JONES DAY

OCTOBER 2011

FOREIGN INVESTMENT ADVISER EXEMPTIONS FROM THE INVESTMENT ADVISERS ACT

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, which, among other changes, amended the U.S. Investment Advisers Act of 1940 ("Advisers Act"). A year later, the Securities and Exchange Commission's ("SEC") implementing rules came into effect, bringing the oft-relied-upon Section 203(b)(3) exemption under the Advisers Act to its end. In its place, investment advisers generally may now rely on four new exemptions of varying scope: the Foreign Private Adviser Exemption, the Private Fund Adviser Exemption, the Venture Capital Fund Exemption, and the Family Office Exemption. For Asia-based investment advisers that do not represent themselves to investors as pursuing a venture capital strategy or do not serve a single family, the first two of these exemptions are most relevant. Absent an applicable exemption, Asia-based investment advisers may be subject to registration, reporting, recordkeeping, SEC examination, and other obligations under the Advisers Act as a result of their advisory activities in, or directed toward, the United States.

FOREIGN PRIVATE ADVISER EXEMPTION

The Foreign Private Adviser Exemption applies to any investment adviser that:

- has no place of business in the United States;
- has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the investment adviser;
- has aggregate assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser of less than US$25 million; and
- does not hold itself out generally to the public in the United States as an investment adviser.

Place of Business. Given the broad application of the phrase "place of business," investment advisers should examine closely their past and planned activities in the United States. In addition to including an office at which it provides investment advisory services, solicits, meets with, or otherwise communicates with clients, a "place of business" also includes

any other location that an adviser holds out to the general public as a place where it provides these services. Offices from which an adviser conducts solely administrative and back office activities will generally not fall under this definition, assuming the adviser does not communicate with clients from such location. However, temporary offices such as a hotel or even an auditorium may be included depending on the activities conducted there.

Counting Clients and Investors. For purposes of applying the 15 U.S. clients and investors threshold, an adviser generally must count as a client each natural person, managed account, or company that it directly advises. An adviser must also examine the private funds that it advises and count the beneficial owners of such funds, which generally requires an adviser to "look through" any master-feeder structures, nominee, or intermediate accounts. A precise counting of clients and investors, however, will also require reference to the well-developed analysis of ownership under the U.S. Investment Company Act of 1940.

Whether such clients and investors are "in the United States" and therefore count toward the limit will generally be determined by reference to the Regulation S definition of a "U.S. person," and will therefore turn on the residency of natural persons and the jurisdiction in which a company has been formed.

Assets Under Management. In order to determine whether the US$25 million assets under management cap has been reached, an adviser need only count those assets under management attributable to clients in the United States and investors in the United States in private funds advised by the investment adviser. However, unlike the Private Fund Adviser Exemption discussed below, the locale from which these assets are managed is immaterial. Advisers must calculate the assets under management annually.

Scope of Exemption. Unlike the Private Fund Adviser Exemption (and Venture Capital Fund Exemption), a Foreign Private Adviser enjoys exemption from the registration, reporting, recordkeeping, and SEC examination obligations under the Advisers Act. Such an adviser will therefore not need to file Form ADV with the SEC.

PRIVATE FUND ADVISER EXEMPTION

Different criteria apply to an investment adviser seeking to avail itself of this exemption depending on whether its principal office and place of business is in the United States. For those advisers whose principal office and place of business is located outside the United States, the Private Fund Adviser Exemption will apply if:

- such adviser has no client that is a U.S. person except for one or more qualifying private funds; and
- all assets managed by the investment adviser at a place of business in the United States are solely attributable to private fund assets, the total value of which is less than US$150 million.

Principal Office and Place of Business. An adviser's "principal office and place of business" means its executive office from which its officers, partners, or managers direct, control, and coordinate its advisory activities. This would include the location where an adviser has ultimate responsibility for the management of private fund assets, even if daily management of certain assets takes place at another location.

Solely Advises Private Funds. Although the Private Fund Adviser Exemption does not limit the *number* of clients or investors (indeed, a Private Fund Adviser may advise an unlimited number of private funds), it does limit the *type* of client to qualifying private funds only. As a result, a Private Fund Adviser could not, for example, have a separately managed account as a U.S. client. For advisers whose principal office and place of business is located outside the United States, this restriction applies only to its United States clients and such an adviser may therefore avail itself of the exemption without regard to the type or number of its non-U.S. clients.

Counting Assets. A foreign adviser need only count the private fund assets that it manages from a place of business in the United States. The focus here is on the specific locale from which the adviser manages the relevant assets.

Scope of Exemption. It is important to note, however, that although a Private Fund Adviser enjoys an exemption from registration under the Advisers Act, such an adviser must

nonetheless comply with certain SEC reporting and record-keeping obligations. Specifically, a Private Fund Adviser must annually file Part 1A of Form ADV and provide basic identifying information about the adviser and its related persons, advisory affiliates, private fund clients, and (direct and indirect) controlling persons, as well as disciplinary history for the adviser and its advisory affiliates.

ADDITIONAL EXEMPTIONS

Although the Foreign Private Adviser and Private Fund Adviser exemptions are likely of greater relevance to the majority of Asia-based investment advisers, the Dodd-Frank Act and its implementing regulations have provided additional exemptions.

Foreign advisers who solely advise venture capital funds may rely on the venture capital exemption if all of their clients, whether U.S. or non-U.S., are venture capital funds. The exemption requires such advisers' funds to each (i) hold no more than 20 percent of the fund's capital commitments in certain nonqualifying investments, (ii) generally not borrow or otherwise incur leverage other than limited short-term borrowing and certain other exclusions, (iii) not offer investors redemption rights other than in extraordinary circumstances, and (iv) represent itself as pursuing a venture capital strategy. The exemption will not apply to an adviser to venture capital funds that are registered investment companies or business development companies. Under the exemption, advisers to venture capital funds, like Private Fund Advisers, would not need to register but would need to annually file Part 1A of Form ADV with the SEC. However, unlike Private Fund Advisers, an Asia-based adviser to a venture capital fund cannot disregard its non-U.S. activities when determining whether it solely advises venture capital funds.

Family offices, which have traditionally relied on the former Section 203(b)(3) exemption, may still be exempt from SEC registration if they meet the definition of a "family office," which, under the new rules, requires that (i) the adviser provide advice only to certain "family clients," (ii) family clients wholly own the family office and family members control the office, and (iii) the adviser not hold itself out to the public as an investment adviser. Such advisers will be excluded from the definition of "investment advisers" under the Advisers Act and therefore exempt from its registration and reporting requirements.

TAKING STOCK AND PLANNING AHEAD

Advisers previously relying on the Section 203(b)(3) private adviser exemption and that cannot rely on one of the new exemptions must file the required Form ADV by February 14, 2012 at the latest in order to meet the March 30, 2012 registration deadline. Exempt reporting advisers that rely on the Private Fund Adviser Exemption or Venture Capital Fund Exemption must file their initial reports by March 30, 2012. Asia-based investment advisers should therefore reevaluate their current standing under the Advisers Act and take into consideration the new exemptions as they plan future fund launches. With careful planning, many currently unregistered foreign advisers should be able to remain unregistered or at a minimum limit their reporting obligations to Part 1A of Form ADV.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Dennis Barsky
Singapore
+65.6233.5959
dbarsky@jonesday.com

Sean J. Murphy
Singapore
+65.6233.5993
sjmurphy@jonesday.com

Anthony L. Perricone
New York
+1.212.326.7871
aperricone@jonesday.com

Carolyn McNabb
Singapore
+65.6233.5983
cmcnabb@jonesday.com