

# Are Foreign Investment Advisers required to register?



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This document has been prepared for the assistance of those who are considering registration of a foreign company in the Cayman Islands. It is not intended to be exhaustive but merely to provide general information to our clients and their professional advisers. It is highly recommended that legal advice be sought to determine whether registration is required.

- Dodd Frank Act removed many of the private adviser exemption requirements.<sup>i</sup>
- A Foreign Private Adviser can still be able to avoid the need to register with the SEC by satisfying the Foreign Private Adviser Exemption.<sup>ii</sup>
- Relief under the Foreign Private Adviser Exemption is only granted if the foreign private adviser can demonstrate that it:
  1. has no place of business in the US;
  2. has, in total, fewer than 15 clients and investors in the US in private funds advised by the adviser;
  3. has less than US\$25 million of aggregate assets under management attributable to such clients and investors; and
- 4. neither holds itself out generally to the public in the US as an investment adviser nor advises mutual funds or business development companies.<sup>iii</sup>
- If the Foreign Private Adviser Exemption cannot be met then there are certain conditions where an Adviser can rely on the revised Private Adviser Exemption criteria. Please find below a decision tree which provides a high level overview of the factors which will need to be evaluated to determine whether an Adviser will be required to register with the SEC. It is highly recommended that legal advice be sought to determine whether registration is required.

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## Compliance Requirements for Advisers required to register with the SEC

- Will be required to provide substantial information about private funds under their management on a new Form PF, to be filed either annually or quarterly depending on the total firm assets under management.<sup>1</sup>
- Have to develop a compliance program, including developing and implementing policies and procedures reasonably designed to prevent violations of the securities laws, conducting an annual review of those policies and procedures<sup>2</sup>, and designating a chief compliance officer.<sup>3</sup>
- Required to establish, maintain, and enforce a Written Code of Ethics, which must apply to the adviser's personnel and must include provisions on standards of business conduct, compliance with federal securities laws, reporting of personal securities transactions, and reporting violations of the Code.<sup>4</sup>
- Must maintain books and records, including substantial records relevant to the adviser's business.
- Must adopt and implement a Written Proxy Voting Policy.
- Must disclose information about their advisory business, advisory personnel, fee arrangements, industry affiliations, and control persons.
- Required to comply with rule 206(4) -2 of the Investment Advisers Act if the Adviser is deemed to have custody of assets. As an Adviser to pooled investment vehicles part of satisfying the requirement is being able to rely on the audit of the pooled investment vehicles from (a) a PCAOB Registered Firm that is (b) subject to regular inspection and (c) independent under the SEC rules.
- Privacy Rules- Title V of the Gramm-Leach-Bliley Act.
- FATCA Compliance.<sup>iv</sup>

## Compliance Requirements for Advisers who are not required to register with the SEC

- May be required to provide substantial information about private funds under their management on a new Form PF, to be filed either annually or quarterly depending on the total firm assets under management.<sup>5</sup>
- A Foreign Private Adviser is not required to file anything with the SEC or comply with any compliance program or record keeping requirements.
- Still subject to the Investment Advisers Act and could be subject to investigation under the antifraud provisions within the Act just like Registered Advisers.<sup>6</sup>
- Exempt Foreign Private Advisers must still apply resources towards monitoring the number of US Person's investments as well as capital appreciation on the AUM which could breach the US\$25M limit.
- Exempt Foreign Advisers are still regulated by the SEC on the political donations towards politically exposed persons in the US.<sup>7</sup>
- All Advisers whether registered or not are required to comply with Insider Trading rules.<sup>8</sup>
- If not able to satisfy the requirements for an exempt foreign private adviser, might be able to satisfy the private adviser exemption. Exempt Private Advisers are subject to similar SEC Reporting and recordkeeping requirements as Registered Advisers.
- Privacy Rules. Title V of the Gramm-Leach-Bliley Act protects the privacy interests of consumers of financial services, including clients of SEC-registered investment advisers. 229 SEC rules implementing the statute protect only individuals' personal privacy interests, and not those of businesses or individuals who seek to obtain the services of an adviser for business purposes.<sup>9</sup>
- FATCA Compliance.

### Source

<sup>i</sup> [www.sec.gov/news/press/2011/2011-133.htm](http://www.sec.gov/news/press/2011/2011-133.htm)

<sup>ii</sup> Page 102 Section C: [www.sec.gov/rules/final/2011/ia-3222.pdf](http://www.sec.gov/rules/final/2011/ia-3222.pdf)

<sup>iii</sup> [www.sec.gov/rules/final/2011/ia-3222.pdf](http://www.sec.gov/rules/final/2011/ia-3222.pdf)

<sup>1</sup> Systemic Risk Reporting on Form PF. In October 2011, the SEC adopted rule 204(b)-1 requiring registered advisers with at least US\$150 million in private fund assets under management to submit regular reports on new Form PF. Advisers must file Form PF electronically on a confidential basis. Form PF is designed, among other things, to assist the Financial Stability Oversight Council in its assessment of systemic risk in the US financial system.

<sup>2</sup> Rule 206(4) - 7

<sup>3</sup> Chief Compliance Officer. Each adviser must designate a chief compliance officer ("CCO"). The CCO must be knowledgeable about the Act and have the authority to develop and enforce appropriate compliance policies and procedures for the adviser. The CCO need not be an employee who does not have other duties.

<sup>4</sup> See page 41 section 9 [www.sec.gov/about/offices/oia/oia\\_investman/rplaze-042012.pdf](http://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf)

<sup>5</sup> [www.sec.gov/divisions/investment/pfrd/pfrdfaq.shtml](http://www.sec.gov/divisions/investment/pfrd/pfrdfaq.shtml) Advisers that manage at least US\$150 million of private fund assets, but less than the amounts that make them "large private fund advisers," complete only section 1 of Form PF. They file annually within 120 days of the end of their fiscal year.

<sup>6</sup> See page 8 [www.sec.gov/about/offices/oia/oia\\_investman/rplaze-042012.pdf](http://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf)

<sup>7</sup> Rule 206(4)-5(a).

<sup>8</sup> Insider Trading. Section 204A of the Act requires advisers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, non-public information by the adviser or any of its associated persons, including the misuse of material, non-public information about the adviser's securities recommendations and client securities holdings and transactions. Page 42 [www.sec.gov/about/offices/oia/oia\\_investman/rplaze-042012.pdf](http://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf)

<sup>9</sup> See rule 248.3(g)(1). The SEC's implementing rules can be found at 17 CFR Part 248 ("Regulation S-P"). The rules apply to SEC-registered advisers. Rule 248.1(b). Advisers that are unregistered or are registered only with the states are subject to privacy regulations overseen by the Consumer Financial Products Board. Regulation S-P was adopted under the Securities Exchange Act, the Investment Company Act, and the Advisers Act; therefore the SEC has the remedies available under those statutes as applicable in enforcing the privacy rules. The SEC staff has posted responses to frequently asked questions about Regulation S-P at [www.sec.gov/divisions/investment/guidance/regs2qa.htm](http://www.sec.gov/divisions/investment/guidance/regs2qa.htm). Where the laws of a foreign jurisdiction prevent a non-US large trader (whether itself a broker-dealer or adviser) from disclosing certain personal identifying information of an underlying principal. In such event, foreign large traders or representatives of foreign large traders may request an exemption from the SEC pursuant to section 36 of the Exchange Act and subsection (g) of rule 13h-1.

