



# U.S. REGULATORY ACTION ITEMS FOR INVESTMENT ADVISERS (2013)

Happy 2013 to clients and friends of Jones Day! We wish you a happy, healthy, and prosperous new year.

Of course, a new year brings not only (the potential for keeping) New Year's resolutions, but also a new set of obligations and undertakings for many investment advisers. We have outlined in Part I herein some of these obligations for exempt reporting advisers (i.e., those relying on the private fund exemption or the venture capital exemption) and, in Part II, some obligations for investment advisers that are registered with the U.S. Securities and Exchange Commission (the "SEC"). In Part III, we address certain requirements and undertakings that may be relevant for any investment adviser—whether registered, filing as an exempt reporting adviser, or neither.

## PART I: ANNUAL OBLIGATIONS APPLICABLE TO EXEMPT REPORTING ADVISERS<sup>1</sup>

### ANNUAL FORM ADV UPDATE

Each exempt reporting adviser is required to update its Form ADV Part 1 within 90 days of the end of its fiscal year. In 2013 (a non-leap year), this deadline is April 1 (as March 31 falls on a Sunday) for advisers with December 31 fiscal year-ends.

<sup>1</sup> Exempt reporting advisers should be aware of obligations under the U.S. Investment Advisers Act of 1940, as amended (the "Advisers Act") to, at a minimum (a) establish and maintain appropriate written policies designed to prevent the misuse of material nonpublic information, and (b) have and enforce policies and procedures to comply with the Advisers Act's "pay to play" rule. See Jones Day's February 2012 publication for further information regarding exempt reporting advisers, available at [http://www.jonesday.com/exempt\\_reporting\\_advisers/](http://www.jonesday.com/exempt_reporting_advisers/). All web sites herein last visited on January 18, 2013.

**TIP:** You should ensure that your IARD account is adequately funded (\$150 for exempt reporting advisers, plus any additional amount(s) for required state notice filings<sup>2</sup>) well in advance of the filing deadline.

## **PART II: ANNUAL OBLIGATIONS APPLICABLE TO REGISTERED INVESTMENT ADVISERS**

### **ANNUAL FORM ADV UPDATE**

Each registered investment adviser is required to update its Form ADV (Parts 1 and 2A) within 90 days of the end of its fiscal year. In 2013 (a non-leap year), this deadline is April 1 (as March 31 falls on a Sunday) for advisers with December 31 fiscal year-ends.

Unlike the Form ADV Part 2A (the “brochure”), the Form ADV Part 2B (the “brochure supplement”) is not required to be filed with the SEC or delivered annually to clients (however, the brochure supplement must be updated and delivered to clients should there be material changes to any disciplinary information).

**TIP:** You should ensure that your IARD account is adequately funded (generally \$225 for registered investment advisers, plus any additional amount(s) for required state notice filings<sup>3</sup>) well in advance of the filing deadline.

### **ANNUAL DELIVERY OF FORM ADV PART 2**

A registered investment adviser must, within 120 days of the end of its fiscal year, deliver to each client either (a) a free updated brochure that either includes a summary of material changes or is accompanied by a summary of material changes, or (b) a summary of material changes that includes an offer to provide a copy of the updated brochure and information on how a client may obtain the brochure.<sup>4</sup>

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<sup>2</sup> The state notice filings are made through an investment adviser’s IARD renewal account.

<sup>3</sup> The state notice filings are made through an investment adviser’s IARD renewal account.

<sup>4</sup> Advisers may deliver their brochures electronically—see SEC interpretive guidance on delivering documents electronically, *available at* <http://www.sec.gov/rules/concept/33-7288.txt>.

**TIP:** You should review your compliance manual to confirm whether it requires you to take the approach in (a) or (b) above and whether, in respect of any private investment funds that you advise, you must make such an annual delivery only to your “clients” (e.g., the private investment funds that you advise) or also to the investors in those funds.

### **FORM PF**

Investment advisers to “hedge funds,” “private equity funds,” and/or “liquidity funds” (as those terms are defined in Form PF) that meet the Form PF filing thresholds (but that were not required to file the Form PF in 2012) must make their initial filings in 2013. The frequency and the timing of the Form PF filings are based on the type of funds managed by the investment adviser, the amount of the investment adviser’s assets under management in those funds, and the date of the investment adviser’s fiscal year-end.

See Jones Day’s November 2011 publication for further information regarding Form PF, *available at* <http://www.jonesday.com/sec-adopts-new-risk-reporting-requirements-for-certain-registered--investment-advisers-to-private-funds-form-pf-11-04-2011/>.

**TIP:** Many private investment funds that may not typically be considered “hedge funds” (for example, real estate funds) may actually qualify as “hedge funds” under the Form PF definition of “hedge fund” depending upon their level and type of borrowing and short selling. (See the Form PF at <http://www.sec.gov/rules/final/2011/ia-3308-formpf.pdf> (page 57) for the definition of a “hedge fund”).

### **COMPLIANCE REVIEW**

Registered investment advisers are required to annually perform and document an annual review of their compliance policies and procedures to ascertain their effectiveness under the Advisers Act.

**TIP:** Make sure that any revisions to your compliance policies and procedures are reflected in your Form ADV Part 2A and/or offering documents, if applicable.

## **DISTRIBUTION OF PRIVACY POLICY, PROXY NOTICE, AND CODE OF ETHICS**

Each registered investment adviser must annually distribute its privacy policy, its current code of ethics (if distribution is required by the investment adviser's compliance manual), and information as to how to obtain proxy vote records.

**TIP:** You should refer to your compliance manual to determine who must receive this information/documentation (for example, whether it requires you to distribute your annual privacy notice to all investors or just natural person investors).

## **DISTRIBUTION OF ANNUAL AUDITED FINANCIAL STATEMENTS**

If an investment adviser uses the audited financial statement exception to the surprise examination requirements under the Custody Rule in respect of the private funds that it manages (and those funds have December 31 fiscal year-ends), the investment adviser should mark July 1 (for funds of funds, as June 29 falls on a Saturday) or April 30 (for all other funds) on its compliance calendar as the deadline for distributing 2012 fiscal year audited financial statements to fund investors.

**TIP:** If you take advantage of the audited financial statement exception, make sure that you satisfy all requirements of that exception, such as the requirement that the accountant performing the annual audit of the fund be registered with and subject to regular inspection by the Public Company Accounting Oversight Board. For further information on the audited financial statement exception (and the Custody Rule generally), please refer to the SEC's FAQ on the Custody Rule, available at [http://www.sec.gov/divisions/investment/custody\\_faq\\_030510.htm](http://www.sec.gov/divisions/investment/custody_faq_030510.htm).

## **PART III: ANNUAL OBLIGATIONS AND UNDERTAKINGS POTENTIALLY APPLICABLE TO ANY INVESTMENT ADVISER**

### **REVIEW OF AND UPDATE TO OFFERING MATERIALS**

To ensure compliance with federal and state securities laws (anti-fraud laws in particular), it is a good practice for an investment adviser to periodically review and update the offering documents for its funds that are currently

being offered. In the context of such a private investment fund, among the types of changes for which an investment adviser may want to consider whether an update is necessary are modifications to investment strategy, instruments in which the fund may invest, service providers to the fund, risk factors related to market conditions, conflicts of interest, and applicable legal, tax, and regulatory matters.

**TIP:** Make sure that your subscription documents reflect the Dodd-Frank-based adjustments to the accredited investor and qualified client standards.

### **LOBBYIST REGISTRATION REQUIREMENTS**

Any investment adviser that solicits monies from public pension plans may be required to make filings in certain jurisdictions under those jurisdictions' lobbying laws. Many jurisdictions require annual (New York City) or biannual (California) registration of lobbyists and lobbyist agents.

**TIP:** Investment advisers should be aware that the definition of "lobbyist" in a jurisdiction (such as a state, city or municipality) in which they—or their agents—solicit public pension plans as clients or investors may have been revised to explicitly include placement agents (which in turn may trigger a registration requirement). It is helpful to consult with the relevant laws and regulations regarding lobbyist registration requirements, as lobbying registration forms may not contain the most updated information regarding registration requirements.

### **NEW ISSUES CERTIFICATIONS**

If a fund may purchase "new issues," its broker (or, for funds of funds that invest in funds investing in new issues, the underlying fund(s)) will likely request that the fund complete an annual certification (certifying whether the fund is a restricted person under the Financial Industry Regulatory Authority ("FINRA") Rule 5130 and/or Rule 5131). In order to complete that certification, the investment adviser to that fund will need to confirm that there has been no change to the restricted status of its investors.

**TIP:** Make sure that any new issues questionnaire in the subscription documents for the funds that you manage has been updated to cover Rule 5131 and that you have received representations from existing investors as to their respective

statuses under Rules 5130 and 5131. Be aware that if you fail to respond to a request for annual certification, the broker or underlying fund may deem you to have represented that you are a restricted person under Rules 5130 and 5131.

### **FORM D FILINGS**

Annual electronic Form D renewal filings for each issuer of securities in a continuous offering is required by the SEC and certain states.<sup>5</sup>

**TIP:** A mandatory capital commitment call for a private fund does not constitute a new offering but is deemed to have been made as part of the original offering, so no new Form D filing is required.

If a continuous offering has in fact been terminated, in order to reflect that fact, an investment adviser may want to consider filing a final amended Form D with the SEC and with those states that require notification that sales will no longer be made in that state.

### **BLUE SKY AND WORLD SKY LAWS**

Investment advisers should make sure that they have maintained and updated a record of the state and country of residence of clients and fund investors and that any required blue and world sky filings have been made.

**TIP:** Many blue sky filings must be renewed on a periodic basis (for example, annually).

### **CFTC RULE 4.13(a)(3) REAFFIRMATION**

Investment advisers which have filed a notice with the National Futures Association (“NFA”) to claim their U.S. Commodity Futures Trading Commission (“CFTC”) Rule 4.13(a)(3) exemption should be aware that their eligibility must be electronically reaffirmed with NFA, generally not later than 30 days after calendar year-end (i.e., January 30).

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<sup>5</sup> Form D must also be amended (for any offering) to correct a material mistake of fact or error in the previously filed notice and, subject to certain exceptions, to reflect a change in the information provided in the previously filed notice.

**TIP:** In 2013 only, firms will have 60 days after December 31, 2012 (i.e., March 1, 2013) to provide the NFA with the applicable notice of exemption.

### **SCHEDULES 13D AND 13G**

Schedule 13G filings must be updated within 45 days of the end of each calendar year (February 14), unless there is no change to any of the information reported in the previous filing (except the holder’s percentage ownership due solely to a change in the number of outstanding shares).

Schedule 13D filings must be amended “promptly” upon the occurrence of any “material changes.”

**TIP:** Consider whether you may be subject to any reporting obligations, or potential short-swing profit liability, under Section 16 of the U.S. Securities Exchange Act of 1934, as amended.

### **FORM 13F**

Institutional investment advisers with investment discretion over \$100 million of certain equity securities (“Section 13(f) securities”) must file quarterly reports on Form 13F (within 45 days of the end of each calendar quarter). The next quarterly filing deadline is February 14.

**TIP:** The official list of current and past Section 13(f) securities is available at <http://www.sec.gov/divisions/investment/13flists.htm>.

### **FORM 13H**

Annual amendments for “large traders” (persons effecting transactions in certain securities in amounts equal to 2 million shares or \$20 million in one calendar day or 20 million shares or \$200 million in one calendar month) are due within 45 days of the end of each calendar year (February 14).

**TIP:** If any of the information contained in a Form 13H filing becomes inaccurate for any reason, a large trader must make an amended filing no later than the end of the calendar quarter in which the information became stale. If a large trader files an amended Form 13H to reflect changes that occurred during the fourth calendar quarter, the large trader is still required to file the mandatory annual updated Form 13H.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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