

To help investment advisers review their 2018 compliance “to do” lists, we are providing our annual update to remind investment advisers to private investment funds about certain annual compliance obligations and to highlight certain priorities of the SEC’s Office of Compliance Inspections and Examinations (OCIE), which are likely to have an impact on advisers to private funds.

Annual Reminders

Regulatory Filings

Form ADV: All registered investment advisers (RIAs) and exempt reporting advisers (ERAs) must file an amendment to Form ADV with the SEC annually within 90 days of the end of their fiscal year (i.e., March 31 for those that have a December 31 fiscal year end). Some additional points to consider regarding Form ADV:

- Amendments to Form ADV which became effective on October 31, 2016, now require all advisers to use the new form for initial filings or the first amendments to existing filings occurring on or after October 1, 2017. Those advisers with a fiscal year ending December 31 will be required to use the new form for the first time when they file their annual update in the first quarter of 2018. Among other things, the amendments modify the requirements under Part 1A of Form ADV to require (i) additional reporting requirements with respect to separately managed accounts; (ii) registration on a single Form ADV of multiple private fund advisers operating as a single advisory business in a “relying adviser” structure (the “Umbrella Registration”), which effectively codified the position expressed in the SEC No-Action Letter to the American Bar Association, Business Law Section, dated January 18, 2012; (iii) additional disclosures about investment advisers and their businesses; and (iv) certain clarifying and technical changes. Additionally, the amendments include a revision to Rule 204-2 of the Advisers Act (relating to recordkeeping), requiring investment advisers to maintain additional records of performance calculations and performance-related communications.
- Each client of an RIA must receive on an annual basis (i) a copy of Form ADV Part 2 or (ii) a summary of any material changes to the brochure that also includes information on how the client may obtain a copy of the updated brochure and where to get more information through the Investment Adviser Registration Depository.

Form PF: Certain RIAs must also file annually with the SEC an updated Form PF for each of their funds within 120 days of the end of their fiscal year (i.e., April 30 for those that have a December 31 fiscal year end). Depending on assets under management or the types of funds being advised, more frequent filing may be required (e.g., on a quarterly basis).

Form D: Advisers to funds with continuing non-registered offerings in reliance on Regulation D (e.g., hedge funds and any closed-end funds raising capital for longer than a year) must annually file, on behalf of any such fund, an amended Form D on or before the first anniversary of the initial filing or the filing of the most recent amendment. In addition to the annual Form D amendment, we recommend reviewing applicable state “blue sky” laws to determine if there are any annual amendment requirements to such state filings.

CFTC Exemption: Advisers that rely on the exemption from registration with the US Commodity Futures Trading Commission (CFTC) pursuant to Rule 4.13(a)(3), the *de minimis* exemption, must resubmit their claim of exemption annually within 60 days of the end of the calendar year, or by March 1.

Internal Compliance

Custody Rule Audit: To satisfy the SEC’s Custody Rule, some RIAs obtain an annual audit for their funds by an independent public accountant registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board, and send such audited financial statements to clients within 120 days after the fund’s fiscal year end (i.e., April 30 for those that have a December 31 fiscal year end).

Privacy Policy: Provide each client with an updated copy of the adviser’s Privacy Notice.

Pay-to-Play: Obtain an annual certification from each employee attesting to his or her state and local political contributions, solicitations, or related payments to third-parties during the prior year.

Annual Compliance Review: RIAs must conduct an annual review of their policies and procedures to determine their adequacy and the effectiveness of their implementation.

Annual Securities Holdings’ Report: RIAs must obtain annual personal securities holdings reports for each “access person.”

Highlights of Certain OCIE 2018 Examination Priorities Affecting Private Fund Advisers

Never-Before Examined Investment Advisers: OCIE will continue to make risk-based assessments of investment advisers and select those with elevated risk profiles for examination. OCIE observed that approximately 15% of all investment advisers were examined in 2017, up from 8% the previous year.

Cybersecurity: OCIE will continue to examine cybersecurity, emphasizing governance and risk assessment, access rights and controls, data loss prevention, vendor management, training and incident response.

Anti-Money Laundering Programs: OCIE announced that it will devote a portion of its resources to examine whether the firms it regulates (particularly investment companies) are adopting appropriate anti-money laundering (AML) programs to address their obligations. OCIE indicated that such programs might relate in part to customer due diligence and to whether investment advisers are filing Suspicious Activity Reports (SARs) when required. In 2015, the Treasury Department proposed extending the requirement to maintain a formal AML program under the Bank Secrecy Act to RIAs and having the SEC assume responsibility for examining RIAs' AML programs. No such rules have been put into effect yet and it is uncertain whether the Trump Administration's efforts to reduce regulations will impact this proposal, but commentators have suggested that AML matters would be less likely to be subject to deregulation.

The foregoing is intended only to provide an overview of the primary recurring compliance requirements for RIAs and ERAs to private investment funds and some of OCIE's 2018 examination priorities as they relate to advisers to private funds. For more information regarding such compliance requirements and related regulatory obligations, please contact your principal firm lawyer or one of those listed in this publication.

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