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August 10, 2015

Federalism, Regulatory Assets under Management (“RAUM”), and Voluntary Registration with the SEC as an Investment Adviser — Part One

As a matter of Federalism, Congress cannot require the several states to adopt laws regulating investment advisers, but it can prohibit "small" investment advisers from registering with the SEC unless they have a sufficient amount of RAUM. For the last two decades, Congress has been slowly but continuously removing "small" investment advisers from the SEC's jurisdiction. Section 203A was added to the Investment Advisers Act of 1940 by the National Securities Markets Improvement Act of 1996 ("[NSMIA](#)"), and it allocated to states the responsibility for registration and oversight of investment advisers with less than \$25 million of assets under management. As a result, the SEC has long been [alert](#) to situations where investment advisers sought to register with the SEC even though they are not eligible to register. [Some types](#) of investment advisers can face serious challenges in attempting to achieve eligibility for registration with the SEC. Section 410 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") effectively raised that initial \$25 million threshold to \$100 million or such higher amount as the SEC by [rule](#) might deem appropriate. [Rule 203A-1](#) under the Advisers Act now reflects an RAUM threshold of \$100 million below which registration with the SEC is prohibited, an RAUM threshold of \$110 million above which registration with the SEC is permitted, and a \$100 million to \$110 million RAUM range in which an investment adviser may elect to be registered either with the SEC or a state. [Rule 203A-3](#) provides that an investment adviser must "[d]etermine 'assets under management' by calculating the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services as reported on the investment adviser's Form ADV." The SEC's Form ADV includes detailed instructions for calculating RAUM. In response to NSMIA, the SEC initially adopted Rule 203A-4 to mitigate the regulatory risk faced by registrants who made a good faith determination that state registration was appropriate by providing a safe harbor from SEC enforcement actions (but not necessarily from private lawsuits) for the failure of a state-registered investment adviser to register instead with the SEC. After the Dodd-Frank Act, however, the SEC [rescinded](#) Rule 203A-4. This can create a serious risk for an investment adviser in any doubt about its RAUM, and thus its ability to register with the SEC.

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