

# Countdown to New Form ADV – Are You Ready?

October 1st is less than a month away. That's the effective date for the new Form ADV (Uniform Application for Investment Adviser Registration and Report by Exempt Reporting Advisers). The new form reflects numerous changes adopted by the Securities and Exchange Commission ("SEC") on August 25, 2016 to improve the quality of the information collected on the form and to facilitate risk-monitoring objectives.<sup>1</sup> Are you ready?

Highlights of the new Form ADV are discussed in greater detail in our August 29, 2016 [client alert](#)<sup>2</sup>, but here's what you need to know:

## ***Summary of Changes to Form ADV and Compliance Dates***

Along with a number of technical and clarifying changes, the amendments to Form ADV require additional information regarding separately managed accounts ("SMAs") and codify the "umbrella registration" method for private fund adviser registration. Indeed, the changes are so significant that the text of the General Instructions, Glossary and almost every Item of Part 1A and its related section of Schedule D are changing. The SEC has prepared a summary of changes to Form ADV, which is available on the SEC's website.<sup>3</sup>

The first time most advisers will need to file on the new Form ADV will be for their annual updating amendments in the first quarter of 2018. However, initial Form ADV filers and those filing amendments to an existing Form ADV must begin using the new Form ADV on or after October 1, 2017. In its August 2017 Information Update,<sup>4</sup> the SEC's Division of Investment Management stated that the staff would not recommend enforcement action under certain circumstances for certain 2017 third quarter filings. The relief specifically applies to advisers that must file an "unanticipated other-than-annual amendment" to their Form ADV after October 1, 2017, but before the first quarter of 2018, and do not have enough data to respond to the new or amended items in Item 5 and the related Schedule D sections. To avoid enforcement, those advisers should respond with a placeholder – the number "0" – for these questions. Advisers relying on

## **Related Capabilities**

- Investment Management
- Financial Services Regulatory
- Securities & Financial Services Litigation & Enforcement

this position must explain the use of the placeholders in the Miscellaneous section of Schedule D to the Form ADV.

### ***Additional SEC Guidance on New Form ADV***

This summer the SEC provided additional guidance on the new Form ADV by adding 23 new questions and answers to its Frequently Asked Questions (“FAQs”) on Form ADV and IARD, Reporting to the SEC as an Exempt Reporting Adviser.<sup>5</sup> A high-level review of the FAQs is discussed below.

#### ***Social Media Presence***

Item 1.I has been updated to require disclosure of whether an adviser has one or more accounts on social media platforms, such as Twitter, Facebook or LinkedIn. Advisers need only provide the address of accounts on publicly available social media platforms where the adviser controls the content. Advisers are not required to provide the address of social media accounts where (a) an unaffiliated third party distributor or solicitor controls the content, or (b) information about the advisory firm is simply included on a platform where a third party controls the content (for instance, publicly available platforms which list information about job listings or public ratings or reviews of companies).

Interestingly, in the event that an adviser’s parent company maintains a social media account that references the adviser, advisers must apply a facts and circumstances test as to how the content is created and how the account promotes the adviser’s business to determine whether the adviser should include the parent-run account on its own Form ADV. Advisers will not be required to report the address of their employee social media accounts even in the situations where the adviser controls the contents of the employee accounts. Form ADV is intended to capture disclosures regarding an adviser’s social media accounts only, not its employees.

#### ***Outsourced Chief Compliance Officers***

Advisers that utilize an outsourced Chief Compliance Officer (“CCO”) for compliance services will be required to disclose on new Item 1.J.2 whether their CCO is compensated or employed by any person other than the adviser or a related person. Where an adviser’s outsourced CCO provides concurrent compliance services to other firms, advisers are not required to provide the information of the other firms unless those other firms employ or compensate the CCO for compliance services provided to the adviser’s firm.

#### ***Regulatory Assets Under Management***

Advisers with assets of \$1 billion or more will be required to report their assets within three ranges in amended Item 1.O: (a) \$1 billion to less than \$10 billion; (b) \$10 billion to less than \$50 billion; and (c) \$50 billion or more. However, the SEC’s FAQ Guidance clarifies that Item 1.O requires an adviser to indicate whether it had \$1 billion or more in

total assets shown on the adviser's balance sheet as of the last day of the adviser's most recent fiscal year end. In Form ADV instruction for Item 1.O, "assets" refers to the adviser's total assets, not the assets managed on behalf of clients. Therefore, for instance, a firm that has \$5 billion in regulatory assets under management, but only \$300 million in total assets on its balance sheet for its most recent fiscal year end would answer "no" to Item 1.O. Non-proprietary assets, such as client assets under management, should be excluded when responding to Item 1.O, regardless of whether they appear on an adviser's balance sheet.

### *Reporting the Number and Type of Clients*

Item 5.D requires advisers to report the approximate number of clients and the amount of total regulatory assets under management attributable to certain categories of clients. To address disclosure of client-specific information and related competition concerns, advisers with fewer than five clients in a particular category may check the column to report "Fewer than 5 Clients" even in instances where an advisory firm does not have any clients of a particular category. However, the SEC's FAQ guidance indicates that the staff encourages advisers to report "0" in these situations instead.

It should be noted that for purposes of Item 5.D, "pooled investment vehicles" include but are not limited to private funds, which are defined in the Form ADV Glossary. Whether a fund (other than an investment company or business development company) should be considered to be a "pooled investment vehicle" will depend on its particular facts and circumstances. Notably, the staff believes that there are some circumstances in which it may be appropriate for an adviser to treat a single-investor fund (a "fund of one") as a pooled investment vehicle. However, an adviser generally should not consider a single-investor fund to be a pooled investment vehicle if that entity in fact operates as a means for the adviser to provide individualized investment advice directly to the investor in the fund.

### *120-Day Rule*

An adviser relying on Rule 203A-2(c) to register with the SEC because it expects to be eligible for SEC registration within 120 days of filing its initial Form ADV filing but does not currently manage any assets will need to make use of a placeholder in responding to Schedule D, Section 5.K. For purposes of providing year-end information, advisers should respond with "100%" in the "Other" category and indicate in the Miscellaneous section of Schedule D that the firm does not have any responsive data to report as it is relying on Rule 203A-2(c) as the basis of its registration. If the adviser is required to report mid-year information on Schedule D, Sections 5.K(1) and 5.K(2) but did not manage assets for SMA clients as of the mid-year date, the adviser can take the same approach. As noted in Schedule D, Section 5.K., each column should add up to 100%.

### *Separately Managed Accounts*

Item 5.K. instructs advisers to report regulatory assets under management attributable to clients "other than those listed in Item 5.D(3)(d)-(f)." For purposes of answering Item 5.K

and Schedule D, Section 5.K, advisers to private funds that report information about parallel managed accounts to those private funds on Form PF should treat those parallel managed accounts as SMAs. This is because parallel managed account (which is defined in the Form PF Glossary) clients that are not registered investment companies, business development companies, or pooled investment vehicles are not reported in Item 5.D(3)(d)-(f). As a result, they should be considered SMA clients for purposes of answering Item 5.K and Schedule D, Section 5.K.

### *Umbrella Registration and Schedule R*

The amendments to Form ADV better accommodates the method of filing a single umbrella registration for multiple private fund advisers under common control with the filing adviser, as established in the SEC staff 2012 no-action letter (the “2012 ABA Letter”).<sup>6</sup> The SEC’s FAQs point out that a relying adviser may not be deleted from a Form ADV simply by selecting Item (9) (“are no longer eligible to remain registered with the SEC”) in Section 2. In addition to selecting Item (9), the filing adviser must also select one of the two options under “Delete a Schedule R” at the top of Schedule R.

It should be noted that umbrella registration (and the filing of New Schedule R) is not permitted for exempt reporting advisers (“ERAs”). Umbrella registration is available only for “filing advisers” and “relying advisers” to register with the SEC. Filing advisers and relying advisers are required to satisfy the definitions of those terms (including that it is otherwise “eligible to register” with the SEC) and meet the conditions set forth in General Instruction 5. Therefore, in order to switch a relying adviser from filing as such on Schedule R to being an ERA, the relying adviser should first submit its own Form ADV as an ERA. Then, the filing adviser should file an other-than-annual amendment to its Form ADV. On Schedule D of the amendment, the filing adviser can remove the relying adviser and any private funds advised by the relying adviser in Section 7.B.(1) of Schedule D. On Schedule R of the amendment, the filing adviser can delete the existing Schedule R for the ineligible relying adviser by selecting the “Delete” option and selecting “No Longer Eligible” from the drop-down menu.

### ***Reminder on New Performance Advertising Books and Records Requirements***

In addition to the new Form ADV, the Adopting Release also made changes to the Investment Advisers Act of 1940, as amended (the “Advisers Act”) books and records Rule 204-2 that will require advisers to make and keep supporting documentation that demonstrates performance calculations or rates of return in any written communications that the investment adviser circulates or distributes. The amendments to the books and records Rule 204-2 apply to communications circulated or distributed after October 1, 2017. However, advisers that circulate or distribute communications after October 1, 2017 that include performance information, including information on performance that predates October 1, 2017, must maintain records supporting those performance claims.

### ***Additional Resources***

For a more in depth conversation on the new Form ADV, we invite you to join Dorsey &

Whitney LLP's Private Funds Symposium on September 27, 2017.<sup>7</sup> One of our seven discussion panels will focus on Private Fund Investment Adviser Regulation and Enforcement and will include coverage on the New Form ADV. For more information, please contact Genna Garver.

<sup>1</sup> See SEC Release No. IA-4509, August 25, 2016 (the "Adopting Release").

<sup>2</sup> <https://www.dorsey.com/newsresources/publications/client-alerts/2016/08/form-adv-gets-an-overhaul>

<sup>3</sup> <https://www.sec.gov/rules/final/2016/ia-4509-form-adv-summary-of-changes.pdf>

<sup>4</sup> <https://www.sec.gov/divisions/investment/imannouncements/im-info-2017-06.pdf>

<sup>5</sup> <https://www.sec.gov/divisions/investment/iard/iardfaq.shtml>

<sup>6</sup> <http://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm>

<sup>7</sup> <https://www.dorsey.com/newsresources/events/event/2017/09/dorsey-annual-private-funds-symposium>