

Funds Regulatory and Investigations Update

Tips and Tricks for Annual Form ADV Update Season

February 15, 2023

Registered investment advisers and exempt reporting advisers (“**ERAs**”) are required to file an annual update to Form ADV with the Securities and Exchange Commission (“**SEC**”) within 90 days after the end of their fiscal years.¹ Accordingly, a registered adviser or ERA whose fiscal year ended on December 31, 2022 must submit an annual Form ADV update no later than **Friday, March 31, 2023**. Below are some practical suggestions that registered advisers and ERAs² should consider when preparing to file their annual Form ADV updates.

Aim to File the Update by 8 p.m. (ET) on March 31, 2023

Registered advisers and ERAs should aim to submit their filings no later than 8 p.m. (ET) on the filing deadline, March 31, 2023 (and are encouraged to file earlier). The Investment Adviser Registration Depository (“**IARD**”), the system that advisory firms use to submit Form ADV filings with the SEC, is generally available until 11 p.m. (ET) on weekdays.³ However, the IARD Call Center, which provides advisory firms with IARD system support, is only available 8 a.m. to 8 p.m. (ET) from Monday to Friday. In the event that an advisory firm encounters an IARD system technical issue after 8 p.m. (ET) on the filing deadline, it would be unable to receive system support from the IARD Call Center.

Complete the Newly Added Item 5.L (Marketing Activities)

Registered advisers with a fiscal year that ends on December 31 will be required to complete the newly added Part 1A, Item 5.L (entitled “**Marketing Activities**”) in their annual update. Item 5.L includes new questions regarding the adviser’s marketing and advertising activities under Rule 206(4)-1 (the “**Marketing Rule**”) under the Investment Advisers Act of 1940, as amended (the “**Advisers Act**”). The SEC staff has said in a recent risk alert focused on the Marketing Rule (from September 2022) that it will review an adviser’s responses to these new questions for accuracy and to provide the staff with additional information regarding the adviser’s marketing practices for examination purposes.⁴ Accordingly, responses to Item 5.L should be consistent with how an adviser

¹ See Advisers Act Rule 204-1 and Rule 204-4; see also [Form ADV: General Instructions](#).

² ERAs are only required to complete some of the items in Form ADV Part 1A and are not required to complete Form ADV Part 2A. As such, the suggestions in this update relating to separately managed account reporting and Part 2A are not relevant to ERAs.

³ See [IARD/PFRD Availability Schedule](#). IARD is typically available Monday through Friday from 5 a.m. to 11 p.m. (ET), Saturday from 8 a.m. to 6 p.m. (ET), and Sunday from 10 a.m. to 6 p.m. (ET).

⁴ See, *Examinations Focused on the New Investment Adviser Marketing Rule* (September 19, 2022), available at, <https://www.sec.gov/files/exams-risk-alert-marketing-rule.pdf>.

is treating marketing materials under its relevant compliance policies, procedures and practices developed for complying with the Marketing Rule, which went into effect for all registered advisers in November 2022.

In Item 5.L, an adviser is required to answer “Yes or No” questions regarding whether the adviser’s “advertisements” (as defined under the Marketing Rule) include performance results, references to specific investment advice (*e.g.*, case studies (including those without performance), information about specific investments included in full deal-by-deal track records), hypothetical performance (*e.g.*, fund target returns), predecessor performance, testimonials, endorsements, or third party ratings. Advisers that include testimonials, endorsements or third-party ratings in their advertisements will have to disclose whether they have paid any cash or non-cash compensation in connection with their use.⁵

Remove References to Rule 206(4)-3

In connection with the adoption of the Marketing Rule, the SEC rescinded previous Rule 206(4)-3 (the former “**Cash Solicitation Rule**”), which was adopted to highlight the conflict of interest between paid solicitors and advisers, and incorporated certain aspects of Rule 206(4)-3 into the Marketing Rule (Rule 206(4)-1). As a result, the instructions in the Form ADV section entitled “Part 2A of Form ADV: Firm Brochure,” have been amended to remove the phrase “SEC rule 206(4)-3” in the Note in Item 14.B, and “SEC rule 206(4)-1” was added in its place. Therefore, any reference to “Rule 206(4)-3” should be removed from an adviser’s responses in Form ADV Part 2A.

Start Collecting Private Fund and SMA Client Information as Soon as Possible

Registered advisers (and ERAs with private fund clients) must continue to provide individual reporting regarding their private fund clients and, as applicable, aggregate information regarding separately managed accounts (“**SMAs**”) they manage. In particular, advisers must report information about private funds in Section 7.B of Schedule D and information about SMA clients in Item 5.K of Part 1A, as applicable. If they have not already done so, firms should start collecting this information as soon as possible, as this process often takes some time and coordination.

Advisers should continue to review newly formed advisory relationships (*e.g.*, funds that have closed throughout the year or where they have entered into new advisory agreements with SMAs) to collect necessary reporting information for their annual Form ADV updates. More generally, advisers should review any changes to their businesses or other practices over the past year to ensure they are capturing necessary updates for Part 1 and Part 2. Advisers should also continue to retain back-up documentation for the information they use to populate their Form ADV and any assumptions or internal practices supporting their responses.

⁵ Advisers may respond “No” to the endorsement or testimonial questions if the only endorsements or testimonials contained in the adviser’s advertisements are those of its affiliates, *i.e.*, an adviser’s partners, officers, directors, or employees, or a person that controls, is controlled by, or is under common control with the investment adviser, or is a partner, officer, director or employee of such a person (*e.g.*, an employee of a portfolio company that is controlled by the adviser or by a person that controls the adviser).

Confirm That the IARD Flex-Funding Account Has Sufficient Funds

Registered advisers must pay a filing fee in the amount of either \$40, \$150, or \$225, depending on the amount of their regulatory assets under management (“RAUM”), in connection with their annual Form ADV updates.⁶ ERAs must pay a filing fee in the amount of \$150 in connection with their annual Form ADV updates.⁷ The fees must be credited to the advisory firm’s IARD Flex-Funding Account *before* an annual update filing can be submitted.

Firms should check their Flex-Funding Accounts well in advance of when they expect to submit their Form ADV filings and confirm there are sufficient funds to cover the applicable filing fee. In the event that there are insufficient funds, advisory firms will need to have enough time to arrange for the necessary check payments or wire transfers to fund their Flex-Funding Accounts.⁸

Run a Completeness Check a Few Days Before the Filing Will Be Submitted

The IARD system has a “completeness check” feature that enables advisory firms to identify any required fields in draft Form ADV filings that have not yet been completed. Running a completeness check will also highlight the lack of sufficient funds in a Flex-Funding Account to cover filing fees and also helps to identify any technical issues that may require assistance from the IARD Call Center. An advisory firm will be unable to submit its Form ADV filing until all completeness check errors have been resolved.

We caution advisory firms against waiting to run a completeness check until the date that they plan to submit their Form ADV filings in order to avoid unanticipated delays or problems when they do submit their filings. A completeness check is also not a substitute for careful review of the draft Form ADV, so we recommend advisers allow sufficient time between entering information and submission in order to perform a quality control check prior to filing.

Verify That the PDF of Part 2A Is Text-Searchable

Registered advisers that are required to complete a Form ADV Part 2A need to upload a PDF of their updated Part 2A to the IARD system before submitting their Form ADV filings. According to the “General Instructions for Part 2 of Form ADV,”⁹ a PDF of Part 2A must be text-searchable. As a practical matter, the IARD system will not permit advisory firms to upload a PDF of Part 2A that is not text-searchable. We, therefore, recommend that registered advisers ensure in advance that the PDF of Part 2A they plan to upload is in a text-searchable format.

⁶ The annual update filing fee is \$40 for registered advisers with less than \$25 million in RAUM, \$150 for those with between \$25 million and \$100 million in RAUM, and \$225 for those with \$100 million or more in RAUM. See [Electronic Filing for Investment Advisers on IARD: IARD Filing Fees](#).

⁷ No fee is charged to registered advisers or ERAs for filing an other-than-annual update to Form ADV. See *id.*

⁸ It may take up to two business days for a firm’s check payment or wire transfer to be processed and posted in the firm’s Flex-Funding Account. See [Investment Adviser Accounting and Payments Methods](#).

⁹ See [General Instructions for Part 2 of Form ADV](#).

Confirm That the Adviser Does Not Have a Form CRS Requirement

Registered advisers should confirm whether they offer any services to “retail investors.”¹⁰ Under Advisers Act Rule 204-5, registered investment advisers must prepare, file (through the IARD system) and provide to “retail investors” a brief relationship summary, referred to as Form CRS, before or at the time the adviser enters into an investment advisory contract with a retail investor. A registered investment adviser, or a supervised person acting on its behalf, must deliver its current Form CRS to each “retail investor”: (i) before or at the time it enters into an investment advisory contract with that “retail investor”; and (ii) who is an existing client upon the occurrence of certain triggering events (*e.g.*, where the adviser opens a new account for its “retail investor” client). If applicable, Form CRS should be filed through IARD as Form ADV Part 3.

Advisers to private funds are generally **not** required to prepare, file or deliver a Form CRS, so long as they do not have any SMA advisory clients who are “retail investors,” *i.e.*, a natural person, or a legal representative thereof, receiving investment advisory services primarily for personal, family, or household purposes.

Reminder to Amend Audit Disclosures As Required

In response to Schedule D, Section 7.B.(1), Question 23(h) in Form ADV Part 1, advisers to private funds whose financial statements are subject to annual audits need to indicate whether all of the private fund’s audit reports that have been prepared since the adviser’s last annual Form ADV amendment contain an unqualified opinion.

If the choice “Report Not Yet Received” is selected, the adviser is required to promptly file an amendment to the Form ADV to update this response when the audit report becomes available (*i.e.*, make an other-than-annual amendment to its annual amendment described herein). In 2022, the SEC settled enforcement actions with several advisers concerning (among other things) their alleged failure to update this specific Form ADV item for several months (which the SEC staff considered not to be prompt) or, in certain instances, until they filed their next annual updating amendments.¹¹ Advisers that respond “Report Not Yet Received” to this question may want to set a calendar reminder to file this other-than-annual ADV update promptly after the date they expect audit reports for reported private funds to be finalized.

¹⁰ Advisers Act Rule 204-5 defines a “retail investor” as “a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes.” See also [General Instructions for Part 3 of Form ADV](#).

¹¹ See, *SEC Charges Two Advisory Firms for Custody Rule Violations, One for Form ADV Violations, and Six for Both* (September 9, 2022), available at, <https://www.sec.gov/news/press-release/2022-156>.

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