

HAPPY NEW YEAR OR IS IT? THE THREE R's – REGULATION, REGULATION, REGULATION

January 2012

THE REFORM ACT AND SEC REGISTRATION – BRIEFING NO 3

2012 looks set to usher in yet more swathes of regulation for private equity fund managers with Dodd-Frank, FATCA and the AIFMD at the fore of an extensive list. The first of these to make its mark on the industry will be the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).

When Dodd-Frank was passed in July 2010, many non-US based private equity firms thought that they may be obliged to register with the SEC – a major regulatory burden. That was because the Act effectively abolished an existing exemption which allowed most US and non-US advisers to private funds to avoid registration, and replaced it with a very narrow exemption for “foreign private advisers”.

However, during the consultation process, a series of important revisions were made. In the final rules issued in June 2011 registration was delayed until Quarter One of 2012 and crucially the previously narrow exemptions were expanded.

So what should you do now?

In the first instance you need to consider whether, as a non-US Fund Manager under Dodd-Frank, you:

- Need to comply with full registration;
- Comply with the requirements associated with exempt reporting adviser (“ERA”) status;
- Do not need to register at all.

In the event that you do need to register, you will also need to consider which entity within the structure will do so.

It may be that the investment adviser registers with the SEC or that the general partner or an advisory company within the fund structure (“GP”) itself registers as the investment adviser. The latter option could have implications with the regulator of the GP. For example, in Guernsey, the GP may need to seek consent from the GFSC in order to be an investment adviser which may incur additional fees.

The exemptions

The final rules published in June 2011 confirmed that the “fewer than 15 clients” exemption had been removed as expected. In its place these rules defined several new and narrower exemptions, including:

1. Foreign private adviser exemption – no place of business in the US, fewer than 15 clients in the US and US investors in private funds administered by the investment adviser, aggregate assets

under administration (AUM – taken to be value of securities not commitments) attributable to these US clients/investors of less than US\$25m, does not hold itself out to be an investment adviser in US and does not advise a registered investment company – **if you meet ALL of these criteria, you will NOT need to register.**

2. Mid size private fund adviser exemption – manager acts solely as an adviser to private funds, assets managed from the US are solely attributable to private fund assets with total value less than US\$150m AUM, place of business is where the manager regularly provides investment advisory services, AUM calculated on the underlying securities portfolio and assets managed from the US are those which the adviser provides continuous and regular supervision or management services. Please note that for a non-US adviser the exemption applies if the adviser has only private fund clients and assets managed from the US are less than US\$150m – **if you meet ALL of these criteria you qualify as an exempt reporting adviser “ERA” requiring you to complete part 1 of the Form ADV only.**
3. Venture capital fund adviser exemption – five factors of which the manager needs to meet all; 80 % qualifying investments, no leverage in excess of 15 % of commitments, no redemption rights, states that they are a venture capital fund in all marketing and publicity and is a private fund – **if you meet ALL these requirements you would qualify as exempt reporting adviser “ERA” requiring you to complete part 1 of the Form ADV only.**

For further information to help you to determine whether you need to register, please refer to the flow chart at the end of this document, provided by PwC.

Registration requirements

If you fall outside these exemptions, you must undertake full SEC registration. Broadly this captures, those with significant US investors and an office in the US which undertakes management activity, and those with direct client relationships with US investors (rather than just having those investors in their European funds).

Full registration means that you will need to complete parts 1 and 2 (Firm’s Brochure) of the ADV Form which needs to be filed 45 days before the 30 March 2012 filing deadline so in effect by **14 February 2012**. The filing process commenced on 1 January 2012. The form has to be updated annually thereafter or on an ad hoc basis for material amendments.



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In addition this year you may also be required to complete Form PF. The primary purpose of the 44-page Form PF is to collect information for the Financial Stability Oversight Council (FSOC) in order to assess systemic risk relating to certain investment advisers.

Form PF provides for a two-tier reporting requirement, whereby large advisers to particular types of funds will be subject to a more detailed reporting requirement than smaller advisers and large advisers to other types of funds. The requirements apply to investment advisers registered with the SEC which advise private funds with at least \$150m AUM. Most registered investment advisers are expected to make annual filings; however, some large fund advisers, including those with at least \$1.5bn AUM, will be required to file more detailed information on a quarterly basis.

The largest fund managers are also subject to accelerated initial filing dates for Form PF. As of the last day of the fiscal quarter most recently completed prior to 15 June 2012, advisers with at least \$5bn in AUM must begin filing for periods on or after 15 June 2012. Advisers who do not meet that threshold must begin filing for periods on or after 15 December 2012. All other advisers must file their first Form PF for the first period ending after 15 December 2012.

Consequences of full SEC registration

The consequences of full SEC registration include:

- Ongoing reporting and SEC supervision;
- Advisers Act compliance regime including named Compliance Officer;
- Subject to SEC inspection;
- Auditors that are registered with the Public Company Accounting Oversight Board "PCAOB" and are subject to regular inspection;
- Subject to Pay for Play Rules;
- Accounts to be prepared in US GAAP or have suitable conversion in the notes to the accounts;
- Comply with custody rules;
- Have and comply with various policies on anti money laundering, insider dealing, brokers, political contributions and code of ethics.

Most non-US firms who cannot avail themselves of the narrow foreign private adviser exemption, and therefore avoid registration completely will be able to take advantage of the mid size private fund adviser exemption (and a few others will come within the "venture capital" carve out). These are only partial exemptions, in the sense that those relying on them will be ERAs and will need to claim the exemption by filing ADV part 1A form between 1 January 2012 to 30 March 2012, providing the SEC with information about themselves and the funds they manage. This information will then be public as completed forms are published on the SEC website.

The reality is that ERAs will need to start the registration process by the end of February at the latest. Firstly by completing the entitlement package in order to obtain a CRD number for the entity. This needs to be sent by post and it generally takes around three weeks to receive back the various codes. You then need to pay the filing fee (based on AUM) so you can file electronically.

The filing of ADV Part 1A requires the provision of the following information:

- Basic data such as name, address, contact details, type of entity and who controls it;
- Which relevant exemption the entity is taking advantage of;
- Any other financial industry business activities the investment adviser is involved in;
- The name and AUM of any private fund advised by the investment adviser;
- The name and details of any individual involved in investment decisions as an advisory affiliate;
- Disciplinary history of the investment adviser and its staff including a description of any reportable events;
- Evidence of having and complying with various policies on anti money laundering, insider dealing, brokers, political contributions and code of ethics.

The investment adviser is liable for the accuracy and truth of any statements made.

Talk to us

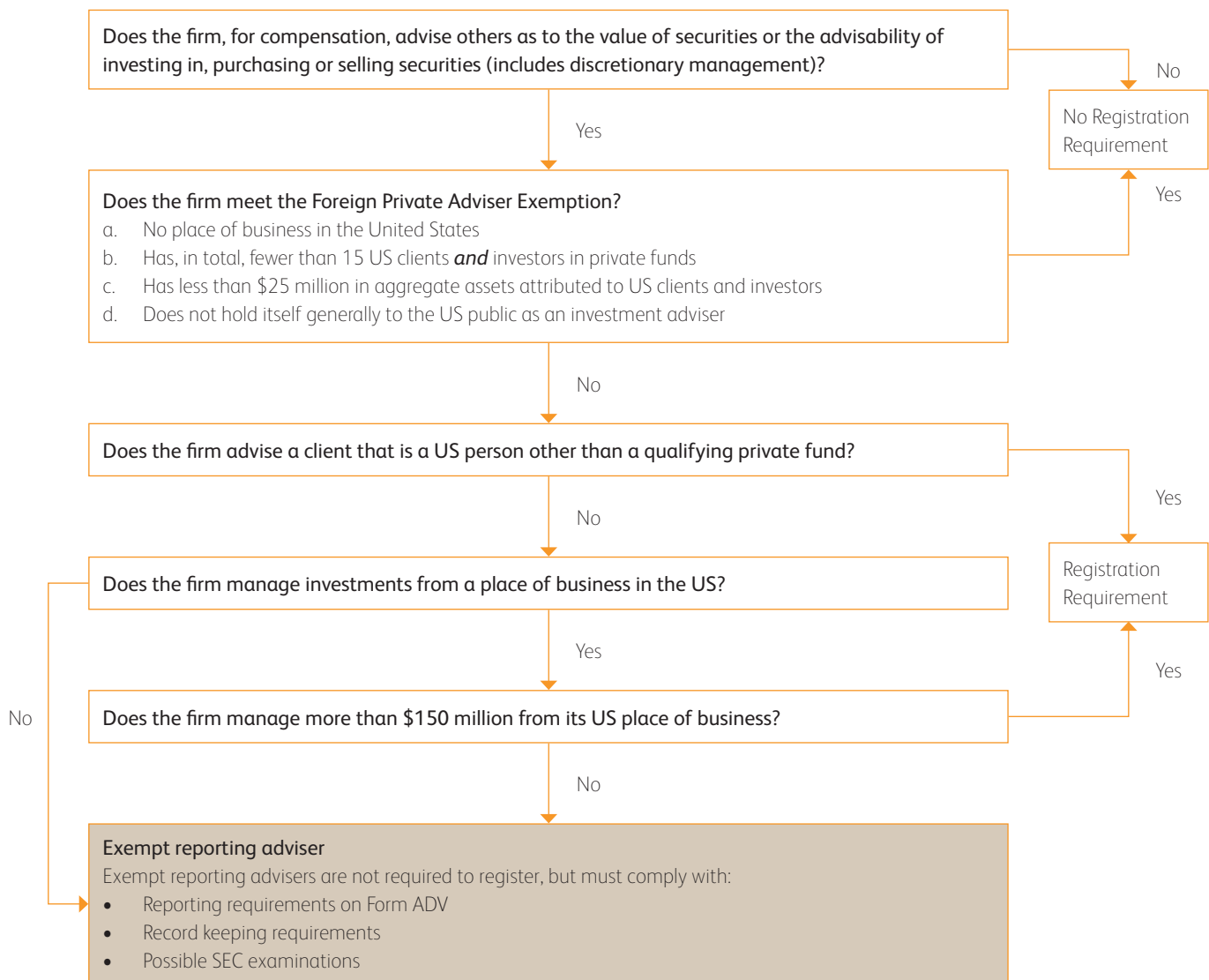
Whilst we do not and cannot provide legal or tax advice in respect of how your funds are structured or the specific implications of any legislation we are able to provide practical support with respect to Dodd Frank registration including:

- Provision of a view on the legislation and the actions we consider you should take in order to ensure that your fund structure is compliant – although we suggest that you seek the appropriate professional advice in order to come to a final decision;
- Preparation and submission of ADV Forms parts 1 & 2 and Form PF where full registration is required and the entity administered by ourselves is to be registered;
- Preparation and submission of ADV Form part 1A where the registered entity is administered by ourselves and qualifies as an ERA;
- Review of any forms relating to the investment advisor where it is the registered entity.

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Non-US advisers to private funds: Determining whether registration is required



This chart is provided to show the regulatory requirements. For advice on their application, we recommend you take the appropriate professional advice.
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