

Summary of Certain Exemptions Added to the Advisers Act by Dodd-Frank and Related SEC Rulemakings¹

(Exempt from Registration) Foreign Private Adviser	(Exempt Reporting Adviser)		Venture Capital Adviser
	Principal Office In U.S.	Principal Office Outside U.S.	
<ul style="list-style-type: none"> • IA must have no place of business in the U.S. This is very broadly defined by the SEC, and could include, for example, hotel rooms in the U.S. if used to meet with clients. • IA must have, in the aggregate, fewer than 15: <ul style="list-style-type: none"> ○ U.S. person clients; and ○ U.S. person investors in “private funds” (i.e., funds that rely on ICA Sections 3(c)(1) or (7)); • Those U.S. person clients and investors must account for less than \$25 million in assets under management; and • The IA must not “hold itself out to the public” as an investment adviser, and may not advise a U.S. registered investment company. • Other issues to keep in mind: <ul style="list-style-type: none"> ○ “U.S. person” status is generally determined by Regulation S, with some exceptions, and is based on status at time of becoming a client or at the time of acquiring securities in the private fund, as applicable; ○ “Investors” <i>includes</i> holders of short-term paper and persons with swap-based exposure; ○ IAs are required to count proprietary assets and investors and clients from whom they do not receive compensation toward their U.S. person limitations; ○ Use of offshore vehicles that <i>do not</i> rely on 3(c)(1) or (7) would prevent a look through to investors for U.S. person counting (e.g., 3(c)(5), 3a-7). 	<ul style="list-style-type: none"> • IA’s only clients must be funds relying on ICA Sections 3(c)(1) or (7); • IA must manage assets of less than \$150 million. <p>• Other issues to keep in mind:</p> <ul style="list-style-type: none"> ○ AUM based on “regulatory assets under management” as defined in Form ADV³ ○ Rule provides a grace period for IAs relying on the exemption in the event of a change in RAUM. At the time of filing its annual update to Form ADV (within 90 days of its fiscal year-end), if the IA’s RAUM exceeds \$150 million in that filing, it must, within 90 days, register with the SEC (unless another exemption is available). ○ No grace period is available if the IA takes on a client other than a private fund, which causes the exemption to become unavailable—the IA must be fully registered (or have another exemption available) prior to beginning to manage the non-private fund client. ○ IA may, at its option, choose to treat certain funds that are able to rely on exceptions under ICA Section 3 other than Section 3(c)(1) or (7) as private funds, but if it does so, it must treat such funds as private funds for all purposes under the Advisers Act. 	<ul style="list-style-type: none"> • IA’s only U.S. person clients must be funds relying on ICA Sections 3(c)(1) or (7)—IA may have non-fund clients provided that they are not U.S. persons; • If IA also has a U.S. office, <u>personnel in that office</u> may only manage the IA’s 3(c)(1) or (7) fund clients, and those assets must account for less than \$150 million. • If IA does not have a U.S. office, there is <u>no limit</u> on the number of U.S.-based private funds, U.S. investors, or U.S. assets under management. 	<p>IAs whose only clients are private funds that meet the following requirements are exempt from registration.</p> <ul style="list-style-type: none"> • Fund must represent to investors that it pursues a VC strategy; • Immediately after acquisition of any asset other than a “Qualifying Investment” or short-term holdings (cash, cash equivalents, and U.S. treasuries with remaining maturity of 60 days or less), the cost <i>or</i> fair value of all assets other than Qualifying Investments held by the fund is no more than 20% of the fund’s aggregate capital contributions plus uncalled capital commitments <ul style="list-style-type: none"> ○ A “Qualifying Investment” is essentially one where the fund holds an equity security acquired <i>directly</i> from a “Qualifying Portfolio Company” (“QPC”), or certain specified, related transactions. ○ Although a fund can use cost <i>or</i> fair value, it must pick one and use it consistently • Fund may not borrow, issue debt, provide guarantees, or otherwise employ leverage in excess of 15% of the fund’s aggregate capital contributions and uncalled capital commitments, and all such leverage (in any form) must be for a non-renewable term of less than 120 days; • Generally, the fund may not issue any securities that have a withdrawal, redemption, or repurchase provision; and • Fund must not be registered as an investment company under the ICA. <p>QPCs are limited to companies that:</p> <ul style="list-style-type: none"> • At the time of investment by the fund, are not, and are not controlling, controlled by, or be under common control with, a U.S. public reporting company or a company that has a security traded or listed on a foreign exchange or organized market; • Do not borrow or issue debt in connection with the fund’s investment in the company and distribute the proceeds of the borrowing or debt issuance in exchange for the fund’s investment; • Are not an investment company, a 3(c)(1) or (7) fund, a commodity pool, or a vehicle relying on ICA Rule 3a-7. <p>“Grandfathering” is available for certain funds that opened prior to December 31, 2010 and have ceased taking capital commitments by July 21, 2011.</p>
<p>Not an exempt reporting adviser. Foreign private advisers remain subject to general antifraud provisions under the Advisers Act, as well as the pay-to-play rule and the pooled investment vehicle antifraud rule.</p>	<p><u>Exempt Reporting Advisers</u></p> <ul style="list-style-type: none"> • Subject to general antifraud provisions under the Advisers Act, the pay-to-play rule, and the pooled investment vehicle antifraud rule. • Required to file census-type information on a version of Form ADV Part 1, which includes information regarding advised private funds; • Although subject to some form of inspection/examination authority from the SEC, the SEC has indicated that at its current resource levels it will not be making use of this authority outside of the enforcement context. 		

¹ This summary is intended only to help familiarize readers with the broad concepts of the new Advisers Act exemptions and does not address all of the nuances included in the rules and the SEC's guidance. The summary is not intended as a substitute for a more thorough legal analysis. This summary does *not* address "collapsing" issues that may arise for organizations that have affiliates in multiple countries, or organizations have an affiliate that is registered as an investment adviser with the SEC.

Definitions

Advisers Act – Investment Advisers Act of 1940

Assets / Assets under management – refers to "regulatory assets under management"

IA – investment adviser

ICA – Investment Company Act of 1940

VC – venture capital

² The private fund adviser exemption applies differently depending upon whether the IA's "principal office and place of business" is located inside or outside of the U.S. This is a fact-specific inquiry that looks at the location of the IA's executive management.

³ Form ADV provides a number of rules for calculation of regulatory assets under management. A summarized version of those rules follows:

- Only count portfolios to which the adviser provides "continuous and regular supervisory or management services."
- Only count assets held in "securities portfolios" (i.e., portfolios that are at least 50% composed of securities). An exception to this general rule is that assets held in a "private fund" are always counted, even if less than 50% of the fund is made up of securities. Private fund regulatory assets under management also includes capital commitments.
- If the adviser only manages a portion of a portfolio (e.g., because it is a subadviser), only count the portion actually managed.
- Do not deduct indebtedness or other accrued but unpaid liabilities (e.g., mortgages on real estate would not be deducted or margin for securities).
- All assets must be valued at market value, or if no market value is available, at fair value. Subject to certain exceptions, assets generally may not be valued at cost, except that the SEC noted that with respect to real estate assets held by a private fund, the assets should be valued the same way as the fund values assets for financial reporting purposes. The SEC explained that under limited circumstances, real estate assets may not need to be fair valued, although it noted that the Financial Accounting Standards Board has a current project underway that may in the future require fair valuation of real estate assets.