Etude sur les obligations réglementaires américaines de reporting

Lettre d'information - Services Financiers et Gestion d'Actifs

Février 2017

Dechert LLP

Comme chaque année, nous avons préparé un mémorandum qui présente les principales obligations déclaratives ou de reporting réglementaire exigées par les lois et règlementations des Etats-Unis et qui sont susceptibles de concerner nos clients européens en 2017.

Vous trouverez ci-dessous cette publication en anglais, précédée d'un résumé en français. La version en anglais de cette étude est plus détaillée.

Parmi les européens touchés par ces obligations se trouvent : les sociétés de gestion et les fonds européens qui ont des activités ou des investissements sur les marchés américains ; les gestionnaires qui ont pour clients des investisseurs américains ; ou encore des acteurs qui placent des ordres sur les marchés américains ou par l'intermédiaire de prestataires financiers soumis au droit américain. Pour rappel, ces dernières années les régulateurs américains, et la SEC en particulier, ont investi dans des systèmes informatiques sophistiqués permettant de recouper les informations provenant des marchés et les reporting effectués par chacun de leurs acteurs. De plus en plus, ces informations sont analysées méthodiquement afin de détecter les activités suspectes ainsi que les manquements aux obligations de reporting. Egalement, les procédures de "donneurs d'alerte" ("whistleblower") avec la SEC, ouvertes aux étrangers, décuplent les risques d'avoir à faire face à des procédures disciplinaires.

Les obligations déclaratives de franchissement de seuils

Le formulaire 13F

Tout gestionnaire d'actifs doté d'un pouvoir de gestion discrétionnaire sur des actifs qui sont des "Valeurs Mobilières" tel que définies par l'article 13(f)" de la loi "U.S. Securities Exchange Act de 1934" (lequel vise la plupart des actions et autres titres échangés sur les marchés américains ainsi que les contrats liés à ces titres), et ce pour un montant d'actifs sous gestion ayant une valeur de marché globale au dernier jour de n'importe quel mois de l'année d'au moins 100 millions de dollars, a une obligation déclarative consistant à remplir le formulaire dit "13F" et à l'adresser à la SEC. Le gestionnaire concerné, qualifié dans ce cas de "Gestionnaire d'Investissement Institutionnel", a l'obligation de remplir le Formulaire 13F dans les 45 jours suivants la fin de l'année civile au cours de laquelle il remplit les critères de qualification en tant que Gestionnaire d'Investissement Institutionnel et dans les 45 jours suivants le dernier jour de chacun des trois premiers trimestres de l'année civile suivante.

Les formulaires 13D et 13G

Les gestionnaires d'actifs, les fonds d'investissements et plus généralement toutes personnes qui sont des "Bénéficiaires Économiques" directs ou indirects de plus de 5% d'une classe d'actions d'un émetteur listé sur un marché financier américain a une obligation déclarative consistant à remplir le formulaire dit "13D" et à l'adresser à la SEC. Les termes "Bénéficiaire Économique" (beneficial ownership) sont d'interprétation large et visent toute entité ayant le pouvoir d'exercer les droits de vote attachés aux actions, un pouvoir de gestion, ou ayant le droit d'acquérir un tel pouvoir dans les 60 jours (suite à la résiliation d'un contrat de délégation de gestion par exemple). Les personnes qui sont des "Bénéficiaires Économiques" directs ou indirects de plus de 5% d'une classe d'actions d'un émetteur listé sur les marchés américains et qui peuvent être qualifiés d'"Investisseurs Institutionnels Qualifiés" ou d'"Investisseurs Passifs" peuvent toutefois remplir le formulaire dit "13G" plutôt que le formulaire 13D, les obligations liées à ce formulaire 13G étant moins contraignantes. Les "Investisseurs Institutionnels Qualifiés" comprennent, entre autres, la plupart des sociétés de gestion non-américaines.

Les obligations déclaratives auprès de la SEC liées aux activités de “Large Trader” et le formulaire 13H

Selon la règlementation américaine, un “large trader” est défini comme une personne effectuant des transactions pour son compte propre ou celui d’un tiers en “titres NMS” (les actions autres titres financiers et les options standardisées cotées sur les marchés américains) pour des montants égaux ou supérieurs à l'un des seuils suivants : 2 millions de titres ou $20 millions par jour, ou 20 millions de titres ou $200 millions par mois (ces seuils représentant des “Niveaux d’Activité Requérant Identification”). Tout gestionnaire correspondant à la définition de “large trader” doit s’enregistrer auprès de la SEC en remplissant un formulaire dit “13H”. Le formulaire 13H, qui contient des informations concernant les dirigeants du “large trader”, et une liste des brokers qui effectuent des transactions pour le compte du “large trader” doit être “rapidement” rempli une fois les seuils requis atteints, ce qui signifie en pratique qu’il doit être rempli dans les 10 jours.

Mise à jour annuelle du Formulaire ADV (pour les sociétés de gestion enregistrées comme “investment adviser” auprès de la SEC uniquement ou se plaçant sous le régime "exempt reporting adviser")

Le Formulaire ADV (le formulaire d’enregistrement des gestionnaires d’actifs auprès de la SEC), Partie 1 et Partie 2, si applicable, (comprenant la Partie 2A ou “Brochure” et la partie 2B ou “Brochure Supplement”), doit être mis à jour annuellement. Les Partie 1 et 2A doivent être mises à jour au moins une fois par an, dans les 90 jours à compter de la fin de l’année fiscale du gestionnaire d’investissement. Les gestionnaires d’actifs qualifiés de “Exempt reporting advisers” ne doivent soumettre que certaines portions de la Partie 1 à la SEC.

Le reporting de fonds privés et le Formulaire PF (pour les sociétés de gestion enregistrées comme “investment adviser” avec la SEC uniquement)

Les gestionnaires d'actifs enregistrés auprès de la SEC qui gèrent au moins un fonds privé (i.e. les fonds exclus de la définition de "société d’investissement" tel que définie aux Sections 3(c)(1) ou 3(c)(7) du “Investment Company Act” de 1940, ce qui inclus les hedge funds, les fonds non-américains vendus aux États-Unis (dont les UCITS), les liquidity funds, et les private equity funds notamment) doivent remplir un Formulaire PF. Les dates butoirs d’enregistrement du Formulaire PF varient en fonction du type de fonds privé concerné.

Le reporting de placements privés aux Etats-Unis et le Formulaire D

Les fonds d’investissement de tous types (y compris les UCITS par exemple), qui vendent leurs parts à des investisseurs américains, opèrent de fait des placements privés aux États-Unis. En application du Règlement D du “Securities Act” de 1933, beaucoup d’entre eux peuvent avoir à remplir un formulaire dit “Form D” avec la SEC dans les 15 jours à compter de la première vente de titres effectuée par fonds concerné et pour chaque achat de parts suivant.

Le reporting auprès de la CFTC et de la NFA (pour les sociétés de gestion enregistrées avec la CFTC uniquement)

Les “commodity pool operators” ou CPOs et les “commodity trading advisors” ou CTAs enregistrés auprès de la “U.S. Commodity Futures Trading Commission” (“CFTC”) doivent généralement également devenir membres de la “National Futures Association” (“NFA”) et doivent : (i) enregistrer des rapports trimestriels auprès de la NFA (Formulaires CPO-PQR et NFA-PQR pour les CPOs et Formulaires CTA-PR et NFA-PR pour les CTAs); (ii) compléter un auto-examen

annuel ; et (iii) compléter une “Mise-à-jour d’Enregistrement Annuelle” (“Annual Registration Update”), comprenant un questionnaire à remplir et certains frais à payer à la NFA.

Nos équipes francophones de Paris, Bruxelles, Dublin, Munich, Londres, Luxembourg et Washington, D.C., sont à votre disposition pour répondre à vos questions ou vous assister sur les sujets mentionnés dans la présente étude.

Julien Bourgeois
Associé
Washington, D.C.
T: +1 202 261 3451
julien.bourgeois@dechert.com

Mark Browne
Associé
Dublin
T: +353 1 436 8511
mark.browne@dechert.com

Olivier Dumas
Associé
Paris
T: +33 1 57 57 80 09
olivier.dumas@dechert.com

Jean-Louis Frognet
Associé
Luxembourg
T: +352 45 62 62 29
jean-louis.frognet@dechert.com

Patrick Goebel
Associé
Luxembourg
T: +352 45 62 62 22
patrick.goebel@dechert.com

Angelo Lercara
Associé
Munich
T: +49 89 21 21 63 22
angelo.lercara@dechert.com

Antoine Sarailler
Associé
Paris
T: +33 1 57 57 80 16
antoine.sarailler@dechert.com

Marc Seimetz
Associé
Luxembourg
T: +352 45 62 62 23
marc.seimetz@dechert.com

Johan Terblanche
Associé
Luxembourg
T: +352 45 62 62 43
johan.terblanche@dechert.com

Ysabelle Vuillard
Collaboratrice
Bruxelles
T: +32 2 535 5440
ysabelle.vuillard@dechert.com

Reminder: Certain U.S. Reporting and Compliance Obligations for Investment Advisers and Funds

The U.S. federal securities laws and the rules of U.S. self-regulatory organizations (such as the Financial Industry Regulatory Authority) impose certain reporting and compliance obligations on investment advisers and funds. Some of these requirements apply only to U.S.-registered investment advisers, but others apply to investment advisers and funds that are located outside the United States and are not registered as investment advisers in the United States. This *Dechert OnPoint* provides a brief description of some of these requirements and serves as a reminder of the need for compliance.

Please refer to a companion *Dechert OnPoint*, Countdown to March 1, 2017: Derivatives Trading Regulatory Compliance Checklist, which focuses on new upcoming deadlines for asset managers trading derivatives subject to U.S. regulation. Also, for information regarding current SEC examination priorities, please refer to *Dechert OnPoint*, SEC 2017 Examination Priorities Focus on Retail Investors, Seniors and Retiring Investors, and Market-Wide Risk Assessment.

Note that if the filing date falls on a week-end or federal holiday, the filing is not due until the next business day.

Reporting of Significant Positions in U.S. Equity Securities

Investment advisers and funds that have discretion over, or beneficially own, more than certain amounts of equity securities registered under the Securities Exchange Act of 1934 ("Exchange Act") may have to report these holdings to the Securities and Exchange Commission ("SEC"). Depending on the circumstances, an investment adviser 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 advisers and funds regardless of whether they are registered with the SEC and regardless of where they are organized (U.S. or non-U.S.).

Form 13F

Who must file?	Institutional Investment Managers (defined below) that exercise investment discretion with respect to at least $100 million in Section 13(f) Securities (defined below), as of the last trading day of any calendar month.
What needs to be filed?	Form 13F, plus any request for confidential treatment.

When are filings due?

Within 45 days after the end of each calendar year with respect to which the investment adviser is an Institutional Investment Manager and within 45 days after each of the first three quarter-ends of the subsequent calendar year. Thus, if the investment adviser reached the $100 million threshold to be considered an Institutional Investment Manager as of the last day of any month in 2016, the investment adviser is required to make all four 13F filings in 2017.

For 2017, the first Form 13F filing is due on February 14 (the first business day after such 45-day period). The remaining filings in 2017 are due on May 15, August 14 and November 14.

Definitions:

An "Institutional Investment Manager" is defined under Section 13(f)(1)(6)(A) of the Exchange Act as (i) any person, other than a natural person, investing in or buying and selling securities for its own account, and (ii) any person, including a natural person, exercising investment discretion with respect to the account of any other person.

Under Section 3(a)(35) of the Exchange Act, a person has "investment discretion" with respect to an account if the person (1) is authorized 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.

"Section 13(f) Securities" are generally (i) equity securities traded on a U.S. securities exchange or the NASDAQ and/or (ii) certain other securities such as:

- ADRs;
- Certain convertible debt securities;
- Swaps and other derivatives if these transactions result in an investment adviser exercising investment discretion over an underlying asset which is an equity security traded on an exchange; 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. Form 13F filers may rely on this list to determine whether a particular security should be included in the filing.

Please also see Frequently Asked Questions About Form 13F.

Schedule 13D

Who must file?

Investment advisers, funds or other persons that are direct or indirect Beneficial Owners (defined below) of more than 5% of a class of Equity Securities (defined below) registered under the Exchange Act.

What needs to be filed?

Schedule 13D, unless qualified to file the short form Schedule 13G instead (see below for a discussion of Schedule 13G reporting).

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 Equity Securities registered under the Exchange Act, measured from the trade date and not the trade settlement date.

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 Equity Securities constituting 1% of the class or where the intent of the reporting entity changes).

How is the 5% threshold measured?

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

Definitions:

For this purpose, "Beneficial Owner" can be a complex concept, but generally means an entity with:

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

A "Beneficial Owner" of a security also includes any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan to evade the reporting requirements of Section 13(d) or (g) of the Exchange Act.

A person is also deemed to be the Beneficial Owner of an Equity Security if such person has the right to acquire such Equity Security within 60 days, including through exercising an option, warrant or right, or through the conversion of a convertible security.

Investment advisers with the power to vote or sell an Equity Security held in client accounts will be deemed to be Beneficial Owners of those Equity Securities even if they do not receive any economic benefit from those securities.

"Equity Security" generally means an equity security of a class registered under the Exchange Act (including exchange-traded funds) or an equity security issued by a closed-end investment company, but excluding any class of non-voting securities.

Schedule 13G

Who must file?

Investment advisers, funds or other persons that are direct or indirect Beneficial Owners of more than 5% of a class of an Equity Security and qualify as either a Qualified Institutional Investor or Passive Investor (each as defined below). Non-U.S. 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.[1]
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 an 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 an 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. For 2017, both the initial and amendment filings are due on February 14 (the first business day after 45-day period). ***Passive Investors:*** *Initial filings*: Within 10 days of the acquisition that caused the Passive Investor to be the Beneficial Owner of 5% or more of a class of an 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 an Equity Security, and (3) if the Passive Investor is a 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. For 2017, the amendment filings are due on February 14.
How is the 5% threshold measured?	See Schedule 13D discussion above regarding measurement of the 5% threshold.
Definitions:	"Qualified Institutional Investors" (*i.e.*, all persons entitled to rely on Exchange Act Rule 13d-1(b))[2] include, *inter alia*: • Registered broker-dealers; • Banks; • Insurance companies; • Registered investment companies;

[1] In order for a non-U.S. institution to be eligible to file using the shorter Schedule 13G, the non-U.S. institution must be: (a) the non-U.S. equivalent of the kinds of U.S. institutions listed in Exchange Act Rule 13d-1(b)(1)(ii); (b) subject to a regulatory regime that is substantially comparable to the regulatory regime applicable to the equivalent U.S. institution (provided that the non-U.S. 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.

[2] *See* Exchange Act Rule 13d-1(b) for a complete list of entities.

- SEC- or state-registered investment advisers; and
- Non-U.S. equivalents of the foregoing, subject to certain restrictions.

A "Passive Investor" is a person that:

- Is not a Qualified Institutional Investor;
- Holds an Equity Security in the ordinary course of business;
- Does not hold the 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 Equity Security.

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

Large Trader Reporting

Market participants, including investment advisers, that conduct in excess of a threshold amount of trading activity (as measured by volume or market value) in exchange-listed securities as described below are required to file Form 13H with the SEC, in order to obtain a "Large Trader Identification Number."

Form 13H

Who must file?	Large Traders (defined below).
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. Once the initial Form 13H is filed, the Large Trader will receive a Large Trader Identification Number (also known as a "LTID") from the SEC, which the Large Trader must then provide to any broker-dealer where the Large Trader, or its affiliates, maintain an account.
When are filings due?	*Initial filings*: Promptly after crossing the volume thresholds. "Promptly" is not defined, but is generally understood to mean within 10 days. Voluntary filings are permitted and traders who expect to cross the thresholds in the future may wish to file prior to crossing the thresholds. *Amendments*: Promptly after the end of any calendar quarter in which any information in Form 13H becomes inaccurate. As indicated above, "promptly" is generally understood to mean within 10 days. However, the SEC encourages Large Traders to file an amendment as soon as possible after the information in Form 13H becomes inaccurate. The addition or removal of any broker-dealers from the Large Trader's list of broker-dealers triggers an amendment filing requirement.
Is there an annual filing requirement?	Yes, Form 13H must be filed annually, within 45 days after calendar year-end, even if there are no changes to the Form 13H.

If the Large Trader did not conduct aggregate transactions during the prior full calendar year that crossed the thresholds, the Large Trader can file for "Inactive Status" on Form 13H.

For 2017, the filing is due on February 14 (the first business day after 45-day period).

Definitions:

A "Large Trader" is any person or entity that effects transactions in NMS Securities (defined below) 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 U.S. and non-U.S. based traders. The thresholds include transactions for the trader's own account and any accounts over which the trader exercises investment discretion, directly or indirectly, including through persons controlled by such person. Accordingly, this typically includes client accounts of an investment adviser.

Under Rule 600(b)(46) of Regulation NMS, "NMS Security" is defined to include any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. In general, the term "NMS Security" refers to U.S. exchange-listed equity securities and standardized options, but does not include U.S. exchange-listed debt securities, securities futures, or U.S. open-end mutual funds, which are not currently reported pursuant to an effective transaction reporting plan.

Note on SEC Filings and SEC Filing Codes

Issuers must submit Form 13F, Schedule 13D, Schedule 13G and Form 13H filings with the SEC electronically via the Electronic Data Gathering, Analysis and Retrieval ("EDGAR") system.

Entities that have not previously made any filings with the SEC through EDGAR should allow at least 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 Form 13H) to obtain the necessary SEC filing codes. Sometimes more time is needed.

Annual Updating of Adviser's Form ADV

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

What is Form ADV?

Form ADV is a uniform form used by investment advisers to register with the SEC and consists of two parts:

- Part 1: check-the-box, fill-in-the-blank form providing information as to the adviser;
- Part 2A: narrative brochure providing information as to the firm; and
- Part 2B: narrative brochure supplements providing information as to the specific employees who provide investment advice.

Form ADV also serves as a report by exempt reporting advisers, who must file specified portions of Part 1.

	Amendments to Part 1 must be submitted electronically through the SEC's Investment Adviser Registration Depository ("IARD") website. The updated brochure must be uploaded as a text-searchable document in portable document format (PDF) to IARD.
By what date must Part 1 of Form ADV and the Brochure be updated?	Part 1 of Form ADV and the Brochure must be updated at least annually within 90 days of the registered adviser's fiscal year-end.[3] For registered advisers with a December 31 fiscal year-end, the annual amendment filing for 2017 is due on March 31.
Is there an annual update requirement for the Brochure Supplements?	There currently is no mandatory filing requirement for the Brochure Supplements for federally registered advisers; instead, advisers must maintain copies of their Brochure Supplements in their books and records. Registered advisers should review their Brochure Supplements periodically, including at the time of the annual update and upon any changes in personnel or an individual's title or function, to ensure that the disclosure remains current. All advisers are required to update the information in the Brochure Supplements promptly after any information therein becomes materially inaccurate.
What is the delivery requirement for the Brochure?	The registered 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. For advisers with a December 31 fiscal year-end, it is recommended that the delivery in 2017 should be made by April 28 since the 120th day falls on a weekend.
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"[4] to whom the Brochure Supplement relates begins to provide advisory services (or certain other services) to that client.[5] 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.

[3] 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. Further, following the compliance date for amendments to Form ADV, Sections 7.B and 9.C of Schedule D must be amended promptly following receipt of reports from the fund's auditors and the independent public accountants engaged by the adviser to perform a surprise audit, respectively. 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). Additionally, advisers who file Form PF on a quarterly basis must amend Section 7.B of Schedule D of their Form ADV when they begin advising a new Private Fund, in order to obtain a private fund identification number for such Private Fund. This identification number is required on the adviser's Form PF filings. Certain Private Funds can be excluded from Form ADV and Form PF if the fund: (a) is not a U.S. entity; (b) is not beneficially owned by any U.S. Persons; and (c) has not been "offered" in the United States in the prior 12 months.

[4] A supervised person is any of the adviser's employees, partners or directors, or any other person that provides investment advice on behalf of the adviser and is under the adviser's control or supervision.

[5] There are several exceptions to the Brochure Supplement delivery requirement. If a supervised person begins to provide advisory services as a result of another supervised person's termination or resignation, the delivery of the new supervised person's Brochure Supplement can be made within 30 days after the new supervised person begins to provide advisory service to the client if certain conditions are met. If a supervised person provides advisory services to clients on a temporary basis for 30 days or less (such as when the primary supervised person is on vacation), an adviser does not need to deliver a Brochure Supplement with respect to such supervised person.

When do the amendments to Form ADV effective October 31, 2016 ("Final Rule") affect advisers?

Advisers filing an initial Form ADV or an annual updating amendment to an existing Form ADV on or after October 1, 2017 will be required to provide responses to the form revisions indicated in the Final Rule.

However, advisers filing an other-than-annual amendment on or after October 1, 2017 will not be required to complete new portions of Form ADV.

For further information, please refer to *Dechert OnPoint*, SEC Amends Form ADV and Investment Adviser Recordkeeping Rules.

Most existing registrants will not file a relevant annual updating amendment until March of 2018. Thus, most will first need to comply with the Final Rule beginning with their March 2018 annual amendment. However, advisers should consider whether their systems are able to produce the information that is required to be disclosed under the Final Rule.

Which advisers qualify to use umbrella registration following the effectiveness of the Final Rule?

In certain cases, an adviser ("filing adviser") together with its "relying advisers" may file Parts 1 and 2 of a single Form ADV that includes all required information about itself and each relying adviser ("umbrella registration"), which will satisfy the registration/disclosure requirements of Form ADV for all the advisers.

The Final Rule permits umbrella registration if a group of related advisers is operating a single advisory business where each of the relying advisers is controlled by or under common control with the filing adviser (together, "all advisers"), and in accordance with the following:

- All advisers advise only private funds and separately managed accounts for qualified clients that are eligible to invest in those private funds, and whose accounts pursue substantially similar investment objectives and strategies as those private funds;
- The principal office and place of business of the filing adviser is in the United States;
- Each relying adviser, its employees and those acting on the relying adviser's behalf are "persons associated with" the filing adviser, and thus under the supervision and control of the filing adviser;
- The relying advisers' advisory activities are governed by the Advisers Act and relying advisers are subject to examination by the SEC; and
- All advisers operate under a single code of ethics, single set of written policies and procedures and have the same CCO.

What filing fees are required?

There is a fee payable in connection with filing the annual updating amendment, which ranges depending on regulatory assets under management ("RAUM"). There are additional annual renewal fees charged by certain states in which the adviser has made notice filings. The state renewal fees are generally charged to the adviser's IARD account in December of each year.

What are the Form ADV filing requirements for exempt reporting advisers?

Those advisers who are not required to register with a state securities regulator and which fall into the category of "exempt reporting adviser" (advisers who qualify as "private fund advisers" or "venture capital fund advisers") must submit specified

portions of Part 1 of Form ADV to the SEC.[6] Exempt reporting advisers are not required to have a Brochure or Brochure Supplement.

Form ADV filings made by exempt reporting advisers are subject to the same annual updating requirements as 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 are publicly available.

Private Fund Reporting by Registered Advisers

Registered investment advisers who manage "Private Funds" above certain RAUM thresholds must file Form PF. A "Private Fund" is any issuer that would be an investment company as defined in Section 3 of the Investment Company Act of 1940, but for the exemptions provided by Section 3(c)(1) or 3(c)(7) of that Act.[8] Form PF describes the categories of Private Funds for which reporting is required and sets forth relevant RAUM 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. These terms are defined in the Glossary of Terms in Form PF.

Form PF

Who must file?

SEC-registered investment advisers who manage at least one Private Fund and have at least $150 million of gross RAUM in connection with the Private Fund(s) they manage ("Relevant RAUM"). A registered adviser must include on Form PF the Private Funds it identified on its Form ADV.[9]

What needs to be filed?

Form PF, including:

Part 1A/1B: all filers

Part 1C: all advisers to Hedge Funds

Part 2: Large Hedge Fund Advisers (those with at least $1.5 billion in Relevant RAUM with respect to Hedge Funds)

Part 3: Large Liquidity Fund Advisers (those with at least $1 billion in Relevant RAUM with respect to Liquidity Funds)

Part 4: Large Private Equity Fund Advisers (those with at least $2 billion in Relevant RAUM with respect to Private Equity Funds)

---

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 of Part 1 of Form ADV. Following the compliance date for amendments to Form ADV, exempt reporting advisers filing using an umbrella registration must also complete Schedule R of Part 1 of Form ADV.

7 As with 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.

8 This is also the definition of a Private Fund for purposes of Form D, Form ADV and FINRA Rules 5130 and 5131.

9 For purposes of calculating Relevant RAUM, there are certain instances in which an adviser must aggregate certain separately-managed and fund accounts and certain instances when it is not required to do so, which may lessen the reporting burden. In addition, in cases where a Private Fund is managed by multiple advisers, only one adviser is permitted to file Form PF with respect to such Private Fund. The Relevant RAUM for Liquidity Funds includes registered money market fund assets.

When are initial filings due?

For advisers who qualify as Large Hedge Fund Advisers:

An adviser who crosses the threshold of $1.5 billion of Relevant RAUM with respect to Hedge Funds as of any month-end must file Form PF (including the more detailed Part 2 as applicable) within 60 days of the end of the subsequent fiscal quarter of the adviser. For example, if an adviser with a fiscal year-end of December 31 crosses such threshold as of the last day of February, the adviser must file Form PF with respect to data from the April to June fiscal quarter within 60 days following the end of June.

For advisers who qualify as Large Liquidity Fund Advisers:

An adviser who crosses the threshold of $1 billion of Relevant RAUM with respect to Liquidity Funds as of any month-end must file Form PF (including the more detailed Part 3 as applicable) as of the end of the subsequent fiscal quarter of the adviser. For example, if the adviser with a fiscal year-end of December 31 crosses such threshold as of the last day of February, the adviser must file Form PF with respect to data from the April to June fiscal quarter within 15 days following the end of June.

For all advisers to Private Equity Funds, as well as advisers to Hedge Funds or Liquidity Funds who do not meet the threshold to be Large Hedge Fund Advisers or Large Liquidity Fund Advisers:

Filings are due 120 days following the end of the fiscal year of the adviser, if the adviser had at least $150 million in Relevant RAUM as of the end of such fiscal year.

Large Private Equity Fund Advisers must file the more detailed Part 4 of Form PF by the same deadline.

For advisers with a December 31 fiscal year-end, the Form PF filing in 2017 is due on May 1.

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 must update Form PF annually. The updating requirement 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

If an adviser is required to file multiple sections of Form PF (*e.g.*, an adviser is both a Large Private Equity Fund Adviser and a Large Liquidity Fund Adviser), the adviser only needs to update each Form PF section by the applicable deadline for such section. For example, the adviser described above would need to update portions of Form PF with respect to Liquidity Funds within 15 days after the end of each fiscal quarter, but would only need to update portions of Form PF with respect to Private Equity Funds on an annual basis within 120 days after the end of its fiscal year.

Filing Requirements for New and Continuing U.S. Private Placements

Section 5 of the Securities Act of 1933 ("Securities Act") generally requires registration of any security offered or sold through the use of any means of U.S., interstate or international commerce. Section 4(a)(2) of the Securities Act and Regulation D provide private placement exemptions from registration under the Securities Act for any offer or sale of a security by an issuer that does not involve a public offering. Rule 506 under Regulation D is a commonly-used private placement exemption that allows issuers to raise money in a private securities offering without a maximum offering amount if purchasers of securities generally meet certain eligibility requirements, including qualifying as accredited investors. Rule 506(b) is a non-exclusive safe harbor under Section 4(a)(2), which prohibits general solicitation or general advertising in connection with an offering of securities. Rule 506(c) is an exemption created in 2013 under Section 4(a)(2), which permits general solicitation and general advertising in connection with an offering, subject to satisfying certain conditions, including taking reasonable steps to verify the accredited investor status of purchasers.

Form D

Who must file?	Each issuer, including hedge funds, private equity funds and foreign funds (*e.g.*, UCITS), that makes a private placement offering in the United States pursuant to Rule 506(b) or Rule 506(c) under Regulation D. Additionally, 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.
What needs to be filed?	Form D with the SEC, plus any additional blue sky filings in the state(s) where the sale of securities occurred, depending on each state's blue sky laws. Further, New York currently requires that certain pre-sale filings be made. For continuing offerings, the filing of the required annual amendment with the SEC may trigger various state notice renewal filing requirements as well. As part of the Form D filing, the issuer must certify that it is not disqualified by the "Bad Actor Rules," which prevent issuers from relying on the Rule 506(b) or Rule 506(c) exemption (as applicable), if the issuer or a covered person thereof (which includes the issuer's directors, officers, and certain beneficial owners, among other individuals and entities) has had a relevant criminal conviction or has been the subject of certain regulatory actions or other disqualifying events as set forth in the Bad Actor Rules. As support for its certification, the issuer may need to obtain representations from each covered person that such person (i) has not been the subject of any relevant disqualifying event under the Bad Actor Rules and (ii) will notify the issuer upon an event that might trigger the Bad Actor Rules. The issuer should obtain updated representations in connection with the Bad Actor Rules periodically as long as the offering is ongoing.
When are filings due?	*New offerings*: Within 15 days after the first sale of securities. 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 payment. *Continuing offerings*: On or before the anniversary of the issuer's last federally filed Form D. Form ADV requires investment advisers to specify whether each Private Fund that they advise is relying on Regulation D and, if so, to provide such Private Fund's Form D file number. It is therefore imperative to ensure that all Form D filings are kept up to date.

How are filings made?

Issuers must submit Form D filings to the SEC electronically via the EDGAR system. State Form D notice filings may be made either electronically or in paper format. An electronic system was recently launched for electronic state Form D notice filings. Most states have transitioned to the electronic system, and currently most of those which have done so allow both electronic and paper Form D filings.

States are becoming increasingly demanding regarding compliance with their notice filing requirements. Penalties for non-compliance can include substantial late fees and can ultimately lead to demands by state securities regulators that rescission offers be made to investors within that state.

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 EDGAR access codes before such issuers can file Form D. Each issuer must obtain its own EDGAR codes.

Is there an update requirement?

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 still ongoing;
- 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.

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 U.S. Financial Industry Regulatory Authority ("FINRA") is a part of the underwriting syndicate.

Who may invest in New Issues?

***Rule 5130*:** An account, including a private investment fund, may invest in New Issues (defined below) only in accordance with the requirements of FINRA Rule 5130, which provides that Restricted Persons (defined below) are limited in their ability to invest in New Issues.

Rule 5131: FINRA Rule 5131 regulates the allocation of New Issues by U.S.-registered broker-dealers ("FINRA Members") to executive officers and directors of current (and certain former and prospective) investment banking clients of the FINRA Member. Rule 5131 provides that Covered Persons (as defined below) that have certain relationships with FINRA Members are limited in their ability to invest in New Issues.

Generally, a private investment fund's offering materials contain a questionnaire in the fund's application form or subscription agreement, designed to ascertain whether investors are Restricted Persons or Covered Persons. This will enable the fund to determine whether it may invest in New Issues in compliance with Rule 5130 and Rule 5131.

Definitions:

"New Issue" is any initial public offering of an equity security, as defined in Section 3(a)(11) of the Exchange Act, made pursuant to a registration statement or offering circular. New Issues do not include:

- Offerings made pursuant to an exemption under Section 4(a)(1), 4(a)(2) or 4(a)(6) of the Securities Act or Securities Act Rule 504, if the securities are "restricted securities" under Securities Act Rule 144(a)(3), or Rule 144A, Rule 505 or Rule 506 adopted under the Securities Act;
- Offerings of exempted securities as defined in Section 3(a)(12) of the Exchange Act, and rules promulgated thereunder;
- Offerings of securities of a commodity pool operated by a commodity pool operator;
- Rights offerings, exchange offers, or offerings made pursuant to a merger or acquisition;
- Offerings of investment grade asset-backed securities, convertible securities, or preferred securities;
- Offerings of a registered investment company;
- Offerings of securities that have a pre-existing market outside of the United States; and
- Offerings of a business development company (as defined in Section 2(a)(48) of the Investment Company Act), a direct participation program (as defined in Rule 2310(a)) or a real estate investment trust (as defined in Section 856 of the U.S. Internal Revenue Code, or "IRC").

"Restricted Persons" under Rule 5130 are FINRA Members or other broker-dealers, certain broker-dealer personnel, finders and fiduciaries, portfolio managers, and owners of broker-dealers.

As used herein, "Covered Persons" are "executive officers and directors" of public companies and certain covered non-public companies, and persons "materially supported" by such executive officers and directors.

An "executive officer or director" for the purpose of Rule 5131 includes any: (i) person named as an executive officer or director in a U.S. 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) an executive officer or director of a non-U.S. company that is registered with the SEC under the Exchange Act; or (iii) an executive officer or director of certain non-public companies. 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 the purpose of Rule 5131 means directly or indirectly providing more than 25% 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 such fund may allocate profits and losses from New Issues to such an investor.

Rule 5130 and Rule 5131 require that an investor's eligibility to participate in New Issues be reconfirmed on an annual basis. Many investment advisers also ask those investors that have previously been classified as Restricted Persons or Covered Persons whether their status has changed, to determine whether those investors would be eligible to participate in New Issues.

What format is required for an annual verification?

Both Rule 5130 and Rule 5131 allow investment advisers to follow a "negative consent" process for annual verification of an investor's status. As such, an investment adviser 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 adviser is subject to certain restrictions under the U.S. 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 may 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 adviser to a fund will not become a fiduciary that is subject to ERISA if the extent of investment by Benefit Plan Investors in the fund is less than 25% of the value of each and every class of equity interest in that fund.

There are no specific annual monitoring requirements set forth under ERISA for reviewing whether a fund has become a "plan assets" entity that is subject to ERISA. However, a private investment fund that is not intended to be subject to ERISA may wish to periodically review ownership by Benefit Plan Investors to confirm that the fund has not become a "plan assets" fund.

Who are "Benefit Plan Investors"?

"Benefit Plan Investors" include: (i) an "employee benefit plan" subject to Part 4 of Title I of ERISA; (ii) a "plan" to which Section 4975 (the prohibited transaction provisions) of the IRC applies; and (iii) entities the assets of which include "plan assets" for purposes of ERISA or Section 4975 of the IRC by reason of a plan's investment in the entity or otherwise.

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

What testing must be performed?

An investment adviser to a fund wishing to avoid becoming subject to ERISA should perform testing with respect to each class of equity interests in the fund to attempt to ensure that Benefit Plan Investors do not hold 25% or more of the value of any class of equity interests. In determining whether Benefit Plan Investor ownership reaches or 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 that 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% threshold (although the issue may be less significant at the feeder level in the case of certain fund structures).

When must testing be performed?

A determination of whether Benefit Plan Investor ownership reaches or exceeds the 25% threshold must be made after each acquisition of an equity interest (which has also been interpreted to include each redemption of an interest) in the fund.

Each investor should be required to represent whether it is a Benefit Plan Investor when making an initial investment (with some funds seeking continuing assurances from their investors). This may be accomplished through a Benefit Plan Investor questionnaire in a fund's subscription agreement or application form.

New DOL "Fiduciary Investment Advice" Rule

The U.S. Department of Labor ("DOL") on April 6, 2016, released the final version of its highly anticipated "investment advice" regulation and accompanying prohibited transaction exemptions (collectively, "Final DOL Rule") under the fiduciary provisions of ERISA. The Final DOL Rule culminated from a lengthy process to adopt new rules relating to the definition of fiduciary "investment advice" under ERISA (and also under the corresponding provisions of the IRC). The Final DOL Rule will subject a wider group of investment advisers and other providers to fiduciary standards under ERISA in connection with providing "recommendations" to retirement investors, including individual retirement accounts and certain other non-ERISA plans.

Those who may provide nondiscretionary investment advice under the expanded new rules should review the Final DOL Rule to determine whether they may be fiduciaries (or whether and how they can avoid becoming fiduciaries, if applicable), and, if so, what compliance steps might be appropriate. In addition, all investment advice providers – even parties that are already concededly fiduciaries (whether because they are providing discretionary advice or otherwise) – need to consider whether and when (if applicable) their sales and marketing activities may involve an investment "recommendation. In that event, fiduciary status could potentially be triggered at a time earlier than intended, resulting in difficult compliance challenges.[10]

Note, however, that the 2016 election may have drawn into question the ultimate survival of the Final DOL Rule.

[10] For further information regarding the Final DOL Rule, please refer to the following *Dechert OnPoints*:

Some FAQ News Under ERISA – The DOL Issues Two More Sets of "Investment Advice" Q&As;

DOL "Investment Advice" FAQs: Considerations for Investment Advisers, Broker-Dealers and Insurance Companies;

Mutual Fund Sales by Intermediaries – Fall-Out from DOL Fiduciary Rule and FINRA Enforcement;

Navigating the DOL's New Fiduciary Rules: A Game Plan for Broker-Dealers;

The New DOL Fiduciary Rule: Impact on Mutual Fund Distribution; and

The Brave New Fiduciary World has Arrived – The DOL Tries to Find a More Ideal Balance in the Final "Investment Advice" Rules.

CFTC and NFA Requirements

Commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") that are registered with the U.S. Commodity Futures Trading Commission ("CFTC") generally must become members of the National Futures Association ("NFA") ("NFA Members") and must: (i) file quarterly reports with the NFA; (ii) complete an annual self-examination; and (iii) complete an NFA "Annual Registration Update," which includes submitting the firm's NFA annual questionnaire and paying certain fees and dues to the NFA.[11] In addition, CPOs and CTAs relying on certain exclusions or exemptions from registration must annually affirm the applicable exclusion or exemption with the NFA.

Further, any U.S. person or entity trading in OTC swaps must obtain and subsequently annually certify a legal entity identifier ("LEI") to allow swap data recordkeeping and reporting by their swap dealers. Any entity trading in the CFTC-regulated futures and swaps markets may also be required to provide information to their futures commission merchants ("FCMs") and swap dealers to fulfill CFTC "ownership and control reporting" requirements. Market participants holding "reportable positions" or owning a "volume threshold account" in certain futures and swaps will also be required to provide reports on their ownership, control and business activities to the CFTC on CFTC Form 40 and CFTC Form 40S.

CPO Quarterly Report: Form CPO-PQR and Form NFA-PQR

CFTC Regulation 4.27 and NFA Compliance Rule 2-46 require a registered CPO to periodically file certain risk-related reports on CFTC Form CPO-PQR and NFA-PQR relating to each pool the CPO operates (with limited exceptions).The forms consist of Schedules A, B and C.

Who must file?

CPOs registered with the CFTC.

However, a registered CPO would not be required to file if the CPO did not operate a pool during the reporting period, or operated only pools for which the CPO was not required to be registered as a CPO during the reporting period.

[11] Any entity that (i) is the moving force behind the formation, promotion and operation of a commodity pool, (ii) solicits investments in the commodity pool, and (iii) has the authority to hire (and to fire) the pool's CTA is required to register as a CPO with the CFTC, unless the entity qualifies for relief under an exclusion or exemption under the Commodity Exchange Act ("CEA") or CFTC Regulations. In addition, an individual or organization that, for compensation or profit, engages in the business of advising others as to the value of, or the advisability of trading in, commodity futures contracts or commodity options, commodity swaps, futures, options or swaps on foreign currency exchange contracts or many other over-the-counter ("OTC") derivatives must register with the CFTC as a CTA, unless the individual or organization qualifies for relief under an exemption or exclusion under the CEA or CFTC Regulations.

What needs to be filed?

CPO Size*	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
>$1.5 billion ("Large CPO")	CPO-PQR A, B, C**	CPO-PQR A, B, C**	CPO-PQR A, B, C**	CPO-PQR A, B, C**
$150 million to $1.5 billion ("Mid-Size CPO")	NFA-PQR	NFA-PQR	NFA-PQR	CPO-PQR A, B
<$150 million ("Small CPO")	NFA-PQR	NFA-PQR	NFA-PQR	CPO-PQR A and NFA-PQR
SEC-Registered Investment Adviser who files Form PF	NFA-PQR	NFA-PQR	NFA-PQR	CPO-PQR A and NFA-PQR

* Once a CPO identifies itself as a large, mid-sized or small CPO by selecting an option from the dropdown menu in Box 15S in the NFA Easyfile system, the system will generate the appropriate questions for the quarter's filing.

** Schedule C Part 2 is only applicable to pools of at least $500 million.

What new information must be included in 2017? Effective beginning with reports dated December 31, 2016, CPOs will be required to report information about parallel managed accounts for pool-level questions, as well as monthly rates of return for all months (even if a pool does no calculate intra-quarter monthly rates of return as a matter of course).

Effective beginning with reports dated June 30, 2017, CPOs will be required to report two financial ratios with respect to the CPO's financial condition.

When are filings due? Within 60 days of the calendar quarters ending in March, June and September and within 90 days of the calendar year-end (60 days for Large CPOs only).

A $200 late fee will be assessed by NFA for each business day the report is filed late.

How are filings made? Electronically using the NFA's EasyFile system.

CTA Quarterly Report: Form CTA-PR and NFA PR

CFTC Regulation 4.27 and NFA Compliance Rule 2-46 require that all CTAs file CFTC Form CTA-PR and NFA Form PR with the NFA. These forms provide the CFTC and NFA with general information about the CTA, its trading programs, the pool assets directed by the CTA and the identity of the CPOs that operate the pools. The forms consist of Schedules A and B.

Who must file? CTAs registered with the CFTC.

However, registered CTAs that are inactive or do not direct any commodity interest accounts are not required to file.

What needs to be filed?	Schedules A and B of Form CTA-PR. Note that CFTC Form CTA-PR and NFA Form PR require the same information regardless of whether the filing is to meet CFTC and/or NFA filing requirements. A registered CTA that is also registered with the SEC as an investment adviser and advises only pools that satisfy the definition of "Private Fund" must only file Schedule A of Form CPO-PQR. For a non-NFA Member, a limited version of Form CTA-PR.
What new information must be included in 2017?	Effective beginning with reports dated June 30, 2017, CTAs will be required to report two financial ratios with respect to the CTA's financial condition.
When are filings due?	Within 45 days of the end of each calendar quarter for registered CTAs that are NFA Members. For non-NFA Members, within 45 days of the calendar year-end. A $200 late fee will be assessed by NFA for each business day the report is filed late.
How are filings made?	Electronically using the NFA's EasyFile system.

NFA Annual Self-Examination Questionnaire

NFA Compliance Rules 2-9, 2-36 and 2-39 impose continuing responsibilities on NFA Members to diligently supervise their employees and agents. As a general matter, the NFA allows its members to determine what constitutes "diligent supervision." However, the NFA believes all NFA Members should regularly review their supervisory procedures and requires that NFA Members complete an internal review of their supervisory procedures and certain records using the NFA's "Self-Examination Questionnaire."

To whom does requirement apply?	NFA Member CPOs and CTAs (including those who take advantage of CFTC Regulation 4.7).
What needs to be completed?	An appropriate representative of the CPO/CTA must review the firm's procedures and records using the Self-Examination Questionnaire and sign a written attestation stating that he or she has reviewed the firm's operations using the Self-Examination Questionnaire.
Where is Questionnaire found?	https://www.nfa.futures.org/NFA-compliance/publication-library/self-exam-questionnaire.HTML
When must Self-Examination be completed?	Within 12 months of the last self-examination.
What must CPO/CTA do with Questionnaire?	Keep the completed questionnaire and attestation as part of the CPO/CTA's records and, for the first two years, keep the copies in an easily accessible place. The attestation must be produced in connection with NFA exams.

NFA Annual Registration Update

NFA Registration Rule 204(d) requires that each NFA Member complete an Annual Registration Update each year on the anniversary of its registration with the NFA. The Annual Registration Update covers information about the NFA Member firm as well as its principals and associated persons. In addition, NFA Members must complete the NFA annual electronic questionnaire, which includes firm and disaster recovery information, as well as a questionnaire for

each category of registration (*i.e.*, CPO or CTA) and pay certain fees and dues to the NFA. The failure to complete the Annual Registration Update will be deemed a request to withdraw registration from the NFA.

Who must complete update?	All NFA Members.
What needs to be submitted?	A completed Annual Registration Update, the NFA annual electronic questionnaire and the annual registration records maintenance fee of $100 for each category of registration in addition to any other outstanding registration fees.
When are updates due?	Within 30 days of the anniversary of the NFA Member's registration with the NFA.
How are updates made?	Electronically through the NFA's Online Registration System.

Annual Affirmation Process

CPOs and CTAs that rely on an exclusion or exemption under CFTC Regulations 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3) and 4.13(a)(5) and/or CFTC Regulation 4.14(a)(8) must annually affirm the applicable exclusion/exemption.

Who must complete affirmation?	Excluded or exempt CPOs relying on CFTC Regulations 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3) and 4.13(a)(5) and exempt CTAs relying on CFTC Regulation 4.14(a)(8).
What needs to be done?	Affirm that the applicable exclusion or exemption continues to be effective.
When are affirmations due?	Within 60 days of the calendar year-end.
How are affirmations made?	Electronically through the NFA Exemptions System.

Annual Certification of CICIs/LEIs

CFTC Regulation 45.6 requires that every market participant (*i.e.*, each fund or account managed by a CPO or CTA) that enters into OTC derivatives transactions have an LEI. Currently, the CFTC has designated "CFTC Interim Compliance Identifier" ("CICI") as the appropriate LEI, but also recognizes certain other international LEIs. An LEI is a reference code used by swap dealers and the CFTC to identify each legally distinct entity trading in swaps for reporting and recordkeeping purposes. The CFTC has designated the DTCC-SWIFT utility called the Global Markets Entity Identifier ("GMEI") as the provider of CICIs and LEIs.

Once a market participant has registered an entity for a CICI/LEI, the legal entity information must be certified annually.

Who must complete certification?	Every entity with a CICI/LEI.
What needs to be done?	Information related to an entity record must be updated as necessary and certified to be accurate.

When is maintenance required?	Within one year of the initial registration or last annual certification.
How is annual maintenance completed?	Electronically through the GMEI utility portal.

Ownership and Control Reports

The CFTC requires futures commission merchants ("FCMs") and swap dealers to submit ownership and control reports ("OCR") to the CFTC for certain of their clients/counterparties. Many FCMs and swap dealers have requested their CPO and CTA clients to provide this information for each fund or account under their management fund that is trading futures, options, and specified physical commodity "paired swaps" and/or "swaptions" in order to permit the FCMs and/or swap dealers to submit OCR reports to the CFTC regarding their clients' accounts as required under the final rules.

Who must report?	CPOs/CTAs of funds or accounts trading (i) futures or options on U.S. reportable markets (designated contract markets or swap execution facilities) or (ii) "paired swaps" and/or "swaptions" where at least one counterparty is a U.S. person.
Definitions:	A "paired swap" is an open swap that is: (1) directly or indirectly linked, including being partially or fully settled on, or priced at a differential to, the price of any of the commodity futures contracts in CFTC Regulation 20.2; or (2) directly or indirectly linked, including being partially or fully settled on, or priced at a differential to, the price of the same commodity for delivery at the same location or locations. A "swaption" is an option to enter into a swap or a swap that is an option.
What needs to be done?	CPOs/CTAs of any relevant fund or account must provide required information through the OCR Portal, which is part of the FIA Tech System.
When are filings due?	FCMs and swap dealers are requiring their clients/counterparties to provide ownership and control information and update it on an ongoing basis.

CFTC Form 40 and CFTC Form 40S

CFTC Regulation 18.04 requires that a trader who (i) owns, holds or controls a "reportable position" in exchange-traded futures and/or options or (ii) owns or controls a "volume threshold account" or "volume threshold sub-account" of exchange-traded futures and/or options file CFTC Form 40 upon a special call by the CFTC. Similarly, CFTC Regulation 20.5 requires that a trader who (i) owns, holds or controls a "reportable position" in paired swaps and/or swaptions or (ii) owns or controls a "volume threshold account" or "volume threshold sub-account" of paired swaps and/or swaptions file CFTC Form 40S upon a special call by the CFTC.

Who must file?	Traders with reportable positions or who own or control volume threshold accounts or sub-accounts and receive a special call by the CFTC.

Definitions:	With respect to exchange-traded futures and options, a "reportable position" is any open contract position that at the close of the market on any business day equals or exceeds the thresholds in CFTC Regulation 15.03, which sets forth specified limits for a number of commodities. With respect to paired swaps and swaptions, a "reportable position" is a position in any one futures equivalent month, comprised of 50 or more futures equivalent paired swaps or paired swaptions based on the same commodity underlying a futures contract listed in CFTC Regulation 20.2, grouped separately by swaps and swaptions, then grouped by gross long contracts on a futures equivalent basis or gross short contracts on a futures equivalent basis. A "volume threshold account" is a trading account that carries "reportable trading volume" on or subject to the rules of a reporting market that is a designated contract market ("DCM") or swap execution facility ("SEF"). These accounts could include trading in futures, options on futures, swaps, and any other product traded on or subject to the rules of a DCM or SEF. "Reportable trading volume" is defined as trading volume of 50 or more contracts, during a single trading day, on a single reporting market that is a DCM or SEF, in all instruments that such reporting market designates with the same product identifier.
What needs to be filed?	CFTC Form 40 (for exchange-traded futures and/or options) or CFTC Form 40S (for paired swaps and/or swaptions).
When are filings due?	As specified in the CFTC's special call.
How is filing completed?	Submissions must be made electronically through the CFTC's web-based submission process at www.cftc.gov, through a secure FTP data feed to the CFTC or as otherwise instructed by the CFTC and updated on an ongoing basis as directed in the CFTC's special call.

Reporting of Cross-Border Holdings and Transactions by U.S. Persons

The U.S. Department of the Treasury ("Treasury") and the Bureau of Economic Analysis ("BEA"), an agency in the U.S. Department of Commerce, conduct periodic surveys of the cross-border economic activity of U.S. persons for the purpose of collecting macroeconomic data for a variety of purposes, including the calculation of the U.S. balance of payments, the preparation of macroeconomic reports and the formulation of international financial and monetary policies. The surveys that may be relevant to investment advisers and the funds they manage fall into three broad categories:

- ***Treasury International Capital ("TIC") Forms***. The TIC Forms, which are issued by Treasury and collected by the Federal Reserve Bank of New York ("FRBNY") as its collection agent, collect data on: U.S. reporters' holdings of foreign securities; foreign persons' holdings of U.S. reporters' securities; securities transactions between U.S. reporters and foreign persons; certain derivatives positions of U.S. reporters; and U.S. reporters' claims on, and liabilities to, foreign persons.

- ***BEA Surveys***. The BEA Surveys collect data on: U.S. reporters' direct investment (defined below) in foreign persons; foreign persons' direct investment in U.S. reporters; and certain transactions in financial and other services (including investment advisory services) between U.S. reporters and foreign persons.

- ***Treasury Foreign Currency ("FC") Reports***. The FC Reports (FC-1, FC-2 & FC-3) gather data on foreign exchange positions and foreign currency-denominated assets and liabilities of U.S. reporters that are foreign exchange market participants.

The discussions below address the TIC Forms and BEA Surveys. Further information on the FC Reports is available upon request.

TIC Forms

The TIC Forms require U.S. reporters meeting specified thresholds to file periodic reports on certain cross-border portfolio investments (defined below), derivatives positions and claims and liabilities.

Who must file?

U.S. reporters (defined below).

In most cases, U.S. reporters are required to file on a consolidated basis at the level of the top U.S. parent entity. However, some TIC Forms require certain types of business units (such as bank, broker-dealer and insurance underwriting subsidiaries) to file independently.

In general, where U.S. funds have reporting obligations, it falls to the funds' investment adviser to prepare and file TIC Forms on an aggregated basis on behalf of all its U.S. clients.

The TIC Forms collect most data from large U.S. intermediaries (such as custodians) that are positioned to report on multiple U.S. clients.[12]

However, the reporting obligation for: (i) certain transactions, such as private placements and those effected directly through a foreign broker-dealer, (ii) claims on and liabilities to foreign persons, and (iii) securities held by a foreign custodian, may be the responsibility of a fund or its investment adviser.

Definitions:

"Portfolio investments" are broadly defined as holdings of non-voting securities or voting securities comprising less than ten percent of an issuer's outstanding voting securities, and are contrasted with "direct investments," which are discussed below in connection with the BEA Surveys.

"U.S. reporters" are U.S.-resident funds, investment managers and other financial institutions that meet a form's specified reporting thresholds.

[12] For example, foreign securities held by a U.S. custodian are generally reported on Forms BQ-1, SLT, SHC and SHCA by the custodian and not by the U.S. end investor. Similarly, cross-border transactions in securities that are effected through a U.S. broker-dealer are reported on Form S by the broker-dealer and not by its clients.

What filings must be made in 2017?

In addition to routine monthly, quarterly and annual TIC Form filings (see table below), in March 2017, U.S. reporters may be required to file the Benchmark TIC SHC Report, which is collected once every five years. TIC SHC covers holdings of foreign portfolio securities (including short- and long-term securities and selected money market instruments) by U.S.-resident investors, including asset managers and their fund and other clients. TIC SHC requires U.S. reporters to: (1) report, on Schedule 2, on a security-by-security basis, each foreign security owned by the U.S. reporter that was either held by a foreign-resident custodian or held directly by the U.S. investor or its asset manager; and (2) identify, on Schedule 3, each U.S. custodian that held foreign securities on behalf of the U.S. reporter and report the value of those securities. A U.S. reporter is required to file Schedule 2 and/or Schedule 3 if the total value of its reportable data, as of December 30, 2016, exceeded $200 million with respect to that schedule.

TIC SCH filings are due by March 3, 2017.

For further information, please refer to *Dechert OnPoint*, U.S. Treasury's Benchmark TIC SHC Survey and Implications for Investment Managers.

What needs to be filed, and with what frequency?

TIC Form	Core Coverage	Threshold	Frequency
TIC B Forms	Snapshot of cross-border claim and liabilities and holdings of short-term securities	BC, BL-1, BL-2, BQ-1, BQ-2: $50 million in cross-border claims or liabilities (or $25 million in claims or liabilities in an individual country) BQ-3: total reported data for all geographic areas exceeds $4 billion	Forms BC, BL-1, BL-2: monthly Forms BQ-1, BQ-2, BQ-3: quarterly
TIC Form D[13]	Snapshot of cross-border derivatives contracts and related net settlement payments	Total notional value of the reporter's cross-border derivatives contracts for its own and its customers' accounts exceeds $400 billion	Quarterly
TIC Form S	Report of U.S. or foreign long-term securities purchased from, or sold to, foreign residents	$350 million in total long-term securities transactions during the reporting month	Monthly
TIC Form SHC	Snapshot report of U.S. residents' holdings of foreign securities	(i) total fair value of foreign securities with a foreign-resident custodian or with a U.S. or foreign resident central securities depository is $100 million or more; OR (ii) reporter is notified by the FRBNY that filing is required	Benchmark survey every five years (next filing in 2017)
TIC Form SHCA	Snapshot report of U.S. residents' holdings of foreign securities	Only required when notified by the FRBNY	Annually

[13] Although an investment adviser must file TIC Form D if the aggregate notional value of its clients' cross-border derivatives contracts exceeds $400 billion, it is only required to report such contracts where the investment adviser acted as counterparty or transacting party (*e.g.*, as a broker-dealer) in entering the derivatives contract. Accordingly, as a practical matter, investment advisers rarely file TIC Form D.

TIC Form	Core Coverage	Threshold	Frequency
TIC Form SHL	Snapshot report of foreign residents' holdings of U.S. securities	(i) total value of U.S. securities owned by foreign residents is $100 million or more; OR (ii) reporter is notified by the FRBNY that filing is required	Benchmark survey every five years (next filing in 2019)
TIC Form SHLA	Snapshot report of foreign residents' holdings of U.S. securities	Only required when notified by the FRBNY	Annually
TIC Form SLT	Snapshot of U.S. holdings of foreign long-term securities and foreign holdings of U.S. long-term securities	$1 billion in holdings of long-term securities	Monthly

BEA Surveys

BEA Surveys gather data on a variety of cross-border economic activity. The surveys most relevant to investment advisers and their clients collect data on cross-border direct investment (defined below) and international trade in financial services.

Who must file?

U.S. persons that meet a survey's reporting threshold.

In addition to reporting on behalf of the funds they manage, investment advisers should also consider both their own transactions in financial services (e.g., investment advisory services they provide to foreign clients) and their corporate structures, which may give rise to reportable direct investment (for example, an investment adviser that has foreign subsidiaries or that is the subsidiary of a foreign parent may be required to file BEA Surveys relating to those relationships). It is also important to note that the BEA Surveys generally require consolidation of a limited partnership with its general partner (and a limited liability company with its managing member), which can impact the reporting obligations of an investment adviser that serves as general partner of a fund.

When must filings be made?

The BEA Surveys include benchmark surveys that are generally administered once every five years and are required of all U.S. persons that meet the specified reporting thresholds, as well as more frequent annual and quarterly surveys that are required only by reporters contacted by the BEA.

Definitions:

In contrast to "portfolio investments" (described above), "direct investments" are investments that establish ownership or control of ten percent or more of an issuer's securities and are intended to capture parent-subsidiary and other relationships in which an investor is able to exercise control or influence over an issuer.

What needs to be filed?

Survey	Who Must Report	What Must Be Reported	Frequency
BE-180	U.S. persons that (i) had more than $3 million in cross-border financial services transactions in the last fiscal year; OR (ii) are contacted by the BEA	Payments and receipts for transactions in financial services with non-U.S. persons	Every five years (next filing expected in 2020)
BE-185	U.S. persons contacted by the BEA	Payments and receipts for transactions in financial services with non-U.S. persons	Annually
BE-10	U.S. persons that (i) control more than 10% of the outstanding voting securities of a non-U.S. person; OR (ii) are contacted by the BEA	Direct investment abroad by U.S. persons	Every five years (next filing expected in 2020)
BE-11	U.S. persons contacted by the BEA	Direct investment abroad by U.S. persons	Annually
BE-577	U.S. persons contacted by the BEA	Direct investment abroad by U.S. persons	Quarterly
BE-12	U.S. persons that (i) received any direct investment from non-U.S. persons in the last year; OR (ii) are contacted by the BEA	Direct investment in U.S. persons from non-U.S. persons	Every five years (next filing expected in 2018)
BE-15	U.S. persons contacted by the BEA	Direct investment in U.S. persons by non-U.S. persons	Annually
BE-605	U.S. persons contacted by the BEA	Direct investment in U.S. persons by non-U.S. persons	Quarterly
BE-13	U.S. persons that received direct investment from a non-U.S. person in excess of $3 million	Direct investment in U.S. persons by non-U.S. persons	Within 45 days of initial investment by non-U.S. persons

Recent Developments Regarding the SEC Whistleblower Rule

The Dodd-Frank Act amended the Exchange Act to add Section 21F, "Securities Whistleblower Incentives and Protection." Section 21F empowers the SEC to pay monetary awards to "whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement" of "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000." Section 21F also protects whistleblowers from retaliation by employers. As part of implementing the Dodd-Frank whistleblower program, the SEC adopted Rule 21F-17 ("Whistleblower Rule") under the Exchange Act, which states "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation."

The Office of Compliance Inspections and Examinations ("OCIE") of the SEC issued a National Exam Program Risk Alert on October 24, 2016 ("Risk Alert") regarding examinations of registrants' employment-related documents with respect to provisions that seek to limit: (1) the types of information an employee may provide to the SEC; or (2) the monetary reward a former employee may receive when reporting to the SEC as to possible securities law violations.

The Risk Alert states that, in OCIE staff examinations of registered investment advisers and registered broker-dealers, the staff will review, among other materials, "compliance manuals, codes of ethics, employment agreements, and severance agreements" to determine whether certain provisions in those documents may contravene whistleblower protections set forth in the Whistleblower Rule. The Risk Alert further cautions that OCIE staff "is citing deficiencies and making referrals to the Division of Enforcement where appropriate." Registrants should consider evaluating their compliance manuals, codes of ethics, employment agreements, severance agreements and any other documents that may contain provisions that arguably could be deemed to interfere with a whistleblower's rights under the Dodd-Frank Act, and take steps to remediate any material deficiencies.

The Risk Alert also provides an overview of the remedial measures provided for in recent enforcement actions, which have included requirements for registrants to:

- Revise documents to clarify that employees and former employees are not prohibited from (1) voluntarily communicating with authorities regarding possible violations of law or (2) recovering an award pursuant to a whistleblower program;
- Notify employees of "their right to contact" authorities; and
- Inform former employees who have signed severance agreements that there are no prohibitions against (1) voluntarily communicating with authorities regarding possible violations of law or (2) recovering an award pursuant to a whistleblower program.

Also please refer to the following *Dechert OnPoints*: SEC Continues to Target Employer Agreements Restricting Whistleblower Rights and The International Scope of the United States SEC's Whistleblower Program and What It Means for Multinationals.

This update was authored by:

Karen L. Anderberg
Partner
London
+44 20 7184 7313
Send email

Julien Bourgeois
Partner
Washington, D.C.
+1 202 261 3451
Send email

Elliott R. Curzon
Partner
Washington, D.C.
+1 202 261 3341
Send email

Philip T. Hinkle
Partner
Washington, D.C.
+1 202 261 3460
Send email

Andrew L. Oringer
Partner
New York
+1 212 698 3571
Send email

Michael L. Sherman
Partner
Washington, D.C.
+1 202 261 3449
Send email

David A. Vaughan
Partner
New York / Washington, D.C.
+1 212 698 3540
+1 202 261 3355
Send email

* The authors would like to thank Audrey Wagner, Matthew Barsamian, Andrew Braid, Daniel Clausen, Shyla Giri, Lin Jia, Kirsten Linder, Kenneth Rasamny, Ashley Rodriguez, Brandon Smith and Kimberly Thomasson for their contributions to this *OnPoint*.