# Investment Funds Special Report

## Annual Compliance Obligations of Investment Funds Clients

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*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 filing 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 and sell interests in hedge funds, private equity funds or other pooled investment vehicles (each a "fund") are required to file a Form D with the SEC and amend their Form D filings on the anniversary of their last filing, if the offering is continuing. All Form Ds and Form D amendments must be filed using the SEC's electronic filing system.

General partners or managing members of 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 several jurisdictions have no blue sky filing requirements or deem the electronically filed Form D to satisfy state filing requirements, while others have exemptions from blue sky filing requirements for certain categories of investors, such as institutional accredited investors.

## INVESTMENT ADVISER COMPLIANCE REQUIREMENTS AND BEST PRACTICES

### Annual Compliance Review

SEC-registered investment advisers are required to perform a risk assessment review and update compliance policies and procedures on at least an annual 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" here, 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. Written evidence of the annual review should be reviewed by the firm's chief compliance officer with senior management of the firm and retained counsel.

### Changes to Custody Rule

The SEC's adoption of amendments to Rule 206(4)-2 under the Investment Advisers Act of 1940 (the "Amended Custody Rule") and related changes to Form ADV will become effective on March 12, 2010.

**Pooled Investment Vehicles.** SEC-registered investment advisers to hedge funds and other pooled investment vehicles will continue to be exempt from the annual surprise audit and quarterly statement delivery requirements for those clients if audited financial statements are delivered to all fund investors within 120 days or 180 days (for funds of funds) after the end of the fund's fiscal year. Starting with the audit relating to fiscal years beginning on or after January 1, 2010, the fund's financial statements will, however, be required to be audited by an independent accountant that is registered and subject to inspection by the Public Company Accounting Oversight Board (PCAOB) as of the commencement of the professional engagement period and as of each calendar year-end. A registered investment adviser will also now be required to conduct an audit upon dissolution of the fund and promptly deliver audited financial statements after the audit is completed. We encourage our SEC-registered investment adviser clients to confirm that auditors to affiliated investment funds are PCAOB-registered and -inspected accountants during this year.

**Managed Accounts and Internal Control Reports.** SEC-registered investment advisers to separately managed accounts holding private investment securities will likely be required to contract with an independent accountant for an annual surprise audit of these assets. For assets held with a qualified custodian, the qualified custodian will now be required to deliver statements to registered investment advisers' clients directly. Also, registered investment advisers who use related persons as qualified custodians will be required to obtain an internal control report.

**Policies and Procedures.** Registered investment advisers should update their compliance policies and procedures in light of the guidance provided by the SEC in connection with the Amended Custody Rule.

For more information on the Amended Custody Rule, see our January 6, 2010, alert, "Amendments to Custody Rule Will Not Require Annual Surprise Audit for Most Fund Managers," available here.

### Code of Ethics and Personal Trading

SEC-registered investment advisers are required to adopt a code of ethics that establishes a standard of conduct in accord with the adviser's fiduciary duties and requires that supervised persons comply with the federal securities laws, including restrictions on insider trading. 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 upon becoming an access person and at least once during each 12-month period thereafter, and submit transaction reports on a quarterly basis. Many codes require an annual attestation of acknowledgement of receipt and continued compliance with the code. Given the SEC's recent focus on insider trading, we recommend that all advisers review their codes to determine whether procedures designed to detect and prevent insider trading are adequate and, if necessary, offer additional training to appropriate staff members of their compliance obligations.

## FORM ADV UPDATE

SEC-registered investment advisers (and most state-registered investment advisers) are required to update their Form ADV and file Part I of Form ADV with the SEC and with individual state regulators, if applicable, electronically through the Investment Adviser Registration Depository (IARD) system within 90 days of the adviser's fiscal year-end.[1] Among other things, the adviser must update assets under management, number of clients and potential conflicts of interest. Registered investment advisers must deliver or offer in writing to deliver an updated copy of their Form ADV Part II to clients on an annual basis.

## RESTRICTED NEW ISSUES

Pursuant to FINRA Rule 5130 (formerly known as NASD Conduct 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 as an initial public offering—to any client, unless such member receives 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 interest in that client. In order to comply with the annual representation requirements in good faith, advisers should reconfirm that the "restricted person" status of investors in its affiliated funds has not changed since the certification made in the subscription documents. This annual certification may be obtained through "negative consent" letters.

## PRIVACY POLICY AND AFFILIATE MARKETING REQUIREMENTS

**Annual Update Requirement.** Investment advisers, commodity pool operators and commodity trading advisors, whether registered or not, are subject to SEC, Commodity Futures Trading Commission (CFTC) and/or Federal Trade Commission (FTC) regulations, as appropriate, governing the privacy of certain confidential information (the "Privacy Rules"). Under the Privacy Rules, covered persons are required to deliver a privacy notice, along with fund subscription materials, to each new client and update the policy notice as necessary. Additionally, the Privacy Rules require a privacy notice to be distributed at least once during each 12-month period. Given recent regulatory focus regarding the safeguarding of confidential information received from clients, advisers are encouraged to review related procedures to ensure that private information is adequately protected as disclosed in your privacy notice and as required under the Privacy Rules or state law.

**New Model Form.** On November 16, 2009, the FTC, National Credit Union Administration, Board of Governors of the Federal Reserve System, SEC, CFTC, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency and Office of Thrift Supervision jointly released a final model privacy notice form (the "Model Form") designed to make it easier for consumers to understand how financial institutions collect and share information about them. Persons subject to the Privacy Rules are provided a safe harbor from the privacy notice delivery requirement if they deliver a privacy notice that conforms to the Model Form. Safe harbors currently provided under the sample clauses employed in many current privacy notices will expire for notices posted or delivered on or after January 1, 2011. However, covered persons may continue to use forms of privacy notices outside of the safe harbor after that date so long as they contain the disclosure and opportunity to opt out required by the applicable Privacy Rules.

The Model Form contains a number of questions relating to how financial institutions treat their clients' personal information and credit report information. Advisers will be required to disclose whether they share their clients' personal information for certain purposes and whether clients can choose to opt out from allowing such disclosures. If you share certain types of information, such as providing creditworthiness information to affiliates or providing personal information to non-affiliates, you are required to provide an ability to opt out. Each question is designed as a stand-in for legal requirements and exceptions set forth in the SEC's Regulation S-P and S-AM.

As the Model Form is very regimented, including suggestions and requirements as to text size and layout, some clients may wish to continue to use a narrative form even after 2011 outside of the safe harbor. For a link to the Model Form and instructions, click here.

**Affiliate Marketing.** Effective on June 1, 2010, Regulation S-AM will, subject to certain exceptions, prohibit SEC-registered investment advisers, registered investment companies, broker-dealers and transfer agents from using credit report information regarding individuals received from affiliates for marketing solicitation purposes unless the use of information is clearly and conspicuously disclosed, and the relevant individual is provided an opportunity to opt out. The relevant opt-out may be combined with the privacy notice delivered in compliance with the Privacy Rules, including through the Model Form.

[1] In addition, a registered investment adviser must update its Form ADV promptly if certain information becomes inaccurate or the Form ADV is materially inaccurate.

## PROXY VOTING POLICY

SEC-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 SEC-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.

## 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

If you exercise investment discretion or voting power over more than 5 percent of any class of outstanding equity securities of a U.S. publicly traded issuer, you should consider preparing and filing a Schedule 13D or 13G with the SEC. 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 becomes, active in trying to influence management or control of the issuer. Schedule 13Gs are initially filed, depending on the registration status of the filing person, either 10 days after acquiring securities resulting in beneficial ownership of more than 5 percent, or 45 days after the end of the fiscal year, and Schedule 13Ds are filed within 10 days after an acquisition that results in ownership of more than 5 percent of the outstanding securities of a public issuer.

Rule 13d-2 under the Securities Exchange Act of 1934 (the "Exchange Act"), provides that a Schedule 13D must be amended promptly after any *material* change occurs in the facts set forth in the previously filed schedule (such as, among other things, a 1 percent or more change in ownership or a change in investment intent). 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, and within a specified period after the Schedule 13G filer increases its beneficial ownership above 10 percent or increases or decreases its ownership percentage by 5 percent thereafter. 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. This year's Schedule 13G filings must be made by February 16, 2010.

### Section 16

You and/or your firm 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 a U.S. publicly traded issuer, or if you are an officer or director thereof, including as a "director by deputization." 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 here as of the last day of any calendar month during 2009, then your firm is required to file four quarterly reports showing all long positions in such 13F securities as of December 31, 2009, and as of the close of the first three quarters of 2010. 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.

## HART-SCOTT-RODINO FILINGS

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"), subject to several exceptions, requires parties to transactions (including the purchase of publicly traded securities) that meet certain thresholds to file premerger notification forms with the FTC and the Department of Justice Antitrust Division. For the first time in the history of the HSR Act, the filing thresholds were adjusted lower this year. If a fund you manage is contemplating making an acquisition that would result in the ownership of voting securities or assets valued at $63.4 million or more using the HSR Act's valuation mechanics, you should contact us to discuss your filing obligations or the exemptions that may be applicable.

## ANTI-MONEY LAUNDERING POLICY

You 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, you should review compliance programs to ensure compliance with the economic sanctions programs administered by the Office of Foreign

Assets Control (OFAC). Maintaining an effective anti-money laundering program may be considered as a positive factor in assessing penalties for a violation of OFAC sanctions.

## STATE-REGISTERED AGENT AND ADDRESS

Most states require an amendment to the formation documents on file with the state if an 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 or other documents on file with the state, please ensure that your address is current with state regulatory agencies. If necessary, please file appropriate amendments.

## 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 and update, as necessary, your private placement memorandum or other offering documents used in the offering of interests in your fund 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.

## FBAR REPORTING

In general, any U.S. person having a financial interest in, or signatory or other authority over, a bank, securities or other type of financial account in a foreign country must file an Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), reporting such relationship by June 30 of the year following the year in which the relationship exists. In 2009, the IRS informally stated that U.S. investors in offshore investment companies, whether registered or unregistered, and U.S. persons with signatory authority over such investments, must file an FBAR.

On August 7, 2009, the Treasury Department released Notice 2009-62 (the "Notice"), which extends until June 30, 2010, the deadline for certain filings of FBAR for 2008 and prior years. This extension applies to two categories of persons: (1) those with no financial interest in a foreign financial account but with signature or other authority over the foreign financial account and (2) those with a financial interest in, or signature authority over, a foreign commingled fund. Absent additional relief, such persons will need to file FBARs for 2009, 2008 and prior years by the June 30, 2010, deadline.

In the Notice, the Treasury Department also stated that it is considering further guidance clarifying certain issues relating to FBAR. Thus, important changes in the FBAR requirements may be made prior to the June 30, 2010, filing date.

## 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 (including those who take advantage of disclosure exemptions under CFTC Regulation 4.7) are required to complete and retain the NFA's "self-examination questionnaire" on an annual basis.

### Delivery of Annual Reports

Registered CPOs (including CPOs exempt under CFTC Regulation 4.7) are required to file affirmed 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. If a CPO cannot obtain necessary information to prepare the reports, a CPO for a fund of funds may file a notice with the NFA to delay the filing of the annual reports for an additional 90 days, and the notice shall continue to be effective until the CPO files a certificate that it is no longer a fund of funds.

### Recent Amendments to Reports

The CFTC recently amended its rules on the content of annual and periodic reports for registered CPOs, including those who receive disclosure relief under Regulation 4.7. First, CPOs preparing annual reports under CFTC Regulation 4.7 or 4.22 for pools with multiple classes or series with limitations on liability between such classes or series may include only information for the class or series being reported, but net asset value and other financial information must be presented for both the pool as a whole, as well as for each pool with separate series or classes that are not structured with a limitation on liability. Second, CFTC Regulations 4.7 and 4.22 now permit the use of International Financial Reporting Standards (IFRS) in annual financial reports of registered CPOs of nonexempt pools and pools for which disclosure relief was granted in accordance with Rule 4.7, subject to certain conditions set forth in prior staff interpretive letters if such pools are organized under the laws of a foreign jurisdiction. Third, CFTC Regulations 4.7 and 4.22 now codify previous interpretations requiring the disclosure, in the notes to the financial statements, of the amounts of management and incentive fees and expenses indirectly incurred as a result of investing in any fund where the investment in the notes to the financial statements exceeded 5 percent of the pool's net asset value. Finally, CFTC Regulations 4.7 and 4.22 now require a "statement of operations" or "statement of operations and changes in net assets," respectively, in annual reports that (1) separately reflects any special allocations to a general partner or similar interest as an expense of the pool or as a separate allocation and (2) combines gains and losses from commodities trades with related non-commodities trades.

Two additional changes for reporting requirements do not apply to all registered CPOs. First, periodic reports to pools operated by CPOs under CFTC Regulation 4.7 may now disclose either the net asset value per outstanding participation unit in the pool or the total value of a participant's interest or share in the pool. Also, registered CPOs providing annual reports under CTFC Regulation 4.22 are now required to file the report within 90 days of ceasing trading, which may consist of an estimate with a later true-up report.

Finally, the CFTC also amended Regulation 4.13 to eliminate requirements for annual reports for exempt funds. Previously, Regulation 4.13(c)(2) required any CPO that was exempt under Regulation 4.13 and that distributed an annual report to participants in the relevant pool to (1) present and compute the numbers in the annual report in compliance with generally accepted accounting principles and (2) to have the report, if certified by an accountant, be certified in accordance with CFTC regulations. Both of these requirements have now been removed. For a link to the adopting release for the amendments, click here.

## PENDING LEGISLATION AND IMPACT

On December 11, 2009, the U.S. House of Representatives approved the Wall Street Reform and Consumer Protection Act of 2009 (the "Reform Act"), which includes the Private Fund Investment Advisers Registration Act of 2009 (PFIARA). PFIARA would, if enacted, (1) require many investment advisers to register with the SEC under the Advisers Act, (2) expand reporting requirements for investment advisers and (3) expand the SEC's discretion to interpret the Advisers Act.

Given that drafts of Senate versions of the financial reform legislation seem to contemplate similar registration requirements, unregistered investment advisers to private funds should consider devoting resources to their compliance practices now. In particular, investment advisers should consider (1) appointing or determining who would serve in the role of chief compliance officer, (2) reviewing existing disclosure documents to determine what additional disclosures would be required upon registration, (3) conducting a compliance risk assessment and (4) reviewing and revising, as necessary, existing compliance policies and procedures to ensure that required compliance mechanisms are in place (including proxy voting, codes of ethics and information security policies).

*Additional information on these and other topics relevant to your business are available here. Akin Gump Strauss Hauer & Feld LLP is available at any time to advise and assist you with your compliance and update requirement needs.*

**IF YOU HAVE ANY QUESTIONS REGARDING THIS SPECIAL REPORT, PLEASE CONTACT —**


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