

May 27, 2015

SEC Proposes Amendments to Form ADV and the Recordkeeping Rule under the Advisers Act

On May 20, 2015, the SEC proposed amendments to Form ADV, and amendments to Rule 204-2 (the “Recordkeeping Rule”) and certain other rules under the Investment Advisers Act of 1940, as amended (the “Advisers Act”).¹

The proposed amendments to Form ADV would require additional information regarding separately managed accounts (“SMAs”) and would permit by rule the “umbrella registration” regime introduced by the 2012 ABA No-Action Letter² under which related private fund advisers operating as a single advisory business may register with the SEC under a single Form ADV. In addition, among other things, the proposed amendments to Form ADV would require additional information about an investment adviser’s (an “IA”) advisory business, including branch office operations and the use of social media, as well as make certain other clarifying and technical amendments to Form ADV.

The proposed amendments to the Recordkeeping Rule would require, among other things, the maintenance of additional materials related to the calculation and distribution of performance information, regardless of the number of persons to whom related performance information is distributed.

An overview of certain key amendments applicable to private fund advisers is set out below. Comments on the proposed amendments must be submitted to the SEC no later than 60 days after their publication in the Federal Register (approximately July 26, 2015).

Proposed Amendments to Form ADV

Separately Managed Accounts. The proposed amendments to Form ADV would require that more detailed information regarding SMAs than the SEC currently collects be provided on Schedule D of Part 1A, including information relating to the types of assets held in SMAs, the use of derivatives and borrowings³ in SMAs and the IA’s regulatory assets under management attributable to SMA’s (“SMA RAUM”).

Notably, under the proposed amendments to Form ADV, any accounts other than accounts of investment companies, business development companies and other pooled investment vehicles would be considered SMAs.

Under the proposed amendments to Form ADV, *all* IAs that report that they have regulatory assets under management attributable to separately managed accounts would be required to report the approximate

¹ See, “Amendments to Form ADV and Investment Advisers Act Rules” (May 20, 2015), available at <http://www.sec.gov/rules/proposed/2015/ia-4091.pdf>, <http://www.sec.gov/rules/proposed/2015/ia-4091-appendix-a.pdf>, <http://www.sec.gov/rules/proposed/2015/ia-4091-appendix-b.pdf>, <http://www.sec.gov/rules/proposed/2015/ia-4091-appendix-c.pdf>, and <http://www.sec.gov/rules/proposed/2015/ia-4091-appendix-d.pdf>.

² See, American Bar Association, Business Law Section, SEC Staff Letter (Jan. 18, 2012), available at <http://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm> (the “2012 ABA No-Action Letter”).

³ As discussed in more detail below, reporting on the use of borrowings and derivatives would only be required with respect to SMAs with a net asset value of at least \$10 million.

percentage of SMA RAUM invested in ten broad asset categories consistent with the asset categories contained in Form PF, such as exchange-traded equity securities, U.S. government/agency bonds, corporate bonds (investment grade and non-investment grade), derivatives, etc. Then, depending upon the amount of SMA RAUM, the IA would be required to complete more detailed questions regarding those SMAs as follows:

SMA RAUM	Information Required	Timing of Collection of Data
> \$150 million, but < \$10 billion	<ul style="list-style-type: none"> approximate percentage of SMA RAUM invested in ten broad asset categories number of SMAs that correspond to certain categories of gross notional exposure to borrowings and derivatives⁴ weighted average amount of borrowings (as a percentage of net asset value) in SMAs 	year-end data reported on annual updating amendment to Form ADV
≥ \$10 billion	<ul style="list-style-type: none"> all of the above; and weighted average gross notional value of derivatives (as a percentage of the net asset value) in each of six different categories of derivatives (comparable to information collected on Form PF) in SMAs 	mid-year and year-end data reported on annual updating amendment to Form ADV ⁵

Finally, IAs would be required to identify any custodians that hold 10% or more of the IA's SMA RAUM, as well as the amount of the IA's SMA RAUM held at the custodian. The SEC is proposing the 10% threshold in order to focus the proposed reporting requirements on the identification of custodians that serve a significant number of IAs' SMA clients.

Umbrella Registration for Certain Private Fund Advisers. The proposed amendments would codify the 2012 ABA No-Action Letter's guidance regarding "umbrella registration" that permits related IAs (that is, IAs that control, are controlled by or are under common control with each other) operating as a single advisory business to file a single Form ADV, and would clarify and expand the disclosure required with respect to each IA covered by the "umbrella registration". Under the proposal, Form ADV's General Instructions would be amended to provide for the conditions under which umbrella registration would be available (which conditions are consistent with the conditions set forth in the 2012 ABA No-Action Letter), as follows:

- (i) The filing IA and each relying adviser ("RA") advise only private funds and SMA clients that are "qualified clients" (as defined in Rule 205-3 under the Advisers Act) and are otherwise eligible to invest in the private funds advised by the filing IA or an RA and whose accounts pursue investment objectives and strategies that are substantially similar or otherwise related to those of such private funds;
- (ii) The filing IA has its principal office and place of business in the U.S. and, therefore, all of the substantive provisions of the Advisers Act and the rules thereunder apply to the filing IA's and each RA's dealings with each of its clients, regardless of whether any client or the filing IA

⁴ For this purpose, "gross notional exposure" is the percentage obtained by dividing (i) the sum of (a) the dollar amount of any borrowings and (b) the gross notional value of all derivatives, by (ii) the net asset value of the account.

⁵ The proposed amendment would not require the IA to file a semi-annual update to this information, but rather to include the information for both semi-annual periods in the IA's annual update of its Form ADV.

or RA providing the advice is a U.S. person;

- (iii) Each RA, its employees and the persons acting on its behalf are subject to the filing IA's supervision and control and, therefore, each RA, its employees and the persons acting on its behalf are "persons associated with" the filing IA (as defined in §202(a)(17) of the Advisers Act);
- (iv) The advisory activities of each RA are subject to the Advisers Act and the rules thereunder, and each RA is subject to examination by the SEC; and
- (v) The filing IA and each RA operate under a single code of ethics adopted in accordance with Rule 204A-1 under the Advisers Act and a single set of written policies and procedures adopted and implemented in accordance with Rule 206(4)-(7) under the Advisers Act and administered by a single chief compliance officer ("CCO") in accordance with that rule.

In addition, the SEC is proposing a new Schedule R to Part 1A that would have to be completed for each RA and would include identifying information, basis for registration, and ownership information for each RA. A new question on Schedule D would also require identification of the particular adviser (whether the filing IA or an RA) that manages or sponsors each private fund reported on Form ADV.

Additional Identifying and Advisory Business Information. The proposed amendments to Form ADV would also require an IA to provide additional information on Part 1A, including, but not limited to, the following:⁶

Item	Additional Information Required
Item 1.I.; Section 1.I. of Schedule D	whether the IA has a website(s) for social media platforms (<i>e.g.</i> , Twitter) and, if so, the website address(es)
Item 1.F.; Section 1.F. of Schedule D	total number of offices at which the IA conducts investment advisory business; information about 25 largest offices in terms of number of employees (rather than the 5 largest offices as is asked in the current Form ADV) (address, CRD branch number, number of employees who performed advisory functions from each office, identify from a list of securities-related activities the business activities conducted from each office, and describe any other investment-related business conducted from each office)
Item 1.J.	whether the IA's CCO is compensated or employed by any person other than the IA (or a related person of the IA) for providing CCO services, and, if so, the name and IRS Employer Identification Number (if any) of that other person
Item 1.O.	the IA's own assets (within a given range, rather than simply whether the IA's own assets exceed \$1 billion as is asked in the current Form ADV)
Item 5	the number of clients and amount of RAUM attributable to each category of clients as of the date the IA determines its RAUM (rather than providing such information within stated ranges as is asked in the current Form ADV), including the number of clients for whom the IA provided advisory services but does <i>not</i> have RAUM whether the IA elects to report its client assets in Part 2A of Form ADV differently from the regulatory assets under management it reports in Part 1

⁶ The SEC also proposed numerous clarifying and technical amendments to Form ADV which are not described in this memorandum.

Proposed Amendments to the Recordkeeping Rule

Rule 204-2(a)(16) under the Advisers Act currently requires IAs to maintain records supporting performance claims in communications that are distributed or circulated to “10 or more persons.” The proposed amendments would remove the “10 or more persons” condition and replace it with “any person.” In addition, a proposed amendment to Rule 204-2(a)(7) would expand the categories of written communications received and sent by an IA that an IA is required to maintain *to include communications relating to the performance or rate of return of any or all managed accounts or securities recommendations and supporting documentation*. The SEC states that these proposed amendments would provide its examination staff with additional information to review an IA’s compliance with Rule 206(4)-1, which regulates advertisements by IAs, and would assist the SEC in enforcing Rule 206(4)-1 in cases of fraudulent advertising.

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This memorandum is not intended to provide a complete overview of the proposed amendments to Form ADV and the Recordkeeping Rule, but rather an overview of certain key amendments applicable to private fund advisers. This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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