

INVESTMENT MANAGEMENT

SEC AMENDS FORM ADV AND RECORDKEEPING RULES

By Scott H. Moss, Esq. and George Danenhauer, Esq.

On August 25, the Securities and Exchange Commission (the “SEC”) adopted a final rule making amendments to Form ADV providing for (i) the disclosure of additional information regarding advisers, including information about their separately managed accounts, (ii) a method for private fund adviser entities operating a single advisory business to register using a single Form ADV, and (iii) certain clarifying, technical, and other amendments to certain Form ADV items and instructions. The SEC also adopted amendments to the books and records rule under the Investment Advisers Act of 1940 (the “Advisers Act”).

Background

The amendments adopted in the final rule are largely consistent with the proposed amendments, but with several modifications to address comments received. Compliance with the amendments adopted in the final rule is generally required on or after October 1, 2017. The amendments are summarized below.

Separately Managed Accounts

Advisers are required to report aggregate information about their separately managed accounts, which the SEC considers to include all advisory accounts other than those that are pooled investment vehicles (i.e., registered investment companies, business development companies, and pooled investment vehicles that are not registered). The specific separate

account reporting requirements include amendments to Item 5 of Part 1A and Section 5 of Schedule D of Form ADV requiring aggregate-level information regarding separately managed accounts:

- Section 5.K.(1) of Schedule D requires the reporting of the approximate percentage of separately managed account regulatory assets under management that are invested in 12 broad asset categories, with such percentages to be reported annually by advisers with less than \$10 billion in regulatory assets under management attributable to separately managed accounts and twice a year by advisers with \$10 billion or more in such regulatory assets under management;
- Section 5.K.(2) of Schedule D requires the reporting of information regarding the use of borrowings and derivatives in separately managed accounts. Advisers having at least \$500 million in regulatory assets under management attributable to separately managed accounts are required to report the amount of such regulatory assets under management and the dollar amount of borrowings attributable to those assets that correspond to three levels of gross notional exposure (less than 10%, 10% -149%, and 150% or more). Advisers with \$10 billion or more in such regulatory assets under management are also required to report information concerning derivatives exposures across six derivatives categories. Advisers may exclude any separately managed

accounts with regulatory assets under management of less than \$10 million; and

- Section 5.K.(3) of Schedule D requires advisers to identify the custodians that account for at least 10 percent of separately managed account regulatory assets under management and the amount of such assets held at the custodian.

Umbrella Registration

To use umbrella registration, the adviser is required to file, and update as required, a single Form ADV (Parts 1 and 2) that relates to and includes all information concerning the adviser and each relying adviser, and must include this same information in any other reports or filings it must make under the Advisers Act. Advisers are permitted to use umbrella registration subject to a number of conditions (which are consistent with the conditions required under previous no-action guidance):

- The filing adviser and each relying adviser must advise only (i) private funds, and (ii) separately managed accounts (a) whose beneficial owners are “qualified clients” and who are otherwise eligible to invest in such advisers’ private funds and (b) that pursue investment objectives and strategies that are substantially similar or otherwise related to those private funds;
- The filing adviser must have its principal office and principal place of business in the United States;

- Each relying adviser and its employees and persons acting on its behalf must be subject to the filing adviser's supervision and control and, therefore, must all be "persons associated with" the filing adviser;
- The advisory activities of each relying adviser must be subject to the Advisers Act, and each relying adviser must be subject to examination by the SEC; and
- The filing adviser and each relying adviser must operate under a single code of ethics and written policies and procedures administered by a single chief compliance officer.

Each relying adviser must file a new Schedule R to Part 1A, providing identifying information, the basis for SEC registration, and ownership information about such relying adviser. A new question on Schedule D requires the identification of the filing adviser and relying advisers who manage or sponsor the funds reported on Form ADV.

Other Amendments to Form ADV

The amendments require several additional new disclosure items in Form ADV, including disclosure of (a) all social media accounts and the address of each social media page (in addition to all websites), (b) information concerning the total number of offices along with the 25 largest offices and information concerning their employees, businesses, and activities, (c) information concerning any employment or compensation of the chief compliance officer by a party other than the adviser, (d) identifying information regarding certain financial

service providers, (e) information concerning the adviser's balance sheet assets, (f) information concerning the number of clients across certain specified categories and the total regulatory assets under management by category, and (g) information concerning whether sales of fund interests in 3(c)(1) funds are limited to qualified clients.

Amendments to Recordkeeping Rules

The amendments to the recordkeeping rules under Rule 204-2(a) of the Advisers Act (a) require that records supporting performance claims in communications be maintained even if distributed only to a single person and (b) require advisers to maintain originals of certain categories of written communications relating to the performance or rate of return of managed accounts or relating to securities recommendations.

Next Steps

While compliance with the final rule will not be required until October 1, 2017, advisers should familiarize themselves with the revisions to Form ADV and the recordkeeping rules, and begin the process of implementing procedures for complying therewith, including procedures for gathering information pursuant to the new disclosure requirements of Form ADV.

The text of the SEC's Final Rule adopting the amendments described herein may be found [here](#).

contacts

Please contact any of the attorneys listed, or any other member of Lowenstein Sandler's Investment Management Group, for further information on the matters discussed herein.

Scott H. Moss, Esq.
646 414 6874
smoss@lowenstein.com

George Danenhauer, Esq.
646 414 6879
gdanenhauer@lowenstein.com

Follow us on [Twitter](#), [LinkedIn](#), and [Facebook](#).

www.lowenstein.com

New York Palo Alto Roseland Washington, DC Utah

© 2016 Lowenstein Sandler LLP.

This Alert has been prepared by Lowenstein Sandler LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. Lowenstein Sandler assumes no responsibility to update the Alert based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. You should consult with counsel to determine applicable legal requirements in a specific fact situation.