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Client briefing June 2017

SEC Information Update to Form ADV FAQs

On June 12, 2017, the staff of the Division of Investment Management (the "**Staff**") of the U.S. Securities and Exchange Commission (the "**SEC**") released new guidance in the form of "Frequently Asked Questions" ("**FAQs**") for investment advisers that submit Form ADV to the SEC pursuant to the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"), either as "exempt reporting advisers" ("**ERAs**") or registrants ("**RIAs**").

The FAQs provide details on how investment advisers should respond to certain questions on Form ADV under modifications to that Form adopted by the SEC on August 25, 2016,[1] and which will be effective as of October 1, 2017.[2] The SEC's August 2016 rulemaking also codified a regime for "umbrella registration" through which multiple advisers may report jointly on Form ADV. Prior to the rulemaking and the release of the FAQs, guidance relating to umbrella registration and related issues was contained primarily in two Staff no-action letters.[3]

Pursuant to the Advisers Act amendments, investment advisers filing jointly will be required to complete new "Schedule R" for each relying adviser and disclose, among other things, what private funds, if any, those relying advisers sponsor or manage. The FAQs confirm the SEC's and the Staff's position that umbrella registration may ***not*** be used either by non-U.S. RIAs or by ERAs. Neither the SEC nor the Staff has, however, withdrawn existing FAQs that permit ERAs to file a single Form ADV on behalf of one or more special purpose vehicles ("**SPVs**").[4] And, in one FAQ, the Staff expands the scope of "pooled investment vehicles" by taking the position that, subject to the particular facts and circumstances, this term may include non-U.S. investment funds (*e.g.*, UCITs)—thereby increasing the SEC's territorial reach.

An overview of the key guidance in the recently updated FAQs appears below, and we anticipate that the Staff will release additional guidance on a rolling basis.

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[1] The SEC simultaneously adopted other amendments to Form ADV, as well as rules related to recordkeeping requirements for registered investment advisers, but the FAQs address only a subset of the SEC's rulemaking from August 2016. *See* "Form ADV and Investment Advisers Act Rules," Investment Advisers Act Release No. 4509 (August 25, 2016) available at: https://www.sec.gov/rules/final/2016/ia-4509.pdf; *see also* "Amendments to Form ADV and Investment Advisers Act Rules," Investment Advisers Act Release No. 4091 (May 20, 2015) available at: https://www.sec.gov/rules/proposed/2015/ia-4091.pdf.

[2] Each investment adviser's annual updating amendment to Form ADV is due 90 days after that investment adviser's fiscal year-end. Assuming an investment adviser's year-end is December 31, that investment adviser would be subject to the new requirements in respect of the annual update to its Form ADV that must be filed no later than March 31, 2018.

[3] Under the no-action guidance, investment advisers were permitted to file jointly only if they controlled each other (or were under common control) and operated a single advisory business, among other conditions. *See* American Bar Association Subcommittee on Hedge Funds, SEC No-Action Letter (Jan. 18, 2012) (the "**2012 ABA Letter**") (available at https://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm); American Bar Association Subcommittee on Private Investment Entities, SEC No-Action Letter (Dec. 8, 2005) (available at: https://www.sec.gov/divisions/investment/noaction/aba120805.htm, and together with the 2012 ABA Letter, the "**ABA Letters**"). In its FAQs, the Staff specifically withdraws Question 4 of the 2012 ABA Letter, in which it set parameters for "relying advisers", including that each relying adviser would be deemed fully registered, and in principle, the group of advisers must be part of a "single advisory business" that is subject to a single compliance program, and furthermore, that each adviser and its personnel were subject to the supervision and control of the filing adviser. In its FAQs to new Schedule R, however, the Staff indicates that the ABA Letters otherwise continue to represent the Staff's position.

[4] *See* FAQs at "Reporting to the SEC as an Exempt Reporting Adviser," available at: https://www.sec.gov/divisions/investment/iard/iardfaq.shtml.

Form ADV Reference	***Amendment***	***FAQ***	***ERA***	***RIA***
Item 1.I	Social media. Disclosure of such activity is required regardless of whether the adviser uses the Internet to promote its advisory business or if its activity is intended for a purely non-U.S. audience.[5]	An adviser need not list the social media accounts of employees, even if the adviser controls such accounts, nor websites or accounts on social media platforms for which the adviser does not control the content. A parent company that uses a website to promote its subsidiary's advisory business may be required to be disclosed.	☑	☑
Item 1.J	Chief Compliance Officers. An adviser must identify whether its chief compliance officer (**"CCO**") is an employee or is compensated by someone other than the adviser (or its related person), and if so, provide the name and EIN of the applicable employer.	An adviser need not disclose any information under Item 1.J(2) should its CCO also provide compliance services to other, third party advisers for which the CCO is compensated. Such third party advisers would, however, need to disclose any compensation they provide to third party CCOs on their respective Form ADVs.	☑	☑
Item 1.O	Total Assets of the Investment Adviser. An adviser must disclose if it has more than US$1 billion of assets on its own balance sheet.	For purposes of the US$1 billion threshold, "assets" refers to the assets on an investment adviser's own balance sheet rather than the assets it may manage on behalf of its clients.	☑	☑
Item 5.D	Client Categorization (General). An adviser must report its regulatory assets under management ("**RAUM**") according to client type and asset volume.	• Each wrap fee program participant is a separate "client". • A sub-adviser's "client" is the beneficiary of its advice rather than the principal investment adviser. • An adviser should report "zero" for any category in which it has no such client. • "Pooled investment vehicles" may include entities other than private funds that rely on Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, as amended, to avoid registration under such Act, including UCITs. • The Staff is of the view that an investment adviser's categorization should be consistent with the manner in which it reports such information internally and in other regulatory filings.		☑

[5] Note: Disclosure would not be required if the social media platform was used by an affiliate only in respect of that affiliate's business.

Item 5.K	Client Categorization (Separately Managed Accounts ("**SMAs**")). An adviser must report its RAUM attributable to SMAs according to the asset into which those accounts invest as well as any borrowing transactions executed on behalf of those SMAs.	• "Provisional" registrants (which do not yet but will soon have the necessary RAUM to register with the SEC) should report 100% of their assets in the "Other" category. • Parallel SMAs reported on Form PF should be treated as SMAs for purposes of this item. • "Borrowing transactions" cover a range of lending activities, including bank loans, margin accounts, as well as synthetic borrowings, short selling transactions, and transactions in which variation margin is owed, but an adviser should not report leverage through derivative exposure, securities lending or repurchase arrangements under this item. • Borrowings of which the adviser is not aware (*e.g.*, client borrowing arranged without the investment adviser's knowledge or advice, borrowings by employees that are not disclosed to the employing investment adviser) need not be reported, but the adviser may not arrange an indirect borrowing to circumvent any reporting requirement. • If a custodian that holds 10% or more of an adviser's SMA assets (and therefore must be reported) elects to use a sub-custodian, the adviser need not disclose the sub-custodian.		☑
Item 7.B	Auditors. An adviser must disclose its auditor's "Assigned Number"[6] and state whether audited financial statements have been distributed to the private fund's investors.	An adviser must consult the PCAOB's website, which lists an auditor's "Assigned Number". If a private fund's investors have not yet received audited financial statements when the adviser files Form ADV—but such audited financial statements will be distributed within the required timeframe—the adviser may nevertheless indicate that the private fund's investors have received such statements.	☑	☑
Schedule R	Relying Advisers. The filing adviser must report certain information about each "relying adviser," including its name and form of organization, the basis of its	• A relying adviser's general partner or "managing agent" must file Form ADV-NR, regardless of its residence or the residence of the adviser. • No Schedule R must be filed for SPVs that	☑	

[6] As assigned by the Public Company Accounting Oversight Board ("**PCAOB**"), which is available at: https://pcaobus.org/Registration/Firms/Pages/RegisteredFirms.aspx.

	registration, and its "control persons." This adviser must also be disclosed as part of the private fund reporting in Schedule D if that adviser manages or sponsors any private funds listed.	act as a private fund's general partner or managing member and rely on an RIA's filing rather than separately register. • Umbrella registration is ***not*** available to ERAs. [7] • Any relying adviser intending to switch to ERA status must first file its own Form ADV and thereafter the filing adviser may delete that relying adviser from its Form ADV.		

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[7] As noted above, however, similar FAQs related to the SPVs of ERAs have not been withdrawn.