

# SEC Proposes Expanding Reporting Requirements for Investment Advisers

Skadden

07/17/15

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

**Anastasia T. Rockas**

New York  
212.735.2987  
anastasia.rockas@skadden.com

**John R. Stewart**

New York  
212.735.3314  
john.r.stewart@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square  
New York, NY 10036  
212.735.3000

skadden.com

On May 20, 2015, the Securities and Exchange Commission (the “SEC”) proposed new rules, forms and amendments that would expand the information that registered investment advisers<sup>1</sup> are required to report. The changes are intended to enhance the information available to investors and to permit the SEC to more effectively collect and use information reported by investment advisers.

The SEC proposals would (1) amend Form ADV to require investment advisers to report additional information about separately managed accounts and about the adviser and its business, (2) incorporate a method for multiple private fund adviser entities operating a single advisory business to register using a single Form ADV, (3) effect certain other clarifying and technical amendments to Form ADV, (4) amend the Investment Advisers Act of 1940 (as amended, the “Advisers Act”) books and records rule to require advisers to make and keep additional supporting documentation relating to performance calculations, and (5) effect certain technical amendments to the Advisers Act rules.

## Form ADV Amendments

### Separately Managed Accounts Information

The SEC’s proposals would amend Item 5 of Part 1A of Form ADV to collect more information on separately managed accounts and about the adviser and its business.<sup>2</sup> For purposes of reporting on Form ADV, the SEC considers advisory accounts other than those that are pooled investment vehicles to be separately managed accounts.

The proposed amendments would collect additional information on separately managed accounts, including the types of assets held and the use of derivatives and borrowings in the accounts.<sup>3</sup> Advisers reporting regulatory assets under management (“RAUM”) attributable to separately managed accounts would be required to complete additional questions in response to the following proposed new items.<sup>4</sup>

**Section 5.k.(1) - Investments.** All advisers to separately managed accounts would be required to report the approximate percentage of separately managed account RAUM invested in 10 broad asset categories such as exchange-traded equity securities and U.S. government/agency bonds.<sup>5</sup> The SEC would collect both mid-year and year-end data on an annual basis for advisers with at least \$10 billion in RAUM attributable to separately managed accounts.

**Section 5.k.(2) - Borrowing and Derivatives.** Advisers with at least \$150 million in RAUM attributable to separately managed accounts would report information regarding the use of borrowing and derivatives in such accounts.

- Advisers with \$150 million to \$10 billion in RAUM attributable to separately managed accounts would report (1) the number of accounts that correspond to certain categories of gross notional exposure,<sup>6</sup> and (2) the weighted average amount of borrowings, as a percentage of net asset value, in such accounts. Separately managed

<sup>1</sup> The full text of the SEC’s release on proposed amendments applicable to investment advisers is available [here](#) (the “Investment Advisers Release”).

<sup>2</sup> Investment Advisers Release at 8.

<sup>3</sup> *Id.* at 9.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* See also Proposed Form ADV, Part 1A, Schedule D, Section 5.K.(1)(a)-(b).

<sup>6</sup> “Gross notional exposure” for these purposes will be the percentage calculated by dividing (1) the sum of (a) the dollar amount of any borrowings and (b) the gross notional value of all derivatives, by (2) the net asset value of the account. *Id.* at 10-11.

# SEC Proposes Expanding Reporting Requirements for Investment Advisers

accounts with a net asset value of less than \$10 million would not be required to report on the use of borrowing and derivatives.

- Advisers with at least \$10 billion in RAUM attributable to separately managed accounts would be required to report, in addition to gross notional exposure and borrowing information detailed above, the weighted average gross notional value of derivatives (as a percentage of the net asset value) in each of six different categories of derivatives.<sup>7</sup> Advisers with at least \$10 billion in RAUM attributable to separately managed accounts also would report both mid-year and year-end data filed on an annual basis.

Derivatives and borrowings information would be required to be updated annually in the updating amendment to a fund's Form ADV.

**Section 5.k.(3) – Custodians.** Advisers would be required to report (1) any custodians accounting for at least 10 percent of separately managed account RAUM, and (2) the amount of RAUM attributable to separately managed accounts held by the custodian.<sup>8</sup>

The information proposed to be collected and the new definitions added for these purposes correspond to information collected by, and definitions in, Form PF. Information on Form PF is filed confidentially, whereas this information on Form ADV would be publicly available. The SEC solicits comments as to whether there are confidentiality concerns with the separately managed account proposals.

## Investment Adviser Information

The SEC proposals would seek new information in the following categories.

**Identifying Information.** The proposals would seek additional information by amending Item 1 of Part 1A of Form ADV to require advisers to report the following information:

- All assigned Central Index Key (CIK) numbers regardless of public company reporting status. Currently only advisers that are public reporting companies are required to provide CIK numbers.<sup>9</sup>
- Any websites for social media platforms used by the adviser in addition to the adviser's website(s). Currently advisers are not asked for information about their presence on social media.<sup>10</sup>

<sup>7</sup> *Id.* at 11.

<sup>8</sup> *Id.* at 12-13. See also proposed Form ADV, Part 1A, Item 5.K.(4) and Schedule D, Section 5.K.(3).

<sup>9</sup> *Id.* See also proposed Form ADV, Part 1A, Item 1.D.(3).

<sup>10</sup> *Id.* See also proposed Form ADV, Part 1A, Item 1.I. and Section 1.I. of Schedule D.

- Expanded information regarding offices other than the principal office, including (1) the total number of offices at which they conduct investment advisory business, (2) information about their 25 largest offices in terms of number of employees, (3) each office's CRD branch number, and (4) for each office, the number of employees performing advisory functions and information regarding business activities.<sup>11</sup>
- Whether the adviser's chief compliance officer receives compensation or is employed by a person other than the adviser for providing compliance services, and, if so, to provide certain information regarding such person.<sup>12</sup> Currently advisers are only required to provide the name and contact information of the chief compliance officer.
- Report the adviser's assets within given ranges of less than \$1 billion, \$1 billion to \$10 billion, \$10 billion to \$50 billion and over \$50 billion instead of indicating if the adviser has assets of \$1 billion or more, as is currently required.<sup>13</sup>

**Advisory Business Information.** The SEC proposals would amend Item 5 to add certain new questions and require more detailed information in various reporting areas, as follows:

- *Item 5.D.(1)-(2):* Currently advisers report on (1) the number of advisory clients, (2) the types of advisory clients, and (3) RAUM attributable to client types within ranges. The amendments would require reporting of the precise number of advisory clients and RAUM attributable to client types instead of a range. The amendments also would add sovereign wealth funds and foreign official institutions as a client type, and specify that state or municipal government entities include government pension plans.<sup>14</sup>
- *Item 5.C.(1):* New Item 5.C.(1) would require reporting on the number of clients an adviser provided advisory services to without attributable RAUM.
- *Item 5.J.(2):* New Item 5.J.(2) would require an adviser to indicate whether it has elected to report client assets under Part 2A of Form ADV differently from RAUM reported in Part 1A.
- *Item 5.F.(3):* New Item 5.F.(3) would require an adviser to report the approximate amount of RAUM attributable to non-U.S. clients.
- *Section 5.G.(3):* The amendments would revise Section 5.G.(3) of Schedule D to require advisers to report RAUM of all

<sup>11</sup> *Id.* at 18. See also Form ADV, Part 1A, Item 1.F. and Section 1.F. of Schedule D.

<sup>12</sup> *Id.* at 19. See also Proposed Form ADV, Part 1A, Item 1.J.

<sup>13</sup> *Id.* at 19. See also Proposed Form ADV, Part 1A, Item 1.O.

<sup>14</sup> *Id.* at 21.

# SEC Proposes Expanding Reporting Requirements for Investment Advisers

“parallel managed accounts”<sup>15</sup> that are related to a registered investment company or business development company advised by the adviser.

- *Item 5.I.*: The amendments would revise Item 5.I. to require reporting of RAUM attributable to acting as a sponsor or portfolio manager of a wrap fee program and revise Section 5.I.(2) of Schedule D to require reporting of the sponsor’s SEC File and CRD Numbers.

## Financial Industry Affiliations and Private Fund Reporting

The proposals would amend Sections 7.A. and 7.B.(1) of Schedule D (1) to require advisers to report certain identifying numbers, such as Public Company Accounting Oversight Board registration numbers and CIK numbers in response to several questions, as well as (2) add a new question that would require reporting of the percentage of a private fund owned by “qualified clients,” as defined in rule 205-3 under the Advisers Act.

## Umbrella Registration

The SEC proposals would revise the current Form ADV, which is intended to provide for reporting by advisers organized as a single entity, to provide for “umbrella registration” allowing for a more efficient registration for advisers to private funds that are organized as a group of related advisers but effectively operate a single advisory business to register on one Form ADV.

The SEC previously issued guidance detailing the conditions under which advisers could file a single Form ADV for related entities.<sup>16</sup> The new proposals would codify the concept of umbrella registration as permitted in past guidance. Umbrella registration would be available to an adviser where the “filing adviser and one or more relying advisers conduct a single private fund advisory business and each relying adviser is controlled by or under common control with the filing adviser.”<sup>17</sup> Related advisers that operate separate advisory businesses would still be required to file separate Form ADVs.

To qualify for umbrella registration, the below conditions would need to be met:

- The advisers filing a single Form ADV must advise only private funds and “qualified clients” in separately managed accounts

<sup>15</sup> See proposed Form ADV, Part 1A, Section 5.G.(3) of Schedule D.

<sup>16</sup> See January 2012 SEC no-action letter, available [here](#), that (1) confirmed and expanded prior 2005 SEC guidance (available [here](#)) as to the availability of relief from registration under the Advisers Act of certain special purpose vehicles established by investment advisers that are registered with the SEC (“registered advisers”) to act as general partners or managing members to their affiliated private funds, and (2) provided guidance regarding registration issues for certain other advisory entities that are affiliated with registered advisers. For a more detailed discussion of the 2012 SEC no-action letter, see Skadden’s February 13, 2012, mailing, available [here](#).

<sup>17</sup> *Id.* at 29.

that are otherwise eligible to invest in the private funds and that pursue investment strategies substantially similar or otherwise related to those private funds.

- The filing adviser must have its principal place of business in the United States.
- The advisers relying on the filing adviser and their employees must be subject to the filing adviser’s supervision and control.
- The relying advisers must be subject to the Advisers Act and SEC examination.
- The relying advisers and filing adviser must follow a single code of ethics and set of written policies and procedures administered by the same chief compliance officer.

The single Form ADV must include all information concerning the filing adviser and each relying adviser. The filing adviser must include this same information in any other reports or filings it must make under the Advisers Act, such as Form PF.<sup>18</sup> The proposal also would add a new Schedule R to Part 1A to be filed for each relying adviser and would seek (1) identifying information, (2) the basis for SEC registration, and (3) ownership information about each relying adviser.<sup>19</sup> Finally, a new question would be added to Schedule D that asks advisers to identify the filing advisers and relying advisers that manage or sponsor private funds reported on Form ADV.<sup>20</sup>

## Clarifying and Technical Amendments to Form ADV

The SEC’s proposal would make certain clarifying and technical amendments to Form ADV to streamline the filing process for advisers, many of which are derived from frequent questions to SEC staff.

*Item 2.* The phrase “newly formed adviser” would be deleted from Item 2.A.(9) and Section 2.A.(9) of Schedule D to make clear that the exemption from the prohibition on SEC registration contained in rule 203A-2(c) under the Advisers Act is not limited to “newly formed” entities.<sup>21</sup>

*Item 4.* The SEC would add clarifying text to Item 4 and Section 4 of Schedule D to make clear that “succeeding to the business of a registered investment adviser includes, for example, a change of structure or legal status (*e.g.*, form of organization or state of incorporation).”<sup>22</sup>

*Item 7.* The proposals would make certain technical amendments to Item 7 regarding an adviser’s industry affiliations and private funds, as follows:

<sup>18</sup> *Id.* at 32.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* See also Proposed Form ADV, Part 1A, Section 7.B.(1) of Schedule D, Question 3(b).

<sup>21</sup> See Proposed Form ADV, Part 1A, Item 2.A.(9); see rule 203A-2(c) under the Advisers Act.

<sup>22</sup> See proposed Form ADV, Part 1A, Item 4.A.

# SEC Proposes Expanding Reporting Requirements for Investment Advisers

- Revise Item 7.A. to make clear that information regarding employees that perform investment advisory functions or who are registered representatives of a broker-dealer should be reported in Item 5.B. instead of Item 7.A.<sup>23</sup>
- Add text to Item 7.B. in order to clarify that Section 7.B.(1) of Schedule D should not be completed if another SEC-registered adviser or SEC exempt reporting adviser reports the information required.<sup>24</sup> The proposal also would make certain other changes to Section 7.B.(1) to clarify and request additional information. The SEC is proposing, for example, to add text to clarify that the adviser should not consider feeder funds as clients who are solicited to invest in a private fund. The SEC also is proposing to clarify that an adviser should report if a private fund has ever relied on Regulation D.<sup>25</sup>

*Item 8.* The SEC would clarify that Item 8 should be answered by advisers based upon the types of participation and interest the adviser expects to engage in during the next year.<sup>26</sup> The proposal also would make the following changes to Item 8:

- Revise Item 8.B.(2) regarding recommendations of securities to advisory clients “to clarify that the question applies to any related person who recommends to advisory clients or acts as a purchaser representative for advisory clients with respect to the purchase of securities for which the adviser or any related person of the adviser serves as underwriter, general or managing partner.”
- Revise Item 8.H. such that it would contain two parts: (1) regarding compensation for client referrals to non-employees, and (2) compensation to employees (other than regular salaries) for obtaining clients.
- Clarify that Item 8.I., regarding compensation received by the adviser or related persons for client referrals, does not include an employee’s regular salary received from the adviser.

*Section 9.C. of Schedule D.* The proposal would make two changes to Section 9.C. of Schedule D to (1) require advisers to report the Public Company Accounting Oversight Board registration number of the adviser’s public accountant, and (2) ask whether all of the reports by an independent public accountant contained unqualified opinions.<sup>27</sup>

*Item 11.* The proposal would amend Item 11 regarding disclosure reporting pages to clarify that both registered and exempt reporting

advisers may remove a disclosure reporting page from their Form ADV record if a criminal, regulatory or civil judicial action was resolved in the adviser’s (or advisory affiliate’s) favor.<sup>28</sup>

Amendments to Instructions and Glossary. The proposal also would make certain conforming amendments to the instructions and glossary for Form ADV, including the addition of umbrella registration instructions, certain definitions and certain other clarifying changes and updates.<sup>29</sup>

## Amendments to Books and Records Rule 204-2

The SEC proposed two amendments to the Investment Advisers Act rule 204-2 relating to books and records to impose additional requirements related to the calculation and distribution of performance information.

The first amendment would revise rule 204-2(a)(16) to require advisers to keep additional materials<sup>30</sup> relating to the calculation and distribution of performance or rate of return information that is distributed, directly or indirectly, to any person.<sup>31</sup> Records are currently only required if information is distributed to 10 or more persons. The proposal would eliminate the 10-person threshold.

The second amendment would revise rule 204-2(a)(7) to require advisers to maintain a new category of information: all written communications sent by an investment adviser relating to the performance or rate of return of any or all managed accounts or securities recommendations.<sup>32</sup>

## Technical Amendments to Advisers Act Rules

Finally, the SEC is proposing certain technical amendments to the Advisers Act rules to remove transition provisions related to the Dodd–Frank Wall Street Reform and Consumer Protection Act.<sup>33</sup>

Public comments should be submitted to the SEC on or before August 11, 2015.

<sup>28</sup> Proposed Form ADV, Part 1A, Criminal, Regulatory Action and Civil Judicial Action Disclosure Reporting Pages.

<sup>29</sup> *Id.* at 43.

<sup>30</sup> See rule 204-2(a)(16) for a list of materials required to be maintained.

<sup>31</sup> *Id.* at 44-45.

<sup>32</sup> *Id.* at 45.

<sup>33</sup> *Id.* at 46.

<sup>23</sup> See proposed Form ADV, Part 1A, Item 7.

<sup>24</sup> See Proposed Form ADV, Part 1A, Section 7.B.(1) of Schedule D.

<sup>25</sup> Advisers Act Release at 37-40.

<sup>26</sup> *Id.* at 40.

<sup>27</sup> See proposed Form ADV, Part 1A, Section 9.C.(6) of Schedule D.