Morgan Lewis

ADVANCED TOPICS IN HEDGE FUND PRACTICES CONFERENCE

Manager and Investor Perspectives WEBINAR SERIES

Track 7: International Issues

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www.morganlewis.com/2022hedgefundconference

Investment Restrictions

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Top 5 Issues in the Sanctions and International Trade Space

- Prohibited Activities & Prohibited Parties
- Winding Down Authorizations – Time Barred and Not Time Barred – and Other General Licenses
- Multilateral Restrictions
- Countermeasures or Countersanctions
- Managing the Uncertainties

Key Issue

Prohibited Activities

- Financial Engagements – new investments, debt, payments to operate, payments for rights (such as IP rights)
- Services – accounting, corporate/trust formation, and management consulting services, debt financing

Prohibited Parties

- Specially Designated Nationals
- Entity List Parties
- Chinese Military Industrial Complex List
- UK and EU Prohibited Parties

Due Diligence and Know-Your-Customer Guidelines

- Reasonableness standards have changed
- Understand ultimate beneficial ownership (UBO) – direct and indirect
- Under UBO from a US and non-US perspective
- Documentation needed to support a decision to proceed
- Benefit (or not) of “opinion letters” from counsel regarding the sanctioned (or non-sanctioned) status of a specific party

Winding Down Authorizations or Other General Licenses (GL)

- Designed to provide parties some “breathing room” to disengage from sanctioned parties
- Authorizes specific activities with sanctioned parties for limited periods of time or on an open-ended basis – see, e.g., General License 13, General License 34, or General License 35
- May require reporting
- May require blocking or freezing of assets, depending upon the scope of the GL
- Injects third-party uncertainty into the sanctions analysis – i.e., activity may be permitted under the GL with a sanctioned party but a financial institution, as part of its own de-risking strategy, may nonetheless decline to proceed with a lawful action

Multilateral Restrictions

- Sanctions, as a foreign policy tool, are now global
- Coordinated action, driven in large measure by the Russia-Ukraine situation, has resulted in a broad and more consistent set of restrictions among the United States, the European Union, the United Kingdom, and other countries (such as Japan, Australia, Canada, etc.)
- While aligned overall, significant variations exist among the United States, the United Kingdom and the European Union
- Necessitates a broader analysis than just what the US requires
- As expected, elicited reactions from Russia (and maybe a similar situation with China at some point)

Countermeasures or Countersanctions

- Countries that face coordinated sanctions have issued laws and regulations to allow for responsive countermeasures
- Russia and China each of anti-sanctions policies and laws that have resulted in counter-designations and restrictions under their local laws
- Countermeasures vary – e.g., Russia designated a number of foreign appointed officials from the departments of State, Commerce, and Defense to their sanctions lists; China designated the Chairman of the US-China Economic and Security Review Commission as a sanctioned party
- Contracts and other engagements need to be examined from a sanctions-countermeasures perspective to ensure that the equities are addressed – e.g., Russia instituted a penal law that impacts individuals who comply or seek to comply with sanctions requirements outside of Russia
- Understanding how to “wind down” or “continue” operations in this environment

Managing the Uncertainties

1. Revisiting existing documentation to assess the need or benefit of updates
2. Anticipating the next round of sanctions
3. Updating the diligence/KYC requirements to meet the new standard for understanding UBO
4. Updating termination and penalty provisions in documents
5. Engaging with financial institutions that participate somewhere in the process to understand their risk-profiles and “policies versus legal requirements”

Asia Funds Landscape

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Asia Funds Landscape

- Statistics have shown that before the COVID-19 pandemic, investors had been moving away from hedge funds globally in favor of private equity, real estate, and venture capital. This trend reversed itself to a limited extent in 2020 and 2021 as performance improved, but outflows from Asian hedge funds have picked up in the last 12 months. According to Eurekahedge, total assets under management in Asian hedge funds decreased by US$19.7 billion during the month of April 2022 as the sector witnessed performance-based growth of US$7.1 billion while registering net asset outflows of US$26.7 billion.
- The Eurekahedge Asian Hedge Fund Index was down - 8.24% year to date as of May 2022. In contrast, that index had been positive 6.75 in 2021. The MSCI AC Asia Pacific IMI was down – 11.87 year to date in 2022, so at least hedge fund performance in general appears to have stayed ahead of the broader market. Note that the Eurekahedge CTA/Managed Futures Index was up 8.48% year to date for 2022.
- On the Japan front, the performance of the Eurekahedge Japan Hedge Fund Index has been down 5.86 so far in 2022 and the Japan Long/Short Equities Index was also negative for the first quarter of 2022. A study by WorldScientific.com of Japanese hedge-fund results between 2000 and 2018 showed that these hedge funds outperformed the Japanese equity and fixed-income markets by a significant margin during that period even though the Eurekahedge Japan Hedge Fund Index is down for 2022.

Asia Funds Landscape

- Recently US fund managers have been shown to be more willing to offer alternative fee structures than have their Asian and European counterparts. An EY study showed in 2021 that 61% of Asian hedge-fund managers indicated that they are not considering alternative fee arrangements, as opposed to 22% of US hedge fund managers.
- Over the last decade the global hedge-fund industry has witnessed a continuing trend in reducing management and performance fees. Writers have speculated that mediocre returns over recent years along with increasing competition within the industry, tighter regulation, and lower available margins are key factors that have contributed to this trend. Investor experience during the last 10 years since the global financial crisis has resulted in more disintermediation within the hedge-fund industry in Asia and, as a partial result, many large institutional investors have set up funds-of-one or SMAs with hedge-fund managers directly.

Asia Funds Landscape

- Eurekahedge reported in 2021 that of the 12,669 live hedge funds in its database, the five most popular locations for running a global hedge-fund strategy are the United States (50.7%), the United Kingdom (22.7%), Switzerland (7%), Hong Kong (5%), France (3.2%), Luxembourg (3%), and Singapore (3%).

- According to an EY study in 2021, US hedge funds received a higher percentage of subscriptions for new strategies and products than have similarly focused funds in Asia and Europe. The EY study in question indicated that only 6.0% of subscription in flows during 2020 for Asian hedge-fund managers were for new products. The study also observed that hedge-fund managers in Asia tend to be smaller organizations that focus on a core strategy, so they often will offer only one flagship fund. We believe that this continues to be true.

- We have noticed that a number of hedge-fund strategies that lost favor in the past have regained a new following. This is true in Asia as well. For example, over the last two years we have steadily seen new macro fund and quantitative trading fund launches in the last two years. Cryptocurrency and other digital asset funds have been a strong contributor to this trend despite extreme volatility. On the other hand, launches of traditional long/short strategies have remained flat.

Asia Funds Landscape

- As mentioned above, we have seen more and more large institutional investors opt for separately managed accounts or funds-of-one rather than agreeing to participate in pooled vehicles. This is part of a trend among these investors as they seek to control risk and reduce exposure.
- We have noticed a trend of new funds being launched without a management fee. Instead, these funds pass through the expenses of the fund and, to a certain extent, the expenses of the manager through to the investors. This is good for the manager because it relieves him/her of the cash-flow risk of a mismatch between the management fee inflow and the expense outflow. Detailed disclosure of the expenses that will be passed through is essential for this to work correctly. The SEC staff in the United States is very focused on expense allocation and related issues. We are not aware of regulators in Asia having examined this issue.
- The onshorization trend continues with the Singapore Variable Capital Company (VCC) and the Hong Kong Limited Partnership Fund an open-end fund company. The VCC seems to have gained more traction and we have used that structure for a number of different types of funds recently. The Singapore government has provided financial incentives for using the VCC.

Japan's Financial Services Agency

FSA's Annual Strategic Objectives (July 2021- June 2022)

- Theme is "Overcoming COVID-19 and Building the Financial System for Greater Vibrancy"

1. Overcome challenges of COVID-19 and bring about a robust economic recovery
2. Further develop financial system to achieve a vibrant economy and society
3. Further develop FSA's financial policies

Promotion of Digital Innovation

As part of the second priority of developing a vibrant economy and society, the FSA has acknowledged that Japan will need to promote digital innovation, including in the areas of block chains, Ais, and APIs

- Policy frameworks to support digital means of payments and securities products
- Improved payment infrastructures and the development of new financial services
- Digitalization of business processes and procedures
- Enhancement of IT governance at financial institutions

Promotion of Japan as International Financial Center

Japan will continue to promote itself as an international financial center

Financial market entry office

- English communications available
- Expansion of administrative services available in English for overseas financial institutions announced March 29, 2022
- Seeking to attract foreign asset-management firms

Also increase support network for foreign firms, including foreign securities firms and banks, dealing mainly in English

Further Develop FSA's Financial Policies

Increasing sophistication of monitoring operations

- Reliance on more-granular data
- More effective analysis of data

Improvement of organizational capability as a financial regulator

- Focus on increasing expertise of personnel

Preparation for potential risks

- AML/counterterrorism
- Ensuring cybersecurity and operational resilience

Amendment to the Act on Protection Personal Information

- ✓ Amendment came into effect **April 1, 2022**
- ✓ All business operators, even those outside Japan, who acquire personal data of individuals in Japan are subject
- ✓ Personal Information Protection Commission helps with oversight
- ✓ Closer to regulations in EU, EEA and UK
- ✓ Different alternatives to meet requirements include consent after detailed disclosures or undertaking that persons to whom information is transferred will take appropriate measures, equivalent to Japanese APPI requirements
- ✓ There are also more extensive recordkeeping obligations in place
- ✓ Penalties increased significantly, from 500,000 yen in past to 100,000,000 yen.

UK and Europe Funds Landscape

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Agenda

- EU Cross-Border Distribution of Funds
- Pre-Marketing
- Marketing Communications Requirements
- EU Sustainable Finance Disclosure Regulation
- UK PRIIPS Rule Changes
- Looking Ahead . . .
- UK Investment Manager Exception
- Criminal Finances Act

EU Cross-Border Distribution of Funds

- New measures applicable to AIFS and UCITS funds that supplement and extend the AIFMD and UCITS Directive in relation to marketing funds to investors in the European Union
- A directive (Directive (EU) 2019/116) and a regulation (Regulation (EU) 2019/1156)
- Applied starting August 2, 2021
- Applicable to:
  - EU fund managers marketing funds to EU professional investors
- Depending on local EU country policy, potentially applicable to:
  - non-EU fund managers marketing funds to EU professional investors under national private placement regimes (NPPRs)
  - the directive contains a recital which hints that EU countries should consider applying pre-marketing regime to non-EU fund managers marketing funds to EU professional investors
- Post Brexit, these new requirements are not applicable to UK, US, and other non-EU fund managers marketing to UK investors – UK AIFMD NPPR continues without overlay as the United Kingdom starts to diverge from the EU incrementally

Two key aspects:

- under the directive, the pre-marketing regime is intended to standardize the hitherto patchwork approach across EU member countries to the concept of when “marketing” of a fund commences for AIFMD regulatory purposes; and
- under the regulation, the requirements for the form and content of “marketing communications”

Pre-marketing

Definition of “pre-marketing”:

> “*provision of **information or communication**, direct or indirect, **on investment strategies or investment ideas** by an EU AIFM or on its behalf, to potential professional investors domiciled or with a registered office in the Union in order to test their interest in **an AIF** or a compartment **which is not yet established, or which is established, but not yet notified for marketing** … in that Member State where the potential investors are domiciled or have their registered office, and which in each case **does not amount to an offer or placement** to the potential investor to invest in the units or shares of that AIF or compartment”* (presenter’s emphasis)

- This allows “soft marketing” to gauge investor interest in a proposed new fund before having to commit to making a full marketing notification and accepting the fees and obligations associated with that notification.
- Aims to establish a uniform approach in the European Union as to the activities that can be undertaken with prospective professional investors before triggering a full marketing notification.
- EU countries are required to permit pre-marketing; the only requirement for fund managers is to provide an informal notification to the applicable EU regulator within two weeks of commencing pre-marketing.
- Pre-marketing does not permit the provision of final-form offering documents or constitutional documents or subscription forms in draft or final form.

Pre-marketing: Impact on Reverse Solicitation

EU professional investors are not permitted to subscribe for interests in funds as a result of pre-marketing only; investors may only acquire fund interests following a full marketing notification having been made

It is not clear whether this applies on a per-country basis or on a pan-EU basis

For a fund that has been pre-marketed, a subscription by an EU professional investor for an interest in the fund that occurs within 18 months of the pre-marketing will be treated as having resulted from the pre-marketing and will be subject to a full marketing notification having been made

The EU Commission is required to produce a report on reverse solicitation, including on the extent of its use, its geographic distribution, and its impact on the passporting regime

This means that conducting pre-marketing rules out the ability to rely on reverse solicitation for a period of 18 months following the cessation of the pre-marketing

Marketing Communications Requirements

The Cross-Border Distribution Regulation creates a new requirement for marketing communications (to EU investors) to:

- be identifiable as marketing
- describe the risks and rewards of investing in an equally prominent manner
- be fair, clear, and not misleading

Marketing communications include a wide range of marketing materials, including pitchbooks and other presentations.

The regulation expressly does not apply to non-EU fund managers and is not intended to do so; however, local EU countries may choose to apply the same regime to non-EU fund managers.

ESMA guidelines on the application of the requirements for marketing communications prescribe detailed form and content requirements and came into effect on February 2, 2022.

Marketing Communications Requirements

- The marketing communications guidelines set out ESMA's expectations in relation to:
  - the manner in which risks and rewards are described (including mentioning risks and rewards at the same level or one immediately after the other)
  - including prominent disclosure that a relevant communication is a marketing communication and specific disclaimer language
  - meeting the "fair, clear and not misleading" requirement, including verifying factual statements, adequately describing the features of the investment, clarifying whether a fund is passively or actively managed, limiting use of overly optimistic wording, providing information on costs, meeting requirements when providing information on past or expected future performance, and meeting requirements relating to the presentation of sustainability-related aspects of investments

Marketing Communications Requirements

Key Considerations for Non-EU Fund Managers

- Before ‘testing the water’ in relation to a new fund/investment strategy with potential investors in an EU country:
  - ascertain whether pre-marketing regime applies to non-EU fund managers in that country (nb: certain countries have applied/are expected shortly to apply regime to non-EU managers – e.g. Germany, Luxembourg, Finland, Denmark, the Netherlands)
  - consider pros/cons of pre-marketing vs reliance on reverse solicitation (pre-marketing will likely remove ability to use reverse solicitation)
  - ascertain whether requirements for marketing communications apply to non-EU fund managers in that country (e.g. Germany)
  - if so, assess impact on/update pitchbook, presentations, and other marketing materials and note detailed requirements of ESMA guidelines on marketing communications

EU Sustainable Finance Disclosure Regulation

- The EU Sustainable Finance Disclosure Regulation (EU SFDR) has been applicable since March 10, 2021
  - combats “greenwashing” through mandating transparency
  - increases comparability of disclosures for investors
- Three categories of rules that:
  - impose manager-level obligations
  - impose fund-level obligations applicable to all funds whether or not they have an ESG/sustainability focus
  - impose additional obligations applicable only to funds promoting environmental or social characteristics or having a sustainability objective
- Applicable to:
  - EU fund managers
  - Non-EU fund managers using NPPRs to promote their fund in EU countries are certainly subject to the fund-level obligations. There are arguments that non-EU managers are not subject to the manager-level obligations but a recent Q&A from the European Commission suggests that they are, while leaving room for further clarification.
- Not applicable to:
  - Non-EU fund managers relying on reverse solicitation
  - The United Kingdom did not onshore EU SFDR into UK law as part of Brexit and is developing its own sustainability disclosure regime

EU Sustainable Finance Disclosure Regulation

- Non-EU fund managers should consider a number of issues when marketing funds to EU investors under an NPPR:
  - Ensure that applicable fund-level disclosures are made in fund documentation:
    - a description of the manner in which sustainability risks are integrated into the manager's investment decisions for that fund and the extent to which sustainability risks might impact the performance of the fund either in qualitative or quantitative terms; and
    - whether and, if so, how the fund considers principal adverse impacts on sustainability factors or, if the manager is eligible, due to its size, to opt out of making that statement (and wishes to do so), disclose that the manager does not consider the adverse impacts of investment decisions on sustainability factors and why.

EU Sustainable Finance Disclosure Regulation

- Consider whether the manager meets the size requirement enabling it to opt out of the requirement to disclose how it considers principal adverse impacts on sustainability factors (the opt-out is not available to a manager that has or is the parent undertaking of a group that has an average of more than 500 employees during the financial year).

- Consider whether it is able to meet the manager-level disclosure requirements (which must be met through disclosures on the manager's website).

- Consider whether the fund promotes environmental or social characteristics or has a sustainability objective - if so, there are additional, more detailed disclosure requirements and ongoing reporting requirements for such funds that the manager will first need to double-check that it can meet.

UK PRIIPS Review

- UK revisions to the FCA's PRIIPS rules will apply from December 31, 2022, diverging from EU's PRIIPS
- Targeted amendments relating to methodologies for the presentation of Key Information Document (KID) performance scenarios and risk indicators
- New FCA guidance - to be seen as not being made available to retail investors (and thus not requiring a UK PRIIPS compliant KID):
  - there must be clear disclosure in marketing materials/PPM that:
    - product is being offered only to investors who are professional clients
    - product is not intended for retail clients
  - issuer to take reasonable steps to ensure product offering and related promotions are directed only to investors who are professional clients
  - minimum investment required is £100,000
- Marketing materials may need updating to reflect guidance more explicitly
- More holistic PRIIPS review to follow

Looking Ahead ...

Key proposed changes to AIFMD

Delegation

- Applicable to EU AIFM
- Increased emphasis on substance requirements for EU AIFMs and resources for monitoring and controlling delegates
- EU AIFMs must have at least two FTE, EU resident staff members
- ESMA to be notified (by home state regulator) of delegation by an EU AIFM to a third country firm of more portfolio or risk management functions than EU AIFM retains
- AIFMD delegation regime extended to delegation by EU AIFMs of non-AIF management activities – e.g., portfolio management and investment advice
- ESMA to report every two years to EU Commission on market practices relating to delegation to third country firms and carry out a peer review of supervisory practices relation to delegation across European Union

Loan Origination

- Applicable to EU AIFMs
- Originating loans to be a passportable activity of an AIF
- Loans to any AIF or UCITS, or a bank, insurer, investment firm, or other financial undertaking, not to exceed 20% of AIF capital
- Specific risk management procedures required for granting of loans, assessing credit risk, and monitoring credit portfolio
- Loans cannot be made by an AIF to its AIFM (or its staff), its depositary, or any delegate
- The AIF must retain at least 5% of notional value of loans originated and sold on a secondary market
- If notional value of an originated loan exceeds 60% of net asset value, the AIF must be closed-ended
- Percentage restrictions apply on a continuing basis, so could be breached by fluctuations in capital/NAV

Marketing / NPPRs

- Applicable to non-EU AIFMs
- NPPRs for non-EU AIFs remain but application becomes more restricted
- Country in which AIF (and its manager) is established must have entered into an OECD-compliant tax information exchange agreement with the member state in which AIF is to be marketed
- Country in which AIF (and its manager) is established must not be on EU list of noncooperative jurisdictions for tax purposes
- Country in which AIF (and its manager) is established must not be on EU list of high-risk countries for AML purposes (in March 2022, Cayman was added to this list)

Looking Ahead . . .

Investor Disclosures

- Applicable to non-EU AIFMs using NPPRs
- Pre-contract (article 23) disclosures to investors to include:
  - a list of fees and charges to be borne by the AIFM
  - disclosure of liquidity management tools that may be used
- Periodic disclosure to investors of:
  - originated loan portfolios
  - all fees and charges directly or indirectly charged or allocated to the AIF or its investments (on a quarterly basis)
  - any parent/subsidiary or SPE established by the AIFM or affiliates in relation to the AIF's investments

Depositary Services

- Provision of depositary services by EU credit institutions on a cross-border basis permitted pending a review by the Commission on the need for a depositary passport
- Ability for a depositary to use services of a central security depositary without that being regarded as a delegation

EU AIFM Ancillary Services

- Permitted non-AIF management activities expanded to include benchmark administration and credit servicing

Liquidity Risk management

- List of liquidity management tools that EU AIFMs are permitted to use added to AIFMD
- Open-ended AIFs must be able to use at least one of: redemption gates, notice periods, and redemption fees and may additionally use temporary suspension of redemptions (in exceptional cases)
- EU AIFM must notify its regulator when activating/deactivating gates, notice periods, or redemption fees
- ESMA is permitted to develop standards to specify characteristics of the listed liquidity management tools
- Power given to EU regulators to require AIFM (including non-EU AIFM using NPPRs) to activate or deactivate a relevant liquidity management tool

Annex IV Reporting

- Applicable to non-EU AIFMs using NPPRs
- Expanded by removal of limitations on information that is to be reported
- All markets, instruments, and exposures of AIF to be reported rather than principal markets and exposures and main instruments

Looking Ahead . . .

Reverse Solicitation Update

- EU Commission is required under Cross-Border Distribution Regulation to report on reverse solicitation and its impact.
- The report is delayed but is in process.
- Expected to be some tightening of reverse-solicitation practices:
  - ESMA input to EU Commission of December 2021:
    - There is no information readily available to EU regulators on the use of reverse solicitation.
    - In a few countries, reverse solicitation was seemingly being used extensively
    - EU regulators have indicated concerns that reverse solicitation is used in practice to circumvent passporting and NPPR regimes.
  - ESMA has suggested that new reporting requirements for reverse solicitation should be considered.
- Further developments on this are likely, possibly later in 2022.

UK Manager/Adviser: UK Tax Implications

A non-UK resident (fund or investor) is generally taxable in the United Kingdom only to the extent that it has profits attributable to a UK branch.

A UK branch may exist if an agent of the non-UK fund has, and habitually exercises in the United Kingdom, authority to conduct business on behalf of the fund.

A UK manager with investment discretion could comprise a branch.

However, a UK branch for the fund or investors is only established if the fund's activities amount to "trading" (as opposed to investment) for UK tax purposes.

Should be no concern if the UK adviser has no discretion to make investment decisions.

The Investment Manager Exemption (IME) may be available if there is trading activity.

UK Manager / Adviser

What activities amount to trading?

No statutory definition.

Can be hard to determine for hedge funds, but it is prudent to assume that funds with high turnover of assets could be treated as trading.

If there is a trade, it would be a trade of the fund if it is a corporate vehicle, or the investors if it is a partnership.

UK Manager / Adviser

The IME:

- Provided the requirements of the IME are met, the non-UK fund and/or investors should not be taxable in the United Kingdom.

Investment transactions

The manager is independent from the non-resident

Manager carries out a trade of providing investment management services

The “20% rule” is satisfied

The transaction is carried out in the ordinary course of that business

The manager receives customary remuneration

UK Manager / Adviser

Investment transactions

- Transaction in shares, securities, most derivatives including futures and options, most debt assets, etc.
- Derivatives must not have physical delivery.
- Excludes transactions in, and derivatives over, land.
- HMRC consultation to extend it to cryptoassets.

UK Manager/Adviser

Independence test

- HMRC guidance provides practical safe harbors
  - Widely held funds
  - Less than 70% of the manager's business derived from the fund
- 18-month grace period for new funds (may be extended)

UK Manager / Adviser

20% test

- Affects the manager and its connected persons

- If they have a beneficial entitlement to 20% or more of the profits of the fund, that will be taxable in the United Kingdom.

- Excludes management fees and performance-based or incentive fees, provided that they are of a customary nature and quantum.

Criminal Finances Act

Corporate criminal offence

Applies to companies and partnerships

Failure to prevent

The facilitation of tax evasion by an “associated person”

Associated person

Includes employees and any person providing services for or on behalf of it

UK tax evasion

Facilitation (and failure to prevent) can be anywhere

Non-UK tax evasion

Must be a criminal offense and requires a UK nexus

Sole defense

Implementation and adherence to a suitable prevention policy

MENA Funds Landscape

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Investment Fund Trends in the Middle East

Fund Formation

- Asset Manager Licensing
- Legal forms for funds
- Economic Substance Regulations

Feeder Vehicles for Foreign Funds

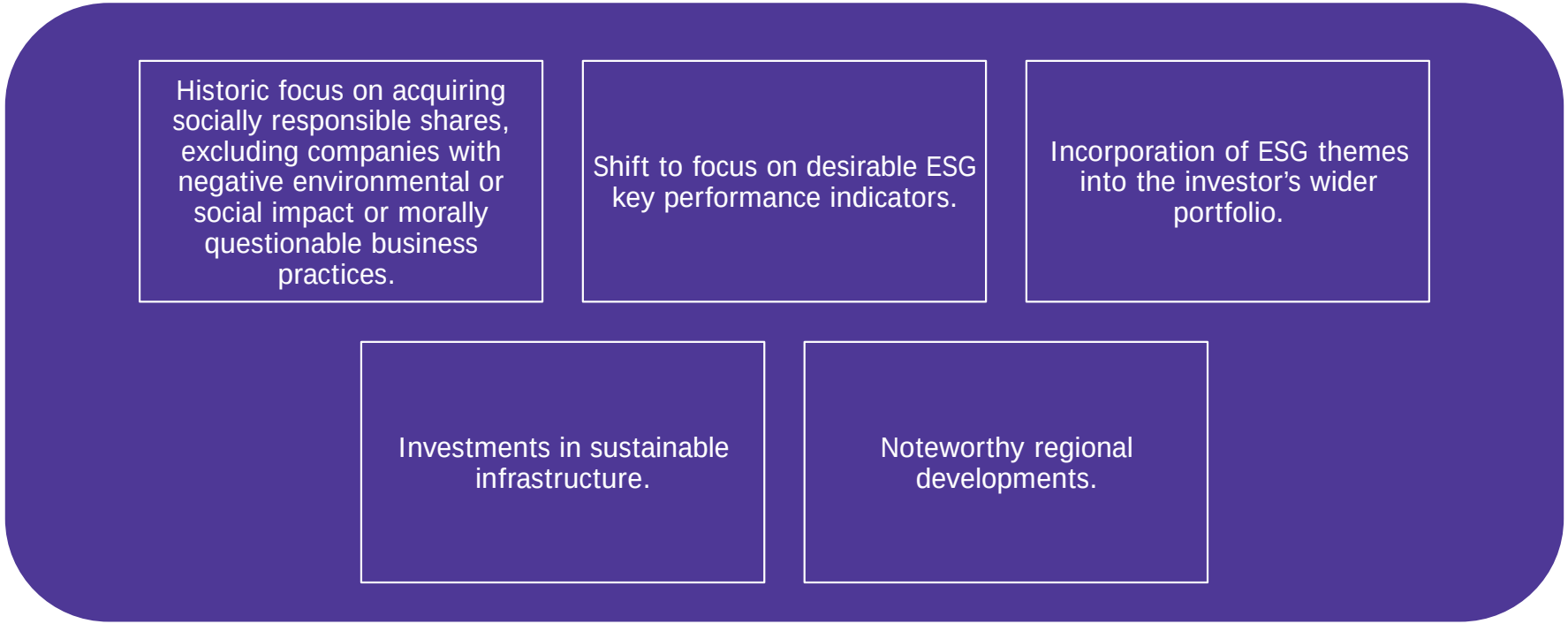
- ADGM feeder into Cayman hedge fund structure
- Feeder structures to attract Islamic investors

Investment into Regional Funds

- VC and technology
- Credit products

Onshore Regulations

ESG in the Middle East



Developments in Digital and Virtual Assets

- Regulatory developments in the Middle East
- Market participants

Accessing Non-US Institutional Capital: Co-Investment and Direct Investment Opportunities and Legal Considertions

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Recent Trends: Who Are the Key Players?

- **Categories of Non-US Institutional Investors:**
  - Sovereign wealth funds and (SWFs) strategic governmental entities
    - New types of SWFs with limited mandates such as VC, renewable energy….etc.
  - Asset managers and private banks
    - Proprietary capital
    - Private clients
    - Managed accounts and investment funds
  - Family offices
  - And in a number of cases, all of the above
- **Accessing capital from these investors is governed by the local laws and regulations to which they are subject. In most cases, and outside the United Kingdom in particular there are very limited passporting opportunities; as such, an ad hoc marketing approach must be implemented**

Recent Trends: Who Are the Key Players?

- **In addition to preserving and growing national wealth: SWFs and governmental entities are expanding their mandate to include:**
  - Diversifying the economy (for GCC-based SWFs, away from oil and gas)
  - Transferring and licensing of technology
  - Accounting for employment considerations
  - Supporting geopolitical initiatives

SWFs: In Numbers

$10+ trillion

Size of the SWF industry increased 6% year-on-year in 2021 and exceeded the US $10 trillion mark for the first time in history

$212 million per deal

SWFs are continuing to widen their lens to include smaller investments, with the average investment size in 2016 averaging $522 million per deal and decreasing to $212 million per deal in 2021.

$219 billion

In 2021, state-owned investors deployed more capital than in any of the previous six years – both in terms of number of deals and in terms of deal value, which was over $219 billion.

4.2%

SWF participation in direct venture capital style investments has gone from 8.2% of deal value in 2021 to 4.2% of deal value in Q1 2022. *(Source: Pitchbook)*

500

SWFs invested in more than 500 different investments, more than in any previous year.

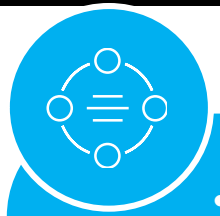
Public Pension Funds and SWFs partnered on some of the largest transactions of the year, particularly in infrastructure and telecom deal opportunities.

Source: *2022 Annual Report: State-Owned Investors 3.0, Global SWF LLC* https://globalswf.com/reports/2022annual#preface-0

Legal Issues:
Direct Investments by Non-US Institutional Investors

- SWFs have become the largest direct investors in venture capital:
  - Direct investments, particularly in companies or sectors that complement strategic initiatives adopted by the nations they represent (for example, technology, manufacturing, and defense)
  - SWFs tend to come in at a later stage as compared to traditional VC funds
- However, SWF interest in direct investments has dropped off significantly
  - SWFs accounted for 8.2% of deal value in 2021; SWF participation represented only 4.2% of deal value in Q1 2022 (*Source: PitchBook)*
- Direct investments by non-US institutional investors trigger a multitude of cross-border legal issues including domicile of investment vehicles, governance, US regulations including CFIUS, sovereign immunity, tax planning, and marketing of securities considerations

Direct Investments: Overview



- Principal investment documentation is typically on the NVCA form, which allows new investors to quickly determine any unique treatment
- Companies offering direct investment opportunities are often in early seed or series stage financing, and side letters tend to be used strictly for special information rights or other board observer rights
- For non-US institutional investors, the side letter often plays a more expansive role, and it is important to provide the company with an early preview of what will be required

Direct Investments: Side Letter Considerations

- MNPI: Does the non-US institutional investor have internal reasons to limit the inflow of MNPI from the company?
- Regulatory Requirements:
  - What foreign direct investment (FDI) filings may be required now?
    - Interest in launching or strengthening FDI regulations has increased significantly around the globe, with the U.S., U.K., Germany, EU, China, Australia, India, and many other jurisdictions increasing scrutiny in the wake of the COVID-19 pandemic
  - What overlap does the company have with cryptocurrency/digital assets, and how might that evolving regulatory environment change the company's prospects?
  - MNTI: Can the company commit to not providing material nonpublic technical information (MNTI) to its non-US institutional investor?
  - Did the company make the typical AML, sanctions, FCPA and other detailed compliance with law representations as provided in the NVCA?

Co-Investments: General Considerations

Non-US institutional investors are an attractive source of capital for co-investment opportunities – investors seek to increase alpha with reduced- or no-fee exposure to private equity and similar illiquid investments, and sponsors have an increasing need to diversify relationships.

These investments may have additional legal, tax, and regulatory risks and complexities:

- **Legal structuring**: Separate holdings structures and legal documentation need to sync with "main fund" and/or additional vehicles and accounts that participate.
- **Tax planning**: Taking on additional exposure to any particular US asset must be studied and diligenced from a tax perspective.
- **Regulatory scrutiny**: Non-US investors and sponsors need to understand how an investor's indirect and direct exposure via the fund and the co-investment vehicle will be aggregated in the eyes of the applicable regulator (CFIUS, FCC, SEC, Federal Reserve, etc.), as well as the potential implications from the SEC's recent proposed rules for private fund advisers

Co-Investments: Laying the Groundwork

- Private fund sponsors that open up co-investment opportunities typically know their co-investment partners well or want to strengthen relationships.
- Co-investment “clubs” with pre-set terms for participation.
- Aggregation structures vs. “direct” co-investments.
- Precedent co-investment vehicle documentation can be utilized to reduce uncertainty as to how a co-investor will be treated.
- Mitigate tension between sponsor and investor when applying existing fund side letter for the co-investment.

Co-Investments: Issues Regarding Diligence, Documentation, and Negotiation

- Scope for diligence of the target or asset and reconciling different interests during the process
  - Investors: desire, need for transparency, capability, bandwidth
  - Sponsors: need for speed of execution, control over both the process and information flow
- Considerations as to type of asset: private equity vs. other instruments/trades
- Scope for changes in the co-investment vehicle operating agreement depends on various factors
  - Investor demand
  - Where in the timeline are the parties between capital raising and closing of underlying transaction
- Side letters: benefits and burdens; potential impact of SEC's proposed rules
- For investors, the process may entail the input of many internal stakeholders and external advisers–patience and understanding are key

Wrap-Up

- Investment opportunities sought by ESG and other investors such as foundations and Islamic investors.
- Capital raising requires familiarity and compliance with securities regulations. Other panels to cover raising money from United Kingdom, the European Union, Asia, and the Middle East and North Africa.
- Economic substance regulations adopted by a number of offshore jurisdictions resulted in a reshuffling of the deck with cost and complexity now an issue.

Lawyer Biographies

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Gregg Buksbaum focuses his practice on domestic and international business transactions, primarily representing private fund sponsors and institutional investors in the formation of, and investment in, various types of private investment funds, including private equity, hedge, venture capital, real estate, infrastructure, mezzanine, credit, distressed debt, special opportunity and funds of funds, among others. He has extensive experience with co-mingled funds and bespoke funds of one, managed accounts and similar investment management arrangements. Gregg also represents clients in private equity and venture capital transactions, joint ventures, financings, entity formation, and other domestic and cross-border transactional matters in developed and emerging markets in a variety of industries.

Gregg works with new fund and fund-less sponsor groups in helping them navigate the challenges of setting up operations and employing best practices, and with established sponsors who have more complex institutional needs, such as succession planning, profit-sharing schemes, and conflicts management due to expanding business platforms. He also advises on joint ventures between sponsor groups seeking to merge platforms and/or raise co-sponsored funds.

His experience also includes negotiating seeding and revenue sharing arrangements, sub-advisory arrangements, placement agent agreements, and providing counsel on investment adviser regulatory and compliance matters at the state and federal levels.

Gregg regularly advises institutional investors—including sovereign wealth funds, public pension plans, family offices, funds of funds, and other similar investors—in negotiating their investments in a variety of private investment funds and managed account platforms, as well as negotiating secondary transactions, co-investments, direct investments and arrangements with transition managers, prime brokers, custodians, and commodities trading advisers.

Notably, Gregg has served as outside counsel to fund managers, advising them on a range of fund management issues, best practices and compliance, as well as serving as outside counsel to private companies, counseling them on a range of corporate governance issues, as well as on issues concerning employment, tax, and regulatory matters.

Before joining Morgan Lewis, Gregg was a partner and chair of the private investment funds practice at another global law firm. He previously has counseled clients in the coordination and interplay of business and US foreign policy and has interacted with Congress and executive branch departments and agencies in those endeavors.

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Giovanna M. Cinelli is the leader of the international trade and national security practice. As a practitioner for more than 30 years, she counsels clients in the defense and high-technology sectors on a broad range of issues affecting national security and export controls, including complex export compliance matters, audits, cross-border due diligence, and export enforcement, both classified and unclassified.

She handles complex civil and criminal export-related investigations and advises on transactional due diligence for regulatory requirements involving government contracts, export policy, and compliance, as well as settlement of export enforcement actions before the US departments of State, Commerce, Treasury, and Defense, and related agencies. Giovanna has conducted dozens of export investigations and has negotiated six consent agreements before the Department of State. She advises clients on matters before the Committee on Foreign Investment in the United States (CFIUS), and addresses mitigation requirements that may apply as part of CFIUS clearances for cross-border transactions. Giovanna is a member of the Morgan Lewis CFIUS working group.

Additionally, Giovanna has developed and assisted clients with the implementation of business-related strategies with adherence to strict requirements addressing US government national security and critical infrastructure concerns, as well as Foreign Agents Registration Act (FARA) requirements.

Giovanna serves as an expert witness on export issues affecting litigations and arbitrations, both in the US and abroad, involving controlled goods, technologies, data, and services. Her testimony has addressed complex licensing and compliance issues related to the conduct of trials and arbitration proceedings both in the United States and globally, and she has been called to testify as an expert witness on matters affecting compliance with the International Traffic in Arms Regulations and the Export Administration Regulations. She has addressed the challenging issues associated with the extraterritorial application of US export laws and regulations within litigations and arbitrations, and has assisted clients when navigating the conflicting requirements these laws may create.

Giovanna regularly speaks and writes on international arms trade, technology transfer, national security cross-border requirements, and export issues. She has participated in panel discussions related to CFIUS and technology transfer hosted by the Center for Strategic and International Studies and the Council on Foreign Relations. She has appeared on CNN's "Burden of Proof" and MSNBC's "Hardball with Chris Matthews" as an expert in international technology transfer, arms exports, and related national security issues. As a member of the Defense Trade Advisory Group for nearly two decades, Giovanna engages regularly with the Department of State on matters affecting defense trade. She was a member of the Regulations and Procedures Technical Advisory Committee and is in her third term as a member of the Department of Commerce's Virginia/DC District Export Council.

Concurrent with her private practice, Giovanna served as a Naval Reserve intelligence officer, where she specialized in Soviet-era submarine platforms, national security, and intelligence issues. She is fluent in French and Italian, and a violinist with the Washington Opera Society.

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Ethan W. Johnson counsels clients on a variety of regulatory and transactional matters, with a focus on hedge fund and private equity fund formation, and guides investment managers through the legal intricacies of international operations. He also advises clients on establishing offices and operations outside the United States, developing and offering financial products and services sold on a global basis, and building global compliance programs.

Ethan's regulatory and transaction practice includes counseling clients on the creation of hedge funds, private equity funds, venture capital funds, real estate funds, Undertakings for Collective Investment in Transferable Securities (UCITS), and US Securities and Exchange Commission (SEC) registered funds. He also advises on the organization and operation of broker-dealers and investment advisers, and on corporate finance projects including public and private offerings of debt and equity securities.

Through Morgan Lewis's US, European, and Asian offices, he advises on the laws of more than 100 non-US jurisdictions, including all major financial centers, most emerging markets, and less-developed nations. He has experience counseling many US-based firms on US and non-US securities and regulatory matters—including joint ventures and investment projects—in Latin America, Europe, and Asia. In cross-border business matters, he helps clients comply with local marketing restrictions, and advises them on local authorizations and exemptive relief. He also works to ensure concurrent compliance with US and local laws.

A frequent author and lecturer, Ethan addresses topics including the regulation of broker-dealers and investment advisers; global distribution of investment funds; private equity real estate funds; investment in emerging markets; and corporate governance. He is an editor of the *Morgan Lewis Hedge Fund Deskbook,* published by Thomson Reuters/West.

Kate Habershon

Kate Habershon advises corporations and funds on corporate taxation. Her focuses include tax and structuring issues related to international tax planning, mergers and acquisitions, corporate finance, private equity, executive compensation, internal group restructurings, and financial products. Before joining Morgan Lewis, Kate was tax counsel in the London office of another international law firm, a solicitor on the international and energy tax teams of a Magic Circle firm, and a lawyer in the tax department of the Sydney, Australia, office of another international law firm.

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Ayman A. Khaleq, co-leader of the Middle East practice, advises global and regional institutional clients and asset managers on cross-border investment management, capital markets, and structured finance transactions. He advises on the structuring, formation, and documentation of private investment funds, private placement transactions, and alternative investment platforms; global investments by sovereign wealth funds and other institutional investors; and on a range of Islamic finance, investment, and debt capital markets transactions. He is admitted to practice in New York, is registered as a Foreign Legal Consultant with the California Bar, and is a Registered Foreign Lawyer with the Law Society of England & Wales.

In addition, Ayman provides regulatory and legal advice to global asset managers and foreign direct investors in relation to the marketing of securities (to conventional and Islamic investors) and doing business in the broader Middle East and North Africa (MENA) region, and in such sectors as healthcare, technology, infrastructure, telecommunications, energy, and education. He also advises on policy reform initiatives in the MENA region and other emerging markets. Ayman also advises on complex and cross-border restructuring matters and privatizations in emerging markets.

Ayman, who is fluent in Arabic and English, is a frequent speaker at international conferences on topics relating to foreign direct investment, investment management, and structured transactions (including Islamic finance). In addition, Ayman taught on transactional Islamic law and international investment law at George Washington University Law School (Washington, DC); Bocconi University (Milan, Italy), and Sorbonne University (Abu Dhabi, UAE). He is also serving on the firm's Advisory Board, is the chair of the International Bar Association's Arab Regional Forum, and is a member of the Young Presidents Organization (YPO). Ayman is the leader of the firm's Middle Eastern North African Lawyer Network.

Ayman Khaleq was recently invited by the Dubai Islamic Economy Development Centre (DIEDC), Dubai International Financial Centre (DIFC) and Dubai Financial Market (DFM) to join a new focus group that these three entities are forming, with support from the Climate Bonds Initiative (CBI). The focus group will be composed of relevant experts in capital markets and environmental protection and will be responsible for developing "Sustainable Sukuk Standards".

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Ken Nunnenkamp represents clients in international trade and national security matters before United States federal courts and government agencies, including the US departments of State, Commerce, Homeland Security, Defense, and Treasury. His practice involves internal investigations and disclosures, including voluntary disclosures and responding to government demands, as well as federal court defense against government actions. He also advises on compliance counseling and training, transactional due diligence–including both domestic and cross-border transactions–and statutory submissions to US government agencies.

With more than 30 years of litigation and investigation experience, including time as a JAG Officer in the US Marine Corps, Ken routinely conducts internal investigations for clients, including investigations into actual or potential compliance issues arising under the International Traffic in Arms Regulations (ITAR), Export Administration Regulations (EAR), Office of Foreign Assets Controls Regulations, US Customs Regulations, and Foreign Trade Regulations. Additionally, Ken works with clients to understand each business's scope and needs in establishing and improving trade and sanctions compliance programs, including the creation and auditing of company export management systems of all sizes.

Ken provides comprehensive investigation management and execution, from the preparation of an investigation plan, to the preparation, filing, and resolution of voluntary and directed disclosures of US government investigations and subpoenas related to export and import matters. His investigations work regularly involve fact gathering, witness interviews, board of directors counseling, preparation of reports for submission to US government agencies, and settlement of enforcement actions.

Ken also assists clients facing trade and national security enforcement actions from agencies including the US departments of Justice, Homeland Security, Federal Aviation Administration, and Customs, representing them in civil enforcement matters and working with criminal counsel when necessary. He has litigated such matters before the International Trade Commission, US district courts, and other US administrative agencies.

On the transactions side, Ken works with counsel in handling trade due diligence and preparing transactions for review by the Committee on Foreign Investments in the United States (CFIUS), and performing due diligence, assessment, and examination of often latent issues. He also works with both buyers and sellers on public and private transactions in the million- and billion-dollar range. Ken's experience with CFIUS includes almost every industry and transactions from more than 15 countries, including China, Germany, Japan, the United Kingdom, Canada, and Indonesia.

Ken also has aided companies with responses to various Executive and Congressional information requests and filings, including those under section 332(g) of the Tariff Act, BE-13 filings with the US Department of Commerce, or ITAR registrations and 122.4 notices with the US Department of State.

Ken has written numerous articles and chapters, and lectures regularly on CFIUS, export investigations, and export control and compliance issues. He serves as a resource for multiple publications on export, economics, and national security issues. Ken maintains an active pro bono practice, representing veterans before the Board of Veterans Appeals, the US Court of Appeals for Veterans Claims, the US Court of Appeals for the Federal Circuit, and various military discharge review boards. He previously served in the US Marine Corps as a JAG officer.

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Douglas T. Schwarz is a trusted advisor to and advocate for employers in all aspects of labor and employment law. He litigates in court, arbitration, and administrative proceedings; counsels employers on human resources matters; negotiates and drafts executive employment and separation agreements; advises on labor and employment aspects of corporate transactions, both domestic and cross-border; and conducts internal investigations of employee complaints. Doug also handles ADA Title III and state law matters involving access of persons with disabilities to public accommodations.

Doug's clients include financial services firms (mutual funds, hedge funds, private equity, venture capital, commercial and investment banks, wealth management); educational institutions; and media, technology, and telecommunications, pharmaceuticals, and life sciences companies.

He represents numerous non-US companies, from Japan and elsewhere in Asia, the United Kingdom, and Europe, regarding their US labor and employment matters, and US companies on international labor and employment issues.

Doug's experience includes litigating claims of discrimination, harassment, and reasonable accommodation (race, gender, age, disability, pregnancy, sexual orientation, religion), whistleblower retaliation, wage and hour violations (bonus, commission, overtime and minimum wage), non-competition, non-solicitation, and trade secret breach, defamation and privacy; counseling on reorganizations, reductions-in-force, and executive hiring and termination matters; developing and implementing litigation-avoidance strategies, diversity and affirmative action plans, and training programs on harassment prevention, diversity, and performance management; and advising on government audits (by OSHA, the Department of Labor and OFCCP) and labor-management relations.

He also serves as an arbitrator and mediator.

Doug represents clients in a range of other matters, including housing, education and public accommodations discrimination. Doug has served in government as commissioner of the Massachusetts Commission Against Discrimination (MCAD), as an assistant attorney general in the Civil Rights Division of the Massachusetts Office of the Attorney General and as a US District Court law clerk.

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Alishia K. Sullivan advises institutional investors with respect to their global investment activities, focusing primarily on investments in private funds, including leveraged buyout, hedge, infrastructure and real estate funds, and direct investments and co-investments. She assists clients in drafting, reviewing, and negotiating investment documentation, including subscription agreements, limited partnership agreements, side letters, managed account agreements, and other commercial agreements. She also has extensive experience with advising clients on structuring and maintaining their investment subsidiary platforms and negotiating bespoke investment advisory arrangements and operational agreements necessary to support investment activities. Alishia is admitted to practice in the District of Columbia.

Alishia is a former member of the board of directors of two non-profit organizations whose missions focus on the care, empowerment, and education of women and children.

Prior to joining Morgan Lewis, Alishia was a partner at another global law firm. She previously worked as in-house counsel for a state-owned petroleum company in the Middle East and was a member of the global projects group of the Washington, DC, office of an international law firm.

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Carol Tsuchida focuses her practice on investment funds and financial regulatory matters, as well as labor and employment. She helps clients establish, register, and license investment funds in Japan, and she assists with regulatory issues, including those pertaining to Japan's Financial Instruments and Exchange Law. Additionally, Carol counsels investors across many jurisdictions who are investing in infrastructure funds, hedge funds, and private equity funds throughout Asia.

Fluent in Japanese and English, Carol handles transactional and general corporate matters, including securities law compliance, investment funds, mergers and acquisitions, underwritten public offerings, private equity financings, and venture capital transactions.

In the labor and employment area, Carol counsels companies on their employment law obligations in Japan. She advises on the structure of employment contracts and assists employers in developing and implementing workplace policies. Carol helps employers navigate regulations related to overtime.

Prior to joining Morgan Lewis, Carol served as the assistant general counsel for a leading international financial institution that specializes in real estate investment funds.

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William Yonge has more than 20 years' experience advising global clients on regulation and related commercial issues arising in the financial services, investment management, securities, and derivatives sectors. Clients include asset managers across a wide range of asset classes and their funds, broker-dealers, corporate financiers, fintech and payment services firms, institutional investors, and market associations. Prior to entering private practice, he served as an in-house lawyer at the Securities and Investment Board (now the Financial Conduct Authority) and the Investment Management Regulatory Organisation.

William frequently helps clients to navigate UK and European regulatory issues that arise during fund formations, mergers and acquisitions, establishment of regulated investment management firms in the United Kingdom, and advises on customer and service provider documentation. He also counsels managers from the United States, Europe, Middle East, and Asia on structuring their private placements of funds to UK and European investors and establishing themselves in the United Kingdom.

William advises clients on regulatory developments arising in the context of the United Kingdom's exit from the European Union (Brexit) and counsels firms on restructuring in light of Brexit-related regulatory change.

William's work includes advising on operational, regulatory, and compliance matters regarding the UK Financial Services and Markets Act 2000, the rules of the UK Financial Conduct Authority (FCA), and the UK Prudential Regulatory Authority (PRA) such as the perimeter of regulated activities, obtaining authorisation, conduct of business, changes of control, financial promotion, remuneration requirements, product development, anti-money laundering, trading issues, payment for research, market abuse, cross-border business, and EU passporting.

William provides clients with insight into the impact of current and proposed financial services legislation at European level, including the Alternative Investment Fund Managers Directive (AIFMD), Markets in Financial Instruments Directives (MiFID II), European Market Infrastructure Regulation (EMIR), the Investment Firms Prudential Review, and UK/EU Initiatives in ESG and Sustainability.

Addressing topical regulatory issues, William frequently writes articles for key publications including *Complinet*, *Hedge Fund Journal*, *FX-MM*, *Funds Europe*, *Global Risk Regulator*, *Global Funds Europe*, *EuroWatch*, *Lexology*, *Alternative Intelligence Quotient*, and *Private Debt Investor*. He also speaks regularly at hedge fund and private equity conferences and events.

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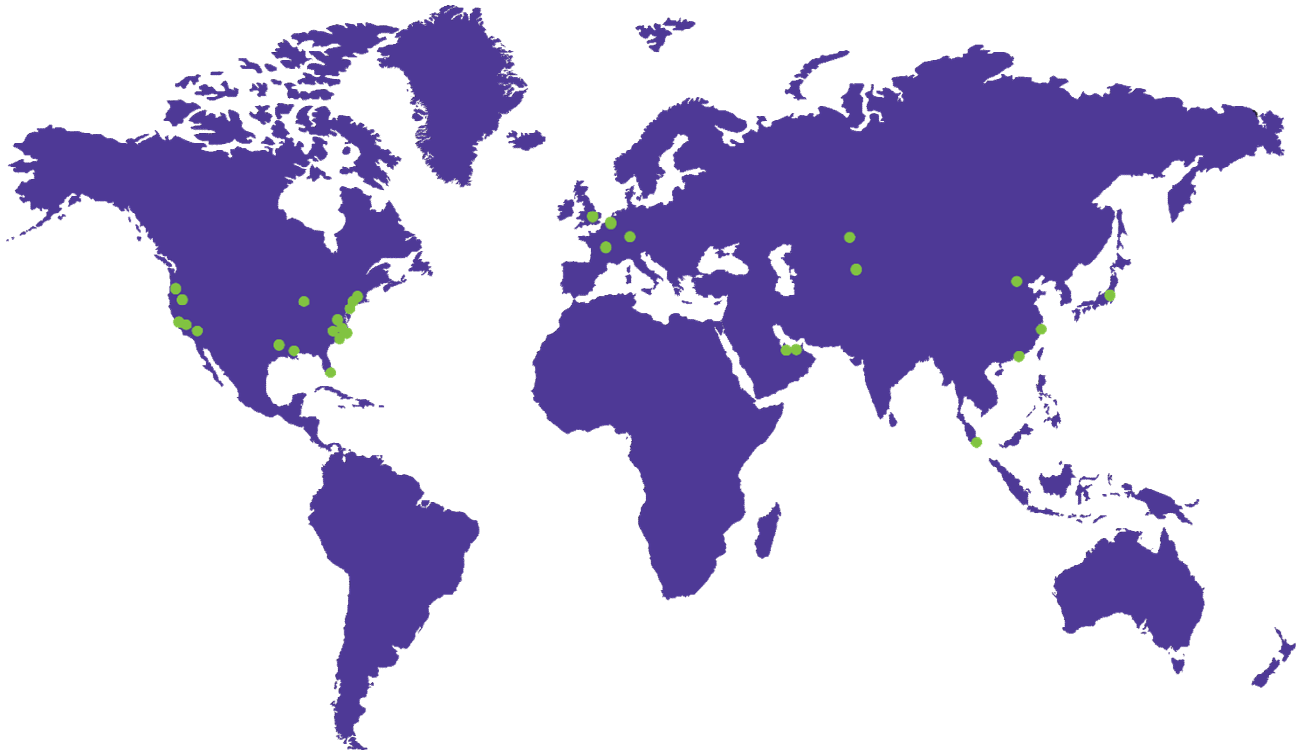

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