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INVESTMENT MANAGEMENT SERVICES

SEC Registration and Compliance Considerations for Foreign Investment Advisors with U.S. Clients

When must a foreign investment advisor register with the SEC?

The Foreign investment advisers frequently seek access to U.S. investors through private funds, separately managed accounts, or other cross-border investment structures. One of the first legal questions these advisers must address is whether they are required to register with the SEC or whether they qualify for an exemption from registration under the Investment Advisers Act of 1940.

Unlike U.S.-based investment advisers, which generally register with state securities regulators until reaching specified assets under management ("AUM") thresholds, foreign investment advisers with U.S. clients typically look first to the SEC's registration framework. Although registration may become mandatory, Congress created several exemptions recognizing that foreign advisers often maintain only limited connections to the United States. The most significant exemptions are the Foreign Private Adviser Exemption, the Private Fund Adviser Exemption, and the Venture Capital Adviser Exemption. Determining whether one of these exemptions applies should occur before soliciting U.S. investors or accepting advisory clients, as registration status affects virtually every aspect of an adviser's compliance program.

What is the foreign private adviser exemption?

The Foreign Private Adviser Exemption is designed for foreign advisers conducting only limited advisory business in the United States. To qualify, an adviser generally must have no place of business in the United States, fewer than 15 U.S. clients and private fund investors combined, less than $25 million in assets under management attributable to those U.S. clients and investors, must not hold itself out publicly in the United States as an investment adviser, and may not advise a registered investment company or business development company.

Although these requirements appear straightforward, applying them often requires a detailed factual analysis. For example, advisers must determine not only the number of advisory clients they maintain but also the number of beneficial owners invested in private funds they manage. Unlike many other regulatory tests, advisers generally cannot simply count an entire private fund as a single client. Instead, the SEC requires advisers to "look through" the fund and count the underlying U.S. investors, including investors participating through master-feeder structures, certain derivative arrangements, and other layered investment vehicles.

Since eligibility depends upon multiple quantitative thresholds, advisers relying upon this exemption should periodically review both the number of U.S. clients and investors and the amount of U.S.-related assets under management to ensure continued compliance.

What constitutes a "place of business" in the United States?

Whether a foreign adviser maintains a U.S. place of business frequently determines whether registration exemptions remain available. Under SEC rules, a place of business generally includes any office where investment advisory services are regularly provided, where advisers routinely communicate with clients, or where advisory activities are held out to the public.

Importantly, administrative offices performing purely operational or back-office functions generally do not constitute places of business for purposes of these exemptions. Likewise, research conducted in the United States does not automatically create a place of business if investment decisions continue to be made independently from outside the United States. Instead, the SEC focuses on where continuous supervisory and investment management activities actually occur.

Accordingly, foreign advisers should carefully evaluate the functions performed by U.S.-based personnel before establishing offices or expanding domestic operations.

How are clients, investors, and assets counted?

One of the most technical aspects of the Foreign Private Adviser Exemption involves determining who qualifies as a client or investor. SEC rules permit certain family members, trusts, and affiliated entities to be treated collectively as a single client under specified circumstances. Likewise, corporations, partnerships, and affiliated organizations with identical ownership or common investment objectives frequently may be counted together.

Private funds, however, receive different treatment. Rather than counting a fund itself, advisers generally must count each underlying beneficial owner investing in that fund. Investors participating through feeder funds, master-feeder structures, and certain debt or derivative arrangements also may count toward the statutory limits.

Similarly, the SEC evaluates only assets attributable to U.S. clients and U.S. private fund investors when applying the exemption's $25 million assets under management threshold. Assets managed for non-U.S. clients generally remain irrelevant for this analysis. Because the counting rules are highly technical, advisers should regularly monitor both investor composition and assets under management before relying upon the exemption.

Who qualifies as a U.S. client?

Whether an investor is considered “in the United States” depends primarily upon residency rather than citizenship. Natural persons residing within the United States, entities organized under U.S. law, and certain discretionary and nondiscretionary accounts maintained for U.S. persons generally qualify as U.S. clients or investors for purposes of the registration exemptions.

Importantly, SEC rules evaluate residency at the time an advisory relationship or investment begins. Consequently, an adviser generally does not lose the exemption simply because a foreign client later relocates to the United States. This approach avoids requiring advisers to continuously monitor changes in client residency or terminate longstanding client relationships solely because of relocation.

Foreign advisers also should carefully consider how they market advisory services. Public advertising, maintaining U.S.-focused solicitation efforts, or otherwise holding themselves out as accepting U.S. advisory clients may jeopardize exemption eligibility. However, maintaining a website that includes an appropriate disclaimer indicating services are not directed toward U.S. persons generally will not, standing alone, constitute holding oneself out as an investment adviser in the United States.

What is the private fund adviser exemption?

Foreign advisers that exceed the limitations of the Foreign Private Adviser Exemption frequently may qualify instead for the Private Fund Adviser Exemption. Unlike the Foreign Private Adviser Exemption, this exemption permits advisers to manage an unlimited number of non-U.S. clients and unlimited assets outside the United States while focusing primarily upon U.S.-based advisory activities.

To qualify, the adviser’s only U.S. clients generally must be qualifying private funds, and assets managed from a U.S. place of business must remain below $150 million. Importantly, foreign advisers may continue managing unlimited private fund assets from offices located outside the United States because only assets managed from U.S. places of business count toward the statutory threshold.

For purposes of calculating assets under management, advisers must include proprietary assets, uncompensated accounts, and uncalled capital commitments while valuing assets on a gross basis without deducting liabilities. Advisers relying upon this exemption must annually review their assets under management and report those figures through annual Form ADV amendments. Once assets managed from U.S. locations exceed $150 million, advisers generally have a limited transition period to complete SEC registration.

What is the venture capital adviser exemption?

The Venture Capital Adviser Exemption provides another important alternative for advisers whose clients consist exclusively of venture capital funds. Unlike the Private Fund Adviser Exemption, this exemption applies regardless of the amount of assets under management. However, it is also significantly narrower because every client advised by the firm, both inside and outside the United States, must qualify as a venture capital fund under SEC rules.

Foreign advisers intending to advise hedge funds, private equity funds, separately managed accounts, or other investment vehicles generally become ineligible for this exemption immediately upon accepting those additional clients. Consequently, advisers should carefully evaluate anticipated business expansion before relying upon the Venture Capital Adviser Exemption as their long-term regulatory strategy.

What compliance obligations continue to apply even without registration?

Qualifying for an exemption from SEC registration does not eliminate all regulatory obligations. Advisers relying upon the Private Fund Adviser Exemption or Venture Capital Adviser Exemption generally become Exempt Reporting Advisers ("ERAs"), requiring the filing of portions of Form ADV, annual updating amendments, and compliance with SEC examinations and the antifraud provisions of the Investment Advisers Act.

Even advisers qualifying for the Foreign Private Adviser Exemption remain subject to the Advisers Act's antifraud provisions, including the SEC's Pay-to-Play Rule, which restricts certain political contributions and solicitation activities involving government entities. In addition, foreign advisers should independently evaluate state registration requirements because exemption from SEC registration does not automatically eliminate state-level registration obligations.

Which exemption is most appropriate?

Selecting the appropriate exemption depends upon the adviser's business model, investor base, and long-term growth strategy. The Foreign Private Adviser Exemption offers the least ongoing reporting but imposes strict limitations on U.S. clients, investors, and assets under management. The Private Fund Adviser Exemption provides substantially greater flexibility for advisers focused on private funds, particularly those managing significant assets outside the United States. The Venture Capital Adviser Exemption removes assets-under-management limitations altogether but restricts advisers exclusively to venture capital funds.

Because advisers cannot combine elements of multiple exemptions to avoid registration, eligibility should be analyzed carefully before entering the U.S. market. As advisory businesses evolve, periodic review of registration status remains essential to ensuring continued compliance with both federal and state securities laws.

Contact Raj R. Mahale, Esq. for more information:

Raj R. Mahale
Partner, Investment Management, M&A, and International Transactions

KPPB LAW

Direct: 203.570.0308
Main: 678.443.2220
Fax: 678.443.2230
Email: rmahale@kppblaw.com
Website | **Blog** | **Facebook** | **News**
575 Fifth avenue – Suite 1400
New York, NY 10017

470 James Street
New Haven, Connecticut 06513

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