

Form ADV Annual Updating Amendment Reminder

All registered investment advisers and exempt reporting advisers (“Advisers”), need to file the annual Form ADV amendment within 90 days of the firm’s fiscal year-end (by March 30, 2020 for those with a December 31, 2019 fiscal year-end). This also applies to newly-registered Advisers who may have filed late in the year. The annual update requirement is in addition to the requirement to amend Form ADV promptly if certain information becomes inaccurate.

Form ADV Part 1A and Part 2A (Brochure) are filed electronically with the SEC through the Investment Adviser Registration Depository (IARD) administered by FINRA. Form ADV Part 2B, the Brochure Supplement, is not required to be filed with the SEC, but must made available, if requested, to the SEC for examination.

Delivery Requirements

Registered investment advisers are required to deliver a copy of the Brochure to clients annually within 120 days of the Adviser’s fiscal year-end. To meet the client delivery requirements, the Brochure may be sent together with a summary of material changes (if any); or an Adviser may send only the summary of material changes, if it is accompanied by an offer to provide the entire Brochure upon request. If requested by the client, the Brochure then must be mailed within seven (7) days, or delivered electronically in accordance with SEC guidelines.

While SEC rules only require the Brochure to be delivered to “clients,” (which the SEC staff has acknowledged does not include fund investors), many Advisers deliver the Brochure to fund investors. We recommend that Advisers check their internal policies and procedures, and applicable fund agreements, which may require delivery of the Brochure to fund investors. Additionally, if an Adviser is ineligible to rely on an exception to the annual privacy notice requirement¹, the Adviser may wish to deliver their privacy policy and updated Brochure to clients at the same time to meet both annual requirements.

Related Capabilities

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

Common Errors

Inaccurate, misleading or omitted Form ADV disclosure is often cited as a deficiency in SEC examinations, and in certain instances has even led to enforcement actions. To avoid the most common deficiencies, found in SEC examinations, Advisers should pay close attention to:

- *Inconsistencies* between Form ADV Part 1 and Part 2, including as related to: assets under management; the types of compensation received; and custody, all of which are addressed in both parts of Form ADV.
- *Incomplete* disclosure of conflicts of interest. The SEC staff has indicated that disclosure must include “sufficiently specific facts” to allow clients to understand the Adviser’s conflicts and business practices and give informed consent or reject them.²
- *Inaccurate* reporting of assets under management. Regulatory assets under management (RAUM) must be calculated on a gross basis, including proceeds of leverage and uncalled capital commitments and without deduction of any outstanding indebtedness or other accrued but unpaid liabilities. See, Instruction 5.b of Form ADV: Instructions for Part 1A.³ To be prepared for future inquiries by regulators, and to ensure consistency in reporting methodology, Advisers should maintain detailed notes on how they arrived at RAUM or any other computation required by Form ADV.
- *Private funds information* on Form ADV should be kept current, but when new funds have not been added prior to the annual update, Advisers may need to amend Form ADV to add the new fund before information regarding the new fund can be reported on Form PF. An Adviser in this situation may need to file its annual Form ADV amendment early or file an other-than-annual amendment in order to timely file Form PF.⁴
- *Remember the states* in which you are registered, have a place of business, or have clients, and revisit the requirements relating to state filings. Notice filings and investment adviser registration requirements differ from state to state based primarily on whether the Adviser has a place of business, or a certain number of clients, in a particular state. Notice filings may be made on Form ADV by checking the relevant box in Part 1A and ensuring that sufficient funds are in the Adviser’s IARD Flex-Funding Account for filing fees.⁵

Exempt Reporting Adviser Considerations

An exempt reporting adviser (ERA) relying on the private fund adviser exemption must also annually calculate private fund RAUM and report the amount in its Form ADV amendment. If a U.S. ERA reports in its annual amendment that it has \$150 million or more of private fund RAUM, or has accepted a client that is not a private fund, the Adviser will no longer be eligible for the private fund adviser exemption.

A private fund adviser that has met all ERA reporting requirements but is no longer eligible for the private fund adviser exemption because its RAUM meets or exceeds \$150 million must apply for registration with the SEC within 90 days after filing the annual amendment but may continue advising private fund clients during this period. The transition period is not available to Advisers relying on the venture capital fund adviser exemption, which must register under the Advisers Act before accepting a client that is not a venture capital fund, unless the Adviser is eligible for another exemption from

registration.

Final Reminders

It is important to use the IARD system's "completeness check" feature well in advance of the filing deadline. This feature identifies any required fields which are missing in a draft Form ADV and will also highlight if there are insufficient funds in the Adviser's IARD Flex-Funding Account to cover filing fees.⁶ Also remember that the Part 2A Brochure PDF must be text-searchable.

Many of the items in Form ADV call for interpretations regarding the Form's instructions. We recommend Advisers begin the process of completing their annual amendment as early as possible. Please feel free to contact us if you have any interpretive questions or if you would like us to review your filing at any stage prior to submission.

Dorsey & Whitney LLP provides counsel to diversified global financial services firms in their asset management, bank, broker-dealer, and insurance activities, as well as their business operations and governance. Dorsey provides our investment advisory clients with a full range of legal services. We assist these clients with registration and compliance matters arising under federal and state securities laws, and counsel clients on fiduciary duties and conflicts of interest, disclosure and internal controls, advertising and performance presentation, regulatory examinations and enforcement defense. Our team advises a broad range of both registered and private funds, including mutual funds and ETFs, and hedge, private equity, real estate and venture capital funds, and we represent fund managers, boards of directors and leading institutional investors.

¹ An Adviser which has not changed its privacy policy or privacy practices since its prior privacy notice was last sent, and which only provides non-public personal information in accordance with the permitted disclosure provisions of Regulation S-P, is not required to send an annual privacy notice. Section 503 of GLBA, Regulation S-P.

² See *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Investment Advisers Act Release No. 5248 (June 5, 2019), at 24.

³ Form ADV: Instructions for Part 1A, <http://www.sec.gov/about/forms/formadv-instructions.pdf>.

⁴ See Form PF: General Instructions, <https://www.sec.gov/about/forms/formpf.pdf>.

⁵ Exempt reporting advisers may also be required to register as an investment adviser in some states, or file an ERA state notice filing separate and apart from the federal ERA filing.

⁶ All Advisers must pay a filing fee in connection with their annual Form ADV updates, and the firm's IARD Flex-Funding Account must be funded before an annual update filing has been submitted.