

registration may be sufficient to address the concern that an investment adviser required to register in 15 states would frequently have to switch between state and federal registration.⁸⁸

We request comment on whether the 15-state threshold should be applied to small advisers as well as mid-sized advisers. If not, should the threshold of 30 or more states continue to apply to small advisers? Should we, as proposed, eliminate the “cushion” that permits advisers to remain registered with us even if they are no longer registered in five of the states in which they were initially registered? Should we retain that provision or, alternatively, include a different number of states? Does the grace period currently provided in rule 203A-1 prevent the transient registration problems that the five-state cushion was designed to address?⁸⁹

6. Elimination of Safe Harbor

Rule 203A-4 provides a safe harbor from Commission registration for an investment adviser that is registered with the state securities authority of the state in which it has its principal office and place of business, based on a reasonable belief that it is prohibited from registering with the Commission because it does not have sufficient assets under management.⁹⁰ Advisers have not, in our experience, asserted, as a defense, the availability of this safe harbor, which protects only against enforcement actions by us and not any private actions, and we are not proposing to extend it to the higher threshold established by the Dodd-Frank Act. This rule was designed for smaller advisory businesses with assets under management of less than \$30

⁸⁸ See *supra* notes 66-68 and related text. We also note that proposed rule 203A-2(d) would permit an adviser to choose to maintain its state registrations and not switch to SEC registration. See proposed rule 203A-2(d)(2) (adviser elects to rely on the exemption by making the required representations on Form ADV).

⁸⁹ See proposed rule 203A-1; *supra* notes 66-68 and related text; Multi-State Adviser Adopting Release at section II.A. (five-state provision creates a cushion to prevent an adviser from having to de-register and then re-register with the Commission frequently as a result of a change in registration obligations in one or a few states).

⁹⁰ Rule 203A-4.

million,⁹¹ which may not employ the same tools or otherwise have a need to calculate assets as precisely as advisers with greater assets under management. We view it as unlikely that an adviser would be reasonably unaware that it has more than \$100 million of regulatory assets under management when it is required to report its regulatory assets under management on Form ADV.⁹² Commenters are requested to address whether advisers do, in fact, rely on this safe harbor today. We also request comment on whether we should, as we propose, rescind this safe harbor or, alternatively, extend its availability to the higher registration threshold of the Dodd-Frank Act.

7. Mid-Sized Advisers

As discussed above, section 203A(a)(2) of the Advisers Act, as amended by the Dodd-Frank Act, will prohibit mid-sized advisers from registering with the Commission, but only if: (i) the adviser is required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the state in which it maintains its principal office and place of business; and (ii) if registered, the adviser would be subject to examination as an investment adviser by such commissioner, agency, or office.⁹³ The Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is “required to be registered” or is “subject to examination” by a particular state securities authority.⁹⁴ We propose to incorporate into Form ADV an explanation of how we construe these provisions.⁹⁵

⁹¹ See rule 203A-4; NSMIA Adopting Release at section II.B.3.

⁹² We believe that whether an adviser has \$100 million of assets under management is unlikely to be determined by whether non-discretionary assets could be treated as assets under management or whether the adviser provides continuous and regular supervisory or management services with respect to certain assets, which was the basis for the safe harbor. See NSMIA Adopting Release at section II.B.3.; NSMIA Proposing Release at section II.B.4.

⁹³ See section 410 of the Dodd-Frank Act.

⁹⁴ The Advisers Act defines the term “state” to include any U.S. state, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States. Advisers Act