

REGISTRATION – WHERE TO FILE

The National Securities Markets Improvement Act of 1996 (“NSMIA”) divided the registration and oversight responsibilities between state and federal securities regulators. The Investment Advisers Supervision Coordination Act under NSMIA took effect on July 8, 1997. As of that date, advisors are to be registered with either the SEC or state(s) but not both. Federal covered advisors are subject to state notice filings (see details below).

Under NSMIA, states have the primary responsibility for supervision of investment advisors managing less than \$25 million in client assets or for those providing other advisory services (i.e. financial planning) which does not include “assets under management.” The SEC has the primary responsibility for supervision of investment advisors who advise mutual funds or who manage \$25 million or more in client assets (“federal covered investment advisers”). NSMIA preserves the authority of states and the SEC to investigate and bring enforcement action against any investment adviser for fraud or deceit. For federal covered investment advisers, states preserve the right for licensing authority over investment adviser representatives.

The SEC retains regulatory responsibility for investment advisers with a principal office and place of business in states that have not enacted investment adviser statutes. Currently the only remaining state is Wyoming. The SEC also retains responsibility for foreign advisers doing business in the United States. Furthermore, any person who meets the definition of investment adviser in the Act (and not otherwise exempt from registration of the Act) is required to register with the SEC if the person has a principal office and place of business in a state that has an investment adviser statute, but is not required to be registered (and in fact is not registered) under that state statute. A person may not be required to register with the state as a result of an exemption from registration or exemption from the definition of investment adviser in that state’s statute. The effect of this interpretation is that all advisers will be regulated either by the SEC or the states, except for advisers that are exempt from registration under both the Act and state statutes.

New advisers need to determine whether registration is required with the SEC or with one or more state jurisdictions. For most new advisers the answer is relatively simple. Because the primary test for registering with the SEC is assets under management of \$25 million or more, a person new to this discipline would not meet the criteria. Therefore registration would be required with the state jurisdiction(s) where clients reside.

If however, you are currently working under another investment advisor and will be transferring the requisite \$25 million within 120 days of your initial registration, you may immediately register with the SEC. This is subject to verification within 120 days that the qualifying assets were actually transferred.

Advisors providing only financial planning services would not meet the definition of assets under management. Advisors who are providing Portfolio Management or Asset Allocation services would need to look closer at the definition of assets under management. (See instructions to ADV Part 1 or The Consortium’s information sheet on Calculating Assets Under Management.)

There are reasons other than assets under management why an advisor would be eligible (or not eligible) for SEC registration. Therefore a decision needs to be made whether SEC or state registration(s) is appropriate.

A “yes” answer to any of the following questions would indicate registration with the SEC is required. Conversely, if all questions are “no” then the adviser would be subject to state registration.

- Has “assets under management” (as defined by the Coordination Act) of \$25 million or more.
- Is not registered (or required to be registered) as an investment adviser in the State in which it maintains its principal office and place of business. (This would be the case in the state of Wyoming. It would cover a registrant whose principal office and place of business is located in a country other than the United States. It also covers registrants whose principal office and place of business is in a state that regulates investment advisers, but is exempted from regulation or registration in that state.) **NOTE: As of 4/05 the Virgin Islands has adopted registration requirements and therefore is no longer available as an automatic category for registration with the SEC.)**
- Is investment adviser (or sub-adviser) to an investment company registered under the Investment Company Act 1940.
- Is a nationally recognized statistical rating organization.
- Is a pension consultant (as that term is used in rule 203A-2(b)).
- Is an investment adviser that controls, is controlled by, or is under common control with, an investment adviser eligible to maintain its registration with the SEC, and whose principal office and place of business is the same as that adviser.
- Is a newly formed adviser relying on rule 203A-2(d) because expects to be eligible for SEC registration within 120 days.
- Is a multi-state adviser relying on rule 203A-2(e).
- Is an Internet investment adviser relying on rule 203A-2(f).
- Has received an order of the SEC exempting registrant from the prohibition on registration from the SEC if the prohibition would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of Section 203A.

Federal covered advisors are not subject to state “registration,” but are subject to “notification” filings and licensing of investment advisor representatives. Check each state for requirements.

NSMIA provides a national de minimis for advisors who are to be registered with the states. Under NSMIA, an investment advisor need not register in a state where the advisor has no place of business, and has fewer than six clients. NSMIA allows states to adopt more liberal policies, but not more restrictive. The effect after NSMIA is that an advisor should not be required to register in a state for one client unless there is a physical presence in the state. An advisory firm and each of its investment advisor representatives will designate at least one place or office in a state in which the advisor or its representatives regularly communicate to clients as a place of business. Note that not all states have adopted NSMIA uniformly, and therefore you must check for the exceptions.

**If you want information about services & products for Investment Adviser compliance please call:
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