Fund Management
2021

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Fund Management*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Rochman of Morgan, Lewis & Bockius LLP, and to Michelle Moran of K&L Gates LLP for her assistance with previous editions.

LEXOLOGY
Getting The Deal Through

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FUND MANAGEMENT REGULATION

Regulatory framework and authorities

1 How is fund management regulated in your jurisdiction? Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

The US Securities and Exchange Commission (SEC) is the regulatory authority primarily responsible for the oversight of fund management and offering activities in the United States. The substantive laws are as follows:

- the US Securities Act of 1933, as amended (the 1933 Act), which governs the offer and sale of securities, including fund interests;
- the US Securities Exchange Act of 1934, as amended (the Exchange Act), which governs the marketing and sale of fund interests by broker-dealers;
- the US Investment Company Act of 1940, as amended (the 1940 Act), which governs the structure and operation of funds that are registered or are required to be registered under the 1940 Act (which are referred to as 'investment companies' under US law) and which is relevant to private funds that are structured to fall within one or more exemptions from regulation as an 'investment company' under the 1940 Act; and
- the US Investment Advisers Act of 1940, as amended (the Advisers Act), which governs the activities of investment advisers (as that term is defined in the Advisers Act), which includes certain fund managers.

Registered and private funds

Investment companies that are marketed and sold to the general public must be registered under the 1940 Act (registered funds). Registered funds can be open-end or closed-end and diversified or non-diversified. Private funds are structured and operated to fit within one or more exceptions to the definition of 'investment company' and as a result are not registered or regulated under the 1940 Act, except for certain limitations when investing in registered funds.

Shares of registered funds are typically offered to the public and registered under the 1933 Act. In contrast, private funds, which are exempt from registration under the 1940 Act, issue securities in private offerings that are exempt from registration under the 1933 Act, although they will typically seek to adhere to an offering regime promulgated under the 1933 Act that provides a safe harbour from registration. It is also possible for a fund to be registered as an investment company under the 1940 Act, but not conduct a public offering. In this case, similar to a private fund, the registered fund would offer its shares pursuant to an exemption from registration under the 1933 Act.

Fund managers (investment advisers)

Investment advisers with a principal place of business in the US generally must register with the SEC or with the state securities agency for the state of their principal place of business. Generally, investment advisers with at least US$100 million of assets under management must register with the SEC, and smaller advisers must register at the state level, unless the applicable state does not provide for investment adviser registration. An exemption is provided for investment advisers that act solely as an adviser to one or more 'private funds' with less than US$150 million of assets under management, and investment advisers that act solely as an adviser to one or more 'venture capital funds'. Such private fund and venture capital fund advisers are not required to register with the SEC and instead file with the SEC as exempt reporting advisers which are generally subject to less regulation as compared to registered investment advisers. Additionally, many smaller investment advisers that manage over US$25 million of assets under management may register with the SEC as small or mid-sized investment advisers. Non-US advisers that provide investment advisory services in the US are not subject to threshold requirements on assets under management and therefore, absent an exemption, must register with the SEC. Registration with the SEC or a state securities agency requires the filing of Form ADV. Among other things, Form ADV requests information about an adviser's business, services, strategies, and the attendant conflicts of interest and risks to clients of the adviser.

Marketers

The marketing of registered and private funds is generally conducted by broker-dealers registered under the Exchange Act. The SEC is primarily responsible for the oversight of broker-dealers, but broker-dealers must also become members of the Financial Industry Regulatory Authority, Inc (FINRA), a self-regulatory organisation. The SEC recently updated its rules regarding certain marketing activities by investment advisers.

Other regulators

The US Commodity Futures Trading Commission (CFTC) is the regulatory authority responsible for the regulation of commodity trading. Fund managers that invest in commodities on behalf of clients, including registered funds, may be required to register with the CFTC and become members of the National Futures Association, or seek an exemption from registration. Many fund managers are subject to regulation by both the SEC and the CFTC because they trade both securities and commodities.

The US Employee Retirement Income Security Act of 1974, as amended (ERISA), applies to most employee retirement and welfare benefit plans maintained by private corporate employers, and by extension to the management of assets for such plans. Regulations under ERISA are issued by the US Department of Labor. Under ERISA and related regulations, if plan investors in the aggregate hold 25 per cent or more of the value of any class of equity interests in a private fund, the fund's assets will be treated as 'plan assets'. In such case, the fund manager will be subject to a heightened fiduciary standard under ERISA, including certain express prohibitions imposed on fiduciaries by ERISA.

Fund administration

2 | Is fund administration regulated in your jurisdiction?

Fund administration activities such as accounting, financial reporting and performance-related services are generally not subject to regulation in the United States. Often, funds outsource these activities to third-party administrators. However, an adviser generally would remain responsible for its own regulatory obligations, such as record-keeping, when delegating such obligations to a third-party administrator. The board of directors or trustees (the board) of a registered fund would oversee the services that the administrator provides to the registered fund in accordance with the board's general oversight responsibilities.

Authorisation

3 | What is the authorisation or licensing process for funds? What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

To register as an investment company under the 1940 Act, an issuer must file a registration statement with the SEC that contains the fund's prospectus as well as certain additional disclosure documents and other information regarding the issuing fund. The registration statement describes the fund's investment objectives, investment policies, risk factors, investment restrictions, method of operations and management and also must include certain important corporate documents. The registration statement is subject to review and comment by SEC staff. Registered open-end funds may, and often do, offer several classes of shares, certain expenses of which may vary. Registered closed-end funds may not offer multiple share classes, except pursuant to an exemptive order granted by the SEC.

Investment advisers are deemed to be fiduciaries and are subject to an anti-fraud regime as well as an obligation to adopt and implement written policies and procedures reasonably designed to prevent violation, by an investment adviser and its supervised persons, of the Advisers Act. Investment advisers are also required to adopt and implement a written Code of Ethics and policies to prevent the misuse of material non-public information. SEC-registered advisers are also subject to rules promulgated under the Advisers Act that impose several obligations and restrictions with respect to, among other things:

- advertising and marketing;
- proxy voting;
- performance-based fees;
- solicitation arrangements;
- political contributions;
- record-keeping; and
- custody of client assets.

SEC-registered advisers and 'exempt reporting advisers' are subject to periodic examinations by the SEC.

Territorial scope of regulation

4 | What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?

In general, an investment adviser that provides advice to US clients must comply with US regulation, regardless of whether its principal place of business is located in the United States or abroad. However, certain exemptions and other arrangements can limit the application of US regulation to investment advisers with a principal place of business outside the United States (non-US advisers).

Foreign private adviser exemption

A non-US adviser is exempt from the obligation to register with the SEC if it:

- has no place of business in the United States from which it provides actual investment advice;
- has in the aggregate fewer than 15 clients and investors in private funds it advises in the United States;
- manages less than US$25 million attributable to US clients and investors; and
- does not hold itself out to the US public as an investment adviser.

This exemption is not available to advisers to registered funds.

Private fund adviser exemption

A non-US adviser may be deemed an 'exempt reporting adviser', exempt from registration under the Advisers Act, if:

- it provides investment advisory services only to one or more qualifying private funds; and
- the aggregate assets managed by the adviser at a place of business in the United States are less than US $150 million.

Exempt reporting advisers are subject to limited SEC reporting and other requirements, including annual filing of a short form version of the Form ADV. Exempt reporting advisers are also subject to SEC oversight, examination and enforcement.

Venture capital fund adviser exemption

A non-US adviser may be deemed an 'exempt reporting adviser', exempt from registration under the Advisers Act, if it is an investment adviser solely to one or more 'venture capital funds'. For purposes of this exemption a venture capital fund is a private fund that: (1) holds no more than 20 per cent of its capital commitments in certain non-qualifying investments (eg, non-venture capital investments); (2) generally does not borrow or otherwise incur leverage other than limited short-term borrowing and certain other exclusions; (3) does not offer investors redemption rights other than in extraordinary circumstances; and (4) represents itself as pursuing a venture capital strategy.

Participating affiliate arrangement

A non-US adviser that is an affiliate of an SEC-registered adviser (participating affiliate) may provide investment advice to US clients subject to certain conditions, including:

- the registered adviser and participating affiliate are separate legal entities;
- the participating affiliate appoints a US agent for service of process and submits to US jurisdiction;
- personnel of the participating affiliate who provide advisory services to US clients or who have access to certain information regarding US persons are treated as associated persons of the registered adviser; and
- the participating affiliate maintains certain records required by the Advisers Act.

In a participating affiliate arrangement, the participating affiliate is not required to register with the SEC, but its activities on behalf of US clients are subject to the substantive requirements of the Advisers Act.

SEC-registered non-US advisers with non-US clients

The SEC has issued guidance in a series of no-action letters (Uniao de Bancos de Brasilerios, 28 July 1992), indicating that it will not apply the Advisers Act to certain SEC-registered investment advisers that are not located in the US, with respect to their non-US clients. Such advisers are exempt from certain requirements for their non-US clients, including the requirement to deliver specific disclosure documents.

Acquisitions

5 | Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?

The acquisition of a controlling stake in an investment adviser is not subject to prior authorisation by the SEC or the CFTC. However, the acquisition of a controlling stake in an investment adviser may be considered an assignment of the adviser's contracts with clients, which requires client consent. Where the investment adviser is an adviser to a registered fund, such an assignment automatically terminates the existing advisory agreement between the adviser and the fund, typically resulting in the need to obtain a majority approval of the fund's shareholders for a new contract. For these purposes, a 25 per cent ownership stake is presumed to confer 'control' of an investment adviser, but certain circumstances, such as mergers among affiliates, fall outside these requirements.

Restrictions on compensation and profit sharing

6 | Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?

There are no regulatory restrictions on the structuring of an adviser's asset-based management fee. However, the Advisers Act restricts an investment adviser from receiving compensation based on a share of realised or unrealised capital appreciation (ie, a performance-based fee), unless the fee: is charged to a 'qualified client', which includes a natural person or institution with a net worth of at least US$2.1 million or with at least US$1 million in assets under the adviser's management; or is a 'fulcrum fee' that increases and decreases proportionately with the investment performance of a managed fund.

FUND MARKETING

Authorisation

7 | Does the marketing of investment funds in your jurisdiction require authorisation?

A person engaged in the business of marketing securities in the United States, including fund interests, is generally subject to regulation as a broker-dealer. A limited exemption exists for certain associated persons of a fund's sponsor who do not receive commissions or transaction-based compensation, are not associated persons of a broker-dealer and who perform substantial duties other than offering the fund's shares. Many fund sponsors avoid broker-dealer registration requirements by engaging an affiliated or third-party broker-dealer to solicit investments by potential investors.

Fund managers may also engage another third party that is not a broker-dealer (including current clients or investors) to market their funds. Such arrangements often require written agreements between the investment adviser and third-party promoter, and are subject to specific disclosure requirements under the US Investment Advisers Act of 1940, as amended (the Advisers Act).

8 | What marketing activities require authorisation?

Generally, the receipt of transaction-based compensation in connection with a securities transaction, including compensation based on the outcome or size of the transaction, is considered the hallmark of broker-dealer activity that would require registration. However, participation in the solicitation, negotiation or execution of a securities transaction may also require registration, depending on the facts and circumstances.

In addition, marketing materials are subject to differing regulatory regimes. Advertisements of, and solicitations by, investment advisers are subject to rules and guidance under the Advisers Act. Advertisements disseminated by a broker-dealer are subject to the Financial Industry Regulatory Authority, Inc (FINRA). The Commodity Futures Trading Commission also regulates advertisements for commodity pool operators.

Territorial scope and restrictions

9 | What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?

All broker-dealers conducting activities in the United States, even if their activities are directed only to investors outside the United States, must register in the US. Conversely, a non-US broker-dealer that induces or attempts to induce securities transactions by any person in the United States must register in the country or work with a US broker-dealer to chaperone their activities.

10 | If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?

Many fund managers engage a US broker-dealer to market their funds. The US broker-dealer acts as the placement agent for the securities of the fund and representatives of the broker-dealer accompany fund manager personnel at meetings with potential investors.

Commission payments

11 | What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?

When selling registered fund shares, broker-dealers are subject to a FINRA rule that imposes caps on a broker-dealer's sales compensation and distribution fee levels. The amount of sales compensation that will be deemed excessive, and therefore in violation of the rule, is dependent on whether the fund has an asset-based sales charge or is a fund of funds.

RETAIL FUNDS

Available vehicles

12 | What are the main legal vehicles used to set up a retail fund? How are they formed?

US law does not require registered funds to be organised using a particular corporate form. Various legal forms may be used, although in practice registered funds are typically organised under state law as Massachusetts business trusts, Delaware statutory trusts or Maryland corporations. In addition, the US Investment Company Act of 1940, as amended (the 1940 Act) requires registered funds to establish a board and governs the composition of the board.

Laws and regulations

13 | What are the key laws and other sets of rules that govern retail funds?

The 1940 Act and the US Securities Act of 1933, as amended (the 1933 Act), and the rules thereunder, primarily govern registered funds and the public offering of their securities. In addition, the Securities and Exchange Commission (SEC) has issued no-action letter guidance and interpretive statements and publications clarifying the application of these laws and rules, and may grant exemptive relief to permit certain activities that would otherwise be prohibited by laws and rules. Investment advisers to registered funds are subject to the US Investment Advisers Act of 1940, as amended (the Advisers Act) and the rules and guidance thereunder. Registered exchange-listed closed-end funds and open-end exchange-traded funds (ETFs) are also subject to the listing and trading rules of the relevant exchange.

Authorisation

14 | Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?

Registered funds must be registered under the 1940 Act. To market or sell their securities in a public offering, registered funds must also register their securities under the 1933 Act and comply with attendant requirements.

Marketing

15 | Who can market retail funds? To whom can they be marketed?

Registered funds are typically marketed by a principal underwriter (known as a distributor) and by other broker-dealers, although banks and insurance companies may also distribute registered fund shares.

Shares of registered open-end funds (except ETFs) may be offered and sold to any investor. Registered closed-end funds listed on an exchange are typically offered to investors via an initial public offering where broker-dealers act as underwriters to the publicly offered shares.

ETF shares are only sold to certain broker-dealers that are 'authorised participants' in large blocks known as 'creation units'. The authorised participants then sell individual ETF shares on an exchange.

Managers and operators

16 | Are there any special requirements that apply to managers or operators of retail funds?

An investment adviser to a registered fund generally must be an investment adviser registered with the SEC under the Advisers Act. A registered fund, and, in practice, its investment adviser, must also maintain policies and procedures to comply with the 1940 Act, including a code of ethics. In addition, a registered fund must have a written investment advisory agreement with an investment adviser that is approved by the fund's board for an initial two-year period and annually thereafter.

Investment and borrowing restrictions

17 | What are the investment and borrowing restrictions on retail funds?

Fundamental investment policies

A registered fund's registration statement must recite the fund's fundamental investment policies with respect to certain types of investments and investment practices, and the fund cannot deviate from these policies without a shareholder vote. Fundamental investment policies include:

- diversification (ie, whether a registered fund will operate as a diversified or non-diversified fund);
- the issuance of senior securities;
- concentration (more than 25 per cent) of investments in a particular industry or group of industries;
- policies around borrowing money;
- underwriting of securities of other issuers;
- making loans;
- purchase or sale of commodities or commodities contracts; and
- purchase or sale of real estate and real estate mortgage loans.

To be considered 'diversified', at least 75 per cent of a registered fund's total assets must be represented by cash, government securities, securities of other investment companies and securities of other issuers where no more than 5 per cent of the fund's assets are invested in any one issuer and the fund owns no more than 10 per cent of an issuer's outstanding voting securities.

Non-fundamental investment policies

In addition to fundamental investment policies, a registered fund may adopt non-fundamental investment limitations, which may be changed by the fund's board without shareholder approval.

Names rule policy

Under the 1940 Act, a registered fund that has a name suggesting the fund focuses its investments in a particular type of investment, industry, country or geographic region must adopt a policy to invest, under normal circumstances, at least 80 per cent of the value of its assets in the particular type of investment or industry, or in assets that are tied economically to the particular country or geographic region suggested by its name.

Illiquid securities

Registered open-end funds (including ETFs) generally may not invest more than 15 per cent of their assets in illiquid investments. Money market funds are subject to a 5 per cent limit.

Borrowing and senior securities

A registered open-end fund may borrow money, provided that the borrowing is from a bank and the fund has asset coverage at least equal to 300 per cent of such borrowings. A registered closed-end fund may borrow money from a bank or from a private source, and must also meet the asset coverage limitation of 300 per cent.

A registered open-end fund is prohibited from issuing senior securities, which include debt and preferred shares. A registered closed-end fund may issue debt, subject to a 300 per cent asset coverage limitation, and preferred shares, subject to a 200 per cent asset coverage limitation.

Certain financing and derivative transactions such as reverse repurchase agreements, short sales, options, forwards, swaps and futures can create exposure that is similar in some respects to borrowings and issuing senior securities. To address this concern, the SEC and its staff historically took the position that these transactions will not be subject to the limitations on borrowing and issuing senior securities if a registered fund segregates or earmarks on its books liquid assets sufficient to meet its future obligations arising from such transactions. In October 2020, the SEC adopted new Rule 18f-4, which will regulate derivative and certain financing transactions by registered funds.

Tax treatment

18 | What is the tax treatment of retail funds? Are exemptions available?

The tax treatment of registered funds is governed by the Internal Revenue Code (IRC). Under the IRC, registered funds receive pass-through tax treatment, meaning that the fund itself is not subject to federal income tax, but rather that income and capital gains are passed through to the fund's investors. To qualify as a regulated investment company, and therefore receive pass-through tax treatment, a fund must meet certain eligibility requirements set forth in section 851 of the IRC.

Asset protection

19 | Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The assets of a registered fund must be held by a custodian, which generally must be a US bank, under conditions designed to assure the safety of the fund's assets. Special protections apply if the custodian is an affiliate of the fund, such as a bank owned by the same company that owns the fund's investment adviser. Assets may also be posted to a futures commission merchant to support trading futures and swaps, or held by a foreign custodian that segregates fund assets from its proprietary assets.

Governance

20 | What are the main governance requirements for a retail fund formed in your jurisdiction?

All registered funds must establish a board of directors or trustees. At least 40 per cent of the board members must be independent; however, to take advantage of many exemptive rules under the 1940 Act, a majority of the board's members must be independent of fund management. The board retains responsibility for oversight of the fund, which specifically includes the review and approval of the fund's advisory contract or contracts, underwriting agreements, distribution plans and related agreements (if any), the selection of the fund's independent auditors and oversight of potential risks and conflicts faced by the fund. Although the board is not involved in the day-to-day management of the fund, it is also responsible for approving the fund's compliance policies and procedures.

All registered funds must designate an individual as chief compliance officer (CCO). The CCO is tasked with administering the fund's compliance policies and procedures and must have sufficient authority to compel others to adhere to them. The CCO reviews the adequacy and application of the compliance policies and procedures, and provides an annual written report to the fund's board.

Reporting

21 | What are the periodic reporting requirements for retail funds?

Registered funds must maintain registration statements with the SEC, and are also required to file periodic reports, including the following:

- Form N-CSR: annual and semi-annual shareholder report;
- Form N-PX: annual disclosure of the proxy record for all portfolio securities;
- Form 24F-2: annual notice of securities sold by an open-end fund and, effective 1 August 2021, certain closed-end funds;
- Form N-MFP: monthly disclosure of portfolio holdings and other information required for money market funds;
- Form N-PORT: portfolio-wide and position-level disclosure of holdings data filed monthly;
- Form N-CEN: census-type disclosure filed annually;
- Form N-LIQUID: confidential disclosures required upon certain triggering liquidity events; and
- certain state filings to maintain a fund's corporate existence in good standing.

Issue, transfer and redemption of interests

22 | Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

Investors purchase shares of registered open-end funds directly from the funds, and thus registered open-end funds may set minimum investment requirements. Minimum investment requirements are typically related to the type of investor the fund intends a share class to be sold to (eg, shares with a higher minimum typically will be marketed or sold to high net worth individuals or institutional investors). Although a share class may have a distinct investment minimum and certain expenses may vary by share class, all share classes of a fund must charge the same advisory fee. In addition, a registered fund's board may adopt a policy of not selling shares to certain investors whose ownership in the fund may be disruptive to the fund's operations (eg, market timers that exploit pricing inefficiencies). ETFs set the minimum investment requirements with respect to the authorised participants that purchase shares directly from the ETFs. The authorised participants then sell those shares to investors through a listing exchange. ETFs cannot impose minimum investment amounts on shares purchased by such investors on an exchange.

A registered fund generally must pay redemption proceeds to a shareholder within seven days of receiving the redemption request. Exceptions exist in certain limited instances (eg, when the SEC issues an order delaying redemption to protect shareholders in the fund). Registered funds are permitted to charge a redemption fee when shareholders redeem; however, the SEC has limited the fee to 2 per cent of the value of shares redeemed.

Registered closed-end funds generally do not issue redeemable securities.

NON-RETAIL POOLED FUNDS

Available vehicles

23 | What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Most funds that are excluded from regulation under the US Investment Company Act of 1940, as amended (the 1940 Act) are referred to as 'private funds' regardless of the investment strategy pursued by the fund. Private funds may be organised in various forms, including as limited partnerships, limited liability companies (LLCs) and statutory trusts. Private funds can also be organised in non-US jurisdictions. The most common jurisdictions are Delaware for domestic funds and the Cayman Islands for offshore funds.

Most domestic funds are organised as Delaware limited partnerships, which have a general partner (GP) or sponsor that is responsible for the management of the private fund, while the limited partners (LPs) are passive investors. Typically, the GP delegates management responsibility to an investment adviser via an investment management agreement (IMA).

Delaware limited partnerships are formed under the Delaware Revised Uniform Limited Partnership Act by filing a certificate of limited partnership signed by the GP. The limited partnership agreement (LPA), the IMA and other organisational documents are not publicly filed.

A Delaware limited partnership must maintain a registered agent and office in Delaware; however, most limited partnerships hire a service provider to satisfy this requirement.

Delaware LLCs are substantially similar to limited partnerships, but are not used as frequently to form private funds (investors are generally more familiar with the limited partnership structure and, thus, that is typically the structure of choice) and receive different tax treatment in certain jurisdictions. Delaware LLCs are formed under the Delaware Limited Liability Company Act by filing a certificate of formation.

Laws and regulations

24 | What are the key laws and other sets of rules that govern non-retail funds?

Many of the key rules that govern the activities of private funds relate to the perfection and maintenance of their exceptions from US federal securities laws and the obligations they impose on registered funds.

Private funds rely on exceptions to the definition of 'investment company' under the 1940 Act and as a result are not required to register under the 1940 Act. Most commonly private funds will rely on the exceptions in section 3(c)(1) and section 3(c)(7) of the 1940 Act. Section 3(c)(1) is an exception available to a fund with 100 or fewer investors. Beneficial ownership by an entity shall be deemed to be beneficial ownership by one person, except that there is a look-through of certain investors. Section 3(c)(7) is an exception available to a fund offered only to 'qualified purchasers' (generally, natural persons with US$5 million in investments or institutions with US$25 million in investments). To rely on these exceptions, private funds must also avoid conducting a public offering and registering the sale of their securities under the US Securities Act of 1933, as amended (the 1933 Act). There is no separate filing requirement to claim or perfect a section 3(c)(1) or 3(c)(7) exception.

The Securities and Exchange Commission (SEC) has promulgated a set of rules under the 1933 Act, collectively designated Regulation D, that provides a safe harbour for private offerings. Regulation D generally requires that a private offering be directed exclusively to 'accredited investors', although non-accredited investors may be admitted under certain circumstances. Historically, private funds could not use general solicitation or general advertising, including offerings made via the radio, newspaper or any other public medium. However, the SEC now allows for the use of general solicitation, subject to certain conditions, including enhanced verification requirements to ensure that sales are made only to accredited investors.

The SEC on 26 August 2020 adopted amendments (Amendments) to the 'accredited investor' definition. The Amendments allow individuals to qualify as accredited investors based on defined measures of professional knowledge, experience or certifications, in addition to the existing tests for income or net worth. The Amendments also expand the list of entities that may qualify as accredited investors, including by allowing any entity that meets an investments test to qualify. Accredited investors are defined to include, among other things, the following:

- an individual with a net worth (or joint net worth with spouse or spousal equivalent) in excess of US$1 million, excluding the value of their primary residence;
- an individual with income in excess of US$200,000 (or US$300,000 joint income with spouse or spousal equivalent) in each of the previous two years and who reasonably expects to have income in excess of US$200,000 (or joint income in excess of US$300,000) in the current year; and
- a corporation, partnership, LLC or family office with assets in excess of US$5 million that was not formed for the specific purpose of acquiring the securities offered.

For non-US investors, fund sponsors can offer their securities in reliance on a safe harbour provided in Regulation S under the 1933 Act. So long as their requirements are otherwise satisfied, Rule 506 (for US investors) and Regulation S (for non-US investors) may be used simultaneously.

Private funds structured as limited partnerships are governed by an LPA, which provides a framework for the operations and structure of the limited partnership, and grants the GP authority to enter into agreements on behalf of the LPs. A private fund's principal offering document is its private placement memorandum, which provides investors with information regarding the fund. Private funds are excepted from the governance and other restrictions of the 1940 Act; consequently, sponsors enjoy extraordinary latitude in structuring the operations of the fund. However, managers of private funds (other than certain private funds that invest in real estate) are investment advisers. All investment advisers operating in the United States (regardless of registration status) are fiduciaries to their clients and are, among other things, subject to anti-fraud provisions of federal and state law.

To avoid registration of a class of equity securities under Section 12(g) of US Securities Exchange Act of 1934, as amended (the Exchange Act), a private fund should have no more than 1,999 holders of record.

If an entity is deemed to hold plan assets, each US Employee Retirement Income Security Act of 1974, as amended (ERISA) plan (or plan within the meaning of Internal Revenue Code, s 4975, which includes Individual Retirement Accounts) that invests in such entity is deemed to hold an undivided interest in its underlying assets, and the managers of the entity generally will be considered fiduciaries for purposes of applying the prohibited transaction rules and ERISA's fiduciary requirements.

Most private funds avoid holding plan assets by ensuring that benefit plan investors own less than 25 per cent in value of each class of equity interest in the fund. Some private funds, such as private equity and real estate funds, can avoid being deemed to hold plan assets by qualifying as special types of operating companies under the plan assets regulation, known as VCOCs for 'venture capital operating companies' or REOCs for 'real estate operating companies', both of which require a certain level of management authority over their portfolio investments.

Authorisation

25 | Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?

No. Private funds are not subject to authorisation or licensing requirements in the United States, although funds that seek to rely on the safe harbour provisions of Regulation D (the SEC has promulgated a set of rules under the 1933 Act, collectively designated Regulation D) must make a brief notice filing known as Form D. In addition, a state blue sky review and analysis should be done whenever a fund sells a security to a US investor.

Marketing

26 | Who can market non-retail funds? To whom can they be marketed?

A person engaged in the business of marketing a private fund in the United States is generally subject to registration as a broker-dealer, although a limited 'issuer exemption' may be available to personnel of the sponsor. Private funds are generally marketed only to accredited investors or qualified purchasers.

Ownership restrictions

27 | Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?

Yes. Private funds are generally marketed only to investors that are both 'accredited investors' and 'qualified clients'. Private funds relying on section 3(c)(7) as an exception to investment company status under the 1940 Act will also require that investors be 'qualified purchasers'.

Most private funds avoid holding plan assets by restricting ownership by benefit plan investors to less than 25 per cent in value of each class of equity interest in the fund.

Managers and operators

28 | Are there any special requirements that apply to managers or operators of non-retail funds?

Generally, no, except that if a private fund is considered to be 'plan assets', the manager of the fund generally must comply with certain Employee Retirement Income Security Act requirements.

Tax treatment

29 | What is the tax treatment of non-retail funds? Are any exemptions available?

Most private funds organised as limited partnerships or LLCs receive pass-through tax treatment under the Internal Revenue Code, meaning that the fund itself is not subject to federal income tax, but rather income and capital gains are passed through to the fund's investors.

If the fund is organised as a company under the laws of a non-US jurisdiction that imposes little or no tax, such as the Cayman Islands, the offshore company is typically treated for US tax purposes as a non-US corporation. An offshore company is generally suitable for non-US and US tax-exempt investors.

Private funds may also be structured as corporations, offer parallel or feeder funds structured as corporations, or otherwise utilise corporate blockers in their structures to address tax concerns of non-US and US tax-exempt investors. These corporate blockers serve to block unrelated business taxable income (UBTI) for US tax-exempt investors and effectively connected income (ECI) for non-US investors. The appropriate structure for a particular private fund will depend on, among other things, the investment objectives of the private fund and the tax sensitivities of the private fund's investors.

Asset protection

30 | Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

The assets of a private fund do not need to be held by a separate local custodian. The 'custody rule' under the US Investment Advisers Act of 1940, as amended (the Advisers Act) imposes specific requirements on fund managers that are registered investment advisers which have actual or deemed custody of client funds and securities. Most investment advisers to private funds will be deemed to have custody over the assets within the funds they advise because an affiliate serves as the general partner or managing member of such funds. Under the custody rule, advisers that are deemed to have custody must, among other things:

- maintain client funds and securities with a 'qualified custodian' in a segregated account in the client's name;
- provide notice to clients regarding the qualified custodian and manner in which the funds or securities are maintained;
- have a reasonable basis to believe that the qualified custodian provides (at least) quarterly account statements to clients; and
- engage an independent public accountant to verify the assets by actual examination at least once during each calendar year.

The custody rule permits advisers to certain types of funds to forego the custody rule's client notice, quarterly account statement and surprise examination requirements with respect to a fund, if the adviser:

- obtains a full audit of the fund;
- distributes audited financial statements prepared in accordance with generally accepted accounting principles to all fund investors annually within 120 days of the end of the fund's fiscal year; and
- obtains an audit upon the fund's liquidation.

Governance

31 | What are the main governance requirements for a non-retail fund formed in your jurisdiction?

The private fund's GP has broad authority over the operations of the fund, subject to any limitations provided in the LPA. Unlike registered funds, US private funds are not required to have a board of directors or trustees; however, under state law and the Advisers Act, the GP owes certain fiduciary duties to each LP. Many LPAs of private equity and real estate private funds will establish an 'advisory committee' of LPs that can receive disclosure of or consent to conflicts of interest, or both, that arise during the life of the fund.

Reporting

32 | What are the periodic reporting requirements for non-retail funds?

Registered investment advisers must identify the private funds they manage on Form ADV, and must disclose certain information about the private fund, including the type, size, leverage, liquidity, and the types of investors, on Form ADV or Form PF, or both. Form PF is required for all registered investment advisers with at least US$150 million in private fund assets under management. A private fund's LPA will also typically provide for certain reports to be provided to the LPs, including financial statements, performance reports and annual tax reports.

SEPARATELY MANAGED ACCOUNTS

Structure

33 | How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts (SMAs) are typically managed by a registered investment adviser. The adviser will usually enter into an investment management agreement with a client that grants the adviser authority to manage the client's assets in accordance with a designated investment strategy. Institutional investors in the United States typically hire a separate custodian to hold assets and assist with the administration of the account, and will hire an investment adviser directly. Retail SMAs are frequently sponsored by a broker-dealer that is responsible for the operations, custody and administration of the account and for engaging an investment adviser on behalf of account holders. This arrangement may also involve a dually registered broker-dealer and investment adviser that is engaged to serve in both roles for the SMA client.

Key legal issues

34 | What are the key legal issues to be determined when structuring a separately managed account?

Although written advisory contracts are not required by the US Investment Advisers Act of 1940, as amended (the Advisers Act), agreements between an adviser and its clients are often in writing to memorialise certain provisions, and as a matter of good practice. An investment management agreement for an SMA should define the investment strategy to be employed by the investment adviser and identify any investment policies and restrictions that must be observed by the investment adviser when managing the account. In addition, the agreement generally should address, among other things, the following topics:

- appointment (and acceptance) of the investment manager as investment adviser to the client;
- delineation of voting responsibilities between the adviser and client with respect to corporate actions, proxy voting and class actions;
- authorisation to select trading counterparties, generate research from brokerage and 'block' trades, as applicable;
- delivery of Form ADV to the client;
- calculation of management fees (including restrictions on performance fees) and the time frame for payment;
- indemnification and liability standard;
- the Employee Retirement Income Security Act of 1974, as amended;
- 'assignment provision': the Advisers Act prohibits the assignment of an advisory agreement by the adviser without client consent. The assignment provision should define the term 'assignment' within the meaning under the Advisers Act and allow flexibility for negative consent.

Additional issues arise in the context of 'wrap fee' programmes, which charge investors a bundled fee, based on a percentage of assets, for investment advice and brokerage through a 'sponsor' of the programme. For example, advisers that provide discretionary advice to multiple clients using a similar strategy must be cautious to avoid the creation of an unregistered investment company.

An adviser must also be cognisant of its fiduciary duties to clients, which comprises two distinct duties: the duty of care; and the duty of loyalty. The overarching principle that encompasses both of these duties is the adviser's obligation to act in the best interest of the client, and not subordinate the client's interest to its own. The adviser's duty of care includes, among other things, the duty to seek best execution for securities transactions. The duty of loyalty requires an adviser to either eliminate or make full and fair disclosure of all material conflicts of interest.

'Soft dollar' arrangements are permitted under US law, subject to certain conditions, including that the adviser makes a good faith determination that trading commissions borne by clients are reasonable in relation to the value of products and services received by the adviser from trading counterparties.

Regulation

35 | Is the management or marketing of separately managed accounts regulated in your jurisdiction?

Investment advisers owe the same fiduciary duties to fund clients and SMA clients, but the marketing of SMA strategies is governed by the Advisers Act, rather than the Exchange Act and Financial Industry Regulatory Authority, Inc (FINRA) rules. On 22 December 2020, the Securities and Exchange Commission (SEC) adopted its new Marketing Rule. The new Marketing Rule generally broadens what is considered an 'advertisement' by the SEC to include client testimonials and third party endorsements, among other things, and expands the SEC's prior rule governing investment adviser advertisements to cover communications with investors in private funds. The Marketing Rule also expands certain record-keeping obligations, including with respect to materials that include performance. The new Marketing Rule's effective date was 4 May 2021, however investment advisers are not required to comply with the new rule until 4 November 2022.

In addition, many institutional managers choose to comply with the CFA Institute's Global Investment Performance Standards (GIPS). GIPS are voluntary, ethical principles for the reporting of investment performance results and are designed to facilitate apples-to-apples comparison of investment performance. While the SEC does not formally endorse GIPS compliance, it will bring enforcement actions against firms that claim GIPS compliance, but do not adhere to the Standards.

GENERAL

Proposed reforms

36 | Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

On 2 March 2020, the Securities and Exchange Commission (SEC) requested public comment on the 'names rule' to determine whether the rule should be updated to more effectively prohibit materially deceptive or misleading fund names. The names rule requires a fund to invest at least 80 per cent of its assets in instruments that are consistent with the 'type of investment, industry, country or geographic region that its name suggests. The SEC sought input on, among other things: (1) the current effectiveness of the names rule; (2) how to address certain challenges due to market and fund innovation since the rule was adopted in 2001; (3) whether there is a more appropriate alternative to the rule's current 80 per cent asset requirement; and (4) whether the rule should treat closed-end funds and business development companies differently from open-end funds. Comments were due on 5 May 2020.

On 5 August 2020, the SEC proposed a new disclosure framework for mutual funds and exchange-traded funds (ETFs) that seeks to provide shareholders with streamlined reports delivered semi-annually. The proposal would replace current prospectus and shareholder report delivery requirements with the delivery of abbreviated reports tailored to highlight information of particular importance to retail investors, including fund expenses, performance and portfolio holdings. In addition, the reports would be required to briefly describe material changes to the following: (1) the fund's name; (2) investment objective or goals; (3) increase in ongoing annual fees, transaction fees or maximum account fee; (4) principal investment strategies; (5) principal risks; (6) investment adviser or sub-adviser (or both); and (7) portfolio manager(s). Under the proposal, investors would continue to receive a prospectus when they make their initial investment, and prospectuses would still be available online and upon request. The proposal would also require prospectuses to include summaries of fees and principal risks in a new, concise format, which would allow for more interactive, graphical and investor-friendly disclosures.

The SEC has recently taken a number of actions in response to the growing popularity of environmental, social and governance (ESG) investing. On 26 February 2021, the SEC's Office of Investor Education and Advocacy issued a bulletin designed to educate investors about matters related to ESG mutual funds and ETFs. In addition, on 4 March 2021, the SEC announced the creation of a Climate and ESG Task Force in its Division of Enforcement. On 3 March 2021, the SEC's Division of Examinations announced its 2021 priorities, which include a focus on the disclosures of advisers and funds regarding ESG strategies, and whether processes and practices match these disclosures.

Public listing

37 | Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

Registered closed-end funds and ETFs are the only types of registered funds listed on an exchange. Private funds are not listed on an exchange.

Each exchange imposes various requirements for the listing of fund shares. With respect to closed-end funds, the New York Stock Exchange, for example, requires certain corporate governance measures (ie, the fund must have an independent audit committee), annual shareholder meetings and reporting with respect to holdings of fund shares by certain insiders. Most ETFs meet an exchange's 'generic' listing standards that permit the continued listing of ETF shares on the exchange. Additionally, an annual certification is provided to the exchange to indicate compliance with the listing requirements.

Overseas vehicles

38 | Is it possible to redomicile an overseas vehicle in your jurisdiction?

It is possible to redomicile an overseas vehicle in the United States, although the process will vary depending on state law in the chosen state of incorporation.

Foreign investment

39 | Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Foreign investors generally may invest in US-registered or private funds without limitation, although certain income paid by such funds to the foreign investors may be subject to a US withholding tax of 30 per cent (or at a lower rate under an applicable tax treaty). There are exemptions from such US withholding tax, including for certain items of capital gain and interest income earned through a private fund, as well as for registered fund distributions of net capital gains, net short-term capital gain dividends and interest-related dividends. The withholding tax will apply to other registered fund dividends and on US corporate dividends. Foreign investors may also be subject to regular US income tax on certain types of business income earned through private funds and on gains from investments related to US real property.

US investors may invest in foreign private funds or another country's registered fund equivalent, which may subject the investor to foreign tax withholding. In addition, there may be adverse US income tax treatment for a US taxable investor who invests in certain foreign private funds and registered fund equivalents that are not treated as pass-through entities for purposes of US tax law under the passive foreign investment company rules.

Funds investing in derivatives

40 | Are there any special requirements in your jurisdiction relating to funds investing in derivatives?

The Commodity Futures Trading Commission (CFTC) regulates commodity trading. Managers of funds that invest in commodities may need to register with the CFTC and become National Futures Association members, or seek an exemption from registration. In addition, the 1940 Act limits the ability of registered funds to utilise leverage, including by engaging in certain derivative transactions that involve potential future payment obligations. The SEC recently adopted new Rule 18f-4 under the 1940 Act to govern the use of derivatives by registered funds. Rule 18f-4 is discussed in greater detail below under "New Derivatives Rule."

UPDATE AND TRENDS

Recent developments

41 | Are there any other current developments or emerging trends in your jurisdiction that should be noted? Please include reference to world-wide regulatory concerns, such as restrictions on foreign ownership in strategic industries, high-frequency trading, commodity position limits, capital adequacy for investment firms and 'shadow banking'.

Expanded definition of 'accredited investor'

On 26 August 2020, the Securities and Exchange Commission (SEC) adopted amendments expanding the definition of 'accredited investor'. The amendments create new categories of accredited investors and will allow more investors to participate in private offerings based on professional knowledge, experience or certifications. The amendments add SEC- and state-registered investment advisers, as well as certain investment advisers exempt from SEC registration, to the list of entities that qualify as accredited investors based on their status alone. To conform with the updated accredited investor definition, the SEC also expanded the definition of 'qualified institutional buyer' (QIB) in Rule 144A under the US Securities Act of 1933, as amended (the 1933 Act). The amendments became effective on 8 December 2020.

New Fund of Funds Rule

On 7 October 2020, the SEC adopted new Rule 12d1-4 under the US Investment Company Act of 1940, as amended, as amended (the 1940 Act) and related amendments that are collectively designed to provide a more consistent and efficient regulatory framework for a registered fund to acquire the shares of another registered fund in excess of statutory limits ('fund of funds' arrangements). To rely on the Rule, funds must comply with conditions that generally: (1) limit control and voting on the part of acquiring funds; (2) require advisers of acquiring and acquired funds to make and report to their respective funds' boards certain evaluations and findings; (3) require acquiring and acquired funds to enter into fund of funds investment agreements that contain certain terms; (4) limit the ability to establish three-tier fund of fund structures; and (5) require acquiring and acquired funds to maintain and preserve certain written records. The compliance date for Rule 12d1-4 is 19 January 2022. At that time Rule 12d1-2 under the 1940 Act, most exemptive orders granting relief related to fund of funds arrangements, and certain related no-action letters will be rescinded or withdrawn.

New Derivatives Rule

On 28 October 2020, the SEC adopted new Rule 18f-4 under the 1940 Act, which replaces prior guidance with an updated, comprehensive framework for registered funds' use of derivatives. Rule 18f-4 applies to mutual funds (other than money market funds), ETFs and closed-end funds. Funds that use derivatives to a limited extent (ie, 10 per cent or less of net assets) will have to adopt written risk management programmes, but will not be required to comply with more onerous elements of the Rule. Other funds will be required to develop and implement a derivatives risk management programme designed to identify and assess a fund's derivatives risks and designate a derivatives risk manager who will be responsible for administering the programme and providing reports to the board. Rule 18f-4 will limit a fund's derivatives exposure based on its value-at-risk. Rule 18f-4 also has implications for funds' use of reverse repurchase agreements, similar financing transactions and unfunded commitment agreements. Generally, the Rule permits funds (including money market funds) to invest in these instruments, but lays out certain conditions and obligations that funds must follow to do so. The compliance date for Rule 18f-4 is 19 August 2022. At that time current guidance that is moot, superseded by or inconsistent with the Rule will be rescinded.

New Valuation Rule

On 3 December 2020, the SEC adopted new Rule 2a-5 under the 1940 Act, which establishes an updated regulatory framework for registered fund valuation practices. The new Rule sets out minimum standards for funds for good-faith determination of fair value and a principles-based framework for fund boards to use in creating tailored processes for making fair value determinations. Under the new Rule, fund boards will remain responsible for fair value determinations required by statute, but may designate and oversee a 'valuation designee' to perform fair value determinations. Where a board designates fair value determinations, the board must fulfil its continuing statutory obligations through active oversight of the valuation designee's performance, which will include certain board reporting requirements. The compliance date for Rule 2a-5 is 8 September 2022.

New Marketing Rule

On 22 December 2020, the SEC adopted its final amendments to the rules that govern investment adviser advertisements and payments to solicitors under the US Investment Advisers Act of 1940, as amended (the Advisers Act). The Marketing Rule became effective on 4 May 2021, and advisers have until 4 November 2022 to comply with the Rule. The existing rule had not been substantively amended since its adoption in 1961. In a departure from the proposed amendments, the adopted rule creates a single Marketing Rule to replace both the current SEC advertising and cash solicitation rules. The new Marketing Rule generally expands the definition of 'advertisement', and mandates significant changes to current marketing practices for certain fund managers. For example, the Marketing Rule extends the scope of the investment adviser marketing regulation to communications with investors in private funds. The Marketing Rule also updates the requirements for use of performance advertising, by, for example, broadly defining the definition of hypothetical performance to generally include any performance that is not actually achieved (eg, model performance and targeted or projected performance). Communications with hypothetical performance will generally be treated as advertisements under the new rule, even if directed to only one person.

The Marketing Rule will also replace the cash solicitation rule, as it includes compensated endorsements and client testimonials (through cash or non-cash payments, or other benefits) in the definition of advertisements that are subject to specific oversight, disclosure and disqualification provisions. Endorsements and testimonials will require certain clear and prominent disclosure, and bad actors will generally be disqualified from such compensated arrangements.

The adoption of the new Marketing Rule also results in amendments to investment adviser record-keeping requirements. Investment advisers will need to make and keep records of all advertisements they disseminate, including records related to testimonials, endorsements and performance, and back-up documentation to substantiate certain information contained in advertisements.

Coronavirus

42 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In response to the pandemic, the SEC and its staff announced temporary regulatory relief for various market participants, including registered funds and advisers. In particular, relief was granted with respect to, among other things: in-person board meetings, filings and delivery requirements; borrowing transactions; and affiliated purchases of certain fund securities. The SEC also formed a cross-divisional covid-19 Market Monitoring Group to assist with actions and analysis related to the effects of covid-19 on markets, issuers and investors, and to coordinate with other regulators and public sector partners.

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