REMINDER – PERIODIC FILING AND NOTICE REQUIREMENTS FOR PRIVATE EQUITY FUNDS

December 21, 2009

To Our Clients and Friends:

Despite the perception that private equity funds are unregulated, they are, in fact, subject to various types of regulation under U.S. federal law. With year-end approaching, we wanted to remind our private equity fund clients and friends to check their internal compliance procedures and/or "tickler" lists to ensure that they are up-to-date and in compliance with any annual or quarterly reporting requirements that may be imposed by law or pursuant to the partnership agreements and side letters for their funds (in addition to any tax filing or reporting obligations). Examples of such periodic delivery requirements may include:

Annual Privacy Notices. Certain private equity funds are required by U.S. law to send a privacy notice to each limited partner who is an individual at the start of the partner's relationship with the fund and annually thereafter. The privacy notice must describe the fund's policy regarding disclosure of current and former limited partners' non-public information and, in certain cases, must permit any limited partner who is an individual to opt out of the fund's disclosure of such information.

On November 16, 2009, the Federal Trade Commission, Securities and Exchange Commission (SEC) and other federal regulators joined together to issue a long-anticipated model privacy form that private equity funds and other financial institutions may use to make privacy disclosures. Use of the model form is not mandatory, but firms that elect to use the two-page model benefit from a regulatory safe harbor. The model form is available at http://www.sec.gov/news/press/2009/2009-248.htm.

Annual Update of Form ADV. All registered investment advisers must file with the SEC, within 90 days after the end of the registrant's fiscal year, an amendment updating Part I of the registrant's Form ADV. Part II of the Form ADV (the brochure) must also be updated, although it is not filed with the SEC. Registrants must also offer to furnish a copy of the brochure to clients on an annual basis. Although there is no specific obligation of a registered adviser to provide its brochure to limited partners, many sponsors of private equity funds offer to furnish a copy of Part II to investors in their funds.

Annual Compliance Review. A registered investment adviser must maintain, adopt and implement written policies and procedures reasonably designed to prevent violation of the U.S. Investment Advisers Act of 1940, as amended, by the adviser and its employees. In

addition, the adviser must review, no less frequently than annually, the adequacy of these policies and procedures and the effectiveness of their implementation. If they have not already done so, registered advisers should begin planning the annual review of their policies and procedures.

Filings Pursuant to the Securities Exchange Act of 1934. In addition to forms, such as Schedule 13D, Schedule 13G and Form 4 (which must be filed following certain purchases and sales), there are certain additional filings that may need to be made periodically with the SEC, such as:

- *Form 5:* Directors, officers and 10% stockholders of public company issuers may be required to file with the SEC an annual statement of beneficial ownership on Form 5 of certain transactions (such as gifts) exempt from the Form 4 "changes in beneficial ownership" filing requirements, as well as for transactions that should have been reported on a Form 4 but were not. If a Form 5 must be filed, it is due within 45 days of the issuer's fiscal year end.

- *Form 13F:* Institutional investment managers (including private equity and hedge fund managers) that exercise investment discretion over $100 million or more (by fair market value) of Section 13(f) securities must report their holdings of such securities on Form 13F. For this purpose, Section 13(f) securities are, generally, securities traded on an exchange (including Nasdaq) and restricted securities of the same class. (The SEC publishes a quarterly "Official List of Section 13(f) Securities," which is available at http://www.sec.gov/divisions/investment/13flists.htm.) In determining whether a fund manager has discretion over $100 million or more of Section 13(f) securities, a manager should aggregate each fund and other securities, portfolios and accounts over which it exercises investment discretion. However, when determining whether a fund manager has discretion over $100 million or more of Section 13(f) securities, the manager need not count securities issued by a person whom the manager "controls." The 2010 filing requirement will be triggered if, on the last day of any month in 2009, Section 13(f) securities under management are in excess of $100 million. In that case, a Form 13F will need to be filed by February 15, 2010, and thereafter on a quarterly basis.

- *Form SH*: Institutional investment managers that file a Form 13F for a calendar quarter had been subject to the SEC's temporary Rule 10a-3T, including the requirement to report short sales on Form SH. In July 2009, the SEC confirmed that it would not renew or extend the rule beyond the August 1, 2009 expiration date. Therefore, the final

Form SH filing deadline was July 31, 2009. In lieu of extending or amending Rule 10a-3T, the SEC and self-regulatory organizations (SROs) are working together to substantially increase the availability of short sale volume and transaction data and to make this information available through the SROs' websites.

- *Schedule 13G:* All 5% beneficial owners of public company issuers who are exempt from the "long-form" filing requirements of Schedule 13D must nonetheless disclose such holdings (and any changes in such holdings that have not been previously reported) on the "shorter-form" Schedule 13G. Eligible Schedule 13G filers include investors who acquired shares pre-IPO, certain qualified institutional acquirers and investors who are considered "passive" (because they hold less than 20% of the securities and did not acquire the securities with the intent to exercise control with respect to the issuer). If a Schedule 13G must be filed, it is due within 45 days of the end of the calendar year in which the reporting requirement was triggered.

ERISA-Related Filing Obligations.

- *Annual VCOC Certifications:* Many private equity funds operate as "venture capital operating companies" (VCOCs) in order to avoid being deemed "plan assets" subject to the U.S. Employee Retirement Income Security Act of 1974, as amended, and have agreed with some or all limited partners to deliver an annual certification as to the fund's VCOC status. In general terms, a fund will qualify as a VCOC if, during the fund's "annual valuation period," (a) at least 50% of the fund's assets that are invested in long term investments (valued at cost) are invested in venture capital investments (*i.e.*, investments in operating companies with respect to which the fund has or obtains management rights) or derivative investments, and (b) the fund actually exercises management rights in the ordinary course of its business with respect to one or more of its venture capital investments. Note that each fund's annual valuation period may be different because it is established by the fund itself.

- *Form 5500:* Some private funds are operated as "plan assets" subject to ERISA. Such funds typically agree either to (a) file as a direct filing entity (DFE) on IRS Form 5500 or (b) provide ERISA investors with the necessary information concerning the fund to include on the investor's IRS Form 5500. If a fund files as a DFE, the return (Form 5500) is due 9½ months after the end of the fund's fiscal year.

Under current Department of Labor guidance, a private fund that relies on the 25% exception is now required to provide information to its ERISA investors concerning direct and indirect compensation received by its manager or general partner as well as placement fees paid in connection with a plan's purchase of an interest in the fund. This information will be reported on the Form 5500 of the ERISA investor, with the first such filing occurring in 2010 or later, depending on the plan year of the ERISA investor. Private funds should comply with requests by ERISA investors (including those set forth in side letter provisions) because ERISA investors are required to identify on Form 5500 each service provider, such as a fund manager, that fails to provide the necessary information. Under a special rule for the 2009 plan year, ERISA investors will not be required to list those service providers who fail to provide the necessary information if the service provider furnishes a statement to the effect that it made a good faith effort to make any necessary recordkeeping and information system changes in a timely fashion and, despite such efforts, the service provider was unable to complete the changes for the 2009 plan year.

Other Contractual Requirements. Most private equity fund agreements provide for the delivery of annual audited, and sometimes quarterly unaudited, financial reports to limited partners, and often include a number of additional annual and/or quarterly reporting requirements. Be sure to check your partnership agreements and side letters carefully for any additional contractual reporting obligations.

In addition to the obligations addressed above, there are various tax filing and reporting obligations that we would be happy to discuss with you. Please feel free to contact us if you have any questions about the above.

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