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# THE SEC'S NEW DODD-FRANK ADVISERS ACT RULEMAKING: AN ANALYSIS OF THE SEC'S IMPLEMENTATION OF TITLE IV OF THE DODD-FRANK ACT

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The Investment Advisers Act of 1940, as amended (the "Advisers Act") requires "investment advisers" within the meaning of the Advisers Act with assets under management ("AUM") in excess of the new statutory floor to register with the Securities and Exchange Commission ("Commission" or "SEC"), unless they qualify for an exemption from registration. Among other things, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") repealed Section 203(b)(3) of the Advisers Act, the "private adviser" exemption, which many investment advisers relied upon. Section 203(b)(3) exempted from registration certain investment advisers having fewer than 15 clients in any 12-month period if they met certain conditions.[1] In applying the numerical limit in the old Section 203(b)(3), which the Dodd-Frank Act repealed, the SEC generally permitted investment advisers to count as a single "client" any fund they advise, but the SEC did not require such funds to count the individual investors as separate clients. Accordingly, private fund managers had been able to rely upon the private advisers exemption in Section 203(b)(3) and advise a substantial number of separate funds (not more than 14 in any 12-month period) without becoming subject to SEC registration.

An investment adviser that is required to register, that is not otherwise exempt (and that previously relied on the "private adviser" exemption in Section 203(b)(3) on July 20, 2011), may delay registering with the SEC until March 30, 2012.[2] Initial

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[1] The exemption did not apply to advisers to registered investment companies and "business development companies."

[2] Rule 203-1(e); Release No. IA-3221, Rules Implementing Amendments to the Investment Advisers Act of 1940.

applications for registration can take up to 45 days to be approved. Thus, advisers relying on this transition provision to remain unregistered until March 30, 2012 should file a complete application, both Part 1 and a brochure(s) meeting the requirements of Part 2 of Form ADV at least by February 14, 2012.

However, the Dodd-Frank Act does not require all investment advisers to register with the SEC. Although the Dodd-Frank Act replaced the Section 203(b)(3) exemption with a more narrow exemption, it generally raised the floor (discussed below) on Advisers Act registration for most "investment advisers" to register with the SEC and added certain new exemptions from the registration requirements in the Advisers Act.

*Definition of "Investment Adviser"*

"Investment adviser" is defined in Section 202(a)(11) of the Advisers Act to mean "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," subject to certain carve-outs. Certain investment advisers that do not advise about securities may therefore not be subject to the Advisers Act. However, the definition of "securities" under the Advisers Act is very broad.

*Advisers Act Jurisdiction*

In Release No. IA-3222,[3] the Commission stated that non-U.S. investment advisers, even with no place of business in the United States and no U.S. clients may be subject to registration under the Advisers Act, unless exempt, if there is sufficient U.S. jurisdictional means. It is possible that the SEC will determine that non-U.S. investment advisers falling within the definition of "investment adviser" that use U.S. jurisdictional means, since they are not subject to state law regulation, registration or examination, will generally be required to register with the SEC at any size, unless otherwise exempt.

The Commission has suggested that the test of jurisdictional means for non-U.S. investment advisers is whether there are "conduct or effects" in the United States.[4] A foreign investment adviser could also potentially be subject to U.S. jurisdictional means by using U.S. mails or any means or instrumentality of U.S. interstate commerce.[5] Section 202(a)(10) defines "interstate commerce" to include "trade, commerce, transportation, or communication . . . between any foreign country and any State . . . ."

In certain cases, the Commission has allowed a non-U.S. investment adviser to use limited U.S. jurisdictional means without being subject to Advisers Act jurisdiction. In *Gim-Seong Seow*, a no-action letter,[6] the SEC staff noted that a non-U.S. investment

[3] *See* Release No. IA-3222, Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less than $150 Million in Assets under Management, and Foreign Private Advisers.

[4] *See, e.g.*, The National Mutual Group, 1993 SEC No-Act. LEXIS 384 (March 8, 1993).

[5] Advisers Act, Section 203.

[6] Protecting Investors: A Half Century of Investment Company Regulation, 1992 SEC LEXIS 3489

adviser to clients residing outside the United States may use limited U.S. jurisdictional means without triggering the registration requirements of the Advisers Act. In that no-action letter, the non-U.S. investment adviser obtained information about securities issued by U.S. issuers through U.S. jurisdictional means, gave advice abroad about those securities to its non-U.S. clients and effected transactions in securities through U.S. broker-dealers on behalf of those clients.[7] In contrast, the SEC staff said in that no-action letter that a domestic adviser dealing exclusively with foreign clients must register if it uses any jurisdictional means in connection with its advisory business.[8]

Non-U.S. investment advisers can, in certain cases, be subject to U.S. jurisdiction if they are affiliates of U.S. registered investment advisers.

*Raising the Floor for Advisers Act Registration*

The concept of "covered mid-sized investment adviser" is central to understanding the applicable Advisers Act floors. The Dodd-Frank Act generally defines a covered mid-sized investment adviser as an investment adviser with between $25 and $100 million in assets under management, and that is subject to registration and examinations as an investment adviser with the state in which it maintains its principal office and place of business.[9] Wyoming, New York and Minnesota do not currently subject investment advisers to registration and examination. Investment advisers with a principal place of business in Wyoming, New York or Minnesota, would not currently be considered subject to registration and examinations in the state where they maintain their principal office and place of business, and therefore would not be covered mid-sized investment advisers.[10]

Small investment advisers with under $25 million in assets under management generally may not register with the SEC, unless the state in which they maintain their principal office and place of business has not enacted an investment adviser statute (e.g., Wyoming), or unless they act as an investment adviser to a registered investment company, in which case they must register with the SEC under the Advisers Act, unless otherwise exempt.[11] Thus, an investment adviser with its principal office and place of business in Wyoming will have to register at any size, unless otherwise exempt. Presumably, non-U.S. investment advisers with their principal office and place of business in a foreign country falling within the definition of "investment adviser" that use U.S. jurisdictional means,[12] since they are not subject to a state law investment adviser statute, will generally be required to register with the SEC at any size, unless otherwise exempt. However, it is possible that the SEC could take the position that non-U.S. investment advisers that met the requirements of U.S. jurisdictional means and that had

(May, 1992); Gim-Seong, SEC No-Action Letter, 1987 SEC No-Act. LEXIS 2789 (Nov. 30, 1987).

[7] *Id.*

[8] *Id.*

[9] Dodd-Frank, Section 410; Advisers Act, Section 203A(a)(2)(B).

[10] Form ADV, Part 1A, Items 2.A.(3), 2.A.(4).

[11] Advisers Act, Section 203A(a)(1).

[12] U.S. jurisdictional means in discussed in "Non-U.S. Advisers" below.

less than $25 million in assets under management would not have to register with the SEC if it had assets under management of less than $25 million and if the foreign country where they are located had enacted an investment adviser statute.

Second, non-covered mid-sized investment advisers with between $25 million and $100 million in assets under management will generally be required to register with the SEC, unless an exemption applies.[13] As discussed above, the Dodd-Frank Act generally defines a "covered mid-sized investment adviser" as an investment adviser with between $25 and $100 million in assets under management, and that is subject to registration and examinations as an investment adviser with the state in which it maintains its principal office and place of business.[14] The Commission noted that advisers with their principal office and place of business in Minnesota, New York and Wyoming with assets under management between $25 million and $100 million must register with the Commission, unless otherwise exempt. Presumably, mid-size non-U.S. investment advisers with their principal office and place of business in a foreign country falling within the definition of "investment adviser" that use U.S. jurisdictional means,[15] since they are not subject to state law registration or examination, will generally be required to register with the SEC, unless otherwise exempt. However, it is possible that the SEC could take the position that such a foreign investment adviser would not have to register with the SEC if the foreign country required investment adviser registration and examinations.

Third, covered mid-sized investment advisers with between $25 million and $100 million in assets under management will generally be prohibited from registering with the SEC unless (1) they advise a registered investment company or a company that has elected to be a "business development company," in which case they are required to register under the Advisers Act, unless otherwise exempt;[16] or (2) they are required to register with 15 or more states, in which case they will be permitted to register under the Advisers Act.[17] If the covered mid-sized investment adviser has between $100 million and $110 million in assets under management, it will be permitted, but not required, to register with the Commission.[18] It is uncertain whether foreign investment advisers that are subject to registration and examinations as an investment adviser with the country in

[13] Rule 203A-1(a); Advisers Act, Section 202(a)(11); Dodd-Frank Act, Section 410.

[14] Dodd-Frank, Section 410; Advisers Act, Section 203A(a)(2)(B). A mid-sized adviser that relies on an exemption from registration with its home state would not be considered to be "required to be registered" with its home state. *See* Form ADV: Instructions for Part 1A, instr. 2.b.

[15] U.S. jurisdictional means in discussed in "Non-U.S. Advisers" below.

[16] Release No. IA-3221, Rules Implementing Amendments to the Investment Advisers Act of 1940, at fn. 106.

[17] Section 203A(a)(2)(A) of the Advisers Act provides as follows: "No investment adviser described in subparagraph (B) shall register under Section 203, unless the investment adviser is an adviser to an investment company registered under the Investment Company Act of 1940, or a company that has elected to be a business development company pursuant to Section 54 of the Investment Company Act of 1940, and has not withdrawn the election, except that, if by effect of this paragraph an investment adviser would be required to register with 15 or more States, then the adviser may register under Section 203.

[18] Rule 203A-1(a).

which they maintain their principal office and place of business would fall within the definition of a "covered mid-sized investment adviser."

Fourth, investment advisers with more than $110 million in assets under management will generally be required to register with the SEC, unless an exemption applies.[19]

As a result, the minimum assets under management threshold for Commission registration for most U.S. investment advisers that do not manage registered investment companies or business development companies will be $100 million in general, and $25 million for advisers that would either (1) not be subject to registration and examination in the state in which they maintain their respective principal offices and places of business or (2) otherwise be required to register with 15 or more states. If the investment adviser has its principal office and place of business in a state that has not enacted an investment adviser statute, then it would be required to register at any size, unless otherwise exempt.

If a mid-sized adviser is prohibited from registering with the Commission, the Commission noted that it would be possible for a mid-sized investment adviser to receive an order permitting the adviser to register with the Commission.[20]

*The New Exemptions*

Although it eliminated the "private adviser" exemption, the Dodd-Frank Act created several new exemptions.[21] The most important of these exemptions for investment advisers are as follows:

- *Advisers Solely to Venture Capital Funds* - Section 203(l) provides that "no investment adviser that acts as an investment adviser solely to 1 or more venture capital funds shall be subject to the registration requirements of this title with respect to the provision of investment advice relating to a venture capital fund."[22]
- *Advisers Solely to Private Funds with less than $150 Million in AUM* - Section 203(m) provides that the Commission shall provide an exemption from the registration requirements to any investment adviser of "private funds," if each of such investment adviser acts solely as an adviser to private funds and has assets under management in the United States of less than $150 million.[23]
- *Foreign Private Advisers* - Section 203(b)(3), as revised, created a new exemption

[19] Advisers Act, Section 203A; Section 202(a)(11); Rule 203A-1(a).
[20] Form ADV, Part 1A, Item 2.A.(12).
[21] In Release No. IA-3222, the Commission voted unanimously to implement the venture capital, private funds and foreign private advisers exemptions as set forth in Section 203(l), Section 203(m) and 203(b)(3) of the amended Advisers Act. In Release No. IA-3220, the Commission adopted Rule 202(a)(11)(G)-1 under the Advisers Act, which defines the term "family office." For a discussion of the nuances of these exemptions, Kenneth Muller, Jay Baris and Seth Chertok, SEC Dodd-Frank Advisers Act Rulemaking: Parts I and II INSIGHTS (forthcoming).
[22] Dodd-Frank Act, Section 407.
[23] Dodd-Frank Act, Section 408.

for "foreign private advisers."

- *Family Offices* - The Dodd-Frank Act adds an exclusion from the definition of "investment adviser" in Section 202(a)(11) that will apply to any "family office," as defined by rule, regulation or order of the Commission.[24]

Rule 204-4 requires Section 203(l) and Section 203(m) exempt reporting advisers to file reports with the Commission electronically on Form ADV through IARD using the same process used by registered investment advisers.[25] A Section 203(l) or Section 203(m) exempt reporting adviser must submit its initial Form ADV within 60 days of relying on the exemption from registration under Section 203(l) or Section 203(m) of the Advisers Act.[26] Each Form ADV is considered filed with the Commission upon acceptance by IARD.[27] As amended, Rule 204-1 requires a Section 203(l) or Section 203(m) exempt reporting adviser, like a registered adviser, to amend its reports on Form ADV: (1) at least annually, within 90 days of the end of the adviser's fiscal year; and (2) more frequently, if required by the instructions to Form ADV. Similarly, the Commission amended General Instruction 4 to Form ADV to require a Section 203(l) or Section 203(m) exempt reporting adviser, like a registered adviser, to update promptly Items 1 (Identification Information), 3 (Form of Organization), and 11 (Disciplinary Information) if they become inaccurate in any way, and to update Item 10 (Control Persons) if it becomes materially inaccurate. Section 203(l) or Section 203(m) exempt reporting advisers must file their first reports on Form ADV through IARD between January 1 and March 30, 2012.

*State Registration*

Investment advisers that register with the SEC will not be subject to state registration requirements.[28] "Investment advisers" that do not register under the Advisers Act as a result of falling short of the applicable floor may have to register under applicable state law instead, although some states are considering granting exemptions if the investment adviser otherwise qualifies for an exemption under the Advisers Act. If an investment adviser does not register with the SEC on the basis of an exemption, it may also be required to register as an investment adviser under applicable state law, but some states provide exemptions to investment advisers that are exempt under the Advisers Act. California, for example, is currently considering granting an analogous exemption with respect to the Section 203(m) exemption if the investment adviser has more than $100 million in assets under management, and an analogous Section 203(l) exemption. In the event a state does not grant such an exemption, if an investment adviser is eligible for SEC registration (but SEC registration is not required), many investment advisers will choose to register with the SEC rather than register with the applicable state authorities

[24] Dodd-Frank Act, Section 409.
[25] Rule 204-4(b).
[26] *See* Form ADV: General Instruction 13.
[27] Rule 204-4(c).
[28] Advisers Act, Section 203A(b).

because state registration can be more onerous as it may require registration in multiple states and compliance with certain state rules regarding investment advisers and investment adviser representatives.

*Transition to State Registration*

The SEC adopted new Rule 203A-5 to provide for an orderly transition to state registration for mid-sized advisers that will no longer be eligible to register with the Commission. The transition requirements are addressed to existing registrants and new applicants.

***Existing Registrants.*** Under the Rule, each adviser registered with the Commission on January 1, 2012 must file an amendment to its Form ADV no later than March 30, 2012.[29] These amendments will respond to new items in Form ADV and will identify mid-sized advisers no longer eligible to remain registered with the Commission.[30] Advisers will determine their assets under management based on the current market value of the assets as determined within 90 days prior to the date of filing the Form ADV.[31] Mid-sized advisers that are no longer eligible for Commission registration under Section 203A(a)(2) of the Advisers Act, and are not otherwise exempted by Rule 203A-2 from such prohibition, must withdraw their registrations with the Commission after filing their Form ADV amendments by filing Form ADV-W no later than June 28, 2012.[32] Mid-sized advisers registered with the Commission as of July 21, 2011 must remain registered with the Commission (unless an exemption from Commission registration is available) until January 1, 2012, which is the date by which the Commission expects the programming of IARD will be completed.[33]

***New Applicants.*** Until July 21, 2011, when the amendments to Section 203A(a)(2) took effect, advisers applying for registration with the Commission that qualify as covered mid-sized advisers under Section 203A(a)(2) of the Advisers Act may register with either the Commission or the appropriate state securities authority. Thereafter, all such advisers are prohibited from registering with the Commission and

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[29] Rule 203A-5(b). The Commission stated that after this period, it expected to cancel the registration of advisers no longer eligible to register with the Commission that fail to file an amendment or withdraw their registrations in accordance with the Rule. *See* Advisers Act, Section 203(h).

[30] The Commission stated that advisers will report the current market value of their assets under management determined within 90 days of the filing.

[31] Rule 203A-5(b).

[32] Rule 203A-5(c)(1). During this period while an investment adviser is registered with both the Commission and one or more state securities authorities, the Advisers Act and applicable State law will apply to the investment adviser's activities. *Id*. If, prior to the effective date of the withdrawal from registration of an investment adviser on Form ADV-W, the Commission has instituted a proceeding pursuant to Section 203(e) of the Advisers Act to suspend or revoke registration, or pursuant to Section 203(h) to impose terms or conditions upon withdrawal, the withdrawal from registration shall not become effective except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors. Rule 203A-5(c)(2).

[33] Rule 203A-5(a).

must register with the state securities authorities. Covered mid-sized advisers registered with the Commission as of July 21, 2011 must remain registered with the Commission (unless an exemption from Commission registration is available) until January 1, 2012. Covered mid-sized investments advisers that are no longer eligible for Commission registration under Section 203A(a)(2) of the Advisers Act, and are not otherwise exempted by Rule 203A-2 from such prohibition, must withdraw their registrations with the Commission after filing their Form ADV amendments by filing Form ADV-W no later than June 28, 2012. Mid-sized investment advisers that previously relied on the "private adviser" exemption in Section 203(b)(3) on July 20, 2011 that register with the appropriate state securities authority, if required to register under the Advisers Act, will generally be permitted to remain unregistered under the Advisers Act, until March 30, 2012, but should file a complete application, both Part 1 and a brochure(s) meeting the requirements of Part 2 of Form ADV at least by February 14, 2012. Generally speaking, advisers that have assets under management of more than $100 million (for permissive registration) and more than $110 million (for mandatory registration) will continue to register with the Commission (unless, with respect to mandatory registration, an exemption from registration with the Commission otherwise is available).[34] Larger investment advisers that previously relied on the "private adviser" exemption in Section 203(b)(3) on July 20, 2011 will generally be permitted to remain unregistered under the Advisers Act, until March 30, 2012, but should file a complete application, both Part 1 and a brochure(s) meeting the requirements of Part 2 of Form ADV at least by February 14, 2012. Registration under the Advisers Act will preempt state law registration. [35]

*Switching between State and Commission Registration*

Rule 203A-1 is designed to prevent an adviser from having to switch frequently between state and Commission registration as a result of changes in the value of its assets under management or the departure of one or more clients. The SEC decided that eligibility for registration is to be determined annually as part of an adviser's annual updating amendment. This allows an adviser to avoid the need to change registration status based on fluctuations that occur during the course of the year.[36]

Rule 203A-1(b) provides rules for switching to or from Commission registration. If an investment adviser is registered with a state securities authority, it must apply for registration with the Commission within 90 days of filing an annual updating amendment to its Form ADV reporting that it is eligible for Commission registration and is not relying on an exemption from registration under Sections 203(l) or 203(m) of the Advisers Act.[37] This safe harbor period would only be available to an adviser that has complied with all applicable reporting requirements of exempt reporting advisers as such (as opposed to all Commission reporting requirements). If an investment adviser is

[34] Advisers Act, Section 202A(a)(2).
[35] Advisers Act, Section 203A(b).
[36] Rule 203A-1(b)(2).
[37] Rule 203A-1(b)(1).

registered with the Commission and files an annual updating amendment to its Form ADV reporting that it is not eligible for Commission registration and is not relying on an exemption from registration under Sections 203(l) or 203(m) of the Advisers Act, it must file Form ADV-W to withdraw its Commission registration within 180 days after its fiscal year end (unless it is then eligible for Commission registration).[38] During the period while an investment adviser is registered with both the Commission and one or more state securities authorities, the Advisers Act and applicable State law will apply to its advisory activities.

*Timeline of Compliance Deadlines for Advisers Act Registration and Reporting*

**July 21, 2011** - Until July 21, 2011, when the amendments to section 203A(a)(2) took effect, advisers applying for registration with the Commission that qualify as covered mid-sized advisers under section 203A(a)(2) of the Advisers Act may register with either the Commission or the appropriate state securities authority.

**September 17, 2011 (60 days after publication of Release No. IA-3221 in the Federal Register)** - Advisers may begin relying on the Commission amendment to the buffer in Rule 203A-1. Advisers may rely on the Commission's amendments to Rule 203A-2. Form ADV amendments will become effective on such date.

**January 1, 2012** – Mid-sized advisers registered with the Commission as of July 21, 2011 must remain registered with the Commission (unless an exemption from Commission registration is available) until January 1, 2012. Exempt reporting advisers may begin filing their first reports on Form ADV through the IARD on January 1, 2012.

**February 14, 2012** - Because initial applications for registration can take up to 45 days to be approved, advisers relying on the "private adviser" exemption transition provision to remain unregistered until March 30, 2012 should file a complete application, both Part 1 and a brochure(s) meeting the requirements of Part 2 of Form ADV at least by February 14, 2012.

**March 30, 2012** – Registered advisers registered with the SEC on January 1, 2012 must file an amended Form ADV by March 30, 2012. Exempt reporting advisers must file their first reports on Form ADV through the IARD by March 30, 2012. An investment adviser that is not otherwise exempt that previously relied on the "private adviser" exemption in section 203(b)(3) on July 20, 2011, may delay registering with the SEC until March 30, 2012.

**June 13, 2012** – Registered advisers, exempt reporting advisers and foreign private advisers must comply with the ban on third-party solicitation in the "pay to play" rule by June 13, 2012.

**June 28, 2012** - Mid-sized advisers that are no longer eligible for Commission registration under section 203A(a)(2) of the Advisers Act, and are not otherwise exempted by Rule 203A-2 from such prohibition, must withdraw their registrations with

[38] Rule 203A-1(b)(2).

the Commission after filing their Form ADV amendments by filing Form ADV-W no later than June 28, 2012.

*Conclusion*

The new rules substantially change the registration regime under the Advisers Act. Investment advisers that previously did not have to register may now have to register, while investment advisers that previously registered may now be unable to register. Many non-U.S. investment advisers that were previously exempt may now have to register as well. In the event a state does not grant an exemption from registration to an investment adviser, if an investment adviser is eligible for SEC registration (but SEC registration is not required), many investment advisers will choose to register with the SEC rather than register with the applicable state authorities. State registration can be more onerous as it may require registration in multiple states and compliance with certain state rules regarding investment advisers and investment adviser representatives.

Registration and exemption issues will affect compliance obligations. Compliance obligations of investment advisers under the Advisers Act will vary depending upon whether the investment is unregistered, a Section 203(l) or Section 203(m) exempt reporting adviser or a registered investment adviser. In addition, there are special compliance rules for non-U.S. investment advisers exempt as "foreign private advisers."

Unregistered investment advisers will generally be subject to Section 206, the anti-fraud provision of the Advisers Act, and Section 203(e)(6), the supervision provision of the Advisers. Section 203(l) and Section 203(m) exempt reporting advisers, in addition to being subject to the obligations of unregistered investment advisers, will be subject to filing a limited Form ADV, and to submitting to the SEC's "pay to play" rules. "Foreign private advisers" exempt under Section 203(b)(3) will be subject, in addition to the obligations of unregistered investment advisers, to the SEC's "pay to play" rules, with respect to its U.S. clients and investors. The SEC staff previously has taken the position that the substantive provisions of the Advisers Act generally should not govern the relationship between an investment adviser located outside the U.S. and its foreign clients, even though the adviser is registered under the Advisers Act.

In Release No. IA-3222: Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less than $150 Million in Assets under Management, and Foreign Private Advisers, the Commission noted that nothing in that release was intended to withdraw any prior statement of the Commission. Presumably, this same logic would apply with respect to an exempt foreign private adviser. To the extent an investment adviser registers with the SEC, it will become subject to the full scope of the Advisers Act (including, without limitation, the obligations of unregistered investment advisers). A brief summary of these obligations include: (1) filing current disclosures on Form ADV; (2) record keeping requirements; (3) examinations by the SEC's Office of compliance Inspections and Examinations; (4) establishing, maintaining and implementing compliance programs; (5) establishing, maintaining and implementing a code of ethics; (6) custody requirements; (7) restrictions on principal transactions; (8)

complying with advertising rules; (9) restrictions on performance fees; and (10) compliance with "pay to play" rules. Compliance is complex and you would be well advised to consult with counsel familiar with these issues.

The SEC staff previously has taken the position that the substantive provisions of the Advisers Act generally should not govern the relationship between an investment adviser located outside the U.S. and its foreign clients, even though the adviser is registered under the Advisers Act. In Release No. IA-3222, the Commission noted that nothing in that release was intended to withdraw any prior statement of the Commission. To enable the Commission to monitor and enforce a registered foreign adviser's performance of its obligations to its U.S. clients and to ensure the integrity of U.S. markets, a registered foreign adviser must comply with certain Advisers Act recordkeeping requirements and provide the Commission with access to foreign personnel with respect to all its activities.[39] In one no-action letter, the SEC staff suggested that the Advisers Act could govern a relationship between a foreign adviser and its non-U.S. clients if the adviser's activities involved conduct or effects in the United States.[40] In a later no-action letter in 1998, subject to heavy conditions and representations, the SEC staff said it would not recommend enforcement action when registered investment advisers did not comply with the Advisers Act with respect to their foreign clients if they comply with applicable foreign law.[41] Of course, a registered foreign adviser would always have to comply with the Advisers Act with respect to its U.S. clients. It should be noted that when a foreign adviser advises a foreign client that is an intermediate conduit used to advise U.S. clients, Section 208(d) of the Advisers Act would operate to prevent the adviser from considering the conduit as a foreign client. In such event, the full compliance obligations of the Advisers Act would apply. It is uncertain what the compliance obligations of a foreign adviser would be with respect to U.S. investors, as opposed to U.S. clients.

[39] Murray Johnstone Holdings Limited; Murray Johnstone Limited; Murray Johnstone International Limited, 1994 SEC No-Act. LEXIS 734 (Oct. 7, 1994).

[40] The National Mutual Group, 1993 SEC No-Act. LEXIS 348 (March 8, 1993).

[41] Royal Bank of Canada, Royal Bank of Canada Investment Management (US) Limited, Royal Bank of Canada Investment Management (USA) Limited, 1998 SEC No-Act. LEXIS 620 (June 3, 1998).