April 25, 2011

Dodd-Frank Act May Require New SEC Registration for Non-U.S. Advisers

The Dodd-Frank Act may require many currently unregistered non-U.S. investment advisers to register with the U.S. Securities and Exchange Commission (the "**SEC**") as investment advisers, because the Act eliminates a registration exemption on which many non-U.S. advisers have traditionally relied. Although we expect the deadline to be extended, if it is not extended, these registrations will be required to be completed by July 21, 2011.

This memorandum describes the new registration requirement, as well as certain new, more limited exemptions from registration under the Investment Advisers Act of 1940 (the "**Advisers Act**") available after Dodd-Frank, some of which may be useful to a non-U.S. investment adviser.

General Registration Requirement Absent an Applicable Exemption

Effective July 21, 2011, the Dodd-Frank Act eliminates the "private investment adviser" exemption contained in Section 203(b)(3) of the Advisers Act. At present, this exemption from registration is available to non-U.S. investment advisers who, among other things, have had fewer than 15 U.S. clients over the preceding 12 months and who do not hold themselves out generally to the U.S. public as investment advisers.

Most unregistered non-U.S. investment advisers that have U.S. clients currently rely on the "private investment adviser" exemption on the basis of having fewer than 15 U.S. clients and thus, upon the elimination of such exemption, they will be required to register as investment advisers if they do not qualify for any other registration exemption.

As the law currently stands, upon elimination of the private investment adviser exemption, a non-U.S. adviser that previously relied on that exemption and does not qualify for an alternative exemption would be required to register under the Advisers Act by July 21, 2011. In a letter to a state securities administrator, however, a senior SEC official stated that he expects that the SEC will consider extending the registration deadline to the first quarter of 2012.

Possible Registration Exemptions After Dodd-Frank

Foreign Private Adviser Exemption

The Dodd-Frank Act provides a narrow registration exemption for any "foreign private adviser." As set forth in the Dodd-Frank Act and proposed implementing rules issued by the SEC,[1] a foreign private adviser is defined as any investment adviser that:

- has no "place of business" in the United States;
- has, in total, fewer than 15 "clients and investors" in the United States in private funds advised by the adviser;

[1] On November 19, 2010, the SEC issued a release to propose rules implementing provisions of Title IV of the Dodd-Frank Act that exempt certain advisers from registration under the Advisers Act. In that release, the SEC proposed a new rule 202(a)(30)-1 (the "**foreign private adviser rule**") under the Advisers Act to implement the foreign private adviser exemption and define certain terms used in the definition of foreign private adviser. Please note that this rule has not yet officially been adopted by the SEC and remains subject to change.

- 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 $25 million, or such higher amount as the SEC may, by rule, deem appropriate in accordance with the purposes of the Advisers Act; and
- does not:
  - hold itself out generally to the U.S. public as an investment adviser;
  - act as an investment adviser to any registered investment company (a “**RIC**”) under the Investment Company Act of 1940 (the “**Investment Company Act**”); or
  - act as a business development company under Section 54 of the Investment Company Act (a “**BDC**”).

Private Funds. The Dodd-Frank Act defines the term “private fund” to mean an issuer that relies on Section 3(c)(1) or 3(c)(7) of the Investment Company Act. Many funds advised by non-U.S. investment managers rely on these exemptions when offering in the United States.

Place of Business. Under the proposed foreign private adviser rule, “place of business” means “(i) an office at which the investment adviser regularly provides investment advisory services, solicits, meets with, or otherwise communicates with clients; and (ii) any other location that is held out to the general public as a location at which the investment adviser provides investment advisory services, solicits, meets with, or otherwise communicates with clients.”

Clients and Investors. Eligibility for the new foreign private adviser exemption is determined in part by the number of clients of an adviser. The proposed foreign private adviser rule would incorporate the safe harbor rules and many of the client counting rules that have been applicable under the private adviser exemption. For example, an adviser would be allowed to treat a legal organization (*e.g.*, a corporation or limited partnership) as a single client if the advice was based on the investment objectives of the legal organization and not its individual beneficial owners.

Under the proposed foreign private adviser rule, the definition of “investor” would incorporate the counting methods and look-through rules required by Sections 3(c)(1) and 3(c)(7) of the Investment Company Act. As such, any person who would be included in the number of beneficial owners of a 3(c)(1) fund, or included in the determination of whether all of a 3(c)(7) fund’s investors were qualified purchasers, would be deemed an investor. To avoid double-counting, an adviser would be able to treat as a single investor any person who is an investor in two or more private funds advised by the adviser.

In the United States. In general, the proposed foreign private adviser rule defines “in the United States” by reference to the definitions of “U.S. person” and “United States” in Regulation S under the Securities Act of 1933.[2] An exception to this is that the proposed foreign private adviser rule would treat a discretionary or similar account, which is held for the benefit of a U.S. person by a non-U.S. dealer or other professional fiduciary that is a related person of the investment adviser relying on the exemption, as a person “in the United States,” even though such account would not be considered a “U.S. person” under Regulation S.

[2] For determining whether an investor or client is “in the United States,” under the proposed rule, an adviser would generally only be required to look to the point in time when the person became either a client or an investor. Investors that were not “in the United States” at the time of becoming a client or an investor but later became a person “in the United States” would not need to be treated as being “in the United States” for purposes of the rule.

Private Fund Adviser Exemption

Another registration exemption in the Dodd-Frank Act that may possibly be available to non-U.S. investment advisers is the exemption for certain private fund advisers with less than $150 million in assets under management in the United States. The Dodd-Frank Act mandates that the SEC provide such an exemption to any investment adviser that (i) acts *solely* as an adviser to private funds and (ii) has assets under management in the United States of less than $150 million. Under the Dodd-Frank Act, SEC must further require, however, that such advisers maintain such records and provide to the SEC such annual or other reports as the SEC determines necessary or appropriate in the public interest or for the protection of investors.[3]

On November 19, 2010, the SEC proposed new rule 203(m)-1 under the Advisers Act to implement this new exemption.[4] For a non-U.S. adviser (*i.e.*, an adviser that has its "principal office and place of business" outside of the United States), the private fund adviser exemption would be available, under the proposed rule, so long as:

- the adviser has no client that is a U.S. person (generally as defined in Regulation S with the same exception noted above) except for private funds (as defined above); and
- all assets managed by the adviser from a "place of business" in the United States are solely attributable to private fund assets with a value of less than $150 million.[5]

Principal Office and Place of Business. According to the proposal, the "principal office and place of business" would be the location where the adviser controls, or has ultimate responsibility for, the management of private fund assets.

Place of Business. "Place of business," under the proposed rule, would have the same meaning as in the foreign private advisers rule, as described above.

Conclusion

In general, the Dodd-Frank Act may require many non-U.S. investment advisers that have previously been exempt from registration to register with the SEC as an investment adviser. Under the Dodd-Frank Act, unless another exemption applies, a non-U.S. investment adviser that had been relying on the private adviser exemption generally will be required to register if the adviser (i) manages at least $25 million in assets attributable to U.S. clients and/or U.S. investors in its private funds, (ii) has 15 or more U.S. clients and/or U.S. investors in its private funds, or (iii) potentially, even just has a place of business in the United States.

Alternatively, if a non-U.S. adviser has no U.S. clients except for private funds and manages less than $150 million in private fund assets (and no other type of client assets) from a "place of business" in the United States, it may qualify for a limited Advisers Act exemption. Such an adviser would have certain

---

[3] According to SEC proposed rules, such advisers (so-called "exempt reporting advisers") would be subject to certain reporting requirements on Form ADV (the form investment advisers use to register with the SEC), including reporting obligations with respect to the private funds they manage.

[4] Please note that this rule has not yet officially been adopted by the SEC and remains subject to change.

[5] An adviser that becomes ineligible to continue relying on the private fund adviser exemption because the value of its private fund assets under management has exceeded $150 million would have a three-month transition period from the end of the calendar quarter at which its private fund assets equaled or exceeded $150 million to register with the SEC (if an alternative exemption was unavailable). The proposal notes that the transition safe harbor would only be available to an adviser that has complied with the applicable reporting requirements of the exemption.

reporting obligations to the SEC as an "exempt reporting adviser," but fewer requirements than it would under full SEC registration.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

John G. Crowley	212 450 4550	john.crowley@davispolk.com
Nora M. Jordan	212 450 4684	nora.jordan@davispolk.com
Yukako Kawata	212 450 4896	yukako.kawata@davispolk.com
Nicholas A. Kronfeld	212 450 4950	nicholas.kronfeld@davispolk.com
Leor Landa	212 450 6160	leor.landa@davispolk.com
Arthur S. Long	212 450 4742	arthur.long@davispolk.com
Gregory S. Rowland	212 450 4930	gregory.rowland@davispolk.com
Danforth Townley	212 450 4240	danforth.townley@davispolk.com
John A.B. O'Callaghan	212 450 4897	john.ocallaghan@davispolk.com

© 2011 Davis Polk & Wardwell LLP

Notice: This is a summary that we believe may be of interest to you for general information. It is not a full analysis of the matters presented and should not be relied upon as legal advice. If you would rather not receive these memoranda, please respond to this email and indicate that you would like to be removed from our distribution list. If you have any questions about the matters covered in this publication, the names and office locations of all of our partners appear on our website, davispolk.com.