

SEC Adopts Amendments to Form ADV and Investment Advisers Act

The Securities and Exchange Commission (“SEC”) recently issued amendments to particular recordkeeping rules under the Investment Advisers Act of 1940 as well as Form ADV. In general, these amendments will affect SEC-registered investment advisers and state-registered investment advisers. Although the amendments will become effective 60 days after publication in the Federal Register, investment advisers will not need to comply with the amendments until October 1, 2017. Thus, most investment advisers will not encounter the amended Form ADV until early 2018 when they file their annual Form ADV updates.

Background

Under the Investment Advisers Act, investment advisers must register with the SEC and the states using Form ADV, which must be updated annually. The recent amendments to Form ADV were designed to improve the SEC’s ability to collect data and monitor the asset management industry. To that end, the Form ADV amendments will:

- Require investment advisers to disclose additional data on an aggregate level regarding their separately managed accounts;
- Clarify previous amendments and instructions; and
- Allow certain private fund investment advisers operating as a single advisory business to register under one Form ADV (umbrella registration).

Amendments Regarding SMAs

Under the amendments, investment advisers must disclose additional information concerning their separately managed accounts (SMAs). SMAs are defined as all advisory accounts except registered investment companies, business development companies, and pooled investment vehicles that are not registered investment companies.

Investment advisers will be required to disclose data on the types of assets owned and the use of derivatives and borrowings in their SMAs. For example, for advisers with at least \$10 billion in SMA assets under management, the annual Form ADV update must include mid-year and end-of-year percentages of SMA assets in 12 broad categories. Advisers with less than \$10 billion in SMA assets under management must only include such percentages at the end of the year.

Advisers with a minimum of \$500 million in SMA assets must report information on the use of borrowings and derivatives in their SMA accounts, while investment advisers with \$10 billion or more in SMA assets under management are also required to classify the derivative exposures across six particular derivatives classifications. In addition, investment advisers must disclose any custodians that retain at least 10% of their SMA assets under management and report the total number of assets held at the custodians.

Umbrella Registration

The recent amendment also codifies the umbrella registration process, by which private fund advisers operating a single advisory business file a single Form ADV. According to a 2012 no-action letter, advisers previously could use a type of umbrella registration.

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Under the amendment, private fund advisers may use the umbrella registration if the following five conditions are satisfied:

- The filing investment adviser and any relying investment advisers operate a single private fund advisory business and provide advice only to private funds and specific SMAs of qualified clients;
- The filing investment adviser has its principal place of business in the United States;
- Any relying investment advisers and its employees are controlled and managed by the filing investment adviser;
- The advisory activities of each relying investment adviser are subject to the Investment Advisers Act and the rules thereunder, and each relying investment adviser is subject to examination by the SEC; and
- The filing investment adviser and each relying investment adviser use one code of ethics and one set of written guidelines that comply with the Investment Advisers Act and are administered by a single chief compliance officer.

Investment Advisers Act

Under the amended Books and Records Rule, if investment advisers communicate with *any* person about the calculation of their performance or rate of return, then the investment advisers must retain additional documentation regarding such calculation. In other words, the amendment eliminates the current 10-person threshold. Additionally, when investment advisers receive written communications about their performance or rate of return, they must retain the originals. Investment advisers must also maintain copies of all written communications they send relating to performance or rate of return.

Conclusion

Investment advisers subject to the Investment Advisers Act should consider these recent amendments when filing their Form ADV. HSE attorneys can assist you in reviewing and drafting Form ADV to protect your interests while complying with the law. If you would like more information regarding these amendments and how they may apply to your company, please contact a member of our firm's Securities Group at 585-232-6500. ■



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