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2022 Regulatory Update for Investment Managers and Private Funds

By Evan Hall

The purpose of this update is to remind investment advisers, investment managers, private funds, commodity pool operators and commodity trading advisors about various annual and periodic regulatory, legal, reporting, compliance and other obligations, considerations and requirements, including required filings and reports with due dates fast approaching. This update does not purport to be a comprehensive or exhaustive overview of all applicable compliance, reporting, regulatory, legal or other obligations that are or may be applicable to investment advisers, investment managers, private funds, commodity pool operators and/or commodity trading advisors.

FORM ADV ANNUAL UPDATING AMENDMENT FOR RIAs; ANNUAL DELIVERY OF PART 2A TO CLIENTS

Annual Updating Amendment

Each registered investment adviser ("RIA") must file an annual updating amendment to its Form ADV (including Part 1A and Part 2A) to update its responses to all items and questions within 90 days of the end of each fiscal year. Accordingly, an RIA with a December 31 fiscal year end will be required to file an annual updating amendment to its Form ADV by **March 31, 2022**. The Form ADV annual updating amendment is filed electronically with the Securities and Exchange Commission ("SEC") (or applicable state regulatory authorities) via the Investment Adviser Registration Depository ("IARD"). An RIA must include the summary of material changes required by Item 2 of Part 2A either in the brochure (cover page or the page immediately thereafter) or as an exhibit to the brochure. Amendments to Part 2B of Form ADV generally are not required to be filed with the SEC (unless requested) or made publicly available on the IAPD website, but investment advisers registered with the State of Texas or other state regulatory authorities may be required to file amendments to Part 2B of Form ADV with such authorities (including as part of the annual updating amendment).

Please note that the IARD charges filing fees in connection with Form ADV annual updating amendments and each RIA should review the balance in its IARD account at FINRA to ensure that sufficient funds are available to cover such fees.

Annual Delivery of Part 2A to Clients

Within 120 days of the end of each fiscal year, an RIA generally must deliver to each of its clients either (1) an updated Part 2A of Form ADV (including a summary of any material changes), or (2) a summary of any material changes to Part 2A of Form ADV, together with an offer to provide the updated Part 2A of Form ADV to any client promptly upon request. As a result, an RIA with a December 31 fiscal year end must deliver the updated Part 2A of Form ADV to clients by **May 2, 2022**.

Other-Than-Annual Amendments

In addition to the annual updating amendment, an RIA must file an "other-than-annual" amendment to Part 1A of its Form ADV promptly if and as required pursuant to General Instruction 4 to Form ADV. An RIA must also amend (and file) Part 2A of Form ADV promptly whenever any information in Part 2A of Form ADV becomes materially inaccurate.

FORM ADV ANNUAL UPDATING AMENDMENT FOR ERAs

Advisers relying on the "private fund adviser" and/or the "venture capital fund adviser" exemptions from registration as an investment adviser ("exempt reporting advisers" or "ERAs") are required to file reports with the SEC (and/or applicable state regulatory authorities) on Part 1A of Form ADV electronically via the IARD system. Like an RIA, an ERA generally must file an annual updating amendment to its Form ADV (on Part 1A of Form ADV) within 90 days of the end of its fiscal year. As a result, an ERA with a December 31 fiscal year end must file an annual updating amendment to its Form ADV by **March 31, 2022**. The fee for initial reports and each annual updating amendment is $150 for an ERA and fees must be credited to an ERA's IARD account before an ERA can submit any filing. In addition to annual updating amendments, an ERA must also file an "other-than-annual" amendment to Form ADV promptly if and as required pursuant to General Instruction 4 to Form ADV.

An ERA relying on the private fund adviser exemption must calculate annually the private fund regulatory assets under management that it manages and report this amount on its annual Form ADV amendment. A private fund adviser that has complied with all ERA reporting requirements but is no longer eligible for the private fund adviser exemption because its RAUM meets or exceeds $150 million as of the end of its fiscal year must apply for registration with the SEC up to 90 days after filing its annual updating amendment and may continue advising private fund clients during this period. An adviser relying on this exemption, however, must be registered with the SEC (or, if applicable, one or more applicable states) prior to accepting a non-private fund client.

FORM CRS

Overview
All RIAs and broker-dealers that offer or provide (or seek or expect to provide) services to "retail investors" are required to prepare and file the Form CRS ("relationship summaries") with the SEC (via the IARD system) and deliver copies of such relationship summaries to their current and prospective "retail investors". For purposes of Form CRS, "retail investor" is defined as "a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes." Importantly, firms should note that all natural persons, regardless of net worth or sophistication, are included in the definition of "retail investor," and Form CRS must be provided to a retail investor who invests for personal, family or household purposes. RIAs and broker-dealers that do not provide or offer services to "retail investors" are not required to prepare, deliver or file a Form CRS. For example, an RIA whose sole clients are pooled investment vehicles is not required to prepare Form CRS, even if the vehicles have one or more investors that are natural persons.

Form CRS Delivery and Updating Requirements
An RIA generally must deliver a relationship summary to each retail investor before or at the time such RIA enters into an advisory agreement with such retail investor. An RIA must also deliver the most recent Form CRS to a retail investor who is an existing client or customer before or at the time it: (i) opens a new account that is different from the retail investor's existing account(s); (ii) recommend that the retail investor roll over assets from a retirement account into a new or existing account or investment; or (iii) recommend or provide a new investment advisory service or investment that does not necessarily involve opening of a new account and would not be held in an existing account. RIAs must also deliver the relationship summary to a retail investor within 30 days upon the retail investor's request.

RIAs must update a relationship summary (including an exhibit highlighting the changes) and file it with the SEC in accordance with the instructions to Form CRS within 30 days of any information in the summary becoming materially inaccurate. Any changes in the updated relationship summary to retail investors who are existing clients are required to be made available without charge within 60 days after the Form CRS becomes materially inaccurate. Any amended relationship summary that is delivered to a retail investor who is an existing client must highlight the most recent changes, as described in the Form CRS instructions

FORM PF

An RIA is required to file Form PF with the SEC if it: (i) advises one or more private funds; and (ii) collectively, with related persons (other than related persons that are separately operated), had private fund regulatory assets under management of $150 million or more as of the end of its most recently completed fiscal year. Form PF must be filed with the SEC electronically through the Private Fund Reporting Depository (PFRD) system, a subsystem of the IARD. In order to determine if an RIA meets the $150 million minimum reporting threshold or is a large private fund adviser for purposes of Form PF, such RIA is required to aggregate for each type of private fund assets of private funds advised by any of its related persons other than persons that are separately operated.

Large hedge fund advisers (*e.g.*, advisers with $1.5 billion or more in regulatory assets under management attributable to "hedge funds" as of the end of any month during the preceding fiscal quarter) are required to file Form PF on a *quarterly* basis within 60 days of the end of each fiscal quarter (*i.e.*, **March 1, 2022** with respect to the fiscal quarter ending December 31, 2021). Smaller private fund advisers (*e.g.*, RIAs with $150 million or more in private fund regulatory assets under management, but less than $1.5 billion in regulatory assets under management attributable to "hedge funds") and large private equity fund advisers (*e.g.*, RIAs with $2 billion or more in regulatory assets under management attributable to "private equity funds" as of the end of their most recent fiscal year) are required to file Form PF on an *annual* basis within 120 days of the end of each fiscal year (*i.e.*, **May 2, 2022** with respect to the fiscal year ending December 31, 2021). Section 1 of Form PF must be completed by all private fund advisers, Section 2 must be completed by all large hedge fund advisers (and Section 2b requires additional information about any hedge fund advised by the adviser that had a net asset value of at least $500 million as of the end of any month in the prior fiscal quarter), Section 3 must be completed by all large liquidity fund advisers, and Section 4 must be completed by all large private equity fund advisers.

The current fee for filing annual and quarterly Form PF reports is $150. We recommend that private fund advisers coordinate with their accounting, compliance, administrative and legal advisers in order to determine the appropriate filing category, filing deadline, the reporting frequency and the information required to be reported.

Investment managers and other firms that are registered with the Commodity Futures Trading Commission ("CFTC") as commodity pool operators and/or commodity trading advisors can file Form PF with the SEC to satisfy certain applicable CFTC reporting requirements, but such firms generally will also need to file (among other things) Schedule A of Form CPO-PQR (for CPOs) or Schedule A of Form CTA-PR (for CTAs) with the National Futures Association ("NFA").

FORM 13F

Section 13(f)(1) of the Securities Exchange Act of 1934, as amended, requires each institutional investment manager that exercises investment discretion over accounts holding $100 million or more in "Section 13(f) securities" (which generally include equity securities traded on exchanges or NASDAQ and certain convertible debt securities) to file quarterly reports on Form 13F within 45 days of the end of each calendar quarter. The Form 13F reporting requirement begins at the end of a given year (with respect to the fourth quarter of such year) in which an institutional investment manager's holdings reach the Section 13(f) threshold on the last trading day of any month of that year. After the initial Form 13F filing, a manager's filing obligation continues for at least the first three quarters of the subsequent calendar year (even if a manager's holdings drop below the threshold) and, if the manager continues to have discretion over at least $100 million in Section 13(f) securities, may continue indefinitely. The Form 13F for the fourth quarter of 2021 will be due on or before **February 14, 2022**.

SCHEDULE 13D AND SCHEDULE 13G

Under Section 13(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), a person whose acquisition of securities of an issuer results in beneficial ownership of more than 5% of a class of the issuer's equity securities that is registered under the Exchange Act must file with the SEC a Schedule 13D within 10 days of the acquisition (unless the person is eligible to file or report on a Schedule 13G, as discussed below). For purposes of Schedules 13D and 13G, the "beneficial owner" can be the adviser, the private funds it manages that hold the relevant securities, the general partners or managing members of the private funds and/or the adviser's portfolio managers and principals.

The occurrence of any material change in any facts set forth in a filed Schedule 13D will, in general, trigger the requirement to file an amendment to such previously filed Schedule 13D promptly after such change. A material change includes, without limitation, a material change in the percentage of the class of securities beneficially owned.

Schedule 13G is a short-form statement that certain passive investors may file in lieu of the Schedule 13D under certain circumstances. Depending on the circumstances, an initial Schedule 13G filing must be made either: (i) within 10 days after the filing requirement arises; (ii) within 10 days after the end of the month in which the filing requirement arises; or (iii) within 45 days after the end of the calendar year in which the filing requirement arises. Schedule 13G must be amended under certain circumstances including: (A) within 45 days after the end of a calendar year in which there are any changes in the information reported on a previously filed Schedule 13G (on or before **February 14, 2022**); (B) for certain investors, promptly after certain changes in ownership occur; and (C) for certain other investors, within 10 days after the end of the first month in which such changes in ownership occur.

If a Schedule 13G filer ceases to be a passive investor (*i.e.*, if the filer holds the securities with the purpose of changing or influencing control of the issuer) or is otherwise no longer eligible to file a Schedule 13G rather than a Schedule 13D, such filer is required to file a Schedule 13D within 10 days of such change. There is a ten-day cooling off period after such filing is made during which the investor may not purchase securities of the issuer or its controlling entities and may not vote securities of the issuer.

FORM 13H

Rule 13h-1 under the Securities Exchange Act of 1934, as amended, imposes reporting requirements on any person (including a firm or individual) whose transactions in covered securities (in general, any security listed on a national securities exchange), together with transactions of persons subject to its control (a "Large Trader"), equal or exceed: (i) 2 million shares or shares with a fair market value of $20 million during any calendar day; or (ii) 20 million shares or shares with a fair market value of $200 million during any calendar month. A Large Trader must self-identify to the SEC, obtain from the SEC a Large Trader Identification Number, and provide that number to U.S. broker-dealers through which it trades. Unless it becomes inactive, a Large Trader must update its Form 13F within 45 days after the end of each calendar year and promptly following the end of a calendar quarter in the event that any information contained in the Form 13H becomes inaccurate. A Large Trader may suspend its filing obligation if it has not traded securities in excess of the identifying activity level at any time during the preceding year.

ANNUAL NEW ISSUES CERTIFICATIONS; AMENDMENTS TO NEW ISSUES RULES

Investment funds that desire or intend to invest in "new issues" (*i.e.*, equity securities issued in an initial public offering) should send an annual "new issues" questionnaire and certification to all investors to obtain and/or confirm the investors' "exempted person," "restricted person" and "covered person" status. This annual certification can be obtained and effected through a negative consent letter or process.

FORM D AND BLUE-SKY NOTICE FILINGS

Form D is required to be filed with the SEC by all issuers that sell securities in reliance on the exemption from registration set forth in Regulation D under the Securities Act of 1933, as amended (the "Securities Act"). This includes interests in hedge funds, private equity funds, real estate funds or other privately-offered pooled investment vehicles. An issuer must file an initial Form D notice with the SEC for each new offering of securities no later than 15 calendar days after the date of first sale of securities in the offering. In addition to the initial filing, Form D must be amended on or before the anniversary of the issuer's previous Form D filing if the offering of securities is continuing at that time. Form D must also be amended to correct a material mistake or to reflect a change in the information provided in the previously filed Form D. An issuer that files an amendment to a previously filed Form D must provide current information in response to all requirements of the Form D, regardless of the reason that the amendment is being filed. Form D filings (and amendments thereto) must be filed electronically using the SEC's EDGAR system.

In addition, Form D notice filings (or "blue sky filings") generally are required to be made in each state in which an issuer's securities are sold to investors. Blue sky filings typically consist of a copy of the Form D filed with the SEC, a consent to service of process (such as a Form U-2) and a filing fee. State blue sky filings generally are required to be made in such state within 15 days after the date of the first sale of securities to an investor in such state. Please note that some states require that every amendment to the Form D that is filed with the SEC also be filed in that state (whether or not there are new sales in that state). Most states allow for either electronic or paper Form D notice filings, with the majority of states accepting and a few states mandating the electronic filing of Form D.

BEA AND TIC REPORTS

U.S. institutional investors may be subject to reporting requirements under the Treasury International Capital (TIC) and the Treasury Foreign Currency systems of the U.S. Department of the Treasury, and under the so-called BE system of the U.S. Department of Commerce's Bureau of Economic Analysis (BEA). The TIC system collects data from the United States on cross-border portfolio investment flows and positions between U.S. residents (including U.S.-based branches of firms headquartered in other jurisdictions) and foreign residents (including offshore branches of U.S. firms) through a series of forms. Each of the TIC forms requires reporting only if a certain threshold of cross-border activity is reached. Certain TIC forms must be filed monthly, quarterly or annually; others every five years; and still others must be filed only upon request by the Federal Reserve Bank of New York. Data on cross-border direct investment is collected by the BEA, U.S. Department of Commerce. "Direct investment" is the ownership or control, directly or indirectly, by a person or affiliated group, of 10% or more of the voting securities of an incorporated business enterprise, or an equivalent interest in an unincorporated enterprise. Similar to TIC forms, BEA forms are filed variously on a monthly, quarterly or annual basis, every five years or upon the BEA's request.

Investment managers and other institutional investors are encouraged to review the applicable reporting requirements and thresholds to determine if and when they are required to file reports or claims of exemption with the U.S. Department of the Treasury or BEA.

ANNUAL REVIEW OF COMPLIANCE POLICIES

Pursuant to Rule 206(4)-7 under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), RIAs must establish, adopt and implement written compliance policies and procedures that are reasonably designed to prevent violations of the Advisers Act and other applicable securities laws. Each RIA must identify the conflicts of interest and activities that create compliance risks for the firm and create policies and procedures that are reasonably designed to address those risks. The policies and procedures should be designed to prevent violations from occurring, to detect violations that have occurred and to correct such violations.

Rule 206(4)-7 also requires an RIA to review its policies and procedures on at least an annual basis for adequacy and effectiveness of implementation. Although Rule 206(4)-7 requires only annual reviews, RIAs generally should conduct periodic and interim reviews of their compliance policies and procedures throughout the year. When conducting an annual review, an RIA should take into account and consider any developments during the year that might suggest a need to revise or modify or amend such adviser's compliance policies and procedures including, among other things: (i) changes in applicable laws, rules or regulations; (ii) changes in the adviser's business activities or operations (such as entering a new line of business); (iii) any compliance issues that arose during such year; (iv) the results of any SEC examinations of the adviser; and (v) recent SEC enforcement actions or proceedings. The goals of the annual review should be to determine whether an RIA's compliance program reasonably and effectively prevents compliance issues and problems from arising, detect compliance issues that have arisen, and promptly address any issues or problems that have occurred. The annual review process should incorporate reasonable and appropriate "forensic tests" to evaluate the compliance program. "Forensic tests" are quality control or transactional tests that help to identify weaknesses or deficiencies in an adviser's compliance program or instances in which the adviser's policies may have been circumvented or are otherwise not operating effectively.

RIAs generally should document each annual and other review and all steps and actions taken to revise or enhance or improve the compliance program as a result of such review. The SEC typically asks RIAs to produce documentation evidencing required annual reviews during examinations. The failure to conduct (or to timely conduct) and/or adequately document annual compliance reviews is one of the top issues identified by the SEC during examinations and any such failure could result in enforcement proceedings by the SEC. Compliance training should also be provided to supervised persons on at least an annual basis and more frequently as necessary or appropriate.

ERAs generally are not required to establish, adopt and implement comprehensive compliance policies and procedures pursuant to Rule 206(4)-7 under the Advisers Act or to comply with most of the other rules under the Advisers Act. Nonetheless, unregistered advisers are subject to the anti-fraud provisions of the Advisers Act, and ERAs are subject to the pay-to-play rule under the Advisers Act as well as the requirement to adopt policies and procedures reasonably designed to prevent insider trading. Generally, then, it is advisable for ERAs to establish, adopt and implement certain minimum policies and procedures to ensure compliance with the applicable provisions of the Advisers Act. An ERA should review at least annually the adequacy of its policies and procedures and make any appropriate revisions and updates.

The SEC's Division of Examinations released the following Risk Alerts in 2021 that are applicable to RIAs: (i) Risk Alert: The Division of Examinations' Continued Focus on Digital Asset Securities; (ii) Risk Alert: The Division of Examinations' Review of ESG Investing; (iii) Risk Alert: Observations from Examinations of Investment Advisers Managing Client Accounts That Participate in Wrap Fee Programs; (iv) Risk Alert: Observations Regarding Fixed Income Principal and Cross Trades by Investment Advisers from an Examination Initiative; (v) Risk Alert: Observations from Examinations of Advisers that Provide Electronic Advice; and (vi) Risk Alert: Division of Examinations Observations: Investment Advisers' Fee Calculations. RIAs would be well-advised to carefully consider and review the Division of Examinations' guidance in these and other recent Risk Alerts and assess their compliance policies and procedures accordingly. RIAs should document any steps or measures taken to evaluate and address such concerns or other concerns related to these and other recent Risk Alerts.

REVIEW AND UPDATE OFFERING, DISCLOSURE AND SUBSCRIPTION DOCUMENTS

An investment manager should review all offering and disclosure documents on at least an annual basis (and more frequently as necessary or appropriate) to ensure that such documents are accurate and complete in all material respects and comply with applicable laws and regulations (and the investment manager's policies) and make any necessary updates or changes. Marketing materials, pitch books and standard due diligence questionnaire responses should also be reviewed on at least an annual basis.

INCREASE IN QUALIFIED CLIENT THRESHOLDS

On June 17, 2021, the SEC issued an order increasing the "net worth" and "assets under management" thresholds for purposes of determining whether an advisory client or investor meets the definition of "qualified client" under Rule 205-3 under the Advisers Act. The increase of the thresholds became effective August 16, 2021. As a result of this recent increase, in order to meet the definition of "qualified client", the client or investor must: (1) have at least $1.1 million in assets under the management of the adviser immediately after entering into an advisory contract with the adviser; (2) have a net worth of more than $2.2 million (excluding the value of a person's primary residence and indebtedness secured by such residence) immediately prior to entering into the advisory contract; (3) be a qualified purchaser as defined under Section 2(a)(51)(A) of the Investment Company Act of 1940, as amended; or (4) be a "knowledgeable employee" of the adviser, as defined in Rule 3c-5 under the Investment Company Act of 1940, as amended. Any new clients or investors, or existing clients or investors entering into new advisory agreements or subscriptions relying on the net worth or assets under management tests, must now meet the new thresholds in order to fall within the definition of a "qualified client." Pursuant to Section 205-3 of the Advisers Act, RIAs may charge or receive performance-based compensation or incentive-based compensation only from clients or investors that are "qualified clients."

RIAs should review and update their various client agreements and fund documents, including subscription documents for private funds and forms of advisory agreements for separately managed accounts, to reflect the new thresholds for the assets under management and net worth tests.

PREPARATION AND DELIVERY OF ANNUAL AUDITED FINANCIAL STATEMENTS

Investment managers should work with fund auditors to ensure timely and correct preparation and delivery of annual audited financial statements to investors in accordance with the requirements set forth in Rule 206(4)-2 under the Advisers Act (and any other applicable laws, rules and regulations). In particular, a private fund's annual audited financial statements generally must be distributed to investors within 120 days of the end of such fund's fiscal year (or within 180 days after the end of such fiscal year for a private fund that invests 10% or more of its total assets in other pooled vehicles that are not, and are not advised by, a related person of the vehicle or its fund manager). In order to comply with the audit exception of Rule 206(4)-2, audited financial statements must be prepared in accordance with U.S. generally accepted accounting principles by an independent public accountant that is registered with, and subject to regular inspection by, the Public Company Accounting Oversight Board.

BAD ACTOR CERTIFICATIONS

Rule 506(d) and (e) of Regulation D under the Securities Act precludes reliance on the exemption from registration set forth in Rule 506 of Regulation D by any private fund or other issuer that has committed, or is subject to, one or more disqualifying events, or which has certain relationships with other persons ("covered persons") who have committed or are subject to such disqualifying events. With respect to any private fund offerings conducted pursuant to or in reliance upon Rule 506 of Regulation D, the private fund should update, with reasonable care, its factual inquiries (*i.e.*, by email or questionnaire) to determine whether it has committed or is subject to, or any "covered persons" have committed or are subject to, any "disqualifying events". Disqualifying events may also require disclosure in Form ADV and in the applicable offering documents.

CFTC ANNUAL EXEMPTION AFFIRMATIONS

Many fund managers who manage funds or investment vehicles that directly or indirectly trade in commodity interests rely on and claim one or more exemptions or exclusions from registration with the CFTC as a "commodity pool operator" ("CPO") or "commodity trading advisor" ("CTA"). CFTC regulations require any person or entity claiming an exemption or exclusion from registration as a CPO under CFTC Regulation 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3) or 4.13(a)(5), or an exemption from registration as a CTA under CFTC Regulation 4.14(a)(8), to annually affirm the applicable notice of exemption or exclusion within 60 days of the end of each calendar year (*i.e.*, **March 1, 2022** for this affirmation cycle). Failure to affirm an active exemption or exclusion from CPO or CTA registration will result in the exemption/exclusion being withdrawn on March 2, 2022. Any person or entity may complete the annual affirmation process by accessing NFA's Exemption System through the Electronic Filings section of the NFA's website.

COMPLIANCE WITH THE NEW MARKETING RULE

As noted in our 2021 Regulatory Update, the SEC adopted significant amendments, updates and revisions to the advertising and cash solicitation rules applicable to RIAs on December 22, 2020 that went into effect on May 4, 2021. The amendments combine Rule 206(4)-1 under the Advisers Act (the advertising rule) and Rule 206(4)-3 (the solicitation rule) under the Advisers Act into a single amended Rule 206(4)-1 (the "Marketing Rule"). In connection the Marketing Rule's adoption, the SEC also codified related amendments to its books and records rule (Rule 204-2 under the Advisers Act) and to Form ADV. In sum, the Marketing Rule: (i) expands the definition of "advertisement"; (ii) replaces the four *per se* prohibitions in current Rule 206(4)-1 with a set of seven principles-based prohibitions; (iii) permits testimonials, endorsements and third-party ratings, subject to certain restrictions and conditions; and (iv) includes specific requirements for the presentation of performance results and track records. Importantly, RIAs will need to ensure that marketing activities related to private funds adhere to the requirements of the Marketing Rule, even when fund interests are distributed by a placement agent or other intermediary.

While the Marketing Rule went into effect on May 4, 2021, RIAs are not required to come into full compliance with the Marketing Rule until **November 4, 2022**. RIAs may voluntarily elect to come into full compliance with the Marketing Rule prior to such date, so long as they comply with the Marketing Rule and the other amended rules and forms in their entirety from the time of such election. In our experience, most RIAs have not yet come into full compliance with the Marketing Rule and have opted to wait until closer to the compliance deadline to begin making the necessary revisions to their existing marketing materials and marketing policies and procedures. Given the extensive nature of the updates and revisions that may be required, RIAs should begin that process now to ensure that they are in full compliance with the Marketing Rule by November 4, 2022.

REPORTING, FILING AND OTHER COMPLIANCE REQUIREMENTS OF CFTC-REGISTERED CPOs AND CTAs

CFTC-registered CPOs and CTAs are subject to various reporting, filing and other compliance-related requirements, which may vary depending upon certain traits and characteristics of the CPO or CTA and/or the pools they operate and/or advise. An overview of certain of the material periodic and annual reporting, filing and other compliance-related requirements that are or may be applicable to CFTC-registered CPOs and CTAs is set forth below:

- **NFA Annual Registration Update and Questionnaire.** In order to maintain its membership with the NFA and registration with the CFTC, a CFTC-registered CPO or CTA must annually: (i) file an electronic Annual Registration Update in the NFA's Online Registration System (ORS) when notified through NFA's Dashboard; (ii) complete the NFA's Annual Questionnaire on the CPO's membership anniversary date using NFA's Annual Questionnaire system; and (iii) complete NFA's Self-Examination Questionnaire as discussed below.

- **Annual NFA Membership Fees.** CFTC-registered CPOs and CTAs must pay certain annual fees to the NFA including annual registration records maintenance fees (currently $100 for each category of registration) and NFA membership dues (currently $750 for each category of registration).

- **NFA Annual Compliance Review.** NFA members must review their operations on at least an annual basis using the NFA's Self-Examination Questionnaire, which is designed to aid NFA members in recognizing potential problem areas and to alert them to procedures that need to be revised or strengthened. The NFA Self-Examination Questionnaire includes a general questionnaire that must be completed by all NFA members and supplemental questionnaires (*i.e.*, CPO and CTA) that must be completed as applicable. After reviewing the NFA Self-Examination Questionnaire, an appropriate supervisory person must sign and date a written attestation stating that he or she reviewed the member's operations in light of the matters covered in the questionnaire.

- **NFA Bylaw 1101**. NFA Bylaw 1101 prohibits CFTC-registered CPOs and CTAs from doing business with non-members that are required to be registered with the CFTC in any capacity or to be members of the NFA. CPOs and CTAs should have adequate policies and procedures in place to ensure compliance with NFA Bylaw 1101, such as conducting due diligence on other firms and persons with which or whom they do business (such as brokers, counterparties and investors in pools). In particular, a CFTC-registered CPO generally should take steps to confirm the status of certain types of pool investors on at least an annual basis – for example, by checking the NFA website to confirm compliance by investors with requirements to file any exemption affirmation notices (*e.g.*, under CFTC Rule 4.13(a)(3)) within 60 days of the end of each calendar year. As noted above, all CFTC-registered CPOs and CTAs should plan to review and revise their NFA Bylaw 1101 questionnaires to reflect the CFTC's new rules and documentation requirements for family offices.

- **Ethics Training**. Registered CPOs and CTAs are required to comply with the ethics training requirements of the CFTC and the NFA and to adopt, implement and maintain a written ethics training policy. In particular, such written ethics training policy should require employees (particularly associated persons of the CPO or CTA) to receive ethics training on a periodic basis (including within six months of becoming registered as a CPO or CTA). For information regarding how to comply with the ethics training requirements, CPOs and CTAs should review NFA Interpretive Notice 9051.

- **CFTC Form CPO-PQR, CFTC Form CTA-PR, NFA Form PQR and NFA Form PR**. CFTC-registered CPOs and CTAs must file periodic reports with the CFTC and NFA on CFTC Form CPO-PQR, CFTC Form CTA-PR, NFA Form PQR and NFA Form PR, as applicable, in each case in accordance with the filing deadlines summarized below. All of these forms must be filed electronically using the NFA's EasyFile System.
  - **Large CPOs**. A CPO that had at least $1.5 billion in assets under management as of the close of any business day during the calendar quarter is required to file Schedules A, B and C of CFTC Form CPO-PQR on a quarterly basis within 60 days after the end of each quarter. Such quarterly filings will satisfy both the CFTC and NFA reporting requirements.
  - **Mid-size CPOs**. A CPO that had at least $150 million, but less than $1.5 billion, in assets under management as of the close of any business day during the calendar year is required to file NFA Form PQR within 60 days after the end of the quarters ending March, June and September. For the quarter ending December 31, a mid-sized CPO must file Schedules A and B of CFTC Form CPO-PQR within 90 days of the end of each calendar year.
  - **Small CPOs**. A CPO that has less than $150 million in assets under management is required to file NFA Form PQR within 60 days after the end of the quarters ending March, June and September. For the quarter ending December 31, a small CPO must file Schedule A of CFTC Form CPO-PQR and a schedule of investments (identifying each investment that exceeds 5% of the pool's net asset value at the end of the quarter) within 90 days of the end of each calendar year.
  - **CTAs**. CTAs generally must file CFTC Form CTA-PR on an annual basis within 45 days after the end of each calendar year and NFA Form PR on a quarterly basis within 45 days after the end of each calendar quarter. CTAs can satisfy both the CFTC and NFA reporting requirements by filing NFA Form PR with the NFA within 45 days after the end of each calendar quarter.
- **Financial Reporting Requirements**. All CFTC-registered CPOs, including those relying on the relief set forth in CFTC Rule 4.7, are required to provide certain periodic financial information and reports to pool participants. In particular, a CFTC-registered CPO relying on CFTC Rule 4.7 generally is required to provide pool participants with quarterly account statements (within 30 days following the end of each applicable period) and an annual report (within 90 days after the end of each fiscal year) that has been certified by an independent certified public accountant. With respect to each pool that it operates, a CPO generally must submit a copy of the annual report of such pool to the NFA via the NFA's EasyFile system within 90 days of the end of each fiscal year (or within 180 days of fiscal year end for a pool that is a fund of funds, subject to certain conditions).

If you have any questions, please contact one of the lawyers listed below.

Evan Hall, Vicki Odette, Ricardo Davidovich, Shelley Rosensweig, Madelyn Calabrese, Taylor Wilson, Daren Domina, Kellie Bobo, Robert Bruner