DechertOnPoint

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A legal update from Dechert's Financial Services Group

Reminder: Annual US Reporting and Compliance Obligations

The US federal securities laws and the rules of self-regulatory organisations, such as the US Financial Industry Regulatory Authority, impose certain reporting and compliance obligations on investment managers and funds that must be complied with each year and in 2012 some new requirements will apply as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") and related rulemaking and other rule changes. Some of these annual requirements apply only to investment managers that are registered in the United States as investment advisers, but others apply to investment managers and funds that are located outside the United States and are not registered as investment advisers in the United States. This *DechertOnPoint* provides a brief description of these requirements and serves as a reminder of the need to comply with these reporting and compliance requirements.

Reporting of Significant Positions in US Equity Securities

Investment managers and funds that have discretion over, or beneficially own, more than certain amounts of US equity securities registered under the US Securities Exchange Act of 1934 (the "Exchange Act") may have to report these holdings to the US Securities and Exchange Commission ("SEC"). Depending on the circumstances, an investment manager and/or fund may be required to file Form 13F, Schedule 13D, Schedule 13G or a combination of these with the SEC.

These reporting obligations apply to all investment managers and funds regardless of whether they are registered with the SEC and regardless of where they are organised.

Form 13F

Who must file?	Institutional Investment Managers (defined below)[1]
What needs to be filed?	Form 13F, plus any request for confidential treatment.

1 Dodd-Frank added a requirement for institutional investment managers to report at least annually how they voted on certain executive compensation-related shareholder votes. The SEC has proposed a rule to implement this requirement. If adopted, the proposed rule would require institutional investment managers to report annually on Form N-PX their proxy voting record for each shareholder vote pursuant to Sections 14A(a) and (b) of the Exchange Act with respect to which the manager, whether directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, had or shared the power to vote, or to direct the voting of, any security.

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When are filings due?

Within 45 days after the end of each calendar year with respect to which the investment manager is an Institutional Investment Manager and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year. Thus, if the investment manager reached the US$100 million threshold to be considered an Institutional Investment Manager as of the last day of any month in 2011, the investment manager will be required to make all four filings in 2012.

The first filing in 2012 was due on 14 February 2012. The remaining filings in 2012 will be due on 15 May 2012, 14 August 2012 and 14 November 2012.

Definitions:

"Institutional Investment Managers" are investment managers exercising "investment discretion"[2] with respect to accounts holding Section 13(f) Securities having an aggregate fair market value on the last trading day in any month of any calendar year of at least US$100 million.

"Section 13(f) Securities" are generally US equity securities traded on a US exchange and/or certain other securities such as:

- ADRs;
- certain convertible debt securities;
- swaps and other derivatives if these transactions result in an investment manager exercising investment discretion over an underlying asset which is a traded US equity security; and
- put and call options to the extent that they appear on the SEC's list of reportable securities.

Each quarter a complete list of Section 13(f) Securities is available at www.sec.gov/divisions/investment/13flists.htm. Please also see the "Frequently Asked Questions About Form 13F" available at www.sec.gov/divisions/investment/13ffaq.htm.

Schedule 13D

Who must file?

Investment managers, funds or other persons that are direct or indirect Beneficial Owners of more than 5% of a class of a US Equity Security.

What needs to be filed?

Schedule 13D, unless qualified to file the short form Schedule 13G instead (see below).

When are filings due?

Initial filings: Within 10 days after becoming a direct or indirect Beneficial Owner of more than 5% of a class of a US Equity Security.

Amendments: Promptly (i.e., one day) following any material changes in the information included in a prior filing (e.g., most acquisitions and dispositions of additional securities constituting 1% of the class or where the intent of the filing entity changes).

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2 A person has "investment discretion" with respect to an account if the person (1) is authorised to determine what securities or other property shall be purchased or sold by or for the account, (2) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (3) otherwise exercises such influence with respect to the purchase or sale of securities or other property by or for the account as the SEC, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of the Exchange Act and the rules and regulations thereunder.

How is the 5% threshold measured?

When calculating the percentage of a class of a US Equity Security of which it is a Beneficial Owner, an investment manager must aggregate the holdings of the same class of that US Equity Security it holds for all of its client accounts. Where a fund becomes the Beneficial Owner of more than 5% of a class of a US Equity Security, it is likely that its investment manager will also be deemed a Beneficial Owner of those securities for reporting purposes and both entities would be required to file. In some circumstances, US Equity Securities that are beneficially owned by others will also need to be aggregated.

Definitions:

For this purpose, "Beneficial Owner" means an entity with:

- voting power over the US Equity Security (including the power to vote or direct the voting of the US Equity Security); or
- investment power over the US Equity Security (including the power to dispose or direct the disposition of the US Equity Security).

Investment managers with the power to vote or sell a US Equity Security held in client accounts will be deemed to be a Beneficial Owner even if they do not receive any economic benefit from those securities.

"US Equity Security" means an equity security of a US publicly traded company, including a listed closed-end investment company, but excluding any class of non-voting securities.

Schedule 13G

Who must file?

Investment managers, funds or other persons that are direct or indirect Beneficial Owners of more than 5% of a class of a US Equity Security and qualify as either a Qualified Institutional Investor or Passive Investor. Non-US institutions are also permitted to report beneficial ownership of securities on a short-form Schedule 13G instead of the longer Schedule 13D if they meet certain requirements. [3]

What needs to be filed?

Schedule 13G.

When are filings due?

Qualified Institutional Investors:

Initial filings: Within 45 days after the end of the calendar year in which the Qualified Institutional Investor becomes the Beneficial Owner of 5% or more of a class of a US Equity Security.

Amendments: (1) Within 45 days of calendar year end to report any changes, and (2) within 10 days after the end of any calendar month in which (a) the Qualified Institutional Investor becomes the Beneficial Owner of more than 10% of the class of US Equity Security, (b) the percentage beneficially owned increases or decreases by 5% or more of the outstanding securities of the class, and/or (c) there is a change in investment purpose.

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3 In order for a non-US institution to be eligible to file using the shorter Schedule 13G, the non-US institution must be: (a) the non-US equivalent of the kinds of US institutions listed in Exchange Act Rule 13d-1(b)(1)(ii); (b) subject to a regulatory regime that is substantially comparable to the regulatory scheme applicable to the equivalent US institution (provided that the non-US institution includes a certification with the Schedule 13G representing that this is the case, and that it will provide the information that would have been required in a Schedule 13D filing to the SEC staff upon request); and (c) holding the securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer.

When are filings due?

Passive Investors:

Initial filings: Within 10 days of the acquisition which caused the Passive Investor to be the Beneficial Owner of 5% or more of a class of a US Equity Security.

Amendments: (1) Within 45 days of calendar year end to report any changes, (2) promptly if a Passive Investor becomes the Beneficial Owner of more than 10% of a class of US Equity Security, and (3) if the Passive Investor is Beneficial Owner of between 10% and 20%, promptly if beneficial ownership increases or decreases by 5% of the class. A Passive Investor must file a Schedule 13D (see above) within 10 days if the Passive Investor's investment purpose changes or if the Passive Investor acquires beneficial ownership of more than 20% of the class.

How is the 5% threshold measured?

See Schedule 13D discussion above.

Definitions:

- "Qualified Institutional Investors" include, *inter alia*:
- US registered broker-dealers;
- US banks;
- US insurance companies;
- US registered investment companies;
- US registered investment advisers; and
- non-US equivalents of the foregoing, subject to certain restrictions (*see footnote 3*).

A "Passive Investor" is a person that:

- is not a Qualified Institutional Investor;
- holds a US Equity Security in the ordinary course of business;
- does not hold the US Equity Security for the purpose of changing or influencing control of the issuer; and
- does not hold more than 20% of the applicable class of US Equity Security.

"Beneficial Owner" and "US Equity Security" have the meanings set out under the Schedule 13D discussion above.

Note on SEC filing codes

Entities that have not previously made any filings with the SEC should allow four to five business days prior to the deadline for the first filing to be made with the SEC (whether on Form 13F, Schedule 13D, Schedule 13G or otherwise) to obtain the necessary SEC filing codes.

Large Trader Reporting (Form 13H)

The SEC promulgated a new rule in 2011 — Rule 13h-1 under the Exchange Act — which requires investment managers who trade over certain thresholds of exchange-listed securities (including equities and options) described below to file a form (Form 13H) with the SEC. These managers must provide US broker-dealers with the manager's "large trader identifier" (LTID), which will be assigned to the investment manager by the SEC once the investment manager's initial Form 13H filing is made. This rule is designed to allow the SEC to conduct market surveillance and analyse potential securities law violations more efficiently.

Who must file?	Anyone who effects transactions in an amount equal to or exceeding 2 million shares or $20 million during any calendar day; or 20 million shares or $200 million during any calendar month. This includes US and non-US based traders. The thresholds include transactions for the trader's own account and any accounts over which the trader exercises investment discretion.
What needs to be filed?	Form 13H, which includes disclosure of the senior officers of the large trader, together with a list of the brokerage firms that effect transactions on behalf of the large trader.
When are filings due?	*Initial filings:* "Promptly" after crossing the volume thresholds. This is not defined, but is taken to mean within 10 days. Voluntary filings are permitted and traders who are close to the thresholds may wish to file prior to crossing the thresholds. *Amendments:* Within 10 days after the end of any calendar quarter in which any information in the Form 13H becomes inaccurate. However, the SEC encourages traders to file an amendment as soon as possible after the information in the Form becomes inaccurate. The addition or removal of any broker-dealers from the trader's list of brokerage firms triggers an amendment filing.
Is there an annual update requirement?	Yes, the Form must be updated annually (45 days after calendar year end) even if there are no changes to the Form. If the trader does not effect any aggregate transactions at any time during the prior full calendar year that cross the thresholds, the trader can file for "Inactive Status" through a Form 13H submission. *Traders who filed their initial Form 13H in November/December 2011 are not required to make an annual update filing in 2012.*

Annual Filing Requirement for Continuing US Private Placements (Form D)

Section 5 of the US Securities Act of 1933 (the "Securities Act") generally requires registration of any security offered or sold through the use of any means of United States interstate or international commerce. Section 4(2) of the Securities Act and Regulation D provide a private placement exemption from registration under the Securities Act for any offer or sale of a security by an issuer that does not involve a public offering. Any issuer making a continuing private placement in the United States is required to file, annually during the course of the offering, an updating amendment to its federally filed Form D.

Who must file?	Each issuer, including hedge funds and private equity funds, that makes a private placement offering in the United States pursuant to Regulation D where the offering either begins in 2012 or is continuing in 2012.
What needs to be filed?	Form D with the SEC, plus any additional blue sky filings in the state(s) where the purchase of securities occurred depending on such state's blue sky laws. In addition, New York currently requires that a pre-sale filing be made. For continuing offerings, the filing of the required updating amendment will trigger various state notice filing requirements as well.

When are filings due?

New Offerings: Within 15 days after the first sale of securities. The recently amended Form D makes it clear that the date of first sale is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the issuer receives the investor's subscription agreement or cheque.

Continuing Offerings: On or before the anniversary of the issuer's last federally filed Form D. As the deadline for the first required electronic filing was March 2009, the anniversary of this filing for many issuers is in March.

Please note that Form ADV, as amended in 2011, now requires investment advisers to specify which private funds they advise are relying on Regulation D and the Form D file number for any such private fund. It is therefore imperative for funds to ensure that their Form D filings are kept up to date.

How are filings made?

Issuers must submit Form D filings with the SEC electronically via the Electronic Data Gathering, Analysis and Retrieval (EDGAR) system.

Filings with the states must still be made in paper format, however it is likely that in the future state filings will be permitted to be made electronically. In conjunction with the enactment of Dodd-Frank, states are becoming increasingly rigorous in demanding compliance with their filing requirements. Penalties for non-compliance include late fees and can ultimately lead to demands for rescission offers.

What do I need to make the filing with the SEC electronically?

Issuers that have not previously filed documents with the SEC will need to obtain a Central Index Key ("CIK") number and/or EDGAR access codes before such issuers can file Form D electronically via EDGAR.

Do filings need to be updated?

Amendments to Form D are generally required to be made where:

- a year has passed since the filing of the Form D or the most recent amendment, if the offering is continuing;
- a material mistake of fact or error in a previously filed notice is discovered; or
- a change in information occurs, other than in certain prescribed circumstances.

Form ADV Annual Updating Amendment, Including Part 2

An asset manager registered as an investment adviser with the SEC must update Part 1 and Part 2 (which is comprised of a "Brochure" and a "Brochure Supplement") of its Form ADV on an annual basis.

What is Form ADV?

Form ADV is the investment adviser registration form used by the SEC. Form ADV is made up of three parts: Part 1, the Brochure and the Brochure Supplement (both of which comprise Part 2). A registered investment adviser must file amendments to Part 1 of Form ADV and the Brochure electronically on the SEC's Investment Adviser Registration Depository ("IARD") website.

By what date must Part I of Form ADV and the Brochure be updated?	Part 1 of Form ADV and the Brochure must be updated annually within 90 days of a registered investment adviser's fiscal year-end. These updates must be filed electronically on the IARD website.[4] Please note that the requirement to file the Brochure is a change from prior years. Due to recent changes in the Form ADV, all advisers that were registered or had a pending Form ADV as of 1 January 2012 must file an amendment to Form ADV no later than 30 March 2012 to update all items in Form ADV Part 1 and Schedules A-D.
Is there an annual update requirement for the Brochure Supplement?	There currently is no mandatory filing requirement for the Brochure Supplements, but they must be maintained in the registered adviser's records.[5] We recommend that registered investment advisers review their Brochure Supplements periodically, including at the time of the annual update, to ensure that the disclosure is current. As with Part 1 and the Brochure, all advisers are required to update the information in the Brochure Supplements promptly after any disclosure becomes materially inaccurate.
What is the delivery requirement for the Brochure?	The adviser must deliver to clients within 120 days of its fiscal year end a summary of material changes to the Brochure from the prior year with either (i) the updated Brochure, or (ii) an offer to provide the updated Brochure upon request.
Is there a delivery requirement for the Brochure Supplements?	A Brochure Supplement must be delivered to a new or prospective client at or before the time when the supervised person to whom the Brochure Supplement relates begins to provide advisory services (or certain other services) to that client. Delivery of an updated Brochure Supplement to clients is required when there is new disclosure of a disciplinary event, or a material change to disciplinary information already disclosed.
What filing fees are required?	There is a fee payable in connection with filing the annual updating amendment, which ranges from US$40 to US$200 depending on assets under management.
What are the Form ADV requirements for exempt reporting advisers?	Those advisers who fall into the category of exempt reporting adviser ("private fund advisers" and "venture capital fund advisers") must submit the specified portions of Part 1 of Form ADV to the SEC.[6] The deadline for existing advisers to make this filing is 30 March 2012. Filings made by exempt reporting advisers are subject to the same annual updating requirements as fully registered advisers (the filings must be updated within 90 days of the adviser's fiscal year end).[7] All filings made by exempt reporting advisers will be publicly available.

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4 Please note that the updating of certain sections of Part 1 and the Brochure cannot wait until the annual update. Information contained in Items 1, 3, 9 and 11 of Part 1 must be amended promptly after any change, and information in Items 4, 8 and 10 must be amended promptly after the information becomes materially inaccurate. Information in the Brochure must be updated promptly after the information becomes materially inaccurate (except for changes to the Summary of Material Changes and the amount of assets under management, which do not require interim updates). **In addition, advisers who file Form PF must submit an amendment to their Form ADV when they begin advising a new private fund that updates Section 7B of Schedule D as this is the method by which the SEC will assign filing codes to private funds. These codes are required to make the adviser's Form PF filings.** Private funds required to be included in the Form ADV and then subsequently in the Form PF are those funds offered in the United States in reliance on either Section 3(c)(1) or Section 3(c)(7) of the US Investment Company Act of 1940 (the "Investment Company Act"). Certain private funds can be excluded from the Form ADV and the Form PF if they (a) are not a US entity, (b) are not beneficially owned by any US Persons and (c) have not been "offered" in the United States in the prior 12 months.

5 Electronic filing of the Brochure Supplement currently is optional.

6 Exempt reporting advisers must complete Items 1, 2B, 3, 6, 7, 10, 11, and the corresponding sections of Schedules A, B, C and D.

7 Please note that, like registered advisers, the updating of certain sections of Part 1 cannot wait until the annual update. Information contained in Items 1, 3 and 11 must be amended promptly after any change, and information in Item 10 must be amended promptly after the information becomes materially inaccurate.

Private Fund Reporting by Registered Advisers (Form PF)

The SEC adopted a new rule in October 2011 that requires registered investment advisers who manage private funds above certain assets under management ("AUM") thresholds to file Form PF. Form PF is designed to provide regulators with information necessary to monitor potential systemic risk created by private funds and to determine whether particular entities should be designated as "significant financial institutions." The rule describes the categories of private funds for which reporting is required and sets forth relevant asset thresholds and related reporting and updating requirements for each category. The four main categories of private funds are hedge funds (which may include certain UCITS), liquidity funds, private equity funds and "other" funds.

Who must file?	SEC registered investment advisers who manage at least one private fund (as defined by the rule) and have at least $150 million of assets under management in connection with the private fund(s) they manage (referred to herein as "Relevant AUM"). A registered adviser must include on Form PF private funds it identified on its Form ADV.[8]
What needs to be filed?	Form PF, including: Part 1A/1B: all filers Part 1C: all hedge fund advisers Part 2: large hedge fund advisers (at least $1.5 billion in Relevant AUM) Part 3: large liquidity fund advisers (at least $1 billion in Relevant AUM) Part 4: large private equity fund advisers (at least $2 billion in Relevant AUM)
When are initial filings due?	<u>For advisers with $5 billion or more in Relevant AUM</u>: Hedge Fund Advisers: 60 days following end of the first fiscal quarter ending on or after 15 June 2012 Liquidity Fund Advisers: 15 days following end of the first fiscal quarter ending on or after 15 June 2012 Private Equity Fund Advisers: 120 days following end of the first fiscal year ending on or after 15 June 2012
When are initial filings due?	<u>For advisers with less than $5 billion in Relevant AUM</u>: Hedge Fund Advisers: 60 days following end of the first fiscal quarter ending on or after 15 December 2012 (or effective date of SEC registration, if later) Liquidity Fund Advisers: 15 days following end of the first fiscal quarter ending on or after 15 December 2012 (or effective date of SEC registration, if later) Private Equity Fund Advisers: 120 days following end of the first fiscal quarter ending on or after 15 December 2012 (or effective date of SEC registration, if later)

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8 For purposes of calculating Relevant AUM, there are certain instances in which an adviser must aggregate its accounts and certain instances when it is not required to, which may lessen the reporting burden. In addition, in cases where funds are managed by multiple advisers that are related persons, one Form PF is permitted to be filed.

Is there an update requirement?

Yes, depending on which parts of the Form PF are filed. Large hedge fund advisers and large liquidity fund advisers must update Form PF quarterly. All other qualifying advisers, including large private equity fund advisers and small hedge fund or liquidity fund advisers must update Form PF annually. The updating requirements for each part is summarized below:

Part 1: annually within 120 days of the adviser's fiscal year end
Part 2: quarterly within 60 days of the end of each fiscal quarter of the adviser
Part 3: quarterly within 15 days of the end of each fiscal quarter of the adviser
Part 4: annually within 120 days of the adviser's fiscal year end

Annual Eligibility Verification for a Fund's Participation in "New Issues"

"New Issues" involve the initial public offering of securities in which a member of the US Financial Industry Regulatory Authority ("FINRA") is a part of the underwriting syndicate. Please note that FINRA adopted a new rule — Rule 5131 New Issues Allocations and Distributions — which came into effect 26 September 2011 and is explained below.

Who may invest in New Issues?

Rule 5130: A private investment fund may invest in New Issues only in accordance with the requirements of FINRA Rule 5130 (the "Restricted Persons Rule"),[9] which permits investors to participate in the profits and losses from investments in New Issues subject to certain restrictions. The Restricted Persons Rule provides that persons associated with broker-dealers and other financial-type accounts (such as portfolio managers who manage assets for institutional investors) ("Restricted Persons") are limited in their ability to invest in New Issues.

Rule 5131: FINRA Rule 5131 (the "Covered Persons Rule") regulates the allocation of New Issues by US registered broker-dealers ("FINRA members") to executive officers and directors of current, and certain former and prospective, investment banking clients of the FINRA member. This Rule provides that executive officers and directors of public companies and certain covered non-public companies, and persons materially supported by such executive officers and directors[10] ("Covered Persons") that have certain relationships with FINRA members, are limited in their ability to invest in New Issues.

Generally a private investment fund's offering memorandum contains a questionnaire in its application form or subscription agreement designed to ascertain whether any investors are Restricted Persons or Covered Persons. This will enable the fund to determine whether it may invest in New Issues in compliance with the Restricted Persons Rule and the Covered Persons Rule.

9 Formerly, NASD Conduct Rule 2790, which commonly was referred to as the "Hot Issues Rule".

10 For this purpose, an "executive officer or director" includes any (i) person named as an executive officer or director in a US public company's most recent proxy statement filed with the SEC or in an annual report filed with the SEC on Form 10-K or Form 20-F, (ii) executive officer or director of a non-US company that is registered with the SEC under the Exchange Act, or (iii) executive officer or director of a covered non-public company. For entities that are not formed as corporations, the term director should be interpreted to include any person who performs similar functions for such entity. "Material support" for this purpose means directly or indirectly providing more than 25 per cent. of a person's income in the prior calendar year. Persons living in the same household are deemed to be providing each other with material support.

What verifications are required?

A private investment fund seeking to invest in New Issues must receive an initial positive affirmation of an investor's eligibility to participate in New Issues before it may specifically allocate profits and losses from New Issues to such investor.

The Restricted Persons Rule and the Covered Persons Rule also require that an investor's eligibility to participate in New Issues be confirmed on an annual basis. Many investment managers also ask those investors that have previously been classified as Restricted Persons or Covered Persons whether their status has changed over the past year, in which case those investors would be eligible to participate in New Issues in the coming year.

What format is required for an annual verification?

Both the Restricted Persons Rule and the Covered Persons Rule allow investment managers to follow a "negative consent" process for annual verification of an investor's status. As such, an investment manager may send a notice asking whether there has been any change in an investor's status. This notice may be provided together with the fund's annual report or other materials sent to investors periodically or in a separate mailing. Provided that an investor has not affirmatively reported a change in its status, the fund is permitted to rely on existing information regarding a particular investor.

ERISA – Monitoring Ownership by Benefit Plan Investors

An investment manager is subject to certain restrictions under the US Employee Retirement Income Security Act of 1974 ("ERISA") to the extent that a fund it manages includes "plan assets". When ERISA plans invest in a pooled fund, the fund's assets will only be considered plan assets if "Benefit Plan Investors" own 25% or more of the value of any class of equity interests in the fund. Therefore, an investment manager will not be subject to ERISA if the percentage of Benefit Plan Investors in a fund advised by the investment manager does not exceed 25% or more of any class of equity interests in that fund.

There are no *per se* annual monitoring requirements for ERISA purposes; however, we recommend that private investment funds confirm that ongoing monitoring of fund ownership by Benefit Plan Investors is being conducted appropriately to ensure that a fund does not include plan assets.

Who are "Benefit Plan Investors"?

A "Benefit Plan Investor" is defined to include (i) a plan subject to Part 4 of Title I of ERISA, (ii) a plan to which Section 4975 (the prohibited transaction provisions) of the US Internal Revenue Code of 1986 ("Code") applies, and (iii) entities the assets of which include plan assets by reason of a plan's investment in the entity.

Non-US retirement plans, governmental plans, and other plans that are not subject to Title I of ERISA or Section 4975 of the Code are not Benefit Plan Investors.

What testing must be performed?

An investment manager to a fund wishing to avoid becoming subject to ERISA should ensure that testing is done on a class-by-class basis to ensure that the ownership by Benefit Plan Investors of each class of interests in a fund does not exceed the 25% threshold. In determining whether Benefit Plan Investor ownership exceeds the 25% threshold, the value of any equity interests in the fund held by any person who has discretionary authority or control with respect to the fund's assets, or who provides investment advice for a fee, or any affiliate of such a person, will be disregarded (provided such person is not a Benefit Plan Investor).

In a fund of funds structure or a master-feeder structure, each level of the fund must be tested for compliance with the 25% per class limitation.

When must the testing be performed?

A determination of whether Benefit Plan Investor ownership in a fund class exceeds the 25% threshold must be made after each acquisition of an equity interest in the fund (which has also been interpreted to include each redemption of an interest in the fund). Therefore, we would recommend that testing be performed before (if possible) and after each dealing day.

Each investor should be required to represent whether he or she is a Benefit Plan Investor when making an initial investment. This may be accomplished through a Benefit Plan Investor questionnaire in a fund's subscription agreement and/or application form, as the case may be.

CFTC Regulation

Generally speaking, an entity which acts for US customers, whether they are direct customers or investors in a fund which the entity operates or advises, is required to register as a commodity pool operator with the CFTC if the entity engages in exchange-traded futures or options on futures transactions (and pending CFTC rules will extend these requirements to cover most transactions in the over-the-counter ("OTC") market as well). Entities without CFTC registration may be able to rely on certain exemptions from registration.

The most commonly used exemption from CFTC registration for advisers to funds with US investors that are not registered with the SEC is the "sophisticated investor" exemption found under CFTC Rule 4.13(a)(4). The CFTC has recently rescinded this exemption and commodity pool operators that have claimed this exemption as of the effective date of the rescission will have until 31 December 2012 to register with the CFTC, come into compliance with another exemption or cease operating commodity pools subject to CFTC regulation.

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