

Private Equity Alert

SEC Adopts Amendments to Form ADV Regarding Separately Managed Accounts and Umbrella Registration and Advisers Act Recordkeeping Rule

By David Wohl, Venera Ziegler and Gregory Denis

The SEC has adopted final rules to amend Form ADV and the Investment Advisers Act of 1940 (the “Advisers Act”) recordkeeping rule that will (i) require registered investment advisers to provide additional information regarding the separately managed accounts (“SMAs”) they advise, (ii) make certain clarifying, technical and other revisions to Form ADV, (iii) codify the method for multiple private fund adviser entities operating a single advisory business to register using one Form ADV (“Umbrella Registration”) and (iv) make certain revisions to the Advisers Act recordkeeping rule regarding performance information. Advisers will be required to provide responses to the amended Form ADV and comply with the revised recordkeeping rule starting on October 1, 2017. However, the first time most advisers will respond to the revised form will be in connection with their annual Form ADV updates in early 2018. The new requirements regarding SMAs and the recordkeeping rule and the ability to use Umbrella Registration will not apply to exempt reporting advisers.¹

Amendments Regarding Separately Managed Accounts

Although the SEC declined to define the term “separately managed account”, for purposes of the amendments, SMAs are deemed to be any advisory accounts other than pooled investment vehicles (e.g., private funds and registered investment companies). The amendments will increase the amount of reportable information related to SMAs in three broad categories:

- **Types of Assets:** Advisers will be required to report the approximate percentage of regulatory assets under management (“RAUM”) attributable to SMAs invested in 12 broad asset categories, including exchange- and non-exchange-traded equity securities, corporate and municipal bonds, derivatives and U.S. government securities. The adopting release stated that advisers may use their own internal methodologies to categorize assets. For advisers with at least \$10 billion in RAUM attributable to SMAs, the information will be reported in the adviser’s annual Form ADV amendment as of the middle and end of the prior year. Advisers with less than \$10 billion in RAUM attributable to SMAs would only report the information as of year-end.
- **Use of Borrowings and Derivatives:** Advisers with at least \$500 million of RAUM attributable to SMAs will be required to provide aggregate information with respect to the amount of borrowings attributable to those accounts as of year-end. Advisers with \$10 billion or more of RAUM attributable to SMAs will also be required to report information regarding derivatives exposure in the accounts across several broad categories, and the information must be reported as of the middle and end of the prior year. No reporting will be required for SMAs with less than \$10 million of assets.
- **Custodians:** Advisers will be required to identify and provide additional information regarding any custodian that holds at least 10% of its RAUM attributable to SMAs.

Other Amendments to Form ADV

The SEC also added or revised a number of other questions on Form ADV, including, among other things, disclosures related to social media, shared compliance officers, assets under management and private fund ownership. Below is a table listing the significant changes to Form ADV provided by these amendments.

Revision Type	ADV Provision	Revised Requirements
Adviser's Physical Office Locations	Item 1.F and Section 1.F. of Schedule D of Part 1A	Disclose the total number of offices at which the adviser conducts investment advisory business as well as the 25 largest offices by total employees, the number of employees who perform advisory functions at each office and certain additional details about other investment-related business conducted in each office.
Adviser's Presence on Social Media	Item 1.I and Section 1.I. of Schedule D of Part 1A	Disclose whether the adviser has accounts on social media platforms (Twitter, LinkedIn, Facebook, etc.) and the address of each of the accounts. Employees' social media accounts and accounts of unregistered affiliates used solely to promote the non-investment advisory business of such affiliates are not required to be disclosed.
Chief Compliance Officer	Item 1.J of Part 1A	If the adviser's chief compliance officer is compensated or employed by any person other than the adviser for providing chief compliance officer services to the adviser, report the name and tax i.d. number of the other person.
Balance Sheet Assets	Item 1.O of Part 1A	Adds ranges of adviser balance sheet assets of \$1 billion to \$10 billion, \$10 billion to \$50 billion, and \$50 billion or more.
Number of Clients and Assets under Management	Item 5 of Part 1A	Disclose the number of clients for whom the adviser provides advisory services, the amount of RAUM attributable to each type of client, the number of clients for whom the adviser provides advisory services without RAUM, whether the adviser reports client assets differently in Part 2A (brochure) from RAUM in Part 1A, and the amount of the adviser's RAUM attributable to non-U.S. persons.
Assets under Management Attributable to SMAs	Section 5.K.(1) of Schedule D of Part 1A	Disclose the percentage of RAUM attributable to SMAs invested in each of 12 asset categories as of year-end. Advisers with \$10 billion or more in RAUM attributable to SMAs will be required to report the amounts as of mid-year and year-end.
Borrowings and Derivatives of SMAs	Section 5.K.(2) of Schedule D of Part 1A	Advisers with at least \$500 million in RAUM attributable to SMAs must disclose the aggregate amount of borrowings related to those accounts as of year-end. Advisers with at least \$10 billion in RAUM attributable to SMAs will also be required to disclose information related to aggregate derivatives exposure and to report the amounts as of mid-year and year-end.
Custodians of SMAs	Section 5.K.(3) of Schedule D of Part 1A	Disclose information regarding custodians that maintain at least 10% of RAUM attributable to SMAs and report the amount of RAUM attribute to SMAs held by each of the custodians.
Sales to non-Qualified Clients	Section 7.B.(1) of Schedule D of Part 1A	An adviser to a private fund that qualifies for the exclusion from the definition of investment company under Section 3(c)(1) must disclose whether it limits sales of such private fund to "qualified clients."
Private Fund Financial Statements	Section 7.B.(1) of Schedule D of Part 1A	Advisers answering whether a private fund's audited financial statements have been distributed to the fund's investors should now answer with respect to the financial statements for the most recently completed fiscal year. Advisers answering whether the auditor's report contains an unqualified opinion for a private fund should now answer with respect to all of the reports prepared by the auditing firm since the adviser's last annual updating amendment.
Relying Advisers	Schedule R of Part 1A	Requires relying advisers to disclose identifying information, the basis for SEC registration, type of organization and control persons.

Umbrella Registration

The Form ADV amendments also codify Umbrella Registration, a concept originally provided for by a 2012 SEC no-action letter permitting “relying advisers” to be part of, and rely on, an affiliated “filing adviser’s” SEC registration as long as the relying and filing advisers conduct a single advisory business. The amendments expand the disclosure required with respect to the advisers covered by Umbrella Registration (including adding a new Schedule R to Form ADV for each relying adviser). In its adopting release, the SEC stated that exempt reporting advisers may not make use of Umbrella Registration, but noted that the “Frequently Asked Questions” previously released that allowed certain exempt reporting advisers to file a single Form ADV on behalf of multiple special purpose vehicles was not withdrawn as a result of the amendments.

Under the amendments, and consistent with the 2012 no-action letter, five conditions must be met by the filing and relying advisers in order to rely on Umbrella Registration:

- The advisers must advise only private funds and clients in SMAs that are qualified clients (as defined in Rule 205-3 under the Advisers Act) and are otherwise eligible to invest in the advisers’ private funds and whose accounts pursue investment objectives and strategies that are substantially similar or otherwise related to those private funds.
- The filing adviser must have its principal office and place of business in the United States (and therefore the filing adviser and all relying advisers will be subject to the substantive provisions of the Advisers Act regardless of their or their clients’ locations).
- Each relying adviser, its employees and persons acting on its behalf must be subject to the filing adviser’s supervision and control.
- The advisory activities of each relying adviser must be subject to the Advisers Act and examination by the SEC.
- The filing adviser and each relying adviser must operate under a single code of ethics 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.

Amendments to the Recordkeeping Rule

Under the amendments, Advisers Act Rule 204-2 is revised to require registered advisers to maintain additional records regarding the calculation and distribution of performance information. Currently, an adviser is required to maintain supporting documentation for performance information that is distributed to 10 or more persons. The amendment eliminates the 10-person threshold, such that an adviser will be required to maintain supporting documentation for performance information that the adviser distributes (directly or indirectly) to any person. In addition, the amendments require advisers to maintain originals of all written communications received and copies of written communications sent by the adviser relating to the performance or rate of return of any or all managed accounts or securities recommendations.

1 The adopting release for the final rules can be found at: <https://www.sec.gov/rules/final/2016/ia-4509.pdf>. For more information on the proposed rules, please see our June 2015 Private Equity Alert, *SEC Proposes Amendments to Form ADV Regarding Separately Managed Accounts and Umbrella Registrations* available at: http://www.weil.com/~media/publications/private-equity-alert/pe_alert_june_08_2015.pdf.

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