

TRAVERS SMITH

## *Investment Funds*

### *SEC Registration for Non-US Managers and Advisers – Final Rules*



#### Overview

Many UK and EU managers and advisers (including those in the private equity, hedge fund and real estate sectors) may be required to register with the US Securities and Exchange Commission (**SEC**), even if they are already authorised by the UK Financial Services Authority or another regulator. This is as a result of the US Private Fund Investment Advisers Registration Act of 2010, which was signed into law as part of the US Dodd-Frank legislation. We reported on these developments in our briefing notes of July 2010 ([click here](#)) and November 2010 ([click here](#)).

After some delay, the SEC has now published its final rules on the registration requirements, including clarifying the scope of three important new exemptions. It is anticipated that many non-US managers of, and advisers to, private investment funds will be able to benefit from the exemptions. However, for two of the exemptions, firms will still need to file some information with the SEC (which will be made public) and will be subject to limited reporting and compliance obligations (including, in theory, being subject to SEC inspections). Firms providing segregated investment management or advisory services to US clients (sometimes termed "managed accounts") may not be able to rely on the exemptions at all.

This briefing note focuses on the position of non-US managers and advisers. It provides information on the exemptions, the timing implications and the reporting requirements.

We recommend that all non-US managers and advisers reassess their position over the summer. Travers Smith LLP is able to co-ordinate legal advice from specialist US counsel, and/or advice from US compliance consultants on public filings which might need to be made.

#### What are the exemptions?

The existing "private adviser exemption", on which many US and non-US advisers relied, is being replaced by three new exemptions:

- the Foreign Private Adviser exemption;
- the Private Fund Adviser exemption; and
- the Venture Capital Fund exemption.

Flow charts setting out the criteria for reliance on each of these exemptions are provided at the end of this note.

**The Private Fund Adviser exemption is likely to be the key exemption for non-US firms that do not manage any assets from a US place of business and whose only US clients are private funds.** Further details on the Foreign Private Adviser and Private Fund Adviser exemptions are provided below. Because of the difficulty of complying with its criteria, it is not anticipated that the Venture Capital Fund exemption will be used as a matter of course for non-US advisers or fund managers.

Making use of either the Private Fund Adviser or the Venture Capital Fund exemption will mean that the firm becomes an "Exempt Reporting Adviser" (**ERA**), which means the firm will be required to make certain public filings and be subject to limited SEC rules. A Foreign Private Adviser is not an ERA and therefore is not required to provide any information to the SEC.

#### What is the timing?

Registration with the SEC has been pushed-back to 30 March 2012. A firm applying for a full registration will need to bear in mind that the approval process can take up to 45 days, so in practice the deadline for filing is 14 February 2012. Even for an ERA, the amount of

information required is substantial, which means that anyone filing as an ERA should start the process in good time to meet the 30 March 2012 deadline.

### **Further details on the Foreign Private Adviser exemption**

A foreign private adviser is an investment adviser or fund manager that: (a) has no place of business in the US; (b) has fewer than 15 clients (e.g. the private fund advised by the investment adviser) and investors (e.g. the limited partners or shareholders of those funds) in private funds advised by it, in each case in the US; (c) has less than \$25 million in assets under management attributable to US clients and US investors in private funds advised by it; and (d) neither holds itself out to US investors as an investment adviser, nor acts as an investment adviser to any investment company registered under the Investment Company Act.

A "place of business" means any office where an investment adviser regularly provides advisory services, solicits, meets with, or otherwise communicates with clients. For the purposes of determining assets under management, amounts of uncalled commitments should be included along with the value of existing investments.

Having to take account of both "clients" and "investors" is likely to limit the utility of this exemption because, even where a fund is established outside the US, substantial commitments are typically obtained from US investors.

As noted above, a key attraction of the Foreign Private Adviser exemption is that firms will not be subject to any reporting requirements, i.e. they are not ERAs and simply fall outside of the requirements to provide any information to the SEC. However, there is no grace period should the relevant adviser cease to benefit from the exemption (for example, if the assets under management in the US exceed \$25 million following an increase in commitments or an uplift in the valuation of investments).

### **Further details on the Private Fund Adviser exemption**

The scope of this exemption differs for US firms and non-US firms. Non-US firms are those with their principal office and place of business outside of the US. Non-US firms are exempt from registration if: (a) the firm has no client that is a US person, except for one or more private funds (as defined); and (b) all assets managed by the firm from a place of business in the US are solely attributable to private fund assets, the total value of which is less than \$150 million.

The SEC has confirmed that, in general, an adviser will be regarded as managing assets at a US place of business if it provides "continuous and regular supervisory or management services from such location", whereas providing research or conducting due diligence at a US place of business would not mean the assets are covered if a person outside of the US makes independent investment decisions and implements those decisions.

Having a Delaware limited partnership as part of a fund structure that it advises or manages may not preclude the non-US firm from relying on this exemption; that partnership would likely be considered a client that is a "private fund".

### **What information needs to be filed for an ERA?**

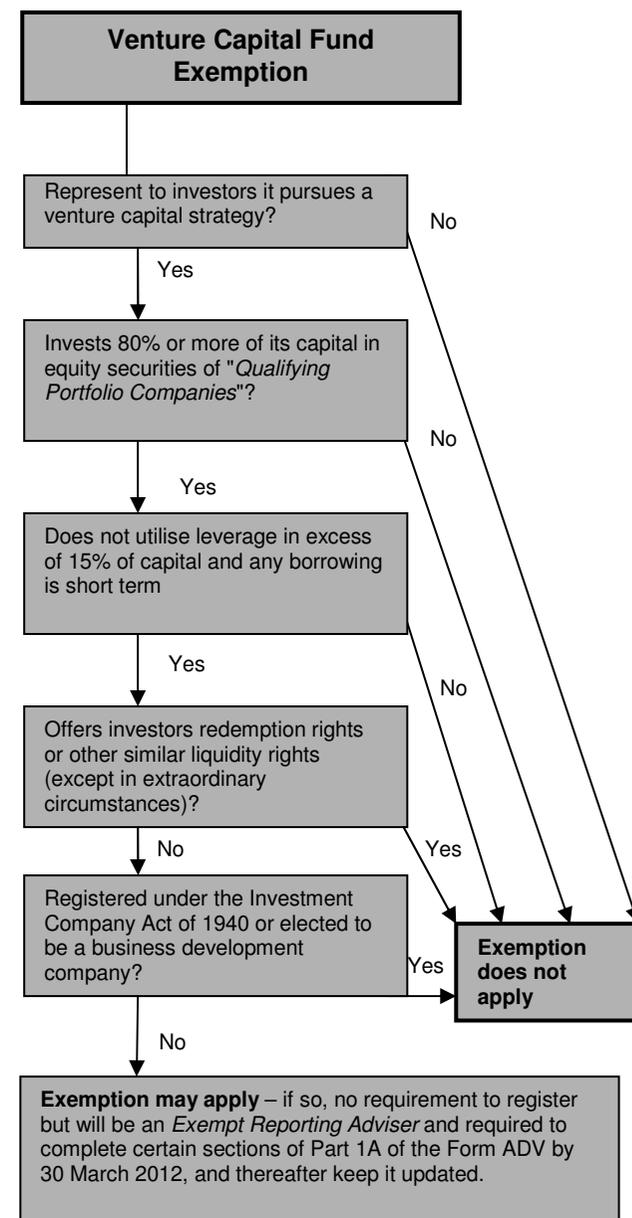
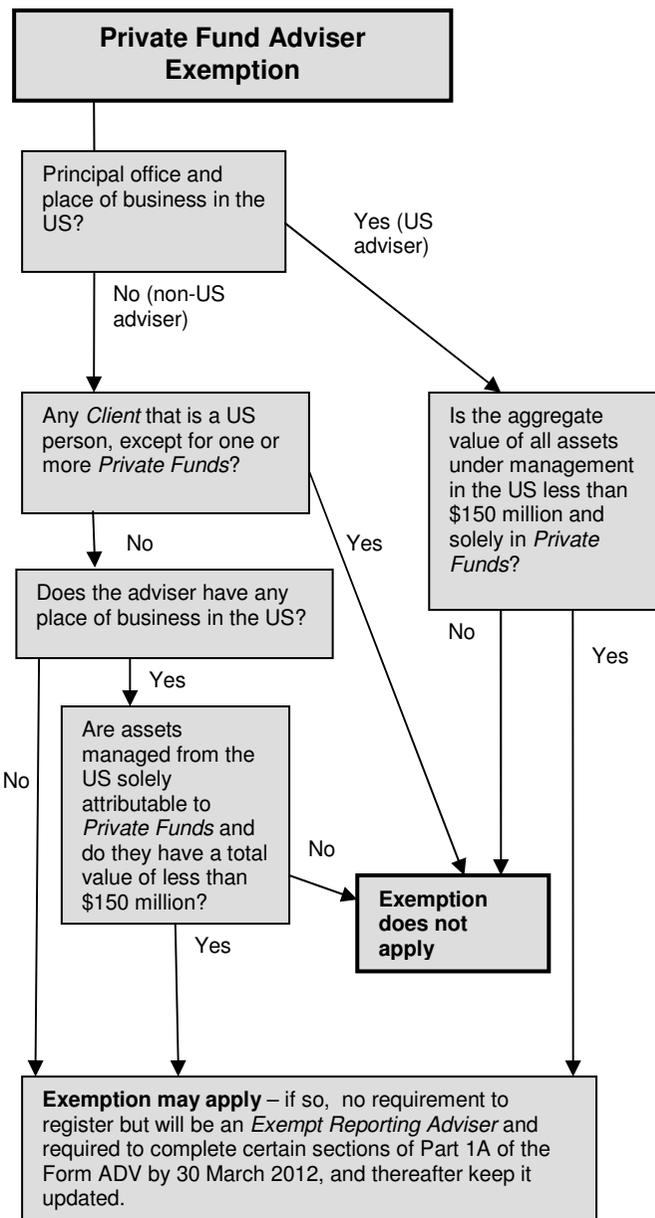
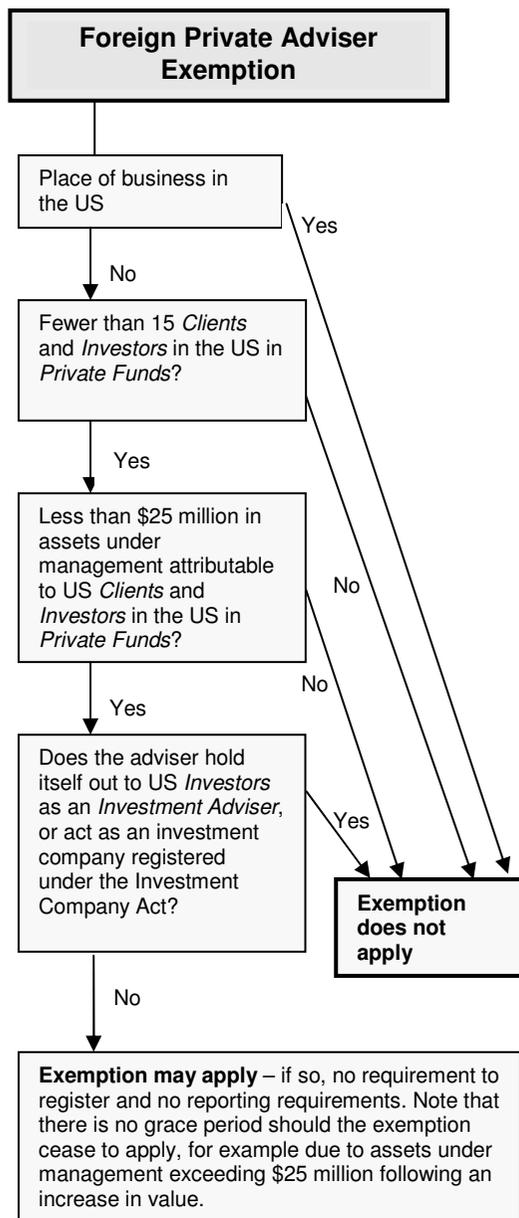
If the firm is relying on the Private Fund Adviser or the Venture Capital Fund exemptions (and is, therefore, an ERA), the firm will be required to file a Form ADV with the SEC. For ERAs, only certain items of Part 1A of the form (and the corresponding sections of the schedules to Part 1A) must be completed. The information required includes:

- basic information about the adviser, including contact details;
- details of private funds managed by the adviser;
- information on group entities and affiliates;
- details of the adviser's direct owners (holding 5% or more of any share class);
- information on the beneficial owners (holding 25% or more) of each direct owner;
- details of the executive officers of the adviser; and
- details of the disciplinary history of the adviser and its employees.

The initial form must be filed between 1 January 2012 and 30 March 2012, and then updated regularly (at least annually and more frequently in the event of certain changes to the adviser's business).

In addition to the reporting requirements, ERAs are subject to inspection by the SEC pursuant to section 204(a) of the Investment Advisers Act of 1940. The SEC has indicated that it does not intend to conduct routine inspections of ERAs, but retains the right to do so in circumstances it deems appropriate, for example where it believes there has been wrongdoing.

**THE REGISTRATION ACT – EXEMPTIONS FROM REGISTRATION**  
 (defined terms are set out on the next page)



**Definitions for the flow charts**

<b>Investment Adviser</b>	Any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities (Section 202(a)(11), Investment Advisers Act of 1940).
<b>Private Fund</b>	A fund exempt from registration as an investment company in the US as it falls within sections 3(c)(1) (fewer than 100 beneficial owners) or 3(c)(7) (all investors are qualified purchasers) of the Investment Company Act of 1940.
<b>Qualifying Portfolio Company</b>	A company that is not publicly traded; does not borrow in connection with an investment by a fund; and is not a pooled vehicle.
<b>Client</b>	An individual or entity to which an investment adviser provides investment advice.
<b>Investor</b>	Any person that would be included in determining (i) the number of beneficial owners of the outstanding securities of a private fund under section 3(c)(1) of the Investment Company Act or (ii) whether the outstanding securities of a private fund are owned exclusively by qualified purchasers under section 3(c)(7).
<b>Exempt Reporting Adviser</b>	An investment adviser exempt from registration with the SEC due to falling within the Venture Capital Fund exemption or Private Fund Adviser exemption.

**How can we help?**

The changes in US legislation are complex and most non-US firms will wish to take advice from specialist US counsel on their particular structures. We are able to co-ordinate this advice and liaise with US counsel to determine the most appropriate options available, including whether an exemption applies. If required, we can also co-ordinate advice about completion and filing of Form ADV.

For further information on this issue, please contact one of the partners in either our Investment Funds Group or Financial Services and Markets department, or your usual contact at Travers Smith.

11 July 2011

Travers Smith  
 10 Snow Hill  
 London EC1A 2AL  
 T +44 (0)20 7295 3000  
 F +44 (0)20 7295 3500  
 www.traverssmith.com



**Sam Kay**  
 Partner – Investment Funds  
 samuel.kay@traverssmith.com  
 +44 (0)20 7295 3334



**Philip Bartram**  
 Partner – Financial Services & Markets  
 philip.bartram@traverssmith.com  
 +44 (0)20 7295 3437



**Jane Tuckley**  
 Partner – Financial Services & Markets  
 jane.tuckley@traverssmith.com  
 +44 (0)20 7295 3238



**Margaret Chamberlain**  
 Partner – Financial Services & Markets  
 margaret.chamberlain@traverssmith.com  
 +44 (0)20 7295 3233



**Tim Lewis**  
 Partner – Financial Services & Markets  
 tim.lewis@traverssmith.com