Client Update
The SEC Releases New Form ADV Frequently Asked Questions

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On June 12, the Securities and Exchange Commission (the "SEC") released 23 new frequently asked questions ("FAQs") on Form ADV to provide guidance on amendments (the "Amendments") to Form ADV that investment advisers will need to comply with beginning this October.[1] Among other things, the FAQs include guidance on (i) the "umbrella registration" approach that many private fund sponsors use to register multiple affiliates (including related managers and general partners) and (ii) the reporting of significant new information concerning separately managed accounts ("SMAs"). Private fund sponsors should review these FAQs to prepare to comply with amended Form ADV.

UMBRELLA REGISTRATION FOR RELYING ADVISERS (SCHEDULE R)

The Amendments codify the umbrella registration approach (originally based on prior SEC staff no-action guidance) under which private fund sponsors may file a single Form ADV that covers the "filing adviser" as well as certain affiliated advisers ("relying advisers"). The FAQs clarify that the SEC staff is only withdrawing the portions of the no-action letter relating to umbrella registration of relying advisers.

- Registration of Special Purpose Vehicles. An existing SEC staff position permits a special purpose vehicle created to act as a private fund's general partner or managing member to rely upon the registered adviser's

[1] The FAQs are available at: https://www.sec.gov/divisions/investment/iard/iardfaq.shtml. The new or updated FAQs are attached to this Client Update. The Amendments were discussed in earlier Client Updates. See Debevoise & Plimpton Client Update: The SEC Adopts Form ADV and Recordkeeping Rule Amendments (Sept. 8, 2016), available at http://www.debevoise.com/insights/publications/2016/09/the-sec-adopts-form-adv-and-recordkeeping. See Debevoise & Plimpton Client Update: Proposed Form ADV Amendments: The New SEC Focus on Data . . . and Other Matters (June 9, 2015), available at http://www.debevoise.com/insights/publications/2015/06/proposed-form-adv-amendments.

registration.[2] The FAQs affirm that registrants may continue to rely on this position and that such general partners and managing members are not required to be reported on the new Schedule R.

- Exempt Reporting Advisers. The FAQs affirm that an exempt reporting adviser may not use the umbrella registration approach with respect to relying advisers. The SEC staff did not withdraw the FAQs with respect to using umbrella registration for certain related general partners of exempt reporting advisers.
- Filing Form ADV-NR. The FAQs affirm that a nonresident general partner or managing agent of a relying adviser is required to file Form ADV-NR.
- Changing and Removing a Relying Adviser. The FAQs provide guidance on how to switch a relying adviser from filing as a relying adviser to an exempt reporting adviser and how to delete a relying adviser from a Form ADV.

INFORMATION ABOUT CLIENTS (ITEM 5.D)

- Subadvised Assets. The FAQs provide guidance that a subadviser to an investment company, business development company, or pooled investment vehicle client should treat the entity (rather than the entity's primary adviser) as the client for purposes of reporting on Item 5.D.
- Pooled Investment Vehicles. The FAQs provide that, for purposes of reporting on client assets, pooled investment vehicles are not limited to private funds (for example, real estate funds). However, the SEC staff cautioned that a "fund of one" should not be reported as a pooled investment vehicle if it "operates as a means for the adviser to provide individualized investment advice directly to the investor in the fund."

OTHER FAQS OF PARTICULAR INTEREST TO PRIVATE FUND SPONSORS

- Social Media Presence. Guidance on disclosing an investment adviser's accounts on social media platforms where the adviser controls the content, but not including employee accounts. (Item 1.I)
- SMA Disclosure. Guidance on how to answer new questions about an investment adviser's regulatory assets under management attributable to

[2] See American Bar Association's Subcommittee on Private Investment Entities, SEC Staff No-Action Letter (Dec. 8, 2005) (available at https://www.sec.gov/divisions/investment/noaction/aba120805.htm) and American Bar Association, Business Law Section, SEC Staff No-Action Letter (Jan. 18, 2012) (available at http://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm).

SMAs, including information about the use of borrowings and derivatives transactions on behalf of SMA clients. (Item 5.K)

- Distribution of Audited Financial Statements. Guidance on checking the box for delivery of audited financial statements if the audited financial statements will be distributed to the private fund's investors as required, but have not yet been distributed. (Schedule D, Section 7.B.(1))

The FAQs also include guidance on disclosing whether the investment adviser's CCO is compensated or employed by any person other than the adviser for providing CCO services. (Item 1.J)

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As a reminder, the amendments to Form ADV will not impact most current registrants until they file the annual update amendments to their Form ADVs in the first quarter of 2018. However, private fund sponsors should continue identifying the type of information that they will have to include in their other-than-annual amendments.

Please do not hesitate to contact us with any questions.

NEW FAQS

Form ADV: Item 1.I [Social Media]

Q: Does an adviser have to report the address of an account on a publicly available social media platform where an unaffiliated third party distributor or solicitor controls the content?

A: No. An adviser should not provide the address of websites or accounts on publicly available social media platforms where the adviser does not control the content. As discussed in the adopting release, to the extent an account is used to promote the business of an adviser registered with the Commission and the adviser controls the content, the account should be reported. See Form ADV and Investment Advisers Act Rules, Investment Adviser Act Release No. 4509 at p. 34-39 (August 25, 2016). Moreover, Schedule D, Section 1.I of Form ADV specifies that the only website addresses that should be reported are ones where the adviser "controls the content." (Posted June 12, 2017)

Q: Information about my advisory firm is included on an account on a social media platform where a third party controls the content. The platform provides job listings and enables the public to rate and review companies. Should I include the address of that account for purposes of Item 1.I?

A: No. You should not provide the address of websites or accounts on social media platforms where the adviser does not control the content. (Posted June 12, 2017)

Q: The parent company of an adviser created and maintains a social media account that references the business of the adviser. Should the adviser report the address of that account for purposes of Item 1.I?

A: It depends. An adviser needs to provide only the addresses of websites or accounts on publicly available social media platforms where the adviser controls the content. Whether an adviser controls the content of such an account depends on the facts and circumstances. For example, the staff believes that if the adviser provides content for the account and is aware that its parent company uses the account to promote the adviser's business, then the adviser may be in control of the content and therefore would have to report the account's address. On the other hand, if such an account merely mentions the adviser as one of the parent company's subsidiaries, but is not used to promote

the adviser's business, then the adviser may not be in control of the content and therefore could omit reporting the account's address. (Posted June 12, 2017)

Q: Should the adviser report the address of an employee's account on a publicly available social media platform if the adviser controls the content of the account?

A: No. For purposes of Item 1.I, an adviser is required to list the address for each of the firm's accounts on publicly available social media platforms. As discussed in the adopting release, this item is not intended to extend to the social media accounts of an adviser's employees regardless of whether the adviser controls the content of such accounts. See Form ADV and Investment Advisers Act Rules, Investment Adviser Act Release No. 4509 at p. 35 (August 25, 2016). (Posted June 12, 2017)

Form ADV: Item 1.J [Chief Compliance Officer Information]

Q: My firm's Chief Compliance Officer provides chief compliance officer services to my firm and two other firms. Those two other firms employ and compensate the Chief Compliance Officer for the services provided to their respective firms and not for the services provided to my firm. What should my firm answer for Item 1.J.(2)?

A: Your firm should leave Item 1.J.(2) blank. Item 1.J.(2) requires information only where another person employs or compensates your Chief Compliance Officer for providing chief compliance officer services to your firm. In this case, the two other firms are employing and compensating your Chief Compliance Officer, but for the services provided to them – not the services provided to your firm. (Posted June 12, 2017)

Form ADV: Item 1.O [Balance Sheet Assets]

Q: My firm has more than $1 billion in regulatory assets under management. Should the firm answer "yes" to Item 1.O?

A: Not necessarily. Item 1.O requires an adviser to indicate whether it had $1 billion or more in total assets shown on the adviser's balance sheet as of the last day of the adviser's most recent fiscal year end. As noted in the Form ADV instruction for Item 1.O, "assets" refers to the adviser's total assets, not the assets managed on behalf of clients. Therefore, for instance, a firm that has $5 billion in regulatory assets under management, but only $300 million in total assets on its balance sheet for its most recent fiscal year end would answer "no" to Item 1.O. Non-proprietary assets, such as client assets under management, should be

excluded when responding to Item 1.O, regardless of whether they appear on an investment adviser's balance sheet. (Updated June 12, 2017)

Form ADV: Item 5.D [Clients]

Q: If my advisory firm acts as a subadviser to an investment company, business development company, or pooled investment vehicle, how should I respond to Item 5.D about the category of clients?

A: A firm that subadvises an investment company, business development company, or other pooled investment vehicle is providing advice to such company or vehicle. Accordingly, you should report those assets in Item 5.D. in rows (d), (e) or (f) (as applicable). Do not report the client in Item 5.D.(j) as "Other investment advisers". (Posted June 12, 2017)

Q: Item 5.D requires advisers to report the approximate number of clients and the amount of total regulatory assets under management attributable to certain categories of client. My advisory firm does not have any high net worth individual clients to report in Item 5.D.(b). Should I check column 5.D.(2) to report "Fewer than 5 Clients" for that category of client?

A: While the staff recognizes that the instructions to Item 5.D. state that "if you have fewer than 5 clients in a particular category (other than (d), (e), and (f)) you may check Item 5.D.(2) rather than respond to Item 5.D.(1), if you do not have any clients for a particular category, the staff encourages you to report "0" in column 5.D.(1), "Number of Client(s)". (Posted June 12, 2017)

Q: For purposes of Item 5.D, are "pooled investment vehicles" limited to private funds (which are defined in the Form ADV Glossary)?

A: No. For purposes of Item 5.D, pooled investment vehicles include, but are not limited to, private funds. Whether other types of funds (aside from investment companies or business development companies, which are separate categories in Item 5.D.) should be considered pooled investment vehicles depends on the facts and circumstances. The staff believes that, in choosing a category for its client in Item 5.D., an adviser should be consistent with information that it reports internally and in other regulatory filings.

For example, funds that would be investment companies as defined in section 3 of the Investment Company Act of 1940 but for sections 3(c)(5) or 3(c)(11) of that Act would typically be considered pooled investment vehicles in Item 5.D. Similarly, UCITS funds that are regulated by the European Commission and that

are not registered under the Investment Company Act would also typically be considered pooled investment vehicles in Item 5.D.

Additionally, the staff believes for purposes of Item 5.D there are some facts and circumstances in which it may be appropriate for an adviser to treat a single-investor fund (also known as a "fund of one") as a pooled investment vehicle. For example, an adviser could reasonably treat a single-investor fund as a pooled investment vehicle where the fund seeks to raise capital from multiple investors but has only a single, initial investor for a period of time, or where all but one of the investors in the fund have redeemed their interests. However, an adviser generally should not consider a single-investor fund to be a pooled investment vehicle if that entity in fact operates as a means for the adviser to provide individualized investment advice directly to the investor in the fund. See Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Investment Adviser Act Release No. 3222 at p. 78-79 (June 22, 2011). (Posted June 12, 2017).

Form ADV: Item 5.K [SMA Information]

Q: I am an adviser relying on rule 203A-2(c) to register with the SEC because I expect to be eligible for SEC registration within 120 days of filing my initial Form ADV filing. I do not currently manage any assets. How should I respond to Schedule D, Section 5.K.?

A: For purposes of providing end of year information to respond to Section 5.K.(1), the staff believes that you should enter "100%" in the "Other" category and indicate in the Miscellaneous section of Schedule D that you do not have any responsive data to report for Schedule D, Section 5.K.(1) because you are relying on rule 203A-2(c) as your basis for registration.

If you are required to report mid-year information on Schedule D, Sections 5.K.(1) and 5.K.(2), but did not manage assets for separately managed account clients as of the mid-year date, you may adopt the same approach. That is, you also may enter "100%" in the "Other" category and indicate in the Miscellaneous section of Schedule D that you do not have responsive data to report for the mid-year date in Schedule D, Section 5.K.(1).

As noted in Schedule D, Section 5.K., each column should add up to 100%. (Posted June 12, 2017)

Q: I am an adviser to private funds and report information about parallel managed accounts to the private funds that I manage in Question 11 of Form PF, in accordance with the instructions to that form. Should I treat those parallel managed accounts as separately managed accounts for purposes of answering Item 5.K. and Schedule D, Section 5.K of Form ADV?

A: Yes. Item 5.K. instructs advisers to report regulatory assets under management attributable to clients "other than those listed in Item 5.D.(3)(d)-(f)." Because parallel managed account (which is defined in the Form PF Glossary of Terms) clients that are not registered investment companies, business development companies, or pooled investment vehicles are not reported in Item 5.D.(3)(d)-(f), they should be considered separately managed account clients for purposes of responding to questions in Item 5.K or Schedule D, Section 5.K. (Posted June 12, 2017)

Q: Item 5.K.(2) asks whether an adviser engages in borrowing transactions on behalf of any of the adviser's separately managed account clients. What types of transactions should I consider to be borrowings for purposes of reporting on Item 5.K.(2) and Schedule D, Section 5.K.(2)?

A: For purposes of Item 5.K.(2) and Schedule D, Section 5.K.(2), the staff believes that borrowings should include traditional lending activities such as client bank loans and margin accounts, other secured borrowings and unsecured borrowings, synthetic borrowings and transactions involving synthetic borrowings (e.g., total return swaps that meet the failed sale accounting requirements), transactions selling securities short, and transactions in which variation margin is owed, but as a result of not reaching a certain set threshold, has not been paid by the client. For the purposes of Item 5.K.(2) and Schedule D, Section 5.K.(2), the staff believes that advisers should not report leverage embedded through the use of derivatives, securities lending or repurchase agreements as borrowings. (Posted June 12, 2017)

Q: A client of my advisory firm arranged a personal loan without the firm's knowledge and used those loan proceeds to invest assets in its advisory account. Should I report this as a "borrowing transaction" for purposes of Item 5.K.(2)?

A: Item 5.K.(2) requires advisers to report if they "engage in borrowing transactions on behalf of any of the separately managed account clients" that they advise. Accordingly, advisers are not required to report client borrowings of which they are not aware. However, the adviser may not indirectly arrange borrowing transactions for separately managed account clients in order to

circumvent any obligation to report those transactions on Form ADV. (Posted June 12, 2017)

Q: When answering Schedule D, Section 5.K.(2) about the use of borrowings and derivatives on behalf of separately managed account clients that I advise, do I have to indicate Gross Notional Exposure of "Less Than 10%" if there is no gross notional exposure in connection with the assets I manage for my separately managed account clients?

A: No. If there is no gross notional exposure to report for the assets you manage for your separately managed account clients, you do not need to complete this section. As the instructional notes following Items 5.K.(2) and 5.K.(3) indicate, only those advisers that report that they engage in borrowing or derivatives transactions on behalf of any of the separately managed account clients that they advise should complete Schedule D, Section 5.K.(2). (Posted June 12, 2017)

Q: A custodian that holds ten percent or more of my separately managed account clients' regulatory assets under management has arranged to use a "sub-custodian" for some custodial services, such as settling trades or trade execution. For purposes of Item 5.K.(4) and Schedule D, Section 5.K.(3), am I required to report such a sub-custodian?

A: No. In the circumstances described above, the staff believes that you are only required to report the custodian in response to Item 5.K.(4) and Schedule D. Section 5.K.(3). (Posted June 12, 2017)

Form ADV: Item 7.B [Private Fund Reporting]

Q: How do I find the Public Company Accounting Oversight Board ("PCAOB")-Assigned Number requested in Schedule D, Section 7.B(1)(23)(e) of Form ADV?

A: You can search for information about auditing firms currently registered with the PCAOB at the PCAOB's webpage https://pcaobus.org/Registration/Firms/Pages/RegisteredFirms.aspx. Search for the relevant auditing firm by entering its "Firm Name" and clicking "Search Firms." In the results that are displayed, the PCAOB-Assigned Number can be found in parentheses after the name of the auditing firm. (Posted June 12, 2017)

Q: How should I answer question 23(g) of Schedule D, Section 7.B.(1) if the private fund's audited financial statements for the most recently completed fiscal year will be distributed to the private fund's investors, but have not yet been distributed to the private fund's investors?

A: You may answer "Yes" if you will distribute the audited financial statements as required, but have not yet done so at the time of filing the Form ADV. (Posted June 12, 2017)

Schedule R [Umbrella Registration]

Q: Is the Staff withdrawing the January 18, 2012 letter addressed to the American Bar Association, Business Law Section ("2012 ABA Letter") (available at http://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm)?

A: The Staff is withdrawing only the staff's response to Question 4 of the 2012 ABA Letter, which has been superseded by the Commission's adoption of amendments to Form ADV that codify umbrella registration for certain advisers to private funds. See Form ADV and Investment Advisers Act Rules, Investment Adviser Act Release No. 4509 at p. 61-75 (August 25, 2016). In the 2012 ABA Letter, the staff in its answer to Question 4 stated that it would not recommend enforcement action to the Commission against an investment adviser that files (or amends) a single Form ADV on behalf of itself and each "relying adviser" under certain described circumstances. That staff position has now been codified in Form ADV. (Posted June 12, 2017)

Q: Is a non-resident general partner or managing agent of a relying adviser required to file Form ADV-NR, even if the relying adviser itself is a resident in the United States?

A: Yes. As specified in Form ADV-NR, every non-resident general partner and managing agent of any investment adviser (domestic or non-resident) must file a Form ADV-NR. Because a relying adviser reporting on Schedule R of Form ADV is an investment adviser, every non-resident general partner and managing agent of such relying adviser must file Form ADV-NR in connection with the relying adviser's initial reporting on Schedule R. A general partner or managing agent of a relying adviser who becomes a non-resident after the relying adviser's initial reporting on Schedule R must file Form ADV-NR within 30 days of the date of becoming a non-resident. (Posted June 12, 2017)

Q: Should my advisory firm file Schedule R with respect to a special purpose vehicle ("SPV") described in the 2005 and 2012 staff letters to the American Bar Association? In those letters, the staff stated that it would not recommend enforcement action to the Commission against a registered investment adviser that creates an SPV to act as a private fund's general partner or managing member and that relies upon the registered adviser's registration with the Commission rather than separately register. See December 8, 2005 letter

addressed to the American Bar Association's Subcommittee on Private Investment Entities ("2005 Staff Letter") (available at https://www.sec.gov/divisions/investment/noaction/aba120805.htm) and January 18, 2012 letter addressed to the American Bar Association, Business Law Section ("2012 Staff Letter") (available at http://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm).

A: No, the 2005 Staff Letter and 2012 Staff Letter continue to represent the staff's position. The staff would not recommend enforcement action to the Commission against an SPV that does not file a Schedule R, but meets the fact patterns and conditions described in the 2005 Staff Letter (and described in the 2012 Staff Letter as the "2005 Conditions"). (Posted June 12, 2017)

Q: Is umbrella registration (and the filing of Schedule R) permitted for exempt reporting advisers?

A: No, as indicated in the Note to General Instruction 5. Umbrella registration is available only for "filing advisers" and "relying advisers" to register with the Commission. Each filing adviser and relying adviser must satisfy the definitions of those terms (including that it is otherwise "eligible to register" with the Commission) and meet the conditions set forth in General Instruction 5. (Posted June 12, 2017)

Q: How do I switch a relying adviser from filing as a relying adviser on Schedule R to being an exempt reporting adviser?

A: The relying adviser should first submit its own Form ADV as an exempt reporting adviser.

Once that Form ADV is submitted, the filing adviser should file an other-than-annual amendment to its Form ADV. On Schedule D of the amendment, the adviser should remove the relying adviser and any private funds advised by the relying adviser by selecting the "Delete" option in Section 7.B.(1) of Schedule D. On Schedule R of the amendment, the adviser should delete the existing Schedule R for the ineligible relying adviser by selecting the "Delete" option and selecting "No Longer Eligible" from the drop-down menu. A pop-up warning message will be displayed, which the adviser should review before selecting either "OK" or "Cancel". (Posted June 12, 2017)

Q: Can a relying adviser be deleted from a Form ADV simply by selecting Item (9) ("are no longer eligible to remain registered with the SEC") in Section 2?

A: No. In addition to selecting Item (9), the filing adviser must also select one of the two options under "Delete a Schedule R" at the top of Schedule R. (Posted June 12, 2017)