# Regulation of Non-U.S. Investment Advisers and Portfolio Managers Doing Business in the United States

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This article discusses the U.S. registration and regulatory issues arising from the provision of discretionary portfolio management or other investment advisory services by non-U.S. advisers[1] to clients in the United States.[2]



## I. Jurisdiction and Exemptions from Federal and State Registrations

Section 203(a) of the U.S. Investment Advisers Act of 1940 (the "Advisers Act" or the "Act") prohibits an investment adviser[3] from making use of the mails or any means or instrumentality of interstate commerce (jurisdictional means) in connection with its business as an investment adviser unless the adviser is registered with the U.S. Securities and Exchange Commission ("SEC" or the "Commission") under the Advisers Act or qualifies for an exemption from registration.

Prior to the promulgation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), which has amended the law with respect to federal registration of investment advisers, the

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[1] For purposes of this article, a "non-U.S. adviser" is an adviser with its principal office or place of business located outside of the territorial United States. *See* Rule 203(m)-1 under the Investment Advisers Act of 1940, as amended.

[2] This article does not discuss certain related topics which may be relevant in specific cases, including (i) broker-dealer registration and compliance issues, (ii) the special rules applicable to the management of pension fund assets, (iii) use of derivatives in portfolio management and (iv) rules applicable to mutual funds.

[3] Section 202(a)(11) of the Advisers Act defines the term "investment adviser" as "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 . . . ." Banks, broker-dealers, attorneys, accountants and certain other identified persons who provide investment advice incidental to other professional services are excluded from the definition.

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most widely used exemption from registration was the so-called “Private Adviser Exemption,” which exempted from registration any investment adviser who (1) during the preceding 12 months had fewer than 15 clients, (2) did not hold itself out generally to the public as an investment adviser, and (3) did not advise any investment company registered under the U.S. Investment Company Act of 1940 (the “Investment Company Act”) or any registered business development company.[4] In general, under this historical exemption, a fund or other partnership, corporation or legal organization qualified as a single client for purposes of the exemption. There was no need to look through a fund to count its underlying investors.[5] As a result, an adviser could advise up to 14 private funds, regardless of the total number of investors invested in the funds or the amount of assets of the funds, without having to register with the SEC. An adviser with its principal office and place of business outside the United States was not required to count its non-U.S. clients toward the 15-client threshold.[6]

The Private Adviser Exemption has been repealed by the Dodd-Frank Act.[7] As a consequence, non-U.S. advisers that have U.S. investors in their funds, manage fund vehicles established in the United States, or have a presence in the United States are potentially subject to registration in the United States.[8] While the primary purpose of the U.S. Congress in repealing the Private Adviser exemption was to require advisers to private funds to register, Congress created three more limited exemptions from investment adviser registration.

The “Foreign Private Adviser Exemption” exempts an investment adviser that (1) has *no* place of business in the United States, (2) has fewer than 15 clients and investors in the United States in private investment funds advised by the adviser, (3) has less than U.S.$25 million in assets under management attributable to clients and investors in the United States, and (4) does not hold itself out generally to the public in the United States as an investment adviser, or act as investment adviser to a registered investment company or registered business development company.[9] The Foreign Private Adviser Exemption is significantly narrower than the Private Adviser Exemption in that, along with the very limited asset threshold, it requires the adviser to look through a private investment fund client and count any U.S. investors in the fund towards the fewer than 15 U.S. clients and investors limit set forth in part (2) of the test, although the adviser does not have to double-count the private investment fund as a “client” for this purpose. An adviser relying on the Foreign Private Adviser Exemption is not required to make any filing with the Commission.

The “Private Fund Adviser Exemption” exempts from SEC registration an investment adviser that (1) acts as an adviser *solely* to private funds and (2) has assets under management in the United States of less than

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[4] Section 203(b)(3) of the Advisers Act. The staff of the SEC has determined that the following activities, among others, if conducted by an investment adviser, constitute “holding out” to the public: advertising for clients, referring to oneself as an investment adviser or using some similar term on a business card or letterhead, listing oneself as an investment adviser on the Internet or in a telephone, business, or building directory, or letting it be known by word of mouth or otherwise that the person is available to provide investment advisory services or to accept new clients.

[5] Rule 203(b)(3)-1(a)(2) under the Advisers Act.

[6] Rule 203(b)(3)-1(b)(5) under the Advisers Act.

[7] Section 403 of the Dodd-Frank Act.

[8] Whether or not subject to registration, a person meeting the definition of an investment adviser is subject to certain provisions of the Advisers Act, including the anti-fraud provisions.

[9] Section 203(b)(3) of the Advisers Act establishes the Foreign Private Adviser Exemption. “Foreign private adviser” is defined in Section 202(a)(30) of the Act. Rule 202(a)(30)-1 under the Act defines the terms and phrases “client,” “investor,” “in the United States,” “place of business” and “assets under management” as used in the definition of “foreign private adviser” under Section 202(a)(30).

U.S.$150 million.[10] For purposes of part (1) of the test, a non-U.S. adviser may avail itself of the exemption as long as all of its clients that are United States persons are private funds.[11] For purposes of part (2) of the test, a non-U.S. adviser may engage *from the United States* in day-to-day management of fund assets not exceeding US$150 million in the aggregate without becoming subject to registration.[12] Accordingly, the non-U.S. adviser's non-U.S. clients will not count in determining its status as a manager of private funds alone provided the assets of such non-U.S. clients are not managed from within the United States. However, if the non-U.S. adviser manages assets for U.S. clients that are not private funds (*e.g.*, separately managed accounts), or assets of foreign clients that are not private funds from the United States, then the exemption is not available. If a non-U.S. adviser has no place of business in the United States, it can operate under the exemption regardless of the number of U.S. investors in its funds or the amount of assets attributable to those investors.[13] A U.S. resident adviser may not avail itself of the exemption if it provides advice to clients other than private funds

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[10] *See* § 203(m) of the Advisers Act and Rule 203(m)-1 thereunder. Private funds include hedge funds and other types of pooled investment vehicles that would be investment companies subject to registration and regulation under the Investment Company Act but for the exclusions from the definition of "investment company" contained in Sections 3(c)(1) and 3(c)(7) thereof. *See* Rule 203(m)-1(d)(5) under the Advisers Act. Section 3(c)(1) of the Investment Company Act is available to a fund that does not publicly offer its securities, and whose outstanding securities are beneficially owned by not more than 100 persons. For purposes of Section 3(c)(1), offshore funds are not required to count non-U.S. investors against the 100-person limitation. Section 3(c)(7) of the Investment Company Act provides an exclusion for a fund that does not publicly offer its securities, and whose outstanding securities are owned exclusively by "qualified purchasers" (natural persons owning at least U.S.$5 million in investable assets or entities with U.S.$25 million in investable assets, in each case measured at the time of investment in the fund). Section 3(c)(7) funds ordinarily limit the number of investors to 500, since Section 12(g) of the U.S. Securities Exchange Act of 1934 (the "Exchange Act") requires that issuers with U.S.$10 million in assets and more than 500 investors register with the Commission.

[11] "United States person" is defined by reference to Regulation S under the U.S. Securities Act of 1933. Regulation S treats entities as United States persons if they are organized or incorporated in the United States. The Private Fund Adviser Exemption does *not* require that the adviser look through to underlying investors in the fund. For purposes of this exemption, the non-U.S. adviser's only "client" is the fund.

[12] Under the Advisers Act, "assets under management" means the securities portfolios with respect to which an adviser provides "continuous and regular supervisory or management services." *See* Section 203A(a)(2) of the Advisers Act. An adviser provides continuous and regular supervisory or management services with respect to an account if it has "ongoing responsibility to select or make recommendations, based upon the needs of the client, as to specific securities or other investments the account may purchase or sell and, if such recommendations are accepted by the client, [it is] responsible for arranging or effecting the purchase or sale." *See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less than $150 Million in Assets Under Management, and Foreign Private Advisers*, SEC Release No. IA-3222 (June 22, 2011) (hereinafter, "*Exemptions for Advisers*") at n.401 and accompanying text, which refers to the Instructions to Item 5 of Part 1A of Form ADV (discussed further below) for guidance on the meaning of providing continuous and regular supervisory or management services with respect to an account. The Form ADV instructions also note that an adviser does *not* provide continuous and regular supervisory or management services for an account if it (a) provides market timing recommendations (*i.e.*, to buy or sell), but has no ongoing management responsibilities; (b) provides only impersonal investment advice (*e.g.*, market newsletters); (c) makes an initial asset allocation, without continuous and regular monitoring and reallocation; or (d) provides advice on an intermittent or periodic basis (such as upon client request, in response to a market event, or on a specific date (*e.g.*, the account is reviewed and adjusted quarterly)).

[13] *See Exemptions for Advisers*, at p.77-78 & n.320 ("a non-U.S. adviser relying on the private fund adviser exemption may have a U.S. place of business, but a non-U.S. adviser need not have a U.S. place of business to rely on the private fund adviser exemption").

(whether or not resident in the United States).[14] An adviser relying on the Private Fund Adviser Exemption will be deemed to be an "exempt reporting adviser."[15]

The third exemption from registration, the "Venture Capital Fund Exemption," is available to advisers solely to venture capital funds.[16] A "venture capital fund" is defined as a private fund that (1) represents itself to investors as pursuing a venture capital strategy, (2) invests primarily in "qualifying investments,"[17] (3) is not leveraged except for a *de minimis* amount of short-term debt, and (4) does not offer redemption rights to investors.[18] Like the Private Fund Adviser Exemption, advisers relying on the Venture Capital Fund Exemption are considered "exempt reporting advisers" required to file certain reports with the Commission.[19]

If any of the foregoing exemptions are available, Section 222(d) of the Advisers Act[20] prohibits the states from requiring that the adviser register in the state if the adviser has no place of business in the state and it has had fewer than six clients who are state residents during the preceding 12 months. The states, however, retain investigatory and enforcement jurisdiction with respect to exempt advisers.

The new registration exemptions are not mandatory. An adviser that qualifies for any of these exemptions could, nevertheless, choose to register with the Commission, subject to Section 203A of the Advisers Act, which prohibits most advisers from registering with the SEC if they do not have at least $100 million in assets under management. Some advisers might choose to register in these circumstances to enhance their profiles in competing for U.S. mandates.

Non-U.S. advisers conducting advisory business in the United States that do not qualify for any of these exemptions, or who choose to register notwithstanding an available exemption, can structure their

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[14] *See Exemptions for Advisers*, at pp.77-78 & n.318.

[15] *See* § 203(m)(2) of the Advisers Act. An exempt reporting adviser must nevertheless file certain reports with the SEC, although the information required is more limited than that required of registered advisers. *See* Rule 204-4 under the Advisers Act.

[16] *See* Advisers Act § 203(l).

[17] A "qualifying investment" is essentially defined as an equity security issued by a "qualifying portfolio company" that has been acquired directly by the venture capital fund from the qualifying portfolio company, or an equity security that has been acquired in exchange for such a security as part of a restructuring or refinancing. A "qualifying portfolio company" means any company that meets the following qualifications:

- At the time of any investment by the private fund, the company is not "publicly traded" (*i.e.*, subject to the reporting requirements of the Exchange Act or having securities listed or traded in a foreign jurisdiction) and is not a control affiliate of a public company.
- The company does not borrow or issue debt obligations, redeem or repurchase securities of the company, or distribute company assets in connection with the private fund's investment.
- The company is not itself a private fund (or an investment company, issuer of asset-backed securities or commodity pool).

The fund may invest in a "basket" of non-qualifying investments of up to 20 percent of its committed capital and may hold certain short-term investments.

[18] *See* Rule 203(l)-1 under the Advisers Act.

[19] *See* Rule 204-4 under the Act (17 C.F.R. § 275.204-4).

[20] 15 U.S.C. § 80b-18a.

U.S. operations to minimize the U.S. regulatory impact on the non-U.S. adviser by establishing a separate U.S. advisory affiliate and registering it with the SEC under the Advisers Act. Organizational separation of the U.S. advisory activities provides a greater degree of insulation between the activities of the U.S. registrant and the non-U.S. adviser. This structure also provides greater flexibility in addressing any different or conflicting regulatory requirements that the United States may impose. The registration and other substantive provisions of the Advisers Act ordinarily should not apply beyond the separately organized U.S. registrant; while registering the non-U.S. adviser for its U.S. advisory business would subject the entirety of its global operations to U.S. regulatory requirements under the Act.[21] Larger, more complex foreign entities, especially those that have an expectation of expanding their operations in the United States, frequently organize a U.S. or foreign holding company with the registered entity as a subsidiary.[22] This provides a more flexible structure for a growing operation with multiple lines of business. The establishment of a U.S. advisory affiliate (with or without a holding company) should not preclude the U.S. registrant from making use of the personnel and other resources of its larger, non-U.S. affiliate in providing advisory services to U.S. clients, subject to certain limitations and qualifying conditions discussed below.

## II. Investment Adviser Registration

If the non-U.S. adviser (or its affiliate) is required to register as a result of its U.S. business, it will be necessary to consider whether federal or state registration is appropriate.

### A. Federal or State Registration

The regulation of investment advisers is apportioned between the SEC and the states. In general, if an adviser manages more than US$100 million in assets it must register with the SEC, but not with the states, subject to a number of exceptions including a non-U.S. adviser with its principal office and place of business outside the United States.[23] The Advisers Act includes provisions governing the conduct of many aspects of an adviser's business, and it provides the SEC with oversight, inspection and disciplinary authority over the registered adviser.

Most states require registration for advisers doing business in the state that are not subject to register with the Commission.[24] The state will have oversight, inspection and disciplinary authority under the state's Blue-Sky laws that is similar to the SEC under the Advisers Act, although there are exceptions and variations from state

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[21] In addition, it may be more tax-efficient and more beneficial from an employment law perspective to conduct business in the United States in this manner.

[22] The determination whether to establish a U.S. or non-U.S. holding company will likely be a tax-driven decision.

[23] In addition, advisers eligible to register with the SEC notwithstanding that they have less than $100 million in assets under management include certain investment advisers affiliated with an SEC-registered adviser, *see* Rule 203A-2(b) under the Advisers Act, certain Internet advisers, *see* Rule 203A-2(e) under the Act, and advisers that would be required to register with 15 or more states, Advisers Act § 203A(a)(2)(A) and Rule 203A-2(d) thereunder. In addition, "mid-sized advisers" – those with assets under management between $25 million and $100 million – in general must register with the states and not the SEC, unless they (i) are not required to register with the state securities authority in the state where they maintain their principal office and place of business or (ii) are not subject to examination as an adviser by the state where they maintain their principal office and place of business. *See* Advisers Act § 203A(a)(2). At present, only New York, Minnesota and Wyoming do not subject investment advisers to examination.

[24] As noted above, a state may not impose its registration and licensing laws on advisers exempt from federal registration if the adviser does not have a place of business in the state and has had fewer than six clients who are state residents during the last 12 months. *See* Advisers Act § 222(d).

to state. While the states are precluded from applying their registration and licensing laws to advisers registered under the Advisers Act,[25] they may require notice filings and payment of annual fees for federally registered advisers doing business in the state, and, furthermore, retain the authority to investigate and bring enforcement actions against advisers for fraud.[26] In addition, the states are not precluded from imposing registration, licensing and qualification requirements on "investment adviser representatives" with a place of business in the state,[27] and most states do in fact impose such requirements.

Application for registration as an investment adviser at the federal level is made on Form ADV. Form ADV is filed with the SEC and must be updated on an annual basis. Many states also permit advisers to register using Form ADV; however, they also may require additional forms and annual renewal of registration and payment of fees.

Form ADV consists of two parts, along with several schedules and disclosure reporting pages to be completed as necessary. Form ADV Part 1 provides for administrative information, including (1) the adviser's name, state of organization, and the locations of its principal place of business and offices, (2) ownership structure and controlling persons, (3) financial and operational information, (4) state registrations, (5) discretionary and nondiscretionary assets, (6) whether the adviser maintains custody of clients' assets, (7) disciplinary history, and (8) background information concerning personnel.[28]

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[25] *See* Advisers Act § 203A(b)(1).

[26] *See* Advisers Act § 203A(b)(2).

[27] *See* Advisers Act § 203A(b)(1)(A). A representative of a federally registered adviser that does not have natural person clients is excluded from the definition of "investment adviser representative" under the Advisers Act and the states are preempted under §203(A)(b) from imposing licensing requirements on such persons. (Rule 203A-3 under the Advisers Act defines an "investment adviser representative" for purposes of §203(A) as a supervised person of the investment adviser who has more than five clients who are natural persons (other than certain excepted persons, including natural persons with a high net worth), and more than 10 percent of whose clients are natural persons (other than such excepted persons). *See* Rule 203A-3 under the Advisers Act.

[28] More specifically, the form requires the disclosure of the following information pursuant to Section 203(c)(1)(A) – (H) of the Advisers Act:

(1) The name and form of business of the applicant;

(2) The name of the state or other sovereign power under which the applicant is organized;

(3) The location of the applicant's principal business office and branch office, if any;

(4) The names and addresses of the applicant's partners, officers, directors, and persons performing similar functions;

(5) The number of the applicant's employees;

(6) The education, the business affiliations for the past 10 years, and the present business affiliations of the applicant and of its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(7) The nature of the business of the applicant, including the manner of giving advice and rendering analyses or reports;

(8) A balance sheet certified by an independent public accountant and other financial statements;

(9) The nature and scope of the authority of the applicant with respect to clients' funds;

Form ADV Part 2, known as the "adviser brochure," requires information that must be provided to clients and prospective clients, in narrative format, including, among other information, (1) a description of the adviser's business and the types of services offered, (2) fees and compensation, (3) types of clients, (4) investment strategies, (5) disciplinary information, (6) affiliations with other securities professionals, (7) a description of the adviser's code of ethics and whether the adviser participates in or has an interest in client transactions, (8) brokerage practices, (9) whether the adviser maintains custody of client funds or securities, has investment discretion, and has or will accept authority to vote client securities and, if so, a description of the adviser's voting practices, and (10) certain financial information about the adviser. The "brochure supplement" requires the adviser to set forth the background and qualifications of its investment professionals in a résumé-like disclosure, including any disciplinary history.

Advisers are required to file Parts 1 and 2 (except for the brochure supplement) electronically with the Commission.[29] The adviser brochure (including the brochure supplement) also must be delivered initially to clients and prospective clients and annually thereafter with respect to existing clients.[30]

SEC-registered advisers not resident in the U.S. must file consent to service of process with the Commission.[31] Non-resident investment advisers also are required to file a notice with the SEC specifying an address within the U.S. where the adviser will maintain its books and records, unless the adviser files an undertaking to furnish copies of all such books and records to the Commission at the adviser's expense within 14 days.[32]

The SEC must take action to grant or deny registration as an investment adviser within 45 days after filing Form ADV.[33] Once granted, registration will cover the adviser's employees and other associated persons. The adviser's employees do not have to register individually with the SEC.[34]

While the adviser is awaiting the SEC's decision on its registration application, it should develop a "Compliance and Supervisory Procedures Manual" and a "Code of Ethics" tailored to its U.S. advisory business. These documents should address among other things, standards of conduct, managing conflicts of interest, preventing

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(10) The basis or bases upon which investment advice is compensated;

(11) Whether the applicant, or any person associated with the applicant, is subject to any disqualification which would be the basis for denial, suspension, or revocation of registration; and

(12) A statement as to whether the principal business of the applicant consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of the applicant consists or is to consist of rendering investment supervisory services.

[29] Form ADV is filed electronically with the SEC through the Investment Adviser Registration Depository ("IARD") system maintained by the Financial Industry Regulatory Authority ("FINRA"), a securities industry self-regulatory organization.

[30] Advisers registering with one or more states must file a brochure supplement for each supervised person doing business in that state.

[31] *See* Rule 0-2 under the Advisers Act.

[32] *See* Rule 204-2(j) under the Advisers Act.

[33] Advisers Act § 203(c)(2). The SEC may request additional information, which would commence a new 45-day review period.

[34] Moreover, if the registered adviser does not have any office in the United States, such persons do not have to pass any qualification examinations or have particular professional designations.

the misuse of inside information, personal trading activities, compliance with Advisers Act requirements, record keeping and reporting, supervision and surveillance.

### B. SEC Relief for Registered Advisers Sharing Resources with non-U.S. Affiliates (The *"Unibanco Letters"*)

In a series of no-action letters,[35] the staff of the Division of Investment Management of the SEC (the "Staff") has provided relief to registered non-U.S. advisers and their affiliated holding companies to allow them to make use of personnel and other resources of the unregistered companies in providing discretionary advisory services and portfolio management services to U.S. clients through the registered entity, often known as "dual hatting" arrangements.

The SEC has long taken the position that a registered investment adviser is subject to the substantive provisions of the Advisers Act with respect to ***all*** of its clients regardless of their location. Consequently, non-U.S. advisers have been reluctant to register in the U.S. out of concern that the Advisers Act would apply to their relationships with their non-U.S. clients. However, over the years the Staff has confirmed that a non-U.S. adviser may establish a separate, registered affiliate to conduct its advisory business in the United States, thereby limiting the application of the Advisers Act to the affiliate and avoiding direct regulation of the non-U.S. advisory business, provided the U.S. registered affiliate has a separate and viable commercial existence.

In general, the SEC recognizes the independent existence of the affiliated entities if they are separately organized, the registered entity is staffed with personnel (located in the U.S. or abroad) who are capable of providing investment advice, any personnel of the non-registered entity involved in U.S. advisory activities are deemed "associated persons" of the registrant, and the Commission has adequate access to trading and other records of the affiliate and its personnel necessary to enable it to identify conduct that may harm U.S. clients or markets.[36]

In 1981, the Staff set out certain conditions for demonstrating the degree of "separateness" required of the U.S. registered affiliates of non-U.S. advisers in a "no-action letter" issued to Richard Ellis, Inc. (sometimes referred to as the "Ellis conditions").[37] Some of the Ellis conditions, particularly the condition requiring separate investment advisory personnel, posed significant practical difficulties. Then, in 1992, the Staff announced a "conduct and effects" test that would apply the Advisers Act to non-U.S. advisers only if their activities take

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[35] A party that is uncertain as to whether a proposed course of action would constitute a violation of the federal securities laws may seek a no-action letter from the SEC Staff. If the staff grants a request for no-action relief, the letter will conclude that the Staff will not recommend that the Commission take enforcement action against the party based upon the facts and representations described in the party's letter. No-action letters constitute informal advice on the part of the Staff and do not legally bind the Commission.

[36] Section 208(d) of the Advisers Act prohibits any person from doing indirectly or through or by any other person any act or thing which would be unlawful for such person to do directly. The SEC would view as inconsistent with the U.S. Congress' intent a situation where an unregistered non-U.S. adviser incorporates and registers a subsidiary adviser that does not, in fact, operate independently of its parent entity, thus enabling the non-U.S. parent to effectively operate in the United States without being registered. However, as discussed herein, an unregistered non-U.S. adviser may share personnel and resources with its U.S. registered affiliate.

[37] These conditions required the subsidiary: (i) to be separately and adequately capitalized, (ii) to have a majority of its board of directors independent of the parent company (or to have a similar "buffer" between it and the parent company), (iii) to have employees engaged in the day-to-day business of providing investment management advice who were not similarly engaged in the investment advisory business of the parent, (iv) to formulate its own advice to its clients using information sources in addition to those of its parent company, and (v) to keep its advice confidential until that advice is communicated to its clients.

place in the United States or have a substantial and foreseeable effect in the United States or on U.S. persons.[38] The Staff also reaffirmed its basic position that independent entities would be considered separately. The Staff recommended a relaxation of the Ellis conditions. Specifically, it proposed to drop the requirement for a separate board of directors, and agreed to permit personnel and communications to be shared between the registrant and its non-U.S. affiliate. The relaxed approach requires that the registrant be staffed with qualified investment advisers.[39] A no-action letter issued to Uniao de Bancos de Brasileiros S.A. on July 28, 1992, was the first in a series of no-action letters issued to non-U.S. advisers reflecting the Staff's application of the broader position (often referred to collectively as the "*Unibanco* letters"). The amendments to the Advisers Act contained in the Dodd-Frank Act do not affect the viability of the *Unibanco* letters.[40]

### 1. **Uniao de Bancos de Brasileiros S.A.**

The first in the series of no-action letters was Uniao de Bancos de Brasileiros S.A., July 28, 1992 ("*Unibanco*"). In *Unibanco*, the Staff expressly permitted a registered investment adviser subsidiary of a non-U.S. adviser to share advisory personnel with its unregistered parent, provided that the shared personnel were competent to advise clients appropriately and that the registrant was a separate legal entity.

The Staff's response included certain conditions to address its concern that the arrangement would not lead to abuses such as placing trades of non-U.S. clients ahead of U.S. clients or entering into unauthorized agency cross-transactions. The most significant of these conditions required the unregistered parent company to agree to maintain and make available to the SEC for inspection certain books and records pertaining to "related securities transactions." The parent company had to agree to make available to the SEC for testimony all persons engaged in the registered subsidiary's advisory operations. To ensure compliance with these undertakings, the parent had to appoint an agent in the United States to accept service of process for the production of documents and testimony. Separate assurance was given that the parent company would not be required to reveal the identities of its non-U.S. clients in connection with any such proceedings.

### 2. **National Mutual Group**

National Mutual Group, March 8, 1993 ("*National Mutual*"), dealt with a complex of several non-U.S. financial services companies that rendered investment advice to both U.S. and non-U.S. clients through the same entities. In *National Mutual*, the corporate structure consisted of the National Mutual Life Association of Australia ("National Mutual Life"), which, through certain holding companies, owned separate fund management companies in Europe, Asia and Australia (the "NMFM Companies"). Each of the NMFM Companies was subject to the regulations and licensing standards of its local jurisdiction. National Mutual Life also owned, indirectly, CMB Investment Counselors ("CMB"), a U.S. investment adviser registered under the Advisers Act.

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[38] *See Protecting Investors: A Half Century of Investment Company Regulation* (SEC Division of Investment Management, May 1992).

[39] The registrant must supervise all personnel involved in advisory activities on behalf of U.S. persons whether they are employed by the U.S. registrant or its non-U.S. affiliate, keep certain records relating to such personnel, and subject such personnel and their supervisors to the SEC's jurisdiction. The registrant must ensure that the SEC would have access to all relevant trading and other records at the non-U.S. affiliate necessary to monitor and police conduct relevant to U.S. investors.

[40] In the course of adopting rules implementing registration exemptions under the Advisers Act amendments, the SEC Staff stated that, although the *Unibanco* letters "were developed . . . in the context of the private adviser exemption, which Congress repealed" in the Dodd-Frank Act, "[n]othing in the rules we are adopting . . . is intended to withdraw any prior statement of the Commission or the views of the staff as expressed in the *Unibanco* letters. We expect that the [SEC Staff] will provide guidance, as appropriate, based on facts that may be presented to [it] regarding the application of the *Unibanco* letters in the context of the new foreign private adviser exemption and the private fund adviser exemption." <u>Exemptions for Advisers</u>, at pp. 125-128 & nn.507-516.

CMB and the NMFM Companies wanted to provide investment advice directly to U.S. clients with regard to U.S. and foreign markets by allocating assets among CMB and the NMFM Companies. While the NMFM Companies were required to register under the Advisers Act, the Staff granted specific relief from certain recordkeeping, operational and administrative provisions of the Advisers Act with regard to the NMFM Companies' non-U.S. clients.[41] Any activities of the non-U.S. adviser and its personnel in relation to U.S. clients that fall within the jurisdictional scope of the Advisers Act would continue to be subject to the antifraud provisions under Section 206 of the Act.

### 3. Royal Bank of Canada

In *Royal Bank of Canada*, June 3, 1998, the proposed structure, like *Unibanco*, involved a separate subsidiary formed to advise U.S. clients that made use of personnel and resources of the non-U.S. parent. The Staff used the opportunity to reconsider certain undertakings previously articulated in *National Mutual* and *Murray Johnstone*, and noted that persons relying on these prior letters also would have to make "clerical and ministerial" personnel available for testimony or other questioning by the SEC or its staff upon receipt of an administrative subpoena, demand, or a request for voluntary cooperation made during a routine or special inspection. The Staff positions were based on certain representations and undertakings, which must be disclosed on Form ADV Part 2.

The *Unibanco* letters continue to provide the relevant guidance for structuring dual-hatting and other cooperative arrangements to enable an SEC-registered adviser to utilize the more expansive resources of its non-U.S. parent or affiliate in servicing its U.S. clients while limiting the extension of the Advisers Act to the latter's overseas operations.

The arrangement typically is implemented by entering into an agreement between the affiliates on the sharing of personnel and resources, and consents to provide information and records to the SEC by the non-U.S. adviser and its personnel involved in providing services to U.S. clients.

The U.S. adviser's written supervisory procedures should include specific protocols designed to effect compliance with the operational requirements and restrictions specified in the *Unibanco* letters. All dual-hatted employees are associated persons of the U.S. adviser. Therefore, all dual-hatted employees must comply with the firm's written supervisory procedures.[42]

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[41] In 1994, the SEC Staff issued a similar, favorable response to a no-action request by Murray Johnstone International Limited, October 7, 1994 ("*Murray Johnstone*"). The SEC Staff essentially reaffirmed the approach taken in *National Mutual*, and restated the provisions of the Advisers Act that would not apply in connection with non-U.S. clients.

[42] All registered advisors must adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act in accordance with Rule 206(4)-7 of the Act. The policies and procedures must be revised annually to ensure adequacy and effectiveness. And the adviser must designate a chief compliance officer responsible for administering the program.

Section 204A of the Advisers Act further requires that all registered advisers establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information in violation of the Act (or of the Exchange Act) by the adviser of its associated persons.

The SEC-registered adviser also must make certain disclosures pertaining to the arrangement in its advisory brochure.

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