



GUNDERSON DETTMER

高锐律师事务所

# CVCFO

## Selected US Legal Update

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## Dodd Frank Registration Repercussions

- The United States rules relating to Investment Adviser Registration were changed by the “Dodd Frank” legislation
- As a result, most China-focused Funds that had raised money from U.S. investors were required to file a Form ADV with the U.S. Securities and Exchange Commission earlier this year.
- However, China-focused Funds with offices or personnel in the United States may also have to comply with the State Investment Adviser Registration rules in which the office or personnel are located.
  - State exemptions from registration which applied prior to enactment of Dodd Frank may no longer be applicable.
- **Action Item:** For VC/PE Firms with offices or personnel in the U.S., it is important to check with local U.S. counsel regarding State Investment Adviser Registration rules.

## Increasing Concern Regarding United States Foreign Corrupt Practices Act

### Anti-bribery Provisions

- Prohibit individuals or organizations from bribing or attempting to bribe foreign officials in order to obtain or retain a business benefit or other improper advantage
  - Can apply directly to a PE/VC Fund in Connection with the Fund's activities: For example, in 2011 it was reported that U.S. SEC launched an investigation into whether certain US entities, including PE funds, violated the Foreign Corrupt Practices Act (FCPA) when soliciting sovereign wealth funds.
  - Can also apply to a PE/VC Fund in connection with the activities of its portfolio companies. For example, if an executive of a Fund's portfolio company bribes a PRC government official, in some circumstances the Fund and its control persons can be held responsible.

### Record-Keeping and Accounting Provisions

- Require companies whose stock is traded on a U.S. exchange to meet certain standards regarding their accounting practices, books and records, and internal controls

### Jurisdictional Reach

- Includes any US entity or U.S. citizen, as well as foreign companies and nationals who commit an act in furtherance of an improper payment while in the US

### Action Item:

- Consider adopting policies addressing FCPA compliance by the Fund and its portfolio companies

## New SEC Large Trader Filings Requirements

- United States Securities and Exchange Commission (SEC) established a large trader reporting system to identify large market participants and analyze trading activity.
- Large traders are persons/entities who effect transactions of US publicly traded securities in an aggregate amount equal to or in excess of: (i) during a calendar day, either 2 million shares or shares with a fair market value of \$20MM, or (ii) during a calendar month, either 20 million shares or shares with a fair market value of \$200MM.
- Foreign persons/entities may be large traders, and must identify themselves as such, but are not subject to certain recordkeeping and reporting requirements that apply to US-registered broker-dealers.
- **Action Item:** Large traders must register with the SEC by filing a Form 13 H “Initial Filing” promptly (e.g., 10 days) after effecting aggregate transactions equal to or greater than the levels specified above.

## United States Commodities Regulation Update

- Commodities Futures Trading Commission (CFTC) recently rescinded a broad exemption from registration as a Commodity Pool Operator (CPO).
- While most VC/PE funds do not think of themselves as dealing in commodities, foreign exchange forwards, foreign exchange swaps, and other foreign exchange products such as currency swaps, cross-currency swaps and non-deliverable FX forwards currently fall within the definition of commodities.
  - The Secretary of the Treasury has the authority to exempt foreign exchange forwards and foreign exchange swaps from the definition, but has not yet taken any final action.
- As a result of the rescission of the broad exemption, private fund managers must either rely on a de minimis exemption or register as a CPO.
  - The de minimis exemption is available if (i) the aggregate initial margin and premiums to establish those positions do not exceed 5% of the fund's liquidation value, or (ii) the aggregate net notional value of those positions does not exceed 100% of the fund's liquidation value.
  - The de minimis exemption may require a fund manager to file notice with the CFTC.
- Compliance date is December 31, 2012 for existing pools.
- **Action Item:** If your Fund utilizes foreign currency exchange swaps or hedges, consult your counsel towards the end of the year to confirm whether any filings are required.

## Cayman Island Registration Developments

- The Securities Investment Business Law of the Cayman Islands as revised requires the registration or licensing of entities incorporated in the Cayman Islands that provide investment management or advisory services (“**Regulated Activities**”); certain exemptions apply.
- Most venture capital / private equity funds and their general partners are exempt.
- However, typical stand - alone management companies to VC/PE funds may, however, be required to register.
- Two exemptions apply: (i) Excluded Activities and (ii) Excluded Persons.
  - Excluded Activities are quite narrow and include when a person makes arrangements to introduce a person to another person and the person to whom introductions are to be made is an Excluded Person, and the introduction is made with a view to provision of independent advice in relation to securities generally.
  - Excluded Persons are broader but require registration as an Excluded Person in the Cayman Islands. Avoids a requirement of licensing.
- **Action Item:** If operating a management company formed in the Cayman Islands, consult with Cayman counsel to determine whether a registration requirement exists.

## Proposed Revisions to PRC Securities Investment Funds Law

- Generally, funds which ***raise capital publicly or privately to set up funds within the territory of the PRC for investment in securities*** will be subject to the revised PRC Securities Investment Funds Law and may have to register with the China Securities Regulatory Commission (CSRC).
- A private placement exemption will be available for funds that offer interests to less than 200 qualified investors who meet certain criteria (still undetermined).
- Fund managers of private funds will still need to register with the CSRC, assuming the private funds qualify based on the target capital commitments and number of investors (thresholds of which are to be promulgated by separate regulations).
- As applied to offshore funds, the exact scope of this legislation is unclear. It appears that a fund that (i) is formed under the laws of a non-PRC jurisdiction such as the Cayman Islands **and** (ii) does not raise money from PRC persons, will not be subject to this new legislation.

## FATCA

- Foreign Account Tax Compliance Act (FATCA) was designed to prevent US persons from using offshore investments to avoid US income tax.
- FATCA is basically a complete revision of the historical U.S. withholding rules.
- The category of “withholdable payments” is expanded.
- Non-compliance may result in a 30% withholding tax.
- **Action Item:** Attend CVCFO Break-out Session on FATCA to learn more

## Gunderson Dettmer

Gunderson Dettmer is the premier law firm serving private equity and venture capital funds and the portfolio companies in which they invest. In 2010 and 2011, the Firm was ranked #1 in worldwide venture capital transactions by Dow Jones *Private Equity Analyst*, and is also consistently ranked as a top-tier firm for fund formation by Chambers USA and Legal 500.

Representative China focused fund clients include:

BlueRun Ventures

Cathaya Capital

China Broadband Capital Partners

China Cloud Tech Partnership

China Hospitality Group

CMHJ Technology Fund

Doll Capital Management (DCM)

Gobi Ventures

GR Sino Green

GSR Ventures

GSR Opportunity Funds

GVT Fund

H&Q Asia Pacific Growth Fund

IDG Accel China Capital Fund

IDG Accel China Growth Fund

InnoSpring VC

Innovation Works

Keytone Ventures

KPCB China Fund

Lotus Ventures

Mingly China Growth Fund

Nokia Growth Partners

Northern Light Ventures

Steamboat Asia

TEEQ Angel Fund

Tiger Technology Private

Investment Partners

Tsing Capital (China

Environment Fund)

**THANK YOU**