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Reminder of Annual Requirements for Investment Managers

As we begin the new year, we thought it would be helpful to remind our clients that manage separate accounts or privately offered hedge funds and private equity funds ("Investment Managers") of certain obligations that may be applicable to them under various U.S. federal and state laws and regulations.

Compliance with certain of these obligations is required within specific time periods after the end of the calendar year or the Investment Manager's fiscal year. Other obligations are required on an annual or periodic basis. Certain other obligations may be characterized as a best practice to be undertaken on a periodic basis, as opposed to a strict legal requirement. The beginning of the new year may be a logical time to review and satisfy many of these obligations.

What follows below is a summary of the primary annual or periodic compliance-related requirements or best practice obligations that may apply to many Investment Managers. This summary is not intended to provide a complete review of an Investment Manager's obligations relating to compliance with applicable tax, partnership, limited liability, trust, corporate or securities laws or rules, or non-U.S. or U.S. state law requirements.[1]

In 2010, there were a number of legislative and regulatory changes that will expand the number of Investment Managers that are subject to regulation, as well as add to or change compliance obligations of Investment Managers that already are registered as investment advisers. Included are recent changes to the custody rule, pay-to-play practices, Form ADV, and various changes resulting from the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") concerning the registration and reporting obligations of investment advisers. Certain of these changes are already in effect, while others take effect in 2011. The Securities and Exchange Commission ("SEC") is in the process of promulgating various regulations implementing the Dodd-Frank Act, and as of this writing certain regulations have yet to be proposed or finalized. We expect to closely monitor and keep you apprised of any further regulatory developments as they occur. For further information, please refer to the client briefings located on our Web site.[2]

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1 Please also note that the following list is not intended to be exhaustive, or to provide a detailed statement of the specifics of the particular obligation. The following necessarily does not include all annual or periodic obligations applicable to all Investment Managers. Similarly, many of the obligations described below may not be applicable to all Investment Managers.

2 *See, e.g.*, the Winston & Strawn Briefings entitled "SEC Adopts Changes to Advisers Act Custody Rule to Better Protect Investor Funds (January 2010);" "SEC Prohibits Pay-to-Play Practices by Investment Advisers (June 2010);""SEC Adopts Changes to Form ADV (August 2010);" "SEC Adopts Rule to Register Municipal Advisors (September 2010);" and " SEC Proposes New Family Office Exemption from Investment Adviser Regulation (October 2010)." Available at www.winston.com.

Requirements for all Investment Managers

Determine investment adviser registration status under Dodd-Frank Act

All Investment Managers, whether or not registered with the SEC or the states, should review the new investment adviser registration requirements imposed by the Dodd-Frank Act and related rules, and determine whether any changes in the firm's registration status will be required in 2011 as a result of the new law. For one, the Dodd-Frank Act eliminated the Advisers Act's "private adviser exemption," upon which many private fund managers relied to avoid registration, and in its place added several new, limited exemptions (such as for private fund managers with assets under management of less than $150 million, or "foreign private advisers," as defined). In addition, the Dodd-Frank Act changed the eligibility requirements for SEC registration, increasing the minimum assets under management required to be eligible for SEC registration from $25 million to $100 million, subject to certain exceptions, and as a result it is expected that many advisers that are currently registered with the SEC will be required to withdraw from SEC registration and register with the states. The new registration requirements generally take effect in July 2011. Investment Managers should review the new law now and begin preparing for any transition in their registration status that may be required as a result.

Requirements for SEC-Registered Investment Advisers

Update your Form ADV

Investment Managers that are registered with the SEC as investment advisers under the Investment Advisers Act of 1940 ("Advisers Act") (such managers, "Registered Managers") must update their registration forms (*i.e.*, Form ADV Part 1 and Part 2) within 90 days of the Registered Manager's fiscal year end. In addition, a Registered Manager must update its Form ADV promptly at any time certain information becomes inaccurate. Please refer to the General Instructions to the form in order to determine whether the form should be amended promptly. State-registered Investment Managers also may be subject to similar requirements.

Prepare and file your new brochure

In 2010, the SEC adopted amendments to Part 2 of Form ADV to require Registered Managers to provide new and prospective clients with a narrative brochure regarding the firm and brochure supplements regarding the firm's advisory personnel, written in plain English. The SEC's amendments to the Advisers Act "brochure rule" expand and broaden the disclosure requirements and are intended to provide clients with improved, clearer disclosure of the Registered Manager's business practices, conflicts of interest, and business background of the firm and its advisory personnel, among other things. The amended rules now also require Registered Managers to file their firm brochures (but not brochure supplements) electronically with the SEC, which will make them available to the public through the SEC Web site, in addition to delivering the brochure and brochure supplements to clients.[3]

New Registered Managers applying for SEC registration after January 1, 2011 must file with the SEC a firm brochure that meets the requirements of the amended form as part of its application for registration on Form ADV. An existing Registered Manager with a fiscal year end of December 31, 2010 or later, must include in its next annual updating amendment to its Form ADV a brochure that meets the requirements of the amended form. Therefore, Registered Managers with a fiscal year end of December 31, 2010 must file with the SEC an annual updating amendment with the new brochures no later than March 31, 2011. Registered Managers should begin preparing their new brochures and brochure supplements in order to comply with these deadlines.

Deliver your brochure to clients

Under the Advisers Act, Registered Managers must provide their clients with a copy of their updated brochure and brochure supplements on an annual basis, at the time that the firm files its annual updating amendment to Form ADV with respect to new clients, and within 60 days of filing the annual amendment with respect to existing clients. New Registered Managers applying for SEC registration after January 1, 2011 generally must provide their clients with a copy of their brochure and brochure supplements upon registering. The SEC recently has promulgated rules extending the compliance dates for delivering the brochure supplements of certain (but not all) existing and new Registered Managers by four months, in order to provide such firms with additional time to implement systems and controls to satisfy their brochure supplement delivery obligations.

Review your required compliance procedures and code of ethics

Under Advisers Act rules, Registered Managers must review their compliance policies and procedures no less than annually

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[3] For additional information please see the Winston & Strawn Briefing " SEC Adopts Changes to Form ADV (August 2010)."

to assess their effectiveness. Written evidence of these reviews should be retained. In general, the review should encompass the following areas:

General review According to the SEC, the review should consider any compliance matters that arose during the previous year, any changes in the business activities of the Registered Manager or its affiliates, and any changes in the Advisers Act or its rules that might suggest a need to revise the Registered Manager's policies and procedures. Although SEC rules require only annual reviews, Registered Managers also should consider the need for interim reviews in response to significant compliance events, changes in business arrangements, and legal or regulatory developments. Registered Managers should pay particular attention to their valuation, confidentiality, and insider trading policies and procedures, which have been areas of recent focus by the SEC. They should also be sure that the policies and procedures have been updated to reflect changes in law and regulation, including the firm's compliance with any new disclosure or reporting requirements that may be required of Registered Managers that manage private funds as a result of the Dodd-Frank Act or otherwise.[4]

Code of ethics Registered Managers must review the adequacy of their code of ethics annually and assess the effectiveness of its implementation. In addition, Registered Managers should determine whether they need to provide any ethics-related training of employees, or enhancements to their code in light of current business practices, and regulatory developments, such as the SEC's prohibition of pay-to-play practices.

Business continuity/disaster recovery plans Registered Managers should review and "stress-test" their required business continuity/disaster recovery plans no less than annually, and make any necessary adjustments. Promulgating and reviewing a business continuity/disaster recovery plan also is recommended for all Investment Managers, whether or not registered.

Deliver your fund's audited financial statements

Under the Advisers Act custody rules, Registered Managers that manage private funds and that are deemed to have custody of client assets (which generally will be most fund managers) must provide audited financial statements of their fund, prepared in accordance with U.S. generally accepted accounting principles, to the fund's investors within 120 days of the fund's fiscal year-end, or 180 days for a fund-of-funds, to avoid complying with the full requirements of the custody rules, which were amended in 2010. Registered Managers that are not able to satisfy the audit requirement will need to confirm that they are in compliance with these new requirements, including the annual surprise audit requirement.

[4] *See* the discussion above, and footnote 2.

Confirm your state notice filings/investment adviser representative renewals

Registered Managers should review their current advisory activities in the various states in which they conduct business and confirm that all applicable state notice filings for the firm are made on IARD. Registered Managers should also confirm whether any of its personnel need to be registered as "investment adviser representatives" in one or more states and, if so, register those persons or renew their registrations with the applicable states, as needed.

In light of the revisions to Form U-4, now may be a good time to review allegations of sales practice violations made against a registered person in an arbitration or litigation, even in cases where the registered person is not a named party, and amend the registered person's Form U-4 to disclose such information as necessary. Please be sure to use the most recent version of this form, as it is periodically amended.

Fund your IARD account

Registered Managers should confirm that their IARD electronic accounts are adequately funded so as to cover payment of all applicable registration renewal fees with both the SEC and with any states, for the year.

Requirements for Registered CPOs and CTAs

Review and update your NFA registration

Registered commodity pool operators ("CPOs") or commodity trading advisors ("CTAs") must update their registration information via the National Futures Association's ("NFA") electronic ORS system annual registration questionnaire, and pay their annual NFA membership dues on or before the anniversary date that the CPO's or CTA's registration became effective. The NFA will deem a failure to complete the review of the annual registration questionnaire within 30 days following the date established by NFA as a request for withdrawal from registration.

The NFA has added new questions to the Firm and DR Information sections of the annual registration questionnaire to assess the member firm's futures-related business activity, if any. If the questions are not answered, the answers will default to "no activity," which will be displayed in BASIC.

Complete your NFA self-examination questionnaire

Under NFA rules, registered CPOs or CTAs must complete the NFA's "self-examination questionnaire" on an annual basis. The completed questionnaire is not filed with the NFA. Instead, Investment Managers must retain the questionnaire for their records. Investment Managers that have branch offices should complete a separate questionnaire for each branch office. As part of this review, CPOs/CTAs should review any established compliance policies and procedures, and confirm whether amendments to those procedures, or additional procedures, may be warranted in light of the CPO's/CTA's current business.

File and distribute your commodity pool certified annual reports

All registered CPOs that manage non-exempt pools and Commodity Futures Trading Commission ("CFTC") Rule 4.7-exempt pools must file certified annual reports for their pools with the NFA within 90 days of the pool's fiscal year-end (including pools that are fund-of-funds). The certified reports must be filed electronically through the NFA's EasyFile system. If it is not possible to comply with this deadline, the Investment Manager must apply to the NFA for additional time to file the certified reports within 90 days after the date on which the certified report was otherwise required to be filed. The Investment Manager also must distribute the certified reports to the pool's participants within the above 90 day deadline, unless the NFA grants an extension.

Confirm your compliance with new NFA quarterly reporting requirements

Under NFA rules passed in 2010, registered CPOs are required to file quarterly reports with the NFA regarding their non-exempt pools or Rule 4.7-exempt pools. Investment Managers that are registered CPOs should confirm they are complying with this new requirement on an ongoing basis.

As a reminder, registered CPOs that manage Rule 4.7-exempt pools may be able to avoid the above annual audit and quarterly reporting filing requirements, as well as registration as a CPO altogether, under broader exemptions available under CFTC Rule 4.13. CPOs may wish to review Rule 4.13 to determine if this exemption is available to them.

Comply with your NFA-required ethics training policy

Under the NFA's ethics training rules, registered CPOs or CTAs should periodically consider whether additional ethics-related training of its registered "associated persons" may be needed, in light of the Investment Manager's required ethics training policies and procedures.

Review your NFA-required business continuity/disaster recovery plan

Under the NFA's rules, registered CPOs or CTAs should periodically "stress test" their required business continuity/ disaster recovery plans and make any necessary adjustments.

Conform your compliance with new retail forex rules

Pursuant to new CFTC rules effective October 18, 2010, persons who operate pools or exercise discretionary trading authority with respect to "retail forex" transactions must register as commodity pool operators ("Forex CPOs") or commodity trading advisors ("Forex CTAs"), as applicable. Retail forex transactions generally are off-exchange foreign currency transactions with customers who do not qualify as eligible contract participants ("ECP").[5] To the extent that a commodity pool operator or commodity trading advisor is already registered as such with the CFTC and a member of the NFA, the firm would be required to amend its status to further reflect its registration as a Forex CPO and/or Forex CTA, as applicable, and its associated persons may need to pass an additional examination (Series 34). Forex CPOs and Forex CTAs also will be required to file their disclosure documents with the NFA and comply with recordkeeping and reporting requirements. Notwithstanding the foregoing, an Investment Manager engaging in retail forex transactions may be able to rely on exemptions under CFTC Rule 4.13 or 4.7 to avoid registration altogether or the requirement that it file a disclosure document, provided that the requirements of those exemptions are met.

Investment Managers that engage in retail forex transactions should confirm they are in compliance with the foregoing retail forex rules and other applicable requirements related to retail forex transactions.

Investment Managers should also be aware that, as of this writing, the CFTC is in the process of writing rules that may impose registration requirements on certain advisers that manage client accounts that trade swaps or other over-the-counter derivatives, pursuant to the derivatives reform mandated by the Dodd-Frank Act.

[5] Investment Managers should be aware that the Dodd-Frank Act amended the ECP definition in the Commodity Exchange Act to require that any commodity pool seeking to qualify as an ECP for purposes of retail forex transactions must itself only consist of participants that are themselves ECPs.

Other Requirements or Best Practices for all Investment Managers

Annual privacy notice

Under SEC Regulation S-P and Part 160 of the CFTC Regulations, Investment Managers must provide investors or clients who are natural persons a copy of their privacy policy on an annual basis, even if there are no changes to the privacy policy. In addition, state-registered Investment Managers or Investment Managers who are not registered with the SEC are subject to the Federal Trade Commission privacy requirements and also may be subject to state privacy laws that impose additional requirements.

Confirm your ongoing new issues compliance

Under Financial Industry Regulatory Authority ("FINRA") Rule 5130 applicable to broker-dealers that are members of FINRA, Investment Managers that purchase "new issues" for a fund or separately managed client account from such FINRA members must obtain written representations every 12 months from the account's beneficial owners confirming their continued eligibility to participate in new issues. In addition, new FINRA Rule 5131 prohibits "spinning," which is the practice of allocating shares in new issues to any account in which certain persons that may influence or direct the provision of investment banking services to the FINRA member have a beneficial interest. In determining whether an account is subject to the spinning prohibitions, a FINRA member may rely on written representations obtained within the prior 12 months from the account's beneficial owners. The annual representations under both Rules 5130 and 5131 may be updated annually through "negative consent" letters.

Review your anti-money laundering and OFAC programs

FinCEN previously has withdrawn its proposed anti-money laundering regulations for unregistered investment companies, certain investment advisers and CTAs. As a result, most Investment Managers are not required to establish a written anti-money laundering program under the Bank Secrecy Act ("BSA"), as amended by the USA PATRIOT Act. Nonetheless, the SEC has required Registered Managers to have such policies in place under its examination authority. Also, many counterparties, broker-dealers and clients/investors have required Investment Managers to maintain such policies. Thus, although not being imposed as a requirement by FinCEN, prudent business practice will dictate that most Investment Managers who previously have instituted anti-money laundering programs under these proposed regulations, retain such programs. In those situations, the Investment Manager should review its program, including its anti-money laundering risk assessment, on an annual basis to determine whether the program is reasonably designed to ensure compliance with the BSA given the business, customer base, and geographic footprint of the Investment Manager. In addition, the Investment Manager should review its compliance program to ensure compliance with the economic sanctions programs administered by the Office of Foreign Assets Control ("OFAC"), which are not affected by the recent FinCEN decision to withdraw its rules proposal. The foregoing reviews should be independent and conducted by an outside professional, internal audit, or an appropriate officer or employee of the Investment Manager with knowledge of the BSA and the economic sanctions programs administered by OFAC.

Amend your Schedules 13G or 13D

Investment Managers whose client or proprietary accounts, separately or in the aggregate, are beneficial owners of five percent or more of a registered voting equity security, and who have reported these positions on Schedule 13G, must update these filings annually within 45 days of the end of the calendar year, unless there is no change to any of the information reported in the previous filing (except the holder's percentage ownership due solely to a change in the number of outstanding shares). This is in addition to any amendments that may have been required during the calendar year. Investment Managers reporting on Schedule 13D are required to amend their filings "promptly" upon the occurrence of any "material changes" including (but not limited to) any increase or decrease of one percent or more in their holdings. Investment Managers whose client or proprietary accounts are beneficial owners of 10 percent or more of a registered voting equity security also must check to determine whether they are subject to any reporting obligations, or potential "short-swing" profit liability or other restrictions, under Section 16 of the Securities Exchange Act of 1934 ("Exchange Act").

File your Form 13F

All "institutional investment managers," whether or not registered as investment advisers, must file a Form 13F with the SEC if they exercise investment discretion with respect to $100 million or more in securities subject to Section 13(f) of the Exchange Act (generally, exchange-traded securities, shares of closed-end investment companies, and certain convertible debt securities), disclosing certain information regarding their holdings. The first filing must occur within 45 days after the end of a calendar year during which the Investment Manager reaches the $100 million filing threshold (calculated as of the last trading day of any month in that year), and within 45 days of the end of each calendar quarter thereafter, for so long as the Investment Manager continues to meet the $100 million filing threshold (again calculated as of the last trading day of any month during the year).

Review your fund offering materials

Except for commodity pool disclosure documents that are filed with the NFA, fund offering materials do not automatically "expire" after a certain time period. However, as a general securities law disclosure matter, and for purposes of federal and state anti-fraud laws, Investment Managers must continually ensure that their fund offering materials are kept up to date and contain all material disclosures that may be required in order for the fund investor to be able to make an informed investment decision. Accordingly, now may be an appropriate time for Investment Managers to review their offering materials and confirm whether or not any updates or amendments are needed. In considering whether changes to offering materials may be needed, Investment Managers should especially take into account the impact, if any, of the global financial crisis and recent regulatory reforms on their funds. Among other things, Investment Managers should review the fund's current investment objectives and strategies, valuation practices, redemption policies, and risk disclosures (including but not limited to, disclosures regarding market volatility and counterparty risk), their current personnel, service provider and advisor relationships, and any relevant legal or regulatory developments.

Review your compliance procedures

Even those Investment Managers that are not registered as investment advisers with the SEC or any state, and therefore are not required to maintain and review formal written compliance policies and procedures should, as a best practice, review no less than annually any established policies and procedures, whether or not they are in writing, to confirm their continued efficacy in light of the Investment Manager's current business practices and market conditions. Investment Managers that do not have written policies and procedures may wish to consider whether it makes sense to establish written procedures in light of the Investment Manager's current business. Investment Managers should also be sure that their policies and procedures have been updated to reflect changes in law and regulation, including the firm's compliance with any new disclosure or reporting requirements that may be required of unregistered Investment Managers that manage private funds as a result of the Dodd-Frank Act or otherwise.

Review your state blue sky filings

Many state securities "blue sky" filings expire on a periodic basis and must be renewed. Consequently, now may be an appropriate time for an Investment Manager to review the blue sky filings for its funds and determine whether any updated filings, or additional filings, are necessary. In this regard, Investment Managers should take into account recent changes to Form D, including the imposition of annual mandatory electronic filing for continuous offerings.

Review your liability insurance needs

As a general matter, Investment Managers are not required to purchase management liability insurance, such as directors and officers liability coverage, fiduciary liability coverage, or errors and omissions liability coverage. However, in this age of apparently increasing investor lawsuits and continued regulatory scrutiny of hedge funds, it may be prudent for Investment Managers that do not have such coverage to periodically assess whether management liability insurance makes sense for them in light of their current business and, if so, what type of coverage and in what amounts. Investment Managers that do have coverage should consider reviewing the adequacy of such coverage.

Volcker Rule

One obligation that is not directly applicable to Investment Managers, but which may significantly affect them, is the so-called "Volcker Rule" in the Dodd-Frank Act. While the requirement will not be effective until the earlier of July 21, 2012 or 12 months after the date federal regulators issue final rules to implement the statute, many firms are already taking steps to comply and that is already having a present effect on some Investment Managers.

The statute generally prohibits a bank and its affiliates from engaging in proprietary trading and, more pertinently, from acquiring or retaining any ownership interest in, or sponsoring, a hedge fund or private equity fund. Many details are left to a study by federal regulators to be completed by January 21, 2011 and then adoption of regulations thereafter by the regulators. The statute provides for a conformance period for divestitures, once the final regulations go into effect, and that conformance period ranges from two to 10 years depending on the willingness of regulators to grant extensions and the liquidity of a particular fund in which the banking entity had an investment and was contractually committed to invest in as of May 1, 2010. There are also exceptions for banking entity-organized funds only offered to customers of such entities and in which the banking entity only maintains a de minimis investment and also for funds outside the U. S. not offered in the U.S. where the banking entity is a foreign banking firm (not controlled by a U.S. banking firm).

In addition, the statute prohibits any banking entity that serves as an investment manager, investment adviser, or sponsor of a fund, and any of the banking entity's affiliates, from extending credit to the fund, purchasing assets from the fund, accepting the fund's shares as collateral for a loan to another person, or issuing a guarantee on behalf of the fund.

ERISA-Related Requirements or Best Practices

There have also been a number of developments this year under the Employee Retirement Income Security Act of 1974 ("ERISA") and related Department of Labor ("DOL") regulations that are important to Investment Managers that accept clients who are ERISA plans or that manage private funds that are subject to ERISA. These developments and other important ongoing ERISA compliance considerations are summarized below. Please contact us should you have any questions regarding compliance with any of the following requirements or their applicability to your specific situation.

Prepare for new disclosures of service provider compensation

The DOL issued "interim final" regulations in July that require disclosure of compensation and other information by certain service providers to ERISA-governed retirement plans. The regulations are slated to become effective July 16, 2011 (barring any extension that may be granted when the regulations are issued in their "final" form, which is expected in the spring of 2011). While these disclosure obligations overlap with the Form 5500 Schedule C requirements to some extent, they are required only at "point of sale" (and when the disclosed information changes) while the Schedule C disclosures are annual.

Among "covered service providers" under the regulations are those providing fiduciary services directly to a plan or to a plan assets entity (such as a group trust or a fund exceeding the 25 percent "significant participation" test). The regulations generally require disclosure of all compensation paid to the covered service provider, its affiliates, or its sub-contractors. This includes non-monetary compensation, as well as indirect compensation received from parties other than the plan or plan sponsor. Additional disclosures are required from those covered service providers providing fiduciary services to a plan assets entity relating to compensation charged against a plan's investment in the plan assets entity and the annual operating expenses of the plan assets entity. If a fund that was not previously a plan assets entity becomes one, fiduciaries to that fund must make the required disclosures within 30 days from the date on which the fiduciary knows that the fund is a plan assets entity.

The regulations do not require that all required disclosures be made in a single document, but the disclosures are required to be in writing. Those Investment Managers with ERISA plan clients may wish to evaluate how they will comply with the regulations and can expect inquiries from ERISA plan clients about compliance efforts.

Comply with Form 5500 fee disclosures

Form 5500 is the annual report required to be filed by ERISA plans with the Internal Revenue Service ("IRS") and the DOL. In addition, Form 5500 filings may also be filed on a voluntary/elective basis by collective trusts and other funds, the assets of which are treated as ERISA plan assets.

Notably, since the 2009 Form 5500 (which was required to be filed in 2010 for plans with December 31 fiscal year ends), the Form 5500 requires expanded disclosures of fees and other compensation received by service providers to ERISA plans (such as Investment Managers). Although the Form 5500 filing is generally the responsibility of the ERISA plan client, clients will look to Investment Managers to provide the necessary information. Investment Managers of plan assets funds who have elected to file Form 5500s on behalf of the fund will need to comply with these additional compensation reporting requirements when filing their 2010 Form 5500s (due in 2011 for plans with December 31 fiscal year ends).

For example, beginning in 2010, required reporting included all money and other things of value (such as gifts, awards, or trips) received by a person directly or indirectly from an ERISA plan in connection with services rendered to the plan. Indirect compensation includes amounts received other than directly from the ERISA plan, such as fees and expense reimbursements from pooled investment vehicles in which a plan invests, float revenue, and soft dollars. Non-monetary compensation includes, for example, gifts, awards, and trips and is reportable subject to certain de minimis exceptions (basically, the non-monetary compensation must be valued at less than $50 and the aggregate of all non-monetary compensation from one source in a calendar year must be valued at less than $100). Please contact us if you have questions about particular types of compensation.

Importantly, these new reporting rules will even apply to direct and indirect compensation in connection with funds that comply with the 25 percent "significant participation" exception from ERISA plan assets status (with the exception of compensation received from operating companies, including "venture capital operating funds" and "real estate operating funds").

Prepare for new disclosures to plan participants in ERISA-governed participant-directed plans

In October, the DOL issued final regulations on the disclosures required to be provided to plan participants who have a right to direct the investment of the assets of their accounts under 401(k) or other participant-directed plans. In contrast to disclosures required by the service provider regulations (described above), the plan administrator is required to provide these disclosures to plan participants. Plan administrators, however, will likely look to investment service providers for much of the information required to be disclosed. Thus, Investment Managers who provide products or services to 401(k) or other participant-directed plans may wish to evaluate how they will provide this information.

The regulations, which become effective for most plans on January 1, 2012, require disclosure of certain information about the plan's investment options in a comparative chart format so that all investment options under the plan can be compared in an "apples-to-apples" manner. The investment information required to be provided upon the effective date of the regulations and annually thereafter includes, among other things: identifying information for each investment option; one, three, and five-year performance information and the same performance information for an appropriate benchmark; "shareholder-type" fees charged against a participant's investment; total annual operating expenses of the investment option, expressed as both an expense ratio and a dollar amount; a Web site where additional information about the investment options can be obtained; and a glossary of terms to assist participants and beneficiaries in understanding the investment options. Importantly, the required format for much of this information is borrowed from mutual fund disclosure rules, which likely will represent new requirements for funds such as group trusts, collective investment trusts (CITs), and private funds not directly subject to the mutual fund rules.

In addition to investment information, certain plan-related information is required as well, such as a description of circumstances under which investment instructions may be given, a description of any "brokerage windows," and descriptions of plan administrative and individual expenses.

Evaluate Potential Effects of DOL Proposed Regulations on the Definition of "Fiduciary"

In October, the DOL issued proposed regulations that would expand the circumstances under which a party who provides investment advice to an ERISA plan would be considered a "fiduciary" under ERISA. Under the current regulations, which have been in place since 1975, a person providing investment advice is not considered a fiduciary unless (among other requirements) the advice is provided on a "regular basis" and unless there is a mutual understanding that the advice will serve as a "primary basis" for the plan's investment decisions. The proposed regulations eliminate those requirements and instead make a person a fiduciary if such person (or one of its affiliates), among other conditions, simply (a) provides advice, an appraisal or a fairness opinion regarding the value of securities or other property; (b) makes recommendations as to the advisability of investment in, purchasing, holding, or selling securities or other property; or (c) provides advice or makes recommendations as to the management of securities or other property.

The proposed regulations (comments are due February 3) have generated a considerable amount of attention because, if adopted as proposed, it is feared that the categories of services deemed to be covered by ERISA's fiduciary rules and prohibited transaction rules would be significantly expanded. Examples could include acting as a broker or consultant, providing financial information about potential products and strategies, appraisal services, or even providing reporting on valuations, responding to client inquiries on best practices, customized newsletters, etc.

Investment Managers who currently provide advice directly or indirectly to ERISA plan clients in a non-fiduciary capacity may wish to evaluate the impact of the proposed regulations.

Expect continued focus on "target date funds"

Investment Managers that manage "target date funds," *i.e.*, investment funds in which the asset allocation generally shifts to become more conservative as retirement approaches, should expect continued scrutiny. The SEC issued proposed regulations in 2010 regarding required disclosures for target date funds that are mutual funds. The proposals, if adopted, can also be expected to influence disclosures made by non-registered target date funds as well. The issues raised in the SEC proposal and elsewhere by regulators and legislators include whether there has been appropriate disclosure regarding the asset allocation in target date funds, whether the target date fund is intended to go "to" or "through" retirement age and whether participants are given adequate information about the underlying investments in target date funds to make informed decisions.

In November 2010, the DOL proposed regulations that would expand the requisite disclosures for target date funds, including requiring more detailed disclosure regarding funds' asset allocations, how funds will change over time, and the point at which funds will reach their most conservative asset allocations.

The proposed regulations would also require disclosure of, among other things, a chart, table, or other graphical representation illustrating changes in asset allocation. Comments on these proposed regulations are due on January 14, 2011.

Prepare to address client inquiries on hard-to-value assets and transparency

Hard-to-value assets and fund transparency continue to be of interest to ERISA plan sponsors both from a fiduciary perspective and in connection with satisfying FAS 157 with respect to hard-to-value assets. Investment Managers should expect that ERISA plan clients/investors will continue to review their investment policies and valuation policies and otherwise seek greater transparency from their Investment Managers.

Monitor ERISA impact of Dodd-Frank Act

The Dodd-Frank Act included several provisions that could have significant consequences on ERISA-governed retirement plans depending on how the regulations under the new law develop. The new regulatory framework to be imposed on swaps and other derivatives may affect ERISA plans that enter into these types of transactions.

In December, the CFTC issued proposed regulations defining "major swap participant." The proposed regulations did not categorically exclude retirement plans from the definition, as had been the hope of many in the retirement plan industry seeking to avoid the more significant and potentially costly aspects of the Dodd-Frank Act reforms. The proposed regulations did, however, exclude swaps "maintained by employee benefit plans for hedging or mitigating risks in the operation of the plan" from certain of the numerical tests proposed to determine "major swap participant" status, which may have the practical effect of excluding many retirement plans.

The CFTC also issued proposed regulations on the "business conduct" rules, which impose certain standards on swaps dealers when dealing with employee benefit plans, and other "Special Entities," as counterparties. It is proposed that swap dealers that act as advisors to Special Entities must act in the "best interests" of the Special Entity. In addition, the proposal would require swap dealers with a Special Entity counterparty to have a reasonable basis to believe that any Special Entity has a representative that meets certain criteria regarding the representative's knowledge and duties to the Special Entity.

The Dodd-Frank Act also requires the CFTC and the SEC to study whether stable value "wrap" contracts fall within the definition of "swaps" and, if so, whether stable value contracts should be exempted from the Dodd-Frank Act. The resolution of these issues could significantly affect how plans manage their investments. Those Investment Managers with ERISA clients/investors may wish to evaluate the effect of these provisions on its management of ERISA assets.

Review private fund compliance with 25 percent limit

Investment Managers managing private funds that seek to maintain compliance with the 25 percent ("significant participation") exception from ERISA plan assets status should consider periodically reviewing their processes for best practices. For example, Investment Managers of private funds may wish to reconfirm whether their fund-of-funds or other fund investors are "benefit plan investors" subject to ERISA or Section 4975 of the Code for purposes of reconfirming their funds' compliance with the 25 percent "significant participation" exception under ERISA and, if so, the extent to which that investor's assets are (and will be) plan assets. Only the portion of these investors' assets that are subject to ERISA need be counted for this purpose. As this percentage can fluctuate over time, we recommend establishing an "upper limit" percentage which the investor will agree not to exceed. However, if your fund is pushing up against the 25 percent limit, you may wish to more closely monitor these limits so as to free up more ERISA capacity). In addition, as noted above, if a fund becomes a plan assets fund, the service provider disclosure regulations will require disclosures within 30 days of the Investment Manager knowing that a fund is a plan assets fund.

Review proposed regulations on investment advice to plan participants or IRA owners

In March, the DOL issued new proposed regulations on the provision of investment advice to plan participants by plan service providers, including plan service providers whose investment options are offered under the plan. Investment Managers with defined contribution plan (such as a 401(k) plan) clients or IRA clients may wish to review the impact of these proposed rules. They follow prior proposed regulations that the DOL withdrew in November 2009 in response to concerns that the regulations did not adequately address conflicts of interest.

The new proposed regulations include a few significant departures from the earlier proposed regulations. The fee-leveling requirement (*i.e.* the requirement that the fiduciary advisor's fees and compensation not be based on the investment options selected by the participant) is clarified in a way which may affect how investment advice providers can structure their compensation, and the requirements for computer models are changed in a way that may affect the extent to which past investment performance is used as a criteria in such computer models.

Investment Managers who provide investment advice to 401(k) or other participant-directed plan participants or IRAs may wish to evaluate the effect of the new proposed regulations, if adopted, on the way they provide services and structure their compensation. We expect to provide an update once the DOL reissues regulations in light of comments received (the DOL received 43 comment letters).

Update your cross-trading policies and procedures for the statutory cross-trading exemption

Compliance with the statutory exemption for cross-trading is generally conditioned upon establishing—in advance—specific policies and procedures and providing advance notice to ERISA clients/investors of these policies and procedures. In the case of ERISA clients with separately managed accounts, actual client consent or revisions to investment management agreements may also be required. If you have not previously considered bringing your policies into compliance with the statutory cross-trading exemption, this may be an item worth adding to your checklist for the coming year. Increasingly, we are seeing more clients adopt the statutory cross-trading exemption.

Update and confirm your ongoing ERISA-related compliance generally

As a best practice, Investment Managers that manage plan assets should periodically review their existing investment policies and investment guidelines and trading practices and relationships to confirm that they are consistent with current requirements under ERISA. Significant changes in trading practices and investment policies and investment guidelines also should be reviewed for ERISA compliance. ERISA-related policies and procedures also should be reviewed periodically, such as cross-trading policies, proxy voting policies, and gift and gratuity policies, to reflect changes in the Investment Manager's practices or changes in the law.

Update QPAM references in light of recent amendments to QPAM Exemption

The QPAM Exemption was amended in July 2010 to provide for additional requirements for Investment Managers serving as QPAMs to their in-house plans. In the course of this amendment, previous Part V was changed to Part VI so prior references in agreements and disclosure documents to Part V of the QPAM Exemption should be revised to refer instead to Part VI of the QPAM Exemption.

File all group trust amendments with IRS

Investment Managers who sponsor group trusts that have been amended during the current calendar year must timely file all material amendments with the IRS to maintain the group trust's determination letter.

Consider expanding group trust eligibility based on IRS Revenue Ruling 2011-01

Effective January 10, 2011, the IRS has expanded the types of investors eligible to participate in a group trust to include custodial accounts under Section 403(b)(7) of the Code, retirement income accounts under Section 403(b)(9) of the Code (commonly referred to as "403(b) plans") and governmental plans under Section 401(a)(24) (governmental plans that provide retiree welfare benefits). Group trust documents may need to be amended to reflect the expanded eligibility (see above regarding filing group trust amendments).

Review compliance with ERISA's fidelity bond requirements, if applicable

Investment Managers with ERISA plan clients or those managing plan assets are required by ERISA to maintain a fidelity bond unless the Investment Manager has determined that it is exempt from ERISA's fidelity bond requirements. Ongoing bonding arrangements should be reviewed on an annual basis to confirm that the Investment Manager is maintaining the bond in the correct amount and with the correct terms to satisfy ERISA's requirements.

Investment Managers may wish to review whether changes in their ERISA plan clients require changes to bonding arrangements (for example, an ERISA plan that did not previously hold employer securities may have acquired employer securities, necessitating a higher bond amount). Changes to a fund advised by the Investment Manager may also dictate changes to the fidelity bond (for example, if a plan assets fund goes under 25 percent, a fidelity bond may no longer be required and, conversely, when a fund exceeds the 25 percent limit, the fidelity bonding rules would generally be triggered on that date).

Consider "FBAR" filing requirements and keep an eye out for developments

United States persons with "financial interests" in "financial accounts" in foreign countries must file an FBAR on Form TD F

90-22.1 by June 30 of each year. Although many have advocated for employee benefit trusts to be excluded from the requirements, they have not been exempted. Certain relief from filing was provided in 2010 (a) for those with only "signature authority" over a foreign financial account (rather than a financial interest) and (b) for foreign commingled investment vehicles other than foreign mutual funds. It is not certain, however, if the relief provided under these circumstances will be extended into 2011, and Investment Managers may wish to evaluate whether accounts maintained on behalf of ERISA plan clients trigger FBAR filing obligations.

Review developments in the law applicable to governmental plan clients

Investment Managers who manage the assets of governmental plans (which are not subject to ERISA) should review developments in the past year in the law applicable to those plans that may affect plan investments. In recent years, a number of states have adopted restrictions on the use of placement agents and giving of political contributions in connection with plan investments, as well as instituted enhanced disclosure requirements for plan service providers. States and municipalities also continue to adopt laws that limit or restrict permissible investments by public pension plans, such as laws that limit investment in certain countries or impose limits on certain categories of investments. In addition, portfolio declines may require rebalancing from alternative or private equity investments to the extent governmental plan-enabling laws limit these types of investments to a specified percentage of the plan's overall assets.

If you have any questions about the matters contained in this Client Briefing or would like assistance in complying with any of the above requirements, please contact any of the Winston & Strawn professionals listed below:

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