

CLIENT ALERT

# The SEC's New Private Fund Adviser Rules: Implications for Non-U.S. Investment Advisers

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## AUTHORS

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On August 23, 2023, the U.S. Securities and Exchange Commission (the “SEC”) adopted new rules and amendments to existing rules (the “Final Rules”) under the Investment Advisers Act of 1940 (the “Advisers Act”) impacting private fund advisers.<sup>1</sup> While the Final Rules generally do not impact non-U.S. investment advisers with respect to their non-U.S. private fund clients, there are some implications for non-U.S. investment advisers, depending on their registration status with the SEC and whether they advise U.S. private fund clients. Set out below are a series of Threshold Questions designed to help non-U.S. investment advisers determine which category of applicability they fall into, followed by a chart summarizing the components of the Final Rules that are applicable to non-U.S. investment advisers for each category.

### 1. Are you a non-U.S. investment adviser?

The term “non-U.S. investment adviser” generally refers to advisers whose principal office and place of business is outside of the United States. “Principal Office and Place of Business” means an adviser’s executive office from which its officers, partners or managers direct, control and coordinate the activities of the firm.<sup>2</sup> Therefore, having secondary office locations in the United States, or otherwise conducting business on a one-off basis at a conference or client meeting in the United States, would not be sufficient to consider an adviser to be a U.S. investment adviser for purposes of the Final Rules. It is important to note that this analysis must be conducted on an entity-by-entity basis. For example, if a non-U.S. investment

<sup>1</sup> Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 6383 (Aug. 23, 2023) (the “Adopting Release”), available [here](#).

<sup>2</sup> See 17 CFR § 275.222-1(b) of the Advisers Act and Form ADV Instructions & Glossary, definition of “Principal Office and Place of Business.”

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adviser sets up a separate entity or subsidiary in the United States that serves as an investment adviser, then this entity's principal office and place of business may in fact be in the United States.

Also, the presence of a U.S.-based sub-adviser could bring a particular private fund client into scope, even if such private fund is primarily advised by a non-U.S. investment adviser and not otherwise subject to the Final Rules.<sup>3</sup> You should consider all of your sub-advisory relationships to determine if any of them are U.S. investment advisers and whether all or a portion of the Final Rules are applicable to your funds.

If you are a non-U.S. investment adviser, please move on to Threshold Question No. 2. Otherwise, please refer to the Willkie Client Alert (available here) for a comprehensive overview of the Final Rules.

### **2. Are you registered as an investment adviser with the SEC?**

If you are not registered as an investment adviser with the SEC, please move on to Threshold Question No. 3 to determine whether you are in Category 1 or Category 2. Note that exempt reporting advisers are considered "not registered" with the SEC for purposes of the Final Rules.<sup>4</sup>

If you are an investment adviser registered with the SEC, please move on to Threshold Question No. 3 to determine whether you are in Category 3 or Category 4.

### **3. Do you have U.S. private fund clients?**

There are three components of this Threshold Question to determine whether a particular vehicle is a "U.S. private fund client." All three prongs must be met in order for this Threshold Question to be answered "yes."

#### *A. Is it a U.S. fund?*

A "U.S. fund" is any fund that is organized or incorporated under the laws of the United States, such as a limited partnership organized under the laws of Delaware.<sup>5</sup> While only private funds are in scope for purposes of the Final Rules, it is important to identify *any entities* in the fund structure (including aggregator or intermediate entities) that are organized or incorporated under the laws of the United States to ensure that a proper analysis can be undertaken.

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<sup>3</sup> See Adopting Release at 69 n. 197.

<sup>4</sup> *Id.* at 47-49.

<sup>5</sup> *Id.* at 46 n. 126.

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### *B. Is it a private fund?*

A “private fund” is defined as an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940, but for section 3(c)(1) or 3(c)(7) of that Act.<sup>6</sup> Whether or not a U.S.-domiciled entity in your fund structure needs to rely on an Investment Company Act of 1940 exclusion, and which exclusions are available to it, is a complex question. We recommend that you consult with counsel before making a final determination as to whether any entity is a “private fund.”

### *C. Is it a client?*

A private fund is a client for purposes of the Final Rules if it is considered an advisory client of the adviser. While this analysis is more subjective than the other two components described above, it may be helpful to consult the list of private fund clients included under Item 7.B.(1) on your Form ADV to the extent you are either a registered investment adviser or an exempt reporting adviser. If the U.S. private fund in question is included on that list—even if it is an aggregator or intermediate entity—it is in scope of the Final Rules. It may also be instructive to consider whether you receive advisory fees from such U.S. private fund, or otherwise have an investment advisory agreement in place with such entity. However, the absence of these factors is not dispositive, so we recommend consulting with counsel before making a final determination regarding status of your advisory clients.

Note that the presence (or lack thereof) of U.S.-based investors does not impact the applicability of the Final Rules.<sup>7</sup>

**If you do not advise any U.S. private fund clients and are not an SEC-registered investment adviser, please see Category 1 in the below chart.**

**If you do advise any U.S. private fund clients and are not an SEC-registered investment adviser, please see Category 2 in the below chart.**

**If you do not advise any U.S. private fund clients and are an SEC-registered investment adviser, please see Category 3 in the below chart.**

**If you do advise any U.S. private fund clients and are an SEC-registered investment adviser, please see Category 4 in the below chart.**

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<sup>6</sup> *Id.* at 7 n. 4.

<sup>7</sup> *Id.* at 46-50.

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	<b>Preferential Treatment Rule</b>	<b>Restricted Activity Rule</b>	<b>Quarterly Statement Rule</b>	<b>Audit Rule</b>	<b>Adviser-led Secondary Rule</b>	<b>Written Annual Review Rule</b>
<b>Category 1:</b> Non-SEC registered non-U.S. adviser with no U.S. private funds	No	No	No	No	No	No
<b>Category 2:</b> Non-SEC registered non-U.S. adviser with U.S. private funds	Yes	Yes	No	No	No	No
<b>Category 3:</b> SEC-registered non-U.S. adviser with no U.S. private funds	No	No	No	No	No	Yes
<b>Category 4:</b> SEC-registered non-U.S. adviser with U.S. private funds	Yes	Yes	Yes	Yes	Yes	Yes

For more information on the various components of the Final Rules that may be applicable to you, please refer to the full Willkie Client Alert available at [here](#), or contact one of the attorneys with whom you usually work.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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