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Client Alert
June 2011

Casting a Wide Net: SEC Significantly Expands Regulation of Non-U.S. Investment Advisers, Adopts Final Rules Under Dodd-Frank

On June 22, 2011, almost five months after the close of the formal public comment period, the U.S. Securities and Exchange Commission (the "**SEC**") adopted final rules relating to provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") that modify the U.S. Investment Advisers Act of 1940, as amended (the "**Advisers Act**"). These provisions expand the Advisers Act's coverage to include many formerly-exempt investment advisers to private equity and hedge funds. From the standpoint of non-U.S. investment advisers, the final rules are identical to the proposed rules in nearly all material respects. Two SEC releases, Rules Implementing Amendments to the Investment Advisers Act of 1940, Release No. IA-3221 (the "**Implementing Adopting Release**") and Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Release No. IA-3222 (the "**Exemptions Adopting Release**"), contain the published text of the final rules.

As predicted, the SEC officially postponed the compliance date for the expanded registration requirements. An investment adviser that becomes subject to registration under the Advisers Act due to the elimination of the "private adviser" exemption will not need to register with the SEC (or report information if an "exempt reporting adviser") until March 30, 2012. Investment advisers required to register with the SEC should plan to file their completed Form ADV (Parts 1 and 2) no later than February 14, 2012 to ensure compliance by the deadline.

This alert reviews the aspects of the Exemptions Adopting Release most relevant to investment advisers who are organized and have their principal place of business outside the United States (referred to here as "**non-U.S. investment advisers**"). In order of preference, these are (i) the complete exemption for "foreign private advisers" (the "**Foreign Private Adviser Exemption**") and (ii) the conditional exemption for investment advisers who act solely as advisers to private funds and who have less than $150 million of assets under management in the United States (the "**Private Fund Adviser Exemption**").

In addition, this alert summarizes the reporting, recordkeeping and examination requirements applicable to "exempt reporting advisers" (or "**ERAs**"), that is, investment advisers relying on the Private Fund Adviser Exemption (but not advisers relying on the Foreign Private Adviser Exemption). The Implementing Adopting Release requires both registered investment advisers and ERAs to report information about the private funds they advise including, in respect of each fund: its basic organizational, operational and investment characteristics,

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the gross value of its assets, the nature of its investors and the identity of its service providers. This information would, in most circumstances, be made available to the public without regard to its proprietary or competitively sensitive nature. Perhaps most significantly, the Implementing Adopting Release makes clear that although the SEC generally will not conduct routine examinations of ERAs, it will still have the authority to conduct on-site examinations of ERAs if the SEC believes an examination is necessary.

Review of the Final Rules

The exemptions most relevant to non-U.S. investment advisers are the Foreign Private Adviser Exemption, a complete exemption that imposes no ongoing compliance obligations, and the Private Fund Adviser Exemption, a conditional exemption that requires investment advisers to submit to the ERA compliance regime. As defined in the Dodd-Frank Act, a "private fund" is a fund that would be regulated as an "investment company" but for Section 3(c)(1) (excluding funds with not more than 100 owners) or Section 3(c)(7) (excluding funds owned by qualified purchasers only) of the U.S. Investment Company Act of 1940, as amended (the "**Investment Company Act**"). *The final rules make clear that any fund qualifying for exclusion under Section 3(c)(1) or Section 3(c)(7) may be treated as a private fund even if it also qualifies for exclusion from the definition of "investment company" pursuant to another provision of the Investment Company Act, such as Section 3(c)(5)(C) (excluding funds primarily engaged in acquiring interests in real estate).* In the case of an investment adviser who advises a private fund, the fund is generally deemed to be the adviser's "client" for purposes of the Advisers Act and the applicable exemptions (and is referred to here as a "**client private fund**"); the fund's investors are *not* clients in the absence of an independent advisory relationship.

For a short illustration of non-U.S. investment adviser eligibility requirements for the Foreign Private Adviser Exemption and the Private Fund Adviser Exemption under the SEC's final rules, see the flow chart that appears at the end of this alert.

Foreign Private Adviser Exemption

The Dodd-Frank Act provides a complete exemption from registration under the Advisers Act for any investment adviser who (i) has no place of business in the United States, (ii) has, in total, fewer than 15 clients in the United States and investors in the United States in client private funds, (iii) has aggregate assets under management attributable to clients in the United States and investors in the United States in client private funds of less than $25 million (or any higher amount specified by the SEC), and (iv) does not hold itself out generally to the public in the United States as an investment adviser. The Exemptions Adopting Release finalizes rule 202(a)(30)-1, which includes counting rules for clients and investors and definitions of certain terms used in the Foreign Private Adviser Exemption.

1. **Counting Clients.** The final rule includes "safe harbors" for counting clients broadly similar to those currently in effect under the "private adviser" exemption (which is repealed by the Dodd-Frank Act as of July 21, 2011). In addition, the final rule avoids potential double-counting by providing that an investment adviser need not count (i) a private fund as a client if any investor in the private fund was counted as an investor for purposes of determining the availability of the Foreign Private Adviser Exemption, or (ii) a person as an investor in a private fund if the person was also counted as a client.

2. **Counting Investors.** The final rule generally defines an "investor" in a private fund as any person or entity that would be included in determining the number of beneficial owners of the private fund under Section 3(c)(1) of the Investment Company Act or whether the private fund is owned exclusively by qualified purchasers under Section 3(c)(7) of the Investment Company Act. In a master-feeder structure, for example, the investors in the feeder funds, and not the feeder funds themselves, would be treated as investors in the master fund. The final rule also avoids potential double-counting by providing that an investment adviser may treat as a single investor any person or entity that has invested in two or more client private funds. Note, however, that holders of "short-term paper" (as that term is defined in section 2(a)(38) of the Investment Company Act) are deemed to be investors in a 3(c)(1) fund for purposes of the final rule. *The final rule, unlike the proposal, does not treat as investors beneficial owners who are "knowledgeable employees" (as that term is defined in the SEC's rule 3c-5 under the Investment Company Act) with respect to a private fund.*

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3. **"In the United States."** The final rule defines "in the United States" – a phrase used in the Foreign Private Adviser Exemption no less than five times – by incorporating certain defined terms used in Regulation S under the Securities Act of 1933, as amended (the "**Securities Act**"). Therefore, as a general matter, a place of business is in the United States if it is in the "United States," as defined in Regulation S, and a client or investor is in the United States if it is a "U.S. person," as defined in Regulation S.[1] In addition, the final rule clarifies that if a client or investor was not "in the United States" when it became a client of the investment adviser or acquired its interest in the investment adviser's client private fund (as applicable), the client or investor may continue to be treated as such even after relocating to the United States.

4. **Place of Business.** The final rule defines an investment adviser's "place of business" as any office where the adviser regularly provides investment advisory services or meets with or otherwise communicates with clients, and any location held out to the public as a place where the adviser conducts such activities. We believe that an office in the United States where an investment adviser engages solely in marketing activities for a client private fund, and meets with or otherwise communicates with investors and prospective investors in the fund, should not be deemed a place of business in the United States for purposes of the final rule. In this regard, however, the Exemptions Adopting Release muddies the waters by advancing an "intrinsic to the provision of investment advisory services" test for identifying a "place of business". According to the Exemptions Adopting Release, an office where an adviser conducts research in order to produce non-public information relevant to the investments of, or the investment recommendations for, any of an adviser's clients would be a place of business under the "intrinsic" test. The Exemptions Adopting Release does specify that a "place of business" would not include an office where an adviser does not communicate with clients and solely performs administrative services and back-office activities – but subject to the unhelpfully circular *proviso* that such services and activities must not be intrinsic to providing investment advisory services.

   Non-U.S. investment advisers with U.S. affiliates will not generally be presumed to have a place of business in the United States. A non-U.S. investment adviser might be deemed to have a place of business in the United States, however, if its personnel regularly conduct activities at an affiliate's place of business in the United States.

5. **Assets Under Management.** The final rule specifies the calculation of "assets under management" for purposes of the Foreign Private Adviser Exemption.

   - *Calculating Assets Under Management.* Under the final rule, assets under management are determined using the method for calculating "regulatory assets under management" for Part 1A, Item 5 of Form ADV (*see* "ERA Compliance Regime – Form ADV Requirements" below). The same methodology is used for calculating assets under management for purposes of the Private Fund Adviser Exemption.

   - *Less-Than-$25 Million Ceiling Unchanged.* The Dodd-Frank Act set an unrealistically low ceiling on assets under management attributable to clients and investors in the United States, but gave the SEC explicit authority to raise the ceiling to any level deemed appropriate in accordance with the purposes of the Advisers Act. Despite virtually unanimous industry commentary imploring the SEC to accept Congress's invitation to make the Foreign Private Adviser Exemption genuinely available, the final rule leaves the less-than-$25 million, effectively *de minimis* ceiling unchanged. Just as troubling as the SEC's failure to act is its dismissive remark, buried in footnote 503 of the Exemptions Adopting Release, that "we have not considered raising the threshold in connection with this rulemaking, but we will evaluate whether doing so may be appropriate in the future."

Many (if not most) non-U.S. investment advisers are likely to find the Foreign Private Adviser Exemption too narrow a basis for an exemption from registration under the Advisers Act. As discussed under "Threshold Jurisdictional Requirements" below, however, a strong argument can be made that any assertion by the SEC of extraterritorial authority to regulate

[1] Regulation S defines "U.S. person" to include U.S. resident individuals, partnerships and corporations organized under U.S. law and U.S. branches and agencies of non-U.S. financial institutions. Therefore, an investment adviser's client private fund organized as a U.K. limited partnership or a Cayman Islands limited company would not be a client of the investment adviser in the United States.

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"**foreign-cubed**" investment advisers *i.e.*, (1) non-U.S. investment advisers (2) who conduct all of their investment advisory business outside the United States and (3) all of whose clients are outside the United States),[2] is simply beyond the intended scope of the Advisers Act and the U.S. federal securities laws.

Private Fund Adviser Exemption

The Dodd-Frank Act directs the SEC to exempt from registration under the Advisers Act any investment adviser who acts solely as an adviser to private funds and who has less than $150 million in assets under management in the United States. The Exemptions Adopting Release contains the SEC's final rule 203(m)-1, which provides a conditional exemption available only to investment advisers who submit to certain recordkeeping, reporting and examination requirements (*see* "ERA Compliance Regime" below), and addresses certain interpretive issues raised by the Private Fund Adviser Exemption.

1. **Treatment of Non-U.S. Investment Advisers.** Under the final rule, *all* clients of an investment adviser with a principal office and place of business in the United States must be private funds for the adviser to be eligible for the Private Fund Adviser Exemption. The exemption is available to an investment adviser with a principal office and place of business *outside* the United States, however, so long as all the adviser's clients *who are U.S. persons* (as defined in Regulation S under the Securities Act) are private funds – even if the adviser has non-U.S. person clients who are not private funds. The Private Fund Adviser Exemption is also available to sub-advisers meeting all of the rule 203(m)-1 criteria.
2. "**Assets Under Management in the United States.**" The final rule resolves the ambiguous meaning of "assets under management in the United States" for purposes of the $150 million ceiling in the Private Fund Adviser Exemption. Under the final rule, *all* private fund assets managed by an investment adviser with a principal office and place of business in the United States are "assets under management in the United States" even if the adviser has offices outside the United States that participate in managing such assets. An investment adviser with a principal office and place of business *outside* the United States, however, only needs to count assets it manages *from a place of business in the United States* toward the $150 million ceiling. In other words, only the "securities portfolios" for which the non-U.S. investment adviser provides "continuous and regular supervisory or management services" from a U.S. place of business are counted as assets under management in the United States for purposes of determining the availability of the Private Fund Adviser Exemption under the final rule.

As a result of the foregoing provisions of final rule 203(m)-1, a non-U.S. investment adviser with no client private funds or other clients who are U.S. persons, and no place of business in the United States, would be eligible for the Private Fund Adviser Exemption – *even if assets under management attributable to U.S. investors in the adviser's non-U.S. client private funds are $25 million, or $150 million, or $10 billion*. The apparent incongruity between the SEC's "generous treatment" of "foreign-cubed" investment advisers under the Private Fund Adviser Exemption and its narrow view of their eligibility for the Foreign Private Adviser Exemption is easily explained: only the Private Fund Adviser Exemption requires investment advisers to submit to the ERA compliance regime. By exploiting ambiguities in the language of the Dodd-Frank Act, the SEC aims to steer as many non-U.S. investment advisers as possible away from a complete exemption under the Advisers Act and into the SEC's information-gathering and enforcement machinery.

Threshold Jurisdictional Requirements

Statutory Framework

Section 203(a) of the Advisers Act provides the SEC with its authority to require registration of investment advisers. Subject to specified exceptions,

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[2] The term "foreign-cubed" is borrowed from a similar, albeit distinct, context and refers to (1) foreign plaintiffs suing (2) a foreign issuer in a U.S. court for violations of the U.S. securities laws based on (3) securities transactions on foreign exchanges. *See Morrison v. National Australia Bank Ltd.*, 561 U.S. ___ (2010). Our Client Alert of January 14, 2011, entitled *Comments Due January 24, 2011 on SEC's Proposed Rules Specifying Available Exemptions from Registration for Non-U.S. Investment Advisers Under the Dodd-Frank Act*, discussed the foreign-cubed issue in additional detail.

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> "it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce[3] in connection with his or its business as an investment adviser."

These are the threshold requirements for jurisdiction under the Advisers Act: an investment adviser's use of the mails or any means or instrumentality of U.S. interstate commerce – that is, "**U.S. jurisdictional means**" – in connection with its business as an investment adviser. Prior SEC staff positions have made clear that Advisers Act jurisdiction arises where a U.S. investment adviser solicits or advises either U.S. clients or foreign clients, or where a foreign investment adviser solicits or advises U.S. clients, because in each case it is necessary for the adviser to use U.S. jurisdictional means in connection with its investment advisory business. By the same token, Advisers Act jurisdiction should *not* arise where a foreign investment adviser only advises foreign clients, and only solicits advisory business from foreign prospective clients, because the adviser is able to avoid using U.S. jurisdictional means.[4]

Prior SEC guidance on this subject has relied on a common understanding of which activities are "in connection with" the business of an investment adviser. A widely-cited 1982 no-action letter in respect of a foreign investment adviser who used various U.S. jurisdictional means to place orders with U.S. broker-dealers and obtain research from U.S. analysts concluded, based on the Advisers Act framework –

> "it appears that the business of an investment adviser is *the getting of clients* and *the providing of advice*, but not the receiving of information about securities and, moreover, that such an activity is not 'in connection with' the 'business' of the investment adviser as such terms are used in Section 203(a)."[5]

Under the Advisers Act, only the activities of soliciting and advising clients, if conducted using U.S. jurisdictional means, are relevant to the scope of the SEC's regulatory authority.

Despite requests from multiple commenters, the SEC avoided any meaningful discussion of its jurisdiction over foreign-cubed advisers in either the Exemptions Adopting Release or the Implementing Adopting Release. Instead, after citing Section 203(a) of the Advisers Act in footnote 415, the Exemptions Adopting Release states that "whether a non-U.S. adviser with no place of business in the United States and no U.S. clients would be subject to registration depends on whether there is sufficient use of U.S. jurisdictional means" – plainly suggesting that the SEC reserves the right to assert its authority to regulate non-U.S. investment advisers who conduct their investment advisory business exclusively outside the United States and have exclusively foreign clients. The SEC might, for example, argue that "sufficient use" of U.S jurisdictional means arises when a non-U.S. investment adviser places orders on U.S. securities exchanges for its non-U.S. clients or communicates with U.S. research analysts. In our view, such an argument would be inconsistent with the threshold jurisdictional requirements of the Advisers Act, the SEC's own prior no-action positions and the limits on extraterritorial application of the U.S. securities laws recently expressed by the U.S. Supreme Court.[6]

In addition, the SEC failed to provide meaningful guidance (again, notwithstanding numerous industry requests) on the viability of the "participating affiliate" framework articulated in the *Unibanco* line of SEC no-action letters.[7] Rather than make its views transparent, the SEC seems to have adopted a wait-and-see approach. On one hand, the Exemptions Adopting Release indicates that the SEC is not withdrawing any prior statements or the views expressed in the *Unibanco* letters; at the

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[3] Section 202(a)(10) of the Advisers Act defines "interstate commerce" as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof."

[4] *See SEC v. Myers*, 285 F. Supp. 743 (D. Md. 1968) (investment adviser in Canada used U.S. jurisdictional means to solicit and advise U.S. clients).

[5] *Forty Four Management, Ltd.*, CCH Fed. Sec. L. Rep., ¶77,373 (Dec. 30, 1982) (emphasis added; citation omitted).

[6] *See Morrison v. National Australia Bank Ltd.,* 561 U.S. _____ (2010).

[7] *See Uniao de Bancos de Brasileiros S.A.,* SEC Staff No-Action Letter (Jul. 28, 1992).

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same time, it states that the *Unibanco* letters were developed in the context of the now-repealed "private adviser exemption". As such, investment advisers should be cautious in their reliance on *Unibanco*, and should consider approaching the SEC staff to obtain no-action relief or at least interpretive advice, given the statement in the Exemptions Adopting Release that "the staff will provide guidance, as appropriate, based on facts that may be presented to the staff regarding the application of the *Unibanco* letters in the context of the new foreign private adviser exemption and the private fund adviser exemption."

ERA Compliance Regime

The Implementing Adopting Release differs only slightly from what the SEC originally proposed despite extensive industry commentary, strong rationales for modification and withering criticism from SEC Commissioners Casey and Paredes. In a 3-2 vote, the SEC approved rules regulating ERAs under the rationale that:

> "Congress . . . gave us [the SEC] broad authority to require exempt reporting advisers to file reports [and maintain such records] as necessary or appropriate in the public interest or for the protection of investors. In addition, the Dodd-Frank Act neither specifies the types of information we could require in the reports nor specifies the purpose for which we would use the information."

In this regard, the Implementing Adopting Release imposes extensive reporting obligations on ERAs, subjects ERAs to SEC examination and makes clear that the SEC will in a "future release" impose additional recordkeeping requirements on ERAs. The scope of regulation imposed on ERAs led Commissioner Casey to opine that, "[a]s a consequence of the requirements imposed under the implementing rules, there will be no meaningful relief from the burdens of registration for those advisers that will be able to fit themselves within the boundaries of the Advisers Act exemptions we define today."

Form ADV Requirements

1. **General Reporting**. ERAs will have to submit reports to the SEC by completing a "limited subset" of the Form ADV reporting items, specifically including the following items in Part 1A (together with the corresponding sections of Schedules A, B, C and D):

Item	Description
1.	Identifying Information
2.B.	SEC Reporting by Exempt Reporting Advisers
3.	Form of Organization
6.	Other Business Activities
7.	Financial Industry Affiliations and Private Fund Reporting
10.	Control Persons
11.	Disclosure Information

The SEC also enacted revisions that allow Form ADV both to serve as a reporting and registration form and to specify the items that must be completed by ERAs. Like registered investment advisers, ERAs would be required to amend their reports on Form ADV at least annually and, in some cases, more frequently. Unlike registered investment advisers, ERAs would not be required to prepare and file a client brochure on Part 2 of Form ADV or the related brochure supplements.

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2. **Private Fund Reporting**. The Implementing Adopting Release requires both registered investment advisers and ERAs to report information about the private funds they advise including, in respect of each fund, its basic organizational, operational and investment characteristics, its regulatory status, and the nature of its investors. In addition, private fund advisers must identify their service providers (*i.e.*, auditors, prime brokers, custodians, administrators and marketers) and describe the services they provide and their regulatory status. All of the foregoing information would, in most circumstances, be made available to the public without regard to its proprietary or competitively sensitive nature.

   Reasoning that "the benefit of public disclosure would not outweigh the potential competitive harm", the SEC chose not to require the following information based on commenter input: (i) each private fund's net assets; (ii) the private fund's assets and liabilities separated by class and categorization in the fair value hierarchy established under GAAP; and (iii) the percentage of each fund owned by particular types of beneficial owners. The SEC did, however, reserve the right to require information requested in (ii) and (iii) above as part of its proposed Form PF.[8]

3. **Regulatory Assets Under Management**. The Implementing Adopting Release includes a new uniform method for calculating an investment adviser's assets under management for purposes of the Foreign Private Adviser Exemption and the Private Fund Adviser Exemption. Amended Part 1A, Item 5 of Form ADV calls for the calculation of "regulatory assets under management," a term intended to acknowledge that the amount disclosed in Part 1A may be different from the amount of assets under management disclosed to clients and investors in Part 2 of Form ADV. Regulatory assets under management will include all securities portfolios for which an investment adviser provides continuous and regular supervisory or management services, regardless of whether such assets are proprietary, managed for no compensation or managed for clients who are not U.S. persons. In reporting regulatory assets under management, the adviser must include the value of any uncalled capital commitments and may not subtract outstanding indebtedness and other accrued liabilities from the assets in client accounts (*i.e.*, they must be calculated on a "gross" basis).

4. **Electronic Submission**. New SEC rule 204-4 requires ERAs to submit their reports on Form ADV electronically through the Investment Adviser Registration Depository (the "**IARD**") system in the same manner as registered investment advisers. Reports submitted by ERAs will be available to the public on the SEC's website, but the SEC will make it clear that ERAs are not registered with the SEC under the Advisers Act. The SEC will also charge ERAs filing fees in line with those for registered investment advisers (*i.e.*, between $40 - $225 based on the amount of assets an adviser has under management).

The SEC intends to collect vast amounts of information on an ERA's business but it is unclear *for what purpose* the SEC will use this information, particularly in light of its current budget difficulties and understaffing. In the vacuum created by a lack of specific policy or supervisory requirements, there would appear to be a non-trivial risk of misuse. A well-maintained database of information gathered from advisers across the investment management sector would, of course, have valuable potential as a tool for monitoring market developments and business practices and as basis for informed rulemaking. However, it seems equally likely that the information provided by ERAs will simply pile up in the IARD, where it will represent a continuing data security concern and a deadweight cost to ERAs and the SEC alike.

Continuing Regulatory Obligations of ERAs

The obligations of an ERA will not end once Part 1A is filed. For example, the Implementing Adopting Release outlines an examination program for ERAs and imposes updating requirements.

1. **SEC Examination of ERAs.** The Implementing Adopting Release leaves no doubt that ERAs will be subject to SEC examination. While the SEC does not "anticipate" conducting regular compliance examinations of ERAs, the Implementing Adopting Release makes it clear that the SEC will conduct "cause" examinations of ERAs where there are "indicators of wrongdoing". Such indicators may include tips, complaints against the ERA and referrals. It remains unclear, however, what the scope of such examinations will be and if examiners will limit themselves to examining only those records which ERAs are required to keep or the broader panoply of an ERA's business records.

[8] For more information on Form PF and its requirements, *see* the proposing release, *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF*.

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2. **Updating Requirements.** ERAs will have to meet the same annual updating requirements as registered investment advisers. This means that ERAs will have to file annual updating amendments within 90 days of the end of the ERA's fiscal year. ERAs will also have to "promptly" update Items 1, 3, and 11 if they become inaccurate in any way, and update item 10 if it becomes materially inaccurate. Ensuring compliance with the updating requirements will require ERAs, at a minimum, to establish compliance procedures designed to detect updating events and ensure disclosure.

SEC Registration Transition Period for ERAs

An ERA that indicates it has private fund assets of $150 million or more in an annual updating amendment will no longer qualify for the Private Fund Adviser Exemption. An ERA must calculate its private fund assets within 90 days prior to the date on which it files its annual updating amendment its Form ADV. Such an adviser that has complied with all of its reporting obligations as an ERA may continue advising private fund clients for up to 90 days after filing an annual updating amendment indicating that it has private fund assets of $150 million or more before filing its application. Therefore, ERAs to which the transition period is available will have up to 180 days after the end of their fiscal years to register with the SEC.

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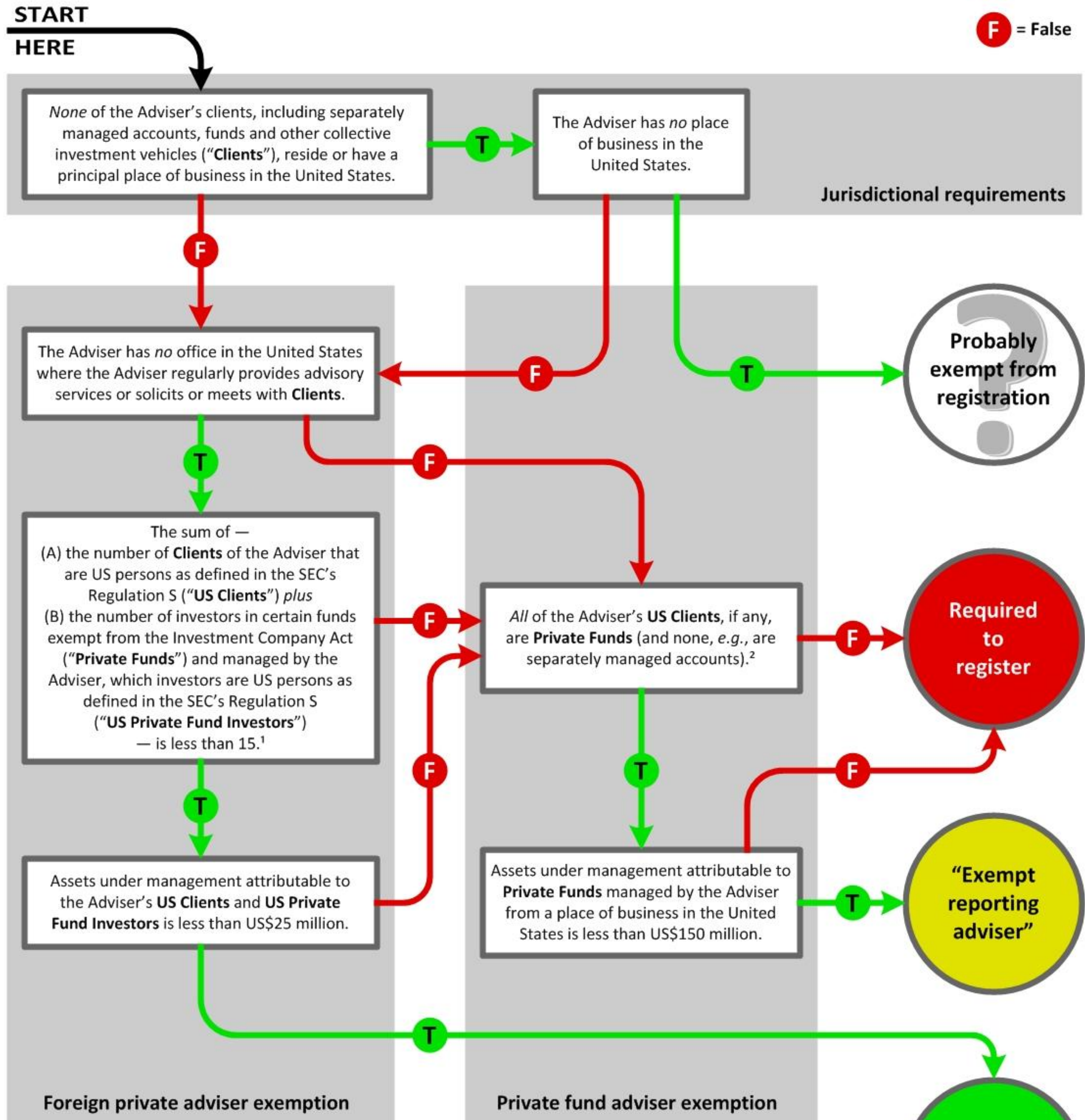
Exemptions for Non-U.S. Investment Advisers Flow Chart

(extent of substantive changes from November 2010 proposals indicated in footnotes)



[1] Under the final rules, US investors who are "knowledgeable employees" of the Adviser (as defined in SEC Rule 3c-5) are no longer counted as US Private Fund Investors.

[2] The final rules make clear that any fund excluded from the definition of "investment company" pursuant to Section 3(c)(1) or 3(c)(7) of the Investment Company Act may be treated as a Private Fund even if such fund also qualifies for another exclusion under Section 3.

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