

# Funds Regulatory and Investigations Update

## Tips and Tricks for Advisers Finalizing Their Form ADV Updates

March 12, 2024

As registered investment advisers (“**RIAs**”) and exempt reporting advisers (“**ERAs**”) prepare to finalize and file their annual Form ADV updates with the SEC, below are (1) some practical suggestions that they should keep in mind in connection with their Form ADV updates and (2) excerpts of new and updated SEC staff FAQs related to Form ADV.<sup>1</sup>

Registered investment advisers and ERAs are required to file an annual update to Form ADV no later than 90 days after their fiscal year end.<sup>2</sup> Accordingly, an RIA or ERA whose fiscal year ended on December 31, 2023 must submit an annual Form ADV update no later than **Saturday, March 30, 2024**.

### **Aim to File the Update by 8 p.m. (ET) on March 29, 2024**

RIAs and ERAs should aim to submit their filings no later than 8 p.m. (ET) on Friday, March 29, 2024 (and are encouraged to file earlier, if possible). The Investment Adviser Registration Depository (“**IARD**”), the system that advisers use to submit Form ADV filings with the SEC, is generally available until 11 p.m. (ET) on weekdays and until 6 p.m. on weekends.<sup>3</sup> In addition, the IARD Call Center, which provides advisers with IARD system support, is only available 8 a.m. to 8 p.m. (ET) from Monday to Friday, and not on Saturday. In the event that an adviser encounters an IARD system technical issue after 8 p.m. (ET) on Friday, March 29<sup>th</sup>, it would be unable to receive system support from the IARD Call Center.

### **Confirm That the IARD Flex-Funding Account Has Sufficient Funds**

RIAs 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.<sup>4</sup> ERAs

<sup>1</sup> 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 Part 2A are not relevant to ERAs.

<sup>2</sup> See Advisers Act Rule 204-1 and Rule 204-4; see also [Form ADV: General Instructions](#).

<sup>3</sup> 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).

<sup>4</sup> 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](#).

must pay a filing fee in the amount of \$150 in connection with their annual Form ADV updates.<sup>5</sup> The fees must be credited to the advisory firm's IARD Flex-Funding Account *before* an annual update filing can be submitted.

Advisers 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, advisers will need to have enough time to arrange for the necessary check payments or wire transfers to fund their Flex-Funding Accounts.<sup>6</sup>

In addition to the filing fees, if you want a state to receive Notice Filings, most states charge advisers a filing fee for making Notice Filings with them. This fee is also paid through IARD which passes your payment to the state securities authority where your filing is made. Be sure to have sufficient funds in your IARD Flex-Funding Account to cover the annual filing fee in addition to any state fees to which you may be subject. A list of state filing fees can be found on [www.iard.com](http://www.iard.com) or you can call the appropriate states securities authority for state filing fee information.

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

The IARD system has a “completeness check” feature that enables advisers 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 helps to identify any technical issues that may require assistance from the IARD Call Center. An adviser will be unable to submit its Form ADV filing until all completeness check errors have been resolved.

We caution advisers 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**

RIAs 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,”<sup>7</sup> a PDF of Part 2A must be text-searchable. As a practical matter, the IARD system will not permit advisers to upload a PDF of Part 2A that is not text-searchable. We, therefore, recommend that RIAs ensure in advance that the PDF of Part 2A they plan to upload is in a text-searchable format.

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<sup>5</sup> No fee is charged to RIAs or ERAs for filing an other-than-annual update to Form ADV. *See id.*

<sup>6</sup> 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](#).

<sup>7</sup> *See* [General Instructions for Part 2 of Form ADV](#).

## Confirm That the Adviser Does Not Have a Form CRS Requirement

RIAs should confirm whether they (newly) offer any services to “retail investors.”<sup>8</sup> Under Advisers Act Rule 204-5, RIAs 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 RIA, 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.

RIAs to private funds are generally **not** required to prepare, file or deliver a Form CRS, so long as they do not have any separately managed account (“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.

An adviser should select “Yes” to question 23(g) if the applicable deadline for the distribution of the private fund’s audited financial statements for the most recently completed fiscal year has not yet passed (typically 120 days following the fiscal year end) if it has engaged an auditor and the audited financial statements will be distributed as required. An adviser should answer “No” if the applicable deadline for distribution has passed and audited financial statements were not delivered to clients for the most recently completed fiscal year.

*For a newly-created fund:* An adviser should not report that a private fund’s financial statements are subject to an annual audit if an auditing firm has not yet been engaged to conduct an audit for the applicable fiscal year. Thus, for a newly-created fund for which an auditor has not been engaged, the response to question 23(a) should be “No.” (Advisers responding “No” may consider adding clarification as to this response—*e.g.*, that certain private funds that held first closings after the end of the most recently completed fiscal year are being reported and have not yet engaged an auditor—in the Schedule D “Miscellaneous” field.)

*“Report Not Yet Received”:* 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

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<sup>8</sup> 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](#).

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.<sup>9</sup> 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.

### Confirm That You Have Selected the Correct Filing Type

When an adviser logs into the IARD system, it will be asked to select a filing type to begin the process of amending its current Form ADV filing. Select “New Filing” followed by “Submit an Annual Amendment.”

Advisers should **not** select “Submit an Other than Annual Amendment,” as it is not possible to switch filing types to an “Annual Amendment” and still retain any entered data. However, one option if an adviser begins on the wrong form of amendment filing is to finish and file the Other than Annual Amendment, then immediately file a new report as an Annual Amendment. If the adviser makes the Other than Annual Amendment filing, it will not have to reenter any data, as the Form ADV will pre-populate with the most recent filing; however, the adviser will need to make a second filing to comply with its obligation to make an annual update filing within 90 days after the end of your fiscal year. After the adviser makes the Other than Annual Amendment filing, start over by selecting “New Filing,” followed by “Submit an Annual Amendment.”

In addition, ERAs should not select “File a Report with one or more States as an ERA,” as it is not possible to switch filing types to an “Annual Amendment” and still retain any entered data if it begins on the wrong form. If the adviser begins on the state ERA filing form, it will need to delete the filing and begin again on the “Annual Amendment” form. (Be sure to print a copy of any data entered on the wrong filing type so you can use it for reference when you reenter the data on the correct form.)

### The SEC Issued New and Updated FAQs on Form ADV and the IARD System

On October 26, 2023, the SEC Staff issued additional FAQs and updated certain existing [FAQs](#) related to Form ADV and the IARD [system](#) (“**the new FAQs**”). These new and updated FAQs cover a wide range of topics including, for instance, amending the Form ADV Part 2A brochure for annual updates that involve material changes, making certain changes to Schedule R related to relying advisers, and answering certain private fund-related questions.<sup>10</sup> Before October 2023, the SEC last made significant updates to the FAQs on Form ADV and the IARD system in September 2017.

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<sup>9</sup> 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>.

<sup>10</sup> Other topics covered by the latest FAQs include: hardship filings; the initial SEC adviser registration process; filings regarding adviser succession; reporting to the SEC as an exempt reporting adviser (ERA); Form ADV-E; Form ADV-W; final filings for ERAs; Form ADV Part 3 (Form CRS), Schedule C; late filing of an annual updating amendment; public disclosure of Form ADV; getting access to IARD; obtaining historical Form ADVs; switching SEC or state registration; and reclaiming ERA status after withdrawal.

Below are excerpts of the new and updated FAQs that may be relevant for private fund advisers that are currently registered with the SEC or that are ERAs, particularly for purposes of making annual or other-than-annual amendments to their Form ADV filings:

Filing an annual Form ADV Amendment:

**Q:** My firm is an SEC registered investment adviser that has a fiscal year ending in December. In February, the firm filed an other-than-annual amendment. Must the firm also file an annual amendment at some point within 90 days following the end of its fiscal year?

**A:** Yes. Filing an other-than-annual amendment to Form ADV does not satisfy a registered investment adviser's (or an SEC exempt reporting adviser's) obligation to file an annual updating amendment.

Form ADV: Item 2.A(8)

**Q:** My firm is an investment adviser that satisfies the requirements for registering with the SEC under rule 203A-2(b) (the "related adviser exemption"). My firm controls, is controlled by, or is under common control with an investment adviser that is eligible to register, and registered with, the Commission and we share a principal office and place of business. Does my firm need to meet any threshold amount of regulatory assets under management to register pursuant to the related adviser exemption?

**A:** No. The related adviser exemption requires no particular amount of regulatory assets under management. The only requirements for registration under this rule are that (a) the adviser controls, is controlled by, or is under common control with an investment adviser eligible to register, and that is registered, with the SEC and (b) the adviser has the same principal office and place of business as that other investment adviser. For purposes of this exemption, "control" means the power to direct or cause the direction of the management or policies of an investment adviser, whether through ownership of securities, by contract, or otherwise. Any person that directly or indirectly has the right to vote 25 percent or more of the voting securities, or is entitled to 25 percent or more of the profits, of an investment adviser is presumed to control that investment adviser. Please see rule 203A-2(b); Form ADV: Instructions for Part 1A, Instruction 2.f.

Form ADV: Item 5.C.(1) and 5.D

**Q:** Items 5.C.(1) and 5.D ask about the number of clients I have. For the purposes of these questions, should I report advisory clients for whom I do not have regulatory assets under management?

**A:** Yes. Any clients for whom an adviser provides investment advisory services, but for whom the adviser does not have regulatory assets under management, should be included in the adviser's responses to both of these Items. Similarly, the definition of "client" for Form ADV states that advisers must count clients

who do not compensate the adviser. If your firm also provides other services (e.g., accounting services), this term does not include clients that are not investment advisory clients.

Form ADV: Item 7.B

**Q:** I am an adviser to a newly created private fund. When should I report in question 23(a) of Schedule D, Section 7.B.(1) that the private fund is subject to an annual audit?

**A:** In the staff's view, an adviser should not report that a private fund's financial statements are subject to an annual audit if an auditing firm has not been engaged to conduct an audit for the applicable fiscal year.

**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:** In the staff's view, if the applicable deadline for the distribution of the private fund's audited financial statements for the most recently completed fiscal year has not yet passed, an adviser may answer "Yes" if it has engaged an auditor and the audited financial statements will be distributed as required. In the staff's view, an adviser should answer "No" if the applicable deadline for distribution has passed and audited financial statements were not delivered to clients for the most recently completed fiscal year.

**Q:** I am an adviser to a private fund. 100% of my private fund client's assets (by value) were valued by my administrator. Specifically, my administrator carried out the valuation procedure established for all assets and I used that administrator's valuation for purposes of investor subscriptions, redemptions, distributions, and fee calculations. The administrator is not my related person. I consider my firm to be ultimately responsible for valuing the private fund's assets. In response to Schedule D, Section 7.B.(1), Question 27, should I enter 0% to indicate that I am ultimately responsible? Or enter 100% to indicate that the administrator values the assets?

**A:** In the staff's view, an adviser should enter 100%.

Form ADV: Part 1 Schedule R

**Q:** My firm includes two investment advisers. On our Form ADV, Adviser A is the "filing adviser" and reports on Form ADV the other adviser (Adviser B) as a "relying adviser." My firm would now like to reflect that Adviser B will become the filing adviser, and Adviser A will become the relying adviser. What is the correct way to make this change on Form ADV?

**A:** To avoid a period during which neither Adviser A nor Adviser B is registered with the Commission, the following process should be followed: (1) Adviser B should file an initial application for SEC registration

and include on that initial application a Schedule R listing Adviser A as a "relying adviser". (2) Once Adviser B's registration request is approved, then Adviser A should file Form ADV-W to withdraw its registration.

**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 and remove the relying adviser's name from all applicable entries in Section 7.B.(1) of Schedule D.

Form ADV: Part 2A Item 2

**Q:** When responding to Item 2 of Form ADV Part 2A, is providing a list of material changes sufficient or must I discuss such material changes?

**A:** An adviser must identify and discuss material changes; in the staff's view, providing a list of material changes is not a sufficient discussion of material changes. See the instructions for Item 2 of Form ADV Part 2A.

## Conclusion

As advisers continue to juggle an increasing number of regulatory compliance obligations (both those currently in-effect and planning for those on the horizon), it remains crucial that they devote appropriate time and attention to ensuring accurate and timely Form ADV filings, given the accuracy of reporting and filings remains an SEC priority.<sup>11</sup>

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<sup>11</sup> See, for example, SEC's focus on Form ADV reporting on custody matters in the SEC's Division of Examinations 2024 Enforcement Priorities, available at, <https://www.sec.gov/files/2024-exam-priorities.pdf>.

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