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January 17, 2024

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. **SEC Issues New Rules for Private Fund Advisers**. On August 23, 2023, the Securities and Exchange Commission (the "**SEC**") adopted significant new rules for private fund advisers (the "**Private Fund Rules**"). Some of the new Private Fund Rules apply to all investment advisers to private funds, including advisers exempt from registering with the SEC and state-registered advisers, while others only apply to SEC-registered investment advisers. The Private Fund Rules affecting all investment advisers to private funds include the preferential treatment rule and the restricted activities rule. The Private Fund Rules affecting only SEC-registered advisers to private funds are the quarterly statement rule, the audit rule, the adviser-led secondaries rule and the compliance rule amendment. Additional information on the Private Fund Rules is available in our client alert: SEC Adopts New Rules for Private Fund Advisers.

The Private Fund Rules have several different compliance deadlines, dependent upon the specific sub-rule and the investment adviser's assets under management. The compliance rule amendment has been enforceable since November 13, 2023, for all SEC-registered advisers (requiring annual compliance reviews to be documented in writing). Investment advisers with less than $1.5 billion of private fund assets under management as of the end of their most recent fiscal year will see all other applicable Private Fund Rules come into effect on March 14, 2025. Investment advisers with $1.5 billion or more of private fund assets under management as of the end of their most recent fiscal year have until September 14, 2024, to comply with the preferential treatment, restricted activities and adviser-led secondaries rules, and until March 14, 2025, to comply with the quarterly statement and audit rules. The Private Fund Rules permit "legacy status" for some practices that would otherwise be prohibited.

In anticipation of the applicable compliance dates, all investment advisers should identify which of their activities will be restricted or prohibited in the future, prepare for new periodic

reporting, evaluate what additional disclosures are required for their operations for both current and prospective investors and consider updating their policies and procedures for such changes. Registered investment advisers should prepare to populate a detailed form of quarterly statement for each private fund they advise and plan to engage an auditor to conduct an audit for such private funds that have been relying on surprise exams. Investment advisers that are considering launching new private funds should be mindful of how the Private Fund Rules may affect their future operations. Please contact us if you have questions about your obligations under the Private Fund Rules.

2. **Corporate Transparency Act Compliance.** The Corporate Transparency Act (the "**Transparency Act**") 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 21 exemptions, some of which are aimed specifically at some types of funds and advisers to relieve such funds and advisers from the reporting requirements. 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. Offshore private investment funds operated by SEC-registered advisers, however, must file abbreviated reports of their ownership statements to the Financial Crimes Enforcement Network ("**FinCEN**"). State-registered and exempt reporting advisers and the funds they manage are not exempt (unless another exemption applies) and are subject to the reporting requirements.

FinCEN previously adopted a rule implementing the Transparency Act, which became 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 its initial report within 90 days of its formation. Reporting companies will have 30 days to report updates to information in prior reports and must correct inaccurate information within 30 days after the reporting company becomes aware of or has reason to know of the inaccuracy. Please see our client alerts regarding the Transparency Act for further compliance information: Corporate Transparency Act Compliance and Corporate Transparency Act Compliance - Update.

3. **Federal Trade Commission Safeguard Rule and Security Breach Reporting Obligations.** As noted in our January 2023 annual letter and our FTC Safeguard Rule for Exempt Reporting Advisers and State Registered Advisers client alert, the Federal Trade Commission (the "**FTC**") implemented rules under the Gramm-Leach-Bliley Act of 1999 (the "**GLBA**") requiring that financial institutions safeguard the consumer information that they collect and maintain (the "**Safeguard Rule**"). The FTC's Safeguard Rule applies to financial institutions, including state-registered advisers and exempt reporting advisers. SEC-registered investment advisers are instead subject to the SEC's Regulation S-P.

The Safeguard Rule requires subject advisers' 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. Advisers subject to the Safeguard Rule must also

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. Financial institutions that collect information on more than 5,000 consumers are subject to additional, more stringent requirements, including that the risk assessment be in writing, that the testing include certain procedures and that the subject financial institution establishes a written incident response plan. The Safeguard Rule requirements became effective December 9, 2022 (for the basic requirement to develop and implement an information security program) and June 9, 2023 (for additional, more onerous compliance tasks).

On October 27, 2023, the Safeguard Rule was further amended to require those subject to the Safeguard Rule to notify the FTC of instances of unauthorized acquisition of unencrypted, personally identifiable, nonpublic financial information of more than 500 consumers (each instance, a "**Notification Event**"). "Consumer" refers to any individual with whom an investment fund or investment adviser has a continuing relationship to provide financial products or services for personal, family or household purposes (generally, institutional investors and other business entity investors are excluded from this definition of consumer). Each Notification Event must be reported to the FTC as soon as possible, but no later than 30 days after the discovery of the Notification Event. The notice, which will be available on the FTC's website, must include certain descriptions of the information involved in the Notification Event and the consumers affected by the Notification Event. Compliance is required with this security breach reporting requirement of the Safeguard Rule beginning May 13, 2024.

Those subject to the Safeguard Rule should already have taken steps to comply with the rule as effective June 9, 2023, and should anticipate compliance with the security breach reporting requirement by May 13, 2024.

4. **California Consumer Privacy Act, as amended by the California Privacy Rights Act (the "CCPA") 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. As mentioned in our January 2023 annual letter and the Upcoming July 1, 2023 Compliance Deadline Under the California Consumer Privacy Act client alert, the CCPA, as amended by the California Privacy Rights Act, requires any adviser subject to its requirements to notify California residents when their personal information is collected and what statutory privacy rights are granted to California residents (among other requirements). Although most advisers are familiar with privacy notification requirements under the GLBA, the CCPA requirements are broader and may require an adviser to update its website, develop an additional CCPA-specific privacy policy, provide notifications whenever personal information is collected from California residents and update its contracts with service providers, among other tasks. 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, CRM systems and contact management systems are also entitled to certain rights under the CCPA that became effective January 1, 2023.

The California Privacy Protection Agency (the "**CPPA**") finalized further CCPA regulations on March 29, 2023 (the "**Agency Regulations**"), which include specific written contract requirements that must be in place with any service provider a CPPA-subject business uses that has access to, collects or processes personal information of California consumers for the CCPA-subject business. Although a court order delayed enforcement of the Agency Regulations until March 29, 2024, CCPA-subject advisers should not delay in complying with the Agency Regulations, as updating privacy policies and service provider contracts for the latest CCPA requirements can be time intensive. Penalties for noncompliance could be up to $2,500 per violation (or, up to $7,500 for intentional violations), with each impacted California consumer potentially giving rise to a separate violation.

Please contact us if you believe your firm is or may become subject to the CCPA or if you would like to discuss the applicability of the privacy requirements of other jurisdictions.

5. **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. The updated rule requires 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 the 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 obligations to file Form N-PX.

6. **Schedules 13D and 13G Amendments; New Form SHO**. The SEC recently adopted amendments to the rules governing beneficial ownership reporting on Schedules 13D and 13G under the Securities Exchange Act of 1934 (the "**1934 Act**"). These amendments change the timing for investors to file Schedules 13D and 13G, as well as provide guidance for when investors will be deemed to beneficially own reference securities used in cash settled derivative instruments and when investors will be deemed to be acting as a group for purposes of beneficial ownership reporting. The amendments generally become effective on February 5, 2024, however the changes related to filing Schedule 13G become effective on September 30, 2024. Please refer to our client alert for a comprehensive overview of these amendments, including the updated filing deadlines: Amendments to Rules Governing Beneficial Ownership Reporting.

In addition, on October 13, 2023, the SEC adopted Rule 13f-2 under the 1934 Act to provide transparency regarding short equity security positions that exceed certain thresholds. Rule 13f-2 requires "institutional investment managers" that exercise discretionary authority with respect to gross short positions exceeding certain thresholds in a calendar month to file a new Form SHO by the 14th of the following month. Similar to Form 13F, "institutional investment manager" includes both natural persons and entities that are investment advisers, whether SEC registered or not, and entities that invest on their own account, such as corporations and pension funds that manage their own investment portfolios. Compliance with Rule 13f-2 is required beginning early in 2025, but advisers who manage significant short positions should start to prepare for the tracking and reporting that Form SHO will require. Our firm will publish an alert soon covering the thresholds and the information that must be reported on Form SHO.

7. **Form PF Amendments**. On May 3, 2023, the SEC approved significant amendments to Form PF which increase the filing obligations of advisers to private equity funds and large hedge fund advisers with regulatory assets under management of at least $1.5 billion ("**Large Hedge Fund Advisers**"). Hedge fund advisers that are exempt advisers or that are not Large Hedge Fund Advisers are not affected by these Form PF amendments. SEC-registered private fund advisers with at least $150 million in private fund regulatory assets under management as of the last day of the most recent fiscal year must submit reports on Form PF. The amendments added two new sections to Form PF: Section 4, regarding private equity funds, and Section 5, which requires prompt disclosure of certain material events by Large Hedge Fund Advisers.

As of December 11, 2023, Form PF Section 5 requires Large Hedge Fund Advisers to report certain material events at a "qualifying hedge fund" (i.e., any hedge fund that has a net asset value of at least $500 million) to the SEC as soon as practicable, but no later than 72 hours after they occur. These prompt reports on material events are in addition to the Large Hedge Fund Adviser's existing quarterly Form PF filing obligations. In addition, advisers with at least $150 million of private equity fund regulatory assets under management ("**Private Equity Fund Advisers**") must report the occurrence of certain key events within 60 days of the end of the fiscal quarter in which the event occurred. These quarterly reports are an additional requirement to the Private Equity Fund Adviser's annual Form PF filing.

Form PF Section 4 amends the annual reporting requirements of Private Equity Fund Advisers with over $2 billion in private equity fund regulatory assets under management ("**Large Private Equity Advisers**"). Large Private Equity Advisers are required to report whether any private equity fund has effectuated a material clawback by the general partner or a limited partner in excess of a specific threshold. This amendment becomes effective June 11, 2024.

Please review our client alert for further information on the Form PF amendments here: SEC Adopts Amendments to Expand the Scope of Form PF and contact us if you have any questions about your Form PF reporting obligations.

8. **Custody Rule Violations**. Based on recent 2023 enforcement actions against private fund advisers, it is the view of the SEC that an investment adviser's failure to promptly file an amended Form ADV when such firm receives its audited financial statements violates Rule 206(4)-2 (the "**Custody Rule**") under the Investment Advisers Act of 1940. If a private fund adviser responds "Report Not Yet Received" to question 23(h), Section 7.B.(1), of Form ADV ("Do all of the reports prepared by the auditing firm for the private fund since your last annual updating amendment contain unqualified opinions?"), the adviser must promptly file an amended Form ADV when it receives its annual audit. The response to question 23(h) must be changed to "Yes" or "No" in the amended Form ADV. Failure to file this amendment exposes private fund advisers to SEC enforcement actions under the Custody Rule.

9. **Department of Labor (the "DOL") Rollover Developments**. In November 2023, the DOL proposed a new regulation defining "investment advice" for purposes of determining fiduciary status under the Employee Retirement Income Security Act of 1974, as amended, ("**ERISA**") and the prohibited transaction rules of the Internal Revenue Code (the "**Code**"). As with an earlier regulation that is no longer in effect, "investment advice" under the proposal would

include 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 proposed regulation, the DOL issued proposed amendments to Prohibited Transaction Exemption ("**PTE**") 2020-02, which allows 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 (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) must exist for the exemption to be available. 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, please contact us for more details on potential PTE 2020-02 requirements, as they may be amended in the future.

10. **DOL Rule on ESG Considerations in Selecting Plan Investments and Exercising Shareholder Rights**. The DOL's rule under ERISA, effective February 1, 2023, 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 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 DOL rule.

11. **Tax Court Finds that Fund is Engaged in a U.S. Trade or Business**. The U.S. Tax Court issued a ruling on November 15, 2023, finding that YA Global, a Cayman Islands fund managed by a U.S. investment adviser, was engaged in a trade or business in the U.S. due to its lending and underwriting activities. The Tax Court also held that YA Global's investment adviser, Yorkville Advisors, acted as YA Global's agent, because it was subject to ongoing instructions from YA Global, and thus its activities were attributable to YA Global. In addition, YA Global was determined to be a dealer in securities because it regularly purchased securities from its customers and thus was subject to the mark-to-market rules. As a result, YA Global's income was effectively connected with a U.S. trade or business with respect to its foreign partners (including its offshore feeder fund) and was taxable at ordinary income rates. While the facts in the case were unusual in several aspects, investment advisers (particularly of credit funds) should review their investment guidelines and their investment advisory agreements and may consider filing protective Form 8804 to start the statute of limitations on any potential future IRS assessments.

12. **Tax Court Decision Potentially Impacts Self-Employment Tax Exception**. On November 28, 2023, the U.S. Tax Court ruled that the statutory limited partner exception from self-employment tax (commonly referred to as the "Medicare tax workaround") may not apply to active limited partners of a partnership. Instead, the court found that for active limited partners that do not satisfy a "functional analysis test," the distributive share of the partnership's business income should have been included in the net earnings from self-employment that is subject to the self-employment tax under the Self-Employment Contributions Act. As a result, investment advisers whose management companies are organized as limited partnerships and who structure their share of management fee income and performance fees to qualify for the Medicare tax workaround are encouraged to review their limited partnership agreements and the roles of their

limited partners. Please see our recent client alert on this ruling here: Tax Court Decision Impacts Self-Employment Tax Exception and contact one of the Shartsis Friese LLP tax attorneys with any questions.

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 IARD within 90 days after the end of its fiscal year. For an adviser whose fiscal year ended December 31, 2023, the deadline is Saturday, March 30, 2024. Because March 30th falls on a Saturday and IARD will have limited hours that day, we strongly encourage all advisers to file by Friday, March 29, 2024. The annual amendment must update your firm's responses to all items of Parts 1 and 2 of Form ADV.

When you amend Part 1, IARD will prompt you to indicate the type of amendment. You should select "annual updating amendment," and indicate that the amendment is for 2023. Unlike Part 1, Part 2A is not an online form. Instead, you must upload Part 2A to 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 the IARD Accounting Information site.

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 30 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.

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 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 SEC- or state-registered adviser must also promptly amend its Form ADV when it receives its annual audit if question 23(h) of Item 7.B.(1) was previously answered as "Report Not Yet Received." Please see the explanation above in the "Legal and Regulatory Changes" section on Custody Rule violations as enforced by the SEC.

An other-than-annual amendment is not required to update Items 2, 5, 6, 7 (except 7.B.(1), question 23(h)), 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 update 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.

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, 2023, the deadline is April 29, 2024. 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 can be found here: Form CRS Instructions.

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 2024 renewal fees through the IARD system. These fees are in addition to the IARD filing fees discussed on page 7.

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 effective November 13, 2023, under the new rule described on page 1, must review its compliance policies and procedures annually, document the review in writing 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 pages 27 and 28);
- 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 Public Company Accounting Oversight Board ("**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 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 7 and 8. 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 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 an 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 IARD within 90 days after the end of its fiscal year. For an adviser whose fiscal year ended December 31, 2023, the deadline is March 30, 2024. Because March 30th falls on a Saturday and IARD will have limited hours that day, we strongly encourage all advisers to file by Friday, March 29, 2024. 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 filing fee for an SEC ERA's annual updating amendment is $150. There is no IARD filing 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.

<u>Investment Advisers Certificated by California DFPI</u>

1. **Annual Updating Amendment of Form ADV**. If your firm is a California-registered adviser, it must amend its Form ADV each year on IARD within 90 days after its fiscal year end. For an adviser whose fiscal year ended December 31, 2023, the deadline is March 30, 2024. Because March 30th falls on a Saturday and IARD will have limited hours that day, we strongly encourage all advisers to file by Friday, March 29, 2024. 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, 2023. Unlike Part 1, Parts 2A and 2B are not online forms. Instead, you must upload them to 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 2023 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 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 on page 8.

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 10. See page 11 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 $10,000 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 can be found here: Verification Form and Minimum Financial Requirements Worksheet. 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 (A) identify the amount of assets in the account at the end of the reporting period, and (B) 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 relies 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 its 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 relies 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 10. 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 Insights**.

(a) **Commodity Futures Trading Commission (the "CFTC") Regulation of Digital Asset Derivatives**. The CFTC takes the position that it regulates certain digital asset derivatives as commodities under existing rules and regulations under the Commodity Exchange Act (the "**CEA**"). In recent years, the CFTC has brought actions against digital asset derivatives trading platforms for failing to implement know-your-customer and anti-money laundering procedures, deliberately evading U.S. regulation and illegally soliciting U.S. investors to enter into digital asset derivative transactions. The CFTC has also brought enforcement actions relating to decentralized finance (commonly referred to as DeFi) protocols, successfully targeting a decentralized autonomous organization (commonly referred to as a DAO) for CEA violations and those offering derivatives trading of off-exchange event-based binary options contracts. The CFTC will likely continue to bring similar enforcement actions under the existing statutory regime with respect to actors that solicit or permit U.S. participation in such activities. Advisers interested in trading digital asset derivatives (including perpetual futures) on unregulated digital asset

exchanges or through DeFi protocols should be aware that the CFTC regulates such activity under existing CFTC rules and regulations, and advisers interested in engaging in those activities should seek legal counsel before doing so.

(b) **Compliance**. Some 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).

- National Futures Association ("**NFA**") Bylaw 1101 prohibits any registered commodity pool operator ("**CPO**") or commodity trading adviser ("**CTA**") from conducting futures-related business with non-members that are required to be registered with the CFTC but have not done so (such as unregistered digital asset trading platforms that engage with U.S. investors). Registration status can be confirmed via the NFA BASIC database.

- Advisers trading digital assets should monitor the registration status of their qualified custodians and centralized exchanges used for trading digital assets and digital asset derivatives. Advisers should be prepared to change such service providers, as needed, to comply with SEC and/or NFA requirements to use qualified custodians and registered exchanges, as applicable. The regulatory status of service providers in the digital asset space is quickly evolving and can be convoluted. For example, in June 2023 Coinbase, Inc. and Coinbase Global, Inc. were charged with operating as an unregistered exchange, broker-dealer and clearing agency; however, as of August 2023, Coinbase Financial Markets, Inc. became registered with the NFA as an FCM, allowing it to act as a qualified custodian.

- 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 no later than 15 days after the end of a quarter via the firm's questionnaire.

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.

(c) **New California Cryptocurrency Licensing Law**. On October 13, 2023, California enacted the Digital Financial Assets Law ("**DFAL**") which becomes effective July 1, 2025, and will require businesses that exchange, transfer or store digital financial assets ("**DFAs**") on behalf of California residents or with California residents to obtain a license and comply with certain reporting and anti-fraud requirements. Those covered by the DFAL are required to obtain a license from the California Department of Financial Protection and Innovation, maintain records of all DFA business activity, submit an annual report and disclose certain fees and charges to California residents whose assets they manage.

Advisers that manage separate accounts on behalf of California residents and engage in selling, trading or converting DFAs for those accounts or who custody digital assets for clients who are California residents may be subject to the DFAL's licensing and reporting requirements. Additionally, advisers that manage California domiciled funds that similarly engage with DFAs may also be subject to the DFAL. There are exclusions available under the DFAL. For example, those (1) registered under the Commodity Exchange Act, (2) registered as a broker-dealer, or (3) who only engage in de minimis DFA business activity with, or on behalf of, California residents that is valued at $50,000 or less per year, do not have to comply with the DFAL. Additionally, advisers that engage in DFA activity for non-California residents (such as Delaware-formed funds) will likely not be subject to the DFAL. The DFPI has rulemaking authority under the DFAL and will be drafting additional rules in the coming year that will govern the DFAL licensure process. Please contact us if you have any questions about a potential obligation to obtain a license under the DFAL.

(d) **Form 8300 Reporting To Include Cryptocurrency Transactions**. Under Code Section 6050I, any person who is engaged in a trade or business who receives more than $10,000 in cash in one transaction (or two or more related transactions) must file FinCEN Form 8300 to report such transaction. The Infrastructure Investment and Jobs Act of 2021 expanded the types of transactions that must be reported under Code Section 6050I and expanded the definition of "cash" to include any digital asset as defined in Code Section 6045(g)(3)(D). Failure to report could result in not only civil but also criminal charges. On January 16, 2024, the IRS issued Notice 2024-4, which provides that businesses do not need to report the receipt of digital assets over $10,000 until the U.S. Treasury Department and IRS publish regulations and issue forms and instructions for such reporting. Notice 2024-4 also clarified that other income tax obligations of businesses receiving digital assets or paying with digital assets continue to apply.

(e) **New IRS Proposed Regulations**. In August 2023, the IRS issued new proposed regulations on tax reporting requirements for cryptocurrency brokers. The proposed regulations would require brokers to report gross proceeds of a sale of digital assets as well as the adjusted basis of certain digital assets. Brokers were broadly defined as "any person that stands ready to effect sales to be made by others in the ordinary course of a trade or business." The proposed regulations on gross proceeds reporting would apply to sales on or after January 1, 2025, and the reporting of adjusted basis with respect to a sale of digital assets would be applicable for

sales that occur on or after January 1, 2026. If adopted, these proposed regulations would address a wide range of aspects relating to the reporting of digital asset transactions and could also require decentralized exchanges to collect certain information from customers (even if historically they have had a policy against doing so).

2. **Cybersecurity and Identity Theft**. Every adviser must have an information security policy, either as required by Regulation S-P, the FTC Safeguard Rule or the NFA (for registered CPOs and CTAs). In addition, the SEC is in the process of finalizing proposed (a) amendments to Regulation S-P that would require SEC-registered advisers to adopt written policies and procedures for incident response programs to address unauthorized access to or use of customer information, including procedures for providing notification to individuals affected by an incident involving sensitive customer information with details about the incident and information designed to help affected individuals respond appropriately, and (b) new rules that would require SEC-registered advisers to adopt and implement cybersecurity policies and procedures designed to address cybersecurity risks, disclose information about cybersecurity incidents and report such information to the SEC. The SEC's agenda notes it expects to release final versions of both proposed rules in April 2024.

Although the specific requirements for SEC-registered advisers may evolve with these expected new rules, advisers should consider reviewing their information security policies and include the policies described in the FTC's Safeguard Rule as recommended best practices in their information security policies.

In addition, identity theft rules and guidelines of 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. Please call us if you would like us to review your firm's cybersecurity and identity theft prevention 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 3 and 4, 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. **SEC Investment Adviser Marketing Rule.** The compliance date for the SEC's rule governing marketing, testimonials and endorsements (the "**Marketing Rule**") was November 4, 2022. The SEC Division of Examinations has published two risk alerts noting areas of examination focus for the Marketing Rule, and Marketing Rule compliance is anticipated to continue to be an area of focus for SEC examiners in 2024. Additional information on the rule is available in our client alerts: SEC Marketing Rule Information and Upcoming Compliance Deadline for SEC Marketing Rule.

6. **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.

7. **Non-Competition Agreements in California**. California Senate Bill 699, which prohibits employers from entering into or attempting to enforce non-compete agreements because they are considered void under state law, became effective January 1, 2024. Bill 699 expands the ways in which California employees can challenge non-compete agreements in the state because it establishes that non-compete agreements are void in California regardless of where the employee worked when the employee entered the agreement. In addition, Assembly Bill 1076 makes it unlawful to impose non-compete clauses in employment contracts and requires employers to notify

employees that any non-compete agreement or clause contained within such employees' employment agreement are void. Such notices are required to be given by February 14, 2024, via email and mailed notice by California employers to all of the employer's current and former employees who worked under a non-compete after January 1, 2022. Failure to comply with this deadline may trigger Unfair Competition Law penalties up to $2,500 per violation. Together, these bills further California's public policy position against non-competition agreements and clauses in employment agreements. If you require assistance auditing your prior employment agreements for potentially prohibited non-competition provisions and drafting notifications required by AB 1076, please contact us or your employee benefits provider.

8. **Continuing Education Requirements for Investment Adviser Representatives**. Over 19 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 of 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 DFPI proposed to implement this continuing education for investment adviser representatives. On October 24, 2023, the DFPI filed the final rulemaking file on this proposal with the California Office of Administrative Law, and it is expected to be approved in 2024.

9. **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 may 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 use 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.

(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 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 must only 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) **UK and EU General Data Protection Regulation ("GDPR").** UK or EU GDPR may apply to a U.S. fund manager that offers fund interests in the UK or EU. UK or EU 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 (or a third party acting on its behalf) carries out personal data processing activities through a UK or EU establishment (such as by having an office or agent in the UK or an EU member state), you may be subject to UK or EU GDPR. If not, but your firm either (A) targets offering goods or services to individuals in the UK or EU (such as through specialized currency offerings of funds or other customized UK or EU marketing efforts), or (B) monitors the online behavior of UK or EU individuals (such as by profiling such persons via cross-context behavioral advertising), then you also may be subject to UK or EU GDPR (as applicable). Please refer to our prior annual letters for more detailed information on 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. The Council of the EU recently published amendments to AIFMD (commonly referred to as AIFMD II), which introduces new requirements and restrictions for alternative investment funds that originate loans and introduces additional investor disclosure requirements. These changes are still pending and EU member states will have 24 months to implement AIFMD II once finalized. Please refer to our prior annual letters for more detailed information on AIFMD or call us regarding how AIFMD II may affect 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 are offering private fund interests, 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, 2023, the filing deadline is April 29, 2024. 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.

As discussed above, the SEC adopted amendments to Form PF applicable to Large Hedge Fund Advisers and Private Equity Fund Advisers, some of which took effect on December 11, 2023. Certain amendments applicable to Large Private Equity Advisers become effective June 11, 2024, which will prompt such advisers to report in 2025. 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. If you are updating your fund offering documents, please note that the address for Shartsis Friese should be changed to our new address effective February 12, 2024: 425 Market Street, 11th Floor, San Francisco, California, 94105-2496.

(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 investment 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.

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 28 and 29. 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 CPOs**. 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 as of 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 on the NFA website.

(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 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 2023 reaffirmation is due by February 29, 2024. The NFA should have sent email reminders of the reaffirmation requirement in December 2023.

(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 on 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.

10. **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, 2023, from the latest Schedule 13G you have filed, you may be required to file an amended Schedule 13G by February 14, 2024. Accelerated initial and amended reporting on Schedule 13D becomes effective on February 5, 2024, and accelerated reporting on Schedule 13G becomes effective on September 30, 2024, as described in our client alert available here: Amendments to Rules Governing Beneficial Ownership Reporting.

(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 here: 13(f) Securities List and is updated on a quarterly basis. If your firm first became required to file Form 13F in 2023, your initial Form 13F is due by February 14, 2024.

(d) **Form SHO**. New Rule 13f-2 under the 1934 Act will require that "institutional investment managers" that exercise discretionary authority with respect to gross short positions exceeding certain thresholds in any given calendar month file Form SHO by the 14th of the following month. Form SHO will require both end of the month information about short positions and daily information for each settlement date on which an institutional investment manager's reportable short positions change within the month. If your firm has any managed accounts with gross short positions in equity securities that exceed the thresholds in a calendar month, then the institutional investment manager will need to file Form SHO for that month after the filing deadline becomes effective. Advisers should begin to monitor how this information is aggregated to be ready to make Form SHO filings in 2025.

(e) **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 a "large trader identification number," or "LTID," from the SEC, 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 2023 is due by February 14, 2024. 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.

11. **Profit Sharing and Waivers**. Your firm may have issued profit interests to key employees and partners. 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 that specified date. If you plan to waive management fees (including in lieu of cash payments on a general partner commitment) or items of profit or gain (including to plan into long-term capital gains), you should make these decisions in writing in accordance with the applicable underlying fund agreements.

12. **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.

13. **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 2023 generally must file FinCEN Form 114 if the aggregate value of all such accounts exceeded $10,000 at any time during 2023. Form 114 must be received by the Department of Treasury by April 15, 2024, which may be automatically extended to October 15, 2024. Failure to file Form 114 when required can result in significant monetary or criminal penalties. You should consult your accountants on whether you must file Form 114.

14. **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.

15. **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 24 and 25 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 23. 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