal year 2022, demonstrating its continued commitment to protecting customers and ensuring market integrity. The CFTC brought 82 enforcement actions in total, yielding more than $2.5 billion in restitution, disgorgement, and civil monetary penalties either through settlement or litigation.

Status:

Digital Assets:

- The CFTC brought 18 actions involving conduct related to digital assets, representing more than 20 percent of all actions filed during FY 2022.

Manipulative and Deceptive Conduct and Spoofing

- The CFTC brought its largest benchmark manipulation case to date, with penalties and disgorgement amounts totaling $1.186 billion.

Recordkeeping and Supervision

- The CFTC found the swap dealer and futures commission merchant ("FCM") affiliates of 12 financial institutions committed recordkeeping and supervision violations, and it imposed a total of $796 million in civil monetary penalties.

Violations by Registered Entities

- The CFTC found a registered designated contract market ("DCM ") committed multiple violations, including failure to conduct controls testing and sufficient internal and external penetration testing; failure to conduct adequate enterprise technology risk assessments; options and swaps reporting violations; false statements to the CFTC; and violation of a DCM core principle that among other things, contains requirements relating to the reliability, security, and adequate scalable capacity of operations and automated systems.
- The CFTC found a registered DCM failed to obtain required written acknowledgment letters from a depository stating the depository was informed that funds deposited are customer funds being held in accordance with the Commodities Exchange Act ("CEA") and to restrict the use of such funds.
- The CFTC found a registered swap execution facility ("SEF") failed to comply with the CFTC's 15-second delay requirement for certain required transactions on a SEF order book.

Misappropriation of Material Non-Public Information

- The CFTC charged an employee with misappropriating confidential natural gas block trade order information from his employer and directing natural gas block trades to a brokerage firm in exchange for a share of the brokerage

commissions charged to his employer for these trades. The complaint also charged the employee with making false statements to the CFTC.
- The CFTC charged an introducing broker ("IB") and an associated person ("AP") with misappropriation of block order information and unauthorized trading. The CFTC alleged the IB brokered trades without customers' knowledge or consent, while the AP traded on the opposite side of brokerage customers, intentionally offered non-true market prices, and misled customers to believe they were negotiating and trading against third parties.
- The CFTC charged defendants for receiving tipped confidential block trade order information belonging to an energy company from a trader at that company and, in turn, trading on the basis of this information, including entering into non-arm's-length, fictitious block trades in natural gas futures on the basis of this information. The CFTC alleged the scheme generated more than $1.5 million in trading profits, which the defendant shared with both the energy company trader and the broker involved in the scheme.

Swaps Reporting and Swap Dealer Business Conduct

- The CFTC found a provisionally registered swaps dealer ("SD") committed swaps reporting failures; failed to comply with SD Business Conduct Standards when it failed to disclose to its swaps counterparties certain material information; and committed a failure-to-supervise violation.
- The CFTC found a provisionally registered SD committed swaps reporting violations; adjusted daily mark disclosures being made to the relevant swap counterparties, contrary to the requirements of the CEA and CFTC regulations; and committed a failure-to-supervise violation.

Other Enforcement Actions: Fraud, Registration, Reporting, Wash Trading, Position Limit Violations

- The CFTC charged a hedge fund and its chief financial officer with engaging in a scheme to provide false or misleading material information and failing to provide such material information to swap counterparties of a private fund it managed, resulting in the swap counterparties collectively losing more than $10 billion.
- In a sweep, the CFTC filed five enforcement actions charging five entities with operating as unregistered FCMs. The CFTC alleges that all the respondents claim to be one of the leading platforms offering binary options, forex, and spreads, and they further claim to be regulated by the CFTC.
- The CFTC alleged defendants defrauded at least 14,000 retail forex customers worldwide and misappropriated at least $4.7 million of customer funds.
- The CFTC found that a state-owned entity and its affiliate engaged in violations involving certain futures, including wash trading violations, position limit violations, and reporting failures.

Whistleblower Program

- The CFTC's whistleblower program made history by issuing a record-breaking award of nearly $200 million to a single whistleblower, the largest whistleblower award ever granted under the Dodd-Frank Act by either the CFTC or the SEC. With that award and others, the total sanctions ordered in all whistleblower-related enforcement actions surpassed the $3 billion milestone.

The CFTC's press release detailing its enforcement results can be found here.

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SEC Adopts Amendments to Modernize Rule 10b5-1 Insider Trading Plans and Related Disclosures

Synopsis: On December 14, 2022, the SEC adopted amendments to Rule 10b5-1 under the Exchange Act and new disclosure requirements to enhance investor protections against insider trading. The amendments include updates to Rule 10b5-1(c)(1), which provides an affirmative defense to insider trading liability under Section 10(b) and Rule 10b-5. Collectively, the final rules aim to strengthen investor protections concerning insider trading and to help shareholders understand when and how insiders are trading in securities for which they may at times have material nonpublic information.

Status: The changes to the rule update the conditions that must be met for the 10b5-1 affirmative defense, including adopting cooling-off periods for persons other than issuers before trading can commence under a Rule 10b5-1 plan. They also add a requirement that all persons entering into a Rule 10b5-1 plan must act in good faith. The amendments further provide that directors and officers must include certain representations in their plans. The use of multiple overlapping trading plans is restricted. The amendments also require more comprehensive disclosure about issuers' policies and procedures related to insider trading.

The final rules require disclosure of issuers' policies and practices for the timing of options grants and the release of material nonpublic information.

Section 16 reporting persons will be required to comply with the amendments to Forms 4 and 5 for beneficial ownership reports filed on or after April 1, 2023. Issuers will be required to comply with the new disclosure requirements in Exchange Act periodic reports on Forms 10-Q, 10-K, and 20-F and in any proxy or information statements in the first filing that covers the first full fiscal period that began on or after April 1, 2023. The final amendments defer by six months the date of compliance with the additional disclosure requirements for smaller reporting companies.

The final rule is available here, and the SEC's press release discussing the adoption of the final rule is available here.

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The SEC's Management Fee Offset and Step-down Enforcement Actions

Synopsis: Given the SEC's evergreen focus on management fee offsets and step-downs and the new proposed rules, investment advisers should expect to see the SEC examine their management fee offset and step-down disclosure policies and procedures.

Status: The SEC's focus on management fee offsets and other calculations is not new, having been highlighted in various SEC risk alerts from 2018 to 2022. In a recent client alert, we detailed recent enforcement actions with respect to management fee offsets and management fee step-downs. Although the summaries also highlight certain remedial actions that the SEC viewed favorably, investment advisers should focus on building a robust and tailored compliance program, an issue that in and of itself is on the SEC's radar. This compliance program should include, among other things, disclosures, policies, and procedures related to the calculation of fees, allocation of expenses, management fee offsets, and management fee step-downs to help avoid the expense and reputational damage of an enforcement action in the first place.

The SEC has examined and will continue to examine investment advisers' practices and associated disclosures with respect to management fee offsets, step-downs, and calculations. In that vein, the common themes with respect to these enforcement actions include, among others, (a) a failure to disclose fee arrangements and other conflicts, (b) a failure to properly follow disclosures, and (c) a failure to have written policies and procedures in place to help avoid and/or mitigate (a) and (b). Investment advisers should pay careful attention to these trends and should continue to make every effort to examine their business and other practices with respect to management fee offsets, step-downs, and calculations. More specifically, investment advisers should ensure that they provide their investors with full and fair disclosure with respect to their management fee offset, step-down, and calculation practices and compensation to advisers or related persons and expense allocations; they have policies and procedures in place to help ensure that disclosures are actually being followed; and the relevant parties (both internal and external) are aware of the disclosures, policies, and procedures as applicable. That said, these items should be only one piece of a more robust and specifically tailored compliance program. In addition to being disclosed in offering documents and Form ADV, there should be policies and procedures in the compliance manual. Furthermore, investment advisers should consider including review of the associated policies and procedures and ensuring management fee offsets and step-downs are calculated properly as part of their annual compliance review, mock exams, and conflict and risk assessments.

Investment advisers should continuously monitor these programs and constantly strive to improve them. As new funds launch and as operations, personnel, and business strategies continue to change, investment advisers should conduct ongoing compliance reviews and continuously update disclosures, policies, and procedures as appropriate.

The Lowenstein Sandler Investment Management Group alert analyzing the SEC's management fee offset and step-down enforcement actions is available here.

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DOL Proposed Changes to the QPAM Exemption for Managing ERISA Assets

Synopsis: On July 26, 2022, the U.S. Department of Labor ("DOL") released a proposal to amend Prohibited Transaction Class Exemption 84-14, known as the qualified professional asset manager ("QPAM") exemption. The QPAM exemption allows investment managers that meet the requirements for QPAM status to engage in a variety of transactions that may otherwise be prohibited by the Employee Retirement Income Security Act of 1974 ("ERISA") or the Internal Revenue Code.

The proposal contemplates significant changes to the QPAM exemption, including an increase in minimum capitalization and asset-under-management requirements to qualify as a QPAM; requires QPAMs to register with the DOL; and requires that agreements between QPAMs and their clients be amended to include specific indemnity terms and other contractual provisions. The proposal does not contain any grandfathering provisions for existing

QPAMs, which could be problematic for investment managers relying on the exemption.

Status: Investment managers relying upon the QPAM exemption should continue to be on the lookout for updates. The DOL allowed interested parties to submit comments to the proposal and held related hearings in November 2022. Most recently, on March 23, 2023, the DOL reopened the comment period for the proposal, which will close on April 6, 2023. We anticipate additional updates will be furnished by the DOL after the close of the comment period.

The Lowenstein Sandler Employee Benefits & Executive Compensation and Investment Management Group alert analyzing the proposed amendment is available here. The DOL proposal setting forth these proposed rules is available here.

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2022 Tax Developments and Future Considerations

Synopsis: The enactment of the Inflation Reduction Act ("IRA") introduced a number of changes, including a 1 percent excise tax on stock buybacks and a 15 percent corporate minimum tax. In 2022, the IRS and the Treasury Department introduced new final and proposed regulations under the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA"). In addition, a 2023 Supreme Court decision has limited the imposition of penalties for non-willful failures to file Form 114, Reporting of Foreign Bank and Financial Accounts ("FBAR").

Status: On August 16, 2022, the IRA was signed into law. For taxable years beginning after December 31, 2022, the IRA imposes a new 1 percent excise tax on domestic corporations that repurchase stock that is traded on an established securities market if such corporation repurchases more than $1 million of stock in a taxable year. In determining the applicability of this excise tax, the amount of stock repurchased is netted against the amount of stock issued by the corporation for each taxable year. For purposes of this rule, repurchases are redemptions or economically similar transactions, such as acquisitive reorganizations, Type E recapitalizations and Type F reorganizations, spin-offs, and complete liquidations to which both sections 331 and 332 apply. Most complete liquidations and distributions by a distributing corporation of stock of a controlled corporation are not repurchases under these rules. In most instances, these rules reduce the relative tax advantage of buybacks over dividends and, where shareholders are tax-exempt, create a preference for dividends.

For taxable years beginning after December 31, 2022, the IRA also introduced a new 15 percent corporate alternative minimum tax on adjusted financial statement income that is generally applicable to large corporations with average annual financial statement income exceeding $1 billion.

In December 2022, the IRS and the Treasury Department introduced new final and proposed regulations under FIRPTA. In general, a holder of an interest in a domestically-controlled qualified investment entity ("QIE") is not subject to FIRPTA tax or withholding. In determining whether a QIE is domestically-controlled, new proposed regulations provide for a look-through of certain entities (e.g., partnerships, S corporations, real estate investment trusts ("REITs"), Regulated Investment Companies ("RICs"), and trusts) and their owners, which would reduce the number of entities that are QIEs. Notably, these rules also would apply to non-publicly traded C corporations if foreign persons hold more than 25 percent of the fair market value of the corporation's outstanding stock. If finalized, these rules would prevent a non-U.S. person from investing through a wholly owned U.S. corporation in order to cause a REIT or a RIC to be domestically controlled. In addition, the proposed regulations introduce new requirements regarding historic ownership of U.S. real property interests ("USRPIs") that must be satisfied in order for a qualified foreign pension fund or a qualified controlled entity to be a "qualified holder" exempt from the application of FIRPTA. Final regulations provide for classification of a foreign partnership that is owned entirely by qualified holders as a "withholding qualified holder;" such partnerships are not subject to FIRPTA withholding on dispositions of USRPIs.

Another recent development stems from the U.S. Supreme Court's decision in *Bittner v. United States*, 143 S. Ct. 713 (2023). On February 28, 2023, the Supreme Court held that the $10,000 maximum penalty for the non-willful failure to file an FBAR should be calculated per report and not per account. Generally, the Bank Secrecy Act requires U.S. persons to file an FBAR annually listing any foreign financial accounts in which the U.S. person has an interest or over which it has authority, where the combined value of all foreign accounts exceeds $10,000. The maximum penalty for any non-willful violation is $10,000. Before the Supreme Court's decision, the definition of "violation" and the basis pursuant to which penalties were to be assessed in the case of non-willful violations was unclear. In *Bittner*, the Supreme Court held that in the case of a non-willful violation, the failure to file a legally compliant report constitutes one violation for purposes of the $10,000 penalty, regardless of the number of foreign accounts that would have been disclosed on such report. This decision settles a split among circuit courts and provides a significant limitation on the liability of taxpayers who non-willfully have failed to file an FBAR to report their interest in foreign financial accounts.

The Lowenstein Sandler Tax Group alert analyzing the implications of the IRA is available here. The slip opinion of the Supreme Court's decision in *Bittner v. United States* is available here.

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COMPLIANCE CHECKLISTS

PRIVATE INVESTMENT FUNDS AND THEIR ADVISERS

- ☐ **Conduct periodic review of compliance policies.**
- ☐ **Provide/collect new issues certifications regarding whether funds/investors are "restricted persons."**
- ☐ **Conduct periodic review and update of offering documents.**
- ☐ **Consult counsel regarding annual Form D amendments and blue-sky and local securities matters in connection with offers or sales.**
- ☐ **Make certain Schedule 13G filings within 45 days of calendar year-end (e.g., February 14, 2023 for filings due in 2023).**
- ☐ **File Schedule 13G year-end amendments within 45 days of calendar year-end (e.g., February 14, 2023 for filings due in 2023).**
- ☐ **File Schedule 13H year-end amendments within 45 days of calendar year-end (e.g., February 14, 2023 for filings due in 2023).**
- ☐ **Amend Schedule 13H quarterly as applicable.**
- ☐ **File Form 13F within 45 days of quarter-end (e.g., by February 14, May 15, August 14 and November 14 for filings due in 2023).**
- ☐ **File BE-12 Survey Form for 2022 by May 31, 2023.**
- ☐ **File Form PF quarterly updates and annual updates.**
- ☐ **Conduct periodic review of Section 13 and Section 16 filings.**
- ☐ **Conduct periodic review of other BEA and TIC forms.**
- ☐ **Monitor compliance with 25 percent ERISA limitation with respect to benefit plan investors.**
- ☐ **Prepare annual VCOC Certification (if required) for benefit plan investors.**
- ☐ **Prepare Form 5500 Schedule C fee disclosures for ERISA plan investors.**
- ☐ **Prepare year-end audits and distribute financial statements as appropriate.**
- ☐ **Collect annual holdings reports and annual certifications from access persons and other personnel.**
- ☐ **Renew "bad actor" questionnaires, and conduct placement agent verifications.**
- ☐ **Conduct annual training of personnel.**
- ☐ **Update conflict assessments and risk assessments.**
- ☐ **Conduct periodic anti-money laundering verifications (e.g., OFAC verifications).**
- ☐ **Reevaluate state privacy obligations.**
- ☐ **Distribute privacy notices, if required.**

Discussion:

Compliance Policies. The compliance and operating requirements pertaining to registered investment advisers and unregistered advisers (including exempt reporting advisers) have continued to merge, and more and more unregistered managers are adopting best practices and upgrading their compliance policies to meet the demands of regulators and/or investors. Whether your firm is currently federally registered or will be required to register in the future, you should review your compliance policies periodically to verify that they are adequate and appropriately tailored to your business risks and that your firm is adhering to them.

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

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

Form D Amendments and Blue Sky and Local Securities Matters. You should continue to inform counsel of all offers or sales of fund interests. Ongoing offerings may necessitate an amendment to a private fund's Form D (typically required on an annual basis on or before the first anniversary of the most recent notice previously filed). Additionally, offers to U.S. persons may trigger filing obligations in a given investor's state of residence, while offers to foreign persons may require filings in the country of an investor's residence.

Beneficial Ownership Reporting Requirements. Certain Schedule 13G filings pursuant to sections 13d-1(b) and 13d-1(d) of the Exchange Act are required to be filed within 45 days of calendar year-end (e.g., by February 14, 2023 for filings due in 2023). If you have filed Schedule 13G previously and the information reflected in the schedule is different as of calendar year-end from that previously reported, you are generally required to have amended the schedule within 45 days of calendar year-end. Form 5 must be filed within 45 days of the end of the issuer's fiscal year-end (e.g., for issuers with a December 31, 2022 fiscal year-end, by February 14, 2023 for filings due in 2023). All relevant Section 13 and Section 16 filings should be reviewed periodically to ensure they are current and complete.

BEA and TIC Forms. Firms should periodically review the Bureau of Economic Analysis ("BEA") and Treasury International Capital ("TIC") forms and filing requirements applicable to such firm.

BEA

BEA forms include a benchmark form, an annual form, a quarterly report, and a transaction form. Benchmark forms are required if the criteria described in such forms are met, even if the reporter is not contacted by the BEA. A response to the reporting requirements of the BE-13 (survey of new foreign direct investments in the U.S.) is also required whether or not a reporter is contacted by the BEA. Note that the BEA has also issued special reporting instructions for private funds, such that reporting on some BEA forms is only due if the private funds themselves have 10 percent voting ownership of operating companies (as opposed to, for example, only reporting a U.S. entity holding the general partner interests of a foreign limited partnership that serves as a private fund).

- **Form BE-10: The Benchmark Form.** A BE-10 report is required of any U.S. reporter that had a foreign affiliate – that is, that had direct or indirect ownership or control of at least 10 percent of the voting stock of an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise. The last benchmark form was filed in 2020 for the fiscal year ending in 2019. The next benchmark form will be due in May 2025 for the fiscal year ending in 2024.
- **Form BE-12: The Benchmark Form.** The benchmark form BE-12 is a comprehensive survey of the value of foreign direct investments in the U.S. The BE-12 is filed every five years; the last BE-12 covered the fiscal year ending in 2017. The next benchmark form is due by May 31, 2023, for the fiscal year ending in 2022. The BEA form is available here. All entities subject to the reporting requirements must file, even if they are not contacted by BEA.
- **Form BE-180: The Benchmark Form.** The benchmark survey is filed every five years. A U.S. person (including an individual or an entity) is required to make a BE-180 filing if the U.S. person (1) is a "financial services provider" and (2) had either combined sales to or combined purchases from foreign persons of "financial services" that exceeded $3 million during the relevant fiscal year. The last benchmark survey was due September 30, 2020, for the 2019 fiscal year. The next benchmark form will be due on September 30, 2025, for the fiscal year ending in 2024.
- **Form BE-13: Survey of New Foreign Direct Investments in the U.S.** The purpose of the survey of new foreign direct investment in the United States is to capture new investment transactions when a foreign direct investment relationship is created or when an existing U.S. affiliate of a foreign parent establishes a new U.S. legal entity, expands its U.S. operations, or acquires a U.S. business enterprise. The initial report must be filed no later than 45 days after the date of the investment transaction. A U.S. entity is required to report if (1) it is acquired or established by a foreign person or entity resulting in the creation of a foreign direct investment relationship or (2) it is an existing U.S. affiliate of a foreign parent and establishes a new U.S. legal entity, expands its U.S. operations, or acquires a U.S. business enterprise. Foreign direct investment is defined as the ownership or control, directly or indirectly, by one foreign person of 10 percent or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest of an unincorporated U.S. business enterprise, including a branch.

TIC

- **Form S: Report of Purchases and Sales of Long-Term Securities by Foreign Residents.** Form S was a monthly report filed by all U.S.-resident entities that purchase from or sell long-term securities directly to foreign residents to provide data on foreigners' purchases and sales of all long-term securities, including equities and shares of mutual funds. Form S was discontinued as of January 31, 2023, but institutions that previously filed the form are required to keep records for three years to respond to any potential inquiries regarding historical submissions.
- **Form SLT: Report of Aggregate Holdings of Long-Term Securities by U.S. and Foreign Residents.** Form SLT is a monthly report filed by all U.S. persons who are U.S.-resident custodians (including U.S.-resident central securities depositories), U.S.-resident issuers, or U.S.-resident end-investors whose consolidated total of all reportable long-term U.S. foreign securities is a fair value equal to or more than $1 billion on the last business day of the reporting month. Form SLT must be filed no later than the 23rd calendar day of the month following the report as-of date. If the $1 billion threshold is met in any month, reporting is required for the remainder of the calendar year.
- **Form SHC: Report of U.S. Ownership of Foreign Securities, Including Selected Money Market Instruments.** Form SHC is a benchmark survey filed approximately every five years. Reporters must provide detailed security-by-security information on their holdings of foreign securities. The reporting requirement applies to significant U.S.-resident custodians of foreign securities and U.S.-resident investors holding securities without using U.S.-resident custodians. The most recent survey was due March 4, 2022 (data as of December 31, 2021).

- **Form SHL: Report of Foreign Residents' Holdings of U.S. Securities, Including Selected Money Market Instruments.** Form SHL is a benchmark survey filed approximately every five years; the report is used to gather information on foreign residents' holdings of U.S. securities, including money market instruments, to provide aggregate information to the public on foreign portfolio investments, and to meet international reporting commitments. The next full survey will be as of June 30, 2024, with reports expected to be due no later than the last business day of August 2024.

Form 13H. Section 13(h) of the Exchange Act established a reporting system and filing requirements for "large traders," i.e., persons effecting transactions in certain securities in amounts equal to 2 million shares or $20 million (determined by fair market value of the shares) in one calendar day, or 20 million shares or $200 million in one calendar month. Persons meeting these thresholds must file Form 13H no later than 10 days after the identifying activity level is reached. Amended filings must be effected promptly after the end of a calendar quarter during which any of the information contained in Form 13H becomes outdated or inaccurate. Large traders may file amended filings more often than quarterly but are not required to do so. Annual amendments (regardless of the number of amended filings previously effected) are due within 45 days of the end of each calendar year (e.g., by February 14, 2023 for filings due in 2023). Persons may now satisfy both the amended fourth-quarter filing and the annual update to Form 13H, as long as such filing is made within the period permitted for the fourth-quarter amendment (i.e., promptly after the fourth quarter's end).

Form 13F. Section 13(f) of the Exchange Act requires "institutional investment managers" with investment discretion over $100 million or more of certain equity securities to file quarterly reports on Form 13F. Form 13F must be filed within 45 days of the end of each calendar quarter (e.g., by February 14, May 15, August 14, and November 14 for filings due in 2023). An initial Form 13F must be filed at the end of the first year in which an institutional investment manager exceeds the $100 million threshold.

Form PF. Many smaller private advisers and large private equity advisers will be required to file an annual update to Form PF by April 30, 2023 (120 days after the end of their fiscal year). Quarterly updates to Form PF are required of large hedge fund advisers within 60 days after the end of their fiscal quarter (e.g., for advisers with a December 31, 2022 fiscal year-end, by March 1, May 30, August 29, and November 29 for filings due in 2023) and large liquidity fund advisers within 15 days after the end of their fiscal quarter (e.g., for advisers with a December 31, 2022 fiscal year-end, by January 15, April 15, July 15, and October 15 for filings due in 2023).

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

Annual VCOC Certification. Annual VCOC Certification. Prior to investing in a venture fund or a private equity fund, ERISA plan investors often require the fund to provide an annual VCOC certification stating that the fund qualifies as a VCOC. A venture fund or a private equity fund that qualifies as a VCOC will not be deemed to hold plan assets subject to ERISA even if equity participation by benefit plan investors exceeds the 25 percent threshold (described above). In general, a fund will qualify as a VCOC if (i) at any time during the fund's annual valuation period at least 50 percent of the fund's assets (other than short-term investments pending long-term commitment or distribution to investors), valued at cost, are invested in venture capital investments in operating companies for which the fund has management rights, and (ii) the fund, in the ordinary course of its business, actually exercises substantial management rights with respect to one or more of the operating companies in which it invests on an annual basis.

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

Year-End Audit. All necessary year-end audits must be completed so that funds can distribute financials to investors on a timely basis as required by relevant governing documents and, in certain instances, as required to comply with the Custody Rule under the Advisers Act and/or CFTC requirements.

Annual Holdings Reports and Annual Certifications. The beginning of the calendar year is a good time for investment advisers to have all "access persons" provide their annual holdings reports regarding securities ownership required pursuant to Rule 204A-1 of the Advisers Act. It is also a good time to have all personnel provide their annual certifications of compliance with firm policies and conflict-of-interest questionnaires.

"Bad Actor" Questionnaires and Placement Agent Verifications. The beginning of the calendar year is a good time to have certain personnel and service providers (e.g., directors of offshore private funds) recertify their status with respect to the SEC's "bad actor" rules in order to rely on the private placement exemption under Rule 506. This bad actor certification is often combined with the annual certification of compliance with firm policies discussed above. It is also a good time to have placement agents recertify their status with respect to such rules and certain other disciplinary matters.

Conduct Annual Training of Personnel. As a best practice under the Advisers Act, investment advisers should hold annual training sessions with existing employees to remind them of their obligations under the firm's compliance manual and code of ethics.

Update Conflict Assessments and Risk Assessments. As a best practice under the Advisers Act, investment advisers should annually reevaluate their "conflict assessment" and "risk assessment" (i.e., evaluation of how the firm's activities, arrangements, affiliations, client base, service providers, conflicts of interest, and other business factors may cause violations of the Advisers Act or the appearance of impropriety) to determine that new, evolving, or resurgent risks are adequately addressed.

Periodic Anti-Money Laundering Verifications. Private investment funds and their advisers have ongoing anti-money laundering compliance obligations that necessitate periodic verifications, the frequency of which depend on such funds' and advisers' operations. The beginning of the calendar year is a good time to assess such obligations and to conduct renewed verifications, such as comparing investor bases with the U.S. Treasury Department's OFAC lists.

Privacy Notices. In accordance with applicable federal law, investment advisers and investment funds must have a privacy policy in place. In addition to being provided at the time of initial subscription, privacy notices must generally be distributed at least annually, and more frequently if there are any changes to the policy/notice. An exception provides that annual notice is not required where an adviser or fund (i) only shares nonpublic personal information ("NPPI") with nonaffiliated third parties in a manner that does not require an opt-out right be provided and (ii) has not changed its policies and practices with regard to disclosing NPPI since its most recent distribution of its privacy notice. Advisers and funds should periodically determine whether they can rely on this exception and review their privacy notices. We believe that the best time for the annual distribution of the notice, if required, is with a fund's annual financial statements and/or tax reports. Additionally, state privacy laws and regulations such as the California Consumer Privacy Act may subject investment advisers and investment funds to additional and/or more stringent privacy requirements.

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REGISTERED INVESTMENT ADVISERS AND EXEMPT REPORTING ADVISERS (WHERE INDICATED)

- ☐ **Prepare annual updating amendments to Form ADV (for registered investment advisers and certain "Exempt Reporting Advisers").**
- ☐ **Review new issue status of clients and investors.**
- ☐ **Deliver Form ADV Part 2A (or portions thereof) to clients and fund investors (for registered investment advisers).**
- ☐ **Review Form ADV Part 3 (Form CRS) updates and delivery requirements.**
- ☐ **Comply with state annual filing requirements.**
- ☐ **Review investment adviser representative state law compliance.**
- ☐ **Conduct periodic review of compliance policies and code of ethics.**
- ☐ **Comply with custody rule annual surprise examination.**
- ☐ **File Form 13F within 45 days of quarter-end (e.g., by February 14, May 15, August 14 and November 14 for filings due in 2023).**
- ☐ **Distribute privacy notices, if required.**
- ☐ **Prepare Form 5500 Schedule C fee disclosures for ERISA plan accounts.**
- ☐ **Comply with ERISA Section 408(b)(2) fee disclosure requirements for Covered Plans.**
- ☐ **Conduct periodic vendor due diligence updates, including in respect of proxy advisory firms.**

Discussion:

Annual Updating Amendments to Form ADV. An investment adviser that (i) is registered with the SEC or (ii) is considered an "exempt reporting adviser" (i.e., an investment adviser relying on the private fund adviser exemption or the venture capital adviser exemption), in each case as of December 31, 2022 (and with a December 31, 2022 fiscal year-end), must have filed an annual updated amendment of items on the form by March 31, 2023.

Review New Issue Status of Clients/Investors. Investment advisers should review the new issue status of clients and investors on an annual basis.

Deliver Form ADV Part 2. An investment adviser that is registered with the SEC and whose Form ADV Part 2A has materially changed since such adviser's last annual amendment must deliver either an amended Part 2A (which must include a summary of such material changes) or a summary of such material changes (which must include an offer to provide a copy of the amended Part 2A). Although such delivery requirements expressly apply only to "clients" (as defined in federal securities laws), we recommend that advisers to private funds deliver such items to their fund investors. Such items must be delivered within 120 days of the end of the adviser's fiscal year (e.g., by April 30, 2023 for advisers with a December 31, 2022 fiscal year-end for 2023).

Review Form ADV Part 3 (Form CRS) Update and Delivery Requirements. An investment adviser that is registered with the SEC must amend its Form ADV Part 3 within 30 days whenever any information therein becomes materially inaccurate by filing an additional other-than-annual amendment or by including such amended information as part of an annual updating amendment. An investment adviser firm must deliver the most recent Form ADV Part 3 to each new retail investor before or at the time of entering into an investment advisory contract and to each existing retail investor before or at time when (i) a new account is opened that is different than the retail investor's existing account, (ii) the investment adviser firm recommends that the retail investor roll over assets from a retirement account into a new or existing account or investment, or (iii) the investment adviser firm recommends new investment advisory service.

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

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

Custody Rule Annual Surprise Examination. With certain limited exceptions, where the adviser (or its related person) possesses or may possess client funds and securities, the adviser is required to undergo an annual surprise examination by an independent public accountant.

Form 5500 Schedule C Fee Disclosures. Advisers managing ERISA plan accounts are required to disclose certain fee-related information necessary for plan administrators to complete Schedule C to the plan's annual report on Form 5500 in advance of the date such annual report is required to be filed.

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

Vendor Due Diligence Updates. As part of an effective third-party risk management program, advisers are encouraged to implement an effective due diligence process with respect to service providers utilized by the adviser, consisting of both an initial due diligence assessment and periodic reviews thereafter. Such periodic reviews may include tailored certifications from the vendor in light of the services provided by each such vendor; review of the vendor's regulatory history, public filings, registrations, and licenses (as applicable); a review of the vendor's financial statements; and (as necessary) conference calls and on-site visits. Advisers should document the due diligence process and results.

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COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

- ☐ **Registered commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") must conduct annual regulatory compliance reviews and complete certain regulatory requirements, which include preparation of annual questionnaires and annual registration updates (applies to registered CPOs and CTAs).**
- ☐ **National Futures Association ("NFA") Member CPOs must prepare and file certain portions of NFA Form PQR within 60 days of year end (e.g., by March 1, 2023 for filings due in 2023).**
- ☐ **Prepare and file certain portions of Form CTA-PR within 45 days after the end of the calendar quarter for CTAs who are NFA Members (e.g., February 14, May 15, August 14, and November 14 for filings due in 2023), and 45 days after the end of the calendar year for other CTAs (e.g., February 14, 2023 for filings due in 2023).**
- ☐ **Annual affirmation of CPO registration exemption under sections 4.5, 4.13(a)(1)-(3), or 4.13(a)(5) or exemption from CTA registration under Section 4.14(a)(8) by March 1.**
- ☐ **Review CPO delegations in connection with annual pool financial statement filings.**
- ☐ **Annual NFA Bylaw 1101 diligence.**

Discussion:

Annual Compliance Reviews/Regulatory Requirements. Registered CPOs and CTAs must conduct annual compliance reviews. These reviews and requirements include (i) the preparation and filing with the NFA of Annual Questionnaires and Annual Registration Updates within 30 days of the anniversary date of their registration; (ii) completion of the NFA's Self-Examination Checklist; (iii) sending privacy policies to every current customer, client, and pool participant; (iv) testing disaster recovery plans and making necessary updates; (v) providing ethics training to staff, and inspecting the operations of branch offices; (vi) for registered CPOs, preparation of Pool Quarterly Reports within 45 days after the end of the year (and within 45 days after the end of each quarter); and (vii) for registered CTAs that are NFA members, the filing of Form CTA-PR, required within 45 days after the end of the year (and within 45 days after the end of each quarter). Finally, unless the applicable fund(s) qualify for an exemption, registered CPOs and CTAs must update their disclosure documents periodically, as they may not use any document dated more than 12 months prior to the date of its intended use. Disclosure documents that are materially inaccurate or incomplete must be promptly corrected, and the correction must be promptly distributed to pool participants. The NFA's Notice to Members regarding these regulatory compliance matters is available here.

Prepare and File Portions of NFA Form PQR. NFA Member CPOs must file NFA Form PQR within 60 days of year end (e.g., by March 1, 2023 for filings due in 2023).

Prepare and File Portions of Form CTA-PR. CTAs are required to have completed Form CTA-PR within 45 days after the end of the calendar quarter for CTAs who are

NFA Members (e.g., February 14, May 15, August 14, and November 14 for filings due in 2023), and 45 days after the end of the calendar year for other CTAs (e.g., February 14 for filings due in 2023).

Annual Affirmation of CPO or CTA Exemption. Each person who has filed a notice of exemption from CPO registration under sections 4.5, 4.13(a)(1)-(3), or 4.13(a)(5) or exemption from CTA registration under Section 4.14(a)(8) must have affirmed such notice of exemption within 60 days of calendar year end (e.g., March 1, 2023 for affirmations due in 2023) through the NFA's exemption system.

Review of CPO Delegations. All CPO delegation agreements entered into by registered CPOs must comply with specific criteria set forth by the CFTC and must be retained as part of the relevant CPO's records. As part of their annual pool financial statement filings through the NFA website, CPOs should ensure that all necessary CPO delegations are in place and appropriately documented.

NFA Bylaw 1101 Diligence. NFA Bylaw 1101 prohibits NFA members from conducting futures-related business with nonmembers that are required to be registered with the CFTC but have not done so. Members should compare their list of exempt CPO/CTAs with which the member transacts (including investors in pools) to the information NFA makes available. Members can review exemption information either by using the NFA's BASIC system or by accessing a spreadsheet (found in the member's Annual Questionnaire) that includes a list of all persons or entities that have exemptions on file with NFA that must be affirmed on an annual basis. Members transacting with a person that previously claimed an exemption from CPO/CTA registration and has not filed a notice affirming the exemption, not filed a notice of exemption for another available exemption, or not properly registered and become an NFA member by December 31 of each year should promptly contact such person to confirm whether the person will file a notice affirming the exemption. If the person does not intend to file a notice affirming the exemption or the person does not, in fact, file an affirmation within 60 days of year-end (e.g., by March 1, 2023 for affirmations due in 2023), then the member must promptly obtain a written representation as to why the person is not required to register or file a notice of exemption and evaluate whether the representation appears adequate. If the member determines that this written representation is inadequate and the person is required to be registered, then the member must cease transacting with the person

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RECENT PUBLICATIONS AND COMMENTARY

Below are links to recent articles and publications featuring or authored by members of the Investment Management Group.

CLIENT ALERTS AND NEWSLETTERS

- **"Investment Advisers, Broker-Dealers, and Other Financial Industry Participants Take Note: SEC Demonstrates Commitment to Cybersecurity With Three Simultaneous Rule Proposals"**
  Investment Management Client Alert
  Scott H. Moss, Michael J. Scales
  March 29, 2023

- **"Getting Acquainted with the FDIC Claims Process Now to Protect Your Deposits in the Future"**
  Anti-Money Laundering Client Alert
  Rossie E. Turman III, Diana Ingallinera Faillace, Jimmy Kang, Samantha Sigelakis-Minski
  March 23, 2023

- **"Silicon Valley Bank Fallout: Navigating and Managing the Account Opening Processes at Other Financial Institutions"**
  Anti-Money Laundering Client Alert
  Rossie E. Turman III, Diana Ingallinera Faillace, Jimmy Kang, Samantha Sigelakis-Minski, Christopher D. Williams
  March 16, 2023

- **"Legal Trading Agreements: As Important Now as in 2008"**
  Investment Management Client Alert
  Boris Liberman, Karen R. Abraham
  March 15, 2023

- **"SEC Proposes to Redesignate Custody Rule as New Safeguarding Rule Under the Investment Advisers Act"**
  Investment Management Client Alert
  Scott H. Moss, Boris Liberman, Michael J. Scales
  March 6, 2023

- **"The SEC and Management Fee Offset and Step-down Enforcement Actions–Not Without Warning"**
  Investment Management Client Alert
  Scott H. Moss, Jeremy Cantor
  February 28, 2023

- **"AML Best Practices for Private Fund Managers: The Prudence of Establishing an AML Compliance Program"**
  Investment Management Client Alert
  Scott H. Moss, Diana Ingallinera Faillace, Jimmy Kang, Samantha Sigelakis-Minski
  February 17, 2023

- **"SEC Releases 2023 Examination Priorities for Registered Investment Advisers and Broker-Dealers"**
  Investment Management Client Alert
  Scott H. Moss, Ethan L. Silver, William Brannan, Vincent R. Scala
  February 16, 2023

- **"SEC Publishes New Guidance on Advertising Gross and Net Performance"**
  Investment Management Client Alert
  Scott H. Moss, David L. Goret, Farah Z. Hussain
  January 18, 2023

- **"SEC Releases Risk Alert Regarding Compliance Issues With Identity Theft Prevention Programs Under Regulation S-ID"**
  Investment Management Client Alert
  Scott H. Moss, Vincent R. Scala
  December 13, 2022

- **"Use of Alternative Data in Investment Community Shows No Signs of Slowing, According to New Survey by Lowenstein Sandler's Investment Management Group"**
  Lowenstein Sandler LLP
  Scott H. Moss, Boris Liberman, George Danenhauer
  November 29, 2022

- **“SEC Proposes Rule Requiring Service Provider Due Diligence and Monitoring by Registered Investment Advisers”**
  Investment Management Client Alert
  Scott H. Moss, Zachary D. Furnald, Vincent R. Scala
  November 21, 2022

- **“Regulators Crack Down on the Use of Messaging Apps as Wall Street Banks and Investment Advisers Hit With $1.8 Billion in Fines”**
  Investment Management and White Collar Criminal Defense Client Alert
  Robert A. Johnston Jr., Scott H. Moss, Arik Hirschfeld, Zachary D. Furnald, Nicholas D. Velez
  October 6, 2022

- **“Strengthened SEC Enforcement Activity is a Reminder that Investment Advisers Must Ensure their Practices and Procedures are Current and Compliant”**
  Investment Management Client Alert
  Scott H. Moss, Michael G. Gordon
  September 30, 2022

- **“Plan Fiduciaries, Including Investment Advisers and Fund Managers, Take Note – U.S. Department of Labor Proposes Enhanced QPAM Requirements”**
  Employee Benefits & Executive Compensation and Investment Management Client Alert
  Andrew E. Graw, Megan Monson, Scott H. Moss
  August 4, 2022

- **“SEC Proposes Rules to Enhance ESG Disclosures by Advisers and Registered Funds”**
  Capital Markets & Securities and Investment Management Client Alert
  Scott H. Moss, Kate Basmagian, David L. Goret, Daniel C. Porco, Zachary D. Furnald
  June 15, 2022

UPCOMING EVENTS

Below is information regarding upcoming events sponsored by or featuring members of the Investment Management Group. For more information regarding any of these events, please contact events@lowenstein.com.

GAIM Ops Cayman
April 24, 2023
Grand Cayman
Managing the Latest SEC Developments
Marie T. DeFalco, moderator

MFA Legal & Compliance
May 2, 2023
New York, NY
Examinations: The SEC Outlook
Scott H. Moss, moderator
Custody Proposals/What Makes an Acceptable Custodian
Boris Liberman, moderator

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