Corporate Group

WINSTON & STRAWN LLP

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Reminder of Annual Requirements for Investment Managers

As we begin the new year, we thought it would be helpful to remind our clients that manage separate accounts or private funds, whether hedge funds, private equity funds, commingled funds, collateralized loan obligations, or commodity pools, of certain obligations that may be applicable to them as "Investment Managers" under various U.S. federal and state laws and regulations.

Some of the guidance contained in this memorandum relates to strict legal requirements imposed by statute or regulatory agencies while other guidance is more accurately characterized as best practices recommendations. The beginning of the new year may be a logical time to review and satisfy, or at least schedule the review of, these obligations, many of which apply to both registered and unregistered advisers.

For your convenience, a table of contents can be found on the following page so that you may more easily reference the information that is relevant to your organization. Additionally, a brief summary of key dates and 2015 regulatory highlights can be found at the end of this briefing in Appendices A and B respectively. In particular, please note that 2016 is a "leap year" so compliance calendars need to be adjusted accordingly.

Please contact us should you have any questions regarding compliance with any of the following or their applicability to your specific situation.

This summary is not intended to provide a complete review of an Investment Manager's obligations relating to compliance with applicable tax, partnership, limited liability, trust, corporate or securities laws or rules, or non-U.S. or U.S. state law requirements.[1]

1 This briefing is not intended to be exhaustive, or to provide a detailed statement of the specifics of any particular obligation. The following necessarily does not include all annual or periodic obligations applicable to all Investment Managers. Similarly, many of the obligations described below may not be applicable to all Investment Managers.

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Table of Contents

I. Requirements for SEC-Registered Investment Advisers 3
- a. Filings. 3
- b. Deliveries. 4
- c. Other requirements. 4

II. Requirements for CPOs and CTAs 6
- a. Filings for Registered CPOs and CTAs. 6
- b. Deliveries - Privacy Notice. 7
- c. Other requirements. 7

III. Generally Applicable Filing Requirements 8
- a. Amend Schedules 13G or 13D. 8
- b. File Form 13F. 8
- c. Amend Form 13H. 8
- d. "FBAR" filing requirements and Form 114. 9
- e. Form SLT. 9
- f. Form BE. 9

IV. Other Requirements or Best Practices (including those relating to unregistered Investment Managers) 10
- a. Exempt reporting advisers. 10
- b. Confirm ongoing new issues eligibility. 10
- c. Review compliance procedures. 10
- d. Review U-4 updates (sales practice violations and allegations). 10
- e. Review anti-money laundering and OFAC programs 11
- f. Review fund offering materials. 11
- g. Review liability insurance needs. 12
- h. Comply with state and municipal lobbyist regulations. 12
- i. Renew Form D and review state blue sky filings 12
- j. Bad actor review. 12
- k. Volcker Rule considerations. 12
- m. Business Continuity/Disaster Recovery Plans 13
- n. Cybersecurity review. 13

V. ERISA-Related Requirements and Best Practices 14
- a. Ongoing Plan and Participant Level Disclosures 14
- b. Anticipated Final Fiduciary Regulations 15
- c. CFTC-related considerations for ERISA plans. 15
- d. Group Trust Participation – a Reminder 16
- e. Update on the Sun Capital Case. 16
- f. Ongoing ERISA Compliance and Monitoring. 16

Appendix A – Calendar of Key Dates: 20
Appendix B – 2015 Regulatory Highlights 22
Appendix C – SEC OCIE National Exam Program's Examination Priorities for 2016 26

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I. Requirements for SEC-Registered Investment Advisers

a. Filings.

i. Update and file Form ADV.

Investment Managers that are registered with the SEC as investment advisers ("Registered Managers") under the Investment Advisers Act of 1940 ("Advisers Act") must update and file their Form ADV with the Securities and Exchange Commission ("SEC") on an annual basis within 90 days of the Registered Manager's fiscal year end (March 30, 2016 for those with a fiscal year end of December 31). In addition, a Registered Manager must update its Form ADV promptly at any time certain information becomes inaccurate.

> **Proposed Regulatory Change**: On May 19, 2015, the SEC proposed amendments to the Form ADV that would: (i) collect more information about Registered Managers' separately managed accounts; (ii) collect information related to Registered Managers' use of social media, branch office locations and chief compliance officer ("CCO"), and (iii) codify prior SEC staff guidance permitting a single "umbrella" registration for affiliated legal entities operating a single advisory. Please stay alert for any final guidance regarding Form ADV filing requirements.[2]

ii. Confirm state notice filings/investment adviser representative renewals.

Registered Managers should review their current advisory activities in the states in which they conduct business and confirm that all required state notice filings have been made on the Investment Adviser Registration Depository ("IARD") website. Registered Managers also should confirm whether any of their personnel need to be registered as "investment adviser representatives" in one or more states and, if so, register those persons or renew such persons' registrations with the applicable states, as needed.

> **Practice Tip**: Registered Managers should confirm that their IARD electronic accounts are adequately funded so as to cover payment of all applicable registration renewal fees with both the SEC and with any states. For purposes of funding and scheduling payments from the account, please note that deposited funds may take several days to appear in the IARD account.

iii. Prepare and file Form PF.

Form PF is required of Registered Managers that manage private funds with assets under management attributable to those funds of at least $150 million.

A Registered Manager that is characterized as a "large hedge fund adviser" or a "large liquidity fund adviser" is required to file Form PF with the SEC within, respectively, 60 days of the end of each calendar quarter or 15 days of the end of each calendar quarter. For other Registered Managers, Form PF is due 120 days after the end of the Registered Manager's fiscal year (April 29, 2016, for those with a fiscal year end of December 31). The rules regarding what constitutes a "large hedge fund adviser," "large liquidity fund adviser," "large private equity adviser," and when an adviser must aggregate information about certain funds can be complex; please contact your usual Winston and Strawn attorney with any questions or for additional guidance.

Registered Managers that are dually registered with the Commodity Futures Trading Commission ("CFTC") will satisfy certain CFTC reporting obligations by filing private fund information on Form PF. Specifically, the dually registered adviser will not need to file Schedules B and C of Form CPO-PQR if the adviser files information on all relevant pools on Form PF. Please see below for a further discussion of CFTC filing requirements.

> **Practice Tip**: Registered Managers to private funds with a fiscal year end of December 31 that are subject to the Form PF filing requirements should begin the process of completing Form PF now as the information required to be reported may require coordination with the Registered Manager's back office function and/or service providers.

2 The SEC also proposed amendments to the recordkeeping requirements under Rule 204-2 of the Advisers Act. For further discussion, see our blog post SEC Proposes to Expand Advisers' Form ADV Reporting Requirements and Books and Records Obligations (May 22, 2015). The proposed rules are available at Release No. IA–4091.

b. Deliveries.

i. Deliver brochure to clients.

Under the Advisers Act, Registered Managers are required to provide new and prospective clients with a narrative brochure (Part 2A of Form ADV) regarding the firm as well as brochure supplements (Part 2B of Form ADV) regarding certain of the firm's advisory personnel. Registered Managers must deliver to clients, within 120 days of the end of the Registered Manager's fiscal year (April 29, 2016, for those with a fiscal year end of December 31), either (i) a free updated brochure that includes, or is accompanied by, a summary of material changes, or (ii) a summary of material changes that includes an offer to provide a copy of the updated brochure and information on how a client may obtain the brochure.

ii. Deliver fund's audited financial statements.

Under the Advisers Act's "Custody Rule," Registered Managers of private funds who are deemed to have custody of client assets and wish to avoid complying with the "surprise audit" requirement of the Custody Rule must provide audited financial statements of their funds, prepared in accordance with U.S. generally accepted accounting principles, to the fund's investors within 120 days of the fund's fiscal year-end (or 180 days for a fund-of-funds) (respectively, for those with a fiscal year end of December 31, April 29 and June 28, 2016). Registered Managers that do not satisfy the delivery of audited financial statement requirement should confirm that they are compliant with all obligations under the Custody Rule, including the annual surprise audit requirement.

> **Practice Tip**: In 2014, the SEC took enforcement action against an advisory firm and its CCO for substantial and repeated late deliveries of audited financial statements. (See here for a copy of the settlement order issued November 19, 2015). Registered Managers should review their practices to ensure compliance with the SEC's custody rules.

iii. Privacy Notice.

Under SEC Regulation S-P, Registered Managers must provide clients and investors who are natural persons a copy of their privacy policy on an annual basis. If a financial institution makes disclosures other than as permitted below, then the privacy notice must be provided even if there have been no changes.

> **Regulatory Update**: On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act ("FAST Act"), which was a federal highway bill, but also contained important provisions for financial institutions as it modified section 503 of the Gramm-Leach-Bliley Act ("GLBA"). Relevant here, the FAST Act has the effect of modifying Regulation S-P[3] by eliminating the annual privacy disclosure requirement, *provided* that the Registered Manager (a) does not disclose nonpublic personal information of consumers to third parties, other than disclosure permitted by subsection (b)(2) or (e) of Section 502 or regulations prescribed under Section 504(b); and (b) has not changed its policies and practices with regard to disclosing nonpublic personal information from the policies and practices that were disclosed in the most recent disclosure sent to consumers.

c. Other requirements.

i. Review required compliance procedures.

Pursuant to Rule 206(4)-7(b), promulgated under the Advisers Act, Registered Managers must review their compliance policies and procedures at least annually to assess their effectiveness. This review also should include an assessment of the adequacy of the firm's code of ethics, including an assessment of its effectiveness as implemented. At a minimum, Registered Managers should ensure their policies and procedures have been updated to address legal and regulatory changes (including compliance with any disclosure or reporting standards), all significant compliance matters that arose during the previous year, any significant changes in the business activities of the Registered Manager or its affiliates, and any other changes in regulatory guidance or agency rules that would suggest a need to revise the Registered Manager's policies and procedures. As part of this review, Registered Managers should determine whether they need to provide any compliance or ethics-related training to employees, or enhancements

3 Regulation S-P was the SEC's regulation enacting provisions of the GLBA.

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in light of current business practices and regulatory developments. Written evidence of such reviews should be retained.

> **Practice Tip**: Registered Managers should pay particular attention to their policies and procedures that relate to areas of recent focus by the SEC, such as: valuation, conflicts of interest, confidentiality of client information and insider trading. Attention should also be given to those areas highlighted by the SEC's Office of Compliance Inspections and Examinations ("OCIE") in the SEC's National Exam Program's Examination Priorities for 2016, a copy of which may be found here. Please see Appendix C for a detailed description of the SEC release.

> **Practice Tip**: On April 20, 2015, the SEC issued a press release announcing an enforcement order against an investment adviser and its former CCO which was significant as it (i) was the first SEC enforcement case to charge violations of Rule 38a-1 under the Investment Company Act of 1940 ("Company Act"), for failure to report a material compliance matter to a fund's board and (ii) reinforced concerns regarding personal liability of compliance officers by charging the compliance officer with causing violations (a) by affiliated funds of Rule 38a-1 and (b) of Section 206(4) under the Advisers Act, and Rule 206(4)-7 thereunder, on account of the investment adviser's failure to adopt and implement written policies and procedures to assess and monitor the outside activities of its employees. For further discussion on this issue, please refer to Winston & Strawn's briefing at: CCO Personal Liability Briefing

> **Practice Tip**: On November 9, 2015, OCIE issued a risk alert regarding the use of an outsourced CCO, based on the findings of nearly 20 examinations conducted by OCIE. The risk alert did not wholly condemn the outsourced CCO model, but noted compliance assessments that did not pass muster, such as where standardized or "off the shelf" documents were employed and not tailored to the adviser client.[4] OCIE also found cases of annual reviews not being conducted and a lack of testing of policies and procedures. The risk alert is available at: Outsourced CCO Risk Alert. Registered Managers that use outsourced CCOs should review their practices against the risks highlighted in the Risk Alert.

ii. Business Continuity/Disaster Recovery Plans

Registered Managers should review and stress-test their business continuity/disaster recovery plans no less than annually and make any necessary adjustments. Written evidence of these reviews should be retained. For a further discussion of this issue, please see section IV.m below.

iii. "Pay-to-Play" Practices

Rule 206(4)-5 under the Advisers Act restricts the political contribution and solicitation practices of Registered Managers and certain of their related persons. Specifically, Rule 206(4)-5 prohibits an Registered Manager from receiving compensation for providing advisory services to government entities for a specified period of time after making political contributions to people or parties that may have the ability to influence a government entity's decision to employ such Registered Manager, while Paragraph (a)(18) of Rule 204-2 specifies various records that must be maintained with respect to Rule 206(4)-5. Annually, Registered Managers should (i) ensure that covered employees are aware of Rule 206(4)-5 and its requirements and (ii) that the Registered Manager is maintaining the records required by Paragraph (a)(18) of Rule 204-2, which records can be broader than the prohibitions of Rule 206(4)-5 might suggest. Rule 206(4)-5 also includes a ban on third-party solicitation, i.e., payment to third parties for the solicitation of advisory business from government entities, provided that this ban was not to be effective until nine months following the adoption by the SEC of a final rule relating to registration of municipal advisors.

> **Practice Tip**: On June 25, 2015, the SEC set a compliance date of July 31, 2015 for the ban on payments to third parties for the solicitation of advisory business from any government entity under Rule 206(4)-5. At the same time, however, the SEC also clarified in its Frequently Asked Questions on the Pay-to-Play Rule that it would not recommend enforcement action against an investment adviser or its covered employees under Rule 206(4)-5 for payments to third-party solicitors

4 For further discussion on the risk alert, please see our blog post Risk Alert Puts Outsourced CCO Model on Notice (Nov. 10, 2015) and Financial Services Update Vol. 10 Issue 40 (Nov. 16, 2015)

until the Financial Industry Regulatory Authority and the Municipal Securities Rulemaking Board have adopted equivalent pay-to-play rules.

II. Requirements for CPOs and CTAs

a. Filings for Registered CPOs and CTAs.

i. Review and update NFA registration.

Commodity pool operators ("CPOs") and commodity trading advisers ("CTAs") registered with the CFTC must update their registration information via the National Futures Association ("NFA") Online Registration System's annual registration questionnaire and must also pay their annual NFA membership dues and annual records maintenance fees on or before the anniversary of their registration's effectiveness. The NFA will deem a failure to complete the review of the annual registration questionnaire within 30 days following the date established by the NFA as a request for withdrawal from registration.

ii. File and distribute commodity pool certified annual reports.

Registered CPOs must file certified annual reports for their pools with the NFA within 90 days of the pool's fiscal year-end (March 30, 2016, for those with a fiscal year end of December 31). CPOs of commodity pools that operate as a fund of funds may obtain an "automatic" 90-day extension by submitting the information specified by Regulation 4.22(f)(2) to the NFA prior to the original due date. The certified reports must be filed electronically through the NFA's EasyFile system. The registered CPO also must distribute the certified reports to the pool's participants within the above 90 day deadline, unless the NFA grants an extension.

iii. File annual reaffirmation.

Persons that claim an exemption under CFTC Regulations 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5) or 4.14(a)(8) – including registered CPOs and CTAs – must annually reaffirm their exemptions. Investment Managers claiming one or more of these exemptions will have 60 days after calendar year-end (February 29, 2016) to reaffirm the notice of exemption through NFA's Electronic Exemption System. Any person that fails to file a notice reaffirming the exemption will be deemed to have requested a withdrawal of the exemption. Please also see section IV of this briefing, as this affirmation applies to non-registered CPOs and CTAs

iv. CFTC and NFA Form CPO-PQR.

A registered CPO is required to file certain information on CFTC Form CPO-PQR. The CFTC Form CPO-PQR filing requirements are based upon the CPO's size and whether the CPO also is dually registered as an investment adviser with the SEC and files a Form PF. CFTC Form CPO-PQR contains Schedules A, B and C. Large CPOs–that is those with at least $1.5 billion of assets under management–are required to file Schedules A, B and C of CFTC Form CPO-PQR quarterly within 60 days of each quarter-end. Mid-sized CPOs–that is those with at least $150 million, but less than $1.5 billion, of assets under management–are required to file Schedules A and B of CFTC Form CPO-PQR annually within 90 days after year-end (March 30, 2016). Small CPOs—that is those with less than $150 million of assets under management—are required to file Schedule A of CFTC Form CPO-PQR plus a Schedule of Investments annually within 90 days after year-end (March 30, 2016).

CPOs may also be required to file quarterly NFA Form CPO-PQR, which consists of certain questions from Schedule A and step 6 of Schedule B of CFTC Form CPO-PQR. As noted above, CPOs that are dually registered as investment advisers with the SEC may satisfy certain of their CFTC Form CPO-PQR filing obligations by filing Form PF with the SEC.

v. CFTC and NFA Form CTA-PR.

All registered CTAs must file CFTC Form CTA-PR annually within 45 days of the end of the fiscal year (February 15, 2016, for those with a fiscal year end of December 31). In addition, each registered CTA that is an NFA member must also file NFA Form CTA-PR within 45 days of each quarter-end. NFA Member CTAs can meet their CFTC filing requirement by filing their NFA Form CTA-PR for that quarter. CFTC Form CTA-PR and NFA Form CTA-PR are identical and cover certain identifying information about the CTA, the CTA's trading program, and performance information.

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> **Practice Tip**: In November 2015, the CFTC and NFA separately issued responses to frequently asked questions regarding their respective Forms CPO-PQR and CTA-PR.[5]

b. Deliveries - Privacy Notice.

With limited exceptions, the CFTC's consumer financial privacy rules enacted pursuant to Title V of the Gramm-Leach-Bliley Act states that CPOs/CTAs who disclose nonpublic personal information about customers/consumers to nonaffiliated third parties must provide such customers/consumers a copy of the CPOs/CTAs privacy policy, both initially and on an annual basis thereafter.

> **Practice Tip**: As discussed above, Title V of the Gramm-Leach-Bliley Act was amended by the FAST Act to eliminate the need for annual privacy notice deliveries in certain situations. Please refer to I.b.iii above for further information.

c. Other requirements.

i. Complete NFA self-examination questionnaire.

Under NFA rules, registered CPOs/CTAs must complete and sign the NFA's "self-examination questionnaire" and applicable supplements on an annual basis. The completed questionnaire is not filed with the NFA; instead, registered CPOs/CTAs must retain the questionnaire in their files for five years, with the questionnaire being readily accessible during the first two years. Registered CPOs/CTAs that have branch offices should complete a separate questionnaire for each branch office. As part of this review, registered CPOs/CTAs should review any established compliance policies and procedures and confirm whether amendments to those procedures, or additional procedures, may be warranted in light of the registered CPOs'/CTAs' current business.

ii. Comply with NFA-required ethics training policy.

Under the NFA's required ethics training rules, registered CPOs/CTAs should periodically consider whether any of their registered associated persons are in need of additional ethics-related training.

iii. Review NFA-required business continuity/disaster recovery plan.

Under the NFA's rules, registered CPOs/CTAs should periodically "stress test" their required business continuity/disaster recovery plans to assess their effectiveness and make any necessary adjustments. Such plans also should be updated to reflect any material changes to operations. For a further discussion of this issue, please see section IV.m below.

iv. Determine registration status of exempt clients.

NFA Bylaw 1101 prohibits NFA members from carrying an account, accepting an order or handling a transaction in commodity futures contracts for any non-member of the NFA that is required to be registered with the CFTC. Registered CPOs/CTAs must take reasonable steps to determine the registration and membership status of clients who were previously exempt. Pursuant to NFA Notice I-14-06, the NFA has made information about pool operators and pools available through the BASIC System which lists whether individuals either have properly filed an annual notice affirming their exemption under CFTC Regulation 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), or 4.13(a)(5) (and 4.14(a)(8) in the case of a CTA) or have withdrawn their exemption. For any exclusions or exemptions that do not require annual affirmation, proper steps by the NFA member may involve contacting clients to determine whether they have registered or if they intend to file a notice affirming their exemption, as applicable, and obtaining a written representation to that effect.

> **Practice Tip**: On April 8, 2015, the NFA issued a Notice to Members that requires a CPO to indicate whether it has been delegated investment management authority over a particular pool pursuant to CFTC Letter 14-126 by answering "yes" to a new question in the annual financial report, which will cause the NFA's Basic system to reflect the fund as a "Delegated Pool." The purpose of the new question is to help NFA members conducting Bylaw 1101 due diligence to determine whether the CPO of a particular commodity pool is registered or exempt from CPO registration.

5 The CFTC responses are available at CFTC's FAQs for CPOs and CTAs. The NFA responses are available at NFA's CPO FAQs on Form PQR and NFA's CTA FAQs on Form PR.

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III. Generally Applicable Filing Requirements

a. Amend Schedules 13G or 13D.

A Schedule 13D must be filed by individuals or entities having beneficial ownership in excess of 5% of a class of registered equity securities. The term "beneficial owner" is defined under SEC rules. It includes any person who directly or indirectly shares voting power or investment power (the power to sell the security). While beneficial ownership determinations can be complex, it includes shares held inside client accounts if the Investment Manager has: (1) the power to vote or direct the voting of the shares, and (2) the power to dispose or direct the disposition of the security. Investment Managers who meet the 5% beneficial ownership criteria, must file a Schedule 13D within 10 days of becoming a 5% beneficial owner. Investment Managers are required to amend their Schedule 13D filings "promptly" upon the occurrence of any "material changes" including, but not limited to, any increase or decrease representing one percent or more in their holdings of a registered voting equity security.

Schedule 13G is very similar to Schedule 13D; however, Schedule 13G is shorter, requires less information and generally must be updated only annually. Schedule 13G is designed to be less burdensome because it is intended to capture reporting by entities that acquire the securities in the ordinary course of business and not with the purpose or effect of changing or influencing the issuer. Therefore, such investors do not raise the same types of activist shareholder concerns that prompt a Schedule 13D. A firm that is registered as an investment adviser with the SEC or under state law will generally be considered a qualified institutional investor and able to file a Schedule 13G. Schedule 13G must be filed when a qualified institutional investor exceeds 5%, but less than 20%, of a class of outstanding registered equity securities provided the investor is a passive investor and does not intend to exercise control of the issuer. Schedule 13G, must be updated annually within 45 days of the end of the calendar year (February 15, 2016), unless there is no change to any of the information reported in the previous filing (please note there is an exception for changes to a holder's percentage ownership due solely to a change in the number of outstanding shares).

Practice Tip: As part of the SEC's "broken windows" approach to enforcement, in 2014, the SEC charged numerous officers, directors, investment firms, and public companies (that contributed to the failure of their officers and directors), for failing to make timely filings of reports on Form 4 and Schedules 13D and 13G under the 1934 Act. These charges demonstrated the SEC's stated interest in going after relatively minor violations as a means of encouraging broader compliance with the SEC's overall rule set. A copy of the press release may be found at: Press Release 2014-190.

Investment Managers whose aggregate direct or indirect client or proprietary accounts beneficially own ten percent or more of a registered voting equity security also must determine whether they are subject to any reporting obligations, or potential "short-swing" profit liability or other restrictions, under Section 16 of the Securities Exchange Act of 1934, as amended ("Exchange Act").

b. File Form 13F.

All "institutional investment managers" must file a Form 13F disclosing certain information regarding their holdings with the SEC if they, directly or indirectly, exercise investment discretion with respect to $100 million or more in securities subject to Section 13(f) of the Exchange Act. As with Schedules 13D and 13G, the determination of whether someone directly or indirectly exercises investment discretion can be complex. The official list of Section 13(f) securities can be found at: http://www.sec.gov/divisions/investment/13flists.htm. The first filing of Form 13F is due within 45 days after the end of a calendar year (February 15, 2016) during which the Investment Manager reaches the $100 million filing threshold (calculated as of the last trading day of any month in that year), and within 45 days of the end of each calendar quarter thereafter. The reporting obligation continues for so long as the Investment Manager satisfies the $100 million filing threshold (again, calculated as of the last trading day of any month during the year).

c. Amend Form 13H.

Pursuant to Rule 13h-1 of the Exchange Act, Investment Managers and other persons that meet the "Large Trader" definition must update their Form 13H on an

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annual basis within 45 days after the calendar year-end (February 15, 2016). In addition, if any information in Form 13H becomes inaccurate for any reason, Large Traders must file an amended Form 13H by the end of the calendar quarter during which the information becomes inaccurate. Large Traders must also disclose their large trader identification number to each broker-dealer effecting covered transactions on their behalf. The definition of a Large Trader and its application can be complex. Investment Managers that may be unclear of their large trader status are urged to contact their usual Winston and Strawn attorney for additional guidance.

d. "FBAR" filing requirements and Form 114.

United States persons with "financial interests" in, or signature authority over, "financial accounts" in foreign countries that in the aggregate exceed $10,000 in value at any time during the calendar year, must file a Report on Foreign Bank and Financial Accounts ("FBAR") on the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") Report 114 by June 30th of the following year. Investment Managers must evaluate annually whether accounts maintained on behalf of clients, particularly offshore private funds, trigger FBAR filing obligations. An officer or employee of a financial institution that is registered with and examined by the SEC or CFTC is not required to report signature authority over a foreign financial account owned or maintained by the financial institution. Even for those individuals who do not meet the preceding exception, the filing deadline for individuals with signature authority over, but no financial interest in, foreign financial accounts of their employer or a closely related entity has been extended to June 30, 2016, by FinCEN Notice 2014-1.

e. Form SLT.

Certain entities are required to complete and submit the Treasury Department's Form SLT, which aims to capture information regarding transactions of long-term securities[6] between United States residents and foreign entities. United States entities (including hedge funds, private equity funds and commingled funds) that either issue long-term securities to foreign residents and/or hold long-term securities issued by foreign entities, are required to file a Form SLT if the amount of such securities exceeds $1 billion (and such securities are not otherwise held by a U.S.-resident third party custodian). For private funds that meet these thresholds, the funds' investment manager likely will be the reporting person for purposes of Form SLT. Entities subject to Form SLT reporting requirements must complete and file a Form SLT on a monthly basis. Additionally, once the $1 billion threshold is met in a month, the reporting entity must provide a Form SLT each month for the remainder of the calendar year, regardless of whether the $1 billion threshold is met in later months of that calendar year.

f. Form BE.

The U.S. Bureau of Economic Analysis ("BEA") has a variety of forms that are applicable to investors and financial institutions. The following are a selection of forms generally relevant to Investment Managers.

The BEA now requires certain surveys to be completed by all persons that fall within the scope of the forms, whether or not they are contacted by the BEA.

Form BE-13 filings are required for transactions that result in "direct investments" (ownership of a direct or indirect voting interest of 10% or more) by a foreign entity in a newly-established, newly-acquired, or newly-merged U.S. entity. Form BE-13 filings may be made as Form BE-13A, Form BE-13B. Form BE-13C, Form BE-13D or Form BE-13E depending on the type of transaction. Entities may also choose to file a Form BE-13 Claim for Exemption if they feel they meet one of the qualifying exclusions. Form BE-13 filings are due within 45 days of establishment of the position or, if the original cost was less than $3 million, then within 45 days of when the investment has increased past that threshold.

Form BE-10 filings are due every five years and are required for any U.S. person or entity with a "foreign affiliate"—a foreign business enterprise in which a U.S. person had direct or indirect ownership or control of at least 10% of the voting stock or equivalent interest. The BE-10 survey was last due in November 2015 and will next be due in November 2020.

6 Long-term securities are securities without a stated maturity date (such as equities) or with an original term-to-maturity greater than one year.

IV. Other Requirements or Best Practices (including those relating to unregistered Investment Managers)

a. Exempt reporting advisers.

Advisers (i) to venture capital funds, (ii) to solely private funds with less than $150 million in regulatory assets under management, and (iii) certain foreign advisers with limited contacts to the U.S. who wish to avoid registering with the SEC generally must file a report as “Exempt Reporting Advisers” (“ERAs”) by completing certain items on Part 1 of Form ADV. The deadline for submitting this report is within 60 days of initially becoming an ERA. Thereafter, ERAs must update their Form ADV on an annual basis within 90 days of the end of their fiscal year (March 30, 2016 for those with a fiscal year end of December 31).

i. Privacy law.

Investment Managers that are not subject to Regulation S-P or CFTC Rules, because they are not registered, are still generally subject to the Federal Trade Commission privacy requirements and also may be subject to state privacy laws that may impose additional requirements.

ii. Business continuity/disaster recovery plans.

Investment Managers not otherwise subject to a requirement that they implement a business continuity/disaster recovery plan should consider promulgating such a plan, stress-testing and reviewing it at least annually, and making any necessary adjustments to the plan based on the results of the review. Written evidence of these reviews should be retained. For a further discussion of this issue, please see section IV.m below.

iii. “Pay-to-Play” practices.

ERAs and certain of their associated persons are subject to the same “pay-to-play” restrictions (discussed above) as Registered Managers. Generally, these restrictions place limits on contributions being made to, or solicitation of contributions for, people or parties that may have the ability to influence the decision of a government entity to utilize the advisers’ services. Please see item I.c.iii above for a more detailed discussion.

b. Confirm ongoing new issues eligibility.

In order for Investment Managers to purchase “new issues” for a fund or separately managed client account, Investment Managers should provide their brokers with annual written representations confirming their continued eligibility to purchase new issues under (i) Financial Industry Regulatory Authority (“FINRA”) Rule 5130, which prohibits the sale by broker-dealers of new issues to customers that have not provided certain written representations within the previous 12 months, and (ii) FINRA Rule 5131, which prohibits the allocation of shares of a new issue to any account in which certain persons have a beneficial interest and such persons have the ability to influence or direct the provision of investment banking services to the FINRA member. The annual representations under both Rules 5130 and 5131 may be updated through “negative consent” letters.

c. Review compliance procedures.

While most Investment Managers are subject to a mandatory annual review requirement, as a best practice, even Investment Managers not subject to the requirement should still review, at least annually, all established policies and procedures, whether or not such policies are in writing, to confirm the policies’ continued efficacy in light of the Investment Manager’s current business practices, market conditions, and any legal or regulatory changes. Investment Managers that do not have written policies and procedures should consider, based on the Investment Manager’s current business, whether establishing such written policies and procedures might be in its interest.

d. Review U-4 updates (sales practice violations and allegations).

Registered Managers should review allegations of sales practice violations made against a registered person in an arbitration or litigation—even in cases where the registered person is not a named party—and amend the registered person’s Form U-4 to disclose such information as required.

> **Practice Tip**: Supervision of recidivist representatives (i.e., those with a track record of misconduct) was listed by OCIE as an examination priority for 2015.

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e. Review anti-money laundering and OFAC programs.

On August 25th, FinCEN proposed new rules[7] that would require Registered Managers (i) to establish anti-money laundering ("AML") programs, (ii) to report suspicious activity, and (iii) generally comply with the Bank Secrecy Act ("BSA") because they would be brought within the definition of a "financial institution" in the regulations implementing the BSA. This definition encompasses more than 11,000 investment advisers. Currently, the Proposed Rule will not cover state-registered investment advisers, ERAs, or mid-sized[8] and small advisers.[9] However, pending the passage of these rules and under the standards that are currently in place, Investment Managers are not required to comply with U.S. AML regulations. Nevertheless, Investment Managers that have agreed with their counterparties, intermediaries (e.g., prime brokers), clients, or other parties to maintain such a program are required to perform those responsibilities. In addition, all Investment Managers are subject to certain related regulations (e.g., U.S. Treasury Office of Foreign Assets Control ("OFAC") reporting requirement and Internal Revenue Code/Bank Secrecy Act reporting procedures for cash transactions). In light of these responsibilities, Investment Managers should review their AML programs, including their AML risk assessment, on an annual basis to determine whether the program is reasonably designed to ensure compliance with any undertakings to which they have agreed as well as all related regulations, reporting requirements and similar obligations to which they may be subject as a matter of law. For Investment Managers that have agreed to comply with AML requirements, this review must be independent of the business unit responsible for the account and may be conducted by an outside professional or internal audit/appropriate officers and employees of the Investment Manager who have sufficient knowledge of the applicable regulations and economic sanctions programs.

Practice Tip: AML was listed by OCIE as an examination priority for 2015. View Winston's detailed briefing on the proposed rules at: Winston Client Briefing on BSA/AML Duties for Investment Advisers.

f. Review fund offering materials.

Except for commodity pool disclosure documents that are filed with the NFA, private fund offering materials do not automatically "expire" after a certain time period. However, as a general securities law disclosure matter, and for purposes of federal and state anti-fraud laws, Investment Managers must ensure that their fund offering materials are kept up-to-date and contain all material disclosures that may be required in order for the fund investor to be able to make an informed investment decision. Accordingly, the beginning of the year may be an appropriate time for Investment Managers to review their offering materials and confirm whether any updates or amendments are needed. Investment Managers should particularly account for the impact, if any, of recent regulatory reform and tax changes on their funds. Among other things, Investment Managers should review the fund's current investment objectives and strategies, valuation practices, redemption policies, risk disclosures (including but not limited to, disclosures regarding market volatility and counterparty risk), real or potential conflicts of interest, current Investment Manager personnel, relationships with service providers and advisors, and any relevant legal or regulatory developments.

Practice Tip: The SEC has brought several enforcement actions against private fund managers for failing to disclose conflicts of interest in connection with allocations of fees and expenses. Investment Managers should ensure that fund offering materials strongly disclose any conflicts of interests related to compensation and adopt internal policies relating to the allocations of fees and expenses. Please see the section titled *Disclosure of Conflicts of Interest Relating to Fees and Expenses* in Appendix B to this briefing for a description of actions taken by the SEC in this area over the last year.

7 The text of the proposed rules can be located at: https://www.gpo.gov/fdsys/pkg/FR-2015-09-01/pdf/2015-21318.pdf.

8 Generally defined as those advisers with regulatory assets under management between $25 million and $100 million.

9 Generally defined as those advisers with regulatory assets under management with less than $25 million.

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g. Review liability insurance needs.

As a general matter, Investment Managers are not required to purchase management liability insurance, such as directors' and officers' liability coverage, fiduciary liability coverage, or errors and omissions liability coverage. Investment Managers that do not have such coverage should periodically assess whether management liability insurance makes sense for them in light of their current business and, if so, the type and amount of coverage. Investment Managers that do have management liability insurance should consider reviewing the adequacy of such coverage.

h. Comply with state and municipal lobbyist regulations.

Investment Managers who provide investment advisory services to state, municipal or other local government pension or retirement plans ("Government Plans") should consider whether they or their personnel are considered lobbyists in each jurisdiction in which they solicit Government Plans. Traditionally, the regulation of lobbyists at the state and municipal-levels has largely been limited to those individuals or entities that sought to influence legislative or rulemaking actions. However, many jurisdictions have begun to define lobbying more broadly to include the act of soliciting investment advisory business from Government Plans.

While each state's lobbying laws are different, those persons or entities that fall within the definition of "lobbyist" are typically required to fulfill some or all of the following requirements: registration with a governmental body and payment of a fee; attending lobbyist education training; and filing periodic reports containing expenditures and other relevant information. Persons who fail to comply with these requirements may be subject to fines, revocation of one's lobbyist privileges or other sanctions. As a result, Investment Managers who solicit Government Plans should become familiar with the lobbying regulations for each jurisdiction in which they solicit Government Plans.

i. Renew Form D and review state blue sky filings.

Investment Managers to private funds are reminded of the annual mandatory electronic filing for continuous offerings on Form D. Also, many state securities "blue sky" filings expire on a periodic basis and must be renewed. Consequently, now may be an appropriate time for an Investment Manager to review the blue sky filings for its funds and determine whether any updated filings, or additional filings, are necessary. Please contact your usual Winston & Strawn attorney if you would like assistance from our dedicated "blue sky" team with any necessary SEC or state filings.

j. Bad actor review.

Investment Managers involved in Rule 506 of Regulation D offerings are required to obtain the information necessary to confirm that no "bad actors" are involved in the 506 offerings conducted by their fund clients. Investment Managers whose fund clients are engaged in a continuous offering should confirm that the fund's "covered persons" (generally, the fund, the fund's directors, general partners, and managing members, executive officers, and other officers of the fund that participate in the offering, 20% beneficial owners of the fund, promoters connected to the fund, and the fund's investment manager and its principals) have not experienced a "disqualifying event." "Disqualifying events" generally include certain (i) criminal convictions; (ii) court/SEC injunctions or stop orders; and (iii) SEC or self-regulatory agency disciplinary proceedings. SEC guidance on the factors used to process bad actor waiver requests is available here.

k. Volcker Rule considerations.

The "Volcker Rule," more properly known as Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), became effective in 2012, however, regulated entities had until July 2014 to become compliant with the final implementing rules. The Federal Reserve Board extended the conformance deadline to July 21, 2015, and, in the case of "covered funds" that were in place prior to December 31, 2013, the deadline has been extended to July 21, 2016. The Federal Reserve Board is considering further extending the deadline to July 21, 2017.

The Volcker Rule generally prohibits a bank and its affiliates from engaging in proprietary trading and, more pertinently, from acquiring or retaining any ownership interest in, or sponsoring, a hedge fund or private equity fund. The Volcker Rule provides for a conformance period for divestitures that ranges from

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two to ten years depending on (i) the willingness of the appropriate regulator to grant extensions and (ii) the liquidity of a particular fund in which the banking entity had an investment and was contractually committed to invest in as of May 1, 2010. A number of exceptions are available, two of the primary exceptions being for (i) banking entity-organized funds that are only offered to customers of such entities, and in which the banking entity only maintains a de minimis investment and (ii) also for investment funds outside the U.S., that are not offered in the U.S. and where the banking entity is a foreign banking firm (not controlled by a U.S. banking firm).

In addition, the Volcker Rule prohibits any banking entity that serves as an investment manager, investment adviser, or sponsor of a covered fund, and any of the banking entity's affiliates, from extending credit to the fund, purchasing assets from the fund, accepting the fund's shares as collateral for a loan to another person, or issuing a guarantee on behalf of the fund.

l. Identity theft procedures.

In 2013, the SEC, in combination with the CFTC, adopted rules related to implementation of identity theft programs by certain entities subject to SEC or CFTC regulation.[10] As part of an Investment Manager's annual review of its policies and procedures, an Investment Manager should evaluate whether the identity theft rules are applicable and if so, (i) adopt policies and procedures to detect and address identity theft or (ii) if such policies have already been adopted, review and update such policies, as necessary.

> **Practice Tip**: On September 22, 2015, the SEC published an Investor Alert entitled "Identity Theft, Data Breaches, and Your Investment Accounts." While this is intended as an educational tool for investors and not industry guidance, it is further evidence that the SEC is acutely focused on the cybersecurity dangers facing the investing community as also listed in OCIE's recent disclosure of examination priorities which is further discussed in Appendix C below.

m. Business Continuity/Disaster Recovery Plans

Investment Managers should review and stress-test their business continuity/disaster recovery plans no less than annually and make any necessary adjustments to strengthen their organizational resiliency and minimize potential regulatory risk. In addition, firm's should review the business continuity/disaster recovery plans of third-party service providers. Written evidence of these reviews should be retained.

> **Practice Tip**: There has been closer scrutiny of business continuity/disaster recovery policies and procedures in recent years by the SEC, FINRA, and the CFTC.[11] In connection with its cybersecurity initiative (discussed below), the SEC has touched on some best practices for business continuity planning and reiterated its position that an adviser's fiduciary obligation to its clients includes taking steps to protect the clients' interests from risks resulting from the adviser's inability to provide advisory services after, for example, a natural disaster or cyberattack.

n. Cybersecurity review.

As noted above, cybersecurity has been a focus area for a number of years and has only gained more prominence with the frequent national news coverage regarding infiltration of corporate and government systems. In 2014, the SEC announced a cybersecurity initiative intended to help firms create sound corporate governance related to cybersecurity, protect networks and information, detect unauthorized activity, and identify cybersecurity risks related to remote customer access, fund transfer requests, vendors and other third parties. In 2015, the SEC released additional guidance in connection with the cybersecurity initiative, and FINRA and the NFA also provided interpretative advice relating to cybersecurity. Please see the section titled *Cybersecurity Initiative* in Appendix B to this briefing for a description of actions taken by the regulatory agencies in this area over the last year.

10 A summary of the joint rules is available at https://www.sec.gov/info/smallbus/secg/identity-theft-red-flag-secg.htm. The full text of the joint rules is available at https://www.sec.gov/rules/final/2013/34-69359.pdf.

11 A joint advisory was issued by the SEC, FINRA, and the CFTC on August 16, 2013.

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V. ERISA-Related Requirements and Best Practices

The Employee Retirement Income Security Act of 1974, as amended ("ERISA") and related Department of Labor ("DOL") regulations are important to Investment Managers that accept clients who are ERISA plans or that manage private funds that are subject to ERISA. Certain important ongoing ERISA compliance considerations are summarized below.

a. Ongoing Plan and Participant Level Disclosures.

i. Disclosures of service provider compensation.

The DOL's final regulations requiring written disclosure of compensation and other information by covered service providers to ERISA-governed retirement plans or ERISA-governed funds continue to apply for both existing and new contracts or arrangements between covered plans and covered service providers. These regulations are commonly referred to as the DOL's "408(b)(2)" or "service provider" regulations.

Briefly, covered service providers include those providing fiduciary services directly to an ERISA plan or to a "plan assets" entity (such as a group trust or private investment fund exceeding the 25% "significant participation" test) and those providing investment advisory services directly to a plan, among others. The 408(b)(2) regulations generally require disclosure of all compensation paid to the covered service provider, its affiliates and/or its sub-contractors. This includes non-monetary compensation, as well as indirect compensation received from parties other than the plan or plan sponsor. These disclosures must be provided before a contract or arrangement with an ERISA plan takes effect, is extended or renewed (and when the disclosed information changes). ERISA plan fiduciaries are required to report to the DOL the failure of covered service providers to provide disclosure no later than 90 days after the ERISA plan fiduciary requests the disclosure. If the covered service provider fails to meet the 90-day deadline, the ERISA plan fiduciary is required to determine whether to terminate or continue the contract or arrangement, and if the failure to disclose relates to future services, the plan fiduciary must terminate the service arrangement as expeditiously as possible. Non-compliant covered service providers may be subject to penalties.

In 2014, the DOL proposed an amendment to the 408(b)(2) regulations that would require covered service providers to furnish a guide with initial disclosures if the initial disclosures are contained in multiple or lengthy documents. The summary guide would comprise a separate document and would specifically identify where each required disclosure would be found in the other document(s) so that the responsible plan fiduciary would be able to quickly and easily find the information. Although the proposal engendered much discussion, the regulation has not been finalized and covered service providers are under no current obligation to provide a guide.

The 408(b)(2) regulations do not apply to funds that satisfy the 25% significant participation test (i.e., funds with "benefit plan investor" participation of less than 25%) or to funds qualifying as "operating companies," such as venture capital operating companies or real estate operating companies. If a fund that was not previously a plan assets entity becomes one, fiduciaries to that fund must make the required disclosures within 30 days from the date on which the fiduciary knows that the fund is a plan assets entity.

ii. Ongoing disclosures to plan participants in ERISA-governed participant-directed plans.

ERISA plan administrators are required to provide to participant-directed, individual account investors under 401(k) or other defined contribution plans certain investment fee and expense information, among other information under regulations commonly referred to as the DOL's "404(a)" regulations. Many, if not most, plan administrators look to their service providers for much of the required information. A plan administrator will not be liable for the completeness and accuracy of information provided by a plan service provider if the plan administrator relies on that information reasonably and in good faith. Investment Managers who provide products or services to 401(k) or other defined contribution plans may wish to periodically re-evaluate the manner in which they have provided this information, particularly in response to any questions raised by plan clients.

The regulations require disclosure of certain information about the plan's investment options in a comparative chart format so that all investment options under the plan can be compared in an "apples-to-apples" manner.

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As we reported last year, in 2014 the DOL had briefly reopened the comment period for its proposed regulation on target date fund disclosures in order to coordinate with the SEC's expanded comment period for its own related rules. To date, neither the SEC nor the DOL has finalized a regulation. In the fall of 2015, the SEC's rulemaking agenda listed the target date rule as still in the proposed stage.

b. Anticipated Final Fiduciary Regulations

In April of 2015, the DOL re-proposed the fiduciary regulation. Although not certain, most practitioners believe that the regulation will go into effect in 2016 with little or no modification.

Unlike the current five-part test under which many advisers and broker-dealers have not been classified as fiduciaries, under the proposed regulation, a person who offers certain kinds of investment advice for a fee or other compensation whether direct or indirect, will be a fiduciary if that person either "(i) represents or acknowledges that it is acting as a fiduciary, or (ii) renders the advice *pursuant to a written or verbal agreement, arrangement or understanding* that the advice is individualized to, or that such advice is specifically directed to, the recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA."

There are four kinds of advice that are considered "investment advice." These are: (i) a recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA; (ii) a recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA; (iii) an appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA; and (iv) a recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described above.

There are several carve-outs for persons who do not represent that they are acting as ERISA fiduciaries provided that significant conditions are met. While we cannot elaborate here on those conditions, these include carve-outs for: (1) statements or recommendations made to a "large plan investor with financial expertise" by a counterparty acting in an arm's length transaction, (2) offers or recommendations to plan fiduciaries to enter into a swap or security-based swap that is regulated under the Securities Exchange Act or the Commodity Exchange Act; (3) statements or recommendations made by employees of the plan sponsor who receive no additional compensation for their services; (4) marketing or making available a platform of investment alternatives to be selected by a plan fiduciary for participant-directed individual account plans; (5) the identification of investment alternatives that meet objective criteria specified by a plan fiduciary or the provision of objective financial data to the fiduciary; (6) certain financial reports and valuations; and (7) the provision of investment or retirement education.

Concurrently with the issuance of the proposed regulation, the DOL proposed new class prohibited transaction exemptions ("PTEs") and amendments to several existing PTEs provided that all conditions are met. One exemption, the "Best Interest Contract Exemption" ("BIC Exemption") will permit advisers to receive compensation such as commissions and revenue sharing provided that in contracts with plans and participants, the advisers commit to acting in the client's best interest and disclose any conflicts of interest that could prevent the adviser from doing so. Amendments to existing exemptions will require the incorporation of "impartial contract standards" set forth in the BIC Exemption. The DOL has also proposed a new exemption for principal transactions in certain debt securities between a plan, participant or IRA, and an investment advice fiduciary.

c. CFTC-related considerations for ERISA plans.

Under the Dodd-Frank Act, ERISA-governed retirement plans are not excluded from the CFTC's definition of "major swap participant," although the regulation does

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exclude swaps "maintained by employee benefit plans for hedging or mitigating risks in the operation of the plan" from certain of the numerical tests proposed to determine "major swap participant" status.

Under the CFTC's business conduct rules, plans are categorized as "special entities," with respect to which a swap dealer may have heightened duties. To avoid these duties, a "swap dealer" (other than a swap dealer also acting as an advisor to an ERISA plan counterparty) must have a reasonable basis to believe that the ERISA plan counterparty has a representative that is an ERISA fiduciary. The rules also include a safe harbor that provides that a swap dealer will not be acting as an advisor to an ERISA plan counterparty if the ERISA plan counterparty represents in writing that it has an ERISA fiduciary to evaluate the swap transactions and the ERISA fiduciary represents in writing that it will not rely on the swap dealer's recommendations, among other representations. The International Swaps and Derivatives Association's industry-wide standard protocols include representations and covenants for special entities, designed to assist swap dealers in meeting the safe harbor.

d. Group Trust Participation – a Reminder

As reported last year, Revenue Ruling 2014-24, issued by the IRS, amended Revenue Ruling 81-100 to permit the participation of Puerto Rican plans that are only qualified under Section 1165 of the Puerto Rican Internal Revenue Code and the participation of insurance company "separate accounts" in group trusts. If they have not done so previously, group trust sponsors who have not yet done so may wish to consider amending their group trust documents to permit participation by qualifying Puerto Rican plans and insurance company separate accounts that meet the requirements of Revenue Ruling 2014-24.

e. Update on the Sun Capital Case.

A year ago, we reported that the ERISA liability landscape for private equity funds remained uncertain after the Supreme Court denied a request to review the First Circuit's decision in *Sun Capital Partners III LP v. New England Teamsters & Trucking Industry Pension Fund*, 724 F.3d 129 (1st Cir. 2013). One year later, there has been no development in this area, and day to day operations of private equity funds remains essentially unchanged.

As a recap, the First Circuit had effectively determined that a private equity fund could be found to be engaging in a "trade or business" and therefore potentially subject to multiemployer plan withdrawal liabilities assessed against one of its portfolio companies. Generally, when an employer withdraws from a multiemployer pension plan, the law may impose withdrawal liability (i.e., the employer's proportionate share of the plan's unfunded vested benefits) on the employer and any "trades or businesses" that are members of the employer's controlled group. In Sun Capital, the First Circuit rejected the core argument that such funds are not engaged in a "trade or business" and thus cannot be part of a controlled group. The court engaged in a very fact-specific analysis of the business operations of the private equity funds in question to conclude that at least one of the funds was not a passive investor and was in fact engaged in a trade or business, in large part because of the extensive management services Sun Capital provided to the portfolio company, fees from which were used to partially offset against management fees paid by the fund. Nonetheless, because the fund held a less than 80% interest in the underlying business, no withdrawal liability would attach to the fund.

To date, the First Circuit remains the sole Circuit to apply this analysis.

f. Ongoing ERISA Compliance and Monitoring.

i. Review private fund compliance with the 25% significant participation test.

Investment Managers managing private funds that seek to satisfy the 25% significant participation test should consider periodically reviewing their processes for best practices. For example, Investment Managers of private funds may wish to reconfirm whether their fund-of-funds investors or other fund investors are "benefit plan investors" subject to ERISA or Section 4975 of the Code for purposes of reconfirming their funds' compliance with the 25% significant participation test and, if so, the extent to which that investor's assets are plan assets. Only the portion of these investors' assets that are subject

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to ERISA and Section 4975 of the Code need be counted for this purpose. As this percentage can fluctuate over time, we recommend establishing an "upper limit" percentage which the investor will agree not to exceed. As noted above, if a fund becomes a plan assets fund, the service provider disclosure regulations require that disclosures be provided to ERISA investors within 30 days of the Investment Manager knowing that the fund is a plan assets fund.

ii. Review private fund compliance with the "operating company" exception.

Investment Managers that have decided to qualify their funds as "venture capital operating companies" or "real estate operating companies" must continue monitoring compliance with the operating company exception on an annual basis, as per the DOL's plan assets regulations until the funds are in their distribution periods. Investment Managers may also wish to consider qualifying their new funds as operating companies. This will permit them to attract more capital from benefit plan investors without being subject to ERISA's fiduciary requirements. Initial qualification as a venture capital or real estate operating company is relatively easy to attain for funds that take a controlling interest in their portfolio companies or routinely negotiate for some management rights with respect to the portfolio companies; likewise, ongoing compliance should not be burdensome for such funds.

iii. Comply with Form 5500 fee disclosures.

Form 5500 is the annual report required to be filed by ERISA plans with the Internal Revenue Service ("IRS") and the DOL. In addition, Form 5500 filings may also be filed on a voluntary/elective basis by collective trusts and other funds, the assets of which are treated as ERISA plan assets.

Schedule C to Form 5500 requires disclosures of fees and other compensation received by service providers (such as Investment Managers) to ERISA plans. Although the Form 5500 filing is generally the responsibility of the ERISA plan investor, plans will look to Investment Managers to provide the information that is needed for the filing. Investment Managers of plan asset funds may elect to file Forms 5500s on behalf of the funds, in which case they will need to comply with these additional compensation reporting requirements. Plan investors sometimes request that Investment Managers make such filings as it relieves the plan investor from some of its more detailed filing requirements.

Importantly, these reporting rules apply to direct and indirect compensation in connection with funds that satisfy the 25% significant participation test to prevent fund assets from being treated as ERISA plan assets (with the exception of compensation received from operating companies, including venture capital operating funds and real estate operating funds).

iv. Update and confirm your ongoing ERISA-related compliance generally.

As a best practice, Investment Managers that manage plan assets should periodically review their existing investment policies, investment guidelines, trading practices and relationships to confirm that they are consistent with current requirements under ERISA. ERISA-related policies and procedures also should be reviewed periodically, such as cross-trading policies, proxy voting policies and gift and gratuity policies, to reflect changes in the Investment Manager's practices or changes in the law.

v. Review compliance with ERISA's fidelity bond requirements, if applicable.

Investment Managers with ERISA plan clients or those managing plan assets are required by ERISA to maintain a fidelity bond unless the Investment Manager has determined that it is exempt from ERISA's fidelity bond requirements. Ongoing bonding arrangements should be reviewed on an annual basis to confirm that the Investment Manager is maintaining the bond in the correct amount and with the correct terms to satisfy ERISA's requirements.

Investment Managers may wish to review whether changes in their ERISA plan clients require changes to bonding arrangements (for example, an ERISA plan that did not previously hold employer securities may have acquired employer securities, necessitating a higher bond amount). Changes to a fund's plan asset status may also dictate changes to the fidelity bond.

vi. Review developments in the law applicable to governmental plan clients.

Investment Managers who manage the assets of governmental plans (which are not subject to ERISA) should review developments in the past year in

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the law applicable to those plans that may affect plan investments. State or local laws may include restrictions on the use of placement agents, enhanced disclosure requirements for plan service providers, limitations or restrictions on permissible investments such as investments in certain countries or limits on certain categories of alternative investments. Also, Investment Managers should consider the consequences of a Governmental Plan's request to be treated as an ERISA plan in a plan asset vehicle. If an Investment Manager agrees to such a request, the language in the agreement should be carefully tailored so that it is not overbroad and will not trigger unwanted consequences. In their subscription agreements, Investment Managers should ensure that governmental plan investors disclose any laws or regulations that may govern their investments.

vii. Indicia of ownership requirements.

ERISA requires that the "indicia of ownership" of plan assets must be within the jurisdiction of the district courts of the United States. Any fund that holds plan assets will have to observe this requirement. While this is not a concern for funds that solely hold assets such as securities located in the United States, the DOL has published regulations that generally permit foreign assets to be held outside the United States provided that the assets are under the management and control of a fiduciary such as a U.S. domiciled Registered Manager that has total client assets under its management and control in excess $50,000,000 and shareholders' or partners' equity in excess of $750,000. The above is necessarily a brief description of the somewhat complicated "indicia of ownership" rules. Accordingly, Investment Managers of plan assets funds that trade or intend to trade outside the United States may wish to review their policies.

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Related Professionals

If you have questions, please contact any of the Corporate attorneys listed below or your usual Winston & Strawn LLP contact.

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Appendix A – Calendar of Key Dates:

Due Date	Requirement
Monthly	• Form SLT (must be submitted no later than the 23rd calendar day of the month following the report as-of date) • CPOs deliver account statements to pool participants for pools with more than $500,000 in assets at the beginning of the pool's fiscal year end (within 30 days of end of prior month)
Quarterly	• Form 13H must be amended by the end of the calendar quarter in which the information becomes inaccurate.
Quarterly – within 15 days of quarter end	• Form PF (for advisers to Large Liquidity Funds) (based on fiscal quarter)
Quarterly – within 30 days of quarter end	• CPOs deliver account statements to pool participants for (i) pools with less than $500,000 in assets at the beginning of the pool's fiscal year end or (ii) exempt pools under CFTC Regulation 4.7
Quarterly – within 45 days of quarter end	• CPOs deliver account statements to pool participants for (i) pools with less than $500,000 in assets at the beginning of the pool's fiscal year end or (ii) exempt pools under CFTC Regulation 4.7
Quarterly – within 60 days of quarter end	• CPOs with at least $1.5 billion of assets under management are required to file Schedules A, B and C of CFTC Form CPO-PQR • CPOs with less than $1.5 billion of assets under management (and investment advisers that file Form PF) are required to file NFA's Form PQR for the 1st, 2nd and 3rd quarters • Form PF (for advisers to Large Hedge Funds) (based on fiscal quarter)
Annually	• Copy of Privacy Policy to clients that are Natural Persons • Review Compliance Policies and Procedures and retain records of such review • Review Code of Ethics • Review Business Continuity/Disaster Recovery Plans • Review Pay-to-Play Practices • CPOs/CTAs must update registration information and pay annual dues/fees • CPOs/CTAs should complete NFA's Self-Examination Questionnaire and maintain such questionnaire on file for five years • Confirmation from beneficial account owners of continued eligibility to participate in new issues under FINRA Rules 5130 and 5131 (may be obtained through negative consent letters) • Update Form D for private fund offerings and review any necessary state "blue sky" filings
Annually (recommended)	• Review of fund offering materials • Assess whether Investment Manager should purchase Director/Officer Liability Insurance, Fiduciary Liability Insurance, or Errors and Omissions Insurance and assess whether current coverage is sufficient.
Annually – within 15 days after fiscal year end (January 15, 2016 if a December 31 fiscal year end)	• Form PF (for advisers to Large Liquidity Funds)

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Corporate Group

Due Date	Requirement
Annually – 45 days after calendar year end (February 14, 2016)	• Form 13F • Schedule 13G (Registered Managers) • Form 13H • CFTC Form CTA-PR (for registered CTAs)
Annually – within 60 days of calendar year end (February 29, 2016)	• Reaffirm exemptions or exclusions under CFTC Regulations 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5) or 4.14(a)(8) • CPOs with at least $1.5 billion of assets under management must file Schedules A, B and C of CFTC Form CPO-PQR
Annually – within 60 days of fiscal year end (February 29, 2016 if a December 31 fiscal year end)	• Form PF (for advisers to Large Hedge Funds)
Annually – within 90 days of calendar year end (March 30, 2016)	• CPOs with between $150 million and $1.5 billion of assets under management will be required to file Schedules A and B of CFTC Form CPO-PQR • CPOs with less than $150 million of assets under management (as well as Investment Advisers that file Form PF) must file Schedule A of CFTC Form CPO-PQR plus a Schedule of Investments • CPOs must file certified annual reports and distribute such report to pool participants (within 180 days if Fund of Fund)
Annually – within 90 days of fiscal year end (March 30, 2016 if a December 31 fiscal year end)	• Update and file Form ADV with SEC • Form ADV should also be updated promptly upon changes in certain material information
Annually – within 120 days after fiscal year end (April 29, 2016 if a December 31 fiscal year end)	• Delivery to clients of updated brochure (Form ADV Part 2A) or summary of changes and offer of brochure • Audited Financial Statements if "custody" of client assets (within 180 days if Fund of Fund) • Form PF (for advisers of funds that are not Large Liquidity Funds or Large Hedge Funds)
June 30, 2016	• FinCEN Report 114

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Appendix B – 2015 Regulatory Highlights

Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies

June 9, 2015 – The SEC, in combination with other federal regulatory agencies, issued a policy statement on diversity that was mandated by certain provisions of the Dodd-Frank Act which are intended to help create and strengthen their diversity policies and practices of regulated institutions. Each agency is required to establish an Office of Minority and Women Inclusion ("OMWI") to oversee the policy at the agencies' regulated entities. The agencies consulted with more than 200 members of the public and the financial services sector to gain a greater understanding of the issues confronting minorities and women in obtaining employment and business opportunities within the financial services industry.

Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Exchange Act

April 1, 2015 – The SEC settled an action against a public company for violation of Section 21F of the Exchange Act, which was adopted as part of Dodd-Frank. The SEC maintained that a confidentiality statement provided to employees in connection with internal investigation interviews impeded communication with the SEC and undermined the purpose of Section 21F and Rule 21F-17 by prohibiting employees from discussing the substance of their interviews without clearance from the company's law department. The public company subsequently revised its confidentiality agreements as part of its settlement with the SEC to carve out disclosures to government agencies, including the SEC and the Department of Justice (DOJ). Notably, the SEC took action notwithstanding that there was no indication that (i) an employee was actually prevented from reporting potential violations, or (ii) that the company had disciplined an employee from disclosing information relating to internal investigations. The settlement is available at: Exchange Act Release 74619

August 4, 2015 – The SEC issued an interpretation which clarified that the anti-retaliation provisions of the whistleblower rules extends not only to persons who report possible wrongdoing directly to the SEC, but also to persons who report "to a supervisor, compliance official or other person working for the company that has authority to investigate, discover or terminate misconduct." The guidance is available at: Exchange Act Rule 21F Interpretation

In light of the foregoing, investment advisers should make certain that their policies and procedures reflect the expanded reach of the anti-retaliation provisions and provide appropriate protections to guard against retaliations. Firms should also review any confidentiality agreements with employees and associated persons to ensure that they do not discourage communications with government agencies and include affirmative language regarding the right to report potential violations of federal securities laws to government agencies without prior notice to, or authorization from, the firm.

OCIE's Never-Before-Examined Registered Investment Company Initiative

In April 2015, OCIE issued a risk alert announcing the launch of a Never-Before Examined Investment Company ("NBE IC") Initiative to examine fund complexes that have not been previously scrutinized, such as open-end funds, closed-end funds, and underlying insurance funds. This follows a Never-Before Examined Registered Investment Adviser Initiative launched in 2014. The NBE IC Initiative consists of focused, risk-based examination of 2 or more of the following areas: (i) compliance programs; (ii) annual contract reviews; (iii) advertising and distribution of fund shares; (iv) valuation of portfolio assets and net asset value calculation; and (v) leverage and the use of derivatives. The risk alert is available at: NBE IC Initiative

Final Rule on Crowdfunding[1]

October 30, 2015 – The SEC approved a final rule to permit the offer and sale of securities through crowdfunding under Title III of the JOBS Act. The final rule will allow companies to raise up to $1 million through crowdfunding during a 12-month period and place limitations on the amount investors may invest in these securities based upon income level. The final rule incorporates several revisions to the originally proposed rule. These include exempting first time crowdfunding issuers offering more than $500,000,

1 For further discussion on this topic, please see our blog post SEC Approves Regulation Crowdfunding (Nov. 2 2015) and Financial Services Updates Vol. 10 Issue 38 (Nov. 2, 2015), and Vol. 10 Issue 39 (Nov. 9, 2015).

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but not more than $1 million of securities from the requirement to provide audited financial statements. Further, the final rule permits an individual investor to invest over a 12-month period in the aggregate across all crowdfunding offerings up to (i) if the investor's annual income or net worth is less than $100,000, the greater of (a) $2,000 or (b) 5% of the lesser of the investor's annual income and net worth or (ii) if the investor's annual income and net worth are both equal to or greater than $100,000, 10% of the lesser of the investor's annual income and net worth. The final rule and forms will be effective 180 days after publication in the Federal Register, except the forms enabling funding portals to register with the SEC, which will be effective on January 29, 2016. The full text of the final rule is available at: Final Crowdfunding Rule

Pay Ratio Disclosure

August 5, 2015 – The SEC adopted a final rule requiring public companies to disclose the ratio of the compensation of their chief executive officers to the median compensation of their employees, including non-U.S., full-time, part-time, temporary, and seasonal employees, as well as employees of its consolidated subsidiaries. Issuers will be required to make a pay ratio disclosure in any filing described in Item 10(a) of Regulation S-K that requires executive compensation disclosure pursuant to Item 402 of such regulation. Many SEC registrants will be subject to the rule, however, there are exclusions available for emerging growth companies, smaller reporting companies, and foreign private issuers. Companies will have to start reporting the new pay ratio disclosures in the first fiscal year beginning on or after January 1, 2017. The final rule is available at: Pay Ratio Disclosure Rule

Credit Risk Retention Rules

The final Credit Risk Retention Rule became effective for asset-backed securities collateralized exclusively for residential mortgages on December 24, 2015, and will take effect on December 24, 2016 for all other classes of asset-backed securities. The Credit Risk Retention Rule—which was mandated by Dodd-Frank and passed by the SEC, the Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, and the Housing and Urban Development Department—generally requires the securitizer of asset-backed securities to retain not less than 5% of the credit risk of the assets collateralizing the asset-backed securities. The final rule is available at: Credit Risk Retention Rule

AIFMD

The Alternative Investment Fund Managers Directive ("AIFMD") requires an annual report from non-EU fund managers who market in the EU, disclosing among other things financial information and remuneration on a quantitative and qualitative basis. For non-EU funds with a calendar year-end of December 31, the report is due by June 30, 2016.

FATCA

The Foreign Account Tax Compliance Act ("FATCA") imposes a withholding tax on (i) certain U.S. source payments such as interest or dividends received on or after July 1, 2014, and (ii) proceeds of a sale of disposition of property producing U.S.-source interests or dividends received on or after July 1, 2019, in each case paid to a "foreign financial institution" (as specifically defined in FATCA) or a non-financial foreign entity (subject to certain exemptions). In addition, U.S Funds have an obligation to determine the FATCA status of current investors prior to June 30, 2016.

Disclosure of Conflicts of Interest Relating to Fees and Expenses

In 2015, the SEC continued to bring enforcement actions regarding inadequate disclosures of conflicts of interest relating to fees and expenses, and has unequivocally communicated that full transparency of fees and conflicts of interests remains a priority and area of concern. On February 26, 2015, the Co-Chief of the Asset Management Unit, stated: "[i]n nearly every ongoing matter in the Asset Management Unit, we are examining, at least in part, whether the adviser in question has discharged its fiduciary obligation to identify its conflicts of interest and either (1) eliminate them, or (2) mitigate them and disclose their existence to boards or investors. Over and over again we see advisers failing properly to identify and then address their conflicts."[2] As a result of this scrutiny, private funds should carefully take stock of the fees and expenses charged to investors (including indirect fees paid by portfolio companies and payments to affiliated parties), identify potential conflicts of interest, and

2 The full transcript of the speech is available at http://www.sec.gov/news/speech/conflicts-everywhere-full-360-view.html.

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consider increasing transparency and taking remedial action where necessary. In addition, funds should ensure that written policies and procedures are in place to prevent and address such conflicts of interest.

Agency Focus on Cybersecurity

In 2015, OCIE conducted the first round of examinations and issued further guidance in connection with its Cybersecurity Examination Initiative. OCIE published a summary of the first round of cybersecurity examinations on February 3, 2015 and put out an Investment Management Guidance Update on cybersecurity in April 2015. On September 15, 2015, OCIE issued a Second Cybersecurity Risk Alert[3] which identifies six principle areas of focus for the second round of cybersecurity examinations: (i) governance and risk assessment, (ii) access rights and control rights, (iii) data loss prevention controls, (iv) vendor management, (v) training programs, and (vi) incident response plans. The risk alert also includes an appendix that provides a sample request for documentation or evidence to satisfy the SEC's review of each focus area.

On September 22, 2014, the SEC settled a cybersecurity enforcement action against an investment adviser for failure to adopt written policies and procedures to ensure the security and confidentiality of personally identifiable information and protect it from anticipated threats or unauthorized access, in violation of Rule 30 of Regulation S-P. In particular, the SEC focused on the adviser's failure to (i) conduct periodic assessments, (ii) implement a firewall, (iii) encrypt the PII, and (iv) adopt a cybersecurity incident response plan. The settlement is available at: Advisers Act Release 4204

In February 2015, FINRA issued a Report on Cybersecurity Practices which presents an "approach grounded in risk management." Topics covered by FINRA's report include cybersecurity risk assessment, technical controls, incident response planning, vendor management, staff training, cyber intelligence and information sharing, and cyber insurance. The report stresses the importance of a strong governance framework in creating a firm foundation for a cybersecurity program.

In August 2015, the NFA issued an Interpretive Notice to NFA Compliance Rules 2-9, 2-36 and 2-49 ("Cybersecurity Interpretative Notice") that proscribes cybersecurity standards for member firms. The Cybersecurity Interpretive Notice adopts a principles-based risk approach to allow firms with flexibility to design and implement security standards, procedures, and practices appropriate for their particular business activities and risks. The Cybersecurity Interpretative Notice was approved by the CFTC in October 2015 and will become effective on March 1, 2016.

For more information on this subject, view Winston & Strawn's detailed briefings from February 2015 and September 2015.

SEC Focus on Use of Unregistered Brokers

Over the last several years, the SEC has demonstrated an increased focus on the use of unregistered brokers in the marketing or sale of securities. In two cases last year, the SEC fined two dozen people more than $10 million for improper brokerage transactions or marketing. Some of the theorized reasons for increased enforcement action include the proliferation of Registered Managers following Dodd-Frank and the recent JOBS Act which now allow issuers and solicitors more latitude to advertise to the public, but may also paradoxically bring them closer to running afoul of the rules.

Division of Investment Management Initiatives: Enhanced Data Reporting, Transition Plans, and Stress Testing

Dave Grim, then the Acting Director (and now the Director) for the SEC's Division of Investment Management ("DIM") gave a speech at the 2015 Investment Adviser Association Compliance Conference in which he discussed certain priorities of DIM including enhanced data reporting, transition plans, and stress testing.

For information about enhanced data reporting through reviews of Form ADV and Form PF, please see the Proposed Regulatory Change under section I.a.i of this briefing.

Transition planning for Registered Managers as a SEC priority was first addressed in December 2014 by SEC Chairman Mary Jo White. Grim stated that the SEC was reviewing policies that are currently in place and ensuring that any new regulations build off of, and are

3 The First Cybersecurity Risk Alert, which was published on April 14, 2014, put the industry on notice that cybersecurity and protection of customer data would be an area of concern during SEC examinations.

complimentary to, current regulations. For example, rule 206(4)-7 under the Advisers Act required Registered Managers to have written policies and procedures, and to the extent relevant, those policies and procedures should address business continuity plans.

Regarding Dodd-Frank mandated stress testing, Grim admitted that DIM was in the infancy of formulating stress testing protocols but said that, among other considerations, they intended to use what had been learned about stress testing through money market reform.

For the full text of the speech, please see the SEC transcript of Grim's prepared remarks here.

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Appendix C – SEC OCIE National Exam Program's Examination Priorities for 2016

On January 11, 2016, OCIE released their annual list of examination priorities for 2016. They are continuing their focus on: issues relating to retail investors, particularly those saving for retirement; issues that may increase market-wide risk; and continuing to expand the use of technological tools to help analyze data to identify potential illegal activity and examine registrants that are engaged in higher-risk areas of the market.

Initiatives directed towards helping retail investors saving for retirement include:

1. Continuing the Retirement-Targeted Industry Reviews and Examinations ("ReTIRE") Initiative launched in June of 2015 which looks at the services offered by Registered Managers and broker-dealers and to investors with retirement accounts. This program is focused on determining if there was a reasonable basis for recommendations made to investors, conflicts of interest, supervision and compliance controls, and marketing and disclosure practices.
2. Exchange-Traded Funds ("ETFs") will also face additional scrutiny as they will be reviewed for (a) compliance with applicable exemptive relief granted under the Exchange Act and the Company Act and with other regulatory requirements, (b) their unit creation and redemption process, (c) sales strategies, (d) trading practices, and (e) proper risk disclosures and suitability standards.
3. Using data analytics, OCIE hopes to better to identify, and subsequently examine, higher-risk registered representatives of broker dealers and investment adviser representatives of Registered Managers that operate out of branch offices. With the significant number of offices maintained by Registered Managers and broker dealers, exams had previously been limited to home offices and a sampling of branch offices. This new strategy hopes to target offices that are more likely to actually be engaged in potentially inappropriate trading.
4. The choice of fee arrangements, whether asset-based, transaction-based, hourly, etc., will continue to be examined to make sure that the selected strategy is appropriate for the investor, based on the amount of fees charged, services offered, and disclosures made. Additionally, the assessment of appropriateness will be made not just at the time that the account is opened but moving forward as well.
5. With respect to variable annuities, OCIE will be paying attention to the suitability of sales, supervision of such sales and adequacy of disclosure.
6. Investment Managers that advise Government Plans should expect to be examined on pay-to-play compliance and undisclosed gifts and entertainment.

The SEC hopes to promote an efficient and stable market by reducing market-wide risks such as: cybersecurity, examining Registered Managers who utilize potentially illiquid fixed income securities for proper risk management and other controls, and examining clearing agencies that are designated systemically important.

The SEC has been increasing the use of data analytics in order to more effectively target its oversight capabilities. Among the characteristics the SEC is most interested in include; (i) recidivist registered representatives of broker dealers and investment adviser representatives; (ii) clearing and introducing brokers who have not filed the number of suspicious activity reports that would be expected based on their business line; (iii) indications of engaging in, aiding or abetting fraud, particularly with respect to over-the-counter markets; (iv) indications of excessive training; (v) promoting new products that the SEC believes may be complex or high-risk.

Additionally, OCIE will continue to focus efforts on: (i) municipal advisors for compliance with recently adopted rules; (ii) private placements, particularly focusing on due diligence, disclosure, and suitability; (iii) Registered Managers and investment companies that have not been previously examined; and, (iv) private fund advisers, principally with regard to fees and expenses and the disclosure associated with an Investment Manager's side-by-side management of both performance-based and purely asset-based fee accounts.

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