

Fund Management

In 15 jurisdictions worldwide

Contributing editors

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DEAL THROUGH

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Fund management

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

Fund managers

In the US, fund managers (investment advisers) are regulated principally by the Investment Advisers Act of 1940 (the Advisers Act). The US Securities and Exchange Commission (SEC) oversees the regulation of funds and their investment advisers. Under the Advisers Act, an investment adviser not qualifying for an exemption must register with the SEC and disclose a significant amount of information about themselves and their qualifications in order to register. This information regarding a registered investment adviser (RIA) must be made available to prospective clients.

Retail and private funds

If a fund is a 'retail' fund – a fund offered to investors by means of a registered public offering and sold to investors of all types or sophistications – then the fund is subject to the Investment Company Act of 1940 (the 1940 Act). The SEC oversees the regulation of retail funds under the 1940 Act, which requires retail funds to register with the SEC (thus becoming a registered investment company (RIC)). A discussion of RICs appears below under the 'Retail funds' section, beginning at question 11. In addition, RICs are required to register their publicly offered shares with the SEC under the Securities Act of 1933 (the Securities Act). The registration statement (which includes the prospectus) and any advertisements used in the public offering must conform to the requirements of the Securities Act.

Non-retail funds (private funds) can be exempt from SEC registration under the provisions of the 1940 Act. The securities of private funds, when sold to investors, typically qualify for an exemption from SEC registration under provisions of the Securities Act.

The Securities Act focuses principally on disclosure by issuers, while the Advisers Act and the 1940 Act focus mainly on substantive regulation of the activities of RIAs and RICs, respectively.

Under the Commodity Exchange Act (CEA), the operator of a 'commodity pool' (ie, a fund that invests in commodities, including many types of derivatives) must register as a commodity pool operator (CPO) (absent an exemption from registration) and its adviser may need to register as a commodity trading adviser (CTA).

Marketing

The marketing of RICs and private funds falls within the jurisdiction of the SEC under the Securities Exchange Act of 1934 (the Exchange Act) and the Advisers Act and, at times, is also subject to oversight by the Financial Industry Regulatory Authority, a self-regulatory organisation. The marketing of private funds is discussed in question 7, and the marketing of RICs is discussed in question 14.

2 Is fund administration regulated in your jurisdiction?

In the US, most fund administration activities generally are not subject to regulation.

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?

Private funds are not subject to authorisation or licensing.

The key requirements applicable to RIAs exist under the Advisers Act and state securities laws, which deem an RIA to be a fiduciary with respect to its clients. As a fiduciary, an RIA is held to strict standards of fairness to clients in all matters, and is prohibited from placing its own interests ahead of the interests of its clients. Under the Advisers Act, an RIA's activities are subject to detailed regulatory requirements. In particular, the Advisers Act and related SEC rules regulate, among other things, the terms of an advisory agreement, performance fees, client-solicitation arrangements, political contributions, trading practices, advertising, record-keeping, proxy voting, personal securities reporting and custody of client assets. The Advisers Act also imposes broad anti-fraud prohibitions, which extend to dealings with clients, prospective clients, and investors and prospective investors in private funds that are advised by the adviser.

An RIA must have written compliance policies and procedures reasonably designed to prevent violations of the Advisers Act, which must be administered by a chief compliance officer. In addition, the SEC will periodically examine RIAs for compliance with the Advisers Act, and has the power to bring enforcement actions for non-compliance with the Advisers Act and to impose fines, suspensions and other penalties for violations.

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?

Generally, an investment adviser, whether located within the US or abroad, must be an RIA to perform investment management activities for US clients. However, investment advisers solely to venture capital funds are exempt from SEC registration. Family offices, which provide investment advice to 'family clients', are exempt from SEC registration. Finally, investment advisers solely to private funds that have less than US\$150 million in assets in the aggregate are exempt from SEC registration. In addition, the following exemptions are available with respect to overseas investment advisers.

Overseas affiliates

There is an exemption available to an overseas affiliate (a 'participating affiliate') of an RIA. The exemption has multiple requirements, including: (i) any advice given to US clients by the participating affiliate must be given through the RIA or through employees of the participating affiliate participating in the RIA's US advisory business; (ii) the RIA must subject to its supervision each employee of the participating affiliate whose duties relate to the determinations and recommendations that the RIA makes to its US clients; and (iii) the participating affiliate must submit to the jurisdiction of US courts with respect to any action under US securities laws that involves the services provided by the participating affiliate's employees to the RIA's US clients.

Overseas private fund investment adviser

There is an exemption available to an overseas investment adviser with its principal office and place of business outside of the US, provided the investment adviser has no US clients, except for one or more private funds, and all assets under management by the investment adviser at a place of business in the US are solely attributable to private fund assets, the total value of which is less than US\$150 million. There is no limit on the amount of assets that can be advised through the private fund if the investment adviser does not have a place of business in the US. To rely on the exemption, the investment adviser must periodically file certain information with the SEC, which is then publicly available.

Overseas private investment adviser

Finally, there is an exemption available to an overseas investment adviser with fewer than 15 US clients and US investors in private funds advised by the investment adviser. The exemption is available only if the adviser has no place of business in the US and has aggregate assets under management attributable to US clients and US investors in private funds advised by the adviser of less than US\$25 million.

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?

There is no pre-authorisation requirement with respect to the acquisition of a non-controlling stake in an RIA. Control is generally defined to be the acquisition of 25 per cent or more of the RIA's (or parent company's) voting stock. The acquisition of control of an RIA may be deemed to constitute an assignment of the RIA's advisory contracts with its clients, and an assignment of an advisory contract may not be made without the consent of the client. Therefore, in practical terms, a transaction involving the acquisition of control of an RIA is usually conditioned on the consent of the RIA's clients.

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

In general, for private funds, in which all of the investors are high-net-worth investors (both natural persons and institutional investors), there are no regulatory restrictions on the structure of the RIA's compensation (other than pre-disclosure to the investors). For RICs, RIAs are generally prohibited from charging the RIC a performance fee, subject to the following exception: an RIA may charge a RIC a fee that provides for compensation based on the investment company's net assets, averaged over a specified period, and increasing and decreasing proportionately with the investment performance of the company over the specified period in relation to the investment record of a relevant securities index.

Fund marketing

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

Marketing activities may subject the person or entities performing the marketing activities to registration with the SEC. Specifically, any person engaged in the business of marketing funds to prospective investors may be required to register with the SEC as a 'broker-dealer' under the Exchange Act and to register with the Financial Industry Regulatory Authority, the industry self-regulatory organisation. There may be an exemption from these registration requirements that applies to employees of the sponsor of a private fund who: (i) do not receive transaction-based compensation; (ii) are not employed by a registered broker-dealer; and (iii) perform substantial duties for the private fund (other than soliciting investors).

Sponsors of funds frequently use registered broker-dealer firms as 'placement agents' to market their funds. A placement agent introduces the sponsor to potential investors.

8 What marketing activities require authorisation?

As noted in question 7, fund marketing activities may subject the person or entities performing the marketing activities to registration with the SEC as a broker-dealer. In general, performance of any one of the following activities may trigger an obligation to register with the SEC.

- participating in important parts of a securities transaction, including solicitation, negotiation, or execution of the transaction;
- earning compensation for participation in a securities transaction that depends upon, or is related to, the outcome or size of the transaction or deal;
- engaging in the business of effecting or facilitating securities transactions; or
- handling the securities or funds of others in connection with securities transactions.

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

The territorial scope of US regulation of fund marketing activities is broad. Generally speaking, activities that occur in the US, even if initiated outside the US, will be regulated.

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

There is no requirement for a local entity to be involved in the fund marketing process.

Retail funds

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

The 1940 Act requires that retail funds (RICs) must adopt a corporate form of governance with a board of directors or trustees (the directors). The 1940 Act does not require an investment company (other than a unit investment trust, which is not discussed here) to be organised in any particular corporate form. Thus, corporations, business trusts and limited partnerships would all be permitted legal vehicles.

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

The key law is the 1940 Act and rules promulgated under the 1940 Act by the SEC. The SEC has also issued a substantial number of guidance and interpretive publications with respect to the 1940 Act and rules thereunder. In addition, the offer and sale of shares of a RIC are governed by the Securities Act. Finally, the provisions of the Advisers Act and rules promulgated under the Advisers Act by the SEC are also relevant to RICs' RIAs.

Closed-ended RICs, if they are listed and traded on a stock exchange, also are subject to the listing and trading rules of the relevant exchange. The same is true with respect to ETFs, described immediately below.

A significant and growing segment of the US retail RIC market belongs to the exchange-traded fund (ETF) sector. Most ETFs are organised as open-ended funds and, as their name suggests, trade on a stock exchange. Most ETFs are passively managed to seek to track the performance of a designated index. ETFs sell shares directly only to 'authorised participants' (APs) in large blocks (eg, 50,000 shares) known as 'creation units'. Each AP is required to enter into an agreement with the ETF, which governs the AP's activities with respect to the ETF and its creation units. Through the arbitrage activities of APs, the ETF share's market price generally tracks the ETF share's net asset value.

Investors (ie, not APs) may buy ETF shares only in secondary market transactions on an exchange. Except where otherwise indicated, any response herein concerning open-ended RICs includes ETFs.

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

RICs must be registered with the SEC under the 1940 Act. To offer their shares to the public, RICs must register their shares with the SEC under the Securities Act.

14 Who can market retail funds? To whom can they be marketed?

Broker-dealers are the principal distribution channels for shares of RICs (other than ETFs). Banks and insurance companies also are permitted to distribute shares of RICs (other than ETFs).

Shares of an open-ended RIC can be offered and sold to any person (except for ETF shares, which are offered and sold only to APs).

Closed-ended RICs, which have their shares listed on a stock exchange, are generally offered to investors through broker-dealers that function as underwriters of the shares offered to investors in a public offering.

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

The principal special requirement is that an investment adviser to a RIC must be an RIA. Therefore, in addition to any provisions of the 1940 Act that affect the RIA to a RIC, the RIA is subject to the requirements of the Advisers Act and rules promulgated under the Advisers Act by the SEC.

16 What are the investment and borrowing restrictions on retail funds?
Investment limitations

The 1940 Act requires a RIC to disclose its policies with respect to certain investments. These policies may be either fundamental or non-fundamental. In general, fundamental policies can be changed only by vote of a majority of the RIC's shareholders. A RIC's registration statement

must disclose its proposed fundamental policies with respect to each of the following:

- diversification (whether it will be diversified with respect to the number of issuers in which the RIC invests);
- borrowing money and issuing any form of debt;
- underwriting the securities of other issuers;
- concentrating its investments in a particular industry;
- investing in real estate and commodities;
- lending; and
- any other policy that the RIC deems fundamental or that cannot be changed without a shareholder vote.

The SEC requires that no more than 15 per cent of an open-ended RIC's assets (10 per cent in the case of a money-market RIC) may be invested in illiquid securities (this restriction does not apply to a closed-ended RIC). The 1940 Act and rules thereunder also regulate a RIC's investments in issuers that are in a securities-related business (eg, broker-dealers and RIAs), issuers that are insurance companies and issuers that are RICs. Finally, the 'name-test' rule under the 1940 Act applies to a RIC with a name that suggests a focus on a particular type of investment (such as an industry, country or region). Under the name-test rule, a RIC is required to invest at least 80 per cent of its assets in the type of investment that is suggested by its name.

Borrowing

Closed-ended RICs are permitted to borrow from banks and private sources and are permitted to issue debt, subject to a 300 per cent asset coverage requirement (ie, the ratio of assets to debt, including the amount borrowed, must be at least 300 per cent), which applies at all times that the borrowing is outstanding. Closed-ended RICs also may issue preferred shares but, in doing so, become subject to a 200 per cent asset coverage requirement.

An open-ended RIC, because its shares are redeemable securities, has less freedom to employ leverage. Specifically, an open-ended RIC may borrow only from banks, and the RIC must retain 300 per cent asset coverage with respect to all such borrowings. Unlike closed-ended RICs, open-ended RICs may not issue preferred shares. However, certain limited exemptions from the rules on borrowing exist.

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

The Internal Revenue Code (IRC) governs the tax treatment of RICs. A RIC that satisfies the IRC requirements to qualify as a 'regulated investment company' is a 'pass-through' entity for US federal income tax purposes. This means that the RIC is not subject to federal corporate income tax. Instead, the RIC's income and capital gains are passed through to the RIC's investors.

18 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 RIC must be maintained by a qualified custodian, usually a bank. As a custodian, the bank performs only limited duties as agent of the RIC and has no discretion with respect to the assets of a RIC.

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

The principal governance requirement applicable to RICs is that, under the 1940 Act and rules thereunder, a majority of a RIC's directors generally must be 'independent' from the RIC (other than serving as a director) and the RIC's RIA, sponsor and principal underwriter. The 1940 Act and its rules mandate that directors, including a majority of the independent directors, have the following specific duties:

- to review and approve investment advisory agreements at least annually;
- to review and approve underwriting agreements;
- to review and approve distribution plans and related agreements; and
- to select the RIC's independent auditors.

More generally, under the 1940 Act, independent directors are critical in policing the potential conflicts of interest between a RIC and its RIA. The Supreme Court of the United States has referred to the role of the

independent directors under the 1940 Act as that of a 'watchdog' protecting RIC investors.

Independent directors are rarely involved in the day-to-day operation of a RIC. Rules promulgated by the SEC mandate that RICs adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws (including the 1940 Act) by the RIC and its principal service providers, including the RIC's RIA. The RIC's policies and procedures must be approved by the RIC's board, including a majority of independent directors. The SEC rules also require the board to designate a chief compliance officer (CCO) responsible for administering the policies and procedures. The CCO is required to review annually with the RIC's board the adequacy of the policies and procedures, including any material violation of those policies and procedures.

20 What are the periodic reporting requirements for retail funds?

Semi-annual and annual reports

Under the 1940 Act, a RIC must transmit semi-annually a report to each shareholder of record no later than 60 days after the close of the relevant period. The annual report, covering the RIC's entire fiscal year, must be audited by the RIC's independent auditors.

Form N-CSR

No later than 60 days after the close of each semi-annual and annual period, a RIC must file with the SEC (using Form N-CSR) its report to shareholders for that period, various certifications regarding the controls and procedures in place to assure that the reports to shareholders are accurate, and other information with respect to the RIC's code of ethics, audit committee, internal controls and procedures, and a schedule of the RIC's portfolio holdings.

Portfolio holdings

For the first and third quarter of its fiscal year, a RIC must file Form N-Q with the SEC, containing a complete list of its portfolio holdings. Form N-Q must be filed within 60 days after the end of the quarter covered. A complete listing of portfolio holdings for the second and fourth fiscal quarters must be contained in the RIC's Form N-CSR. Thus, a RIC's Form N-Q disclosure, combined with the RIC's Form N-CSR disclosure, disclose the RIC's portfolio holdings for each fiscal quarter no more than 60 days after the close of the quarter.

Proxy voting

A RIC must disclose how it voted portfolio securities using a prescribed form that must be filed each year by 31 August and cover the 12-month period ending 30 June.

Form N-SAR

Form N-SAR, which must be filed with the SEC semi-annually, is used by the SEC to obtain data from RICs.

Form N-1A

An open-ended RIC must update its registration statement annually using one form, Form N-1A, under the 1940 Act and the Securities Act.

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

A RIC may set minimum investment requirements (minimum investments of US\$500 or more are not uncommon). Certain RIC classes of shares are intended for institutional investors and, therefore, may have higher minimum investment requirements (for these, minimum investments of US\$1 million are not uncommon). As noted, ETFs sell and redeem their shares only with APs.

A RIC's board may adopt a policy whereunder the RIC will not sell its shares to persons whose ownership of the RIC's shares is likely to be disruptive to the RIC (eg, market-timers). Usually, such persons become known to the RIC due to prior disruptive trading practices with the RIC or with other RICs managed by the same RIA.

In general, with respect to any shareholder, a RIC may delay delivery of redemption proceeds for up to seven days to avoid disruption of the RIC's operations. Moreover, a RIC may pay redemption proceeds in kind (ie, in specie).

The foregoing discussion applies only to open-ended RICs that are not ETFs. ETF shares are not redeemable by ordinary investors (only APs share that privilege) and are sold only to APs. A closed-ended RIC's shares are not redeemable, and the closed-ended RIC's sales of its shares are usually limited to a public offering through underwriters and certain dividend reinvestment programmes.

Non-retail pooled funds

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

Private funds are organised in a variety of structures and jurisdictions. A private fund's investment strategy, type of target investor and tax considerations are normally paramount in determining the structure and jurisdiction of the private fund.

For those private funds organised within the US, the most common structure is a limited partnership, with Delaware most frequently the state of organisation. A limited partnership has a general partner, which is often organised as a limited liability company or in some other form. The general partner is responsible for management of the private fund and the limited partners are passive investors. In most instances, one entity serves as the general partner and an RIA manages the private fund's portfolio pursuant to an investment management agreement. A key advantage of the limited partnership structure is that a limited partner, who takes no role in the management of the private fund, is generally liable only to the extent of its investment in the private fund.

Taking Delaware as an example, limited partnerships are formed under the Delaware Revised Uniform Limited Partnership Act by filing of a certificate in the Office of the Delaware Secretary of State. The certificate must be signed by the general partner and must provide the general partner's name and address. The limited partnership agreement is not publicly filed, and the names of the limited partners do not have to be stated in the certificate filed with the Secretary of State. A Delaware limited partnership must maintain a registered agent and a registered office in the Delaware. There are service providers that will fulfil these roles.

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

The limited partnership agreement controls the structure and operation of the limited partnership, including management fees and performance allocations, payment of costs and expenses, and transfer and assignment of limited partnership interests. The limited partnership agreement normally sets forth each limited partner's capital contribution and explains the manner in which net profits and losses will be allocated to the partners' capital accounts and the manner in which distributions of net profits will be made. Normally, the agreement provides the general partner with broad authority to enter into transactions, contracts and arrangements on behalf of the limited partnership.

Private funds rely on exemptions under the Securities Act to avoid registering the interests to be sold to investors under the Securities Act with the SEC. Similarly, private funds rely on exemptions from the 1940 Act to avoid the registration and substantive provisions of the 1940 Act.

An RIA typically manages the private fund's portfolio pursuant to an investment management agreement. All of the provisions of the Advisers Act described above apply with respect to the RIA's relationship to the private fund, which is a client of the RIA. See questions 1 and 3.

Private funds are sold to investors by means of an offering document (frequently called a 'private-placement memorandum'). Anti-fraud provisions under the US securities laws and state laws would apply in the case of any material misstatements in, or material omissions from, the offering document.

Finally, the SEC recently adopted Form PF, which requires detailed information about private funds managed by an RIA. The form is filed periodically with the SEC on a confidential basis, and RIAs must include various information regarding each fund, such as the fund's use of leverage, derivative holdings and investors.

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

Private funds are not subject to authorisation or licensing. Instead, the most important legal requirements are those that are applicable to RIAs under the Advisers Act and the RIA's fiduciary obligations (under the Advisers Act and state laws). See questions 1 and 3.

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

As described in questions 7 and 8, marketing activities may subject the person or entities performing the marketing activities to registration with the SEC. Absent an exemption, any person engaged in the business of marketing private funds to prospective investors would be required to register with the SEC as a broker-dealer under the Exchange Act. See question 7 for a description of the exemption from these registration requirements that may be available to employees of the sponsor of a private fund.

A private fund or a broker-dealer acting on behalf of the private fund generally may engage in general public solicitation and general public advertising activities (if desired), provided certain conditions are met, including selling interests only to high-net-worth natural persons and institutional investors (sophisticated investors), who are assumed to be able to fend for themselves in making a decision to invest in a private fund.

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

Investment protection rules underlie the exemptions from the Securities Act and 1940 Act alluded to in the second paragraph of question 25. As a consequence, investors who are not sophisticated investors are effectively precluded from investing in private funds.

As noted in question 25, a private fund generally may engage in general public solicitation and general public advertising activities, provided interests in the private funds are sold only to sophisticated investors. More specifically, such sales may be made only to 'accredited investors'. Under the 1940 Act, private funds that limit sales only to accredited investors generally are limited to no more than 100 investors to avoid registration with the SEC. Other private funds limit sales only to accredited investors that are also 'qualified purchasers' (generally, institutions with US\$25 million in investments and individuals or family companies with US\$5 million in investments). The 1940 Act does not limit the number of investors in these funds.

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

Absent an exemption, the manager or operator of a private fund is required to be an RIA. The obligations and responsibilities of an RIA are set forth in questions 1 and 3. In addition, as described in question 23, periodic disclosures must be made to the SEC on Form PF.

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

Private funds, which are usually organised as limited partnerships, are generally 'pass-through' entities for US federal income tax purposes. This means that a private fund is not subject to federal corporate income tax. Instead the private fund's income and capital gains are passed through to the private fund's investors.

29 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?

A private fund's RIA is generally required to maintain custody of the private fund's portfolio securities with a qualified custodian, often a bank. The RIA may be able to rely on an exemption from this custody requirement.

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

The governance requirements of a limited partnership are set forth in the applicable limited partnership agreement. The agreement provides the general partner with broad authority to enter into transactions, contracts and arrangements on behalf of the limited partnership. In addition, under state law, the general partner is a fiduciary to each limited partner. In some cases, the limited partnership agreement may limit the general partner's fiduciary duties.

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

As described in question 23, periodic disclosures must be made to the SEC on Form PF. The limited partnership agreement of a private fund typically sets forth the reports that limited partners are entitled to see or receive,

including financial statements of the limited partnership and its annual tax reports. The limited partnership agreement also may provide for more frequent reporting on the private fund's performance.

Separately managed accounts

32 How are separately managed accounts typically structured in your jurisdiction?

Separately managed accounts are created by an investment management agreement between an investor and an RIA. The assets are held by a custodian, typically hired by the investor. Rather than owning interests in the account, the investor owns the account, which owns securities and other assets directly. Thus, no securities are deemed issued by the account. Instead of an offering document, the account is managed in accordance with the terms of the investment management agreement.

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

From the perspective of an investor, indemnification and standard of care are often among the most important terms. Other important terms include investment limitations, notice requirements and termination provisions.

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

The management of separately managed accounts by an RIA is subject to the requirements of the Advisers Act and rules promulgated under the Advisers Act by the SEC. In addition, state law fiduciary obligations may apply. See questions 1 and 3.

In the case of a separately managed account, the RIA is not marketing any security – the investor does not own an interest in the account but, rather, the investor owns the account. Therefore, the marketing in question is the RIA's marketing of its services. Under the Advisers Act, an RIA's advertising or marketing of its services is regulated. Specifically, any advertisement by the RIA and addressed to more than one person (or any notice or other announcement in any publication or by radio or television) that offers, among other things, any 'investment advisory service with regard to securities' is regulated. There are specific limitations on the RIA's use of any testimonials from other clients and any references by the RIA to past investment recommendations. More generally, the RIA is prohibited from making any advertisement that contains a false or misleading statement of a material fact or that is otherwise misleading.

With these limitations in mind, an RIA is permitted to advertise its past performance, subject to various disclaimers and disclosure requirements.

General

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

As a result of the recent financial crisis, the US Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which authorised the SEC and other federal regulators to issue regulations on a wide variety of topics. The US Financial Stability Oversight Council (FSOC) recently issued a notice inviting public comment on whether certain asset management products and activities could pose potential risks to the US financial system. Whether the FSOC will issue regulations applicable to asset managers remains an open question.

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

Private funds are not listed on US stock exchanges. Only open-ended RICs that are ETFs trade on a stock exchange.

Exchange-listed closed-ended RICs and ETFs are subject to the applicable listing requirements of the exchange on which they are listed. The exchange will impose a number of requirements. Some of the more typical requirements of the New York Stock Exchange (NYSE) are a requirement to have an audit committee, which must consist exclusively of independent directors; the audit committee must establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting matters by employees of the RIA and key service providers to the closed-ended RIC or ETF. Further, an NYSE-listed closed-ended RIC must hold a shareholder meeting each year and the NYSE requires the chief executive officer of a closed-ended RIC to certify annually that the CEO is unaware of any violation by the RIC of NYSE listing standards.

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

Yes, although the process to do so would vary, depending upon the state selected to form or incorporate the vehicle.

38 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 may invest in US private funds and RICs. Such investors may be subject to tax withholding on the income (excluding capital gains income) distributed by the private fund or RIC.

US investors may invest in foreign private funds or the other country's RIC equivalent. However, under the IRC, there likely would be significant tax disadvantages to the US investor if it is a US-taxable investor.

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