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VIA EMAIL

To Our Investment Adviser Clients and Other Friends:

This is our annual letter briefly reviewing various issues that our investment adviser clients should consider over the next few weeks. We will be pleased to respond to questions, assist you in preparing needed forms and otherwise assist you in satisfying any of the requirements discussed below. Please contact one of the Shartsis Friese attorneys in the Investment Funds & Advisers Group if you need assistance.

Legal and Regulatory Changes

1. **New SEC Investment Adviser Marketing Rule.** The Securities and Exchange Commission (the "**SEC**") has adopted a new rule governing marketing, testimonials and endorsements (the "**Marketing Rule**"). Advisers registered with the SEC were required to be in compliance with the Marketing Rule by November 4, 2022. Additional information on the new rule is in our client alerts available here: SEC Marketing Rule Information and Upcoming Compliance Deadline for SEC Marketing Rule.

2. **New Federal Trade Commission Safeguard Rules.** As noted in our January 2022 letter, on October 27, 2021 the Federal Trade Commission (the "**FTC**") adopted expanded and detailed rules implementing the requirement under the Gramm-Leach-Bliley Act of 1999 (the "**GLBA**") that financial institutions safeguard the consumer information that they collect and maintain (the "**Safeguard Rule**"). Under GLBA, "consumer" refers to any individual who is obtaining a service for personal, family or household purposes. The FTC's Safeguard Rule applies to all investment advisers other than those registered with the SEC, including state-registered advisers and exempt advisers. SEC-registered investment advisers are subject to the SEC's Safeguard Rule, discussed on pages 13 and 14.

The FTC's Safeguard Rule requires an adviser's information security systems to include the development, implementation, and continuous monitoring of a comprehensive information security program, which includes: access controls; multi-factor authentication; an incident response plan; data inventory; security awareness training for employees; encryption of customer data; and secure testing and disposal methods. The FTC's Safeguard Rule also requires investment advisers to develop and implement a risk assessment that identifies risks to information security and evaluates whether the adviser's policy is sufficient to safeguard against those risks.

The FTC further mandated that advisers designate a single "qualified individual" to oversee, implement, and enforce the information security program and report any updates to the

adviser's governing body. A qualified individual can be an employee of the institution or an external consultant. The information security policies of FTC regulated investment advisers that collect information on more than 5,000 consumers are subject to additional requirements, including that the risk assessment be in writing, that the testing include certain procedures and that the adviser establishes a written incident response plan.

The FTC's Safeguard Rule requirements that became effective on December 9, 2022, include developing and implementing a comprehensive information security program that is based on a risk assessment identifying the internal and external risks to the security of consumer's information. In addition, the Safeguard Rule now requires advisers to oversee service providers' data security and to require service providers to maintain appropriate data security. However, the Safeguard Rule's requirements to designate a single "qualified individual" to oversee, implement, and enforce the information security program, to encrypt sensitive information, to train personnel and to implement some of the other technical Safeguard Rule requirements have been delayed until June 9, 2023.

Advisers subject to the FTC Safeguard Rule should already be taking steps to comply with the new rule. Although SEC-registered investment advisers are not subject to the FTC's Safeguard Rule, the SEC proposed in early 2022, but has not yet adopted, a requirement for SEC-registered advisers to adopt policies and procedures covering cybersecurity risks. All advisers should review their information security policies in light of current best practices and the standards described in the Safeguard Rule and the SEC proposal.

If you need more information on complying with the Safeguard Rule, please reach out to us.

3. **Consider Amending Fund Agreements for Protective Tax Language**. Fund principals who receive a performance allocation or carried interest from a pooled investment vehicle taxed as a partnership and who have not already considered whether their fund documents should be amended to add protective language for the tax treatment of the performance allocation or carried interest under The Tax Cuts and Jobs Act of 2017 (the "**TCJA**") should review that issue. The deadline to add the protective language to be effective for the 2022 taxable year is March 15, 2023. If you need assistance in determining if an update is appropriate or in making these updates, please reach out to us.

4. **California Consumer Privacy Act (the "CCPA"), as amended by the California Privacy Rights Act (the "CPRA") and Other Privacy Regulations**. California's privacy regulations continue to evolve and expand. Other jurisdictions have also adopted or are in the process of adopting consumer privacy protection requirements. Generally, an adviser that does business in California and has a gross annual revenue of over $25 million will be subject to California privacy rules.

Among other requirements, businesses subject to the CCPA are generally required to notify consumers of the collection of their personal information and to let consumers opt-out of the sharing of their personal information. Personal information includes a consumer's IP address and other information that may be automatically collected by an adviser's website and shared with Google if the adviser's website uses Google Analytics or similar cookies that track user engagement with the adviser's website. Although most advisers are familiar with privacy

notification requirements under the GBLA, an adviser subject to the CCPA that collets personal information of California residents through its website should also have a CCPA compliant website privacy policy and website "opt-out" notification.

In addition, CCPA subject businesses with California-resident employees, job applicants, independent contractors, and other individuals whose personal information is stored or processed in human resources information systems, customer relationship management systems and contact management systems are also entitled to certain rights under the CCPA under the new CPRA amendments effective January 1, 2023. While there are some exemptions, all businesses in California or that have California residents' personal information should review CCPA requirements, as amended by the CPRA effective January 1, 2023, to determine if these rules apply and if existing contracts, policies, and practices are aligned with the latest rules and regulations.

Additional regulations implementing the CPRA amendments were anticipated in the first half 2022, but those regulations have been delayed. It is expected that additional California privacy regulations that further revise existing requirements may be effective as early as April 2023.

Please contact us if you believe your firm is or may become subject to the CCPA or CPRA or if you would like to discuss the applicability of the privacy requirements of the European Union, the United Kingdom or other U.S. states.

5. **Corporate Transparency Act Compliance.** The Corporate Transparency Act (the "**Transparency Act**") became effective on January 1, 2021 and requires that all corporations, limited liability companies, and other business entities that are formed within any U.S. State or foreign jurisdiction that are registered to do business in the U.S. disclose certain information regarding their beneficial owners. The Transparency Act contains several exemptions aimed specifically at some types of funds and advisers to relieve such funds and advisers from the obligations of reporting. Mutual funds, SEC-registered investment advisers, venture capital fund advisers and private investment funds managed by those advisers are exempt from Transparency Act reporting requirements, however offshore private investment funds operated by SEC-registered advisers will need to file abbreviated reports of their ownership statements to the Financial Crimes Enforcement Network ("**FinCEN**"). Exempt reporting advisers and the funds they manage are not discharged and are subject to the reporting requirements.

FinCEN adopted a rule implementing the beneficial ownership information reporting provisions of the Transparency Act in September 2022. The rule becomes effective on January 1, 2024. An entity formed before January 1, 2024 that is subject to the reporting requirements must file its first report by January 1, 2025. An entity formed on or after January 1, 2024 must file is initial report within 30 days after it is created. A reporting company will have 30 days to report changes to information in previously filed reports and must correct inaccurate information in the previously filed reports within 30 days after it becomes aware or has reason to know of the inaccuracy.

6. **Continuing Education Requirements for Investment Adviser Representatives**. Over 10 states have recently adopted and many other states are in the process of adopting, or have proposed to adopt, a continuing education requirement for investment adviser representatives subject to state regulation, regardless whether the adviser is state-registered or SEC-registered. In general, these new continuing education rules require representatives who are

registered with that state to complete 12 continuing education credits per year to remain registered. The requirements are based on a model securities rule adopted by the North American Securities Administrators Association (NASAA) in 2020. On November 16, 2022, the California Department of Financial Protection and Innovation (the "**DFPI**") proposed to implement this continuing education for investment adviser representatives.

7. **Department of Labor Rollover Requirements**. In 2022, a Department of Labor (the "**DOL**") rule defining "investment advice" for purposes of determining fiduciary status under the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**") and prohibited transaction rules of the Internal Revenue Code (the "**Code**") became enforceable. Under the rule, "investment advice" includes a recommendation to a retirement plan account (including an IRA) holder to roll over funds to a different account through which the adviser will receive compensation. Along with the "investment advice" rule, the DOL issued Prohibited Transaction Exemption ("**PTE**") 2020-02 to allow SEC and state registered advisers to receive compensation derived from their recommendations if certain conditions are met. For rollover recommendations, specific documentation and recordkeeping requirements apply for the exemption to be available, including an analysis that the rollover is in the account holder's best interest, compliance with impartial conduct standards (as described in PTE 2020-02) and an annual review on compliance with the PTE. If your firm gives advice with respect to retirement accounts, such as suggesting that a client move a 401(k) balance to an IRA account, and you have not yet adopted forms and procedures to comply with PTE 2020-02, please contact us to discuss PTE 2020-02 requirements.

8. **DOL Rule on ESG Considerations in Selecting Plan Investments and Exercising Shareholder Rights**. The DOL's new rule under ERISA, regarding consideration of environmental, social and governance factors when making ERISA plan investments and proxy voting practices, affects investment advisers that advise ERISA-subject separate accounts and ERISA plan asset funds. With respect to proxies, the new rule removed language from existing rules that the DOL believed encouraged plan fiduciaries to abstain from exercising proxies. It also eliminated specific requirements under existing rules to maintain certain proxy voting records. Please confer with ERISA counsel if you have any questions regarding this new DOL rule.

9. **IRS Delays "Cryptocurrency Broker" Final Rules**. In 2021, the Infrastructure Investment and Jobs Act (H.R.3684) became law. This bill contained a provision requiring the IRS to define the term "cryptocurrency broker." Any cryptocurrency broker is required to issue a Form 1099-B to customers detailing their profits and losses from trades. Cryptocurrency brokers are also required to file information reports with the IRS to notify it of customers' trading activity. On December 23, 2022, the IRS released Announcement 2023-2, describing "transitional guidance" under Sections 6045 and 6045A and the reporting of information on digital assets by brokers. Until the IRS issues final regulations, a cryptocurrency broker may file such information reports as of December 23, 2022.

10. **Required Annual Reporting for Form 13F Filers**. On November 2, 2022, the SEC issued a rule release expanding the proxy voting information that a registered fund is required to report on Form N-PX and requiring each Form 13F filer to annually report on Form N-PX how it voted proxies concerning certain shareholder advisory votes on executive compensation. Effective July 1, 2024, all Form 13F filers will be required to annually report say-on-pay votes on Form N-PX no later than August 31 of each year for the most recent 12-month period ending on June 30. The first reporting deadline on amended Form N-PX is August 31, 2024, with these

reports covering the period of July 1, 2023 through June 30, 2024. Please contact us if you have any questions about your obligations to file Form N-PX.

Federally Registered Investment Advisers

1. **Annual Updating Amendment to Form ADV**. If your firm is SEC-registered, you must amend its Form ADV each year on the IARD within 90 days after the end of its fiscal year. For an adviser whose fiscal year ended December 31, 2022, the deadline is March 31, 2023. This annual amendment must update your firm's responses to all items of Parts 1 and 2 of Form ADV.

When you amend Part 1, the IARD will prompt you to indicate the type of amendment. You should select "annual updating amendment," and indicate that the amendment is for 2022. Unlike Part 1, Part 2A is not an online form. Instead, you must upload Part 2A to the IARD as a separate document in text-searchable PDF format. An SEC-registered investment adviser is not required to file Part 2B or any amendments to it, but must keep its updated Part 2B in its records.

The IARD filing fees for an SEC-registered adviser's annual updating amendment are (a) $40 if the adviser's RAUM is below $25 million, (b) $150 if RAUM is between $25 million and $100 million and (c) $225 if RAUM is over $100 million. You must fund your IARD account with the appropriate amount before you submit the amendment. Information about funding your firm's IARD account is at https://www.iard.com/accounting.

To determine your firm's RAUM, include the securities portfolios for which your firm provides continuous and regular supervisory or management services as of the date you file the Form ADV amendment (e.g., March 31 if you wait until the final day). Your firm's RAUM should be based on the current market value of the assets in those portfolios as of a date within 90 days before the date you file the Form ADV amendment. You should determine market value using the same method you use to report account values to clients or calculate your investment advisory fees.

The SEC has updated Form ADV to reflect the Marketing Rule described above. Given that compliance with the Marketing Rule became effective November 4, 2022, all registered investment advisers must answer the marketing questions in Form ADV.

2. **Other Amendments to Form ADV**. In addition to the annual updating amendment, an SEC- or state-registered adviser must promptly amend Part 1A of its Form ADV, including corresponding sections of Schedules A, B, C, D, and R, promptly, if:

- It is adding or removing a relying adviser as part of its umbrella registration;
- Information in Items 1 (except 1.O. and Section 1.F. of Schedule D), 3, 9 (except 9.A.(2), 9.B.(2), 9.E. and 9.F.) or 11 of Part 1A, Items 1, 2.A. through 2.F. or 2.I. of Part 1B or (c) Sections 1 or 3 of Schedule R, becomes inaccurate in any way; or
- Items 4, 8, or 10 of Part 1A, Item 2.G. of Part 1B, or Section 4 of Schedule R become materially inaccurate.

An other-than-annual amendment is not required to update Items 2, 5, 6, 7, 9.A.(2), 9.B.(2), 9.E., 9.F., or 12 of Part 1A, Items 2.H. or 2.J. of Part 1B, Section 1.F. of Schedule D or Section 2 of Schedule R, even if those items have become inaccurate.

Part 2 must be amended promptly whenever any information in it becomes materially inaccurate, although no update of Part 2 between annual amendments is required if only the amount of assets an adviser manages or its fee schedule has changed. However, if you are updating Part 2 for another reason, and the amount of assets you manage listed in Item 4.E. or your fee schedule listed in Item 5.A. has become materially inaccurate, you should update that item. An other-than-annual amendment to Part 2 does not need to include a summary of material changes.

Advisers will also need to review their Part 2A Brochure to see if their response to Item 14 (Client Referrals and Other Compensation) should be updated in light of the new Marketing Rule. Item 14 of the Form ADV Part 2A requires disclosure of the compensation arrangement to any person who is not a supervised person of the adviser for client referrals (now considered either a testimonial or endorsement). Many advisers may have included in their Part 2A Brochures that if they entered into a client referral compensation arrangement, the adviser would comply with the requirements of the now-rescinded Cash Solicitation Rule. In that case, the statutory cross reference to the Cash Solicitation Rule should be updated in the adviser's next amendment to its Part 2A Brochure. Arrangements with respect to a promoter's solicitation of investors (who do not meet the definition of "client) for private funds are not currently required to be added to the adviser's response to Item 14.

3. **Requirements to Deliver Part 2 to Clients**. An SEC-registered adviser whose Part 2A has materially changed since the last annual updating amendment must deliver to clients annually within 120 days after the adviser's fiscal year end either (a) an amended Part 2A, including a material changes summary, or (b) a separate material changes summary that also offers to provide a copy of Part 2A. For an adviser whose fiscal year ended December 31, 2022, the deadline is April 28, 2023. Clients that previously received Part 2B need not be provided an updated copy of Part 2B unless the disciplinary information disclosed in it has changed materially.

For advisers to private funds, the Part 2 delivery obligation applies to the funds and not to investors in the funds. A private fund is a fund that would be an investment company under the Investment Company Act of 1940 (the "**ICA**"), but for ICA section 3(c)(1) or 3(c)(7). Most hedge funds, private equity funds and venture capital funds are private funds. To reduce the likelihood of possible claims under the anti-fraud provisions of federal and state securities laws, however, a private fund adviser should consider furnishing Part 2 to each fund investor.

4. **Form CRS**. SEC-registered advisers with "retail clients" are required to file and deliver to those retail clients Part 3 of Form ADV (also called Form CRS). In Form CRS, an adviser must provide a plain English description of the relationship between the adviser and a retail client. A "retail client" is any natural person who seeks or receives advisory services "primarily for personal, family or household purposes." Entities, including investment funds, are not retail clients, even if any fund investor is a natural person.

A SEC-registered adviser must amend its Form CRS within 30 days if any information in it becomes materially inaccurate, and notify its retail investor clients, without charge, of the changes within 60 days after the updates are required to be made. The notice must highlight the

changes by, for example, marking the revised text or summarizing the material changes. While an SEC-registered adviser is preparing its required annual amendment to other Parts of Form ADV, it should carefully review its Form CRS to ensure consistency and uniformity across the documents. The instructions for preparing Form CRS are at: https://www.sec.gov/rules/final/2019/34-86032-appendix-b.pdf.

5. **Switching to State Registration**. If the RAUM reported on your firm's annual updating amendment is below $90 million, the firm will likely be required to withdraw its SEC investment adviser registration no later than 90 days after the annual amendment filing date. In that case, unless the firm qualifies for an exemption from state registration, you should file an application for state registration in time to ensure that it is registered by such applicable date. Such registration may take several months.

6. **State Notice Filings**. An SEC-registered adviser may be required to make notice filings and pay fees in each state in which it has clients or a place of business. Some states require an SEC-registered adviser making notice filings to file Form ADV Part 2 and other documents. An SEC-registered adviser that has previously made state notice filings should have received an electronic package from FINRA last fall with instructions for renewing those notice filings and paying the required 2023 renewal fees through the IARD system. These fees are in addition to the IARD filing fees discussed on page 5.

7. **Investment Adviser Representatives**. An SEC-registered adviser may be required to register each of its investment adviser representatives in each state in which the representative has clients or a place of business. You should ascertain whether any of your firm's personnel should be registered as an investment adviser representative in one or more states, and, if so, register those persons or renew their registrations in the appropriate states.

8. **Code of Ethics; Annual Review of Policies and Procedures**. An SEC-registered adviser must provide a copy of its code of ethics to any client or prospective client on request, and also must review its compliance policies and procedures annually, document the review and require employees to certify quarterly or annually that they have complied with the policies and procedures. If the SEC examines your firm, the staff will examine these documents. Even if your firm is not SEC-registered, your policies and procedures may require an annual review. In general, the annual review should cover the following:

- Any compliance matters that arose last year;
- Any changes in your firm's business activities;
- Any revisions to your firm's policies and procedures required by changes to the Advisers Act or its rules;
- The adequacy of your firm's code of ethics, including documenting that review and assessing the effectiveness of the code's implementation;
- A review and test of your firm's business continuity/disaster recovery plans (including an evaluation of whether you should designate a successor manager or liquidating person as discussed on page 22);

- A review and test of your firm's cyber security program;
- An evaluation of the execution services your firm receives from brokers it uses to execute client trades;
- An evaluation of whether all trade errors have been properly addressed as provided in your firm's trade error policy;
- A determination of whether your firm should provide ethics training to its employees or enhancements to its code in light of its current practices; and
- An evaluation of whether your policies and procedures are adequately tailored to your business and whether your firm is following them.

If you have not already done so, you should consult us before you review your firm's compliance policies and procedures.

9. **Custody**. An SEC-registered adviser that has or is deemed to have custody of client funds or securities must indicate that it has custody of client assets on its Form ADV and comply with the Advisers Act's custody rule. This includes:

(a) Maintaining client funds and securities with a qualified custodian;

(b) Having a reasonable basis to believe that the custodian sends account statements to clients at least quarterly; and

(c) Undergoing an annual surprise examination by an independent public accountant registered with, and subject to inspection by, the PCAOB.

An SEC-registered adviser that manages a private fund is not required to have the qualified custodian deliver quarterly account statements to investors or submit to surprise examinations, if the adviser sends the fund's annual audited financial statements to each investor within 120 days (or for a fund of funds, 180 days) after the end of the fund's fiscal year. The financial statements must be prepared in accordance with GAAP and must be audited by an independent public accountant registered with and subject to inspection by the PCAOB.

Exempt Reporting Advisers ("ERAs")

1. **The SEC ERA Exemption**. An investment adviser with RAUM under $150 million that advises only private funds is exempt from SEC registration as an ERA (an exempt reporting adviser).

ERAs relying on this exemption are required to file Part 1A of Form ADV on the IARD and disclose organizational and operational information, but need not include all of the information required of SEC-registered investment advisers. This Part 1A must be amended as described on pages 5 and 6. An ERA is not required to prepare and deliver to investors Part 2 of Form ADV. A registered adviser that is switching to ERA status must first withdraw its registration by filing Form ADV-W on the IARD before filing its first Part 1A as an ERA.

An adviser that is exempt from registering with the SEC because it is an ERA may also have to file as an ERA or register as investment adviser in each state where it has an office. For example, California has a similar registration exemption that is discussed below.

2. **Annual Updating Amendment to Form ADV**. If your firm is an SEC or California ERA, you must file an annual updating amendment to its Form ADV, Part 1A each year on the IARD within 90 days after the end of its fiscal year. For an adviser whose fiscal year ended December 31, 2022, the deadline is March 31, 2023. When you submit your firm's annual updating amendment, you must update the responses to all required items of Part 1A, including corresponding sections of Schedules A, B, C and D. The IARD fee for an SEC ERA's annual updating amendment is $150. There is no IARD fee for a state ERA's annual updating amendment.

3. **Other Amendments**. In addition to the annual updating amendment, an ERA must amend its Form ADV, Part 1A promptly if:

- Information in Items 1 (except Item 1.O. and Section 1.F. of Schedule D), 3 or 11 becomes inaccurate in any way; or
- Information in Item 10 becomes materially inaccurate.

4. **Additional Requirements for California ERAs (Private Fund Advisers).** A private fund adviser that relies on the California ERA exemption from investment adviser registration in California must continue to meet the following requirements in addition to updating its Form ADV, Part 1A:

- It must pay the application and renewal fees required of a California-registered adviser; and
- Neither the adviser nor any of its advisory affiliates may have committed any disqualifying act, or have done any of the acts or satisfied any of the circumstances providing grounds for the California Department of Financial Protection and Innovation (the "**DFPI**") to deny, suspend or revoke its or their investment adviser certificates. Disqualifying acts are set forth in Rule 262 of Regulation A under the Securities Act of 1933 (the "**1933 Act**"), and generally are acts that would result in a disciplinary action that must be disclosed on Form ADV.

A private fund adviser that relies on the California ERA exemption and advises a "retail buyer fund" must meet the additional requirements listed below. A retail buyer fund is a private fund that is not a venture capital company and that is excluded from the definition of "investment company" under ICA section 3(c)(1) or 3(c)(5). A fund that is excluded under ICA section 3(c)(7) is not a retail buyer fund.

- Each investor in a retail buyer fund must either (a) be an accredited investor or a manager, director, officer or employee of the adviser, or (b) obtain the interests in the fund through a divorce settlement, gift, inheritance or other transfer that is not a sale;

- At or before the time an investor invests in a retail buyer fund, the adviser must disclose in writing information about the services the adviser will provide and the duties, if any, it owes to the fund and such investor;

- The adviser must provide the fund's annual audited financial statements to each investor within 120 days after the end of each fiscal year (or 180 days for a fund of funds); the auditor must be a member of, and inspected by, the PCAOB; and

- The adviser must comply with the Advisers Act performance fee rule.

5. **Switching to SEC or California Registration**. If your firm is relying on the SEC or California ERA exemption, it will lose that exemption if it accepts any client that is not a private fund and must register with the SEC or the DFPI (depending on its RAUM) before accepting any such client. In addition, if your firm is an ERA and reports on its Form ADV annual updating amendment that its RAUM is $150 million or more, it must file an application to register as an investment adviser with the SEC within 90 days after filing that annual updating amendment. If your firm has not complied with all SEC reporting requirements applicable to an ERA, this 90-day transition period is not available. If your firm does not qualify for another exemption, the SEC must approve its application for registration before its RAUM reaches $150 million.

Investment Advisers Certificated by California DFPI

1. **Annual Updating Amendment of Form ADV**. If your firm is a California-registered adviser, it must amend its Form ADV each year on the IARD within 90 days after its fiscal year end. For an adviser whose fiscal year ended December 31, 2022, the deadline is March 31, 2023. The firm must update all of Parts 1, 2A and 2B.

When you amend Part 1, the IARD system will prompt you to indicate the type of amendment. You should select "annual updating amendment" and indicate that the amendment is for the fiscal year ended December 31, 2022. Unlike Part 1, Parts 2A and 2B are not online forms. Instead, you must upload them to the IARD as separate documents in text-searchable PDF format.

2. **California Annual Fees**. A California-registered adviser must pay a $125 annual fee before December 15 of each year. You should have received an electronic package from FINRA in late 2022 with instructions on how to pay this fee through the IARD system. If you did not receive that package or otherwise did not pay this annual fee, please contact us. An adviser that failed to pay the fee in December should have received a notice from FINRA and now has a "Failure to Renew" registration status on the SEC's Investment Adviser Public Disclosure website. An adviser that continues to fail to pay the fee could have its investment adviser certificate summarily revoked.

3. **Other Amendments to Form ADV**. A California-registered adviser must also amend Part 1 of its Form ADV promptly during the year to reflect any change in the information reported (other than financial information) and must promptly amend Parts 2A and 2B through the IARD whenever a material change occurs.

4. **Part 2 Client Delivery Requirements**. The DFPI encourages all California-registered advisers to deliver Part 2 to clients on the same schedule that applies to SEC-registered advisers, which is summarized in on page 6.

5. **Switching to SEC Registration**. If your firm's RAUM is $100 million or more, you should contact us to discuss whether you must register as an investment adviser with the SEC.

6. **Switching to the California Private Fund Adviser Exemption**. If your firm's RAUM is below $150 million and it advises only private funds, it may be eligible for the California private fund adviser exemption, which is similar to the SEC ERA exemption summarized on page 8. See page 9 for a discussion of the California private fund adviser exemption.

7. **Investment Adviser Representatives**. A California-registered adviser must report its investment adviser representatives electronically on Form U4 and must report a terminated investment adviser representative on Form U5 within 30 days after his or her termination.

8. **Balance Sheet and Income Statement, Minimum Financial Requirements Computation and Verification**. A California-registered adviser that has investment discretion over client assets or receives fees for advisory services 6 months or more in advance must (a) maintain in its records a written monthly calculation indicating that it satisfies California's minimum financial requirements (generally a minimum net worth of $12,000 for an adviser that does not have custody of client assets and $35,000 for an adviser that does have such custody) and (b) file with the DFPI an annual balance sheet and income statement prepared in accordance with generally accepted accounting principles, together with a schedule showing that the adviser satisfies the minimum financial requirements. These financial statements must be audited unless, during the period covered by the report, the adviser has not held or accepted custody of funds or securities for any client or owed money or securities to any client.

The financial statements and accompanying schedules should be filed as of the same date for each calendar year, except that the first report must be as of a date within 12 months after the adviser's certificate became effective. You should submit the financial information with the verification form required by the DFPI within 90 days after the date as of which the financial information is provided. The verification and minimum financial requirements forms are at https://dfpi.ca.gov/wp-content/uploads/sites/337/forms/Securities/DFPI-260.241.2b.pdf and https://dfpi.ca.gov/wp-content/uploads/sites/337/forms/Securities/DFPI-260.237.2.pdf Your firm's accountants may be able to assist you in preparing the statement of financial condition and income statement.

9. **Custody**. A California-registered adviser that holds, directly or indirectly, client assets or has the authority to obtain them must:

(a) Indicate that it has custody of client assets on its Form ADV;

(b) Maintain those assets with a "qualified custodian" in a separate account for each client;

(c) If advising a private fund:

(1) Send a statement to every investor at least quarterly that shows (A) the total amount of all additions to and withdrawals from the fund, (B) the opening and closing value of the fund for the reporting period, (C) a list of all of the fund's securities positions on the closing date of the reporting period that are required to be disclosed under GAAP for non-registered investment partnerships, and (D) a list of all redemptions and withdrawals by the investor and the value of the investor's interest in the fund; and

(2) Either (A) have the Fund's financial statements audited annually by a certified public accountant registered with and subject to regular inspection by the PCAOB and distribute the audited financials to investors within 120 days after the fund's fiscal year end or (B) enter into an agreement with an independent third party that must act in investors' best interest, which agreement authorizes the independent third party to review, verify and approve invoices and receipts for all fees, expenses and withdrawals.

(d) Additionally, an adviser that advises non-fund clients or uses the independent third party procedure for a fund instead of the annual audit exemption must:

(1) Notify clients of the identity and location of the qualified custodian of the clients' assets;

(2) Have a reasonable basis after due inquiry for believing the clients receive account statements at least quarterly directly from the qualified custodian that (i) identify the amount of assets in the account at the end of the reporting period, and (ii) list all transactions in the account; and

(3) Retain a certified public accountant to conduct a surprise examination of client assets at least once each year at a time chosen by the accountant. An adviser that has custody only because of its authority to deduct its fees from client accounts is not subject to this requirement if the adviser has written authorization to deduct its fee, sends invoices for the amount of the fee to its custodian and the client, and notifies the DFPI that it will rely on this exception to the rule.

10. **Other State Registration Requirements**. A California (or other state) registered adviser also may be required to register in states in which it has clients or any investment adviser representatives.

California Investment Advisers Not Registered in California or with the SEC and Not ERAs.

If your firm has a California office and it is not (1) registered as an investment adviser with either the SEC or California, or (2) relying on the SEC's or California's ERA exemption, you should contact us immediately. If your firm is relying on one or both of the ERA exemptions, it must register with the SEC and/or California before accepting any client that is not a private fund. If your firm reports on its Form ADV annual updating amendment that its RAUM has reached at least $150 million and it has complied with all reporting requirements applicable to an ERA, it must file an application to register as an investment adviser with the SEC and is likely required to make a notice filing in California within 90 days after filing that annual updating amendment. If

your firm has not complied with all ERA reporting requirements, this 90-day transition period is not available. In that case, unless your firm qualifies for another exemption, its registration application must be approved by the SEC before its RAUM reaches $150 million.

If your firm is relying on the California private fund adviser exemption and its RAUM increases to over $25 million, it must file its SEC ERA notice within 60 days thereafter. Please contact us immediately if you believe you may need to make this filing.

Investment Advisers Not Registered with the SEC or States in which They Have Clients or Offices

If you are not registered with the SEC and have one or more clients or offices in any state other than California, you may be required to register in that state. Please contact us immediately if you believe you may need to register in a state.

In addition, if your firm's RAUM is $25 million or more, please contact us to discuss whether you must register with the SEC as an investment adviser or may rely on the SEC's ERA exemption discussed on page 8. An adviser relying on the SEC's ERA exemption must file its initial Form ADV within 60 days after first relying on that exemption.

Other Issues

1. **Cryptocurrency Regulation**. Two primary compliance considerations for managers that invest in, or manage funds focused on, cryptocurrencies, initial coin offerings and other blockchain-related investments are:

- The custody rule under the Advisers Act generally requires that SEC-registered investment advisers hold client funds or securities at a "qualified custodian" (generally a bank, broker-dealer or FCM).

- Any registered CPO or CTA that executes a transaction involving a cryptocurrency or cryptocurrency derivative must notify the NFA by amending the firm-level section of its annual questionnaire. In addition, registered CPOs and CTAs that have executed transactions involving cryptocurrencies or related derivatives must report the number of their client accounts that executed one or more transactions involving a cryptocurrency and the number of their client accounts that executed one or more transactions involving a cryptocurrency derivative during each calendar quarter. This information must be submitted to the NFA through the firm's questionnaire no later than 15 days after the end of a quarter.

In addition, managers that invest in cryptocurrency-related assets should consider whether to update their policies and procedures to address personal investments by employees in these types of assets.

2. **Cybersecurity and Identity Theft**. Every SEC-registered investment adviser and every adviser that is an NFA member must have an information policy. The recent amendments to the FTC's Safeguard Rule, described on pages 1 and 2 of this letter, provide specific elements of an effective cybersecurity policy. In addition, in 2022 the SEC proposed a new rule, which if adopted will require SEC-registered advisers to adopt specific cybersecurity policies and

procedures and to report cybersecurity breaches. All advisers should consider including the elements in the FTC's Safeguard Rule and this SEC proposal in their information security policies.

In addition, identity theft rules and guidelines of the Commodity Futures Trading Commission (the "**CFTC**") and the SEC require certain entities to implement a red-flags program designed to detect, prevent and mitigate identity theft. Cybersecurity and identity theft prevention continue to be an enforcement priority for the SEC. If your firm has not adopted identity theft policies and procedures that comply with these guidelines, please contact us.

Advisers that are not regulated by the SEC are subject to the new FTC Safeguard Rule outlined on pages 1 and 2. Please call us if you would like us to review your firm's compliance policies and procedures.

3. **Annual Privacy Policy Notice**. Investment advisers, whether or not registered with the SEC, and private funds domiciled in the U.S. or having U.S. investors, are subject to SEC and FTC regulations under GLBA governing the privacy of consumer financial information. These regulations require every adviser and private fund to notify clients and investors of the types of non-public personal information ("**NPI**") the adviser or fund collects and the extent to which it discloses that information. If the adviser or fund discloses NPI (other than certain exempt disclosures) it must give each consumer the opportunity to opt out of non-exempt disclosures. Examples of exempt disclosures are disclosures to the adviser's or fund's attorney, accountants or administrator, disclosures required by law or necessary to provide services that a consumer requests and disclosures made at a consumer's request.

If your firm (a) discloses NPI in ways that are not exempt from the federal opt-out requirement or (b) has changed its practices regarding sharing NPI that were described in its last notice to clients or investors, you must deliver an annual privacy notice to clients and investors at least once every 12 months. You may define the 12-month period, but once selected you must apply it consistently. You may deliver the annual notice conveniently by including it in an individual account client's first quarter bill or in your annual letter to investors reporting last year's results. Please call us if you share your clients' or investors' NPI with anyone, including affiliates, or obtain consumer credit reports in your business.

Advisers that may be subject to the CCPA, as described on pages 2 and 3, should contact us to discuss how the CCPA's requirements interact with the privacy regulations described here, to ensure that their privacy notices and policies are consistent with both regulatory schemes.

4. **Pay-to-Play and Lobbyist Rules**. SEC rules disqualify investment advisers, their key personnel, and placement agents acting on their behalf from seeking engagement by a government client if they have made political contributions that exceed specified thresholds. California requires internal sales professionals who meet the definition of "placement agents" (people who for compensation act as finders, solicitors, marketers, consultants, brokers, or other intermediaries in offering or selling investment advisory services to certain government entities, including a state public retirement or university system) to register with the state as lobbyists, and comply with California lobbyist reporting and regulatory requirements.

Other state and local governments have similar requirements, but they differ widely, so you should call us before your firm solicits any state or local government entity.

5. **PTE Tax and the SALT Deduction**. Many states, including California, have passed a workaround to the $10,000 cap on a federal income tax deduction for state and local taxes. The workaround varies state by state, but generally certain passthrough entities may pay an entity-level tax on behalf of their owners' share of the passthrough entity's income. The passthrough owners then receive a tax credit to be applied to their personal state income tax. For federal income tax purposes, the entity level tax generally acts as a deduction against an owner's share of the passthrough's income, thus reducing the owner's overall federal taxable income (effectively making such state income taxes deductible). Each state's version of this workaround may require additional structuring considerations to meet the applicable requirements, and federal law remains unclear on a number of points. Fund managers earning both ordinary income on management fees and long term capital gains on carried interest and invested capital should evaluate whether these income sources could benefit from this passthrough entity tax.

6. **San Francisco Overpaid Executive Tax**. In addition to its gross receipts tax, San Francisco imposes a surtax on any business that is deemed to have excessive executive pay. Labeled the Overpaid Executive Tax, a surtax is applied to companies with an "executive pay ratio" of 100:1. The executive pay ratio is measured by taking the highest paid executive's compensation and measuring it against the company's median employee pay of employees working in San Francisco. The executive's compensation is broadly defined to include "wages, salaries, commissions, bonuses, property issued or transferred in exchange for the performance of services (including but not limited to stock options), compensation for services to owners of pass-through entities, and any other form of remuneration paid to employees for services." If the executive pay ratio exceeds 100:1, then the company will be subject to graduated tax rates, based on the executive pay ratio, on its San Francisco gross receipts or payroll expense (if the gross receipts tax does not apply). The tax rates on gross receipts range from 0.1% to 0.6%, and the tax rates on payroll expense range from 0.4% to 2.4%. If your firm is located in San Francisco, you should consult us or your accountants to discuss how the Overpaid Executive Tax affects you.

6. **Employment Agreements**. A California law bans mandatory pre-dispute arbitration agreements in employment contracts entered into on or after January 1, 2020, but a federal court has enjoined enforcement of the law on the ground that it is unlawful under the Federal Arbitration Act. The Ninth Circuit Court of Appeals will be rehearing the case but no final decision has been issued yet. As a result, please contact us before amending or entering into a new agreement with an employee.

7. **Investment Fund Issues**.

(a) **New Issues**. Generally, you may rely for 12 months on representations made by investors in your funds in their offering questionnaires regarding their eligibility to participate in profits and losses from new issues. After that, you must obtain a re-certification of those representations each year. A convenient way to obtain the re-certifications is to send a request in the annual letter that your firm sends to investors. Re-certifications can be obtained by negative consent. The categories and definitions in FINRA Rules 5130 and 5131, the new issue rules, changed effective January 1, 2020. If you have not revised your subscription documents and forms for annual certification for these changes, you should contact us so that we can advise you on appropriate documentation.

(b) **"Bad Actor" Disqualification**. Rule 506 disqualifies any issuer from relying on Regulation D in any securities offering in which certain persons participating in such offering have had certain "disqualifying events" such as certain criminal convictions and regulatory violations.

An investment adviser must determine whether it is subject to the bad actor disqualification rule each time it offers or sells securities in reliance on Rule 506. The SEC has stated that an issuer may reasonably rely on the agreement of a person covered by the bad actor rule to provide notice of a potential or actual disqualifying event in, for example, a contract or undertaking in a questionnaire or certification. If an offering is continuous, delayed or long-lived, however, the issuer must update its inquiry periodically.

An adviser to a fund relying on any provision of Rule 506 should require each of its employees and certain other persons participating in the offering of fund interests to provide written representations that he or she has not been subject to any disqualifying events and conduct other appropriate due diligence at least annually. For this purpose, an investor holding at least 20% of an investment fund's voting securities may be deemed to be participating in that fund's offering. If you have not contacted us to revise your firm's employee questionnaire and fund subscription documents and taken other steps to comply with these amendments, please contact us as soon as possible.

(c) **Foreign Account Tax Compliance Act ("FATCA") and the Common Reporting Standard ("CRS")**.

(1) **Non-U.S. Funds**. The Cayman Islands, the British Virgin Islands and many other jurisdictions have passed legislation implementing FATCA and CRS obligations for investment funds organized in those jurisdictions. Many jurisdictions have adopted forms of FATCA/CRS self-certification questionnaires to obtain from investors all requisite information and a satisfactory form of declaration as to the investor's FATCA/CRS status. Non-U.S. funds should be using either these questionnaires or other questionnaires (many fund administrators have their own preferred forms) that satisfy all the due diligence requirements. An offshore fund that attaches those forms to its documents should be sure it is using the current versions.

The local requirements implementing FATCA and CRS require covered financial institutions to notify (or register with) the local tax information authority whether the institution has reporting obligations under these requirements, appoint a designated point of contact, keep that information up-to-date, undertake due diligence in relation to investors and annually upload data about each reportable account to that local authority. Non-U.S. funds should work with counsel or other service providers familiar with the applicable jurisdiction's requirements to determine the applicable due diligence, filing and compliance requirements and due dates.

(2) **U.S. Funds**. A U.S. fund with offshore investors must obtain information from those investors identifying direct and indirect U.S. account holders, using the most recent IRS forms. Withholding on gross proceeds payable to investors that are foreign financial institutions that have not complied with FATCA is required.

(d) **Regulations that Affect Offering of Fund Interests in the European Union ("EU").** Some of these are discussed briefly below. If you would like more information about offering fund interests in Europe, please contact us or your EU counsel.

(1) **Second Markets in Financial Instruments Directive ("MiFID II").** MiFID II may affect non-EU investment advisers that:

- trade on EU trading venues;
- trade with (or are clients of) EU counterparties;
- market their funds through EU distributors; or
- provide investment management services directly to EU clients.

In particular, MiFID II imposes disclosure requirements on EU third-party introducers, selling agents, private banks, wealth managers and financial advisers that offer or recommend fund interests that are distributed in the EU to "retail investors," which includes even ultra-high net worth individuals and non-institutional entities. If your firm has a relationship with an EU institution that might introduce your funds to EU investors, that institution will likely ask you to provide the information for the required disclosures. If you offer fund interests directly to EU investors, you may have to make the disclosures yourself.

(2) **Packaged Retail and Insurance-Based Investment Products ("PRIIPs") Regulation (the "PRIIPs Regulation").** The PRIIPs Regulation requires a fund to provide a key information document ("**KID**") to EU retail investors investing in PRIIPs. For this purpose, a "retail investor" is defined the same as under MiFID II. KIDs must be in a prescribed format, presenting various data on costs, risks and rewards, according to set methodologies. A KID generally contains different information than the information contained in the standard Private Offering Memorandum that our clients' funds use, and must be delivered in addition to that Memorandum. Similar to the requirements under MiFID II, if a U.S. fund manager uses a third-party distributor to offer its funds in the EU, it is the distributor's obligation to provide the KID, but the U.S. fund manager would be required to provide the information required by the KID. If you offer fund interests directly to EU retail investors, you must provide the KID.

The prevailing market view appears to be that KIDs only must be provided to existing retail investors when they make new investments, although this is not entirely clear under the PRIIPS Regulation. However, if you want to accept investments from new EU retail investors, you must produce a KID for each fund you offer to retail investors in the EU and publish the KIDs on its website, or coordinate with distributors of its funds in the EU to produce the KIDs.

(3) **General Data Protection Regulation (the "GDPR").** The GDPR may apply to a non-EU fund manager that offers fund interests in the EU. The GDPR contains requirements to provide notices about how personal information will be used, limitations on retaining personal data, requirements to delete or hand over an individual's information on request, mandatory data breach notification, requirements to maintain records of data processing activities and transfers of personal data, and standards for data controllers to demonstrate that they have obtained valid consent for certain data processing activities. If your firm does not have an office

or does not offer funds in the EU, it may not be subject to the GDPR. However, any firm that holds U.S. citizens' data in the EU (whether or not those citizens live in the EU or the U.S.) must comply with the GDPR. Please refer to our prior annual letters for more detailed information on the GDPR or call us regarding your particular inquiry.

(4) **Alternative Investment Fund Managers Directive ("AIFMD")**. AIFMD attempts to harmonize across the EU how investment funds are marketed and managed. If your firm manages a fund that has EU investors, is marketing in the EU or accepts or would accept EU investors even if it is not marketing there, your firm is likely subject to AIFMD. Please refer to our prior annual letters for more detailed information on AIFMD or call us regarding how AIFMD affects your firm and any funds that it manages.

(e) **Other International Offering/Sale Requests**. Clients frequently ask us about offering fund interests in non-EU countries. Many such countries have strict private offering requirements. Please call us before sending marketing materials or conducting any discussions with a prospective non-U.S. investor.

(f) **Amendments to Form D**. If you manage an open ended private fund, you likely are required to file a notice of the offering of fund interests on Form D and amend it annually. Form D is filed electronically with the SEC and on paper or electronically in states where the fund sells interests. We can prepare Form D for your signature and file it on your behalf. If you have not filed a Form D or we have not filed one on your behalf, you should contact us.

(g) **Blue Sky**. Before offering or selling any interests in a private fund to U.S. persons, you should inform us of the states of residence of potential new investors and of existing investors who may purchase additional interests or shares, so that we can review and advise you on compliance with applicable state securities laws and obtain the necessary electronic filing codes in advance of the filing deadline if such offer and sale requires a Form D filing with the SEC.

(h) **Form PF**. An investment adviser must file Form PF if its RAUM attributable to private funds is $150 million or more as of any December 31 and it is registered (or required to be registered) either with the SEC as an investment adviser or with the CFTC as a CPO or CTA. The SEC and CFTC are required to keep all Form PF information confidential and cannot be compelled to disclose it pursuant to the Freedom of Information Act, but may use it for inspection and enforcement purposes.

In most cases the Form PF must be filed annually. For advisers whose fiscal year ended December 31, 2022, the filing deadline is April 30, 2023. When an adviser's RAUM attributable to private funds first reaches $1.5 billion as of the end of any month, it must file a Form PF within 60 days after the end of the fiscal quarter in which it exceeds that threshold and thereafter must file an updated Form PF within 60 days after the end of each fiscal quarter. Some service providers offer products and services that facilitate preparing and filing Form PF. Although in 2022 the SEC proposed multiple amendments to increase Form PF reporting requirements, none have yet been adopted. Please call us if you would like to discuss Form PF.

(i) **Form SLT**. The U.S. Department of the Treasury's Form SLT (Aggregate Holdings of Long-Term Securities by U.S. and Foreign Residents), is designed to gather monthly information about holdings of certain securities. You should discuss Form SLT filing requirements

with your firm's accountants if (1) the firm is the investment adviser to a non-U.S. investment fund or (2) manages a U.S.-based investment fund that holds securities issued by non-U.S. issuers and are not held by a U.S. custodian (for example, an investment fund holds an investment in a Brazilian security that is not held by a U.S. custodian). If your firm has less than $1 billion in assets under management it generally will not be required to file Form SLT.

(j) **Updating Offering Documents**. If you manage a private fund, you should review and update the fund offering documents annually to reflect changes in such matters as soft dollar arrangements and other brokerage practices, performance data, annual financial information and tax and legal requirements.

(k) **Investor Count**. If any private fund that you manage relies on the exception from the definition of "investment company" in ICA section 3(c)(1), you should consider consulting with us regarding the number of investors in the fund for purposes of the section 3(c)(1) 100-investor limit for hedge funds. The SEC rules for counting such investors are complex. Please contact us if you would like our assistance in determining whether the funds your firm manages meet the section 3(c)(1) investor limits.

In addition, if you manage a qualifying venture capital fund, the fund may not have more than 250 investors if it (1) has no more than $10 million in aggregate capital contributions and uncalled committed capital, (2) is a "venture capital fund" as defined for the "venture capital fund adviser" exemption under the Advisers Act and (3) does not make a public offering of its securities. A venture capital or other fund may still rely on the traditional section 3(c)(1) 100-investor exclusion.

(l) **Investors that Are Mutual Funds**. If a registered investment company (a "mutual fund") is an investor in a private fund that you manage, the mutual fund may be an "affiliate" of the fund if it owns 5% or more of your fund. Please contact us to discuss this issue if you believe it may be relevant to you.

(m) **Issues Affecting Managers of Funds that Trade Commodity Interests and Swaps**. A discussion of requirements applicable to registered CPOs and CTAs is on pages 22 and 23. The following issues apply to advisers that may not be so registered but that trade commodity interests, certain swaps or retail off-exchange forex contracts for the funds and accounts that they manage.

(1) **CFTC Self-Executing Relief for Delegation by Commodity Pool Operators**. If a fund's CPO (typically the general partner of a fund organized as a partnership or the directors of a fund organized as a corporation) is not registered as a CPO, it may wish to delegate its CPO responsibilities rather than registering. The CFTC permits delegation without any filing as long as the designated CPO is registered and the delegating CPO and the designated CPO meet certain requirements. Please call us if you would like to discuss this delegation.

(2) **Swaps**. The definitions of "commodity pool operator" and "commodity trading adviser" include advisers that invest in certain swaps. An investment adviser of accounts that invest in such swaps is a CPO or CTA, or both, even if it does not invest in futures or other commodity interests. Therefore, advisers must determine whether the instruments in which they invest include swaps that are regulated by the CFTC. The definition of "swap" is

complex. Some instruments that are commonly called swaps are not treated as swaps subject to CFTC regulation, and some instruments that are not traditionally called swaps are regulated by the CFTC as swaps. If you have not considered or discussed with us whether your firm's swaps trading might cause it to be a CPO or a CTA, you should do so immediately.

Individuals registered as associated persons ("**APs**") of NFA members that engage in swaps activity should have met the new Swaps Proficiency Requirements by January 31, 2021. Each NFA member with APs required to meet these requirements must designate a Swaps Proficiency Requirements Administrator who will coordinate enrollment and track progress. FAQs regarding these requirements are available at https://www.nfa.futures.org/faqs/registrants-membership-app/swap-proficiency.html.

(3) **Advisers that Rely on CFTC Rule 4.13(a)(3) CPO Registration Exemption**. The exemption from CPO registration under CFTC Rule 4.13(a)(3), which is widely used by CPOs of private funds, is available to managers of funds whose investments in commodity interests, CFTC-regulated swaps and retail forex transactions are very limited. A fund may qualify for it if either (A) the aggregate initial margin, premiums and required minimum security deposit for retail forex transactions to establish the fund's positions in such instruments do not exceed 5% (measured when the most recent position was established) of the liquidation value of the fund's portfolio, taking unrealized profits and losses into account, or (B) the aggregate net notional value of the fund's positions in such interests is not greater than the portfolio's liquidation value. The exemption also requires that the fund be privately offered and not marketed as a vehicle for trading commodity interests and generally requires that U.S. investors in the fund be accredited investors or knowledgeable employees.

A CPO relying on the 4.13(a)(3) exemption must claim the exemption by filing a notice with the NFA, and reaffirm that claim annually within 60 days after the end of each year. The 2022 reaffirmation is due by March 1, 2023. The NFA should have sent email reminders of the reaffirmation requirement in December 2022.

(4) **Advisers that Rely on CTA Registration Exemption**. In addition to serving as a CPO, an investment adviser to a fund that invests in commodity interests, CFTC-regulated swaps or retail forex transactions is the CTA of that fund. An adviser to a separately managed account that invests in commodity interests, swaps or retail forex transactions is also a CTA. A CTA is required to register with the CFTC unless it qualifies for an exemption. The exemptions most commonly used by investment advisers are self-executing and do not require any action by an adviser. Typically, an adviser relying on one of these exemptions provides advice solely to pools for which the adviser is exempt from CPO registration or provides only limited advice regarding commodity interests, swaps and retail forex transactions. However, some advisers rely on the exemption in CFTC Rule 4.14(a)(8). An adviser relying this exemption must claim it by filing a notice with the NFA and reaffirm it annually within 60 days after the end of each year. Please contact us if you would like to discuss exemptions from CTA registration.

8. **Section 13 and 16 Filings**. The following filing requirements apply to an investment adviser whether or not it is SEC-registered.

(a) **Schedule 13D/13G**. If you have or share investment discretion or voting power over 5% or more of a class of equity securities of a public company, you may be required

to file Schedule 13D or 13G. If you have reached or anticipate reaching that threshold with respect to any class of equity securities, you should contact us. If you have filed a Schedule 13G, and the information in it changed as of December 31, 2022 from the latest Schedule 13G you have filed, you may be required to file an amended Schedule 13G by February 14, 2023. Although the SEC proposed amendments in 2022 to accelerate the filing deadlines for Schedules 13D and 13G and make other changes to Schedules 13D and 13G, these amendments have not yet been adopted.

(b) **Forms 3, 4 and 5**. If you have or share investment discretion or voting power over more than 10% of a class of equity securities of a publicly traded company, or if you or any of your affiliates is a director or officer of a publicly traded company, you or your affiliate may be required to file with the SEC an initial ownership report on Form 3. Form 3 generally must be filed by a 10% owner within 10 days after exceeding the 10% threshold and by a director or officer within 10 days after assuming that office. Thereafter, such an insider generally must report changes in its beneficial ownership of securities (typically, a purchase or sale of the issuer's securities, including cross trades between funds that your firm manages) on Form 4 within 2 business days after the date of the change. Every person who was an insider of a publicly traded company must file an annual report on Form 5 with the SEC within 45 days after the end of the company's fiscal year, to report previously unreported transactions during the year that should have been reported on Form 4 but were not, and certain other transactions that may be reported on Form 5.

(c) **Form 13F**. If your firm exercises investment discretion over $100 million or more that is invested in "13(f) securities" as of the end of any month in a year, you must report such holdings to the SEC on Form 13F within 45 days after the end of that year and must make quarterly filings thereafter. 13(f) securities typically include stocks, certain options, warrants, convertible debt securities and exchange-traded funds that are traded on a national securities exchange. The SEC's official list of 13(f) securities is posted at https://www.sec.gov/divisions/investment/13flists.htm and is updated on a quarterly basis. If your firm first became required to file Form 13F in 2022, your initial Form 13F is due by February 14, 2023.

(d) **Form 13H**. If your firm directly or indirectly, including through entities that it controls, purchases or sells, through one or more registered brokers, any NMS security on behalf of any discretionary accounts in an aggregate amount of at least 2 million shares or $20 million during any day, or 20 million shares or $200 million during any calendar month, you must file Form 13H with the SEC within 10 days after crossing that threshold. NMS securities are typically exchange-listed equities, ETFs and options.

When your firm files Form 13H, it will receive from the SEC a "large trader identification number," or "LTID," which it must provide to each of the brokers with which it has an account. Those brokers must record trading information associated with this LTID and disclose it to the SEC on request. You must amend Form 13H within 10 days after the end of any calendar quarter during which information in your last filed Form 13H becomes inaccurate. Whether or not there have been any changes in the information in your firm's Form 13H, you also must amend it annually. The annual amendment for 2022 is due by February 14, 2023. Please contact us immediately if you believe that you might be required to file Form 13H or you would like our assistance in filing the amendments to your Form 13H.

9. **Management Company Allocations**. If your firm is organized as a limited liability company or limited partnership, you may have issued profit interests to key employees. If your operating agreement or limited partnership agreement provides that the manager or general partner may adjust each participant's profit interest for the coming year on or before a specified date (typically January 31 of that year), you should make these allocation decisions, in writing and in accordance with the applicable operating agreement or limited partnership agreement, on or before the specified date.

10. **Covenants in Swap, Securities Lending and Margin Lending Agreements**. Most swap, securities lending and margin lending agreements (some of which may be in brokerage account agreements) include covenants that require your firm or your clients or funds to notify the counterparty if certain events occur. One common covenant requires notice if the net asset value of the client or fund decreases more than a specified percentage during a given period or below a specified amount. You should review those provisions carefully. Other common covenants may require you to deliver information (such as monthly NAV estimates and your funds' audited financial statements) by specified deadlines.

11. **Foreign Bank Account Reports**. Every U.S. person or entity that had a financial interest in, or signatory authority over, a financial account in a foreign country in 2022 generally must file FinCEN Form 114 if the aggregate value of all such accounts exceeded $10,000 at any time during 2022. The Form must be received by the Department of Treasury by April 18, 2023, which may be automatically extended to October 16, except certain U.S. persons for whom the deadline has been further extended to April 15, 2024. Failure to file the Form when required can result in significant monetary or criminal penalties. You should consult your accountants on whether you must file this Form.

12. **Designation of Liquidating Person or Successor Manager**. If you manage a private fund under a limited partnership agreement that provides for the designation of a "liquidating person" to liquidate the partnership's assets if the general partner is unable to do so, you should confirm that your appointment of a liquidating person, if any, is consistent with your current desires. Even if you do not manage a private fund, you should consider designating a successor manager to manage or wind up your firm if you are unable to do so. In some recent examinations, the SEC staff has asked our clients about their succession plans. Please call us if you would like to appoint or replace a liquidating person or successor manager.

13. **Registered CPOs or CTAs**. If your firm is registered as a CPO or CTA, you must comply with the requirements listed below. Please see also the discussion on pages 19 and 20 of issues that may apply to advisers that invest in commodity interests and certain swaps but are not registered as CPOs or CTAs.

(a) **Requirements Applicable to Registered CPOs and CTAs**.

(1) **Update NFA Registration**. Annually, you must update your firm's registration information on the NFA's electronic filing system, including submitting an annual questionnaire and paying annual dues. The NFA should send an email reminder of such update and dues, which are due by the anniversary of your firm's registration. Dues are $750 for CPOs and CTAs, plus an annual records maintenance fee of $100 for each registration category.

(2) **Complete NFA Self-Examination Questionnaire**. Your firm must complete the NFA's "self-examination questionnaire" annually. The questionnaire is not filed with NFA, but must be retained in your firm's records. You should review your compliance policies and procedures, and confirm whether amendments, or additional procedures, may be warranted in light of your firm's current business.

(3) **Other Annual Requirements**. At least annually, you must:

- test your disaster recovery plan and make any necessary adjustments;
- provide ethics training in accordance with the NFA's rules; and
- file any new exemption notices with the NFA.

(b) **Additional Requirements Applicable to Registered CPOs**.

(1) **Reporting Requirements**. Your firm must file CFTC Form CPO-PQR and NFA Form PQR with the NFA. The two forms overlap considerably, and in many cases, filing one will be deemed to satisfy the obligation to file the other. They are similar to SEC Form PF described on page 18. A CPO that is also an SEC-registered investment adviser and files Form PF need not complete the items on Form CPO-PQR that request the same information as Form PF.

Filings are required quarterly or annually, depending on the firm's assets under management ("**AUM**"). The method of calculating AUM for this purpose differs from the calculation of RAUM for SEC purposes. Please contact us to discuss the filings and filing dates that apply to your firm or if you have questions about calculating AUM and RAUM. A late Form CPO-PQR is subject to a $200 fee for each business day it is late. Payment and acceptance of such fees, however, does not preclude the NFA from filing a disciplinary action for failure to comply with the deadline.

(2) **File and Distribute Commodity Pool Reports**. For each pool that your firm manages, you must furnish each investor monthly or quarterly account statements containing certain specified financial information. You also must prepare an annual report for each pool and furnish it to each investor in the pool, and the NFA, within 90 days after the end of the pool's fiscal year (which is shorter than the 120 days that generally applies under the SEC and California custody rules). Each pool's disclosure document should be updated regularly and may need to comply with specific CFTC disclosure rules. It may also need to be filed with the CFTC and the NFA. Please call us if you would like to discuss these requirements.

(3) **Offering Document**. If your firm is soliciting new investors for your pools, you must distribute an offering document that complies with specific CFTC rules and filing requirements unless you have made a filing claiming relief from certain of those obligations. Please call us if you would like to discuss CPO disclosure requirements.

(c) **Additional Requirements Applicable to Registered CTAs**.

(1) **Reporting Requirements**. You must file Form CTA-PR with the NFA annually within 45 days after the end of each year, and NFA Form PR quarterly within 45 days after the end of the quarters ending in March, June and September. Form PR is very similar to Form CTA-PR but contains additional information. A CTA that is also an SEC-registered investment adviser and is required to file Form PF must file Form PF in lieu of filing Form CTA-PR with respect to private funds. A late Form CTA-PR is subject to a $200 fee for each business day it is late. Payment and acceptance of the fees, however, does not preclude the NFA from filing a disciplinary action for failure to comply with the deadline.

(2) **Annual Verification by FCM**. At least annually, the FCM that carries your firm's client accounts will contact your clients to verify that the information your firm obtained under NFA Compliance Rule 2-30(c) remains materially accurate, and provide each client the opportunity to correct and complete the information. If the FCM notifies you of any material changes to the information, you must assess whether your firm must provide additional risk disclosure to the client.

(3) **Analysis of Trade Allocation**. If your firm places bunched orders, you should analyze each trading program at least quarterly to ensure that the order allocation method is fair and equitable and document this analysis.

SHARTSIS FRIESE LLP