NAVIGATING US REGULATORY AND TAX ISSUES—A PRIMER FOR SINGAPORE MANAGERS MARKETING PRIVATE FUNDS IN THE UNITED STATES

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As the United States remains a leading source of global private equity (PE), real estate (PERE) and venture (VC) capital, many Singapore-based managers are increasingly seeking to market their funds to US investors. While Singapore and other non-US managers may be concerned about the regulatory and tax complexities of fundraising in the United States, the benefits of such fundraising can significantly outweigh the burdens of doing so with the support of practical and efficient legal advice.

This article summarizes the key US regulatory and US tax considerations when marketing fund interests to US investors, including a comparison with the corresponding Singapore rules that Singapore managers will already be familiar with.

US INVESTMENT ADVISERS ACT

The Investment Advisers Act of 1940 (the Advisers Act) is the primary law governing fund managers in the United States. Under the Advisers Act, fund managers engaging in investment advisory activities in the United States must register as an investment adviser (RIA) with one or more states or the US Securities and Exchange Commission (the SEC) unless an exemption applies. Exemptions available to a non-US manager may include (a) the Foreign Private Adviser Exemption, (b) the Private Fund Adviser Exemption and (c) the Venture Capital Adviser Exemption.

Singapore Comparison

The registration framework under the Advisers Act is analogous to Singapore's licensing framework with respect to Singapore managers under the Securities and Futures Act 2001 (SFA), whereby persons carrying out regulated activities in Singapore (such as fund management and investment advisory activities) must be licensed with the Monetary Authority of Singapore (MAS) unless an exemption applies.

The US and Singapore frameworks are similar in that they each impose distinct levels of compliance requirements on a fund manager depending on the applicable licensing or exemption category and perceived market risk. For example, as further discussed below, while a non-US manager that relies on the Foreign Private

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Adviser Exemption need not make any Advisers Act filing (known as Form ADV), a manager that relies on either the Private Fund Adviser Exemption or the Venture Capital Adviser Exemption is required to make a truncated Form ADV filing, and an RIA is required to make a full Form ADV filing.

That being said, the types and parameters of licensing and registration categories and available exemptions differ significantly between the Advisers Act and the SFA. Accordingly, a Singapore manager that qualifies for a licensing exemption under the SFA is not necessarily exempt from US registration and US reporting requirements under the Advisers Act. Similarly, a manager that qualifies for an exemption from registration and reporting under the Advisers Act is not necessarily exempt from licensing with the MAS under the SFA.

For example, while a Singapore-based private equity real estate manager may be exempt from licensing with the MAS in reliance on the "immovable assets" exemption under the SFA, managers of real estate funds are typically still subject to registration under the Advisers Act. In that case, a Singapore manager would typically seek to rely on one of the US exemptions described below.

Foreign Private Adviser Exemption

The least burdensome exemption for a non-US manager is to qualify for the "Foreign Private Adviser Exemption", with no Form ADV or other affirmative notice filing required to claim the exemption. In general, a non-US manager with no place of business in the United States may rely on this exemption if it, across all funds that it advises, (a) has less than 15 clients and investors in the United States (subject to certain look-through rules), (b) has less than US$25 million of aggregate assets under management (AUM) (including uncalled capital commitments) attributable to US investors and US clients, and (c) does not hold itself out to the US public as an investment adviser.

Managers often will outgrow the thresholds under the Foreign Private Adviser Exemption as they begin to accept more US capital. In that case, a manager typically will rely on either the "Private Fund Adviser Exemption" or the "Venture Capital Adviser Exemption" (each summarized below). As noted above, managers that rely on either of these two exemptions are known as "Exempt Reporting Advisers" (ERAs) because they are required to report to the SEC and the relevant State regulator by making a truncated "Form ADV" filing but are exempt from many of the requirements otherwise applicable to registered investment advisers. An ERA must file a Form ADV within 60 days after first relying on the exemption and annually thereafter (and upon certain material changes). Accordingly, these filings and the related analysis can often be finalized after a fund's initial closing that causes the manager to exceed the AUM and investor thresholds, but this will depend on the specific facts.

Singapore Comparison

There is no analogous regime under Singapore's licensing framework for foreign fund managers. Instead, there is a presumption, broadly speaking, that approaching any potential investors in Singapore is intended to have an "effect" in Singapore and is therefore prima facie a regulated activity. Accordingly, foreign managers need to look to the private placement and other exemptions, generally limited to certain types of fund offerings to institutional and accredited investors, to avoid triggering the need for a full capital markets services (CMS) license from the MAS.

Private Fund Adviser Exemption

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To qualify for the Private Fund Adviser Exemption, a manager must (a) advise only “private funds”, and (b) have less than US$150 million of aggregate AUM in the United States. A manager that has its principal office and place of business in the United States is deemed to manage all of its assets in the United States. A manager with its principal office and place of business outside the United States generally (i) must include only assets managed at a place of business in the United States, and (ii) may exclude consideration of assets managed on behalf of non-US clients (e.g., a Singapore limited partnership) toward the US$150 million threshold. Therefore, a non-US manager may rely on the exemption if (i) all of its clients that are US persons are private funds (even if some or all of the non-US clients are not) and (ii) management activities in the United States are limited to US$150 million in private fund assets. Accordingly, it is possible for a Singapore manager (or any other non-US manager) to continue to rely on the Private Fund Adviser Exemption even if it has exceeded such dollar threshold in total AUM.

Singapore Comparison

As mentioned above, the Singapore licensing framework does not provide a separate category of license for a fund manager with Singapore investors on the basis that the manager has no physical presence in Singapore. Also, whilst there was until recently a lighter-touch licensing regime for fund managers in Singapore with no Singapore retail investors and AUM of no more than S$250 million (the “Registered Fund Management Company” or “RFMC” regime), that regime was abolished by MAS streamlining measures in early 2024. Accordingly, all fund managers formerly operating as RFMCs have needed to give up their licensed status altogether or convert to being full CMS license-holders with the incrementally greater compliance burden that comes with that status.

Venture Capital Adviser Exemption

To qualify for the Venture Capital Adviser Exemption, a manager must advise solely “venture capital funds”, defined as a private fund that meets the following conditions: each such fund (a) represents to its actual and potential investors that it pursues a venture capital strategy, (b) invests no more than 20% of its total assets (including uncalled capital commitments) in nonqualifying investments, (c) does not incur leverage in excess of 15% of its capital contributions and uncalled capital commitments, and (d) does not provide any redemption rights for investors except in extraordinary circumstances (i.e., each such fund must be a closed-end fund), among other technical requirements. Notably, secondary transactions (e.g., acquiring interests in a start-up from an existing owner) are “nonqualifying investments” such that managers relying on the Venture Capital Adviser Exemption may only participate in such transactions on a limited basis.

Singapore Comparison

In 2017, the MAS introduced the Venture Capital Fund Management license regime, a simplified set of regulations for managers of venture capital funds, with the objective of lowering the regulatory compliance burden and shortening the authorization process for fund managers in the VC space and to facilitate start-ups' access to capital. The lighter compliance burden, relative to a full CMS license for fund management, is reflected in several different aspects, including in relation to the requirements for key executive experience, minimum regulatory capital and an internal compliance function. The corollary is that a Singapore VCFM licensee must invest at least 80% of fund capital in companies less than 10 years old, cannot invest in any listed assets and is restricted to offering closed-ended strategies to institutional and accredited investors. The simplified regulatory regime is designed to take into account the extent of contractual safeguards typically found in fund documentation negotiated by VC managers' sophisticated investor client base.

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US SECURITIES ACT AND US INVESTMENT COMPANY ACT

In addition to compliance with the Advisers Act, managers conducting US offerings of fund interests should (a) confirm that each US investor (i.e., an investor that is resident or domiciled in the United States) is an "accredited investor" under Regulation D of the US Securities Act of 1933 (the Securities Act), and (b) ensure that there is no "general solicitation" of the fund interests in the United States (unless relying on Rule 506(c) as discussed below) to avoid registration of fund interests with the SEC under the Securities Act.

It is also important for managers conducting their US offerings to seek to either (i) subject to certain look-through rules, admit to the fund no more than 100 beneficial owners (i.e., the "3(c)(1) exemption"), or (ii) admit as investors only "qualified purchasers" (i.e., the "3(c)(7) exemption"), in order to avoid registration of the fund as an "investment company" under the Investment Company Act of 1940. In the case of a non-US domiciled fund (e.g., Singapore or the Cayman Islands), a manager is only required to count US investors toward the 100 beneficial owner and "qualified purchaser" tests.

Singapore Comparison

The US private placement rules described above are substantially similar to the private fund offering rules in Singapore, whereby under the SFA, it is important to ensure that there is no "broad marketing" of fund interests to the Singapore public. Otherwise, the fund manager will need to obtain MAS approval for the offering. Similar to the rules in Singapore, the prohibition of "general solicitation" in the United States means that there should be no broad dissemination of information relating to the offering, such as through social media, publicly available websites, press releases, public conferences or otherwise.

The US rules on investor suitability described above are also similar to the rules in Singapore in that a manager must offer fund interests only to investors that meet a certain suitability threshold to avoid certain registration requirements. This is analogous to the prospectus requirement in Singapore, whereby a fund manager is required to "lodge a prospectus" with the MAS unless the offering is made only to (i) "accredited investors" (as defined under the SFA), (ii) investors with a capital commitment of at least S$200,000 (i.e., the "Restricted Scheme Exemption"), or (iii) "institutional investors" (as defined under the SFA) (i.e., the "Institutional Investor Exemption"), subject to certain other conditions (e.g., restrictions on advertising costs). Notably, unlike in other key jurisdictions such as the European Union and South Korea, there is no "reverse solicitation" exemption or safe harbor under either the Singapore or US securities laws to avoid such registration requirements.

Form D

For a US private offering of fund interests, a fund typically will file a "Form D" notice of sale with the SEC to affirm reliance on the private placement "safe harbor" provided in Regulation D under the Securities Act. As a practical matter, most practitioners advise clients to file Form D within 15 days following the date the first US investor is admitted to the fund. It is common for a fund to "pre-file" Form D before the fund's initial US closing. Depending on the circumstances, an issuer may not be required to disclose the dollar amount of securities sold in the Form D if the form is filed prior to closing.

Some funds may determine not to file a Form D or rely on Regulation D at all, and may instead rely on the statutory "private placement exemption" available under Section 4(a)(2) of the Securities Act. The Securities Act does not define "public offering", but relevant case law and SEC rulings have introduced several factors that may help determine whether an offering should be deemed public, including (a) whether investors are "sophisticated

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investors" (i.e., have sufficient knowledge and experience in finance and business), (b) whether there is any general solicitation and advertising involved, and (c) the number of investors in the fund (i.e., the fewer the investors, the less likely the offering is considered public), among others. While relying on this self-invoking statutory exemption can reduce costs, it also introduces greater regulatory risk and uncertainty, especially given that (i) the SEC has expressed a strong preference for complying with Regulation D and filing Form D, and (ii) the precise limits of the statutory private placement exemption are not as clearly defined as the parameters of the Regulation D safe harbor. In addition, institutional and other sophisticated investors will often insist that the fund comply with Regulation D and file Form D.

Singapore Comparison

There is no Singapore equivalent to the SEC's Form D. To the extent a fund manager is relying in Singapore on the equivalent private placement exemption under the SFA, the main route is to offer interests to no more than 50 persons (on a look-through basis in relation to any feeder vehicle) in any 12-month period. This is a self-invoking exemption that does not require a filing but would have to be validated if ever scrutinized by the MAS, reinforcing the need for good record-keeping in the fund marketing phase.

General Solicitation–Rule 506(c)

In 2013, the SEC adopted Rule 506(c), which permits managers to offer interests in a fund by "general solicitation", marking a major shift from the traditional restrictions mentioned above. However, Rule 506(c) comes with additional procedural and investor verification requirements. The SEC also has been strict in scrutinizing offerings under these more permissive rules. Accordingly, fund managers should carefully weigh the advantages of general solicitation – often meaning access to a broader base of smaller, noninstitutional investors – against the increased cost and associated risks before engaging Rule 506(c).

Singapore Comparison

There is no equivalent to this "general solicitation" approach in Singapore. Any general solicitation of investors in Singapore will fall outside the private placement exemption routes under the SFA, unless the total value of the offering is very small. Accordingly, unless the manager is confident that the solicitation is only made to institutional and accredited investors (in which case, at the very least and subject to certain other advertising spend and other restrictions, a "restricted scheme" notification in relation to the fund would have to be made to MAS), the offering would be highly likely to trigger the full prospectus filing requirements for retail regulated securities (including fund interest) offerings under the SFA.

US AML AND CFT RULES

In August 2024, the US Department of Treasury's Financial Crimes Enforcement Network (FinCEN) finalized rules (AML Rule) requiring RIAs and ERAs to comply with certain anti-money laundering (AML) and countering the financing of terrorism (CFT) measures with effect from 1 January 2026.

The AML Rule, as adopted, excludes certain types of advisers, including non-US managers that rely on the Foreign Private Adviser Exemption. On the other hand, ERAs (including foreign-located ERAs) are subject to the AML Rule. Accordingly, a Singapore-based manager that is registered with the SEC, or reports as an ERA in reliance on the Private Fund Adviser Exemption or the Venture Capital Adviser Exemption, is subject to the AML Rule.

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Key obligations of the AML Rule include (a) maintaining a risk-based program requiring AML and CFT measures, (b) reporting to authority of any suspicious activity, (c) complying with record-keeping obligations, and (d) adopting special information sharing procedures.

Singapore Comparison

The US AML requirements and the Singapore AML requirements as applied to fund managers are in substance very similar. Singapore managers will note, for example, that the US requirements described in (a) to (d) above apply to managers subject to the Singapore AML rules. Most notably, regarding the implementation of the AML and CFT program, both US and Singapore rules require that a manager (a) establish a "risk-based" program (i.e., to conduct risk assessments and tailor controls accordingly), (b) provide an independent audit function to test such program, (c) designate a compliance officer to oversee such program, (d) conduct ongoing monitoring of client accounts and transactions, and (e) carry out ongoing employee training.

That being said, the Singapore requirements are generally a bit more onerous and detailed than the US requirements. For example, the Singapore rules provide specific guidelines on customer due diligence and risk assessment, whereas the US rules are more principles-based on that topic. Accordingly, compliance with the Singapore requirements likely would cover compliance with the US requirements in substance, although a manager should confirm its compliance in each jurisdiction separately as application of the rules evolves. One unique element of the US rules is that any reportable transactions must be filed with FinCEN.

US TAX CONSIDERATIONS

If a fund will take in US investors, a fund manager should consider (a) what types of US investors there will be for tax purposes and (b) whether the fund will be treated as a partnership or a corporation for US tax purposes. From a US tax perspective, there are two main types of US investors: (i) US taxable investors, which generally include all US citizens, Green Card holders and US-domiciled entities, in addition to any other US tax residents, and (ii) US tax-exempts, which generally include pension plans, retirement funds, private foundations and charities.

Singapore Comparison

In addition to these US tax issues, Singapore managers are already confronted with complex Singapore tax considerations, including (x) seeking tax exemptions under Sections 13D, 13O or 13U, which allow for tax exemption on specified income and gains derived from designated investments, (y) seeking treaty benefits under relevant tax treaties, which may reduce withholding tax on certain income streams and provide clarity on tax obligations, and (z) ensuring that the gains on the dispositions of investments are classified correctly to benefit from the preferential tax policies in Singapore. Accordingly, when Singapore managers offer fund interests to US investors, they will need to consider the unique US issues as an overlay to the existing Singapore and regional structuring concerns.

Similar to many other types of limited partnerships globally, a fund structured as a Singapore limited partnership should automatically be treated as a partnership for US tax purposes. A Singapore Pte. Ltd. or Singapore VCC (and its sub-funds) on the other hand, will be classified by default as a corporation for US tax purposes. Accordingly, a manager would need to affirmatively make a "check-the-box" US tax election in order for a Singapore Pte. Ltd. or Singapore VCC (and its sub-funds) to be classified as a partnership for US tax purposes.

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While the Internal Revenue Service (IRS) has not issued any specific guidance on whether a US tax election could be made for a single sub-fund of a Singapore VCC (or a single series of a non-US series or cell entities generally), the IRS has in the past issued proposed regulations permitting (i) certain types of vehicles (e.g., separate series of a US series entity and separate series of a Bermuda series entity engaged in the insurance business specifically) be treated as separate entities for US tax purposes, and (ii) separate series entities elect different US tax classifications, with some being treated as partnerships and others being treated as corporations for US tax purposes. That being said, the IRS has not expressly blessed this approach in the case of a Singapore VCC or its sub-funds.

For the above reasons, most market practitioners would suggest setting up a separate vehicle, rather than seeking to make the election for a specific sub-fund of a VCC, when electing for a VCC to be taxable as a partnership for US tax purposes to avoid the risk of unintended consequences for the VCC's other sub-funds and investors.

US Taxable Investors

US taxable investors typically would prefer to invest into a fund treated as a partnership for US tax purposes so that the fund's income and gains are subject to income tax only at the partner level, allowing individual partners to receive the benefit of reduced US income tax rates for long-term capital gain produced by fund investments, as well as avoiding an entity level tax on the partnership itself. Generally, an entity structured as a limited partnership will automatically be treated as a partnership for US tax purposes. However, as noted above, a non-US entity structured as a corporation will need to affirmatively make a “check-the-box” US tax election to be treated as a partnership for US tax purposes. The election should be effective prior to the date any US taxable investors join the fund.

US Tax Exempt Investors

On the other hand, US tax exempts may prefer to invest into a fund treated as a corporation for US tax purpose If the fund's investment strategy will generate income that is either “unrelated business taxable income” or “unrelated debt-financed income” (collectively, UBTI) that would be subject to US income tax when received by a US tax exempt entity investing through a partnership.

Generally, an entity that is structured as a corporation will automatically be treated as a corporation for US tax purposes if no “check-the-box” US tax election is made, whereas a fund structured otherwise would need to make a “check-the-box” US tax election for it to be treated as a corporation for US tax purposes.

US tax exempts may require that a manager of a fund partnership set up a “blocker” that is treated as a corporation for US tax purposes to block UBTI the tax exempts would receive if they were to invest directly into the fund. The foregoing issues are also similar to the types of issues that certain non-US investors (e.g., sovereign investors) may encounter.

While setting up “blockers” can significantly increase the costs of a fund offering, these costs can be reduced if, from the outset, the fund is structured, and the governing agreements are drafted, in a manner that provides flexibility to accommodate such investors.

US Tax Filings

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US investors often will require that a fund treated as a partnership for US tax purposes provide annual US informational returns known as “Schedule K-1s” for the US investors in order to prepare their own US tax returns. Typically, US accounting firms would prepare these Schedule K-1s based on the fund's financial statements. In addition, US investors might request that the fund's governing agreements include specific provisions relating to US partnership tax rules, such as income allocation for US tax purposes and the handling of US tax audits. The fund manager will then have to assess the downside, i.e., time and cost of providing information on this basis, against the benefit of satisfying the US investors' request in this regard.

Non-US Investors Generally

US taxation of non-US investors in a fund for US tax purposes typically depends on whether the fund's income will be treated as being related to a trade or business in the United States. If a fund is engaged in a US trade or business (e.g., the fund invests in certain US operating businesses), non-US investors typically would be subject to US income tax on any fund income that is “effectively connected” with such US trade or business. Accordingly, non-US investors generally would seek to avoid such “effectively connected income”. One solution would be for the fund to invest in such US investments indirectly through a corporate blocker, which is often a subsidiary to the fund. Sovereign investors face similar issues with respect to investments that constitute commercial activities.

However, in practice, many non-US investors (generally other than anchor investors, institutional investors and sovereigns) simply rely on a manager in good faith to structure US investments properly without the use of a blocker.

OTHER US REGULATORY ISSUES

The foregoing discussions summarize the primary US regulatory and US tax issues typically relevant to any private fund offering to US investors by a non-US manager. The following is a brief summary of certain additional US issues that may come to play depending on the specific facts and circumstances:

Commodity Futures Trading Commission

If a fund's investment strategy includes options, futures, swaps or similar derivatives in respect of commodities, the fund will generally be subject to regulation by the Commodity Futures Trading Commission (CFTC) pursuant to the Commodities Exchange Act and the rules thereunder, unless an exemption applies. Note that the CFTC has classified digital assets and certain cryptocurrencies (such as Bitcoin) as commodities, such that derivatives thereon could be subject to CFTC regulation. Typically, CFTC issues are more pertinent to hedge funds than to PE, PERE or VC funds, as hedge funds are more likely to trade in commodity interests and derivatives thereon. PE, PERE and VC funds that have some exposure to derivatives in respect of commodity interests (such as via hedging transactions) often would seek to rely on the “de minimis” exemption from registration with the CFTC as a commodity pool operator, on the basis that they stay within the thresholds on their relevant positions.

Singapore Comparison

There is no express Singapore equivalent to the US commodities regulations as they apply to fund managers, whether in terms of having a dedicated commodities and derivatives regulator or having a regulatory framework for commodities and derivatives transactions which has a direct impact on the investment activity of Singapore hedge fund managers. Dealing in these types of assets, to the extent they are regulated products in Singapore,

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generally falls within the automatic “dealing” permission which the SFA includes as an ancillary function within the CMS license for fund management.

Broker-Dealer Rules (Placement Agents, Finders)

The Securities Exchange Act of 1934 provides that, in general, placement agents, finders and similar service providers that receive compensation for raising capital are required to be registered as “broker dealers” with the SEC. This registration requirement applies both to the individuals involved in fundraising as well as the firms that employ them. However, many sponsors of PE, PERE and VC funds seek to satisfy the conditions of the “issuer exemption” in order that they need not register as brokers. This exemption is based on the SEC's interpretation that issuers of securities are generally not acting as broker dealers when selling their own securities (i.e., fund managers marketing their own funds). Note that the exemption is defined narrowly and may not be available in some cases, such as with respect to in-house fundraising professionals who are compensated based on amounts raised.

Singapore Comparison

The Singapore regime is broadly equivalent here. Prima facie, placement agents, finders and similar service providers that receive compensation for raising capital must hold a CMS license for dealing in regulated products and providing corporate finance services. However, a fund manager sponsoring its own funds generally does not need a separate permission from MAS, since dealing and corporate finance activities are considered ancillary functions within the ambit of its CMS license for fund management.

New Issues Under FINRA

The Financial Industry Regulatory Authority (FINRA) has established Rule 5130 and Rule 5131 to protect the integrity of the IPO process. In general, these rules prohibit FINRA member broker-dealers and their affiliates from selling or allocating shares in IPOs of equity securities (New Issues) to funds with significant interests held by certain restricted persons, including broker-dealers, portfolio managers, banks, executive officers and directors of the relevant portfolio company. In January 2020, FINRA amended Rules 5130 and 5131 to provide that the allocation restrictions do not apply to a non-US broker-dealer that allocates New Issues to non-US persons, provided that these allocation decisions are made independently without influence from a US broker-dealer. Broadly speaking, a fund that is domiciled and managed by a non-US manager outside the United States is considered a non-US person. Accordingly, such funds may participate in New Issues through a non-US broker-dealer without being subject to the requirements of Rules 5130 and 5131, regardless of the nationality of the fund's underlying investors.

Singapore Comparison

Beyond the more generically stated MAS guidelines on mitigation of conflicts of interest (set out in the Guidelines on Licensing and Conduct of Business for Fund Management Companies), there is no Singapore equivalent to FINRA or its regulatory regime in the United States as it applies to fund managers.

ERISA

US pension plan investors are a significant source of capital for private funds globally. However, unless an exception is available, the US Employee Retirement Income Security Act of 1974 (ERISA) imposes strict fiduciary duties and prohibited transaction restrictions on funds with ERISA and similar investors, such as US private

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pension plans. Most non-US based managers are able to avoid the application of ERISA by ensuring that the aggregate participation of ERISA and similar investors (which do not include US state and local government pension plans) is less than 25% of each class of equity interests in the fund. Managers that are unable to comply with the 25% threshold typically seek to comply with the “Operating Company” exception, under which the fund would qualify as either a “Venture Capital Operating Company” or a “Real Estate Operating Company” (depending on its investment strategy). However, complying with either exemption could add significant cost and administrative burden.

Singapore Comparison

There is no Singapore equivalent to ERISA's special treatment for public pension funds participating in private funds.

FOIA

Certain government investors that are subject to the Freedom of Information Act of 1966 (FOIA) and similar US state and local government rules may be required to publicly disclose confidential information about the fund. Similarly, certain non-US governmental entities are subject to comparable rules in their jurisdictions. These rules are typically referred to as “FOIA laws” in the funds industry. To navigate these complexities, a fund manager typically will obtain representations from each investor to determine whether any FOIA laws apply. If so, the parties may agree to withhold certain information from these investors or disclose information to these investors in a particular format to mitigate the risks of retention and public disclosure of such information.

Singapore Comparison

There is currently no freedom of information legislation in force in Singapore. However, many of the Southeast Asia region's leading investors are subject to FOIA-like or similar requirements that Singapore managers should be mindful of when considering the ability to preserve confidentiality of fund matters.

CFIUS and Outbound Investments

The US Committee on Foreign Investment in the United States (CFIUS) has the authority to review transactions for potential risks to US national security, with most such transactions being voluntarily and jointly submitted for review by the parties before closing. In 2020, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded the scope of CFIUS review to include certain nonpassive investments in US businesses that deal with critical technology, critical infrastructure and sensitive personal data, as well as certain real estate transactions that are in proximity to sensitive US governmental facilities and mandating that certain of these transactions must be disclosed CFIUS in advance. As a general matter, an investment in a US business by a fund where (a) its general partner is not a foreign person (and is not controlled by one), and (b) its non-US investors do not have any control rights (excluding normal investor and investor advisory board rights) over the general partner or board rights and access to nonpublic material information about the investment, would typically be outside CFIUS's jurisdiction, even if the fund is domiciled outside the United States. Additionally, the US Treasury Department is finalizing an outbound investment regime that will prohibit or require notification of certain investments by US investors into technologies of particular concern to the United States when these involve countries of concern, currently defined as China, including Hong Kong and Macau, with potential broad application to investments in third countries where these may involve a US investor.

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Singapore Comparison

In Singapore, the recently passed the Significant Investments Review Act 2024 has given the Ministry of Trade and Industry (MTI) authority to designate entities deemed critical to national security and to regulate significant investments by foreign and domestic investors in these entities. Although Singapore already had certain sector-specific controls on ownership in telecommunications, banking, utilities, and other industries, this new legislation allows MTI to regulate acquisitions of businesses and assets not previously covered by investment laws and regulations.

Sanctions (OFAC)

The US Treasury's Office of Foreign Assets Control (OFAC) is responsible for administering and enforcing economic and trade sanctions based on US foreign policy and national security goals. All US persons must comply with sanctions imposed by OFAC, including the prohibition against engaging in or facilitating transactions with parties on OFAC's List of Specially Designated Nationals and Blocked Persons (SDNs) or any entity in which one or more SDNs have a 50% or greater interest. Non-US persons are also subject to US sanctions if they engage in activities that have a US nexus, including transactions involving US goods, services, or financial systems. Certain OFAC programs, such as those in effect against Iran, North Korea, Russia, and cyber and proliferation activities, also include “secondary sanctions” whereby OFAC can sanction non-US persons even where there is no US nexus to the transaction.

Singapore Comparison

Singapore has a dual approach sanctions regime:

- As a member state of the United Nations, Singapore implements UN sanctions through its United Nations Act 2001, which applies to nonfinancial institutions and individuals, and, through regulations issued by the MAS under the Monetary Authority of Singapore Act 1970, which apply to financial institutions.
- On an autonomous basis, Singapore also applies targeted financial sanctions against designated individuals and entities under its Terrorism (Suppression of Financing) Act 2002. Funds structured as VCCs in Singapore, akin to the protected cell companies sometimes used in US fund structures, are also required to comply with targeted financial sanctions issued under the Variable Capital Companies Act 2018.

Volcker Rule

The Volcker Rule is a regulation established under section 13 of the Bank Holding Company Act of 1956 (the BHCA). It generally prohibits banking entities (such as US banks and non-US banks with US operations) from engaging in proprietary trading and sponsoring or investing in certain types of private investment funds. Accordingly, banks affiliated with investment funds are limited in their ability to invest in or manage covered funds. However, subsequent US regulatory adjustments have eased some restrictions and added additional exemptions, making it easier for banks, particularly non-US banks, to invest in PE, PERE and VC funds.

BHC Investors

In addition to the restrictions under the Volcker Rule, bank holding companies (BHCs), and their affiliates are subject to activity restrictions under the BHCA. A BHC is generally prohibited from acquiring or controlling more

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than 5% of any class of “voting securities” or acquiring assets of a nonbanking company that is not engaged in permissible activities for a BHC. A BHC that has elected to be treated as a financial holding company may take advantage of additional investment authorities, such as merchant banking powers. Accordingly, a fund that may admit BHC investors should include relevant language in the fund's governing documents providing that BHC investors will hold only a noncontrolling position or nonvoting equity interests in the fund as needed to avoid application of the BHCA.

Singapore Comparison

Singapore has no direct equivalent to the Volcker Rule or BHCA in terms of regulating how deposit-taking banks participate in and otherwise interact with private funds. Instead, to safeguard financial stability and regulating the capital adequacy of banking institutions, Singapore has, like the European Union member countries, gone down the alternative route of fully implementing the Basel III requirements.

CONCLUSION

A fund manager should carefully consider the foregoing issues when offering PE, PERE or VC fund interests to US investors, and keep in mind the similarities, and more critically, the differences to the Singapore regulations and typical practices relating to fund offerings. It is important to address these issues to attract US investors whilst complying with the US and Singapore regimes. As indicated by our brief overview above, the US issues in particular can be complex and nuanced, especially to the uninitiated. However, with the support of experienced practitioners, these issues can be managed in a cost-efficient manner.

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