

# The Path to Registration with the US Securities and Exchange Commission

United States SEC Registration for Foreign Advisers

Waystone Compliance Solutions provides specialist services to clients in the asset management and finance industry. As a truly global partner, we work with clients to align investment strategies and operational processes with the ever-shifting regulatory environment.

Non-US investment advisers, with no principal place of business within the United States (“Foreign Advisers”), providing investment advice to United States persons (including funds with US investors) are subject to the Investment Advisers Act of 1940 (the “Advisers Act”). Foreign Advisers must register with the SEC, subject to certain minimum threshold requirements, unless eligible for an exemption. There are three primary exemptions that are applicable to foreign advisers under the Advisers Act:

1. Foreign Private Adviser
2. Private Fund Adviser
3. Venture Capital Adviser.

We have set out below a detailed examination of each exemption:

## Foreign Private Adviser Exemption

The Foreign Private Adviser exemption applies to foreign advisers who have no place of business in the United States. Foreign advisers are exempt from registration with the SEC if they meet the following criteria:

1. Advise fewer than 15 clients and investors in the United States in private funds<sup>1</sup> advised by the adviser where each natural person, managed account, or company advised counts as one client.

2. 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<sup>2</sup>.
3. The adviser does not offer itself out generally to the public in the United States as an investment adviser.

Advisers should use caution when declaring they have a US presence or office where advisers meet with, advise, or otherwise provide services to clients. Please note that this exemption is not available when acting as an investment adviser to any investment company registered under the Investment Company Act, or company that has elected to be treated as a business development company.

Advisers exceeding the minimum assets under management or client counts are required to register with the SEC unless another exemption applies.

## Private Fund Adviser Exemption

The Private Fund Adviser Exemption depends on whether the foreign adviser maintains its principal office and place of business (where the investment adviser's officers, partners or managers of the adviser direct, control, and coordinate the activities of the investment adviser) are within the United States. Foreign Advisers whose principal place of business is located outside of the United States are exempt from the requirement to register if:

1. The investment adviser has no client that is a United States person except for one or more qualifying private funds.
2. 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 \$150 million calculated on an annual basis consistent with General Instruction 15 to Form ADV.

When counting assets under this exemption,<sup>3</sup> a non-US adviser, with its principal place of business located outside of the United States need only count private fund assets it manages at a place of business in the United States towards the \$150 million asset limit under the exemption. If, however, a foreign adviser's executive offices and partners, officer, or directors making management decisions of the investment adviser are located within the United States, then all assets under management will be counted towards the \$150 million threshold.

This exemption is limited in scope to advisory services provided to United States persons that are qualifying private funds<sup>4</sup>. Advisers with a principal place of business outside of the United States may rely on this exemption provided that all of the adviser's clients that are United States Persons are qualifying private funds. Thus, Foreign Advisers with no principal place of business within the United States, may enter the US market and take advantage of the Private Fund Adviser Exemption without counting the type or number of its non-US clients or the amount of assets it manages outside of the United States.

Foreign advisers seeking to qualify for the Private Fund Adviser Exemption are required to comply with certain SEC reporting and record keeping obligations, including a short Form ADV Exempt Reporting Adviser ("ERA") Part 1. Form ADV ERA Part 1 requires information that includes identifying information, exemption details, form of organization, other business activities, financial industry affiliations and private fund reporting, control persons and disclosure information (related to disciplinary history). Form ADV ERA must be re-filed annually. All information on Form ADV ERA will be made publicly available. Exempt reporting advisers must have policies and procedures that are reasonably designed, taking into consideration the nature of such investment adviser's business, to prevent the misuse of material nonpublic information in violation of the Advisers Act or the Securities Exchange Act of 1934, or the rules or regulations thereunder.

## Venture Capital Fund Exemption

The Venture Capital Fund Exemption applies to any Foreign Adviser who solely advises venture capital funds where all clients of the adviser are venture capital funds, regardless of whether they are located in the US or abroad. Private funds must meet the following requirements to be considered venture capital funds:

1. Represent to investors and potential investors that it pursues a venture capital strategy.
2. Immediately after the acquisition of any asset, holds not more than 20% of the fund's assets in non-qualifying investments.
3. Does not incur leverage in excess of 15% of the private fund's aggregate capital contributions and uncalled committed capital other than short-term borrowing and limited exclusion.
4. Does not offer withdrawal or redemption rights except in extraordinary circumstances<sup>5</sup>.
5. Is not registered under the Investment Company Act nor elected to be treated as a business development company.

For the purpose of this exemption Qualifying Investment includes one of three things:

1. An equity security issued by a "qualifying portfolio company" that is acquired directly by the private fund from such qualifying portfolio company.
2. Any equity security issued by a qualifying portfolio company in exchange for an equity security issued by the qualifying portfolio company.
3. Any equity security issued by a company of which a qualifying portfolio company is a majority-owned subsidiary, or a predecessor, and is acquired by the private fund in exchange for an equity security described in paragraph (c)(3)(i) or (c) (3)(ii) of this section.

Foreign advisers who qualify for the Venture Capital Fund Exemption and advise purely venture capital funds are not required to register with the SEC, however, they are required to annually file Form ADV ERA part 1A with the SEC (as noted above). A key distinction between the Venture Capital Fund Exemption and the Private Fund Adviser Exemption is that under the Private Fund Adviser Exemption Foreign Advisers may disregard, for the purposes of applying the exemption, their advisory activities in their home jurisdictions. The Venture Capital Fund exemption, however, differs because in order to meet the exemption, advisers must take into consideration all advisory activities across all jurisdictions and may not only look at venture fund activities within the United States. For example, a foreign adviser who advises clients that do not meet the Venture Capital Fund Exemption in their home jurisdiction do not meet the US Venture Capital Fund Exemption.

## US SEC Registration and Ongoing Services

Waystone Compliance Solutions is the premier provider of compliance solutions. We inform, prepare and protect our clients in today's challenging regulatory environment. We accomplish this through our leading-edge research, proprietary processes and a dedicated relationship-based service.

When you choose Waystone Compliance Solutions as your compliance partner, you will receive high-quality and professional services. Our series of programs can be tailored to meet your specific requirements.

Companies can register with the SEC in two ways. If a company meets the exemption, they will be able to file as an Exempt Reporting Adviser (ERA). If a company does not meet the exemption, they must fully register with the SEC as a Registered Investment Adviser (RIA). We provide the following bespoke compliance services to ERAs and RIAs on an ongoing basis or as required:

## ERA Services

We can perform your registration and ongoing compliance program implementation or any one of the services identified here.

- advise and assist with registration as an Exempt Reporting Adviser with the SEC
- draft and/or review the compliance manual with updates as needed
- review of marketing materials and investor DDQ
- regulatory inquiry support
- regulatory filing support
- quarterly compliance review including, review of employee trading, allocations, best execution and code of ethics
- access to our regulatory updates that inform clients of changes in relevant regulations.

## RIA Services

We can perform your registration and ongoing compliance program implementation or any one of the services identified here.

- advise and assist with registration as a Registered Investment Adviser with the SEC
- review advertising and sales literature, including emails, marketing pitch books, in-house and investor DDQ, website, etc.
- prepare Form ADV Parts 1, 2A and 2B with updates and amendments as needed
- draft and/or review the compliance manual with updates as needed
- quarterly compliance review including review of employee trading, allocations, best execution and code of ethics
- annual Compliance Review under Rule 206(4) – 7
- regulatory filing support
- compliance calendar
- conduct annual and periodic compliance training including AML policy, FCPA, code of conduct, insider trader training, etc.
- on-site SEC examination support as well as assisting in response to ad-hoc regulatory inquiries
- access to our regulatory updates that inform clients of changes in relevant regulations.

For more information or to speak with a member of our team, please reach out to your Waystone Compliance Solutions representative.

<sup>1</sup> Advisers are required to look through private funds to count each underlying beneficial owners located in the United States as investors.

<sup>2</sup> Calculating total assets under management attributable to United States persons should be consistent with the instructions to Form ADV Item 5 and refers to “regulatory assets under management” (See: <https://www.sec.gov/about/forms/formadv-instructions.pdf>)

<sup>3</sup> See Adopting Release <https://www.sec.gov/rules/final/2011/ia-3222.pdf> Section II.B.

<sup>4</sup> Qualifying private fund means any private fund that is not registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8) and has not elected to be treated as a business development company pursuant to section 54 of that Act (15 U.S.C. 80a-53). For purposes of this section, an investment adviser may treat as a private fund an issuer that qualifies for an exclusion from the definition of an “investment company,” as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), in addition to those provided by section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(1) or 15 U.S.C. 80a-3(c)(7)), provided that the investment adviser treats the issuer as a private fund under the Act (15 U.S.C. 80b) and the rules thereunder for all purposes.

<sup>5</sup> May offer entitlement holders to receive distributions made to all holders on a pro rata basis.

# The Path to SEC Registration in the United States for Foreign Advisers

## The United States SEC Registration for Foreign Advisers

Do you provide investment advice to any persons in the United States?



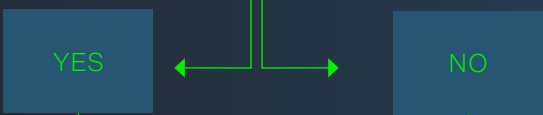
Do you have a place of business in the United States?

You do not likely need to register with or notice file with the SEC. Please check with your Waystone team to confirm.



Do your firm's officers, partners, or managers of the adviser direct or coordinate the activities of the firm from a place of business in the United States?

Do you have more than 15 clients located in the United States or assets under management attributed to persons in the United States of greater than \$24,999,999?



Do you provide investment advice exclusively to private funds where such advice is given from within the United States where total assets under management value less than \$150 million?

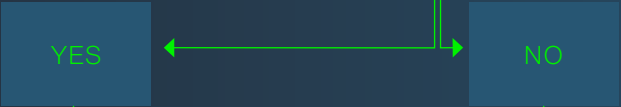
You have likely exceeded the foreign private adviser exemption

You likely meet the US SEC foreign private adviser exemption. You may not be required to register with the SEC. Please check with your Waystone team to confirm.



You likely meet the US SEC private fund adviser exemption. You are required to 'notice file' with the SEC via Form ADV ERA. Please check with your Waystone team to confirm.

Do you solely advise venture capital funds where all clients are venture capital funds regardless of where they are located?



You likely meet the US SEC venture capital fund exemption. You are required to 'notice file' with the SEC via Form ADV ERA. Please check with your Waystone team to confirm.

You may need to register with the SEC. Please consult your Waystone team.

You may no longer meet the foreign private adviser exemption but may meet other exemptions based on total assets under management. Please contact your Waystone team to verify.