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

A legal update from Dechert's Financial Services Group

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The U.S. federal securities laws, the Commodity Exchange Act and regulations thereunder, and certain other applicable federal laws, rules and regulations, as well as rules of U.S. self-regulatory organizations (such as the Financial Industry Regulatory Authority and National Futures Association) impose reporting and compliance obligations on asset managers and investment funds. Some of these requirements apply only to U.S.-registered investment advisers, commodity pool operators or commodity trading advisors, but others apply to investment managers and funds that are located outside the United States and are not registered 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. However, it is not intended to provide a complete discussion of all reporting and compliance requirements that may be applicable to investment advisers and private funds.

Note that – other than for advisory filings of Forms ADV and PF (see Annual Updating of Adviser's Form ADV; Private Fund Reporting by Registered Advisers) – if the filing date falls on a weekend 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, Form 13H 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 2020, the investment adviser is required to make all four 13F filings in 2021.

For 2021, the first Form 13F filing is due on February 16. The remaining filings in 2021 are due on May 17, August 16 and November 15.

Definitions:

An "Institutional Investment Manager" is defined under Section 13(f)(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 (*e.g.*, NYSE, AMEX, NASDAQ), shares of closed-end investment companies and shares of exchange-traded funds, 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 that 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 definitively 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 for additional guidance on these filing requirements.

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 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, where the intent of the reporting entity changes, or entry into a material agreement regarding the applicable Equity Securities).
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 Equity Securities 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 Equity Securities, 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.
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 that, 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 and business development companies) 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 Equity Securities 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 beneficially owned 5% or more of a class of Equity Securities as of the last day of the calendar year, or within 10 days of the end of any calendar month in which the Qualified Institutional Investor becomes the Beneficial Owner of more than 10% of the class of Equity Securities.

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 the Qualified Institutional Investor becomes the Beneficial Owner of more than 10% of the class of Equity Securities, and, thereafter, within 10 days after the end of any calendar month in which the percentage beneficially owned increases or decreases by 5% or more of the outstanding securities of the class. A Qualified Institutional Investor must file a Schedule D (see above) within 10 days if the Qualified Institutional Investor's investment purpose changes from passive to active.

For 2021, both the initial and annual amendment filings are due on February 16.

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 Equity Securities.

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 Equity Securities, 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 from passive to active, or if the Passive Investor acquires beneficial ownership of more than 20% of the class.

[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.

	For 2021, the amendment filings are due on February 16.
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)) must hold the Equity Securities in the ordinary course of their business and may not hold the Equity Securities for the purpose of changing or influencing control of the Issuer. Rule 13d-1(b) sets forth a full list of eligible entity types, which include, *inter alia*: ▪ Registered broker-dealers; ▪ Banks; ▪ Insurance companies; ▪ Registered investment companies; ▪ SEC- or state-registered investment advisers; and ▪ Non-U.S. equivalents of the foregoing, subject to certain restrictions (discussed in footnote 1). A "Passive Investor" is a person that: ▪ Is not a Qualified Institutional Investor; ▪ Holds the Equity Security in the ordinary course of its 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 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 an 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 that 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 2021, the filing is due on February 16.
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 (comprised of Part IA and Part IB) and Part 2 (comprised of the Part 2A (Brochure) and Part 2B (Brochure Supplement)) of its Form ADV on an annual basis. "Exempt reporting advisers" must file portions of Part 1A. While there is no requirement to periodically update Part 3 (Form CRS),[2] registered advisers with clients or potential clients who are "retail investors"[3] are reminded that Form CRS must be updated within 30 days if information becomes materially inaccurate.

What is Form ADV?

Form ADV is a uniform form used by investment advisers to register with the SEC (as well as to register or file notice, if and as applicable, with state regulatory authorities) and consists of the following:

- Part 1A: check-the-box, fill-in-the-blank form providing information as to the adviser;
- Part 1B: for an adviser registered only with one or more states, information required by state securities authorities;[4]
- Part 2A: narrative brochure providing information as to the adviser;
- Part 2B: narrative brochure supplements providing information as to the specific employees who provide investment advice; and
- Part 3 (Form CRS): two-page document[5] providing information to natural persons who are potential clients or clients of the adviser.

Amendments to Part 1A, as well as Part 2A (but not Part 2B) and Form CRS, must be submitted electronically through the Investment Adviser Registration Depository (IARD) website, which is maintained by the Financial Industry Regulatory Authority (FINRA). The updated Brochure must be uploaded as a text-searchable document in portable document format (PDF) to IARD. Form CRS must be uploaded to IARD as a text-searchable document with machine-readable headings. Each adviser's Part 1A, Brochure and Form CRS are accessible to the public through the Investment Adviser Public Disclosure (IAPD) website.

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2 Form CRS is a customer or client relationship summary that provides (among other things) information about: the relationships and services the firm offers to retail investors; fees and costs that retail investors will pay; specified conflicts of interest; standards of conduct; and disciplinary history.

3 A retail investor is a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for person, family or household purposes.

4 Part IB is not required to be completed by advisers that are applying for SEC registration or already are registered with the SEC.

5 For advisers that are registered as both investment advisers and broker-dealers, and which wish to describe their advisory and broker-dealer services in a single Form CRS, the page limit is four pages.

By what date must Part 1A of Form ADV and the Brochure be updated?	Part 1A of Form ADV and the Brochure must be updated at least annually within 90 days of the registered adviser's fiscal year-end.[6] For advisers with a December 31 fiscal year-end, the annual amendment filing for 2021 is due on March 31.
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, the delivery in 2021 must be made on or before April 30.
Is there an annual update requirement for the Brochure Supplements?	All advisers are required to update the information in the Brochure Supplement promptly after any information becomes materially inaccurate. 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. There is no mandatory filing requirement for the Brochure Supplements for registered advisers; instead, advisers must maintain copies of their Brochure Supplements in their books and records.
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"[7] to whom the Brochure Supplement relates begins to provide advisory services (or certain other services) to that client.[8] Delivery of an updated Brochure Supplement to clients is required when there is an update to any disciplinary information provided (*e.g.*, new disciplinary event, material change to disciplinary information already disclosed).
Which advisers qualify to use umbrella registration?	In certain cases, an adviser (filing adviser) together with its "relying advisers" may file Parts 1A and 2 of a single Form ADV that includes all required information about

[6] The updating of certain sections of Part 1A and the Brochure cannot wait until the annual update. Part IA Items 1 (with limited exceptions), 3, 9 (with limited exceptions) and 11 must be amended promptly after information becomes inaccurate, and Items 4, 8 and 10 must be amended promptly after the information becomes materially inaccurate. Further, Sections 7.B and 9.C of Schedule D must be amended promptly, if necessary, when reports from the fund's auditors and the independent public accountants engaged by the adviser to perform a surprise audit, respectively, are received. Part IA also must be amended promptly if adding or removing a relying adviser as part of an umbrella registration. The Brochure must be updated promptly after the information becomes materially inaccurate (except for changes in Item 2, the amount of assets under management, and the fee schedules, if any, do not require interim updates). Additionally, although not required by Form ADV, advisers that 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, which is required to be included 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.

[7] Supervised persons include 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.

[8] There are several exceptions to the Brochure Supplement delivery requirement. For example, 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. Similarly, 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.

itself and each relying adviser (umbrella registration), which will satisfy the registration/disclosure requirements of Form ADV for all the advisers.

Form ADV permits umbrella registration if a group of related advisers is operating a single advisory business, each of the relying advisers is controlled by or under common control with the filing adviser (together, "all advisers"), and the following additional conditions are met:

- All advisers advise only private funds and separately managed accounts for qualified clients who 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 Investment Advisers Act of 1940 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 Chief Compliance Officer.

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. Advisers seeking to avoid notice filing fees in a state where notice filing is no longer required, should amend their Form ADV generally by the first week in November to avoid being charged renewal fees.[9]

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

Those advisers that are not required to register with a state securities authority and which fall into the category of "exempt reporting adviser" (advisers that qualify as "private fund advisers" or "venture capital fund advisers") must submit specified portions of Part 1A of Form ADV to the SEC through IARD.[10] Exempt reporting advisers are not required to have a Brochure, Brochure Supplement or Form CRS.

Form ADV filings made by exempt reporting advisers are subject to the same annual updating requirements as registered advisers (the filings must be updated

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[9] *See* IARD 2021 Investment Adviser Renewal Bulletin and the IARD website for subsequent bulletins with updated information on filing fees.

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

within 90 days of the adviser's fiscal year-end).[11] All filings made by exempt reporting advisers are publicly available.

Do non-U.S. advisers that are required to complete Item 5 and that do not have a principal place of business in the United States need to disclose information about the non-U.S. aspects of their business?

Yes. According to Item 5.F. (3) of Part 1A, an adviser must report information relating to the non-U.S. portion of its business – specifically, the total RAUM attributable to clients that are non-U.S. persons. This is true even if the adviser has a principal place of business outside of the United States.

What types of conflicts disclosure should be included in Part 2A?

An adviser has both general disclosure obligations, as part of the fiduciary duty the adviser owes to its clients, as well as specific disclosure requirements described in Form ADV. FAQs[12] published by the SEC's Division of Investment Management describe several important types of conflicts disclosure to be included in Part 2A. Item 2 requires that, if an adviser is amending its Brochure for its annual amendment and the Brochure contains material changes that occurred since the last annual amendment, the adviser must discuss these material changes. For example, if an adviser materially amends or supplements its disclosures regarding share class recommendations or revenue sharing arrangements, the adviser must highlight these changes in Item 2. Item 5.E requires disclosure if an adviser or its supervised persons accepts sales compensation, including asset-based sales charges or service fees. Specifically, an adviser must describe: the conflict; how the adviser addresses the conflict; and any offsets (against its advisory fees) the adviser applies. Likewise, Item 14.A requires disclosure if someone who is not a client provides an economic benefit to an adviser for providing investment advice or other advisory services to its clients. Specifically, an adviser must describe the nature of the arrangement, the conflict of interest and how the adviser addresses the conflict of interest.

What is the purpose of Form CRS?

Form CRS is designed to inform retail investors about:

- The types of relationships and services the firm offers;
- The fees, costs, conflicts of interest and required standard of conduct associated with those relationships and services;
- Whether the firm and its financial professionals currently have reportable legal or disciplinary history; and
- How to obtain additional information about the firm.

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[11] As with registered advisers, the updating of certain sections of Part 1A 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.

[12] Division of Investment Management, Frequently Asked Questions Regarding Disclosure of Certain Financial Conflicts Related to Investment Adviser Compensation.

When must Form CRS be amended?	Advisers should review Form CRS upon changes to their business that impact the required disclosures. An amended Form CRS must be filed within 30 days if information becomes materially inaccurate. The filing should highlight the most recent changes. Although there is no specific annual updating requirement, advisers should consider reviewing Form CRS annually in connection with their annual updating amendment.
Is there a delivery requirement for Form CRS?	Consistent with existing Brochure delivery requirements, advisers must deliver Form CRS to each retail investor before or at the time the adviser enters into an advisory contract with the retail investor. The delivery requirement applies to oral contracts. Further, advisers must deliver Form CRS to a retail investor who is an existing client before or at the time the adviser: (i) opens a new account that differs from the retail investor's existing account; (ii) recommends a roll over into a new or existing account or investment; or (iii) recommends or provides a new investment advisory service or investment. Advisers are not required to deliver Form CRS to private funds (which are not retail investors) or investors in such private funds, unless the investor is otherwise a client of the adviser and satisfies the definition of "retail investor."
Do non-US advisers that are registered with the SEC, but do not have a principal place of business in the United States, need to deliver a Form CRS to their non-U.S. clients or non-U.S. retail investors?	While neither the SEC nor its staff has made a definitive statement on this topic, it would be reasonable to conclude that non-U.S. advisers would not need to deliver the Form CRS to current or prospective non-U.S. retail investors.
If an adviser provides several types of services to investors, can the adviser prepare and deliver more than one Form CRS (one for each service it offers)?	No, the SEC staff has stated that advisers can only prepare a single Form CRS.[13]
What are the compliance requirements for dual registrants?	Dual registrants are encouraged by the SEC to use a combined Form CRS (that may not exceed four pages) to discuss brokerage and advisory services; however, they are permitted to provide separate summaries that may not exceed two pages each. Dual registrants must deliver Form CRS at the earlier of the broker-dealer and investment adviser timing requirements.

[13] Division of Investment Management and Division of Trading and Markets, Frequently Asked Questions on Form CRS.

Private Fund Reporting by Registered Advisers

Registered investment advisers that 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.[14] 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 that 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.[15]
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)
When are initial filings due?	***For advisers that qualify as Large Hedge Fund Advisers:*** An adviser that 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.

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

[15] For purposes of calculating Relevant RAUM, there are certain instances in which an adviser must aggregate certain separately managed and fund accounts, as well as 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.

For advisers that qualify as Large Liquidity Fund Advisers:

An adviser that 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 that 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 2021 is due on April 30.

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 (*i.e.*, the place where the decision to invest was made by the applicable investor, which may or may not be such investor's domicile/registered address), 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: With respect to such issuers that have a continuous offering (*e.g.*, hedge funds) of more than one year, on or before the anniversary of the issuer's last federally filed Form D. Note that issuers that have a finite fundraising period of under one year (*e.g.*, certain closed-end funds) generally will not be required to make continuing offering filings.

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 is available for certain 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, by submitting a Form ID, 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" are certain initial public offerings of equity securities made pursuant to a registration statement or offering circular.

Who may invest in New Issues?

***Rule 5130*:** FINRA Rule 5130 proscribes certain sales and purchases of New Issues (defined below) by U.S.-registered broker-dealers (FINRA Members) to and by Restricted Persons (defined below), including private funds whose beneficial owners include Restricted Persons.

***Rule 5131*:** FINRA Rule 5131 prohibits the allocation of New Issues by FINRA Members to covered accounts.

Generally, a private investment fund's offering materials contain a questionnaire in the fund's application form or subscription agreement, designed to ascertain whether potential investors are Restricted Persons or have covered accounts. This questionnaire enables 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)(5) 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:, or offerings made under Regulation S of the Securities Act or otherwise made outside of the United States or its territories (unless the securities offered and sold in the Regulation S offering or other offering made outside of the United States also are registered for sale in the United States under the Securities Act in connection with a concurrent initial public offering of an equity security in the United States);
- 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 (as defined under Section 1a(5) of the Commodity Exchange Act);
- Rights offerings, exchange offers, or offerings made pursuant to a merger or acquisition;
- Offerings of investment grade asset-backed securities;
- Offerings of convertible securities or preferred securities;
- Offerings of an SEC-registered investment company;
- Offerings (registered on Form F-6) of securities that have a pre-existing market outside of the United States, including American Depositary Receipts; and
- Offerings of a: special purpose acquisition company subject to SEC rules and regulations; business development company (as defined in Section 2(a)(48) of the Investment Company Act); direct participation program (as defined in Rule 2310(a)); or 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; broker-dealer personnel; finders and fiduciaries of the underwriter of the New Issue; portfolio managers; owners of broker-dealers; and immediate family members of the above. The prohibitions of Rule 5130 do not apply to certain enumerated accounts, including an account if the beneficial interests of Restricted Persons do not exceed, in the aggregate, 10% of such account.

For purposes of Rule 5131, "covered accounts" include certain accounts in which an executive officer or director of a public company or a covered non-public company, or a person materially supported by such executive officer or director, has a beneficial interest.

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 or an account that is directly or indirectly controlled by such investor.[16]

Rule 5130 and Rule 5131 require that an investor's eligibility to participate in New Issues be reconfirmed on an annual basis. Accordingly, many investment advisers ask those investors that have previously been classified as Restricted Persons or covered accounts 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 FINRA Members to rely on representations from investment advisers that 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 a fund's annual report or other materials periodically sent to investors or in a separate mailing. Provided that an investor has not affirmatively reported a change in its status, the fund, and applicable FINRA Members, are permitted to rely on existing information of a particular investor.

Under Rule 5131, but not Rule 5130, FINRA Members may rely on a positive affirmation obtained within the previous 12 months from indirect beneficial owners. Such positive affirmation must be from a person authorized to represent an account that does not look through to the beneficial owners of certain unaffiliated private funds invested in the account (*e.g.*, a fund of funds), subject to certain conditions set forth in the Supplementary Materials to Rule 5131. Indirect beneficial owners cannot be control persons of (including those persons under common control with) the investment adviser.

[16] This is the case unless the fund's adviser is able to rely on certain exemptions that permit allocating a portion of the profits to Restricted Persons or covered accounts.

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), and will be considered an ERISA fiduciary, 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 Benefit Plan Investors hold less than 25% of the value of each and every class of equity interest in that fund. It is noted that there are other possible ways for a fund to avoid "plan assets" status, although only satisfaction of the 25% threshold is discussed below.

There are no specific annual monitoring requirements 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. It is possible in some situations for a fund to operate as a "plan assets" fund, in which case the fund would need to comply with the full panoply of ERISA's requirements.

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 that has discretionary authority or control with respect to the fund's assets, or that 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 consequences of exceeding the threshold at the feeder level arguably may be relatively less significant 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.

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.[17] CPOs and CTAs that transact in or advise on trading virtual currency products (defined below) must answer certain questions in various locations on the NFA systems and ensure that their disclosure documents and marketing materials appropriately reflect this. 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 its swap dealers. Any entity trading in the CFTC-regulated futures and swaps markets may also be required to provide information to its 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 electronic 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 file quarterly certain risk-related reports on CFTC Form CPO-PQR and NFA-PQR relating to the CPO and each pool the CPO operates (with limited exceptions).

Who must file?	CPOs registered with the CFTC, except those CPOs that are voluntarily registered. The CFTC recently amended CFTC Rule 4.27(b) to remove the requirement that registered CPOs which operate only in their capacity as exempt CPOs must file Form CPO-PQR.

[17] 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?	CFTC Form CPO-PQR Parts 1 and 2, which consist of what was previously filed as CFTC Form CPO-PQR Schedule A and the Schedule of Investments, as well as certain additional information the NFA requests, such as two financial ratios related to CPOs' business: Total Revenue/Total Expenses and Current Assets/Current Liabilities. As noted, the CFTC recently amended CFTC Form CPO-PQR to eliminate Schedule B (except the Schedule of Investments), Schedule C, and the questions in Schedule A regarding pool auditors and marketers. The CFTC added an information request to Schedule A for Legal Entity Identifiers (LEIs) for CPOs and their operated pools (if LEIs have been obtained). Note that CFTC Form CPO-PQR and NFA Form PQR have been aligned, so one filing meets both the CFTC and NFA requirements.
When are filings due?	Within 60 days of each calendar quarter-end. As all CPOs will file the same report each quarter, the CFTC will no longer provide extra time for filing the calendar year-end report for certain CPOs based on their regulatory assets under management. 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, with some exceptions. There is no filing requirement for: non-discretionary CTAs; or CTAs not advising any client accounts (inactive CTAs). In addition, the CFTC recently amended CFTC Rule 4.27(b) to provide that the requirement to file CFTC Form CTA-PR is no longer applicable to registered CTAs that act only in the exempt capacity in reliance on CRTC Rule 4.14(a)(4) and (a)(5) because the CTAs are advising commodity pools for which they also serve as the registered or exempt CPO, respectively.
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. In addition, CTAs must provide two financial ratios related to their (versus their accounts') business: Total Revenue/Total Expenses and Current Assets/Current Liabilities. Dually-registered CPOs/CTAs file this information with CFTC Form CTA-PR or NFA Form PR, as those forms are filed each quarter in advance of CFTC Form CPO-PQR and NFA Form PQR.
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 that 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 initial registration and then within 12 months of the last self-examination.
What must CPO/CTA do with Questionnaire?	Keep the signed 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. Although the completed questionnaire and related notes are not a record that is subject to recordkeeping rules applicable to CPOs and CTAs, in connection with NFA exams, the NFA may request copies of notes and/or self-examination questionnaires made in the course of completing the NFA Member's two most recent self-examinations.

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 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. In October 2020, the NFA redesigned the annual electronic questionnaire.[18]

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.

[18] The annual questionnaire user guide and annual questionnaire template are available on the NFA website.

When are updates due?	Within 30 days of the anniversary of the NFA Member's registration with the NFA. Because of the significant number of changes to the annual electronic questionnaire, CPOs and CTAs are advised to begin the process of completing the questionnaire earlier than usual to allow for time for questions.
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.[19]

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. In addition, CPOs relying on CFTC Regulations 4.13(a)(1), 4.13(a)(2), 4.13(a)(3) and 4.13(a)(5) must represent that neither the CPO or any of its principals is subject to a Statutory Disqualification under CEA Section 8a(2).[20]
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. 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 LEIs.

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[19] The CFTC recently amended CFTC Rule 4.5(a)(1) to change the entity that is excluded from the definition of CPO from "the investment company registered as such under" the 1940 Act to the investment adviser to the registered fund. Before the end of the reaffirmation period in March 2021, investment advisers will need to move any CFTC Rule 4.5 exclusion notices identifying the 1940 Act fund trust, company or series as the excluded CPO to its investment adviser's NFA exemptions file and file a CFTC Rule 4.5 exclusion notice identifying the investment adviser as the excluded CPO.

Additionally, the CFTC amended CFTC Rule 4.5(b)(1) to include business development companies (BDCs) that elected an exemption from registration as an investment company under the 1940 Act. As a result, the new CPO exclusion supersedes CFTC No-Action Letter No. 12-40, which previously provided CPO registration relief to investment advisers to BDCs. As a result, investment advisers to BDCs that trade commodity interests must file a reaffirmation between December 1, 2020 and March 1, 2021, and continue to do so annually thereafter.

[20] For more information on this new condition of the CPO exemptions, please refer to *Dechert OnPoint*, CFTC Finalizes New Requirement Applying Statutory Disqualification Prohibitions to CPOs Exempt under CFTC Regulation 4.13 – Exempt CPOs Must Take Action in 2020.

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

Who must complete certification?	Every entity with a 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 FCMs and swap dealers to submit ownership and control (OCR) reports 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 on account opening and to update it on an ongoing basis.

CFTC Form 40 and CFTC Form 40S

CFTC Regulation 18.04 requires that a trader that (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 that (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 that 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, unless the funds' investment adviser has a U.S. parent entity that is required to file on a consolidated basis. The TIC Forms collect most data from large U.S. intermediaries (such as custodians) that are positioned to report on multiple U.S. clients.[21] 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 10% 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.

[21] 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 needs to be filed, and with what frequency?

TIC Form	Core Coverage	Threshold*	Frequency
TIC B Forms	Snapshot of cross-border claims 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[22]	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 $200 million or more; OR (ii) reporter is notified by the FRBNY that filing is required	Benchmark survey every five years (next filing in 2022)
TIC Form SHCA	Snapshot report of U.S. residents' holdings of foreign securities	Only required when notified by the FRBNY	Annually
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 2024)
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

* The threshold for each benchmark survey is based on the previous benchmark survey, and is subject to change in the upcoming benchmark survey.

[22] 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.

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 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 10% 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	Benchmark survey every five years (next filing expected in 2025)
BE-185	U.S. persons contacted by the BEA	Payments and receipts for transactions in financial services with non-U.S. persons	Quarterly
BE-10	U.S. persons that: (i) control at least 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	Benchmark survey every five years (next filing expected in 2025)
BE-11	U.S. persons contacted by the BEA	Direct investment abroad by U.S. persons	Annually

Survey	Who Must Report*	What Must Be Reported	Frequency
BE-577	U.S. persons contacted by the BEA	Direct investment abroad by U.S. persons	Quarterly
BE-12	U.S. persons if (i) a non-U.S. person owns at least 10% of the voting securities of the U.S. person; OR (ii) they are contacted by the BEA	Direct investment in U.S. persons by non-U.S. persons	Benchmark survey every five years (next filing expected in 2023)
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

* The reporting requirement for each benchmark survey is based on the previous benchmark survey, and is subject to change in the upcoming benchmark survey.

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