

## INVESTMENT FUNDS ALERT

### ANNUAL COMPLIANCE OBLIGATIONS OF INVESTMENT FUNDS CLIENTS

As the new year begins, we would like to take this opportunity to remind you of your annual compliance obligations, many of which apply regardless of whether you are registered with the Securities and Exchange Commission (SEC). We encourage our investment management clients to consider regulatory filings and document update requirements and best practices applicable to their operations, which we have set forth below.

### SEC FORM D AND BLUE SKY FILING REQUIREMENTS

Issuers that offer or sell interests in hedge funds, private equity funds or other pooled investment vehicles (collectively, "Fund" or "Funds") are required to file a Form D with the SEC and amend such Form D pursuant to Rule 503 of Regulation D under the Securities Act of 1933, as amended. On February 6, 2008, the SEC adopted amendments to Rule 503 and Form D that, among other things, revise Form D disclosures and mandate the use of a new electronic filing system. Generally, these amendments (1) revise Form D to require disclosure of information related to continuous offerings, such as the date of first offering and the expected length of offering, (2) clarify when Form D amendments are required, (3) require annual Form D amendments for continuing offerings regardless of the initial filing date and (4) require the electronic filing of Form D on the new online filing system. Funds have been permitted to voluntarily file Form D electronically since September 15, 2008, and will be required to file Form D electronically using the revised version and to comply with the new amendment requirements beginning on March 16, 2009. Until March 16, 2009, Funds may make paper filings using the current version of Form D.

Accordingly, all Funds that are engaged in a continuing offering will be required to file an annual amendment to their Form Ds on the revised electronic form on March 16, 2009, unless a Fund filed a Form D or amended its Form D within the

previous 12-month period (in which case, it will have to file an annual amendment on the first anniversary of such filing or amendment). We recommend that any Fund clients that do not currently have electronic filing codes contact us prior to March 2, 2009, so that we may obtain such codes on your behalf.

Additionally, clients who manage Funds should consider whether there are any state “blue sky” filing obligations in connection with the offering or sale of interests in the Funds. The applicable state laws of most jurisdictions require blue sky filings for the sale of Fund interests. The deadline for such filings is generally 15 days after the date of the first sale of interests in any particular jurisdiction (with a few limited exceptions, such as New York and Idaho, that may require pre-sale filings). State blue sky filings consist of a Form D and some combination of a Form U-2 and payment of a filing fee. New York requires an additional disclosure document (Form 99). Please note that a few jurisdictions have no blue sky filing requirements, while others have exemptions from blue sky filing requirements for certain categories of investors, such as institutional accredited investors.

You should be aware that pursuant to Rule 507 of Regulation D, in the event that the SEC were to take action against a Fund for failure to timely file Form D, the Fund may be ineligible to rely upon the Regulation D exemption from registration of the offering in the future. In addition, some states impose monetary fines for late filings.

## **U.S. FEDERAL TAX CHANGES**

On October 3, 2008, President George W. Bush signed into law the Emergency Economic Stabilization Act of 2008 (H.R. 1424), which adds Section 457A to the Internal Revenue Code of 1986, as amended. Section 457A significantly restricts fee income deferral techniques commonly utilized by managers of offshore hedge funds for services rendered after December 31, 2008. Because many offshore hedge funds were structured to accommodate the tax benefits of fee income deferrals, the new restriction renders many existing fee arrangements and related fund structures tax inefficient relative to other alternatives. Section 457A may also impact the manner in which side pocket arrangements are structured for offshore hedge funds. Fund managers are urged to re-evaluate compensation arrangements and fund structures with the assistance of tax counsel to ensure tax optimization in light of the new restrictions imposed by Section 457A.

## **RESTRICTED NEW ISSUES**

Pursuant to FINRA Rule 5130 (previously NASD Rule 2790), a member of the Financial Industry Regulatory Authority, Inc. (FINRA) is prohibited from selling a “new issue”—defined to include many securities sold pursuant to an initial public offering or an offering circular—to any client, unless such member has received a representation from its client within the previous 12 months that the client is not

a “restricted person,” and restricted persons do not have more than a de minimis ownership in said client. In order to comply with the annual representation requirements in good faith, advisers should reconfirm that the “restricted person” status of investors in their affiliated Funds has not changed since the certification made in the subscription documents. This annual certification may be obtained through “negative consent” letters.

## **FORM ADV UPDATES**

SEC-registered investment advisers (and most state-registered investment advisers) are required to update Form ADV and file Part I of Form ADV with the SEC and with individual state regulators, if applicable. Among other things, the adviser must update assets under management, number of clients and potential conflicts of interest. Updates are generally due electronically on the SEC’s Investment Adviser Registration Depository (IARD) system within 90 days of the adviser’s fiscal year end. This requirement is in addition to the adviser’s ongoing obligation to update Form ADV promptly to reflect material changes in the adviser’s business. Advisers must deliver or offer in writing to deliver an updated copy of their Form ADV Part II to clients on an annual basis.

## **PRIVACY POLICY UPDATE**

Investment advisers, commodity pool operators and commodity trading advisers, whether registered or not, are subject to SEC, Commodity Futures Trading Commission (CFTC) and/or Federal Trade Commission regulations governing the privacy of certain confidential information. Advisers should deliver their privacy policy, along with Fund subscription materials, to each new investor and update the policy as necessary. Additionally, advisers must distribute the policy at least once during each 12-month period. Although advisers may define the 12-month period, they must apply the definition consistently. Selecting and adhering to a fixed date for distribution each year will help ensure compliance. Advisers should also review their procedures related to client information to ensure that clients’ or investors’ private information is protected as disclosed in their privacy policy.

## **U.S. SECURITIES FILINGS**

Listed below are regulatory filings that your firm may be required to file in the United States. You should also review similar types of filing requirements in all foreign jurisdictions in which you have business operations or conduct investment activities.

### ***Schedules 13D and 13G***

The preparation and filing of Schedules 13D and 13G with the SEC should be on your mind if you exercise investment discretion or voting power over more than 5 percent of the outstanding equity securities of U.S. publicly traded issuers. If you have reached the 5 percent threshold, please contact us

to assist you in determining your filing obligations. Generally, 13Gs are filed by passive investors, and 13Ds are filed where the investor may be or become active in trying to influence management or control of the issuer.

Rule 13d-2 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), provides that Schedule 13D must be amended promptly after any *material* change (which may include, among other things, a 1 percent or more change in ownership or a change in investment intent) occurs in the facts set forth in the previously filed schedule. Rule 13d-2 also provides that a person filing a Schedule 13G must amend the schedule within 45 days after the end of each calendar year if, as of the end of the calendar year, there are any changes in the previously reported information. With respect to Schedule 13G, an amendment need not be filed if *no* change has occurred, or if the only difference is caused by a change in the aggregate number of securities outstanding. Once an amendment has been filed reflecting beneficial ownership of less than 5 percent of a class of equity securities, no additional filings are required unless and until the reporting person again exceeds 5 percent beneficial ownership of the class of equity securities. This year’s Schedule 13G filings must be made by February 16, 2009.

### ***Section 16***

You may be subject to Section 16 of the Exchange Act and may be required to file reports on Forms 3, 4 or 5 if you hold beneficial ownership of more than 10 percent of any class of equity securities of U.S. publicly traded issuers, or if you are an officer or director of the same. Please contact us for assistance in determining whether you and/or your firm have such a filing obligation.

### ***Schedule 13F***

If your firm had investment discretion over \$100 million or more (by fair market value) of equity securities that are listed on the official list of 13F securities published by the SEC at <http://www.sec.gov/divisions/investment/13flists.htm>, as of the last day of any calendar month during 2008, then your firm is required to file four quarterly reports showing all long positions in such 13F securities as of December 31, 2008, and as of the close of the first three quarters of 2009. In determining whether your firm had discretion over \$100 million or more of 13F securities, the firm should aggregate each fund and other securities portfolios and accounts over which it exercises investment discretion excluding securities issued by a person that the firm “controls.” The report must be filed within 45 days after the relevant reporting date.

### ***Form SH***

Pursuant to Rule 10a-3T under the Exchange Act, institutional investment managers must file a Form SH, which reports any daily short sales and changes in short positions on a weekly basis. An

institutional investment manager's obligation to file Form SH begins immediately after filing a Form 13F. The Form SH filing must reflect the—

- number of 13(f) securities sold short during the day (except for short sales in options)
- opening short position and
- closing short position

for the security on each calendar day of the prior week in which the institutional investment manager engaged in trading.

Notwithstanding the above, an institutional investment manager need not report short positions or short sales if (1) the short position constitutes less than one quarter of 1 percent of the class of the issuer's Section 13(f) securities issued and outstanding and (2) the fair market value of the short position in the Section 13(f) securities is less than \$10 million.

The Form SH filing must be made on the last business day of each calendar week immediately following the calendar week in which any new short positions with respect to Section 13(f) securities (excluding options) were effected. A Form SH must be filed electronically through IDEA ("Interactive Data Electronic Applications," the successor database to EDGAR) as an XML tagged data file. Form SH is nonpublic to the extent permitted by law. Please contact us for assistance in determining your filing obligations.

## **ANTI-MONEY LAUNDERING POLICY**

Investment advisers should maintain and strictly adhere to written anti-money laundering policies and procedures and update such policies and procedures periodically for new money laundering threats. Additionally, advisers should review compliance programs to ensure compliance with the economic sanctions programs administered by the Office of Foreign Assets Control.

## **STATE REGISTERED AGENT AND ADDRESS**

Most states require the amendment of formation documents on file with the state if the entity changes address or registered agent. If you have recently moved and did not amend your entity's certificate of limited partnership, articles of incorporation, articles of formation, form qualification filings or other documents filed with the state, please check to ensure that your address is current with state regulatory agencies.

## STATE NOTICE FILINGS

Review your current advisory activities in the various states and confirm that all applicable state notice filings are made on IARD. Register or renew registrations in the applicable states of any of your professionals who qualify as “investment adviser representatives.” You should confirm that your IARD electronic account is adequately funded to cover expenses associated with annual registration renewals (for both the SEC and any states).

## PRIVATE PLACEMENT MEMORANDUM UPDATES

Review your private placement memorandum or other offering documents used in the offering of interests in your Fund for updates necessary to reflect changes to various regulations or changes in the business or operations of the Fund, including, for example, changes in investment objective or strategy, brokerage practices, key personnel, risk factors or other material provisions.

## INVESTMENT ADVISER COMPLIANCE BEST PRACTICES

### *Compliance Manual and Compliance Officer*

Federally registered investment advisers are required to have both an internal chief compliance officer and a compliance manual detailing the adviser’s internal regulatory compliance policies and procedures. Such advisers are also required to perform a risk assessment and update compliance procedures annually. Written evidence of these reviews should be retained.

The compliance procedures must include a code of ethics that establishes a standard of conduct in accord with the adviser’s duties and requires that supervised persons comply with the federal securities laws. Pursuant to an adviser’s code of ethics, certain supervised persons are required to submit a report of current securities holdings to the adviser’s chief compliance officer or other persons designated in the adviser’s code of ethics at least once during each 12-month period and transaction reports on a quarterly basis.

For additional guidance regarding compliance and other industry practices, all advisers may wish to review the Managed Funds Association’s *Sound Practices for Hedge Fund Managers*, which provides updates on valuation, risk management and responsibilities to investors, as well as a framework of internal policies, practices and controls. In addition, the Asset Manager’s Committee of the President’s Working Group on Financial Markets and the Alternative Investment Management Association (AIMA) have published guidelines for best compliance practices for fund managers. For a copy of the guidance provided by each of these organizations and a resource to help compare the guidance each of them has provided, please visit: <http://www.hedgefundmatrix.com>.

***Delivery of Annual Audit***

Pursuant to the rules governing custody of client's funds, registered investment advisers to Funds other than funds of funds must deliver audited financial statements to their investors within 120 days from the end of their fiscal year. Registered investment advisers to funds of funds must deliver audited financial statements to their investors within 180 days from the end of their fiscal year.

**PROXY VOTING POLICY**

Federally registered investment advisers are required to adopt written proxy voting policies designed to ensure that securities are voted in accordance with the best interests of their clients, and that material conflicts of interest are adequately addressed before exercising voting authority over their clients' securities. Registered investment advisers are required to disclose to clients how clients may obtain a list of the investment adviser's votes with respect to the client's securities. Advisers are additionally required to describe the proxy voting policies and provide the policies upon request to their clients. We suggest that federally registered investment advisers review their proxy voting policies to ensure that they are adequate and reflect their actual practice with respect to voting of client securities.

**COMMODITY POOL OPERATORS / COMMODITY TRADING ADVISORS*****Update of National Futures Association Registration Information***

Registered commodity pool operators (CPOs) or commodity trading advisors (CTAs) must update their National Futures Association (NFA) registration information via NFA's online registration system and pay annual NFA dues on or before the anniversary date that the CPO's or CTA's registration became effective. Failure to complete the review within 30 days following the date established by the NFA is deemed a request for withdrawal from registration that will become effective on the 30th day after the failure to complete the review.

***Complete NFA Self-Examination Questionnaire***

Registered CPOs and CTAs are required to complete and retain the NFA's "self-examination questionnaire" on an annual basis.

***Delivery of Annual Reports***

Registered CPOs are required to file certified annual reports for their pools with the NFA. Annual reports are due electronically through NFA's EasyFile system within 90 days of the pool's fiscal year end. Certified annual reports must also be distributed to the pool's participants within the above-stated deadline.



We encourage our clients to adopt compliance best practices in all aspects of their business, including the adoption and adherence to written compliance policies and procedures. Recent increases in regulatory scrutiny of the industry have made the need for these best practices all the more imperative.

For additional information on these and other topics relevant to your business please click [here](#). Akin Gump Strauss Hauer & Feld LLP is available at any time to advise and assist you with your compliance and update requirement needs.

## CONTACT INFORMATION

If you have any questions regarding this alert, please contact-

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