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US regulation and registration for UK Managers: A regulatory update

The recent flurry of regulation, real and imagined, on European shores continues to gather pace and is set to get a transatlantic uplift from the Obama administration. Those in the alternative investment sector should brace themselves for the next wave that is the Private Fund Investment Advisers Registration Act (“Registration Act”).

This would require investment advisers in the US with more than $30 million in assets under management, and certain non-US managers with US investors falling outside the new “Foreign private advisor” exemption, to register with the Securities and Exchange Commission (“SEC”). It seeks to capture, under the Investment Advisors Act 1940, the previously unregistered advisors of hedge funds, fund of funds and other pooled investment vehicles such as private equity and venture capital funds.

Private Advisor Exemption repealed

Presently, many managers of funds a) organised under the laws of the US and b) 10% or more owned by US persons (i.e. “Private Funds”), rely on the “Private Advisor Exemption” which precludes from registration those that:

> Advise fewer than 15 clients
> Do not hold themselves out to the public
> Do not advise any registered investment company

In its current form, the proposals would repeal this exemption and any US based advisor with a single client or that manages a single private fund would be required to register if the advisor has more than $30mn AUM. Exemptions for certain commodity pool advisors registered with the Commodities and Futures Commission are also set to be removed.

New “Foreign Advisors” Exemption

A non-US manager may, however, have recourse to a new exemption if it;

> has no place of business in the US; and
> has fewer than 15 clients in the US; and
> has AUM attributable to clients in the US <$25mn; and
> neither holds itself out to the public in the US as an advisor, nor acts as an advisor to a registered investment company.

“Counting rule” & Goldstein

At present, when counting clients the Advisors Act permits the counting of a pooled vehicle as a single client (the “Counting rule”).

The Registration Act proposes to give the SEC express authority to “ascribe different meaning to terms (including client) ...necessary to effect the purposes” of the Advisors Act. This is clearly intended to provide the legislative authority that the Goldstein decision determined the SEC did not have and, thereby, reinstate the ‘look-through’.

This would mean that individual investors in pooled vehicles are set to be counted as ‘clients’ and therefore their number, and assets attributable to them, become significant when considering the threshold for registration.

The Requirements

It is still an open question the extent to which non-US advisors would be subject to the detailed provisions of the Advisors Act but, the proposals give the SEC the power to compel the following:

> Appointment of a Chief Compliance Officer, implementation of Compliance policies and programme
> Disclosure requirements for both itself and the funds it manages – including AUM, use of leverage, positions and trading practices

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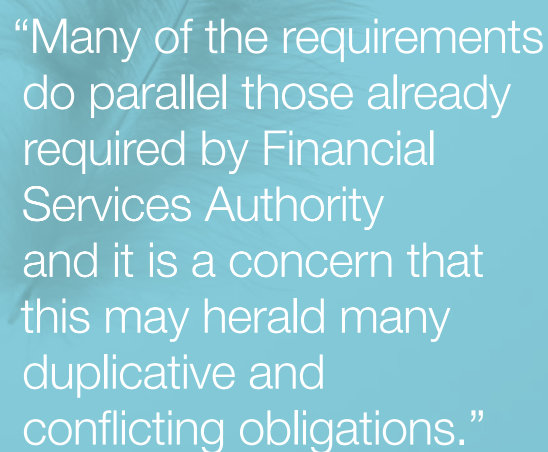

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- Marketing restrictions and disclosure requirements
- Certain requirements for Advisers with Custody of Clients' assets – including surprise Audits
- Requirements for Advisers' Contracts With Clients – specific terms and contract language

Many of the requirements do parallel those already required by Financial Services Authority and it is a concern that this may herald many duplicative and conflicting obligations. At present the proposals are still being finalised but they look set to be enacted next year. A transitional year to prepare for the change is currently being considered.

Next Steps

UK managers should assess their regulatory position with respect to the possibility of registration and review their policies, procedures and records to ensure they are prepared for it, should the proposals be enacted. The impression is, overwhelmingly, that they will.

MMS Regulatory Solutions can help you address these important regulatory changes and ensure you remain abreast of the developments as they occur. Specifically we can:

- Assist with the registration process
- Provide SEC compliant Manuals & Procedures and programmes
- Assist with filings including the form ADV

We will continue to keep you updated as the proposed Act advances. If you believe you will be affected by the proposals please contact your consultant at MMS-RSL.

It's our business to protect your business

We strive to provide all of our clients with the service they require in a flexible but structured way. At MMS Regulatory Solutions – one of the UK's leading compliance consultancies – we want you to relax knowing that your business is protected. If you wish to know more, please do not hesitate to get in touch.

Call us on **020 7065 5200**, email **info@mms-rsl.com** or visit our website at **www.mms-rsl.com**