



September 21, 2016

SEC Adopts Amendments to Form ADV and the Books and Records Rule

I. Introduction

On August 25, 2016 the Securities and Exchange Commission (“SEC”) adopted amendments (“Amendments”) to Form ADV that, among other things, require disclosure of additional information about investment advisers and their separately managed account (“SMA”) business; provide a method for private fund adviser entities operating a single advisory business to register using a single Form ADV (“umbrella registration”); and make certain clarifying, technical and other amendments to Form ADV. The Amendments also revise Rule 204-2 (the “books and records rule”) under the Investment Advisers Act of 1940, as amended (the “Advisers Act”) and require advisers to maintain additional records of performance calculations and performance-related communications.¹

The Amendments will be effective 60 days after publication in the Federal Register, but compliance with the Amendments will not be required until on or after October 1, 2017.

II. Amendments to Form ADV

A. Information Regarding SMAs

The Amendments are designed to collect more information about advisers’ SMAs, which for purposes of Form ADV reporting, are deemed to include “advisory accounts other than those that are pooled investment vehicles.” The Amendments require increased information by adding specific questions in Item 5 of ADV Part 1A and corresponding Section 5 of Schedule D. Specifically, the Amendments require advisers to provide:

- Information about the type of assets held and the use of derivatives and borrowing of SMAs;

¹ The Amendments to form ADV and the Investment Advisers Act Rules, Release No. IA-4509 is available at <https://www.sec.gov/rules/final/2016/ia-4509.pdf>

- Approximate percentage of the regulatory assets under management (“RAUM”) of SMAs that are invested in twelve broad asset categories. (Advisers with at least \$10 billion in RAUM attributable to SMAs will report on an annual basis both mid-year and end of year percentages, while advisers with less than \$10 billion in RAUM attributable to SMAs will report only end of year percentages);
- Information regarding use of borrowings and derivatives in SMAs; and
- Identity of custodians that account for at least ten percent of SMA RAUM, and the amount of the advisers RAUM attributable to SMAs held at the custodian.

In addition to the foregoing, the Amendments require additional information about the adviser itself, its business and affiliations, including: (i) all its CIK numbers, (ii) the address of each of the adviser’s websites and social media platforms, such as Twitter, Facebook and LinkedIn, (iii) total number of offices at which the adviser conducts investment advisory business, information about the 25 largest offices in terms of employees and the number of employees who perform advisory functions from each office, (iv) the business activities conducted from each office, (v) whether the adviser’s chief compliance officer (“CCO”) is compensated or employed by any person other than the adviser (or related person of the adviser) for providing CCO services to the adviser, and if so, to identify that other person, (vi) requiring advisers with assets over \$1 billion to report their accounts within certain specific dollar ranges, (vii) replacing ranges for three data points – number of advisory clients, types of clients and RAUM attributable to client types – with actual numbers;² and identifying the approximate amount of RAUM attributable to clients that are non-U.S. persons, and (viii) requiring an adviser to a 3(c)(1) fund to report whether it limits sales of the fund to “qualified clients,” as defined in Rule 205-3 of the Advisers Act.

B. Umbrella Registration

The Amendments codify umbrella registration for advisers to private funds that operate a single advisory business through multiple legal entities.³ Umbrella registration occurs when one adviser, the “filing adviser,” files a single form ADV on behalf of itself and other advisers that are controlled by or under common control with the filing adviser (each, a “relying adviser”), provided they conduct a single advisory business.

To avail itself of umbrella registration, the following conditions (consistent with prior SEC guidance) must be met:

- The filing adviser and each relying adviser advise only private funds and qualified clients in SMAs that otherwise are eligible to invest in the private funds advised by the filing adviser or a relying adviser, and whose accounts

² Advisers with fewer than five clients in a particular category (other than investment companies, business development companies and other pooled investment vehicles) may indicate that fact rather than report the actual number of clients in the particular category.

³ For a variety of tax, legal and regulatory reasons, advisers to private funds may be organized as a group of related advisers that are separate legal entities but effectively operate as a single advisory business.

- pursue investment objectives and strategies that are substantially similar or otherwise related to those private funds;
- The filing adviser has its principal office and place of business in the United States and, therefore, all of the substantive provisions of the Advisers Act apply to the filing adviser and each relying adviser;
- Each relying adviser, its employees and the persons acting on its behalf are subject to the filing adviser's supervision and control;
- The advisory activities of each relying adviser are subject to the Advisers Act and subject to examination by the SEC; and
- The filing adviser and each relying adviser operate under a single code of ethics and a single set of written policies and procedures adopted and implemented in accordance with the Advisers Act and administered by a single CCO.

• The Amendments also require that a new Schedule R to Form ADV be filed for each relying adviser, which provides identifying information, the basis for SEC registration and ownership information for each such relying adviser.

Umbrella registration is not available to non-U.S. filing advisers, exempt reporting advisers, advisers to other types of clients and advisers not independently eligible for registration with the SEC.

C. Clarifying Amendments to Form ADV

The Amendments include other, clarifying and technical changes to Form ADV that are designed to clarify the Form and its instructions.

III. Amendments to the Books and Records Rule

The Amendments to the Advisers Act books and records rule, Rule 204-2, require advisers to maintain materials related to the calculation and distribution of performance information.

Rule 204-2(a)(16) currently requires advisers to maintain records supporting performance claims in communications that are distributed to “ten or more persons.” The Amendments remove the “ten or more persons” condition and require that records demonstrating the calculation of performance or rate of returns be maintained, even if distributed to a single person.

Rule 204-2(a)(7) currently requires advisers to maintain records of “certain categories” of written communications received and copies of written communications sent by such advisers. The Amendments require advisers also 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 managed accounts or securities recommendations.

The Amendments to the books and records rule will apply to communications distributed after October 1, 2017 (the compliance date). Advisers that distribute communications after October 1, 2017 that include performance information, including information on performance

that predates the October 1, 2017 date, will be required to maintain the materials required by the Amendments that demonstrate the calculation of performance.

If you would like assistance conforming your practice to the requirements of the Amendments to the SEC rules, or if you need assistance preparing or amending your ADV, please contact Meryl Wiener, any of the undersigned, or your regular Warshaw Burstein attorney.

Frederick R. Cummings, Jr.	FCummings@wbcsk.com	(212) 984-7807
Thomas Filardo	TFilardo@wbcsk.com	(212) 984-7806
Marshall N. Lester	MLester@wbcsk.com	(212) 984-7849
Marilyn Selby Okoshi	MOkoshi@wbcsk.com	(212) 984-7874
Murray D. Schwartz	MSchwartz@wbcsk.com	(212) 984-7701
Stephen W. Semian	SSemian@wbcsk.com	(212) 984-7764
Kyle A. Taylor	KTaylor@wbcsk.com	(212) 984-7797
Meryl E. Wiener	MWiener@wbcsk.com	(212) 984-7731