FOLEY HOAG LLP

Important Dates and Reminders for Investment Advisers, Exempt Reporting Advisers, Commodity Trading Advisors and Commodity Pool Operators

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Investment Advisers

Annual Compliance Reviews

All investment advisers registered with the Securities and Exchange Commission ("SEC") or The Commonwealth of Massachusetts are required to review their compliance policies and procedures at least annually (and best practice is for any investment adviser, whether SEC or MA registered or not, to engage in such a review). Many advisers traditionally conduct this review in March of each year. Registered advisers should commence their annual reviews promptly and document the review process and the outcomes of the review.

Form ADV – Annual Amendment Due by March 31st; Delivery of Updated ADVs to Clients

Form ADV for registered advisers (Parts 1A, 1B (state registered advisers only) and 2A) and Exempt Reporting Advisers (relevant portions of Part 1A) with a December 31 fiscal year end must be updated by **March 31, 2017** through the Investment Adviser Registration Depository (IARD) website. In order to get credit for the filing, please select "*annual amendment*" when updating the form. Failure to update Form ADV could lead to registration or status as an Exempt Reporting Adviser being revoked.

In addition, registered investment advisers must deliver updated brochures (Part 2A) and brochure supplements (Part 2B) to all clients within 120 days after the end of the adviser's fiscal year.

Exempt Reporting Advisers – Monitoring of "Regulatory Assets Under Management"

Exempt Reporting Advisers are reminded to review their "regulatory assets under management" on a regular basis to ensure that any increase in regulatory assets under management does not trigger additional requirements, such as full registration with the SEC, or for State Exempt Reporting Advisers, the need to also become an SEC Exempt Reporting Adviser.

"Regulatory assets under management" should be calculated in accordance with Item 5.F of Form ADV and the accompanying instructions.

Form PF

Investment advisers registered with the SEC who manage private funds and have at least $150 million in regulatory assets under management attributable to "private fund assets" (as defined in the Form PF) are required to file a Form PF through the IARD website. Note, this may include assets of a separate account running a parallel strategy to a private fund managed by the adviser.

Large Hedge Fund Advisers (advisers with over $1.5 billion in hedge fund assets under management) must file quarterly within 60 calendar days after the end of each quarter, or by **March 1, 2017** for the quarter ended December 31, 2016. All other advisers must file annually within 120 days of the end of their fiscal year, or **by May 1, 2017** (as April 30, 2017 falls on a Sunday) for advisers with a December 31 fiscal year end. Advisers are cautioned to carefully review the definitions and the instructions for Form PF when

determining the amount of "private funds assets" and "hedge fund assets."

Advisers who have not yet started preparing their Form PF filings are encouraged to start this process promptly.

Registered Advisers to Funds – Delivery of Audited Financial Statements

Registered investment advisers relying on the "audited financials exception" to the account statement delivery and independent verification requirements of the Custody Rule must deliver such audited financial statements for their fund to investors within 120 days of the end of the fund's fiscal year. Please note that funds which are 4.7 pools for CFTC purposes have a 90-day deadline under CFTC rules (see below). The financial statements must be audited by an independent public accountant that is registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board. Advisers to funds of funds must deliver such statements within 180 days of the end of the fund's fiscal year.

Exempt Reporting Advisers – Delivery of Audited Financial Statements

Exempt reporting advisers in Massachusetts who manage private funds which rely on the exclusion from the definition of "Investment Company" set forth in Section 3(c)(1) of the Investment Company Act of 1940, as amended, which funds are not "venture capital funds" (as defined by the Massachusetts Securities Division), must deliver annual audited financial statements for the fund to each beneficial owner of any such fund.

Exempt reporting advisers qualified in other states should consult their counsel to determine any annual requirements in such states.

Privacy Policy

Generally, all investment advisers must circulate a summary of their privacy policy to advisory clients who are natural persons each year. However, the recently enacted highway bill (the FAST Act) included provisions providing an exception to the annual privacy notice distribution requirement if the following two criteria are met by the investment adviser:

1. The investment adviser does not share nonpublic personal information with nonaffiliated third parties (other than as permitted under certain enumerated exceptions); **and**
2. The investment adviser's policies and practices regarding disclosure of nonpublic personal information have not changed since the last distribution of its policies and practices to its advisory clients.

For more information, see our January 6, 2016 Foley Adviser.

Section 13(f) Filings

Investment advisers who are required to make quarterly Form 13F filings with the SEC must make such filings within 45 days after the end of each calendar quarter. The first of such filings for this year must be made by **February 14, 2017** using EDGAR. These filings are necessary if in the previous calendar year the adviser had under management at least $100 million in securities traded on U.S. securities exchanges (including NASDAQ). Failure to file Form 13F in a timely manner could lead to an enforcement proceeding by the SEC.

Section 13(g) Filings

The SEC permits "qualified institutional investors" (such as registered advisers) and "passive investors" (which may include non-registered advisers or funds managed by registered or non-registered advisers) who have five percent or greater beneficial ownership (a broadly defined concept that goes beyond just who owns the shares) of a class of registered equity securities to report this ownership on Schedule 13G, instead of the more demanding Schedule 13D. For "qualified institutional investors," an initial Schedule 13G must be filed using EDGAR within 45 days after the end of the calendar year if as of the close of business on December 31 its beneficial ownership exceeds 5% (i.e. by **February 14, 2017** with respect to positions from calendar year 2016). In addition, a registered adviser who files Schedule 13G as a qualified institutional investor must notify any person (such as a client) on whose behalf it holds five percent beneficial ownership of any transaction that such person may be required to report (for example, the acquisition of that five percent). For "passive investors," the initial Form 13G filing must be submitted within 10 days of the event which triggers the filing requirement.

With respect to both "qualified institutional investors" and "passive investors" an annual amendment is required to be filed within 45 days after the end of each calendar year to report any change in holdings for that year (i.e. by **February 14, 2017**). The annual amendment

should report holdings as of December 31. A copy of such filing should also be sent to the issuer.

Please note that both qualified institutional investors and passive investors must make additional filings upon certain changes in ownership or changes in investment purpose.

Form 13H Filings

Form 13H filings are required to be made by "large traders," which is defined under Rule 13h-1(a)(1) as a person or entity who directly or indirectly exercises investment discretion over one or more accounts and effects transactions in an aggregate amount equal to or greater than the "identifying activity level." The identifying activity level is defined as aggregate transactions in "NMS securities" that equal or exceed two million shares or $20 million during any calendar day, or 20 million shares or $200 million during any calendar month. The term "NMS securities" refers generally to exchange-listed securities, including equities and options.

Large traders must submit an initial Form 13H within 10 days of reaching the identifying activity level. An amended filing must be submitted promptly following the end of the calendar quarter in which any of the information contained in a Form 13H becomes inaccurate for any reason. Otherwise, large traders must make annual filings no later than 45 days after the calendar year end.

"New Issues Rules" – Annual Eligibility Verification

The New Issues Rules require FINRA members or their associated persons ("Members") to obtain within the twelve months prior to a sale of a new issue to an account holder, either from the account holder or its authorized representative, an affirmative written statement that the account is eligible to purchase new issues in compliance with the New Issues Rules. Members are required to verify this status on an annual basis. The initial verification of an account holder's status under the New Issues Rules must be a positive affirmation of the account holder's non-restricted status. However, the New Issues Rules allow Members to follow a "negative consent" process for annual verification of an account holder's status by sending a notice asking the account holder if there has been any change in its status. Unless an account holder affirmatively reports a change in status, the Member is permitted to rely on its existing information regarding a particular account holder. In many cases, Members rely on representations from investment managers who must, in turn, determine the eligibility status of separate account clients and investors in hedge funds. Investment managers investing in new issues should remember to undertake the annual verification as to new issues eligibility with their clients and investors.

Commodity Trading Advisors and Commodity Pool Operators

Form PQR

Registered Commodity Pool Operators ("CPOs") must file NFA Form PQR through the EasyFile system on the National Futures Association ("NFA") website within 60 days after the end of the quarters ending March, June and September. Reports for the quarter ending December 31 are due within 90 days of the calendar year end for Small (AUM <$150 million) or Mid-size CPOs (AUM >$150 million <$1.5 billion) and within 60 days of the calendar year end for Large CPOs (AUM> $1.5 billion). Each Form PQR filed after its due date will be subject to a late filing fee of $200 for each business day that it is late.

CPOs to 4.7 Pools – Delivery of Annual Audited Financials and Quarterly Account Statements

CPOs managing 4.7 pools must deliver to pool participants and file with the NFA certified (per the certification guidelines in Rule 4.7) annual reports that include audited financial statements within 90 days of the end of the fiscal year, or by **March 31, 2017** for advisers with a December 31 fiscal year end. CPOs of fund of funds can request an extension to up to 180 days after the end of the fiscal year to deliver and file these reports. CPOs to 4.7 pools must also deliver certified (per the certification guidelines in Rule 4.7) quarterly account statements to participants.

Annual Certification – 4.13(a)(3) and 4.14(a)(8)

Fund managers relying on the exemption from registration as a commodity pool operator with the CFTC set forth in Rule 4.13(a)(3), the so-called "de minimis exemption", and those relying on the exemption from registration as a commodity trading adviser with the CFTC set forth in Rule 4.14(a)(8) must reaffirm their claim of exemption or exclusion from registration each year. The annual affirmation may be made through the NFA's Exemption System and must be made within 60 days of the end of the calendar year, or by **March 1, 2017**. Failure to submit an affirmation by this deadline will result in a withdrawal of the exemption from registration.

Form PR

All registered Commodity Trading Advisers ("CTAs") must file NFA Form PR through the EasyFile system on the NFA website within 45 days after the end of the quarters ending March, June and September, and a year-end report within 45 days of the calendar year end. Each Form PR filed after its due date will be subject to a late filing fee of $200 for each business day that it is late.

NFA Bylaw 1101 Compliance

All registered CPOs and CTAs must have procedures in place to comply with NFA Bylaw 1101 which prohibits NFA members from conducting customer business with a non-NFA Member that is required to be registered with the CFTC. The procedures should include (1) the steps firm personnel will take to determine if an entity is required to be registered with the CFTC and to be an NFA Member and (2) a requirement that firm personnel review BASIC to verify that the entity is registered with the CFTC and an NFA Member (if registration and membership are required) or has an exemption from registration on file with the NFA. The procedures should also require firm personnel to document the review and maintain the documentation.

The NFA requires Members to take reasonable steps to confirm each year that previously exempt CPOs/CTAs with which a Member transacts customer business continue to be exempt by confirming that such parties have affirmed their exemptions on the NFA website within 60 days of the end of the calendar year. If the Member learns that a person does not intend to file a notice affirming an exemption or the person does not file a notice affirming the exemption within 60 days of the end of the calendar year, then the Member must promptly obtain a written representation as to why the person is not required to register or file a notice exemption, and evaluate whether the representation appears adequate based upon the information that the Member knows about the person. If the Member ultimately determines that the person's written representation is inadequate and the person is required to be registered, then the Member must put a plan in place to cease transacting customer business with the person or risk violating NFA Bylaw 1101.

Additional NFA/CFTC Requirements

On at least an annual basis, registered CPOs and CTAs must also:

- Complete an NFA Annual Questionnaire on the NFA website
- Complete the electronic Annual Registration Update
- Pay NFA dues on the anniversary date of the firm's registration
- Complete NFA's annual Self-Examination Questionnaire and affirmation
- Send the firm's Privacy Policy to every participant in a pool
- Test the firm's Disaster Recovery Plan and make any necessary adjustments
- Provide Ethics Training to firm employees
- Update the firm's Questionnaire as the firm's information changes, including for any pools that have liquidated

Other Reminders

Employee Confidentiality Provisions

Advisers are reminded that SEC Rule 21F-17(a) under the Exchange Act broadly prohibits any person from taking any action to "impede" any other person from reporting to the SEC any possible violation of federal securities law or regulation. In other words, the rule bars companies from doing anything that might "chill" whistleblowing. That has recently been interpreted to include, among other things, using blanket confidentiality language in employment agreements, employee handbooks and codes of conduct that states company information is confidential and must not be used or disclosed without permission from the company. In April 2015, the SEC brought its first enforcement action, *In the Matter of KBR, Inc.*, for a violation of Rule 21F-17(a).

Since then, former Chair Mary Jo White and former Office of the Whistleblower Director Sean McKessy have made clear that further enforcement actions will follow and that companies must promptly review – and if necessary, revise – all of their relevant materials. Moreover, the Boston Regional Office is now conducting a sweep exam focused on this issue, demanding that companies produce

materials concerning their compliance (or non-compliance) with Rule 21F-17(a) and what steps, if any, they have taken to ensure that they do not chill whistleblowing, even inadvertently. Further, the Defend Trade Secrets Act of 2016 (18 U.S.C. Section 1833(b)) requires that an employer notify its employees that confidentiality restrictions to which they are subject will not prohibit confidential disclosures of trade secrets to government officials and/or to attorneys, to the extent such disclosure is made to report suspected violations of the law. Revisions to employee documents and manuals may be warranted and we recommend reviewing these materials and implementing any changes which are necessary or advisable promptly.

Cybersecurity

Cybersecurity is arguably the current greatest focal point of the SEC and state regulators. The SEC has again included it as an area of examination focus for 2017. Managers that have not yet conducted a cybersecurity review or adopted a cybersecurity policy should do so. For more information, see our alerts dated April 24, 2014, June 18, 2014, April 29, 2015, September 18, 2015 and September 25, 2015.

Rule 506 – "Covered Person" (or "Bad Actor") Questionnaires

Investment advisers relying on Rule 506 of Regulation D in connection with the offering of private fund interests are reminded to collect updated "covered person" (or "bad actor") questionnaires from each of their covered persons on a regular basis. While no specific regulations have been issued indicating how frequently this information should be refreshed, industry guidance suggests that advisers should consider doing this as frequently as quarterly. "Covered persons" include, among others, the private fund, all directors, executive officers, general partners and managing members of the private fund, the investment manager of the private fund, placement agents, and any beneficial owner of 20% or more of the private fund's outstanding voting equity securities calculated on the basis of voting power, even if not a control person of the private fund. For additional information regarding who qualifies as a "covered person" and the "bad actor" requirements, please refer to our July 23, 2013 Securities Alert.

Annual Amendment to Form D

Investment advisers conducting ongoing offerings of securities in reliance on Rule 506 of Regulation D are reminded that an amendment to Form D is required to be filed with the SEC at least annually. In addition, various states require that a filing (sometimes together with a filing fee) be submitted annually or upon closure of any open offering.

FATCA and CRS

FATCA went into effect in 2014, and the due diligence requirements under FATCA have been completely phased-in. Accordingly, fund managers should ensure that the funds they manage have identified and documented their respective investors (e.g., collected and verified an IRS Form W-8 or W-9, as applicable, and any other required information, from each investor) and that they have policies and procedures in place to collect the appropriate information and documentation from new investors (if new investors can be admitted). U.S. funds that made withholdable payments (e.g., U.S.-source interest and dividends) to non-U.S. persons during 2016 will be required to file information returns with the IRS in March 2017, even if withholding was not required, and such funds may have withholding obligations with respect to withholdable payments made to certain non-U.S. investors during 2017. Non-U.S. funds may have registration and information reporting obligations (with respect to 2016) in their respective jurisdictions between April and July 2017.

The OECD Common Reporting Standard (CRS) began to be phased-in on January 1, 2016. CRS is substantially similar to FATCA, but it applies on a global scale in addition to FATCA. The due diligence and information reporting requirements under CRS are intended to expand upon the corresponding requirements under FATCA. For managers of funds in CRS jurisdictions (e.g., Cayman Islands, BVI, but not the United States), such funds are, or will be, required to identify and document their respective investors (e.g., collect and verify CRS Self-Certification Forms) and adopt policies and procedures relating to CRS compliance. Non-U.S. funds subject to CRS may have registration and reporting obligations (with respect to 2016) in their respective jurisdictions between April and July 2017.

Managers of funds with FATCA and/or CRS compliance obligations should consult with counsel and/or accountants immediately to determine what actions are required.

FBAR

Every U.S. person (including both individuals and entities) that had a financial interest in, or signature authority over, one or more non-U.S. financial accounts (e.g., bank accounts and mutual fund interests, but not equity interests in a hedge fund, private equity fund or other

private investment fund) during the prior calendar year must file an "FBAR" (Foreign Bank Account Report) with the U.S. Treasury if the aggregate value of such accounts exceeded $10,000 at any time during the prior calendar year. For this purpose, a U.S. person will be deemed to hold a financial interest in the non-U.S. financial accounts held by an entity or trust if such U.S. person owns, directly or indirectly, more than 50% of the voting power or value of such entity or trust. If an FBAR for 2016 is required, it must be filed electronically with the U.S. Treasury on or before April 18, 2017. The U.S. Treasury will grant filers failing to meet the FBAR due date an automatic extension to October 15, 2017; specific requests for this extension are not required. Failure to comply may expose a U.S. person to a civil penalty of up to $10,000. Willful violations may expose a U.S. person to an increased civil penalty of up to the greater of $100,000 or 50% of the aggregate high value of the accounts for the year in question, as well as criminal penalties.

Pay-to-Play

Advisers who manage assets of one or more government entities (whether as separate clients or investors in an investment fund managed by the adviser), or who engage placement agents to market to government entities are required to comply with the provisions of SEC Rule 206(4)-3, also known as the Pay-to-Play Rule. The Pay-to-Play Rule, which applies whether the Adviser is registered with the SEC or an exempt reporting adviser for SEC purposes, places certain restrictions on the type and amount of political contributions and/or services to political candidates, campaigns or PACs that may be made by an adviser or its affiliates (in certain circumstances including contributions made prior to becoming affiliated with the adviser), as well as placing restrictions on who an adviser may engage to solicit government entities on the Adviser's behalf. In addition, advisers subject to the Pay-to-Play Rule are required to maintain books and records to document their compliance with the rule. Any adviser that currently manages assets of any government entity, or that is or intends to market its services to any government entity, should consult with counsel to ensure adequate policies and procedures are in place for purposes of compliance with the Pay-to-Play Rule.

International Swaps and Derivatives Association Standard Documentation (ISDAs)

Advisers who use swaps are reminded of the various Dodd-Frank and European Market Infrastructure Regulation (EMIR) requirements. Every party to a swap must have a CICI/LEI number and should enter into the August DF Protocol, the March DF Protocol and, if an EU counterparty is involved, potentially several EMIR related protocols. Advisers with EU counterparties are also reminded to monitor the status of each fund they manage for NFC- or NFC+ Status and to update their EMIR NFC filing as needed. Finally, advisers should be mindful of whether particular swaps they are trading fall within the clearing requirements. Finally, with respect to uncleared swaps, the new variation margin rules go into effect March 1, 2017. Advisers who have not taken the necessary steps to update their credit support documentation should contact counterparties immediately to begin that process. Failure to have the necessary documentation in place before March 1 may leave an adviser unable to enter into new swaps.

EU Short Reporting

Advisers that deal in securities of issuers located in the European Union, or securities listed on EU exchanges, should be mindful of the EU short reporting rules (which generally require reporting of short positions of 2% or greater of an EU issuer). We have seen increased enforcement activity from EU regulators in this area in the past year. Advisers should note that swaps, ADRs and other derivative instruments may also be deemed "EU short positions" that must be reported.

EU Alternative Investment Fund Managers Directive (AIFMD)

As a reminder, the AIFMD went into full effect in July 2014. Managers who currently market or are looking to market a fund in the EU should consult EU counsel to determine what actions are required. Such consultation should occur well in advance of any anticipated marketing of a fund in the EU as registration under the AIFMD requires a few months to complete.

Form SLT

Treasury International Capital (TIC) Form SLT is required to be filed by certain custodians, investment advisers and investors. Reporting entities include an investment adviser that has $1 billion or more of "reportable securities" as of the last business day of the reporting month. Form SLT must be submitted by the reporting entity with at least $1 billion in reportable securities to the Federal Reserve Bank, no later than the 23rd calendar day of the month following the month of reporting. The Form may be submitted electronically, by mail or fax. Determining whether an adviser must submit this form is complex, and advisers with $1 billion or more in AUM are urged to consult with counsel if they are uncertain whether they should be making this filing.

Bureau of Economic Analysis (BEA) Reporting

All investment advisers, whether or not registered, should review their obligations for reporting to the Department of Commerce's Bureau of Economic Analysis. In particular, investment advisers should review their reporting requirements for the BE-13 Survey of New Foreign Direct Investments in the U.S. In addition, advisers should note that the five year BE-12 Benchmark Survey of Foreign Direct Investment will be due in 2018. For more detailed information on these BEA requirements please refer to our May 12, 2015 Foley Adviser.

Massachusetts Data Privacy Requirements

All investment advisers with offices in Massachusetts, whether or not registered as an investment adviser with The Commonwealth of Massachusetts, are reminded that they are required to comply with the Massachusetts data security law and the regulations thereunder (the "Regulations"). The Regulations require, among other things, that the adviser have a written Comprehensive Information Security Program and that the adviser provides training to its employees with respect to such policies. The most burdensome requirement of the Regulations is likely the requirement of encryption of all personal information stored on laptops or other portable devices and the encryption of all transmitted records and files containing personal information that will travel across public networks and encryption of all data containing personal information to be transmitted wirelessly. For more information regarding the requirements under the Regulations, please refer to our February 3, 2010 Alert.

General Updates to Fund Documents

All investment advisers, whether or not registered, are reminded that reviews of all fund documents should be undertaken on a periodic basis. Registered investment advisers may undertake this review as part of their annual compliance review. To the extent that such a review has not been undertaken during the last two years, it is recommended that such a review be undertaken at this time.

Annual Massachusetts Corporate Filings

Limited partnerships and limited liability companies formed in Massachusetts and non-Massachusetts limited partnerships and limited liability companies which are qualified to do business in Massachusetts must file an annual report on or about the anniversary date of such entity's formation or qualification, as applicable. There is a $500 fee associated with such annual filing.

Annual Delaware Tax

Limited partnerships and limited liability companies formed in Delaware are required to pay an annual tax in the amount of $300 by **June 1** of each year.

RELATED INDUSTRIES

- Investment Advisers & Private Funds
- Professional Services

RELATED PRACTICES

- Business Counseling
