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SEC Proposes Amendments to Form ADV and Performance Information Recordkeeping Requirements

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On May 20, 2015, the Securities and Exchange Commission (SEC) released proposed amendments to Form ADV and Rule 204-2 under the Investment Advisers Act of 1940 (Advisers Act).[1] The proposed amendments, if adopted, would require investment advisers to provide additional information on Form ADV and expand their obligation to maintain records of performance calculations and performance-related communications.

Proposed Amendments to Form ADV

According to the SEC's press release, the proposed amendments to Form ADV seek to gather additional information for the SEC and the public to better understand the risk profile of individual investment advisers and the industry overall. The proposed amendments would require an investment adviser to report additional information on its separately managed account clients and other facets of its advisory business. Moreover, the proposed amendments would codify the umbrella registration process for private fund adviser entities operating as a single advisory business.

Additional Information Regarding Separately Managed Accounts

Under the proposed amendments, an investment adviser would be required to report more specific information on its separately managed accounts (SMAs). For purposes of Form ADV, the SEC considers SMAs as any advisory accounts other than those that are pooled investment vehicles (*e.g.*, private funds, business development companies and registered investment companies). Among other things, the proposed amendments would add questions to Part 1A of Form ADV to elicit data on the types of investments made by SMAs and the SMAs' use of borrowings and derivatives, including:

- The percentage of regulatory assets under management (RAUM) attributable to SMAs that is invested in and among various specified asset categories;

The number of SMAs falling within certain specified ranges of gross notional exposure and the weighted average amount of borrowings in such SMAs; and

- The weighted average gross notional value of derivatives, expressed as a percentage of net asset value, in various specified categories of derivatives (for an investment adviser with at least $10 billion in RAUM attributable to SMAs).

Additional Information Regarding Investment Advisers

The proposed amendments would add other questions to Part 1A of Form ADV to collect additional information regarding the adviser, its advisory business and affiliations, including:

- Web addresses of the adviser's social media accounts (such as Twitter, LinkedIn and Facebook);
- Total number of offices at which the adviser conducts investment advisory business and information regarding the 25 largest offices (in terms of number of employees);
- Information on whether the adviser's chief compliance officer is compensated or employed by any other person and identifying information relating to such other person; and
- Percentage ownership of qualified clients (as defined under Advisers Act Rule 205-3) in each private fund reported on the adviser's Form ADV.

Umbrella Registration

In addition, the proposed amendments would codify and clarify the umbrella registration process for private fund adviser entities operating as a single advisory business. While the SEC has offered guidance on when multiple private fund adviser entities may be deemed as operating a single advisory business and therefore be eligible to file a joint Form ADV, the umbrella registration process has been limited by the fact that Form ADV is designed for an adviser operating as a single legal entity. The proposed amendments would revise Form ADV and its general instructions to add details on the umbrella registration process and the timing of filings, as well as to specify which questions in Form ADV should be answered solely with respect to the filing adviser as opposed to the filing advisers and its relying advisers.

The proposed general instructions would also set out the conditions indicating whether umbrella registration would be available:

- The filing adviser and each relying adviser advise only (i) private funds and (ii) clients in SMAs that are qualified clients and are otherwise eligible to invest in the private funds advised by the filing adviser or a relying adviser and the SMAs 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 and its rules apply to the filing adviser's and each relying adviser's dealings with each of its clients, regardless of whether any client or the reporting or relying adviser providing the advice is a United States person;
- Each relying adviser, its employees and the persons acting on its behalf are subject to the filing adviser's supervision and control and, therefore, each relying adviser, its employees and the persons acting on its behalf are "persons associated with" the filing adviser (as defined in section 202(a)(17) of the Advisers Act);
- The advisory activities of each relying adviser are subject to the Advisers Act and its rules, and each relying adviser is 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.

As the SEC noted in its proposing release, the conditions above are drawn from its experience in examinations and prior staff guidance on the topic and are intended to capture private fund adviser entities that operate as a single advisory business.

Proposed Amendments to Rule 204-2

Under Rule 204-2 of the Advisers Act, registered investment advisers are required to maintain supporting documentation for performance claims contained in any communication that is distributed to ten or more persons. The proposed amendments to Rule 204-2 would expand this obligation by removing the "ten or more persons" condition and extending the duty to keep supporting documentation to performance claims in a communication that is distributed to any person. In addition, the proposed amendments would require registered investment advisers to maintain originals of all written communications received and copies of written communications sent by a registered investment adviser relating to the performance or rate of return of any or all managed accounts or securities recommendations.

Timing

Comments on the proposed amendments are due to the SEC within 60 days after the publication of the proposing release in the Federal Register. We will continue to monitor these and any new proposals that are relevant to our private investment fund clients. Please contact any of the lawyers listed in this alert with any questions.

[1] In the same proposing release, the SEC also proposed certain technical amendments to several rules under the Advisers Act to remove transitional provisions where the transition process is complete, as well as other clarifying, technical and other amendments to Form ADV in response to inquiries from advisers and their service providers. Also on May 20, 2015, the SEC released proposed rule and form amendments relating to registered investment companies reporting requirements.

Related Professionals

- **Amanda H. Nussbaum**
  Partner
- **Scott S. Jones**
  Partner
- **Charles (Chip) Parsons**
  Partner
- **Jamiel E. Poindexter**
  Partner

- **Marc A. Persily**
  Partner
- **Ira G. Bogner**
  Managing Partner
- **Sarah K. Cherry**
  Partner
- **Bruce L. Lieb**
- **Nigel van Zyl**
  Partner
- **Michael R. Suppappola**
  Partner
- **Arnold P. May**
  Partner
- **Timothy W. Mungovan**
  Chairman of the Firm
- **Mary B. Kuusisto**
  Partner
- **David W. Tegeler**
  Partner
- **David T. Jones**
  Partner
- **Howard J. Beber**
  Partner
- **Robin A. Painter**
  Partner
- **Christopher M. Wells**
  Partner
- **Stephen T. Mears**
  Partner