

September 15, 2016

SEC Adopts Amendments to Form ADV regarding Separately Managed Accounts and Umbrella Registration; also Adopts Amendments to the Recordkeeping Rule under the Advisers Act

On August 25, 2016, the SEC adopted 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 which will:

- require additional information regarding separately managed accounts (“SMAs”);
- permit by rule “umbrella registration” under a single Form ADV of related private fund advisers operating as a single advisory business;
- require additional information about, among other things, an investment adviser’s (an “IA”) advisory business, including branch office operations and the use of social media; and
- require the maintenance of additional materials related to the calculation and distribution of performance information, regardless of the number of persons to whom such performance information is distributed.

Amendments to Form ADV

Separately Managed Accounts. The amendments to Form ADV 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 borrowings² in SMAs and the IA’s regulatory assets under management attributable to SMA’s (“SMA RAUM”). Notably, under the amendments to Form ADV, any accounts other than accounts of registered investment companies, business development companies and private funds³ or other pooled investment vehicles are considered SMAs.

¹ See, “Form ADV and Investment Advisers Act Rules” (August 25, 2016), available at <https://www.sec.gov/rules/final/2016/ia-4509.pdf>, <https://www.sec.gov/rules/final/2016/ia-4509-appendix-a.pdf>, <https://www.sec.gov/rules/final/2016/ia-4509-appendix-b.pdf>, <https://www.sec.gov/rules/final/2016/ia-4509-appendix-c.pdf>, and <https://www.sec.gov/rules/final/2016/ia-4509-appendix-d.pdf>. For a blackline reflecting the amendments to Form ADV, see <https://www.sec.gov/rules/final/2016/ia-4509-form-adv-summary-of-changes.pdf>.

² As discussed in more detail below, reporting on the use of borrowings and derivatives is only required with respect to SMAs with a net asset value of at least \$10 million.

³ The adopting release does not address funds of one. As a result, depending on the facts and circumstances, IAs may either report funds of one as pooled investment vehicles in Item 5 and complete a corresponding Section 7.B.(1) in Schedule D, or report such funds as SMAs in Item 5.

Under the amendments to Form ADV, *all* IAs that report that they have regulatory assets under management attributable to separately managed accounts are required to report the approximate percentage of SMA RAUM invested in twelve broad asset categories, such as cash and cash equivalents, exchange-traded equity securities, non-exchange traded equity securities, U.S. government/agency bonds, corporate bonds (investment grade and non-investment grade), derivatives, etc.⁴ Then, depending upon the amount of SMA RAUM, the IA is required to complete more detailed questions regarding those SMAs as follows:

SMA RAUM	Information Required	Timing of Collection of Data
> \$500 million, but < \$10 billion	<ul style="list-style-type: none"> SMA RAUM that correspond to certain categories of gross notional exposure to borrowings and derivatives⁵ the dollar amount of borrowings for the accounts included in the categories noted immediately above 	year-end data reported on annual updating amendment to Form ADV
≥ \$10 billion	<ul style="list-style-type: none"> all of the above; and aggregate gross notional value of derivatives divided by the aggregate RAUM of the accounts included in the categories noted above with respect to six different categories of derivatives (comparable to information collected on Form PF) 	mid-year and year-end data reported on annual updating amendment to Form ADV ⁶

Finally, IAs are 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 10% threshold is intended to assist the SEC in identifying custodians that serve a significant number of IAs' SMA clients.

Umbrella Registration for Certain Private Fund Advisers. The amendments codify the regime introduced by the 2012 ABA No-Action Letter⁷ 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 clarify and expand the disclosure required with respect to each IA covered by the “umbrella registration”. Amendments to Form ADV's General Instructions provide for the conditions under which umbrella registration are available (which conditions are consistent with the conditions set forth in the 2012 ABA No-Action Letter), as follows:

⁴ IAs may use their own internal methodologies in determining how to categorize assets, so long as their methodologies are consistently applied and consistent with information the IAs report internally and to current and prospective clients. Also, IAs should not look through a SMA's investment in funds, as the SEC seeks to understand the extent to which SMAs assets are invested in funds.

⁵ 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 RAUM of the account.

⁶ The amendment does 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.

⁷ See, American Bar Association, Business Law Section, SEC Staff Letter (Jan. 18, 2012), available at <http://www.sec.gov/divisions/investment/noaction/2012/abao11812.htm> (the “2012 ABA No-Action Letter”).

- (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 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 adopted a new Schedule R to Part 1A that must be completed for each RA and includes identifying information, basis for registration, and ownership information for each RA. A new question on Schedule D also requires 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 amendments to Form ADV also require an IA to provide additional information on Part 1A, including, but not limited to, the following:⁸

Topic	Item	Additional Information Required
Internet Presence	Item 1.I.; Section 1.I. of Schedule D	whether the IA has a website(s) or account(s) on publicly available social media platforms where the IA controls the content (<i>e.g.</i> , Twitter) and, if so, the website or account address(es)
Physical Office Locations	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 (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

⁸ The SEC also adopted numerous clarifying and technical amendments to Form ADV which are not described in this memorandum.

Topic	Item	Additional Information Required
		business conducted from each office)
Chief Compliance Officer	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 or a registered investment company advised by the IA) for providing CCO services, and, if so, the name and IRS Employer Identification Number (if any) of that other person
Balance Sheet Assets	Item 1.O.	the IA's own assets within a given range
RAUM; Clients	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, 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

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 amendments remove the “10 or more persons” condition and replace it with “any person.” In addition, a amendment to Rule 204-2(a)(7) expands 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.*

Effective Date

An IA filing an initial Form ADV or an amendment to an existing Form ADV on or after October 1, 2017 is required to provide responses to the newly adopted amendments. Amendments to the Recordkeeping Rule apply to communications circulated or distributed after October 1, 2017.

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This memorandum is not intended to provide a complete overview of the 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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