

Staying out of Trouble In 2014

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SEWARD & KISSEL LLP

Compliance

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Compliance

Intro: It's a New World

2013 SEC Enforcement Trends

Recent SEC Risk Alerts

2014 Exam Priorities

- Safety of Assets & Custody
- Conflicts of Interests
- Insider Trading / MNPI
- Marketing / Performance
- Quantitative Trading Models
- Never-Before Examined Advisers

Examples of Recent SEC Initiatives

- Rule 105 Update
- Late Regulatory Filings

Government Enforcement & Internal Investigations

Michael G. Considine

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Government Enforcement & Internal Investigations

SEC Enforcement Has Been Aggressive

- Those in top positions were once prosecutors
- SEC is collaborating early with DOJ
- FBI agents are dispatched to conduct interviews
- SEC recently entered first DPA with an individual

SEC Requesting that *Funds* Conduct Internal Investigations and Report Back

Responding to Investigations -- Even Where No Wrongdoing Occurred -- Is Disruptive and Onerous

Hedge Funds Face a Myriad of Issues When Responding to Government Investigations

Counterparty

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Lauri K. Goodwyn

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Counterparty

New documentation requirements

- Futures agreements with derivatives clearing addenda
- Cleared derivatives execution agreements
- Bunched order agreements
- SEF agreements
- ISDA Protocols relating to regulations taking effect

Old documentation clean-ups

- Correcting answers on ISDA Protocols that may have changed (e.g., U.S. Person definition)
- Segregation of Independent Amount collateral

Employment

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Employment

Developments In Whistleblower Law

- Reporting to the SEC under Dodd-Frank - SEC anticipates increased activity and enforcement, including more bounties on the way
- Hot Topic in the Courts
 - Are Dodd-Frank internal whistleblowers protected from retaliatory discharge or not?
 - Are employees of a privately-held contractor of a public company protected by the anti-retaliation provisions of the Sarbanes-Oxley Act?
- What to do?
 - Encourage internal reporting
 - Document performance issues
 - Seek counsel before taking adverse action against employees who have raised compliance issues

Discrimination and Workplace Policies

- New pregnancy discrimination laws
- Earned sick pay
- Social media

Protecting Your Business – What to Include In Employment Agreements

- Confidentiality
- Notice provisions (aka “Garden Leave”)
- Non-Solicitation of client and employees
- Non-Competition

ERISA/Employee Benefits

S. John Ryan
Frank Mitchell

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ERISA/Employee Benefits

Structuring to Stay Below ERISA's 25% Threshold

- Master/feeder fund structures & "hardwiring"
- Consolidating class structures

Department of Labor Investigations of Investment Managers

On the Horizon: Expanded Definition of "Fiduciary" Under ERISA

- DOL expected to re-propose the new definition in mid- to late-2014
- As definition of fiduciary is expanded, exemptive relief available to fiduciaries also expected to expand

Affordable Care Act Mandate

- "Shared responsibility" provisions of ACA applicable to employers with 100 or more full-time employees in 2015
- Employers with 50-99 full-time employees granted extension until 2016 to comply (one year later than initially proposed)

Trusts & Estates

Hume R. Steyer
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Trusts & Estates

Deferred Income Distributions and Grantor CLATs

- 2017 deadline, with large deferrals coming onshore in the next few years
- Grantor CLATs: obtain a current income tax deduction; donate money to charity; and shift property gift tax free to your family

Business Succession for your Hedge Fund

- Short term issues: trading authorization, interim governance and investor communication
- Long term issues: monetization vs. continued equity participation, estate liquidity and new management

Transferring Hedge Fund Interests in 2014

- Low interest rates
- Discounts
- “Vertical slice”
- Ongoing income tax obligations

Proposed Changes to the New York State Estate Tax and Trust Income Taxation

- Enactment uncertain
- Any taxable gifts made after April 1 may be included in your estate for New York estate tax purposes
- NY resident trust beneficiaries may pay tax on accumulated income from distributions after June 1
- Incomplete Non-Grantor Trusts may not work after June 1

Tax

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Tax

FATCA Update

- The Cayman IGA was signed late last year
- Next steps are Cayman implementing legislation and regulations (draft expected by spring/early summer)
- Under the IGA, Cayman funds will not be required to enter into a FATCA agreement with the IRS
- Cayman funds still need to register with the IRS as “deemed-compliant FFIs”

FATCA Registration

- Offshore funds need to register with IRS to obtain GIIN
- Registration is via an online portal
- Biggest issue is determining whether funds are in an “expanded affiliated group”
- Should register by April 25, 2014 for July 1, 2014 effectiveness

FATCA Next Steps

- After registration, managers need to:
 - Update sub docs by July 1 for new investors
 - Contact existing investors (over the next two years) to determine their FATCA status
 - Review withholding tax and mandatory redemption provisions in fund governing documents
 - Be aware of application of FATCA to counterparty documents and investments

Conclusion

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Jon P. Brose is a partner in the Tax Group. Jon represents investment funds (including hedge funds, funds of funds, and private equity funds) and their managers on all aspects of their businesses, including management entity and fund formation, seeding arrangements, mergers and acquisitions, partnership tax issues, international tax issues, compensation arrangements, and ongoing investment activities and transactions. Jon is experienced with a broad range of investment strategies and asset classes, including long/short equity, credit, distressed asset, commodities and real estate.

Jon also advises on tax issues relating to CLOs, CDOs and other structured finance and securitization vehicles. In this capacity, Jon has represented managers, underwriters, issuers and placement agents.

In addition, Jon provides tax advice regarding securities offerings, structured products, derivatives and other financial instruments, repurchase agreements, credit facilities, and partnerships and other joint ventures, as well as a variety of other commercial transactions and capital markets activities.

Jon received a B.A. in English and History from Miami University in 1992, a J.D. from Emory University School of Law (Order of the Coif) in 1995, and an LL.M (in Taxation) from New York University School of Law in 2003. His past experience includes serving as law clerk in federal district court, practicing as a corporate lawyer, and working on the trading desk of a global investment bank. Jon is a member of the New York State Bar Association. Jon is admitted to practice law in New York.

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James C. Cofer is a partner in the Tax Group.

Jim represents private investment funds (including hedge funds, funds of funds, and private equity funds) and mutual funds on a variety of tax issues, including initial structuring, investments by tax-exempt entities, investments in underlying funds, transactional matters, financial instruments, seed capital arrangements, and deferred compensation structures (including Section 409A of the Internal Revenue Code).

Jim also works closely with fund managers on management company tax planning, including incentive compensation arrangements for key employees, outside investments in management companies, and sales to third parties.

In addition to his investment funds practice, Jim represents international and domestic shipping companies on all aspects of their operations. Jim advises shipping companies on Section 883 of the Internal Revenue Code, joint ventures, cross-border transactions, the controlled foreign corporation and passive foreign investment company rules, internal restructurings, and the U.S. tonnage tax regime. Jim has also represented numerous shipping companies (including MLPs) in their public offerings of equity and debt securities, as well as the underwriters of such offerings.

He received a B.A. (with high honors) from Rutgers University in 1997, a J.D. from New York University School of Law in 2000, and an LL.M (in Taxation) from New York University School of Law in 2005. Jim is admitted to practice law in New York.

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Michael G. Considine

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Michael G. Considine is a partner in the Litigation group and co-head of the Government Enforcement and Internal Investigations practice. Mike represents corporations and individuals in complex federal and state criminal investigations, prosecutions, and regulatory probes, and in civil matters related to such inquiries. Among the more significant corporate matters, he has represented:

- Various hedge funds investigated for insider trading by the SEC and DOJ
- An international company investigated for Regulation FD violations
- A financial institution in an SEC probe relating to reserve issues
- A foreign manufacturing company investigated for alleged antitrust violations; a separate foreign company investigated for alleged SEC violations
- A U.S. company in response to FCPA allegations

Mike has counseled clients during the execution of federal search warrants and their aftermath, overseen and conducted internal investigations for corporations, represented clients throughout criminal investigations and proceedings, and negotiated favorable resolutions on behalf of numerous clients. These matters have involved allegations of wrongdoing in varied arenas, including financial services, antitrust, healthcare, the FCPA, defense contracting, environmental, securities, tax and banking.

In addition, during the Enron probe, the DOJ selected Mike to be a federal monitor of an international bank for a three-year period. In this capacity, he monitored the implementation of agreements reached among the bank, the DOJ, and other domestic and foreign government regulatory entities.

In July 2008, Mike was nominated by President George W. Bush to be the United States Attorney for the District of Connecticut. He has also served as an adjunct professor of law and co-taught a course titled: "Criminal Prosecution Affecting Financial Firms - A Defense Perspective" for New York Law School's LLM Program in Financial Services Law.

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Michael G. Considine

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Prior to joining private practice, Mike had been a supervisory federal prosecutor, serving as the Deputy Chief of the Long Island offices of the United States Attorney's Office for the Eastern District of New York. As a prosecutor, Mike handled numerous trials and appeals in cases involving bank fraud, tax fraud, racketeering, and other offenses.

Mike served as a law clerk to the Honorable Shirley W. Kram in the S.D.N.Y in 1985-86.

Mike was nominated by his peers for inclusion as one of the world's leading Business Crime Defense Lawyers for 2013 in Who's Who Legal. Mike was also chosen for inclusion in The Best Lawyers in America, White Collar Criminal Defense, 2010-2013, and has been recognized as a Connecticut Super Lawyer, 2006-2012.

Mike received a B.A. from Boston College, *magna cum laude*, in 1980 and a J.D. from Georgetown University Law Center in 1984. He is admitted to practice law in the State of New York, the United States Court of Appeals for the Second Circuit, the United States District Courts for the Southern and Eastern Districts of New York, and the District of Connecticut.

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Lauri K. Goodwyn is counsel in Seward & Kissel's Corporate Finance Group. She joined the Firm in 2005.

Lauri has extensive experience representing both buy and sell side market participants (most recently, working with many of the Firm's hedge fund clients) in the commodities, derivatives and securities markets on a wide array of matters including prime brokerage, derivative and other counterparty arrangements, structuring and documenting transactions, compliance and investigatory reviews, implementing new products, analyzing credit and risk issues, preparing trading documentation, responding to counterparty defaults and market disruptions, and regulatory matters. Lauri offers a unique perspective derived from her prior experience as Deputy General Counsel of a broker-dealer and futures commission merchant and before that as a former litigator.

Lauri received a B.A. from Dartmouth College in 1986 and a J.D. from New York University School of Law in 1990. She is admitted to practice law in New York.

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Craig T. Hickernell

Partner

Craig T. Hickernell is a partner in Seward & Kissel's Corporate Finance Group. Craig has practiced at the Firm since 1977, and has been a partner since 1986.

Craig frequently represents underwriters, placement agents and issuers of commercial paper, medium-term notes, certificate of deposit notes, and bonds and notes issued by corporations, banks and governments. These transactions often involve securitizations to remove assets from the balance sheets of the originators. In addition, Craig advises clients in connection with swaps, repurchase transactions, securities lending, brokerage agreements, options, forwards, and other types of derivative products.

Craig has frequently represented bank clients in connection with their lending operations, representing banks both in single bank loans and as agents in connection with syndicated credits. Craig's particular expertise is in the restructuring of troubled credits. He has acted as lead counsel to bank advisory committees representing hundreds of creditor banks in the restructuring of the sovereign debts of Bolivia, Costa Rica and Panama, through the issuance of "Brady Bonds" and otherwise, in addition to a large number of private sector debt restructurings. He also represents borrowers, including investment managers and funds, in connection with credit facilities.

Craig is a member of the American Bar Association, the New York State Bar Association and the Association of the Bar of the City of New York.

Craig received his B.A. from Pennsylvania State University, *summa cum laude*, in 1974 and his J.D. from Harvard Law School in 1977. He is admitted to practice law in New York

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Frank L. Mitchell is an associate in the ERISA and Tax Groups. His practice focuses on ERISA and employee benefits and executive compensation matters, including structuring and compliance matters with respect to ERISA's "plan asset" rules in connection with private investment funds and issuers of asset back securities, Title I fiduciary compliance matters, negotiating ISDA and prime brokerage agreements, and advising clients with respect to compensation and equity arrangements, treatment of employee benefits in mergers and acquisitions, and issues arising under the deferred compensation rules of Code Sections 409A and 457A.

Frank received a B.A. from Emerson College in 2000, a J.D., *cum laude*, from Fordham University School of Law in 2009, and an LL.M. in Taxation from New York University School of Law in 2010. He is admitted to practice law in New York.

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Steven B. Nadel is a partner in Seward & Kissel's Investment Management Group. He joined the Firm in 1997. He is also the founding editor of *The Private Funds Report* and *The Private Funds Bulletin*, two Group newsletters.

Steve has extensive experience in issues relating to the establishment and ongoing operation of hedge funds, funds of funds (U.S. and offshore), private equity funds, separate accounts, registered investment advisers, commodity pool operators and commodity trading advisors, as well as related matters, including management company structuring, fund marketing, employment agreements, solicitation agreements, joint ventures, seed capital arrangements, regulatory compliance and general organizational matters.

Steve's strategic, practical, highly responsive approach is well known throughout the industry. Through his large network, he is able to source practical industry trends, which he seeks to impart in addition to his legal guidance. He represents a wide variety of clients ranging from start-up entrepreneurs to very large, prominent institutions, and he is considered by the various services providers in the space (including accountants and brokers) to be one of the premier attorneys in the alternative investment management arena.

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Steven B. Nadel

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Steve wrote a chapter on U.S. private investment fund regulation for the book entitled *The Capital Guide to Alternative Investment*, as well as for *The Review of Securities & Commodities Regulation*. He has also authored the following investment management articles: Foresight for Established Managers, *Law 360*, June 2010; The Expansion of Hedge and Private Equity Funds, *Law 360*, May 2010; How to Reinvigorate Investment in Hedge Funds, *HedgeWorld.com*, July 2009; Hedge Funds Affected by New Rules, *2009 Hedge Fund Industry Report*; State Level Investment Adviser Registration, *Private Investment Forum*, Fourth Quarter 2001; The Principal Elements of Private Equity, *Private Asset Management*, May 3, 1999; An Accountant's Guide to the Major Legal Issues Affecting Hedge Funds, *The CPA Journal*, October 1998; and Becoming an SEC-Registered Investment Adviser: Understanding What's Really Involved, *Hedge Views*, Summer 1998. Steve is a highly sought after lecturer who speaks regularly on various investment management topics, and who is also often quoted in many leading business and legal publications, including the New York Times, the Wall Street Journal and Bloomberg. He is listed in the Super Lawyers New York-Metro edition. He also previously taught a course at the New York Institute of Finance titled, "How to Start a Hedge Fund."

Steve is a member of the American Bar Association and the New York State Bar Association. Steve also sits on the Boards of Directors of the charities Hedge Funds Care and the RBaby Foundation.

Steve received a B.S. from New York University's Leonard N. Stern School of Business, *magna cum laude*, in 1988 and a J.D. from Brooklyn Law School, *magna cum laude*, in 1991. He is admitted to practice law in New York and New Jersey.

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Anne C. Patin is a partner in Seward & Kissel's Litigation Group. Anne has been practicing law since 1994.

Anne provides litigation services in a wide range of business matters involving contract disputes, employment law, banking and securities laws, insurance disputes and partnership matters. In addition to representing clients in the State and Federal courts, Anne handles arbitrations and mediation proceedings. Anne also advises clients on employment policies and practices, including hiring and termination decisions, compliance with discrimination statutes, employee handbooks, family and medical leave, restrictive covenants, reductions in force, employment contracts and compensation matters.

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Anne received an A.B. from Brown University in 1987, an M.S. from Columbia University in 1989 and a J.D. from Fordham University School of Law in 1994. She is admitted to practice law in the State of New York, and in the United States District Courts for the Southern and Eastern Districts of New York.

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Pat's practice specialties include the representation of investment advisers and related regulatory compliance; the formation and representation of private investment partnerships, group trusts and various offshore investment vehicles; the formation and CFTC registration of commodity pools, commodity pool operators and commodity trading advisors; the formation and ongoing representation of registered investment companies (open-end and closed-end funds) and their managers, distributors, underwriters and other service providers; and general securities and general corporate matters.

Pat received an A.B. from Mount Holyoke College, *magna cum laude*, in 1981 and a J.D. from Albany Law School of Union University in 1986. She is admitted to practice law in New York.

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S. John Ryan is a partner in and head of Seward & Kissel's Employee Benefits Group. He joined the Firm in 1998.

John advises a variety of clients -- publicly and closely held corporations, partnerships, governmental entities, tax-exempt foundations and sole proprietorships -- concerning all aspects of employee benefits matters. These matters include representation involving the structuring, drafting, operation, amendment and termination of qualified and non-qualified pension, profit-sharing, stock bonus and employee stock ownership plans, individual retirement accounts, stock option plans and group life, disability, medical reimbursement, and other types of welfare plans.

John has particular expertise with the fiduciary aspects of ERISA. He regularly assists clients in developing investment products for the pension plan market, tailoring investment products for specific plan investors and analyzing the fiduciary duties, and prohibited transaction risks imposed by these investment structures, specific investment agreements or potential transactions on money managers.

John is a member of the American Bar Association (section on taxation) and has been recognized by Best Lawyers in the practice of Employee Benefits (ERISA) Law in the years 2006 - 2013, inclusive.

John received a B.A. from The University of the South in 1982 and a J.D. from New York Law School in 1987. He is admitted to practice law in New York and New Jersey.

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Scott M. Sambur is an associate in the Trusts & Estates Group. Scott represents fiduciaries and individuals with substantial net worth throughout the full range of estate and transfer-tax planning and administration, focusing on the transfer of assets to beneficiaries at the lowest tax cost while achieving overall family and charitable objectives. He advises clients on tax-effective strategies to shift both future wealth and existing wealth, using sophisticated trust planning, family investment vehicles, life insurance and charitable giving. Scott works closely with members of the taxation, investment management and maritime groups at Seward & Kissel to craft comprehensive solutions addressing clients' family and business planning objectives.

Scott advises clients on techniques for charitable giving, including the establishment and administration of charitable foundations, while helping clients to navigate the complicated rules governing the directors and officers of private foundations. He has worked with numerous clients to set up charitable split-interest trusts, helping the charitably-inclined to give large sums to worthy causes while at the same time transferring considerable wealth to members of their family on a tax-advantaged basis.

Scott is experienced with the complicated laws governing non-resident aliens who own assets in the United States or have U.S. family members, as well as U.S. citizens owning foreign assets, holding dual citizenship, residing abroad or considering expatriation. He has advised multiple clients on complex offshore business succession and estate planning matters, and is well-versed in the many rules governing foreign trusts with U.S. beneficiaries.

Scott received an A.B. from Harvard College in 2003 and a J.D. from Harvard Law School in 2006, and he served as a law clerk to the Honorable Bruce A. Markell, of the United States Bankruptcy Court, District of Nevada. He is currently a member of the New York City and State Bar Associations, the American Bar Association and the International Bar Association. Scott is admitted to practice law in New York and Virginia.

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Julia is the co-author of "Occupying the Boardroom: Increasing Government Regulation and Growing Public Anger" which appeared in *Employment Law 2012: Top Lawyers on Trends and Key Strategies for the Upcoming Year*.

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Hume specializes in Trusts & Estates matters. His practice is focused primarily in the field of sophisticated estate and trust planning and administration, as well as in the establishment and administration of private and public charitable entities. The planning aspect of his practice includes advising on and implementing a broad range of family and business arrangements designed to promote financial stability and to minimize taxation. Additionally, Hume handles tax and probate litigation and works with clients to realize their philanthropic objectives.

Hume is a member of the Association of the Bar of the City of New York, and of the New York State and American Bar Associations. Hume is a member of the boards of the Sharonsteel Foundation, the Open Space Institute, and North Country School/Treetops. Hume is also on the board of directors for the Storm King Art Center in Mountainville, NY. He is a former Trustee of the Tuxedo Park School and the American Federation for Aging Research, and he served from 2006-2009 as the Town Justice of Tuxedo, New York.

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Rob is a contributing author to *Hedge Funds: Law and Regulation* (Sweet & Maxwell 2001) (chapter entitled, "U.S. Legal and Regulatory Issues Faced by Offshore Funds and Their Sponsors") and has authored articles on various investment management topics. Rob is a frequent speaker on "hedge fund" and investment management related issues.

Rob received a B.S. from SUNY Albany in 1980, a J.D. from St. John's University School of Law in 1983 and an LL.M. in Tax from New York University School of Law in 1989. He is admitted to practice law in New York. Rob is a member of the American Bar Association (Business Section) and the International Bar Association.

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