



2024 Developments in the Regulation of Financial Products Conference

October 4, 2024

Agenda

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- Introduction
- Key Considerations for Advisers Dealing with Non-U.S. Clients
- Special Focus on ESG
- Questions

Offering Advisory Services to Non-U.S. Clients

- Scope of the Investment Advisers Act
- What type of advisory product is being provided and in what form
 - Direct managed account
 - Single purpose managed account in a “pooled” form
 - Model advisory account
 - Sub-advisory account
 - Collective investment fund
 - Other
- Where is the client located?
- Who is making the investment decision?

Offering Advisory Services to Non-U.S. Clients

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U.S. Considerations

- Direct Advisory Services
- Considerations for Pooled Vehicles
- Fiduciary Duty Owed to Non-U.S. Clients
- Disclosure Obligations
- Cash Solicitation Rule
- Fees
- Contract Issues
- Others

Offering Advisory Services to Non-U.S. Clients

Non-U.S. Considerations

- In order to determine the extent of the application of regulation to a U.S. adviser's activities, a firm must determine (among other things):
 - ▶ what type of advisory product is being provided and in what form
 - ▶ who will be responsible for contracting with the client (regardless of whether that entity will provide actual portfolio management services);
 - ▶ who will be responsible for managing the advisory account, in terms of providing investment advisory expertise;

Offering Advisory Services to Non-U.S. Clients

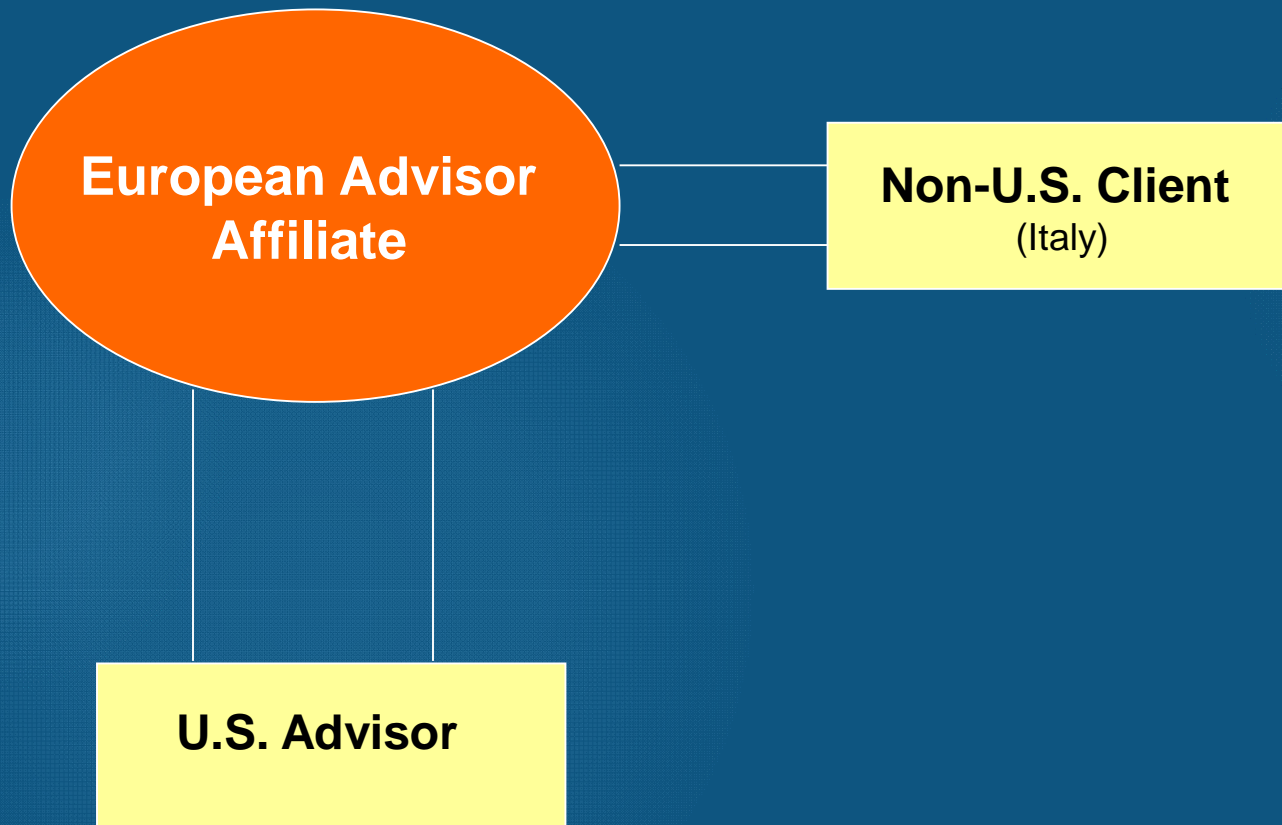
Non-U.S. Considerations

- where will the actual portfolio management take place (e.g., from the United States);
- who will market the advisory services and in what form;
- to whom it will be marketed (retail individual, high net worth individual, corporate, pension, sovereign wealth fund etc.);
- if an entity, how is that prospective client organized and how is it regulated;
- where are the assets to be invested held in custody and who has discretion over those assets; and
- does the U.S. adviser have locally licensed affiliates that can provide marketing or advisory resources outside of the United States.

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Use of Non-U.S. Affiliates



Offering Advisory Services to Non-U.S. Clients

Non-U.S. Considerations - Licensing – Separate Accounts

- In performing the licensing analysis with respect to the ability to offer a separate or managed account to a non-U.S. client, an adviser should consider the following in determining whether licensing or authorization is required to manage the assets:
 - ▶ Is the adviser required to be registered in the local jurisdiction to provide cross-border portfolio management services on a separate account basis?
 - ▶ Is the adviser providing services directly or indirectly in a sub-advisory capacity?
 - ▶ Do the requirements differ if contact was unsolicited?

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Non-U.S. Considerations - Licensing – Separate Accounts

- Is there an exemption under local law depending on the type of client (e.g., an institutional client)? If so, what is it?
- Can the portfolio management take place if on a non-discretionary basis (e.g., asset allocation or modeling approach)?
- Can the portfolio management take place if the client contracts with a licensed entity (e.g., an affiliate) and discretionary asset management is delegated to the U.S. adviser? If so, are there any restrictions on the delegation to the U.S. adviser?

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Non-U.S. Considerations - Licensing – Separate Accounts

- Are there any tax implications to the U.S. adviser or the client as a result of the provision of investment management services?
- Do the requirements differ with respect to investments in the client's account (e.g., options, futures, commodities or other securities)?
- The answer to these questions will determine whether the U.S. registered adviser may provide portfolio management services without being licensed in the client's home jurisdiction, how services may be performed and if there is any impact on portfolio management other than what is to be agreed to within the investment management agreement.

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Non-U.S. Considerations - Licensing – Pooled Products

- To the extent that a U.S. registered adviser offers advisory services to non-U.S. clients through a commingled fund, there are a number of separate considerations under the laws of the jurisdiction in which the client is resident that should be considered by a U.S. investment adviser when marketing to, providing advisory services for, and conducting client servicing of non-U.S. clients in commingled funds, including:
 - ▶ Is the adviser providing services directly or indirectly in a sub-advisory capacity?
 - ▶ Is the adviser required to be registered or authorized to manage the pooled product?

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Non-U.S. Considerations - Licensing – Pooled Products

- Are there any restrictions on managing the asset as a result of the product wrapper and the laws that govern the pooled vehicle?
- Are there reporting, transparency or other requirements that are required by local law?

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Non-U.S. Considerations – Marketing Considerations

- In marketing its portfolio management services to potential non-U.S. clients whether directly in the form of a managed account or indirectly in the form of a pooled product, a U.S. adviser should consider the following questions to determine the scope of permissible marketing activities:
 - ▶ Are there any “broker-dealer” type registration requirements in connection with the marketing by a U.S. adviser of portfolio management services or a fund product?
 - ▶ Does the product need to be registered to offer the product on a solicited basis (e.g., UCITS, private fund etc., collective investment trust etc.) or through a sponsor (e.g., wrap account sponsor)?

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Non-U.S. Considerations – Marketing Considerations

- Are there any additional marketing regulations?
- May a U.S. adviser respond to an unsolicited Request for Proposal (RFP)?
- May representatives of a U.S. adviser conduct in-person marketing visits in the client's jurisdiction?
- May representatives of a U.S. adviser conduct in-person marketing visits offshore (*i.e.*, outside the client's jurisdiction)?
- Is sending unsolicited direct mail permitted?
- Is cold-calling permitted?
- Can marketing be done by way of a website?

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Non-U.S. Considerations – Marketing Considerations

- Can marketing be done by means of other electronic communications (e.g., e-mail)?
- May representatives of a U.S. adviser speak at industry conferences?
- Do the laws and regulations of the potential client's jurisdiction impose any requirements with respect to the language of marketing materials?
- Are any prescribed disclosures in marketing materials required?
- Are marketing materials required to be pre-approved?
- Are there any restrictions as to the scope of potential investors to whom portfolio management services may be marketed?

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Non-U.S. Considerations – Marketing Considerations

- Are there any exemptions that can be utilized (e.g., direct reverse inquiry, cross-border exemption etc.)?
- How are consultants and financial intermediaries treated with respect to the licensing of marketing in a particular jurisdiction?
- While the answers to these questions will provide a U.S. registered adviser with a roadmap to permissible marketing activities, the map must be constructed on a country-by-country basis.

Offering Advisory Services to Non-U.S. Clients

Non-U.S. Considerations – Client Servicing

- In providing client servicing to any non-U.S. resident client (whether in a managed account or in a pooled investment vehicle), a U.S. adviser should consider the following in conducting its licensing analysis:
 - ▶ May a U.S. adviser service clients onshore or is a local licensed intermediary required to service the client?
 - ▶ May a U.S. adviser service clients from offshore?
 - ▶ May a U.S. adviser service clients from offshore via an onshore affiliate?

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Non-U.S. Considerations – Client Servicing

- Are there any reporting requirements under local law with respect to the client relationship?
- While an exemption may exist on which a U.S. registered investment adviser may provide cross-border portfolio management services without being licensed in the client's home jurisdiction, a separate exemption may not be available to "service" the client in its home country.

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Non-U.S. Considerations – Other Considerations

- A U.S. adviser also should consider other material issues that may impact its ability to market to or provide cross-border advisory services to non-U.S. clients, including the following:
 - ▶ Are there any prescribed disclosures or specific terms to be contained in the investment management contract under which services are supplied?
 - ▶ Are there any ongoing regulatory requirements or other rules which are applicable?
 - ▶ Are there any requirements as to the governing law of the agreement?
 - ▶ Are there any requirements as to the language of the agreement?

Offering Advisory Services to Non-U.S. Clients

Non-U.S. Considerations – Other Considerations

- Are there any “doing business” requirements in the client’s jurisdiction (*i.e.*, where “doing business” means holding out to the public and conducting activities within the jurisdiction in question that may be seen as creating a permanent establishment in the jurisdiction)?
- Are there any visa requirements that would prohibit the U.S. adviser from entering a country to market or provide client services (e.g., visa requirements to enter China or another jurisdiction to service an existing client)?
- Are there foreign exchange control restrictions that would impact the client’s ability to invest outside of its own country?

Offering Advisory Services to Non-U.S. Clients

Non-U.S. Considerations – Other Considerations

- Are there requirements that would restrict a U.S. adviser from buying certain securities within the client's account that would otherwise not be contained in the investment management agreement?
- Are there any applicable requirements governing investment advisory agreements, including any formalities required for a client to confer investment discretionary authority?
- Would a U.S. adviser be subject to local laws and regulations in connection with its services for persons outside of its home jurisdiction (e.g., a Singapore investor resident in New York that invests from New York)?

Offering Advisory Services to Non-U.S. Clients

Non-U.S. Considerations - Other Considerations

- Licensing
- Know-Your-Customer Obligations
 - ▶ Application of BSA
 - ▶ Compliance with Foreign Law
- Data Protection
- Anti-Bribery Legislation
 - ▶ FCPA
 - ▶ UK Bribery Act

QUESTIONS

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