

## International: Private Fund Spotlight

Major Developments for Private Fund Managers

### In brief

In this update, we take high-level review of major issues faced by private fund managers investing across the globe. In August and September, private fund managers with U.S. investors faced the broadest expansion of SEC regulation since Dodd-Frank, while European managers worked through the details of ESG reporting. Enforcement continued to be laser-focused on digital assets (but courts didn't always agree with them), Finfluencers, custody and marketing, while new employment and privacy requirements raised unique issues for asset managers.

Read more below.

### In depth

#### Running an Asset Management Business – Licensing, Registration, Employment and Privacy Developments

##### Americas

- U.S. and Non-U.S. Investment Advisers to Private Funds – New Private Fund Adviser Rule: this major **new rule imposes a wide variety of requirements on both registered and unregistered private fund managers**, both inside and outside of the United States. Under the rule, SEC-registered advisers must provide quarterly statements to investors, receive fairness or valuation opinions for any adviser-led secondary transactions in fund interests and conduct annual audits for their private funds. Additionally, all private fund advisers (*whether or not SEC-registered*) are prohibited from offering preferential redemption and transparency terms favoring certain investors and are restricted from incurring certain regulatory costs or offering side letter benefits without investor notice and, in some cases, consent. Initial compliance dates start in September 2024 for large managers.
- SEC- and CFTC-Regulated Entities – Off-Channel Recordkeeping: the CFTC continued a trend started by the SEC and **charged four regulated entities with recordkeeping failures for off-channel communications**. While these actions focused on dealers, asset managers should be on notice—the same rationale could apply to them.
- U.S. Proprietary Traders – Exemption from FINRA membership: the SEC narrowed the scope of exemptions for proprietary traders from FINRA membership, part of a broader push to regulate proprietary traders that are otherwise neither investment advisers nor broker-dealers.
- Americas – Employment: for more detail on global employment matters, subscribe to the **Baker McKenzie Employer Report**.
  - California Employers and Data Protection: a new sweep requests information on **how employers are complying with California Consumer Privacy Act (CCPA) requirements** with respect to the personal information of employees and job applicants. In-scope employers should double-check CCPA compliance procedures and (among other things) update contracts with service providers, affiliates and other parties to whom the company discloses personal information about applicants and personnel.
  - New York Employers and Employee Ownership of IP: the New York legislature has passed a bill (still awaiting signature) that would **prohibit employers from requiring that employee assigns rights in inventions that the employee developed on their own time** and without the use of employer equipment, supplies, facilities, or trade secret information. The restriction does not apply to (among other things) employee inventions that relate to

the employer's business. Once the bill becomes law, asset managers (particularly in IP-intensive sectors) should evaluate their employment agreements for compliance.

- US and NY Employers – AI and Anti-Discrimination Law: new non-binding guidance encourages employers to conduct self-analyses to **determine whether AI-driven employment practices have an adverse impact** under US anti-discrimination laws under Title VII. Various asset managers currently use AI to evaluate both new hires and existing employees. Effective 5 July 2023, **New York City now prohibits the use of certain automated employment decision tools** unless (among other requirements) such tools have been subject to a bias audit within one year of the use of the tool.
- Latin American Employers – Signature Changes to Employment Laws: **major employment law changes have been implemented in 2023** in Mexico, Brazil, Chile, Argentina, Colombia, Venezuela and Peru.

## Europe

- EU and non-EU Managers – ESG -- Corporate Sustainability Reporting Directive (CSRD) Requirements: over the summer, rules detailing what needs to be reported under CSRD took effect. Although these standards remain subject to an additional EU procedural hurdle, managers should review these new standards (the **European Sustainability Reporting Standards or ESRS**) and evaluate how to come into compliance, potentially as soon as January 2024. CSRD directly affects EU managers, but also non-EU managers with EU subsidiaries with (among other things) balance sheet assets of more than EUR 20 million or more than 250 employees. Confirm whether the new rules apply to you using **this tool**. To find out what US legal departments need to know about the EU CSRD, **click here** to watch a webinar by members of the Baker McKenzie ESG team.
- EU Funds and Funds Marketed in the EU– ESG – Sustainable Finance Disclosure Regulation (SFDR): “financial market participants” (including EU managers and those who market their products to EU investors) have been required to make pre-sale sustainability disclosures under SFDR, and market practice continues to evolve—a **new consultation asks managers and investors whether this disclosure is working**. Responses are due by 15 December 2023.
- Europe – Employment
  - Luxembourg Employers: New Leave Requirements: Luxembourg has adopted **new family leave requirements**.
  - Swiss Employers – New Data Protection Requirements: Swiss employers need to evaluate a **new “GDPR-like” law** that could cover employee data. Employers may collect data only if it relates to the employee's suitability for the job or is necessary to fulfill the employment contract. But data might include the employee's CV, job application documents, and payroll data (e.g., the employee's name, bank account details, social security number, and information on salary and benefits). Sensitive data might include the employee's religious activities (potentially relevant for withholding tax purposes), or sensitive health data related to an employee's sick leave.

## APAC

- Australia – Extension of Exemptions for Foreign Managers: the Australian regulator has **extended an exemption for certain foreign managers** from local licensing requirements. The exemption includes managers regulated in Germany, HK, the UK, the US, Singapore and Luxembourg.
- Singapore – Proposed Family Office Exemption: Singapore may soon have a **new exemption from licensing for single-family offices**. Under the proposed new framework, the MAS would no longer grant exemptions for family offices on a case-by-case, but instead permit family offices that meet certain exemptive criteria to file a notification. Comments are due on 30 September 2023. The exemption is part of a broader successful push by Singapore to become a destination for family offices.
- China – Employers and Incentive Compensation: employers in China need to consider new guidance on **whether equity incentives can form part of non-compete compensation** and recent employment dispute cases involving equity incentives.

## MENA

- Dubai – DIFC – Family Plan Rules: Singapore's revamp of its family office exemption follows an earlier announcement that the **DIFC has created a new regulatory regime for family offices**. The prior rules exempted only single-family offices—the new regulations exempt both single- and multi-family offices from registration with the DIFC regulator (though multi-family offices may still require licensing if they provide financial services to multiple families). Family offices will have until 31 January 2024 to comply.

## Global

- United States-EU Data Privacy Framework: the **new data protection framework** should ease GDPR compliance and the transfer of personal data from the EU to the US. This has been a sticking point for managers and the SEC. Managers should evaluate the new framework and determine if it is workable; if it is, they should update their current privacy programs to address the framework's substantive and procedural requirements, and file for certification with the US Department of Commerce. Note that this arrangement *does not apply* to UK GDPR.
- Global – Remote/Flexible Work Requirements Across Jurisdictions: **new flexible work laws** in variety of jurisdictions across APAC, the Americas, the Middle East and Europe.

## Marketing Funds and Investment Advice

- US -- SEC-Registered Advisers – Marketing Rule: the SEC sanctioned nine investment managers for using hypothetical performance in their marketing without having compliance procedures in place. The enforcement staff isn't giving managers a "grace period" to comply with the new rule. If you don't have marketing rule-compliant procedures in place, get them ready quickly—this is clearly a high priority for the regulator.
- UK – Draft Guidance on “Finfluencers”: A new consultation would **update the FCA's approach to social media financial promotions**.
- EU – New Suitability Guidance: **new ESMA Guidelines on MiFID II suitability requirements** take effect 3 October 2023—these apply *in part* to marketing to professional clients.
- HK – Private Company Exclusion: The Hong Kong Court of Appeals overturned the 2016 IPFUND decision—**managers using the “private company” exclusion for HK collective investment schemes** (Chinese language link)

## Investing: Developments Affecting Portfolio Investments

### Equities

- UAE -- Equity Investments: **UAE Federal Decree Law No. 26 of 2020** has liberalized restrictions on foreign ownership, which used to require 51% local ownership. This is a significant liberalization that may encourage foreign asset managers to take another look at UAE companies.
- China – US Investments in Sensitive Technologies: US managers investing in Chinese companies in semiconductors and microelectronics, quantum information technologies and artificial intelligence will, for the first time, be subject to proposed **new rules** restricting these outbound investments. While the proposal is considering exclusions for ETFs, mutual funds and publicly traded securities, the exact nature of the exclusion in final rules will be important. US managers will also need to evaluate whether the activities of non-U.S. subsidiaries are in-scope. Comments on the proposals are due 28 September 2023; the effective date might be as early as late 2023 or early 2024.

## United States – Equity Investments:

- Real Estate:
  - United States – Real Estate – US Government Review of Foreign Investments: foreign investments (including via investment funds) are increasingly being scrutinized. **Proposed rules** would expand the scope of real estate subject to formal CFIUS review.
  - EU – Real Estate and Credit Funds: **The European Systemic Risk Board (ESRB) is exploring** how illiquidity in real estate and credit funds creates regulatory risks, creating a path for greater regulation of private funds.
  - Dubai – Open-Ended Property Funds: **A recent Dear SEO** letter criticized representative offices for marking open-ended property and digital assets funds. Greater enforcement risks lie ahead.
  - UAE – Investment Funds and REITs - Tax Exemptions: the UAE has clarified when investment funds, including REITs (regardless of whether incorporated in ADGM or DIFC) can apply to be exempted from UAE corporate tax (at the discretion of the UAE tax authority). Investment funds and REITs would now be able to perform an analysis (based on prescribed metrics) to understand whether they are eligible for an exemption such that corporate tax on their relevant income streams would pass through to the investors; investment funds and REITs would have to obtain approval from the UA tax authority and would still have to register for UAE corporate tax and make an annual corporate tax filing. Read the Baker & McKenzie blog [here](#).
- ESG / Carbon:
  - United States – CFTC Enforcement in the Carbon Markets? While the CFTC is often considered a “derivatives” regulator, the CFTC has the authority to regulate commodity trading, including carbon markets; some carbon products also inadvertently include derivatives components. In respects, the **CFTC recently established a new climate task force** and issued an alert asking **for tips on carbon market misconduct**.

Managers should confirm that their existing compliance policies adequately address risks in the carbon markets (including the inadvertent use of derivatives and market manipulation).

- Australia – Greenwashing Enforcement: ASIC **commenced a greenwashing action** against Active Super for exposing its members to non-socially or environmentally friendly investments it claimed to restrict or eliminate.
- United States – ESG Legislation: The California Senate passed a landmark law that requires **all large corporations in California to publicly disclose their greenhouse gas emissions in line with the Greenhouse Gas Protocol**.
- Indonesia -- Carbon Trading The Indonesia Financial Services Authority (OJK) issued implementing regulation in connection with the Law on Development and Strengthening of the Financial Sector; the new rule sets out the standard criteria for carbon units that will be traded on a carbon exchange, as well as the licensing requirements for any company that will apply to become a carbon exchange. Read the Baker & McKenzie blog [here](#).
- Credit:
  - United States – Are Syndicated Loans Securities? The **SEC lost in federal court** in a case to determine the SEC has jurisdiction over syndicated loans. While the case maintained the status quo, it may not be the last word: the case was decided on its facts, and market participants still need to take steps to avoid falling afoul of US securities laws.
  - United States – Credit Sensitive Rates After LIBOR IOSCO pronounced that **two credit-sensitive rates (Bloomberg Short-term Bank Index and Ameribor) could not comply with the IOSCO Principles for Financial Benchmarks**. While US law permits US banks to use these rates, this action may inhibit their use.
- Digital Assets / FinTech:
  - United States – Not Every Token Is a Security **The SEC lost in US federal court while arguing that cryptocurrencies are generally securities**. The decision (in the Southern District of New York) involved a fact-sensitive analysis of how the tokens were used (e.g., in sales to institution investors, in programmatic trades or as payment for services) and found that programmatic trades and payment using XRP tokens were not securities offerings. The impact of the decision is directly limited to the Southern District of New York but may alter the SEC's enforcement strategy.
  - United States – But Even if Digital Assets Are Not Always Securities, Are They Derivatives? The CFTC brought **three enforcement actions against three DeFi protocols** that tracked the price of other assets, which could push them into the CFTC's broad definitions of swap and/or leveraged commodity transactions. As a result, the CFTC took the position that the parties needed to register as either swaps markets (swap execution facilities or designated contract markets) or brokers (futures commission merchants).
  - United States -- Investments and Trading: The DC Circuit Court of Appeals **ruled** that the SEC's denial of the Grayscale Bitcoin ETF was arbitrary and capricious, requiring the SEC to reconsider the application. In the wake of this decision the SEC delayed six active cryptocurrency ETF applications until mid-October.
  - Thailand – A Guide to Digital Assets Regulation. Baker & McKenzie recently published the 2023 Edition of the Complete Guide to the Regulations on Cryptocurrency and Digital Token Offerings in Thailand, which reflects applicable Thailand law as of 29 August 2023. The Baker & McKenzie Guide is available [here](#).
- Derivatives
  - Hong Kong – Risk Management Guidelines for Futures Brokers. Some of the **Risk Management Framework** requirements (effective 25 February 2024) will affect the buy-side, including risk and position limits on clients to address credit risk.

## Compliance & Enforcement

- Hong Kong -- SFC-Licensed Managers and Financial Resources Rules: **the SFC revoked the license of a hedge fund manager for violation of the Financial Resources Rules**. Type 9 managers that don't hold client assets have a low liquid capital requirement of HKD 100,000, but the SFC nonetheless expects managers to comply.
- United States – SEC: we know the SEC is intently focused on:
  - **Immediate Compliance with the Marketing Rule**
  - **Cherry Picking**
  - **The Custody Rule**
  - **Examination Transparency**

- France -- AMF Sanction Commission Decision: The AMF has published a decision finding Horizon Asset Management guilty of failing to comply with the conditions of its authorization, breaching its obligation to monitor investments diligently, and failing to comply with its obligations regarding the valuation of assets under management. The combined penalties amount to EUR 135,000

## Rulemaking and Consultations

- United States – SEC-Registered Advisers – Predictive Data: an SEC proposal would require SEC-registered advisers to “eliminate or neutralize” conflicts of interest involving the use of predictive data on adviser customers. The proposal would implicate a broad range of technology and may not be workable, and it’s part of a broader push by the SEC to impose blanket prohibitions on conflicts instead of allowing managers to use disclosure. Comments are due on 10 October 2023.

To sign up to receive our 'Fund Spotlight' newsletter, please [click here](#).

To read more from our Funds team, please [click here](#).

## Contact Us



**Karl Egbert**

Partner

[karl.egbert@bakermckenzie.com](mailto:karl.egbert@bakermckenzie.com)



**Gavin Meyers**

Counsel

[gavin.meyers@bakermckenzie.com](mailto:gavin.meyers@bakermckenzie.com)



**Matthew Smith**

Counsel

[matthew.smith@bakermckenzie.com](mailto:matthew.smith@bakermckenzie.com)



**Shusmita Chowdhury**

Partner

[shusmita.chowdhury@bakermckenzie.com](mailto:shusmita.chowdhury@bakermckenzie.com)



**Zlatomira L. Simeonova**

Associate

[zlatomira.simeonova@bakermckenzie.com](mailto:zlatomira.simeonova@bakermckenzie.com)



**Kameron Hillstrom**

Associate

[kameron.hillstrom@bakermckenzie.com](mailto:kameron.hillstrom@bakermckenzie.com)

© 2023 Baker & McKenzie. **Ownership:** This site (Site) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms, including Baker & McKenzie LLP). Use of this site does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion:** All information on this Site is of general comment and for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulation and practice are subject to change. The information on this Site is not offered as legal or any other advice on any particular matter, whether it be legal, procedural or otherwise. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any information provided in this Site. Baker McKenzie, the editors and the contributing authors do not guarantee the accuracy of the contents and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done wholly or partly in reliance upon the whole or any part of the contents of this Site. **Attorney Advertising:** This Site may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Site may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. All rights reserved. The content of this Site is protected under international copyright conventions. Reproduction of the content of this Site without express written authorization is strictly prohibited.

