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Business Law Section
Securities Regulation Committee
Private Investment Funds Subcommittee

August 12, 2015

Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

E-mail address: rule-comments@sec.gov

Attention: Brent J. Fields, Secretary

RE: File No. S7-09-15
Amendments to Form ADV and Investment Advisers Act Rules
Release No. IA-4091

Ladies and Gentlemen:

The Private Investment Funds Subcommittee of the Securities Regulation Committee of the Business Law Section of the New York State Bar Association (the "NYSBA Committee") appreciates the invitation from the Securities and Exchange Commission (the "Commission" or the "SEC") in Investment Adviser Release No. 4091[1] to comment on the Commission's proposed amendments to Form ADV and rule amendments (collectively, the "Proposal") under the Investment Advisers Act of 1940, as amended (the "Advisers Act").

[1] Amendments to Form ADV and Investment Advisers Act Rules, Investment Adviser Release No. 4091 (July 9, 2015) (hereinafter, the "Release"), *available at* https://www.sec.gov/rules/proposed/2015/ia-4091.pdf. Capitalized terms used herein without definition have the respective meanings ascribed in the Release.

The NYSBA Committee is composed of members of the New York State Bar Association, a principal part of whose practice relates to investment advisers to private funds. The NYSBA Committee includes lawyers in both private practice and in-house legal departments. A draft of this letter was reviewed by certain members of the NYSBA Committee. The views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, the Securities Regulation Committee or the Business Law Section.

Introduction

The NYSBA Committee has comments on specific proposals, as discussed below. As a general matter, the NYSBA Committee believes that the proposed amendments to Form ADV and the Advisers Act outlined in the Proposal will significantly increase the reporting obligations for many investment advisers. For that reason, we would not support a further expansion of reporting requirements beyond what is in the Proposal in the absence of a strong justification based on a clear need for investor protection not previously identified.

A. Separately Managed Accounts

The NYSBA Committee understands the SEC's interest in collecting additional information on separately managed accounts to provide it with better quality information reflecting the investment industry landscape. However, we are concerned that the Proposal's solicitation and disclosure of sensitive information on a publicly available Form ADV would unnecessarily result in disclosure of confidential information about the business of investment advisers and their investors. The information proposed to be collected about separately managed accounts on Form ADV is comparable to information collected confidentially on Form PF with respect to private funds and certain parallel separately managed accounts. As a result, if the SEC is unable to amend Form PF to include the proposed additional information about separately managed accounts, the SEC should permit filing the new information on a confidential basis comparable to the confidentiality of the information filed on Form PF.

The reporting requirements of Form PF and the additional information proposed to be collected on separately managed accounts involve sensitive information, including about trading strategies and the use of leverage. The SEC has acknowledged in the past that disclosure of such information could adversely affect private funds and investors.[2] Further, the Proposal requested comment on whether disclosure of aggregate holdings, derivatives and borrowings in separately managed accounts raises concerns in light of Section 210(c) of the Advisers Act regarding the identity, investments, or affairs of any clients owning those accounts.[3] The NYSBA Committee

[2] Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Investment Adviser Release No. 3308 (July 1, 2011) at 112, *available at* https://www.sec.gov/rules/final/2011/ia-3308.pdf.

[3] Release at 14.

believes that investor privacy as well as proprietary information of investment advisers would be best protected by permitting the filing of such information in a confidential manner. Reporting separately managed account information on Form PF or on a comparably confidential basis would be consistent with the SEC's goal of collecting information to enhance its ability to conduct risk-based examinations and risk-monitoring activities.[4]

In particular, one example of issues created by the public availability of the proposed information is that reporting Gross Notional Exposure without also reflecting actual exposure on the form would be misleading and potentially alarming to investors. In addition, if an adviser has a small number of accounts, the disclosure of any of the information would be particularly problematic as others may be in a position to determine the identity of the clients in any such account. This identification would be inconsistent with the goals of collecting aggregate data and preserving investor confidentiality. Any adviser with a small number of accounts (e.g. five or fewer) should not be required to specify the precise number of its accounts, particularly if the information will be publicly available.

In sum, Form PF currently collects increasingly detailed information on private funds and certain parallel separately managed accounts depending upon the amount of regulatory assets under management and we believe that the newly proposed information to be reported would be more appropriately disclosed in or alongside the current Form PF information or in a confidential manner comparable to the information submitted on Form PF.

We suggest that a higher reporting threshold than the proposed $150 million in regulatory assets under management attributable to separately managed accounts for certain borrowing and derivative reporting is justified given the increased burden in reporting this detailed information. We believe that the new information on separately managed accounts with respect to borrowing and derivatives should only be required if an adviser has at least $500 million in regulatory assets under management attributable to separately managed accounts as a more appropriate threshold for identifying advisers with a substantial separately managed account business who should be required to report additional information.

We also have two suggestions for clarifications as follows: (1) if a subadviser is providing information on separately managed accounts that it subadvises, please confirm that the adviser does not need to also report the information about the subadvised portion of any separately managed account and (2) please confirm that an adviser may elect to include or not include information about separately managed accounts with a net asset value of less than $10 million as it may be administratively difficult for advisers to exclude this information.

As we noted above, we do not recommend any additional or more frequent reporting on separately managed accounts.

B. Additional Information about Investment Advisers and Their Advisory Businesses

[4] Release at 9.

Similarly, we note that the additional information proposed to be collected will be burdensome to many investment advisers and do not believe that the benefits of collecting any additional information justifies any further burdens. For example, collecting information about each employee's social media presence would be potentially voluminous and would serve little benefit. This information is already publicly available for anyone who is interested. It is not clear why any investors would for example be interested in an employee's LinkedIn account. In addition, the collection of information on more than 25 offices would also serve little purpose as these offices would likely be small offices with limited activities. Any investor with an interest in information about any additional offices can request that information of the adviser prior to investing. We also do not believe that the SEC should collect information as to whether the adviser has engaged a compliance consultant. This is an option for advisers seeking to ensure compliance; however, if the information were required to be reported advisers reporting no engagement of compliance consultants would be concerned about negative implications from this lack of engagement. Advisers are not required to use external compliance consultants and should be entitled to continue to ensure compliance through internal resources without concern about negative implications from Form ADV disclosure. Finally, it is not clear why the SEC needs information about an adviser's own assets in excess of $1 billion. We would expect there to be few advisers in this category and we do not believe that the specific amount of assets over that amount is material to advisory clients or necessary for rulemaking.

C. Umbrella Registration

The NYSBA Committee believes that the proposed codification of past guidance[5] on umbrella registration will clarify the reporting process for private fund advisers and will provide the SEC and the public with better quality information. However, we suggest that the SEC expand the categories and types of advisers that can take advantage of the new reporting regime as detailed below. We also believe that there are certain clarifying changes that would improve the Proposal.

We suggest expansion of the requirement in Schedule R that the relying adviser have an independent basis for registration with the SEC. This is a requirement that is inconsistent with the premise behind allowing umbrella registration which is that the relying adviser and the filing adviser are effectively conducting a single advisory business. The registration requirements should be satisfied if they are satisfied on an aggregate basis among the relying and filing advisers. The current ability for advisers to be aggregated with their affiliated adviser entities for purposes of qualifying to register under Advisers Act Rule 203A-2(b) is too narrow in that it requires that the advisers all have the same principal office and place of business. As the past SEC guidance notes, there are many legitimate reasons that advisers set up separate legal entities to conduct a single advisory business. There are also reasons why those entities may have their principal offices and places of businesses in different locations. Advisers with a principal office in New York City may find it economically efficient to have an affiliate conducting the same

[5] SEC no-action letter to American Bar Association (January 18, 2012), *available at* https://www.sec.gov/divisions/investment/noaction/2012/aba011812.htm (confirming and expanding prior 2005 SEC guidance *available at* https://www.sec.gov/divisions/investment/noaction/aba120805.htm) (the "2012 ABA Letter").

business across the Hudson River in New Jersey or, for that matter, in Omaha, Nebraska. Modern methods of communications make it possible for people located in distant locations to work together as if they were in the same room. The Proposal should recognize this modern reality, and should not require the owners of advisory firms to choose between separate registration of these entities or operation from the same principal office and place of business in order to be included on a single Form ADV.

The NYSBA Committee believes that eligibility for umbrella registration should be expanded in order to make the streamlined process available to (1) certain additional categories of US-based investment advisers and (2) certain non-US investment advisers.

We believe that the SEC should permit private fund advisers to take advantage of umbrella registration if the advisers' investment objectives and strategies are not substantially similar as long as they satisfy the other conditions demonstrating that they operate a single advisory business. It is common for related advisers to pursue multiple investment objectives and strategies while operating a single advisory business and there is no basis for suspicion as to the pursuit of multiple investment objectives and strategies. An investment adviser structured as a single legal entity but that pursues more than one investment objective or strategy is not required to file more than one Form ADV. Accordingly, it does not seem justified to require investment advisers structured as more than one legal entity and pursuing more than one investment objective or strategy to file more than one Form ADV. Moreover, it is not at all clear what would constitute substantially similar investment objectives and strategies. For example, if one adviser uses hedging techniques and leverage and another does not, but the investment objectives and strategies are otherwise the same, would that constitute substantially similar investment objectives and strategies?

Another requirement that we question is that all investors in separately managed accounts must be qualified clients. It is not clear why that should be an additional requirement that may not otherwise apply in order to demonstrate that the relying and filing advisers all operate a single advisory business. It seems to be unrelated to the single business requirement and should be removed.

The NYSBA Committee believes that the availability of umbrella registration should be further extended to any non-US based investment adviser that confirms that the Advisers Act and the rules thereunder apply to such investment adviser and its affiliates with respect to all of their US clients and to the non-US clients of all of its related US advisers. The SEC's 2012 letter required that the filing adviser have its principal office and place of business in the US to prevent a group of advisers from circumventing the Advisers Act by designating a non-US adviser as filing adviser, and then asserting that the Advisers Act does not apply to a US-based relying adviser with respect to its non-US clients.[6] The confirmation would address this concern.

[6] *See* 2012 ABA Letter at note 9.

In 2012 the SEC issued guidance[7] allowing exempt reporting advisers ("ERAs") that operate special purpose entities ("SPEs") in connection with their advisory business to include multiple SPEs on a single Form ADV. The Committee suggests the SEC codify this guidance for ERAs in the same manner that it has proposed to do with umbrella registration for private fund adviser entities.

The Committee believes that the SEC should clarify that registered investment advisers may continue to report SPVs described in the prior SEC 2005 guidance as related persons on Schedule D Section 7A. The SEC should however clarify whether it is appropriate to characterize the SPV in Item 9 of Schedule D Section 7A either (1) as registered (under the filing adviser's registration) or (2) exempt from registration (not separately registered in reliance on the 2005 SEC guidance).

D. Proposed Clarifying, Technical and Other Amendments to Form ADV

The Committee suggests certain additional clarifying changes. First, the SEC should clarify that the indebtedness referred to in the instructions for Item 5F Calculating Your Regulatory Assets under Management does not refer to indebtedness incurred at a portfolio company of a private fund client and instead refers to indebtedness incurred by a private fund client. In addition, the SEC should clarify Items 8A (2) and (3) in Part 1A of Form ADV with examples and with the distinction between the information requested in (2) and (3) since it appears that these questions would elicit duplicative information. Finally, in this digital age (1) the term "original" in Advisers Act Rule 204-2(a)(7) should be deleted or clarified and (2) Advisers Act Rule 204-2(g) and Section 1.L. of Schedule D of Form ADV should clarify that records are deemed kept at the adviser's principal office and place of business if the records are accessible electronically from the adviser's office and the electronic storage otherwise complies with the conditions currently specified in Advisers Act Rule 204-2(g) consistent with prior SEC no-action guidance.[8]

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[7] See Frequently Asked Questions on Form ADV and IARD, under the title "Reporting to the SEC as an Exempt Reporting Adviser" posted March 19, 2012 and March 26, 2012.

[8] *See, e.g.*, Omgeo LLC No-Action Letter (August 14, 2009).

We appreciate the opportunity to provide these comments on the Proposal and for the Commission's attention and consideration. We hope that our comments, observations, and recommendations contribute to the important work of the Commission in improving the quality of information reported by investment advisers. We would be happy to discuss these comments further with the SEC Staff.

Respectfully submitted,

PRIVATE INVESTMENT FUNDS SUBCOMMITTEE

By: /s/ Anastasia T. Rockas
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