SEWARD & KISSEL LLP

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- On August 2, 2013, the Division of Investment Management of the SEC released a Guidance Update on treatment of privately offered securities under Rule 206(4)-2 of the Investment Advisers Act (the "Custody Rule"). The SEC stated that it would not object if advisers did not maintain certain privately issued securities with a qualified custodian (non-transferrable stock certificates or "certificated" LLC interests) if the following conditions were met: (i) the client is a pooled investment vehicle that is subject to an annual audit in accordance with the requirements of the Custody Rule, (ii) the private stock certificates can only be used to effect a transfer or to otherwise facilitate a change in beneficial ownership of the security with the prior consent of the issuer or holders of the outstanding securities of the issuer, (iii) ownership of the security is recorded on the books of the issuer or its transfer agent in the name of the client, (iv) the private stock certificate contains a legend restricting transfer, and (v) the private stock certificate is appropriately safeguarded by the adviser and can be replaced upon loss or destruction.

- On August 27, 2013, the Office of Compliance Inspections and Examinations of the SEC released a Risk Alert concerning business continuity plans ("BCPs") of investment advisers. The Risk Alert summarizes observations by staff of the SEC's National Exam Program from an examination of the BCPs of approximately 40 investment advisers that were impacted by Hurricane Sandy.

- On July 2, 2013, the SEC announced three new initiatives that will concentrate the Division of Enforcement's resources on high-risk areas of the market: (a) the Financial Reporting and Audit Task Force will be dedicated to detecting fraudulent or improper financial reporting relating to financial statements, issuer reporting and disclosure, and audit failures, (b) the Microcap Fraud Task Force will target abusive trading and fraudulent conduct in securities issued by microcap companies, especially by targeting "gatekeepers," such as attorneys, auditors, broker-dealers, and transfer agents, and (c) the Center for Risk and Quantitative Analytics will employ quantitative data and analysis to profile high risk behaviors and transactions and to assist staff nationwide in conducting risk-based investigations and developing methods of monitoring for signs of possible wrongdoing.

- In a recent decision involving a family of private equity funds and one of their portfolio companies (*Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund* (Case No. 12-2312, 2013 US App. LEXIS 15190)), the U.S. Court of Appeals for the First Circuit Court held that a private equity fund may be responsible for the pension liabilities incurred by its portfolio companies. Under ERISA, an employer that withdraws from a multiemployer pension plan is liable for its allocable share of the plan's unfunded pension liabilities at the time of withdrawal. In addition to the employer itself, ERISA makes all members of the employer's "controlled group" jointly and severally liable for this liability. The controlled group of the employer includes "trades or businesses" that are under common control with the employer through parent-subsidiary or brother-sister relationships of at least 80% ownership. In connection with its 2008 bankruptcy, Scott Brass Inc., a portfolio company that was 100% owned by three Sun Capital funds, completely withdrew from a multiemployer pension plan, which resulted in the assessment of withdrawal liability in excess of $4.5 million. Notwithstanding the widely held belief that a fund could not be a "trade or business", the court held that certain activities of the general partner of one of the Sun Capital funds (for example, the fund's general partner provided management services to Scott Brass for a fee) should be attributed to the fund for ERISA purposes, and thus the fund was engaged in a "trade or business" and therefore potentially liable for the portfolio company's pension withdrawal liabilities.

- Pursuant to the Dodd-Frank Act, on July 25, 2013 the SEC issued its first Staff Report relating to Form PF.

- On August 27, 2013, the SEC issued an administrative order barring a portfolio manager of a Colorado investment adviser for five years from the securities industry for misleading the firm's chief compliance officer. The portfolio manager did not pre-clear or report approximately 640 of his personal trades, including at least 91 trades in securities held or to be acquired by registered investment companies advised by the firm. The SEC sanctions are the first it has imposed for violations of Rule 38a-1(c) under the Investment Company Act, which prohibits misleading or obstructing a chief compliance officer in the performance of his duties under the Investment Company Act.

SEWARD & KISSEL LLP
One Battery Park Plaza, New York, New York 10004
Telephone: (212) 574-1200 **Fax:** (212) 480-8421 **Electronic Email:** sknyc@sewkis.com
www.sewkis.com