SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

Release No. IA-3221; File No. S7-36-10

RIN 3235-AK82

Rules Implementing Amendments to the Investment Advisers Act of 1940

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting new rules and rule amendments under the Investment Advisers Act of 1940 to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These rules and rule amendments are designed to give effect to provisions of Title IV of the Dodd-Frank Act that, among other things, increase the statutory threshold for registration by investment advisers with the Commission, require advisers to hedge funds and other private funds to register with the Commission, and require reporting by certain investment advisers that are exempt from registration. In addition, we are adopting rule amendments, including amendments to the Commission's pay to play rule, that address a number of other changes made by the Dodd-Frank Act.

EFFECTIVE DATE: The effective date of rules 204-4 and 203A-5(b) and (c), amendments to rules 0-7, 203A-1, 203A-2, 203A-3, 204-1, 204-2, 206(4)-5, 222-1, and 222-2, and amendments to Forms ADV, ADV-E, ADV-H, and ADV-NR is [insert 60 days from date of publication in the Federal Register]. The effective date of rule 203A-5(a) and the amendment to rule 203-1 is July 21, 2011. Rules 202(a)(11)-1, 203(b)(3)-1, 203(b)(3)-2, and 203A-4 are rescinded effective [insert 60 days from date of publication in the Federal Register].

COMPLIANCE DATE: See section III of this Release.

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SUPPLEMENTARY INFORMATION: The Commission is adopting rules 203A-5 and 204-4 [17 CFR 275.203A-5 and 275.204-4] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] ("Advisers Act" or "Act"),[1] amendments to rules 0-7, 203-1, 203A-1, 203A-2, 203A-3, 204-1, 204-2, 206(4)-5, 222-1, and 222-2 [17 CFR 275.0-7, 275.203-1, 275.203A-1, 275.203A-2, 275.203A-3 , 275.204-1, 275.204-2, 275.206(4)-5, 275. 222-1, and 275.222-2] under the Advisers Act, and amendments to Form ADV, Form ADV-E, Form ADV-H, and Form ADV-NR [17 CFR 279.1, 279.3, and 279.4] under the Advisers Act. The Commission is also rescinding rules 202(a)(11)-1, 203(b)(3)-1, 203(b)(3)-2, and 203A-4 [17 CFR 275.202(a)(11)-1, 275.203(b)(3)-1, 275.203(b)(3)-2, and 275.203A-4] under the Advisers Act.

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[1] Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rule 0-7, rule 202(a)(11)-1, rule 203-1, rule 203(b)(3)-1, rule 203(b)(3)-2, rule 203A-1, rule 203A-2, rule 203A-3, rule 203A-4, rule 203A-5, rule 204-1, rule 204-2, rule 204-4, rule 206(4)-5, rule 222-1, or rule 222-2, or any paragraph of these rules, we are referring to 17 CFR 275.0-7, 17 CFR 275.202(a)(11)-1, 17 CFR 275.203-1; 17 CFR 275.203(b)(3)-1, 17 CFR 275.203(b)(3)-2, 17 CFR 275.203A-1, 17 CFR 275.203A-2, 17 CFR 275.203A-3, 17 CFR 275.203A-4, 17 CFR 275.203A-5, 17 CFR 275.204-1, 17 CFR 275.204-2, 17 CFR 275.204-4, 17 CFR 275.206(4)-5, 17 CFR 275.222-1, or 17 CFR 275.222-2, respectively, of the Code of Federal Regulations ("CFR"), in which these rules are published.

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I. BACKGROUND

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") which, among other things, amends certain provisions of the Advisers Act.[2] Title IV of the Dodd-Frank Act ("Title IV") includes most of the amendments to the Advisers Act. These amendments include provisions that reallocate primary responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain mid-sized advisers – *i.e.*, those that have between $25 million and $100 million of assets under management.[3] These provisions will require a significant number of advisers currently registered with the Commission to withdraw their registrations with the Commission and to switch to registration with one or more state securities authorities. In addition, Title IV repeals the "private adviser exemption" contained in section 203(b)(3) of the Advisers Act on which many advisers, including those to many hedge funds, private equity funds, and venture capital funds, rely in order to avoid registration under the Act.[4] In eliminating this provision, Congress created, or directed us to adopt other, in some ways narrower,

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[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[3] *See* section 410 of the Dodd-Frank Act; Advisers Act section 203A. *See also* National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416, § 303 (1996) ("NSMIA") (allocating to states certain responsibility for small investment advisers with less than $25 million in assets under management).

[4] *See* section 403 of the Dodd-Frank Act. Section 203(b)(3) currently exempts from registration any investment adviser who during the course of the preceding twelve months, has had fewer than fifteen clients, and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) ("Investment Company Act"), or a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act (15 U.S.C. 80a-54). Section 403 of the Dodd-Frank Act eliminates this "private adviser" exemption from section 203(b)(3) and replaces it with a new exemption for "foreign private advisers." We are also adopting today a rule to clarify the definition of a "foreign private adviser" in a separate release. *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers*, Investment Advisers Act Release No. [●] ("Exemptions Adopting Release").

exemptions for advisers to certain types of private funds – *e.g.*, venture capital funds – which provide that the Commission shall require such advisers to submit such reports "as the Commission determines necessary or appropriate in the public interest."[5] These provisions in Title IV of the Dodd-Frank Act will be effective on July 21, 2011.[6]

On November 19, 2010, we proposed new rules and amendments to existing rules and forms to give effect to these provisions.[7] Specifically, we proposed a new rule and amendments to our rules and forms to facilitate mid-size advisers' transition from Commission to state registration.[8] We also proposed a new rule and rule amendments to require certain advisers to private funds that are exempt from registration under the Advisers Act to submit reports to us.[9] We proposed rule amendments, including amendments to the Commission's "pay to play" rule,[10] to address a number of other changes to the Advisers Act made by the Dodd-Frank Act.[11] Also, in light of our increased responsibility for oversight of private funds, we proposed to require advisers to those funds to provide us with additional information about the operation of those

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5 *See* section 407 of the Dodd-Frank Act ("The Commission shall require such advisers to…provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors"). *See also* section 408 of the Dodd-Frank Act. Section 407 of the Dodd-Frank Act, which adds section 203(l) to the Advisers Act, exempts advisers solely to one or more venture capital funds. Section 408, which adds section 203(m) to the Advisers Act, exempts advisers solely to private funds with assets under management in the United States of less than $150 million.

6 *See* section 419 of the Dodd-Frank Act. For purposes of this Release, unless indicated otherwise, when we refer to the effective date of the Dodd-Frank Act, we are referring to the effective date of Title IV, which is July 21, 2011.

7 *See Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 3110 (Nov. 19, 2010) [75 FR 77052 (Dec. 10, 2010)] ("Implementing Proposing Release").

8 *See id.* at section II.A.

9 *See id.* at section II.B. Throughout this Release, we refer to advisers exempt from registration under sections 203(l) and 203(m) of the Advisers Act as "exempt reporting advisers."

10 Rule 206(4)-5.

11 *See* Implementing Proposing Release, *supra* note 7, at section II.D.

funds.[12] Finally, we proposed additional changes to Form ADV that would enhance our oversight of advisers and also would enable us to identify advisers that are subject to the Dodd-Frank Act's requirements concerning certain incentive-based compensation arrangements.[13]

We received more than 70 comment letters on our proposals, most of which were from advisers, trade or professional organizations, and law firms.[14] Commenters generally supported our approach to facilitate mid-size advisers' transition from Commission to state registration, and our amendments to Form ADV, including those requiring disclosure of additional information about private funds. Many, however, urged us to take a different approach to, among other things, our proposed amendments to the pay to play rule. We are adopting the proposed rules and rule amendments with several modifications to address commenters' concerns. We address these modifications and comments in detail below.

II. DISCUSSION

A. Eligibility for Registration with the Commission: Section 410

Section 203A of the Advisers Act, enacted in 1996 as part of the National Securities Markets Improvement Act ("NSMIA"), generally prohibits an investment adviser regulated by the state in which it maintains its principal office and place of business from registering with the

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12 *See* sections 403, 407 and 408 of the Dodd-Frank Act; Implementing Proposing Release, *supra* note 7, at section II.C.

13 *See* Implementing Proposing Release, *supra* note 7, at section II.C; section 956 of the Dodd-Frank Act.

14 Comment letters submitted in File No. S7-36-10 are available on the Commission's website at: http://www.sec.gov/comments/s7-36-10/s73610.shtml. We also considered those comments submitted in File No. S7-37-10 (*Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than $150 Million in Assets Under Management, and Foreign Private Advisers*, Investment Advisers Act Release No. 3111 (Nov. 19, 2010) [75 FR 77190 (Dec. 10, 2010)] ("Exemptions Proposing Release")) that addressed the rules and amendments adopted in this Release. Those comments are available at on the Commission's website at: http://www.sec.gov/comments/s7-37-10/s73710.shtml.

Commission unless it has at least $25 million of assets under management,[15] and preempts certain state laws regulating advisers that are registered with the Commission.[16] This provision makes the states the primary regulators of smaller advisers and the Commission the primary regulator of larger advisers.[17]

Section 410 of the Dodd-Frank Act creates a new category of "mid-sized advisers" and shifts primary responsibility for their regulatory oversight to the states by prohibiting from Commission registration an investment adviser that is required to be registered as an investment adviser in the state in which it maintains its principal office and place of business and that has assets under management between $25 million and $100 million.[18] Unlike a small adviser, a mid-sized adviser must register with the Commission: (i) if the adviser is not required to be registered as an investment adviser with the securities commissioner (or any agency or office

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15 Advisers Act section 203A(a)(1). The prohibition does not apply if the investment adviser is an adviser to an investment company registered under the Investment Company Act, or if the adviser is eligible for one of six exemptions the Commission has adopted. *See id.*; rule 203A-2; *infra* section II.A.5.

16 An investment adviser must register with the Commission unless it is prohibited from registering under section 203A of the Advisers Act or is exempt from registration under section 203. Advisers Act section 203(a). Investment advisers that are prohibited from registering with the Commission are subject to regulation by the states, but the antifraud provisions of the Advisers Act continue to apply to them. *See* Advisers Act sections 203A(b), 206. For SEC-registered investment advisers, state laws requiring registration, licensing, and qualification are preempted, but states may investigate and bring enforcement actions alleging fraud or deceit, require notice filings of documents filed with the Commission, and require investment advisers to pay state notice filing fees. *See* Advisers Act section 203A(b); NSMIA, *supra* note 3, at sections 307(a) and (b). Section 410 of the Dodd-Frank Act did not amend sections 203A(a)(1) or 203(a) of the Advisers Act.

17 *See* S. REP. NO. 104-293, at 4 (1996). *See also Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 1633, section I (May 15, 1997) [62 FR 28112 (May 22, 1997)] ("NSMIA Adopting Release").

18 *See* section 410 of the Dodd-Frank Act (adding new section 203A(a)(2) of the Advisers Act). This amendment increases the threshold above which all investment advisers must register with the Commission from $25 million to $100 million. *See* S. REP. NO. 111-176, at 76 (2010) ("Senate Committee Report"). We are further increasing this threshold to $110 million, pursuant to authority granted to us by Congress. *See* section 410 of the Dodd-Frank Act; *infra* section II.A.4.

performing like functions) of the state in which it maintains its principal office and place of business; or (ii) if registered with that state, the adviser would not be subject to examination as an investment adviser by that securities commissioner.[19] Section 203A(c) of the Advisers Act, which was not amended by the Dodd-Frank Act, permits the Commission to exempt small and mid-sized advisers from the prohibitions on Commission registration,[20] and we have adopted six exemptions for small advisers pursuant to this authority.[21]

As a consequence of section 410 of the Dodd-Frank Act, we estimate that approximately 3,200 SEC-registered advisers will be required to withdraw their registrations and register with one or more state securities authorities.[22] We are working closely with the state securities

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[19] *See* section 410 of the Dodd-Frank Act. A mid-sized adviser also is required to register with the Commission if it is an adviser to a registered investment company or business development company under the Investment Company Act; therefore, mid-sized advisers to registered investment companies and business development companies are not permitted to withdraw their Commission registrations. *Compare* section 410 of the Dodd-Frank Act *with* Advisers Act section 203A(a)(1). Additionally, a mid-sized adviser may register with the Commission if the adviser is required to register in 15 or more states. *See* section 410 of the Dodd-Frank Act. For a discussion of advisers required to register in multiple states, see *infra* section II.A.5.c.

[20] For the Commission to permit the registration of small and mid-sized advisers with the Commission, application of the prohibition from registration must be "unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes" of section 203A. Advisers Act section 203A(c). The Commission's exercise of this authority not only would permit registration with the Commission, but also would result in the preemption of state law with respect to the advisers that register with us as a result of an exemption. *See* Advisers Act sections 203(a), 203A(b), and 203A(c).

[21] *See* rule 203A-2 (permitting the following types of advisers to register with the Commission: (i) nationally recognized statistical rating organizations ("NRSROs"); (ii) certain pension consultants; (iii) investment advisers affiliated with an adviser registered with the Commission; (iv) investment advisers expecting to be eligible for Commission registration within 120 days of filing Form ADV; (v) certain multi-state investment advisers; and (vi) certain internet advisers).

[22] According to data from the Investment Adviser Registration Depository ("IARD") as of April 7, 2011, 3,531 SEC-registered advisers either: (i) had assets under management between $25 million and $90 million and did not indicate on Form ADV Part 1A that they are relying on an exemption from the prohibition on Commission registration; or (ii) were permitted to register with us because they rely on the registration of an SEC-registered affiliate that has assets under management between $25 million and $90 million and are not relying on an exemption from registration. We estimate that 350 of these advisers will not switch to state registration because their principal office and place of business is located in Minnesota, New York, or Wyoming, which did not advise our staff that advisers registered with them are subject to examination. *See*

authorities to provide an orderly transition of investment adviser registrants to state regulation. In addition, we are adopting rules and rule amendments, discussed below, that provide us with a means of identifying advisers that must transition to state regulation, that clarify the application of new statutory provisions, and that modify certain exemptions from the prohibition on Commission registration that we previously adopted under section 203A of the Act.

1. Transition to State Registration

We are adopting new rule 203A-5 to provide for an orderly transition to state registration for mid-sized advisers that will no longer be eligible to register with the Commission.[23]

- *Existing Registrants.* Under the rule, *each* adviser registered with us on January 1, 2012 must file an amendment to its Form ADV no later than March 30, 2012.[24] These amendments will respond to new items in Form ADV (discussed below) and will identify mid-sized advisers no longer eligible to remain registered with the

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infra note 152 (according to IARD data as of April 7, 2011, there were 63 mid-sized advisers in Minnesota, 286 in New York, and 1 in Wyoming). As a result, we estimate that approximately 3,200 advisers will switch to state registration. 3,531 SEC-registered advisers – 350 advisers not switching to state registration = 3,181 advisers. In the Implementing Proposing Release, we estimated that approximately 4,100 SEC-registered advisers would be required to withdraw their registrations and register with one or more state securities authorities, based on IARD data as of September 1, 2010. *See* Implementing Proposing Release, *supra* note 7, at n.15. We have lowered our estimate by 900 advisers to account for the advisers that have between $90 million and $100 million of assets under management that may remain registered with us as a result of the amendments we are adopting to rule 203A-1, the advisers that have withdrawn their registrations with us since that time, and as discussed above, the advisers that will not switch registration because they have a principal office and place of business in Minnesota, New York or Wyoming. *See* section II.A.4. for a discussion of adopted rule 203A-1. Based on IARD data as of April 7, 2011, 244 advisers had assets under management of between $90 million and $100 million and, from September 2, 2010 to April 7, 2011, 405 advisers withdrew their registrations with us and 114 advisers initially registered with us.

[23] As proposed, we are also amending the instructions to Form ADV to explain this process. *See* amended Form ADV: General Instructions (special one-time instruction for Dodd-Frank transition filing for SEC-registered advisers).

[24] New rule 203A-5(b). In this filing, advisers will report the current market value of their assets under management determined within 90 days of the filing.

Commission.[25] Mid-sized advisers that are no longer eligible for Commission registration must withdraw their registrations with us after filing their Form ADV amendments by filing Form ADV-W[26] no later than June 28, 2012.[27] Mid-sized advisers registered with the Commission as of July 21, 2011 must remain registered with the Commission (unless an exemption from Commission registration is available) until January 1, 2012.[28]

- *New Applicants*. Until July 21, 2011, when the amendments to section 203A(a)(2) take effect, advisers applying for registration with the Commission that qualify as mid-sized advisers under section 203A(a)(2) of the Act[29] may register with either the Commission or the appropriate state securities authority.[30] Thereafter, all such

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25 *See infra* sections II.A.2. and II.C. Advisers will be required to update all of the items in Form ADV, and this filing will serve as the annual updating amendment for most advisers. *See infra* note 48 and accompanying text.

26 17 CFR 279.2 ("Form ADV-W").

27 New rule 203A-5(c)(1).

28 New rule 203A-5(a). We are using the authority provided to us in section 203A(c) of the Act to require mid-sized advisers to remain registered with the Commission until the programming of the IARD is completed. *See infra* notes 35-41 and accompanying text. For a discussion of section 203A(c) of the Act, see *supra* note 20. We believe that the failure to provide a transition period during the beginning of 2012 would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of section 203A of the Act. We are also adopting, as proposed, a provision that will permit us to postpone the effectiveness of, and impose additional terms and conditions on, an adviser's withdrawal from SEC registration if we institute certain proceedings before the adviser files Form ADV-W. New rule 203A-5(c)(2). This limitation on withdrawal of an adviser's registration is similar to the one we adopted to implement NSMIA in 1997. *See* NSMIA Adopting Release, *supra* note 17.

29 For a discussion of section 203A(a)(2) of the Act, see *supra* notes 18-19 and accompanying text. As discussed above, the Dodd-Frank Act amendments to this section will be effective on July 21, 2011. *See supra* note 6 and accompanying text.

30 We noted in the Implementing Proposing Release that we would not object if, on or after January 1, 2011 until the end of the transition period, any state-registered or newly-registering adviser is not registered with us, so long as the adviser reports on its Form ADV that it has between $30 million and $100 million of assets under management, is registered as an investment adviser in the state in which it maintains its principal office and place of business, and has a reasonable belief that it is required to be registered with, and is subject to examination as an investment

advisers are prohibited from registering with the Commission and must register with the state securities authorities.[31] We also note that advisers that have assets under management of $100 million or more will continue to register with the Commission (unless an exemption from registration with the Commission otherwise is available).[32]

We have made several changes to these transition provisions in response to comments we received.[33] The proposed rule would have provided mid-sized advisers with a 90-day transitional process with two "grace periods," the first providing until August 20, 2011 for an adviser to determine whether it is eligible for Commission registration and to file an amended Form ADV, and the second providing until October 19, 2011 for an adviser to register in the states and

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adviser by, that state. *See* Implementing Proposing Release, *supra* note 7, at section II.A.1. In order to account for the July 21, 2011 effective date of section 410 of the Dodd-Frank Act and the longer transition period that we are adopting (ending on June 28, 2012 instead of October 19, 2011, as proposed), beginning on July 21, 2011, these advisers will no longer be able to choose to register with us; instead, they will be will be prohibited from registering with us and must instead register with the states. *See infra* note 31. We believe that allowing these advisers to register with the Commission before January 1, 2012 only to require them to withdraw their registrations by June 28, 2012 would be burdensome, and permitting them to choose whether to register with us until the summer of 2012 would be inconsistent with the purposes of Advisers Act section 203A(a)(2), as amended by section 410 of the Dodd-Frank Act. *See supra* note 3 and accompanying text.

31 Once registered, an adviser must remain registered with the Commission (unless an exemption is available) until January 1, 2012, when it may transition to state registration as described above. Until January 1, 2012, we are exempting from section 203A(a)(2) only those mid-sized advisers *already registered* with us on July 21, 2011 that have at least $25 million in assets under management because the IARD will not be able to accept the revised Form ADV by July 21, 2011 and it is our understanding that mid-sized advisers will need additional time to switch to state registration. *See* new rule 203A-5(a); *supra* note 28 and accompanying text. As a result, on or after July 21, 2011, state-registered advisers and newly-registering advisers will be subject to the section 203A(a)(2) prohibition from Commission registration.

32 *See* Advisers Act section 203A(a)(2), as amended by the Dodd-Frank Act. *See also* Advisers Act section 203. For a discussion of the threshold requiring larger advisers to register with the Commission, see *infra* section II.A.4.

33 *See* proposed rule 203A-5(a)-(b); Implementing Proposing Release, *supra* note 7, at section II.A.1.

withdraw its registration with us.[34] We noted in the Implementing Proposing Release, however, that timing of the transition period would be affected by our ability to re-program the IARD, through which advisers file their amendments to Form ADV.[35]

We have worked closely with the Financial Industry Regulatory Authority ("FINRA"), our IARD contractor, to make the needed modifications, but it has informed us that the programming will not be completed by the July 21, 2011 effective date of the Dodd-Frank Act. We understand that beginning in November, the IARD will be updated to reflect the revisions to Form ADV that we are adopting today. We noted in the Implementing Proposing Release that if the IARD is unable to accept filings of revised Form ADV on July 21, 2011, we might consider delaying the transition process until the system could accept electronic filing of the revised form.[36]

Commenters, including the North American Securities Administrators Association, Inc. ("NASAA"), agreed with our assessment and supported delaying the transition if the IARD could not accept the revised Form ADV instead of adopting alternative requirements, such as requiring interim paper filings.[37] Many also urged us to provide additional time for mid-sized advisers to complete the switch to state registration,[38] and recommended that the Commission match the

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34 *See* proposed rule 203A-5(a)-(b); Implementing Proposing Release, *supra* note 7, at section II.A.1.

35 *See* Implementing Proposing Release, *supra* note 7, at section II.A.1.

36 *See id.*

37 Comment letter of the North American Securities Administrators Association, Inc. (Feb. 10, 2011) ("NASAA Letter") ("the benefits of electronic filing, including easy public access to the documents, are significant and would outweigh any disadvantages imposed by a delay in filing deadlines."); comment letter of Bill Dezellem, CFA, Tieton Capital Management (Jan. 4, 2011) ("Dezellem Letter"); comment letter of the National Regulatory Services (Jan. 24, 2011) ("NRS Letter"); comment letter of the New York State Bar Association, Business Law Section, Securities Regulation Committee (Apr. 1, 2011) ("NYSBA Committee Letter").

38 Comment letter of the American Bar Association, Section of Business Law, Committee on Federal Regulation of Securities, Committee on State Regulation of Securities, and the

current 180-day period[39] provided to SEC-registered advisers that must switch to state registration.[40] We are persuaded by these commenters, and, as described above, we are requiring mid-sized advisers registered with us on July 21, 2011 to remain registered until they switch to state registration after January 1, 2012.[41] As noted above, rule 203A-5 provides until March 30, 2012 for each adviser already registered with the Commission to determine whether it is eligible for Commission registration and to file an amended Form ADV,[42] and provides an additional 90

Committee on Private Equity and Venture Capital (Jan. 31, 2011) ("ABA Committees Letter"); comment letter of Altruist Financial Advisors LLC (Dec. 12, 2010) ("Altruist Letter"); comment letter of Capital Markets Compliance, LLC (Feb. 8, 2011) ("CMC Letter"); Dezellem Letter; comment letter of R.H. Dinel Investment Counsel, Inc. (Jan. 20, 2011) ("Dinel Letter"); comment letter of Financial Services Institute (Jan. 24, 2011) ("FSI Letter"); comment letter of Amy Klein (Nov. 30, 2010) ("Klein Letter"); NRS Letter; NYSBA Committee Letter; comment letter of Sadis & Goldberg LLP (Jan. 21, 2011) ("Sadis Letter"); comment letter of L.A. Schnase (Dec. 23, 2010) ("Schnase Letter"); comment letter of Seward & Kissel LLP (Jan. 31, 2011) ("Seward Letter"); comment letter of Shearman & Sterling LLP (Jan. 24, 2011) ("Shearman Letter"). Only one commenter supported the proposed 90-day grace period. Comment letter of Pickard and Djinis LLP (Jan. 21, 2011) ("Pickard Letter").

39 Our current rule provides an SEC-registered adviser that has to switch to state registration a period of 180 days after its fiscal year end to file an annual amendment to Form ADV and to withdraw its SEC registration after reporting to us that it is no longer eligible to remain registered with us. *See* rule 203A-1(b)(2); *cf.* rule 204-1(a) (requiring an adviser to file an annual amendment 90 days after its fiscal year end).

40 Altruist Letter; Dezellem Letter; FSI Letter; Klein Letter; NYSBA Committee Letter; Schnase Letter; Seward Letter; Shearman Letter. *See also* ABA Committees Letter (recommending December 31 deadline); NRS Letter (recommending rolling state registration process). One commenter stated that based on its almost three decades of experience, it "most strongly supports a defined and longer" transition period. NRS Letter. Another stated that "some states may be unable to process such filings in a timely and efficient manner." ABA Committees Letter. Several commenters echoed concerns about timely state processing of applications, noting, in particular, additional registration and compliance requirements in many states and expected delays to approve state registrations given the increase in filings as a result of the Dodd-Frank Act. *See* Altruist Letter (noting that it took 122 days for a state to approve its application). *See also* CMC Letter; Dezellem Letter; Klein Letter; NRS Letter; NYSBA Committee Letter; Schnase Letter; Seward Letter. To address potential timing issues, NASAA noted that it is recommending to advisers to file with the states as soon as possible and to the states to conditionally approve the registrations until the re-filing of Form ADV is completed. NASAA Letter.

41 *See supra* note 28 and accompanying text.

42 New rule 203A-5(a) and (b). This deadline coincides with the deadline for most advisers' required annual updating amendment (90 days from December 31, 2011), eliminating the requirement that they file an additional amendment to their Form ADV. *See* rule 204-1(a); *infra*

days (*i.e.*, by June 28, 2012) for an adviser no longer eligible for Commission registration to register with the states and withdraw its registration with us.[43] After the end of this period, we expect to cancel the registration of advisers no longer eligible to register with us that fail to file an amendment or withdraw their registrations in accordance with the rule.[44] The revised process that we are adopting today allows the Commission and state regulators to manage the transition of mid-sized advisers in an orderly manner.[45]

We are requiring that all advisers registered with us on January 1, 2012 – regardless of size – file amendments to Form ADV no later than March 30, 2012. Some commenters argued that advisers unaffected by the statutory changes effected by the Dodd-Frank Act should not have to complete and file all of Form ADV.[46] We believe such a filing is necessary for each adviser to confirm its current eligibility for Commission registration in light of the multiple

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note 48. Postponing the beginning of the transition process until January, instead of November or December, also will ensure that the refiling of Form ADV does not interfere with the November state registration and license renewal process and annual system outages for the IARD scheduled in December.

43 New rule 203A-5(c)(1). The rule 203A-5 transition period is the same 180-day transition period for advisers that fall below the $25 million threshold and have to switch to state registration. *See* rule 203A-1(b)(2). Other advisers that will be required to withdraw from registration because they are no longer eligible for Commission registration will include, for example, pension consultants with plan assets of $50 million to $200 million. *See infra* section II.A.5.b.

44 *See* Advisers Act section 203(h). As provided in the Advisers Act, an adviser would be given appropriate notice and opportunity for hearing to show why its registration should not be cancelled. Advisers Act section 211(c).

45 *See also supra* notes 24-28 and accompanying text.

46 Comment letter of the Investment Company Institute (Jan. 24, 2011) ("ICI Letter") (recommending exempting advisers that do not rely on assets under management to register with the SEC); comment letter of the Managed Funds Association (Jan. 24, 2011) ("MFA Letter") (recommending exempting private fund advisers that file an initial Form ADV by July 7); NYSBA Committee Letter (recommending exempting advisers who will continue to be eligible for Commission registration and advisers relying on the section 203(b)(3) exemption that we proposed would have to register with the Commission by July 21, 2011); Shearman Letter (recommending a more limited filing of Form ADV to determine eligibility). But most commenters supported the proposal. *See* CMC Letter; FSI Letter; NASAA Letter; NRS Letter; Pickard Letter.

statutory changes (as well as changes to the rules that we are adopting today) that could affect whether the adviser may register with the Commission.[47] These commenters' concerns also should be allayed by the new March 30, 2012 deadline for filing Form ADV that will coincide with most advisers' required annual updating amendment, eliminating the requirement that they file an additional amendment to their Form ADV.[48] Finally, as recommended by several commenters,[49] we are providing additional flexibility for an adviser to choose the date by which it must calculate its assets under management reported on Form ADV by requiring the calculation within 90 days of the transition filing, rather than 30 days.[50] This is the same amount of time that advisers are afforded to report assets under management after the end of their fiscal year on Form ADV today.[51]

2. Amendments to Form ADV

We are adopting several amendments to Item 2.A. of Part 1A of Form ADV to reflect the new threshold for registration and the revisions we are making to related rules in response to the

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47 In addition, we believe that requiring advisers to complete all of the items will provide the Commission and the state regulatory authorities with essential information about the advisers that are transitioning to state registration and the advisers that are remaining registered with the Commission. *See infra* sections II.A.2., II.C.

48 As of April 7, 2011, 10,636 of SEC-registered advisers (approximately 92%) had a fiscal year ending on December 31. These advisers will comply with rule 203A-5(b)'s Form ADV filing requirement by submitting their annual amendment. SEC-registered advisers not required to file an annual updating amendment between January 1, 2012 and March 30, 2012 will file an other-than-annual amendment, but they will complete all of the items on Part 1A of Form ADV (not just the items required to be updated in a typical other-than-annual amendment).

49 Altruist Letter (quarter end); comment letter of Dechert LLP (Jan. 24, 2011) ("Dechert General Letter") (rolling 12-month average); Dezellem Letter (fiscal year end); Dinel Letter (rolling three-year average); NYSBA Committee Letter (quarter end); Seward Letter (quarter end); Shearman Letter (quarter end). Several commenters argued, for example, that providing for the use of end of quarter numbers precludes an administrate burden for many advisers that value assets on a quarterly basis because most advisers already value assets quarterly to calculate fees. Altruist Letter; NYSBA Committee Letter; Seward Letter; Shearman Letter.

50 New rule 203A-5(b).

51 Form ADV: Instructions for Part 1A, instr. 5.b.(4).

enactment of the Dodd-Frank Act.[52] Item 2 requires each investment adviser applying for registration to indicate its basis for registration with the Commission and to report annually whether it is eligible to remain registered. We are adopting the revisions to Item 2.A. substantially as proposed,[53] except that we have revised the instructions and Item 2.A.(1) to reflect our adoption of a "buffer" for advisers with close to $100 million in assets under management, which we discuss below.[54]

To implement the new prohibition on registration for mid-sized advisers, we are amending Item 2.A. to reflect the new statutory threshold for registration. Item 2.A. requires each adviser registered with us (and each applicant for registration) to identify whether it is eligible to register with the Commission because it: (i) is a large adviser that has $100 million or more of regulatory assets under management (or $90 million or more if an adviser is filing its most recent annual updating amendment and is already registered with us);[55] (ii) is a mid-sized

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52 We are adopting conforming amendments to Item 2.A. and the related items in Schedule D to reflect revisions to rule 203A-2, which provides exemptions from the prohibition on registration with the Commission. *See* amended Form ADV Items 2.A.(7), (10) and Section 2.A.(10) of amended Schedule D; *infra* sections II.A.4., II.A.5., II.A.7. Additionally, we are making conforming changes to the instructions for Form ADV. *See* amended Form ADV: Instructions for Part 1A, instr. 2. We also are revising the terms used in the rules and Form ADV to refer to the securities authorities in each state with a single defined term, "state securities authority." *Compare* amended rules 203A-1, 203A-2(c) and (d), 203A-3(e); amended Form ADV: Glossary *with* rules 203A-1(b)(1), 203A-2(e)(1), 203A-4; Form ADV: Glossary. *See also* section 410 of the Dodd-Frank Act (amended section 203A(a)(2) of the Advisers Act describes a state securities authority as "the securities commissioner (or any agency or office performing like functions)").

53 One commenter expressed the view that the item was "sufficiently and clearly written." NRS Letter.

54 *See* amended Form ADV: Instructions for Part 1A, instr. 2.a. For a discussion of the buffer, see *infra* section II.A.4.

55 Amended Form ADV, Part 1A, Item 2.A.(1). We are revising Form ADV to use the term "regulatory assets under management" instead of "assets under management." For a discussion of regulatory assets under management, see *infra* section II.A.3.

adviser that does not meet the criteria for state registration or is not subject to examination;[56] (iii) has its principal office and place of business in Wyoming (which does not regulate advisers) or outside the United States;[57] (iv) meets the requirements for one or more of the revised exemptive rules under section 203A discussed below;[58] (v) is an adviser (or subadviser) to a registered investment company;[59] (vi) is an adviser to a business development company and has at least $25 million of regulatory assets under management;[60] or (vii) received an order permitting the adviser to register with the Commission.[61]

Each adviser must check at least one of these items, or indicate that the adviser is no longer eligible to remain registered with the Commission.[62] The IARD will prevent an applicant from registering with us, and an adviser from remaining registered, unless it represents on Form ADV that it meets at least one of the specific eligibility criteria set forth in the Advisers Act or our rules.

3. Assets Under Management

In most cases, the amount of assets an adviser has under management will determine whether the adviser must register with the Commission or one or more states. Section

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56 Amended Form ADV, Part 1A, Item 2.A.(2). For a discussion of the criteria for state registration and examination for mid-sized advisers, see *infra* section II.A.7.

57 Amended Form ADV, Part 1A, Items 2.A.(3), 2.A.(4).

58 Amended Form ADV, Part 1A, Items 2.A.(7)-2.A.(11). For a discussion of the exemptive rules, see *infra* section II.A.5.

59 Amended Form ADV, Part 1A, Item 2.A.(5).

60 Amended Form ADV, Part 1A, Item 2.A.(6).

61 Amended Form ADV, Part 1A, Item 2.A.(12). We are also deleting the item for NRSROs to register as investment advisers. For a discussion of NRSROs, see *infra* section II.A.5.a.

62 Amended Form ADV, Part 1A, Item 2.A.(13). One commenter asked that we clarify whether advisers must check every box in Item 2.A. that they are eligible to check. Schnase Letter. The instructions to the item indicate that an adviser must check "at least one" of the items, but does not require all bases for registration be identified. Amended Form ADV: Instructions for Part 1A, instr. 2.

203A(a)(2) of the Act defines "assets under management" as the "securities portfolios" with respect to which an adviser provides "continuous and regular supervisory or management services."[63] Instructions to Form ADV provide advisers with guidance in applying this provision, and until now have permitted advisers to exclude certain types of assets that otherwise would have to be included.[64]

We are adopting revisions to the instructions to Part 1A of Form ADV to implement a uniform method for advisers to calculate assets under management that will be used under the Act for regulatory purposes in addition to assessing whether an adviser is eligible to register with the Commission.[65] As discussed in more detail below, the amendments improve consistency by eliminating choices the instructions had provided advisers that have enabled some of them to opt in or out of federal or state regulation (by including or excluding a class of assets). We are also amending rule 203A-3 to continue to require that the calculation of "assets under management" for purposes of section 203A of the Act be the calculation of the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services, as reported on the investment adviser's Form ADV.[66] Finally, we are altering the terminology we use in Part 1A of Form ADV to refer to an adviser's "regulatory assets under

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63 Advisers Act section 203A(a)(2). The Dodd-Frank Act renumbered current paragraph 203A(a)(2) as 203A(a)(3), but did not amend this definition. *See* section 410 of the Dodd-Frank Act.

64 *See* Form ADV: Instructions for Part 1A, instr. 5.b. These assets include proprietary assets, assets an adviser manages without receiving compensation, and assets of foreign clients.

65 *See* amended Form ADV: Instructions for Part 1A, instr. 5.b. *See also* sections 402(a) and 408 of the Dodd-Frank Act (adding section 202(a)(30) of the Act, which defines a foreign private adviser as having "assets under management" attributable to U.S. clients and private fund investors of less than $25 million, and section 203(m) of the Act, which directs the Commission to provide for an exemption for advisers solely to private funds with assets under management in the United States of less than $150 million); Exemptions Adopting Release, *supra* note 4, at section II.B.

66 *See* amended rule 203A-3(d).

management" in order to acknowledge the "regulatory" purposes of this reporting requirement and to distinguish it from the assets under management disclosure that advisory clients receive in Part 2 of Form ADV.[67]

Many commenters expressed general support for providing a uniform method of calculating assets under management in order to maintain consistency for registration and risk assessment purposes.[68] Others, however, disagreed with or sought changes to one or more of the revisions we are making to the instructions, which we discuss below. We are adopting the amendments as proposed.

Under the revised instructions, advisers must include in their regulatory assets under management securities portfolios for which they provide continuous and regular supervisory or management services, regardless of whether these assets are family or proprietary assets, assets managed without receiving compensation, or assets of foreign clients.[69] We proposed to require advisers to include these assets in light of the new uses of the term "assets under management" in

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67 *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.; *Amendments to Form ADV*, Investment Advisers Act Release No. 3060 (July 28, 2010) [75 FR 49234 (Aug. 12, 2010)] ("Part 2 Release"). One commenter supported the change of terminology. *See* Schnase Letter (supporting the idea of distinguishing "regulatory assets under management" from "assets under management").

68 *See, e.g.*, comment letter of the American Federation of Labor and Congress of Industrial Organizations (Jan. 24, 2011) ("AFL-CIO Letter") ("an adviser's calculation of its assets under management is central to the determination of whether that adviser is required to register with the SEC and be subject to its oversight . . . . The uniform, comprehensive methodology proposed by the SEC will ensure its ability to oversee advisers to funds that may pose a systemic threat."); comment letter of Americans for Financial Reform (Jan. 24, 2011) ("AFR Letter") ("Because calculations of the amount of assets under management by each adviser are key to the determination of whether or not they are required to register, the comprehensive and uniform definition of these terms in the proposed rule is particularly important."). *See also* comment letter of the Alternative Investment Management Association (Jan. 24, 2011) ("AIMA Letter"); Dechert General Letter; comment letter of the Investment Adviser Association (by Valerie M. Baruch) (Jan. 24, 2011) ("IAA General Letter"); NRS Letter; comment letter of O'Melveny & Myers LLP (on behalf of the China Venture Capital and Private Equity Association) (Jan. 25, 2011) ("O'Melveny Letter"); Schnase Letter; NYSBA Committee Letter; Dezellem Letter.

69 *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(1).

the Advisers Act and the new regulatory requirements related to systemic risk that we anticipated would be triggered by registration with the Commission.[70] Eliminating an adviser's ability to exclude all or some of these assets will prevent advisers from excluding these assets from their regulatory assets under management in order to remain below the new asset threshold for registration and to avoid reporting systemic risk information.[71] This approach will also lead to more consistent reporting of assets under management among advisers.

A number of commenters disagreed with the proposed changes.[72] Some argued that advisers should not be required to include proprietary assets and assets managed without receiving compensation in the calculation because such a requirement would be inconsistent with the statutory definition of "investment adviser."[73] Although a person is not an "investment adviser" for purposes of the Advisers Act unless it receives compensation for providing advice to others, once a person meets that definition (by receiving compensation from *any* client to which it provides advice), the person is an adviser, and the Act applies to the relationship between the adviser and any of its clients (whether or not the adviser receives compensation from them).[74] Moreover, the management of "proprietary" assets or assets for which the adviser may not be

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70 *See supra* note 65. Section 404 of the Dodd-Frank Act gives the Commission authority to impose on investment advisers registered with the Commission reporting and recordkeeping requirements for systemic risk assessment purposes.

71 *See* Implementing Proposing Release, *supra* note 7, at nn.44-45 and accompanying text; *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF*, Investment Advisers Act Release No. IA-3145 (Jan. 26, 2011) [76 FR 8,068 (Feb. 11, 2011)] ("Systemic Risk Reporting Release") (proposing systemic risk reporting).

72 *See* AIMA Letter; Dechert General Letter; MFA Letter; Pickard Letter; Seward Letter; NYSBA Committee Letter.

73 *See* Dechert General Letter; MFA Letter; Seward Letter; NYSBA Committee Letter. *See also* Pickard Letter. Under Section 202(a)(11) of the Advisers Act, the definition of "investment adviser" includes, among others, "any person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities . . . ."

74 *See* section 202(a)(11); Form ADV: Instructions for Part 1A, Glossary of Terms, Client.

compensated, when combined with other client assets, may suggest that the adviser's activities are of national concern or have implications regarding the reporting for the assessment of systemic risk.[75] We are therefore adopting the amendment to the instruction, as proposed.[76]

The revised instructions to Form ADV also clarify that an adviser must calculate its regulatory assets under management on a gross basis, that is, without deduction of "any outstanding indebtedness or other accrued but unpaid liabilities."[77] Several commenters argued that advisers should determine the amount of regulatory assets under management on a net, rather than gross, basis.[78] They asserted that the use of net assets would better reflect the clients' assets at risk that an adviser manages,[79] and that use of gross assets would confuse advisory clients.[80] However, nothing in the current instructions suggests that liabilities should be deducted from the calculation of an adviser's assets under management. Indeed, since 1997, the instructions have stated that an adviser should not deduct securities purchased on margin when

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75 *See supra* note 70.

76 One commenter objected to the inclusion of assets of foreign clients because it would require domestic advisers that only have a foreign client base to register with the Commission. Comment letter of Katten Muchin Rosenman LLP (on behalf of APG Asset Management US Inc.) (Jan. 21, 2011). However, a domestic adviser dealing exclusively with foreign clients must register with the Commission if it uses any U.S. jurisdictional means in connection with its advisory business. *See* section 203 of the Advisers Act (requiring registration of *any* investment adviser that uses the United States mails or any other means or instrumentality of interstate commerce in connection with its business as an investment adviser unless the adviser qualifies for an exemption from registration or is prohibited from registering with the Commission).

77 *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(2). Accordingly, an adviser cannot deduct accrued fees, expenses, or the amount of any borrowing. Prior to today's amendments, the instructions directed advisers not to "deduct securities purchased on margin."

78 *See, e.g.,* Dechert General Letter; comment letter of Georg Merkl (Jan. 25, 2011) ("Merkl Exemptions Letter"); MFA Letter; Seward Letter; Shearman Letter. *See also* NYSBA Committee Letter.

79 *See* Merkl Exemptions Letter; MFA Letter.

80 *See* Dechert General Letter; MFA Letter.

calculating its assets under management.[81] Whether a client has borrowed to purchase a portion of assets managed does not seem to us a relevant consideration in determining the amount of assets an adviser has to manage and the scope and national significance of an adviser's business. Moreover, we are concerned that the use of net assets could permit advisers that utilize investment strategies with highly leveraged positions to avoid registration with the Commission even though the activities of such advisers may have national significance. The use of a net assets test also could allow advisers to large and highly leveraged funds to avoid systemic risk reporting under our proposed systemic risk reporting rules.[82] In addition, there need not be any investor confusion because although an adviser will be required to use gross (rather than net) assets for regulatory purposes, the instruction would not preclude an adviser from holding itself out to its clients as managing a net amount of assets as may be its custom in, for example, its client brochure. We are therefore adopting the instruction, as proposed.[83]

We are also revising the Form ADV instructions, as proposed, to provide guidance regarding how an adviser that advises private funds determines the amount of assets it has under management. We have designed our new instructions both to provide advisers with greater certainty in their calculation of regulatory assets under management (which they would also use as a basis to determine their eligibility for certain exemptions that we are adopting today in the

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81 *See* Form ADV: Instructions for Part 1A, instr. 5.b.(2). ("Do not deduct securities purchased on margin.").

82 *See* Systemic Risk Reporting Release, *supra* note 71.

83 Some commenters asked that we clarify how the calculation on a gross basis would apply with respect to, among others, mutual funds, short positions, and leverage. *See* IAA General Letter; MFA Letter. We expect that advisers will continue to calculate their gross assets as they do today, even if they currently only calculate gross assets as an intermediate step to compute their net assets. In the case of pooled investment vehicles with a balance sheet, for instance, an adviser could include in the calculation the total assets of the entity as reported on the balance sheet.

Exemptions Adopting Release) and to prevent advisers from understating those assets to avoid registration.

First, an adviser must include in its calculation of regulatory assets under management the value of any private fund over which it exercises continuous and regular supervisory or management services, regardless of the nature of the assets held by the fund.[84] A sub-adviser to a private fund would include in its regulatory assets under management only that portion of the value of the portfolio for which it provides continuous and regular supervisory or management services. Advisers that have discretionary authority over fund assets, or a portion of fund assets, and that provide ongoing supervisory or management services over those assets would exercise continuous and regular supervisory or management services.[85]

Second, an adviser must include the amount of any uncalled capital commitments made to a private fund managed by the adviser.[86] As we explained in the Implementing Proposing Release, advisers to some private funds (such as private equity funds) typically make investments following capital calls on the funds' investors.[87] One commenter agreed with this approach generally,[88] while another disagreed, asserting that the uncalled capital commitments remain under the management of the fund investor.[89] As we noted in the Implementing Proposing Release, in the early years of a private fund's life, its adviser typically earns fees

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84 *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(1). One commenter specifically addressed this matter, supporting our approach. *See* IAA General Letter.

85 *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(3).

86 *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(1). A capital commitment is a contractual obligation of an investor to acquire an interest in, or provide the total commitment amount over time to, a private fund, when called by the fund.

87 Implementing Proposing Release, *supra* note 7, at n.53 and accompanying text.

88 *See* AIMA Letter (supporting including uncalled capital commitments, provided that the adviser has full contractual rights to call that capital and would be given responsibility for management of those assets).

89 *See* Merkl Exemptions Letter.

based on the total amount of capital commitments, which we presume reflects compensation for efforts expended on behalf of the fund in preparation for the investments.[90] We are adopting the instruction, as proposed.

Third, advisers must use the market value of private fund assets, or the fair value of private fund assets where market value is unavailable.[91] This requirement is designed to make advisers value private fund assets on a more meaningful and consistent basis for regulatory purposes under the Act and it, therefore, should result in a more coherent application of the Act's regulatory requirements and assessment of risk. This instruction would prevent, for example, an adviser electing to value its assets based on their cost, which could be significantly lower than the value of the assets based on their fair value, thus permitting the adviser to avoid registration with or reporting to the Commission. It is designed to prevent inconsistent application of the Advisers Act to advisers managing the same amount of assets.

We received a number of comments regarding the use of fair value, which represents a change from the current instruction that permits an adviser to calculate the value of its assets under management based on whatever method the adviser uses to report its assets to clients or to calculate fees for investment advisory services.[92] One commenter, for example, supported requiring the use of fair value, noting that it would help achieve more consistent asset calculations and reporting across the investment advisory industry, and that it would enable

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[90] Implementing Proposing Release, *supra* note 7, at n.54 and accompanying text.

[91] *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(4). This valuation requirement is described in terms similar to the definition of "value" in the Investment Company Act, which looks to market value when quotations are readily available and, if not, then to fair value. *See* Investment Company Act section 2(a)(41) (15 U.S.C. 80a-2(a)(41)). Other standards also may be expressed as requiring that a determination of fair value be based on market quotations where they are readily available.

[92] *See* Form ADV: Instructions for Part 1A, instr. 5.b.(4).

better application of our staff's risk assessment program.[93] Other commenters, including the Managed Funds Association, however, objected to the use of fair value, asserting that the requirement would cause those advisers that did not use fair value standards to incur additional costs, particularly if the assets are illiquid and therefore difficult to fair value.[94]

In the Implementing Proposing Release, we noted that we understood that many private funds already value assets in accordance with U.S. generally accepted accounting principles ("GAAP") or other international accounting standards that require the use of fair value, citing letters we had received in connection with other rulemaking initiatives.[95] We are sensitive to the costs this new requirement will impose. We believe, however, that this approach is warranted in light of the unique regulatory purposes of the calculation under the Advisers Act. We estimated these costs in the Implementing Proposing Release,[96] and have taken several steps to mitigate them.[97] While many advisers will calculate fair value in accordance with GAAP or another international accounting standard,[98] other advisers acting consistently and in good faith may

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93 *See* IAA General Letter. *See also* ABA Committees Letter (addressing the requirement within the context of the asset calculation for purposes of the foreign private adviser and the private fund adviser exemptions).

94 *See* MFA Letter; Merkl Exemptions Letter; O'Melveny Letter; Seward Letter.

95 *See* Implementing Proposing Release, *supra* note 7, at n.56 and accompanying text.

96 *See* Implementing Proposing Release, *supra* note 7, at n.369 and accompanying text.

97 We recognize that although these steps will provide advisers greater flexibility in calculating the value of their private fund assets, they also will result in valuations that are not as comparable as they could be if we specified a fair value standard (*e.g.*, as specified in GAAP).

98 Several commenters asked that we not require advisers to fair value private fund assets in accordance with GAAP for purposes of calculating regulatory assets under management because many funds, particularly offshore ones, do not use GAAP and such a requirement would be unduly burdensome. *See, e.g.*, comment letter of European Fund and Asset Management Association (Jan. 24, 2011) ("EFAMA Letter"); IAA General Letter; Comment letter of Katten Muchin Rosenman LLP (on behalf of non-U.S. Advisers) (Jan. 24, 2011) ("Katten Foreign Advisers Letter"). We did not propose such a requirement, nor are we adopting one.

utilize another fair valuation standard.[99] While these other standards may not provide the quality of information in financial reporting (for example, of private fund returns), we expect these calculations will provide sufficient consistency for the purposes that regulatory assets under management serve in our rules (such as applying annual thresholds to determine the registration status of an adviser).[100]

The alternatives that commenters recommended (*e.g.*, cost basis or any method required by the private fund's governing documents other than fair value) would not meet our objective of having more meaningful and comparable valuation of private fund assets, and could result in a significant understatement of appreciated assets.[101] Moreover, these alternative approaches could permit advisers to circumvent the Advisers Act's registration requirements. Permitting the use of any valuation standard set forth in the governing documents of the private fund other than

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99 Consistent with this good faith requirement, we would expect that an adviser that calculates fair value in accordance with GAAP or another basis of accounting for financial reporting purposes will also use that same basis for purposes of determining the fair value of its regulatory assets under management.

100 The fair valuation process need not be the result of a particular mandated procedure and the procedure need not involve the use of a third-party pricing service, appraiser or similar outside expert. An adviser could rely on the procedure for calculating fair value that is specified in a private fund's governing documents. The fund's governing documents may provide, for example, that the fund's general partner determines the fair value of the fund's assets. Advisers are not, however, required to fair value real estate assets only in those limited circumstances where real estate assets are not required to be fair valued for financial reporting purposes under accounting principles that otherwise require fair value for assets of private funds. For example, in those cases, an adviser may instead value the real estate assets as the private fund does for financial reporting purposes. We note that the Financial Accounting Standards Board ("FASB") has a current project related to investment property entities that may require real estate assets subject to that accounting standard to be measured by the adviser at fair value. *See* FASB Project on *Investment Properties*. We also note that certain international accounting standards currently permit, but do not require, fair valuation of certain real estate assets. *See* International Accounting Standard 40, *Investment Property*. To the extent that an adviser follows GAAP or another accounting standard that requires or in the future requires real estate assets to be fair valued, this limited exception to the use of fair value measurement for real estate assets would not be available.

101 *See* Merkl Exemptions Letter; MFA Letter; O'Melveny Letter; Seward Letter; NYSBA Committee Letter.

fair value could effectively yield to the adviser the choice of the most favorable standard for determining its registration obligation as well as the application of other regulatory requirements, and would not provide consistent outcomes from similarly situated advisers. Accordingly, we are adopting the requirement as proposed.

We also requested comment in the Implementing Proposing Release on whether we should require advisers to report their assets under management more frequently than annually. All commenters who responded to our request asked that we continue to require annual reporting, arguing that more frequent reporting would require additional calculations only for purposes of Form ADV disclosure, thus placing an unnecessary burden on advisers.[102] As commenters recommended, we are not changing the frequency of the reporting requirement.

4. Switching Between State and Commission Registration

Rule 203A-1 is designed to prevent an adviser from having to switch frequently between state and Commission registration as a result of changes in the value of its assets under management or the departure of one or more clients. We are amending the rule to eliminate the current buffer for advisers that have assets under management between $25 million and $30 million that permits these advisers to remain regulated by the states, and we are replacing it with a similar buffer for mid-sized advisers.[103] We are also retaining, as proposed, the requirement that eligibility for registration be determined annually as part of an adviser's annual updating

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[102] *See, e.g.*, AIMA Letter; NRS Letter; O'Melveny Letter; NYSBA Committee Letter. Under the Systemic Risk Reporting Release, we proposed to require large advisers with $1 billion or more in assets under management attributable to hedge funds, unregistered money market funds or private equity funds to file systemic risk reports quarterly. *See* Systemic Risk Reporting Release, *supra* note 71.

[103] Amended rule 203A-1(a). Additionally, we are revising the provision in rule 203A-1 that does not require an adviser to withdraw its Commission registration until its assets under management fall below $25 million to reflect the new, $90 million threshold. *See* amended rule 203A-1(a)(1).

amendment, allowing an adviser to avoid the need to change registration status based on fluctuations that occur during the course of the year.[104]

The amended rule provides a buffer for mid-sized advisers with assets under management close to $100 million to determine whether and when to switch between state and Commission registration.[105] The rule raises the threshold above which a mid-sized investment adviser must register with the Commission to $110 million; but, once registered with the Commission, an adviser need not withdraw its registration until it has less than $90 million of assets under management.[106]

Although commenters did not object to elimination of the current buffer, several argued that we need to include a new buffer for mid-sized advisers that have close to $100 million of assets under management.[107] Some commenters, for example, asserted that the current $5

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[104] Amended rule 203A-1(b)(2) (continuing to require an adviser filing an annual updating amendment to its Form ADV reporting that it is not eligible for Commission registration to withdraw its registration within 180 days of its fiscal year end). We are not renumbering this paragraph as proposed. *Compare* proposed rule 203A-1(a)-(b) *with* amended rule 203A-1(b)(1)-(2).

[105] Amended rule 203A-1(a).

[106] Amended rule 203A-1(a)(1). Mid-sized advisers eligible for a rule 203A-2 exemption and advisers to a registered investment company or business development company under the Investment Company Act will not be able to rely on the buffer because they are required to register with us regardless of whether they have $100 million of assets under management. Amended rule 203A-1(a)(2). In addition, advisers that rely on amended rule 203A-2(c) to register with the Commission because they expect to be eligible for registration within 120 days cannot rely on the buffer – they must have $100 million of assets under management within 120 days to remain registered with the Commission. *See* Form ADV: Instructions for Part 1A, instrs. 2.a., 2.g. *See also* amended rule 203A-1(a)(2)(ii); amended rule 203A-2(c).

[107] Altruist Letter; Dezellem Letter; Dinel Letter; FSI Letter; comment letter of Intelligent Capitalworks Investment Advisors (Jan. 24, 2011) ("ICW Letter"); comment letter of JVL Associates, LLC (Jan. 13, 2011) ("JVL Associates Letter"); comment letter of Georg Merkl (Jan. 25, 2011) ("Merkl Implementing Letter"); NASAA Letter; NRS Letter; NYSBA Committee Letter; comment letter of The Wealth Coach, LLC (by Jeffrey W. McClure) (Dec. 31, 2010) ("Wealth Coach Letter"); and comment letter of WJM Financial, LLC (Jan. 4, 2011) ("WJM Letter"). To prevent an adviser from switching frequently between state and Commission registration, we proposed to retain an adviser's ability to rely on the reporting on Form ADV of

million buffer was effective in preventing frequent switching of registration attributable to market fluctuations,[108] while another called the buffer an important element of regulatory flexibility.[109] Several advisers with close to $100 million of assets under management asserted that a buffer is necessary to prevent them from switching to and from Commission registration.[110] Commenters recommended several different buffers, including one for advisers with between $100 million and $120 million (to retain the current buffer's 20 percent increase in assets under management),[111] one that would fall below $100 million,[112] and a buffer that straddled above and below $100 million.[113]

We are persuaded by these comments that a buffer may prevent costs and disruption to advisers that otherwise may have to switch between federal and state registration frequently because of, for example, the volatility of the market values of the assets they manage. Rule 203A-1(a), as amended, raises the threshold above which a mid-sized investment adviser must register with the Commission to $110 million.[114] Once registered with the Commission, an

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assets under management in the annual updating amendment for purposes of determining its eligibility to register. *See* proposed rule 203A-1(b).

108 *See, e.g.*, Altruist Letter; NRS Letter.

109 NASAA Letter.

110 ICW Letter (for 3 years, adviser's assets under management have been greater than $100 million by a few million dollars and at various times throughout the year has been reduced to under $100 million by just a few days of downside market volatility); JVL Associates Letter (adviser's assets under management have fluctuated around $100 million since 2007). *See also* Wealth Coach Letter (from October 2008 through March 2009, adviser's total assets under management fell over 25%).

111 Altruist Letter; FSI Letter; NASAA Letter; WJM Letter. *See also* ICW Letter; Merkl Implementing Letter; NYSBA Committee Letter.

112 Dezellem Letter ($80-$100 million); Dinel Letter ($80-$100 million); JVL Associates Letter ($90-$100 million); NRS Letter ($90-$100 million).

113 Wealth Coach Letter ($85-$115 million).

114 We find that raising the threshold for mid-sized advisers to register with the Commission is appropriate in accordance with the purposes of the Advisers Act. Advisers Act section 203A(a)(2)(B)(ii), as amended by the Dodd-Frank Act.

adviser need not withdraw its registration until it has less than $90 million of assets under management.[115] The amendment operates to provide a buffer of 20 percent of the $100 million statutory threshold for registration with the Commission, which is the same percentage as the current buffer.[116] We believe a 20 percent buffer is appropriate because it is large enough to accommodate market fluctuations or the departure of one or more clients, and does not substantially increase or decrease the $100 million threshold set by Congress in the Dodd-Frank Act.[117]

5. Exemptions from the Prohibition on Registration with the Commission

Using the authority provided by section 203A(c) of the Advisers Act, we are adopting, as proposed, amendments to three of the exemptions in rule 203A-2 from the prohibition on Commission registration in section 203A to reflect developments since their original adoption,

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115 Amended rule 203A-1(a)(1). We find that not providing this buffer and requiring advisers with assets under management of between $90 million and $100 million to register with the states would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of section 203A of the Advisers Act. Advisers Act section 203A(c). Advisers Act section 203A(c) permits the Commission to exempt advisers from the prohibition on Commission registration, including small and mid-sized advisers, if the application of the prohibition from registration would be "unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes" of section 203A. *See supra* note 20 for a discussion of section 203A(c).

116 Commenters said the current $5 million buffer, which is 20 percent of the $25 million statutory threshold, effectively limits advisers having to switch registrations due to market changes in their assets under management. *See, e.g.*, Altruist Letter (current $5 million buffer "was useful in lessening the need to switch back and forth between state and federal regulation as an IA's AUM grew or fell"). *See also* Advisers Act section 203A(a)(1); rule 203A-1(a). The amendment we are adopting provides a $20 million buffer, which is 20 percent of the $100 million statutory threshold. *See* Advisers Act section 203A(a)(2), as amended by the Dodd-Frank Act; amended rule 203A-1(a)(1).

117 An adviser must register if its assets under management are $110 million or more, which is $10 million higher than the $100 million statutory threshold. *See* Advisers Act section 203A(a)(2), as amended by the Dodd-Frank Act; amended rule 203A-1(a)(1). *See also supra* note 108 (citing commenters discussing market fluctuations); Senate Committee Report, *supra* note 18, at 76 (stating that this amendment increases the threshold above which all investment advisers must register with the Commission from $25 million to $100 million).

including the enactment of the Dodd-Frank Act, which we discuss below.[118] Each of the exemptions (including those we are not amending) also applies to mid-sized advisers, exempting them from the prohibitions on registering with the Commission if they meet the requirements of rule 203A-2.[119]

a. Nationally Recognized Statistical Rating Organizations

We are eliminating, as proposed, the exemption in rule 203A-2(a) from the prohibition on Commission registration for nationally recognized statistical rating organizations ("NRSROs").[120] Since we adopted this exemption, Congress amended the Act to exclude certain NRSROs from the Act's definition of "investment adviser"[121] and provided for a separate

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118 Using the authority provided in section 203A(c) of the Advisers Act, the Commission has permitted six types of investment advisers to register with the Commission under rule 203A-2: (i) NRSROs; (ii) certain pension consultants; (iii) certain investment advisers affiliated with an adviser registered with the Commission; (iv) investment advisers expecting to be eligible for Commission registration within 120 days of filing Form ADV; (v) certain multi-state investment advisers; and (vi) certain internet advisers. *See supra* notes 20-21 and accompanying text. We are also renumbering, and making minor conforming changes to, rule 203A-2(c), (d) and (f) regarding investment advisers affiliated with an SEC-registered adviser, newly formed advisers expecting to be eligible for Commission registration within 120 days, and internet advisers, respectively. *See* amended rule 203A-2(b), (c), and (e). We are requiring advisers to comply with amended rule 203A-2 60 days after publication in the Federal Register. *See infra* section III.

119 Rule 203A-2 provides that advisers meeting the criteria for a category of advisers under the rule will not be prohibited from registering with us by Advisers Act section 203A(a). *See* rule 203A-2; NSMIA Adopting Release, *supra* note 17, at section II.D. The new prohibition on mid-sized advisers registering with the Commission also is established under Advisers Act section 203A(a); therefore, mid-sized advisers meeting the requirements for a category of exempt advisers under rule 203A-2 are eligible to register with us. *See* section 410 of the Dodd-Frank Act; amended rule 203A-2. We asked, but did not receive comment on, whether we should limit rule 203A-2's application to small advisers; however, one commenter agreed that these exemptions should apply to all advisers, including mid-sized advisers. NRS Letter (strongly supporting that the exemptions be applicable to all advisers no matter their assets under management as it "promotes uniformity, clarity and a consistent standard for all."). We are leaving rule 203A-2 unchanged in this regard.

120 *See* rule 203A-2(a).

121 Credit Rating Agency Reform Act of 2006, P.L. 109-291, 120 Stat. 1327 § 4(b)(3)(B) (2006) ("Credit Rating Agency Reform Act"). *See also* Advisers Act section 202(a)(11)(F) (excluding an NRSRO from the definition of investment adviser unless it issues recommendations about purchasing, selling, or holding securities or engages in managing assets that include securities on behalf of others).

regulatory regime for NRSROs under the Securities Exchange Act of 1934 ("Exchange Act").[122] Commenters supported the elimination of this provision.[123]

b. Pension Consultants

We are amending rule 203A-2(b), the exemption available to pension consultants, to increase the minimum value of plan assets required to rely on the exemption from $50 million to $200 million.[124] As discussed in the Implementing Proposing Release, pension consultants typically do not have "assets under management," but we have required these advisers to register with us because their activities have a direct effect on the management of large amounts of pension plan assets.[125] As a result of this amendment, advisers currently relying on the pension consultant exemption advising plan assets of less than $200 million may be required to withdraw from Commission registration and register with one or more states.[126]

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122 Credit Rating Agency Reform Act, *supra* note 121, at sections 4(a), 5.

123 NRS Letter (asserting that the proposal is consistent with the Credit Rating Agency Reform Act, which amended the Advisers Act to exclude NRSROs and to provide for a separate regulatory regime for them under the Exchange Act); Pickard Letter (asserting that continued availability of the NRSRO exemption is causing confusion among advisers).

124 Amended rule 203A-2(a). Pension consultants provide services to pension and employee benefit plans and their fiduciaries, including assisting them to select investment advisers that manage plan assets. *See* rule 203A-2(b)(2), (3); NSMIA Adopting Release, *supra* note 17, at section II.D.2. The exemption does not apply to pension consultants that solely provide services to plan participants. *See* NSMIA Adopting Release, *supra* note 17, at section II.D.2. To determine the aggregate value of plan assets, a pension consultant may only include the portion of the plan's assets for which the consultant provides investment advice. Rule 203A-2(b)(3).

125 *See* Implementing Proposing Release, *supra* note 7, at section II.A.5.b.; NSMIA Adopting Release, *supra* note 17, at section II.D.2.; *Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 1601, section II.D.2. (Dec. 20, 1996) [61 FR 68480 (Dec. 27, 1996)].

126 An adviser currently relying on the exemption, but that advises plan assets of less than $200 million and files an annual updating amendment to its Form ADV following the compliance date of the amended rule, will be required to withdraw from Commission registration within 180 days of the adviser's fiscal year end (unless the adviser is otherwise eligible for SEC registration). *See* rule 203A-1(b)(2); *supra* note 118.

We proposed to increase the threshold to $200 million in light of Congress's determination to increase from $25 million to $100 million the amount of "assets under management" that requires all advisers to register with the Commission, and to maintain the same ratio as today of plan assets to the statutory threshold for registration.[127] Commenters supported our proposal.[128] One agreed that the new $200 million threshold would continue to ensure that the activities of a pension consultant registered with the Commission are significant enough to have an impact on national markets.[129] We are adopting the amendment, as proposed.

c. Multi-State Advisers

We are adopting, as proposed, amendments to the multi-state adviser exemption to align the rule with the multi-state exemption that Congress provided for mid-sized advisers in section 410 of the Dodd-Frank Act.[130] Amended rule 203A-2(d) permits all investment advisers who are required to register as an investment adviser with 15 or more states to register with the Commission, rather than 30 states, as currently required.[131] An adviser relying on the rule must

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127 Proposed rule 203A-2(a).

128 *See* NRS Letter; Pickard Letter.

129 NRS Letter. *See also* NSMIA Adopting Release, *supra* note 17, at n.60 (the $50 million "higher threshold is necessary to demonstrate that a pension consultant's activities have an effect on national markets."). The higher asset requirement also reflects that a pension consultant has substantially less control over client assets than an adviser that has "assets under management." *Id.*

130 Amended rule 203A-2(d). Form ADV will not be amended to reflect the changes to the multi-state adviser exemption until the end of the calendar year. *See supra* section II.A.1. Until that time, both a mid-sized adviser eligible for the statutory multi-state exemption and a small adviser eligible for the exemption under amended rule 203A-2(d) because it is required to register as an adviser in 15 or more states may register or remain registered (as the case may be) with the Commission by checking the boxes (Item 2.A.(9) and the relevant section of Schedule D) indicating that it is exempt because it is required to register in 30 or more states. *See supra* note 118. Upon making its next amendments to Form ADV, the adviser should revise its filing to report reliance on the new multi-state adviser exemption.

131 We note that amended rule 203A-2(d) permits an adviser otherwise eligible to rely on the exemption to choose to maintain its state registrations and not switch to SEC registration. *See*

withdraw from registration with the Commission when it is no longer required to be registered with 15 states.[132] We are also rescinding, as proposed, the provision in the current rule that permits advisers to remain registered until the number of states in which they must register falls below 25 states, and we are not adopting a similar cushion for the 15-state threshold.[133]

Commenters generally agreed with our proposal to align our multi-state exemption for small advisers with the statutory exemption for mid-sized advisers.[134] A few, however, recommended a lower threshold of required state registrations for eligibility for the multi-state exemption.[135] In light of Congressional determination to set the threshold at 15 states and our stated purpose in amending the rule to align it with the Dodd-Frank Act, we have determined not

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amended rule 203A-2(d)(2) (adviser elects to rely on the exemption by making the required representations on Form ADV).

132 *See* amended rule 203A-2(d). To rely on this exemption, an adviser also must continue to: (i) include a representation on Schedule D of Form ADV that the investment adviser has concluded that it must register as an investment adviser with the required number of states; (ii) undertake to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that it would be required by the laws of fewer than 15 states to register as an investment adviser with the state; and (iii) maintain a record of the states in which the investment adviser has determined it would, but for the exemption, be required to register. Amended rule 203A-2(d)(2)-(3). The adviser may not include in the number of states those in which it is not required to register because of applicable state laws or the national *de minimis* standard of section 222(d) of the Advisers Act. *See Exemption for Investment Advisers Operating in Multiple States; Revisions to Rules Implementing Amendments to the Investment Advisers Act of 1940; Investment Advisers with Principal Offices and Places of Business in Colorado or Iowa*, Investment Advisers Act Release No. 1733, n.17 (July 17, 1998) [63 FR 39708 (July 24, 1998)].

133 *See* rule 203A-2(e)(1). Eliminating this buffer simplifies the requirements of the exemption. *See* NRS Letter ("The Dodd-Frank Act has addressed the multi-state adviser exemption to simplify the requirements of this exemption.")

134 *See* NASAA Letter; comment letter of the National Education Association Member Benefits Corporation (Jan. 21, 2011) ("NEA Letter"); NRS Letter; Pickard Letter; Seward Letter; Shearman Letter.

135 *See* Seward Letter and Shearman Letter (in each case supporting the 15-state threshold we proposed, and suggesting the burdens of maintaining multiple state registrations can be significant). *See also* NEA Letter. One of these commenters also would support further decreasing the number of states to five and requiring advisers relying on the exemption to have at least $25 million of assets under management. Seward Letter. Another "would support an even lower threshold." Shearman Letter.

to lower the threshold further.[136] We also note that the requirement that advisers annually assess their eligibility for registration and the grace periods provided to switch to and from state registration should further mitigate the frequency with which an investment adviser required to register in 15 states will have to switch between state and federal registration.[137]

6. Elimination of Safe Harbor

We are rescinding, as proposed, rule 203A-4, which has provided a safe harbor from Commission registration for an investment adviser that is registered with the state securities authority of the state in which it has its principal office and place of business based on a reasonable belief that it is prohibited from registering with the Commission because it does not have sufficient assets under management.[138] One commenter argued that the safe harbor should be retained for mid-sized advisers because advisers calculating regulatory assets under management face similar challenges today as when the safe harbor was adopted.[139] We disagree. As stated in the Implementing Proposing Release, the safe harbor was designed for smaller advisory businesses with assets under management of less than $30 million, which may not employ the same tools or otherwise have a need to calculate assets as precisely as advisers with greater assets under management.[140] We also believe that the revisions we are adopting to the Form ADV instructions to implement a uniform method for advisers to calculate assets under

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136 *See* section 410 of the Dodd-Frank Act (a mid-sized adviser that otherwise would be prohibited may register with the Commission if it would be required to register with 15 or more states); H. REP. NO. 111-517, at 867 (2010) ("Conference Committee Report") ("Those advisers who qualify to register with their home state must register with the SEC should the adviser operate in more than 15 states.").

137 *See supra* section II.A.4.

138 Rule 203A-4.

139 NYSBA Committee Letter. Another commenter asserted that there has been and continues to be confusion among smaller advisers in calculating assets under management. NRS Letter.

140 Implementing Proposing Release, *supra* note 7, at section II.A.6. (*citing* rule 203A-4; NSMIA Adopting Release, *supra* note 17, at section II.B.3.).

management will clarify the requirements and reduce confusion among advisers.[141] Moreover, the rule is a safe harbor only from our enforcement actions, and to our knowledge few, if any, advisers have relied upon it in the 14 years since it was adopted.[142] Accordingly, we are rescinding the rule.

7. Mid-Sized Advisers

We are amending Form ADV to require a mid-sized adviser registering with us to affirm, upon application and annually thereafter, that it is either: (i) not required to be registered as an adviser with the state securities authority in the state where it maintains its principal office and place of business; or (ii) is not subject to examination as an adviser by that state.[143] These form revisions implement the Dodd-Frank Act amendment to section 203A of the Advisers Act that prohibits mid-sized advisers from registering with the Commission, but only: (i) if the adviser is required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the state in which it maintains its principal office and place of business; and (ii) if registered, the adviser would be subject to examination as an investment adviser by such commissioner, agency, or office.[144] The Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is "required to be registered" or is

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141 *See supra* section II.A.3.

142 *See* NRS Letter (noting a belief that the safe harbor has been little used by small advisers based upon the commenter's years of consulting for such advisers).

143 *See* amended Form ADV, Part 1A, Item 2.A.(2). For a discussion of changes to Form ADV, Part 1A, Item 2.A., see *supra* section II.A.2.

144 *See* section 410 of the Dodd-Frank Act. An adviser reporting that it is no longer able to make this affirmation will have 180 days from its fiscal year end to withdraw from Commission registration. *See* amended rule 203A-1(b)(2). Thus, the rule will operate to permit an adviser to rely on this affirmation reported in its annual updating amendments for purposes of determining its eligibility to register with the Commission.

"subject to examination" by a particular state securities authority.[145] We are therefore providing an explanation of these provisions in instructions to Form ADV.[146]

a. Required to be Registered

The Form ADV instructions we are adopting reflect that the "required to be registered" standard that Congress included in new section 203A(a)(2) of the Advisers Act for mid-sized advisers is different from the "regulated or required to be regulated" standard set forth in section 203A(a)(1) for small advisers.[147] The instruction explains that a mid-sized adviser "is not required to be registered" with the state securities authority and must register with the Commission (unless an exemption from registration with the Commission otherwise is available)[148] if the adviser is exempt from registration under the law of the state in which it has its principal office and place of business, or is excluded from the definition of investment adviser

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145 The Advisers Act defines the term "state" to include any U.S. state, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States. Advisers Act section 202(a)(19). For purposes of section 203A of the Advisers Act and the rules thereunder, rule 203A-3(c) defines "principal office and place of business" to mean the executive office of the investment adviser from which its officers, partners, or managers direct, control, and coordinate its activities. We are not changing this definition. *See* amended rule 203A-3(c). For a discussion of amendments we are making to the calculation of assets under management, see *supra* section II.A.3.

146 *See* amended Form ADV: Instructions for Part 1A, instr. 2.b.

147 *See* amended Form ADV: Instructions for Part 1A, instr. 2.b. Under section 203A(a)(1) of the Act, an adviser that is not regulated or required to be regulated as an investment adviser in the state in which it has its principal office and place of business must register with the Commission regardless of the amount of assets it has under management. Advisers Act section 203A(a)(1). *See also* Advisers Act section 203(a). We have interpreted "regulated or required to be regulated" to mean that a state has enacted an investment adviser statute, regardless of whether the adviser is actually registered in that state. *See* NSMIA Adopting Release, *supra* note 17, at section II.E.1. The bills originally introduced and passed in the House and Senate increased up to $100 million the threshold for Commission registration under the "regulated or required to be regulated" standard that is used today in section 203A(a)(1). *See* The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7418 (2009); Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 410 (2010). But the final version of the Dodd-Frank Act prohibits a mid-sized adviser from registering with the Commission if, among other things, it is "required to be registered" as an adviser with the state securities authority where it maintains its principal office and place of business. *See* section 410 of the Dodd-Frank Act.

148 *See, e.g.*, Advisers Act sections 203(a) and (b), 203A(b); rule 203A-2.

in that state.[149] Thus, for example, an adviser with $75 million of assets under management that is exempt from registration in the state in which its principal office and place of business is located will have to register with the Commission (unless an exemption from Commission registration is available). None of the commenters disputed our interpretation or suggested an alternative interpretation of the "required to be registered" element,[150] and we are adopting the instructions, as proposed.[151]

b. Subject to Examination

As we discussed in the Implementing Proposing Release, our staff contacted the state securities authority for each state and, based upon information they have provided us, identified those states that do not subject advisers registered with them to examination.[152] We have posted this list on our website,[153] and it also will be available to advisers using the IARD to register or amend their registration forms.[154] Based on those responses, advisers with their principal office

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149 *See, e.g.*, Uniform Securities Act §§ 102(15), 403(b) (2002). An adviser not registered under a state adviser statute in contravention of such statute, however, is not eligible for registration with the Commission. Similarly, an adviser could not voluntarily register with the Commission to avoid state registration.

150 One commenter suggested that we clarify whether mid-sized advisers that are exempt from registration in their home states may or are required to register with us. Sadis Letter. As discussed above and in the Form ADV instructions, if a mid-sized adviser is not required to be registered in the state where it has its principal office and place of business, the adviser must register with the Commission (unless an exemption from Commission registration is available). *See supra* notes 148-149 and accompanying text; amended Form ADV: Instructions for Part 1A, instr. 2.b.

151 *See* amended Form ADV: Instructions for Part 1A, instr. 2.b.

152 All state securities authorities other than Minnesota, New York and Wyoming have advised our staff that advisers registered with them are subject to examination. According to IARD data as of April 7, 2011, there were 63 advisers with assets under management between $25 million and $90 million and a principal office and place of business in Minnesota, 286 in New York, and 1 in Wyoming.

153 *See* http://www.sec.gov/divisions/investment/midsizedadviserinfo.htm.

154 *See* amended Form ADV, Part 1A, Item 2.A.(2)(b); amended Form ADV: Instructions for Part 1A, instr. 2.b. The staff also requested that each state notify us promptly if advisers in the state

and place of business in Minnesota, New York and Wyoming with assets under management between $25 million and $100 million must register with the Commission.[155]

Several commenters agreed with our approach of relying on responses from the state regulators rather than determinations by the Commission to identify whether an adviser is "subject to examination" by a state.[156] Two commenters, however, suggested that we should instead establish our own criteria for whether an adviser is "subject to examination," and one further recommended that we should engage in an evaluation of each state's adviser examination program.[157] We do not believe that the alternatives suggested are practical or appropriate. As we explained in the Implementing Proposing Release, the states are the most familiar with their own circumstances and are in the best position to determine whether advisers in their states are subject to examination.[158]

B. Exempt Reporting Advisers: Sections 407 and 408

To implement new sections 203(l) and 203(m) of the Advisers Act, we are adopting a new rule, as proposed, that requires advisers relying on those exemptions from registration to

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will begin to be subject to examination or will no longer be subject to examination, and we will update the list on the IARD and our website accordingly.

155 *See supra* note 152. The requirement for such an adviser to register with the Commission, as opposed to one of these states, will be effective on July 21, 2011.

156 *See* NASAA Letter (proposed approach "complies with the clear and unambiguous language of the statute" and "attempting to define or otherwise interpret terms that are plain and direct is contrary to long-established rules of statutory construction."); NRS Letter; Pickard Letter. *See also* Sadis Letter (recommending the Commission clarify whether an adviser in a particular state is required to register with the Commission).

157 ABA Committees Letter (recommending the Commission construe "examination" to indicate a "structured adviser examination program, rather than one conducted on an occasional, sporadic or informal basis," and require an annual affirmation from each state that it subjects advisers to examination); FSI Letter (recommending the Commission engage in a stringent evaluation of each state's adviser examination program and expressly define "subject to examination" to, at a minimum, include a "uniform or risk based routine examination process" and that it "mirrors the frequency of broker-dealer examination by FINRA and the SEC").

158 *See* Implementing Proposing Release, *supra* note 7, at section II.A.7.b.

submit to us, and to periodically update, reports that consist of a limited subset of items on Form ADV.[159] We are also adopting the amendments we proposed to Form ADV to permit the form to serve as both a reporting and registration form and to specify the seven items these "exempt reporting advisers" must complete.[160]

As discussed above, the Dodd-Frank Act amends the Advisers Act, as of July 21, 2011, to create two new exemptions from registration for advisers to certain types of "private funds" and to repeal the private adviser exemption contained in section 203(b)(3) of the Advisers Act on which advisers to many hedge and other private funds relied in order to avoid registration.[161] Both section 203(l) (which provides an exemption for an adviser that advises solely one or more "venture capital funds") and section 203(m) of the Advisers Act (which instructs the Commission to exempt any adviser that acts solely as an adviser to private funds and has assets under management in the United States of less than $150 million) provide that the Commission shall require such advisers to maintain such records and to submit such reports "as the Commission determines necessary or appropriate in the public interest."[162] The rules and

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159 We refer to advisers that rely on the exemptions from registration provided in either new section 203(l) or new section 203(m) of the Advisers Act as "exempt reporting advisers." For a brief discussion of these exemptions, see *infra* note 162 and accompanying text; for a more in-depth discussion, see Exemptions Adopting Release, *supra* note 4.

160 For a discussion of additional amendments we are proposing to Part 1 of Form ADV, see *infra* section II.C.

161 Section 403 of the Dodd-Frank Act. Section 203(b)(3) exempts from registration any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the Investment Company Act, or a company which has elected to be a business development company pursuant to Section 54 of the Investment Company Act (15 U.S.C. 80a-54). *See supra* note 4; Implementing Proposing Release, *supra* note 7, at n.112 and accompanying text.

162 *See* sections 407 and 408 of the Dodd-Frank Act, adding Advisers Act sections 203(l) and (m). See *supra* note 5. *See also* Exemptions Adopting Release, *supra* note 4, at section II.; section 204(a) of the Advisers Act and section 204(b)(5), as added by section 404 of the Dodd-Frank Act.

amendments to Form ADV that we are adopting today are designed to address the reporting aspects of these two exemptions.[163]

1. Reporting Required

Rule 204-4 requires exempt reporting advisers to file reports with the Commission electronically on Form ADV through the IARD using the same process used by registered investment advisers.[164] An exempt reporting adviser must submit its initial Form ADV within 60 days of relying on the exemption from registration under either section 203(l) or section 203(m) of the Advisers Act.[165] Each Form ADV is considered filed with the Commission upon acceptance by the IARD.[166] An exempt reporting adviser unable to file electronically as a result of unanticipated technical difficulties may, like a registered adviser, request a temporary hardship exemption of up to seven business days after the filing was due.[167] Advisers filing the

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163 Recordkeeping requirements for exempt reporting advisers will be addressed in a future release. *See* sections 407 and 408 of the Dodd-Frank Act (providing that the Commission shall require investment advisers exempt from registration under either section 407 or 408 of the Dodd-Frank Act to maintain such records as the Commission determines necessary or appropriate in the public interest or for the protection of investors.).

164 New rule 204-4. *See* amended Form ADV: General Instructions 6, 7, 8 and 9 (providing guidance about the IARD entitlement process, signing the form, and submitting it for filing). We are also adopting technical amendments, as proposed, to Form ADV-NR, to enable exempt reporting advisers to appoint the Secretary of the Commission as an agent for service of process for certain non-resident advisers. *See* amended Form ADV-NR; amended Form ADV: General Instruction 19.

165 *See* amended Form ADV: General Instruction 13. An adviser may not be both registered with us and filing as an exempt reporting adviser at the same time. An SEC registered adviser switching from being registered to being an exempt reporting adviser must first file a Form ADV-W to withdraw its SEC registration before submitting its first report as an exempt reporting adviser. We have modified General Instruction 13 from the proposal to reflect IARD system functionality, which we continue to develop.

166 New rule 204-4(c). *Cf.* rule 0-4(a)(2) ("All filings required to be made electronically with the . . . [IARD] shall, unless otherwise provided by the rules and regulations in this part, be deemed to have been filed with the Commission upon acceptance by the IARD.").

167 *See* new rule 204-4(e) (providing a temporary hardship exemption for an adviser having unanticipated technical difficulties that prevent submission of a filing to IARD); amended Form ADV-H; amended Form ADV: General Instruction 17.

form must pay a filing fee designed to pay the reasonable costs associated with the filing and maintenance of the system.[168] We anticipate that filing fees, which the Commission will consider separately, will be the same as those for registered investment advisers, which currently range from $40 to $225 based on the amount of assets an adviser has under management.[169]

Several commenters expressed the view that use of Form ADV and the IARD for exempt reporting advisers would be efficient, because the system is familiar to many advisers and because it would integrate the process of filing with the Commission with any parallel filing the adviser may be obligated to make with state securities authorities.[170] Commenters agreed with our expectation that use of Form ADV and the IARD would facilitate a transition from filing reports with us to applying for registration with us.[171] Two commenters urged that we create a separate reporting system.[172] One recommended a new, more interactive system; and the other suggested a separate filing system to avoid confusion among investors who might mistakenly assume that an exempt reporting adviser is registered if its information comes up in an IARD

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168 New rule 204-4(d).

169 The current fee schedule applicable to advisers applying for registration may be found on our website at http://www.sec.gov/divisions/investment/iard/iardfee.shtml.

170 The Dodd-Frank Act exempts exempt reporting advisers from registration with the Commission. *See* sections 407 and 408 of the Dodd-Frank Act. It does not, however, exempt these advisers from registering or filing reports with state securities regulators. *See also* amended Form ADV: General Instruction 14 (noting that exempt reporting advisers who file reports with the SEC may continue to be subject to state registration, reporting, or other obligations).

171 ABA Committees Letter; comment letter of Better Markets, Inc. (Jan. 24, 2011) ("Better Markets Letter"); NRS Letter; NASAA Letter. Form ADV, as amended, permits an adviser to transition from filing reports with us to applying for registration under the Act by simply amending its Form ADV; the adviser would check the box to indicate it is filing an initial application for registration, complete the items it did not have to answer as an exempt reporting adviser, and update the pre-populated items that it already has on file. *See* amended Form ADV: General Instruction 15 (providing procedural guidance to advisers that no longer meet the definition of exempt reporting adviser).

172 Merkl Implementing Letter; Seward Letter. *See also* Shearman Letter (making similar arguments regarding the potential for investor confusion, but not advocating use of a different form or reporting system).

search. We share these commenters' general goals of innovation and the avoidance of investor confusion as our staff works with FINRA (our IARD contractor) to continue improving the IARD.[173] However, the expense and delay of initiating and developing a new system with adequate functionality, which neither commenter addressed, argues against these commenters' recommendations. We are adopting rule 204-4 as proposed.

2. Information in Reports

We are also amending Form ADV to accommodate its use by exempt reporting advisers. First, we are re-titling the form to reflect its dual purpose as both the "Uniform Application for Investment Adviser Registration," as well as the "Report by Exempt Reporting Advisers." Second, we are revising the cover page to require exempt reporting advisers to indicate the type of report they are filing.[174] Finally, we are amending Item 2 of Part 1A, which today requires advisers to indicate their eligibility for SEC registration, to add a new subsection B that requires an exempt reporting adviser to identify the exemption(s) on which it is relying to report, rather than register, with the Commission.[175]

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[173] Our staff, for example, recently completed a study mandated by section 919B of the Dodd-Frank Act on ways to improve investor access to information about certain financial service providers, including data contained in the IARD. *See* Staff of the Office of Investor Education and Advocacy of the U.S. Securities and Exchange Commission, *Study and Recommendations on Improved Investor Access to Registration Information about Investment Advisers and Broker-Dealers*, Jan. 2011, available at http://www.sec.gov/news/studies/2011/919bstudy.pdf.

[174] An exempt reporting adviser must indicate whether it is submitting an initial report, an annual updating amendment, an other-than-annual amendment, or a final report. We are also adopting corresponding changes to General Instruction 2.

[175] An exempt reporting adviser must check that it qualifies for an exemption from registration: (i) as an adviser solely to one or more venture capital funds; and/or (ii) because it acts solely as an adviser to private funds and has assets under management in the United States of less than $150 million. *See* amended Form ADV, Part 1A, Item 2.B, questions 1 and 2. An exempt reporting adviser relying on the latter exemption, for private fund advisers, must also indicate the amount of private fund assets it manages in Section 2.B. of Schedule D to Form ADV, Part 1A. Investment advisers who have their principal office and place of business outside of the United States, however, need only include private fund assets that they manage at a place of business in the United States. *See* Exemptions Adopting Release, *supra* note 4, at section II.B.3. An adviser

Some commenters asserted that it would be inconsistent with these new exemptions to require exempt reporting advisers to submit reports to the Commission,[176] while others argued that we proposed to require too much information.[177] Congress, however, gave us broad authority to require exempt reporting advisers to file reports as necessary or appropriate in the public interest or for the protection of investors.[178] In addition, the Dodd-Frank Act neither limits the types of information we could require in the reports nor specifies the purpose for which we would use the information.

We are adopting, as proposed, a requirement that exempt reporting advisers complete the following items of Part 1A of Form ADV: Items 1 (Identifying Information), 2.B. (SEC Reporting by Exempt Reporting Advisers), 3 (Form of Organization), 6 (Other Business Activities), 7 (Financial Industry Affiliations and Private Fund Reporting), 10 (Control Persons), and 11 (Disclosure Information).[179] In addition, we are requiring, as proposed, that exempt reporting advisers also complete corresponding sections of Schedules A, B, C, and D.[180] Responses to these items will assist us to identify exempt reporting advisers, their owners, and their business models. The information we collect will provide us with information as to

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that acts solely as an adviser to private funds but is no longer eligible to check box 2.B.(2) because it has assets under management in the United States of $150 million or more may, subject to certain conditions, check a separate box to continue filing as an exempt reporting adviser during the safe harbor transition period described below. *See infra* note 211 and accompanying text. *See also* amended Form ADV, Part 1A, Item 2.B, question 3; Form ADV: General Instruction 15.

176 Comment letter of Avoca Capital Holdings (Dec. 21, 2011) ("Avoca Letter"); AIMA Letter; comment letter of AustinVentures (Jan. 21, 2011) ("AV Letter").

177 Comment letter of Berkeley Center for Law, Business and the Economy (Jan. 31, 2011) ("BCLBE Letter"); Shearman Letter; comment letter of Village Ventures, Inc. (Jan. 24, 2011) ("Village Ventures Letter").

178 *See* sections 407 and 408 of the Dodd-Frank Act.

179 *See* amended Form ADV: General Instruction 3. We will continue to monitor whether we should also require exempt reporting advisers to complete other items on Form ADV (*e.g.*, Part 2).

180 *See id.*; Implementing Proposing Release, *supra* note 7, at section II.B.2.

whether these advisers or their activities might present sufficient concerns to warrant our further attention in order to protect their clients, investors, and other market participants.[181] The reports will also provide the public with some basic information about these advisers and their businesses.

Items 1, 3, and 10 elicit basic identification details such as name, address, contact information, form of organization, and who controls the adviser. Items 6 and 7.A. provide us with details regarding other business activities in which the adviser and its affiliates are engaged, which would permit us to identify conflicts that the adviser may have with its clients that may suggest significant risks to those clients. Item 11 requires advisers to disclose the disciplinary history of the adviser and its employees and to complete a separate schedule containing details of each disciplinary event.[182] Item 7.B. and Section 7.B. of Schedule D require advisers to private funds, which these advisers manage by terms of the exemptions, to disclose information regarding each private fund they advise. As discussed in more detail in Section II.C. of this Release, we are adopting significant amendments to Section 7.B. of Schedule D that are designed to provide us with a comprehensive overview, or census, of private funds.[183] Exempt reporting advisers' responses to Item 7.B., and Section 7.B.(1) of Schedule D, in conjunction with information provided by registered advisers, will provide us with important data about these funds that we would use to identify risks to their investors.

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181 One commenter agreed. *See* ABA Committees Letter (stating that most of the information exempt reporting advisers would have to provide is of a nature that will assist the Commission to identify compliance risks posed by exempt reporting advisers and thus such disclosure responds to the mandate set forth in the Dodd-Frank Act).

182 *See* amended Form ADV, Part 1A, Disclosure Reporting Pages.

183 For instance, advisers who complete Section 7.B.(1) of Schedule D would have to provide identifying information about each private fund, such as its name and domicile, as well as information about its service providers and its gross assets. *See* amended Form ADV, Part 1A, Schedule D, Section 7.B.(1). *See also infra* Section II.C.1.

Several commenters expressed general support for the Commission's proposed reporting requirement.[184] One commenter urged us not to require exempt reporting advisers to report information about their other business activities in response to Item 6, their related persons in response to Item 7.A., their private funds in response to Item 7.B., and their control persons in response to Item 10 because, among other reasons, such information "would not add to the Commission's ability to protect the public interest or investors."[185] We disagree. Without this information, the reports would contain little more than basic identifying data, which would be inadequate to help us to meaningfully identify significant risks to an exempt reporting adviser's clients, investors, or other market participants. Moreover, to require such limited information to be reported would deny investors an opportunity to verify disclosures they receive directly from the adviser.

Some commenters urged that we broaden the scope of information we proposed to collect, suggesting among other things that the Commission should require all or some of the additional information that registered advisers must submit on Form ADV, including a requirement to prepare and deliver a client brochure (Part 2) and brochure supplements.[186] We have considered our need for this information in light of the exemptions Congress provided in the Dodd-Frank Act and the regulatory role we expect to assume with respect to exempt reporting advisers. We have not sought to apply most of the prophylactic rules we have adopted

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184 *See, e.g.*, AFL-CIO Letter; comment letter of Council of Institutional Investors (Jan. 20, 2011) ("CII Letter"); NRS Letter; Better Markets Letter; ABA Committees Letter; NASAA Letter.

185 Village Ventures Letter (asserting also that the requirements would be burdensome). We address the anticipated costs and burdens associated with these requirements below. *See infra* Section V.

186 *See* Better Markets Letter; CII Letter. Part 2 of Form ADV, which requires advisers to prepare a narrative, plain English client brochure, contains 18 items including information on the adviser's business practices, conflicts of interest, and background. Part 2 also requires advisers to prepare brochure supplements that include information about advisory personnel on whom clients rely for investment advice. *See also* AFL-CIO Letter (suggesting requiring performance reporting).

for registered advisers,[187] and we do not anticipate that our staff will conduct compliance examinations of these advisers on a regular basis.[188] One commenter who urged us to collect a broader set of information recommended that we apply additional prophylactic rules to exempt reporting advisers, the consequence of which would be to reduce the distinctions between these advisers and registered advisers, which those urging us to collect less information argued we should avoid.[189] We believe that requiring advisers to complete the items we proposed strikes an appropriate balance. As discussed in more detail below, we have revised some of these items in response to comments we received.

3. Public Availability of Reports

Several commenters urged that we not make public any information filed by exempt reporting advisers.[190] Other commenters, however, supported public disclosure of information

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187 *See*, *e.g.*, rule 206(4)-2 (the custody rule), which applies to advisers registered or required to be registered with the Commission. *But see* rule 206(4)-5 (the "pay to play" rule) (applied to exempt reporting advisers that previously relied on the private adviser exemption and continues to apply to exempt reporting advisers that currently rely on exemptions from registration under sections 203(l) and 203(m) of the Advisers Act). *See infra* section II.D.1. (discussing amendments we are adopting today to the pay to play rule to continue to apply the rule to exempt reporting advisers and foreign private advisers).

188 Our staff will conduct cause examinations where there are indications of wrongdoing, *e.g.*, those examinations prompted by tips, complaints, and referrals. Under section 204(a) of the Advisers Act, however, the Commission has the authority to examine records, unless the adviser is "specifically exempted" from the requirement to register pursuant to section 203(b) of the Advisers Act. Investment advisers that are exempt from registration in reliance on section 203(l) or 203(m) of the Advisers Act are not "specifically exempted" from the requirement to register pursuant to section 203(b).

189 *Compare* comment letter of Coalition of Private Investment Companies (Jan. 28, 2011) ("CPIC Letter") *with* AV Letter; AIMA Letter; Shearman Letter; Village Ventures Letter. *See* Merkl Implementing Letter (indicating that our proposal created a meaningful distinction between registered advisers and exempt reporting advisers by not subjecting exempt reporting advisers to all of Form ADV, to compliance program requirements under rule 206(4)-7, to custody requirements under rule 206(4)-2, and to regular examinations, consistent with a primary concern of Congress in adopting the Dodd-Frank Act).

190 *See* AV Letter; AIMA Letter; ABA Committees Letter; Avoca Letter; Katten Foreign Advisers Letter; MFA Letter; NRS Letter; comment letter of the National Venture Capital Association (Jan. 24, 2011) ("NVCA Letter"); Shearman Letter; Seward Letter.

by these advisers and suggested that such data would be useful, for example, for prospective clients who were conducting "due diligence" reviews of advisers.[191]

Section 210(a) of the Advisers Act requires information contained in reports filed with the Commission to be made available to the public, unless we find that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. Commenters did not persuade us that we could make such a finding.[192] On the contrary, we believe the public reporting requirements we are adopting will provide a level of transparency that will help us to identify practices that may harm investors,[193] will aid investors in conducting

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191 *See* AFL-CIO Letter; CII Letter; Better Markets Letter (each lauding the Commission's initiative to create, for the first time, a database of public information on private investment funds). *See also* Merkl Implementing Letter (noting that a potential investor would be better able to perform due diligence if the information were made available to the public); CII Letter (arguing that an investor could make an informed decision regarding the integrity of a prospective adviser if he or she were able to review the disciplinary history of the exempt reporting adviser and its employees).

192 *See* AV Letter (claiming that the public disclosure of the reports would be "unnecessary and intrusive" and would be done "for no apparent reason"); MFA Letter (urging that, absent a compelling policy reason for public disclosure, the reports should not be publicly available because some of the information is competitively sensitive); NVCA Letter (arguing that making public the ownership or control persons of an exempt reporting adviser would cause competition for scarce human resources among these advisers and could reveal strategic relationships to competitors); NRS Letter (claiming that because investors and prospective investors receive voluminous offering documents, due diligence questionnaires, and other materials, limited Form ADV Part 1A information would be of little value and limited use); ABA Committees Letter (indicating there would be no benefit in members of the general public having access to this information because they are not qualified to invest); Katten Foreign Advisers Letter (claiming that private fund investors already receive an offering document that should cover the items that would be included in the reports). *See also* Katten Foreign Advisers Letter; NVCA Letter; AIMA Letter (each conditioning its support for the scope of the reporting requirement on making the reports non-public).

193 For instance, census data about a private fund's gatekeepers, including administrators and auditors, will be available on Section 7.B.1. of Schedule D and will be verifiable by investors and the Commission. Recent enforcement actions suggest that the availability of such information could be helpful. *See, e.g.*, *SEC v. Grant Ivan Grieve, et al*., Litigation Release No. 21402 (Feb. 2, 2010) (default judgment against hedge fund adviser that was alleged to have fabricated and disseminated false financial information for the fund that was "certified" by a sham independent back-office administrator and phony accounting firm).

their own due diligence,[194] and will deter advisers' fraud and facilitate earlier discovery of potential misconduct.[195] For instance, investors will be able to compare Form ADV information to the information they have received in offering documents and due diligence to identify potential misrepresentations. For these reasons, we believe public availability of these reports is in the public interest and will help to protect investors. Suggestions by some that the Dodd-Frank Act compels us to deny public access to these reports are misplaced.[196] In the Dodd-Frank Act, Congress sought to protect only certain proprietary and similarly sensitive information submitted by advisers about their private funds in reports for the assessment of systemic risk.[197] In light of section 210 of the Act, which presumes reports submitted to us by advisers to be publicly available, together with the Freedom of Information Act,[198] which generally supports disclosure of such documents, we believe at this time that the information should be publicly available.[199]

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194 *See supra* note 191.

195 *See In the Matter of John Hunting Whittier*, Investment Advisers Act Release No. 2637 (Aug. 21, 2007) (settled action against hedge fund manager for, among other things, misrepresenting to fund investors that a particular auditor audited certain hedge funds, when in fact it did not).

196 ABA Committees Letter; Avoca Letter; AV Letter; Seward Letter; Shearman Letter.

197 *Compare* section 404 of the Dodd-Frank Act, codified at Advisers Act section 204(b), *with* sections 407 and 408 of the Dodd-Frank Act, codified at Advisers Act sections 203(l) and 203(m). *See also* Systemic Risk Reporting Release, *supra* note 71 (proposing confidential reporting by advisers to private funds designed to assist the Financial Stability Oversight Council ("FSOC") in its assessment of systemic risk in the U.S. financial system).

198 5 U.S.C. 552(a).

199 Information on Form ADV is available to the public through the Investment Adviser Public Disclosure System ("IAPD"), which allows the public to access the most recent Form ADV filing made by an investment adviser and is available at http://www.adviserinfo.sec.gov. In response to commenters' suggestions we will, however, make it clear to the public viewing reports filed by an exempt reporting adviser on IAPD that the adviser is not registered with us. *See* Shearman Letter; Seward Letter (expressing concerns that public access to reports by exempt reporting advisers might cause confusion if an unregistered adviser's information comes up in an IARD search, an investor's perception may be that the adviser is registered).

Some commenters expressed more narrow concerns that certain of the information we proposed to require could require them to disclose proprietary or competitively sensitive information.[200] As discussed below, we have responded to those concerns by revising certain of our items in a manner that will affect the information that both registered and exempt reporting advisers will provide to us.[201]

4. Updating Requirements

We are also amending rule 204-1 under the Advisers Act, which requires advisers to update their Form ADV filings, to require exempt reporting advisers to file updating amendments to reports filed on Form ADV.[202] As amended, rule 204-1 requires an exempt reporting adviser, like a registered adviser, to amend its reports on Form ADV: (i) at least annually, within 90 days of the end of the adviser's fiscal year; and (ii) more frequently, if required by the instructions to Form ADV. Similarly, we are amending General Instruction 4 to Form ADV to require an exempt reporting adviser, like a registered adviser, to update promptly Items 1 (Identification Information), 3 (Form of Organization), and 11 (Disciplinary Information) if they become inaccurate in any way, and to update Item 10 (Control Persons) if it becomes materially inaccurate.[203]

Most of the commenters who addressed updating and amendment requirements agreed with our approach to update the report annually and to amend it according to the same schedule

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200 *See infra* note 238. The NVCA also argued that requiring a venture capital fund adviser to report information about the adviser's control persons, as required by Item 10 of Part 1A of Form ADV, could increase competition among these advisers for human resources. While this information could result in competitive effects among these advisers, the effects of this item are not unique to these advisers, and they may result in benefits.

201 *See infra* Section II.C.1.

202 Rule 204-1. We are also amending the title of the rule to be "Amendments to Form ADV," rather than "Amendments to application for registration," to reflect use of the form by exempt reporting advisers.

203 *See* amended Form ADV: General Instruction 4.

as is applicable to registered advisers.[204] In order to permit us to receive timely information from exempt reporting advisers, we are adopting the rule amendments as proposed.

5. Final Reports

When an adviser ceases to be an exempt reporting adviser, new rule 204-4 requires the adviser to file an amendment to its Form ADV to indicate that it is filing a final report.[205] Final report filings will allow us to distinguish such a filer from one that is failing to meet its filing obligations.[206] In some cases an exempt reporting adviser will file a final report because it ceases to do business as an investment adviser and thus is no longer subject to reporting under the Act.[207] In other cases an exempt reporting adviser will file a final report in connection with becoming registered with the Commission, in which case it will continue to periodically update its Form ADV, but as a registered adviser.[208]

Amended general instruction 15 to Form ADV provides guidance to exempt reporting advisers transitioning to becoming registered with the Commission. An exempt reporting adviser wishing to register with the Commission can file a single amendment to its Form ADV that will serve both as a final "report" as an exempt reporting adviser and an application for

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204 NRS Letter; Merkl Implementing Letter; CII Letter; ABA Committees Letter. Some of the commenters added that information reported by exempt reporting advisers that is allowed to become significantly outdated or inaccurate would not serve the Commission's or public's interest or protect investors as mandated by the Dodd-Frank Act and could be misleading. ABA Committees Letter; Merkl Implementing Letter. *But see* NVCA Letter (indicating that, because venture capital fund investments are long-term and illiquid, there would be little, if any, benefit to investors, regulators or the public to update the report more frequently).

205 New rule 204-4(f).

206 *Id*. Advisers filing a final report are not required to pay a filing fee. An adviser that failed to file a final report would violate rule 204-4(f).

207 Such an adviser must indicate that it is filing a final report and update Item 1 (Identifying Information) of Part 1A of Form ADV. Amended Form ADV: General Instruction 15.

208 An exempt reporting adviser may be required to become registered with the Commission if, for example, it is relying on the exemption provided by section 203(l) of the Act and accepts a client that is not a venture capital fund. *See* amended Form ADV: General Instruction 15; Exemptions Adopting Release, *supra* note 4, at Section II.A.

registration under the Advisers Act.[209] While an application is pending, but before it is approved, an adviser may continue to operate as an exempt reporting adviser in accordance with the terms of the relevant exemption.[210] In addition, General Instruction 15 provides a safe harbor for certain exempt reporting advisers relying on the "private fund adviser" exemption provided by rule 203(m)-1. Such an adviser that has complied with all of its reporting obligations as an exempt reporting adviser may continue advising private fund clients for up to 90 days after filing an annual updating amendment indicating that it has private fund assets of $150 million or more before filing its final report and application for registration.[211] This transition period is designed to accommodate events that may be beyond the adviser's control, such as an increase in the value of the adviser's assets under management, but it is not available to an adviser that otherwise would not qualify for the exemption provided by rule 203(m)-1. The transition period also is not available to advisers relying on the "venture capital adviser" exemption in section 203(l) of the Act. Advisers seeking to rely on that exemption may not accept a client that is not a venture capital fund without first registering under the Adviser Act.[212] Commenters who addressed the proposal to require a final report endorsed the Commission's approach.[213]

C. Form ADV

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209 *See* amended Form ADV: General Instruction 15.

210 *See* amended Form ADV: General Instruction 15. For example, an adviser transitioning from exempt reporting to registered would violate the Advisers Act registration requirement if it provides advisory services to a client that is not a private fund before the Commission approves its application for registration.

211 *See* amended Form ADV: General Instruction 15. This condition reflects the importance of the Advisers Act reporting requirements applicable to advisers relying on the exemption provided by rule 203(m)-1. *See also* Exemptions Adopting Release, *supra* note 4, at n.377. An adviser that meets or exceeds $150 million in assets under management in the United States must indicate that change by checking the box in Item 2.B.(3) of Form ADV in its annual updating amendment.

212 *See* amended Form ADV: General Instruction 15.

213 ABA Committees Letter; Merkl Implementing Letter.

We are adopting today a number of amendments to Form ADV that will improve our ability to oversee investment advisers. Data collected from Form ADV is of critical importance to our regulatory program and our ability to protect investors. We use information reported to us on Form ADV for a number of purposes, such as to efficiently allocate our examination resources based on the risks we discern, or to identify common business activities, from information provided by advisers. The information is used to create risk profiles of investment advisers and permits our examiners to better prepare for, and more efficiently conduct, their examinations. Moreover, the information in Form ADV allows us to better understand the investment advisory industry and to evaluate the implications of policy choices we must make in administering the Advisers Act.

As amended, Form ADV requires advisers to provide us with additional information about three areas of their operations.[214] First, we require advisers to provide additional information about private funds they advise. Second, we expand the data advisers provide us about their advisory business (including data about the types of clients they have, their employees, and their advisory activities), as well as about their business practices that may present significant conflicts of interest (such as the use of affiliated brokers, soft dollar arrangements, and compensation for client referrals). Third, we require additional information about advisers' non-advisory activities and their financial industry affiliations. Some additional changes to the Form (described below) improve our ability to assess compliance risks and also to

[214] In addition, we are making several clarifying or technical amendments in response to comments, frequently asked questions we receive, and our experience administering the form. *See infra* sections II.C.5. and 7.

identify advisers that are subject to the Dodd-Frank Act's requirements concerning certain incentive-based compensation arrangements.[215]

The commenters that addressed these proposed amendments to Form ADV generally supported the amendments,[216] although many expressed concerns with or urged changes to the proposed private fund reporting requirements contained in Item 7.B. and Section 7.B.(1) of Schedule D.[217] Two commenters argued that the new information requirements we proposed to Part 1A of Form ADV overlap in some respects with the new brochure requirements (Part 2 of Form ADV) and should not be adopted.[218] We acknowledge some overlap in the information required to be reported, but note that overlap may be necessary as the two parts of Form ADV serve very different purposes. Part 2 of Form ADV may overlap Part 1 to ensure that investors are fully informed about a particular practice or conflict, while the information we collect in Part 1 permits us to collect data about that practice or conflict for regulatory purposes.

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215 *See* section 956 of the Dodd-Frank Act.

216 *See, e.g.*, NASAA Letter; IAA General Letter (stating that enhanced disclosure in Part 1 of Form ADV will improve the Commission's ability to gather data about firms and to conduct appropriate inquiries, inspections, and other activities based on that data, and noting that certain additional information will allow the Commission to focus its examination and enforcement resources on those advisers that appear to present greater compliance risks); CPIC Letter (noting that additional information that the revised form will collect should be of assistance to the Commission in its efforts to identify fund advisers, to verify the existence and location of assets and to carry out general market surveillance, and it should also be of use to investors as they conduct due diligence and research the background of fund managers).

217 *See, e.g.*, ABA Committees Letter; AV Letter; AIMA Letter; comment letter of CompliGlobe Ltd. (Jan. 24, 2011) ("CompliGlobe Letter"); comment letter of Debevoise & Plimpton LLP (Jan. 24, 2011) ("Debevoise General Letter"); comment letter of DLA Piper LLP (US) (on behalf of Emerging Growth and Venture Capital Group) (Jan. 24, 2011)) ("DLA Piper VC Letter"); comment letter of Gunderson Dettmer Stough Villeneuve Franklin & Hachigian, LLP (Jan. 24, 2011) ("Gunderson Letter"); IAA General Letter; Katten Foreign Advisers Letter; MFA Letter; NRS Letter; NVCA Letter; O'Melveny Letter; Seward Letter; Shearman Letter.

218 *See* NRS Letter (asserting that parts of the proposed amendments to Items 5, 6, 7, 8, and 10 would result in duplicative reporting); Seward Letter.

We are adopting amendments to the form, with several substantive and technical or clarifying revisions that respond to comments we received.

1. Private Fund Reporting: Item 7.B.

We are adopting amendments to Item 7.B. and Schedule D of Form ADV that expand the information advisers must report to us about the private funds they advise. This information will provide us with a more complete understanding of private funds and permit us to enhance our assessment of advisers for purposes of targeting our examinations. The information will also improve our ability to identify practices that could harm investors and help expose and deter fraud and other misconduct.[219] Both registered and exempt reporting advisers are required to complete Item 7.B. and the related portions of Schedule D.

Item 7.B. requires an adviser to complete a separate Section 7.B. of Schedule D for each private fund that it advises. Part A of Section 7.B.(1) requires an adviser to provide basic information regarding the size and organizational, operational, and investment characteristics of each fund. Part B requires information about five types of private fund service providers that perform important roles as "gatekeepers." This information will be publicly available, as is other information reported on Form ADV. We are adopting these amendments with several changes, discussed below, that respond to comments we received.

Item 7.B. has required an adviser to complete section 7.B. of Schedule D for each "investment-related" limited partnership or limited liability company that it or a related person advises.[220] We are modifying, as proposed, the scope of Item 7.B. by requiring an adviser to

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219 *See* Implementing Proposing Release, *supra* note 7, at nn.148-150 and accompanying text.

220 Section 7.B. of Schedule D previously required an adviser to a private fund that is a limited partnership or limited liability company to provide only the following information: (i) the name of the fund; (ii) the name of the general partner or manager; (iii) whether the adviser's clients are solicited to invest in the fund; (iv) the approximate percentage of the adviser's clients that have invested in the fund; (v) the minimum investment commitment; and (vi) the current value of the

complete a separate Schedule D for each "private fund" that the adviser (but not a related person) manages. We use the new term "private fund," defined in section 202(a)(29) of the Act,[221] with the result that advisers must report on pooled investment vehicles regardless of how they are organized. In addition, as proposed, we are narrowing the reporting requirement so that advisers are no longer required to report on the funds of their related persons, which in most cases are now required to be reported to us by a related person that is either registered under the Act or is an exempt reporting adviser.[222]

We are also adopting several measures that will help to avoid multiple reporting for each private fund and minimize the overall burden of reporting private fund information. First, only one adviser must report the full scope of information for each private fund, even where there are other advisers to the same fund (*e.g.*, subadvisers).[223] Second, an adviser managing a master-feeder arrangement may submit a single Section 7.B.(1) for the master fund and all of the feeder

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total assets of the fund. As we discussed in the Implementing Proposing Release, this information provided us with little data about the operations of the many large hedge funds and other private funds managed by a growing number of advisers registered with the Commission.

221 This section defines a "private fund" as an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act.

222 The Dodd-Frank Act repealed the private adviser exemption effective July 21, 2011, so many private fund advisers that were previously unregistered will now be required to register under the Advisers Act. *See supra* at sections I. and II.B.

223 If an investment adviser completes section 7.B.(1) of Schedule D for a private fund, other advisers to that fund do not have to complete section 7.B.(1) for that private fund. *See* amended Form ADV, Part 1A, Note to Item 7.B.; Section 7.B.(2) of Schedule D. Section 7.B.(1) of Schedule D requires advisers to provide a private fund identification number, which is a unique identification number for each fund. Advisers must obtain an identification number for each private fund by logging onto the IARD website and using the private fund identification number generator. Once an adviser obtains a private fund identification number for a private fund, all advisers to the fund must use that same number on Sections 7.B.(1) and 7.B.(2) for that fund and continue using that same number whenever they amend either section of Schedule D. *See* amended Form ADV: Instructions for Part 1A, instr. 6.b.

funds if these funds would otherwise report substantially identical information.[224] Finally, an adviser with a principal office and place of business outside the United States is not required to complete Schedule D for any private fund that, during the adviser's last fiscal year, was not a United States person, was not offered in the United States and was not beneficially owned by any United States person.[225] Commenters did not address any of the issues raised by these changes to Item 7.B., which we are adopting as proposed.

An adviser must file a separate Section 7.B.(1) (Parts A and B) for each private fund it manages.[226] Part A of Section 7.B.(1) requires an adviser to provide the name of the fund and the state or country in which the fund is organized and to identify other persons involved in the management of the fund.[227] Part A also requires the adviser to report whether the fund is part of a master-feeder arrangement[228] or is a fund of funds[229] and to provide information about the

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224 *See* amended Form ADV: Instructions for Part 1A, instr. 6.d. The feeder funds need not have a direct relationship with the master fund's prime broker or custodian to rely on this instruction. In a master-feeder arrangement, one or more funds ("feeder funds") invest all or substantially all of their assets in a single fund ("master fund").

225 *See* amended Form ADV: Instructions for Part 1A, instr. 6.a. This instruction is only necessary for those funds that fall within the definition of "private fund." A non-U.S. fund that has never used U.S. jurisdictional means in the offering of the securities it issues would not be a private fund. *See* Exemptions Adopting Release, *supra* note 4, at n.285 and accompanying text. We have modified this instruction from the proposal to more closely follow the requirements of Regulation S; the instruction now looks to whether the offering was made "in the United States" rather than "to... any *United States person*." *See also* amended Form ADV: Glossary. "United States person" is defined by reference to the definition in rule 203(m)-1, which tracks the definition of a "U.S. person" under Regulation S, except that it contains a special rule for discretionary accounts maintained for the benefit of United States persons. *See* Exemptions Adopting Release, *supra* note 4, at section II.B.4.

226 *See* amended Form ADV, Part 1A, Item 7.B.

227 An adviser is required to report the names of the fund's general partner, trustee and directors and persons occupying similar positions as well as the name and SEC file number of any other advisers to the fund. *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, questions 1-3 and 17-18.

228 *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, questions 6 and 7. As discussed above, an adviser managing a master-feeder arrangement may submit a single Schedule D for the relevant funds if the information provided would otherwise be substantially identical. *See supra* note 224 and accompanying text. We have added a note to question 6 to clarify that an

regulatory status of the fund, such as the exclusion from the Investment Company Act on which the fund relies, whether the fund is subject to the jurisdiction of a foreign regulatory authority, and whether the fund relies on an exemption from registration under the Securities Act of 1933 (the "Securities Act") with respect to its securities.[230] An adviser must also identify, within seven broad categories, the type of investment strategy the fund employs,[231] report whether the fund invests in securities of registered investment companies,[232] and provide the gross asset value of the fund.[233] Finally, an adviser must provide limited information regarding investors in the fund, including: (i) the minimum amount that investors are required to invest;[234] (ii) the

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adviser must respond to that question regardless of whether it is filing a single Schedule D, Section 7.B.(1) for the master-feeder arrangement or reporting on the funds separately.

229 *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 8. Clause (b) of this question also requires the adviser to indicate whether the fund invests in funds managed by the adviser or its related persons.

230 *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, questions 4-5 and 21-22. Two commenters asserted that requiring advisers to report whether the fund relies on an exemption from registration under the Securities Act with respect to its securities is unnecessarily duplicative because the information is already reported on Form D. *See* Debevoise General Letter; NYSBA Committee Letter. We are not persuaded that providing this information will significantly increase the reporting burden, and the information will assist both the Commission and the public in quickly and accurately locating additional relevant information regarding the fund.

231 *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 10. The categories, which are defined in the Instructions for Part 1A, include: (i) hedge fund; (ii) liquidity fund; (iii) private equity fund; (iv) real estate fund; (v) securitized asset fund; (vi) venture capital fund; and (vii) other private fund. *See infra* note 248 and accompanying text for a discussion of changes to these definitions.

232 This information relates to compliance with the provision of the Investment Company Act that limits the ability of one investment company to invest in shares of another. *See* section 12(d)(1) of the Investment Company Act (15 U.S.C. 80a-12(d)(1)) and amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 9. We have modified this question from the proposal to cross-reference Instruction 6.e. of the Instructions for Part 1A, which excludes from this question investments in money market funds made in reliance on rule 12d1-1 under the Investment Company Act because that rule exempts (subject to the conditions described in the rule) investments in money market funds from the limitations contained in section 12(d)(1) of the Investment Company Act. 17 CFR 270.12d1-1.

233 *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 11.

234 *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 12. We made one

approximate number of beneficial owners of the fund and the approximate percentage of the fund beneficially owned by the adviser and its related persons, funds of funds and non-United States persons;[235] and (iii) the extent to which clients of the adviser are solicited to invest, and have invested, in the fund.[236] We are adopting Part A with several changes discussed below.[237]

Several commenters argued that certain information we proposed to include in Part A is competitively sensitive or proprietary and, as a result, should not be disclosed publicly.[238] These commenters focused in particular on three of the proposed questions in Part A. The first would have required an adviser to report both the gross and net asset values of each private fund it manages.[239] Commenters asserted that public disclosure of this information could reveal a fund's leverage, which may be competitively sensitive strategy information.[240] In addition, commenters expressed concerns regarding the competitive effects of our proposal to require that

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change in this item in response to a comment, which pointed out that a private fund manager may have discretion to lower the minimum amount, meaning that the minimum investment may in practice be different from the amount set out in the organizational documents of the fund. IAA General Letter. We have added an instruction clarifying that the amount reported should be the amount that is routinely required of investors who are not related persons of the adviser.

235 *Id*. questions 13-16. For purposes of these questions, beneficial owners are persons who would be counted as beneficial owners under section 3(c)(1) of the Investment Company Act or who would be included in determining whether the owners of the fund are qualified purchasers under section 3(c)(7) of that Act. (15 U.S.C. 80a-3(c)(1) or (7)). We added the word "approximate" to question 13 to make this question more consistent with questions 14-16 and because we understand based on comments received that, in some cases, the number of beneficial owners may change frequently, making a precise number more difficult to provide and less meaningful. *See* IAA General Letter.

236 *Id*. questions 19-20. This information helps to identify where a fund manager may have conflicts of interest with fund investors of the sort that implicate the adviser's fiduciary obligations to the fund and, in some cases, create risks for the fund investors.

237 *See also infra* notes 264 through 279 and accompanying text for a general discussion of comments on Section 7.B.(1). Some of these comments relate to all or portions of the proposed reporting requirements in Part A.

238 *See* IAA General Letter; MFA Letter; NVCA Letter; NYSBA Committee Letter; O'Melveny Letter.

239 *See* the Implementing Proposing Release for the as proposed version of Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, questions 11(a) and 11(b).

240 *See, e.g.*, MFA Letter. *See also* NYSBA Committee Letter.

advisers report the assets and liabilities of each fund broken down by class and categorization in the fair value hierarchy established under GAAP.[241] Commenters explained that this disclosure could harm an adviser's competitiveness and could, for instance, be used to ascertain the values of private companies held by venture capital funds that make only one or a few investments, potentially harming the private company and the interests of the private fund and its investors.[242] Finally, our proposal would have required that advisers report the approximate percentage of each fund beneficially owned by certain types of investors.[243] Commenters argued that the public disclosure of these data could reveal potentially sensitive information and, in particular, that they could be used to reverse engineer investor identities where a fund is owned by a few investors and that it could serve to deter certain institutional clients from investing in private funds.[244] We are persuaded at this time that, with respect to these three questions, the benefit of public disclosure would not outweigh the potential competitive harm. Therefore, we are not adopting the amendments that would have required an adviser: (i) to disclose each private fund's net assets;[245] (ii) to report private fund assets and liabilities by class and categorization in the fair

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241 *See* the Implementing Proposing Release for the as proposed version of Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 12. *See also* FASB ASC 820-10-50-2b.

242 *See* MFA Letter; NVCA Letter; O'Melveny Letter.

243 *See* the Implementing Proposing Release for the as proposed version of Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 17. The investor types included individuals, broker-dealers, insurance companies, registered investment companies, private funds, non-profits, pension funds, banks and thrift institutions, and state and municipal government entities.

244 IAA General Letter. *See also* MFA Letter.

245 We are, however, adopting question 11(a), concerning gross assets, as proposed. This question retains the requirement, included in Form ADV prior to today's amendments, that advisers report the total (or gross) assets of their private funds on Section 7.B. of Schedule D. Net asset values of individual funds may be important to our investor protection mission and to FSOC's systemic risk monitoring activities. *See* Systemic Risk Reporting Release, *supra* note 71 (proposing non-public reporting of gross and net asset values for private funds managed by registered investment advisers).

value hierarchy established under GAAP;[246] and (iii) to specify the percentage of each fund owned by particular types of beneficial owners.[247]

As noted above, Part A of Section 7.B.(1) requires an adviser to classify each of its private funds by strategy, using definitions that we proposed in the instructions to Form ADV.[248] In the Systemic Risk Reporting Release, we also proposed to use these definitions for purposes of Form PF.[249] Although we received no comments on these definitions in this rulemaking, we received several comments on the same definitions in response to Form PF.[250] We have considered these comments in the context of this rulemaking and have determined to make several changes. We will also consider these comments in the context of the Form PF release.

The first of the changes we are making clarifies the definitions to address concerns that a securitized asset fund may be classified as a hedge fund because of its borrowings.[251] We

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246 The fair value breakdown for individual funds may be important to our investor protection mission and to FSOC's systemic risk monitoring activities, and we will consider whether to adopt it as part of our Form PF proposal. *See* Systemic Risk Reporting Release, *supra* note 71. Some commenters also expressed concern with respect to the burden of reporting this information. *See, e.g.*, ABA Committees Letter; AIMA Letter; Dechert General Letter; DLA Piper VC Letter; IAA General Letter; Katten Foreign Advisers Letter; Merkl Implementing Letter; NVCA Letter. We will consider these comments in connection with our consideration of other comments on proposed Form PF.

247 Beneficial ownership percentages of funds may be important to our investor protection mission and to FSOC's systemic risk monitoring activities, and we will consider whether to adopt it as part of our Form PF proposal. *See* Systemic Risk Reporting Release, *supra* note 71. Some commenters also expressed concern with respect to the burden of reporting this information. *See, e.g.*, Debevoise General Letter; IAA General Letter; Shearman Letter. We will consider these comments in connection with our consideration of other comments on proposed Form PF.

248 The definitions appear in Instruction 6 of the instructions to Part 1A of Form ADV. *See supra* at note 231 and accompanying text.

249 *See* Systemic Risk Reporting Release, *supra* note 71, at section II.B.1. If adopted, registered advisers would use Form PF to report information about the private funds they manage for use by FSOC in its assessment of systemic risk in the U.S. financial system.

250 These comments were submitted in response to the Systemic Risk Reporting Release, *supra* note 71, and are available on the Commission's website at: http://www.sec.gov/comments/s7-05-11/s70511.shtml.

251 *See* Comment letter of TCW Group, Inc. (Apr. 12, 2011) ("TCW Systemic Risk Reporting

believe that the quality and usefulness of the data reported depends in part on accurately grouping funds and that securitized asset funds should not be categorized as hedge funds based on their issuance of debt. To clarify the definitions, we have excluded securitized asset funds from the definition of "hedge fund" and modified "securitized asset fund" so that it is no longer defined by reference to "hedge fund."

Second, we have modified clause (a) of the "hedge fund" definition, which classifies funds based on whether performance fees or allocations are calculated by taking into account unrealized gains. One commenter pointed out that even funds that do not allow for the payment of such fees or allocations, such as private equity funds, may be required to accrue or allocate these amounts in their financial statements to comply with applicable accounting principles.[252] We did not intend for funds that accrue or allocate these fees or allocations solely for financial reporting purposes to be classified as hedge funds, so we have clarified that clause (a) relates only to fees or allocations that may be *paid* to an investment adviser (or its related persons).

Third, we have addressed another commenter's concern that clause (a) could inadvertently capture certain private equity funds because, although these funds typically calculate currently payable performance fees and allocations based on realized amounts, they will sometimes reduce these fees and allocations by taking into account "unrealized losses net of unrealized gains in the portfolio."[253] We agree that funds should not be classified as hedge funds based solely on this practice and have clarified that clause (a) would not include performance fees or allocations the calculation of which may take into account unrealized gains solely for the purpose of reducing such fees or allocations to reflect net unrealized losses.

Letter").

[252] *See* TCW Systemic Risk Reporting Letter.

[253] *See* comment letter of the Private Equity Growth Capital Council (Apr. 12, 2011) ("PEGCC Systemic Risk Reporting Letter").

Finally, several commenters asserted that clause (c) of the "hedge fund" definition, which looks to whether a fund may engage in short selling, should include an exception for a *de minimis* amount of short selling or exclude short selling intended to hedge the fund's exposures.[254] We continue to believe that short selling is a potentially important distinguishing feature of hedge funds, many of which may, as the name suggests, use short selling to hedge or manage risk of various types. We are persuaded, however, that many funds pursuing traditional investment strategies use short positions to hedge foreign exchange risk and to manage the duration of interest rate exposure, and we are concerned that including funds within the definition of "hedge fund" solely because they use these particular techniques would dilute the meaningfulness of the category. Therefore, we have modified clause (c) to provide an exception for short selling that hedges currency exposure or manages duration.[255] We expect that the

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[254] *See* comment letter of the Investment Adviser Association (Apr. 12, 2011) ("IAA Systemic Risk Reporting Letter"); PEGCC Systemic Risk Reporting Letter; Comment letter of Securities Industry and Financial Markets Association (Apr. 12, 2011) ("SIFMA Systemic Risk Reporting Letter"); TCW Systemic Risk Reporting Letter.

[255] We have also made a change to clause (c) to clarify that this clause includes traditional short sales and any transaction resulting in a short exposure to a security or other asset (such as using a derivative instrument to take a short position). The purpose of this definition is to appropriately categorize funds that engage in certain types of market activity, and whether the definition applies should not depend on the form in which the fund engages in that activity. In addition, we note that several commenters expressed concern that clauses (b) and (c) of the "hedge fund" definition are too broad because many funds have the capacity to borrow or incur derivative exposures in excess of the specified amounts or to engage in short selling but do not in fact engage, or intend to engage, in these practices. *See, e.g.*, comment letter of the Alternative Investment Management Association (Apr. 12, 2011); IAA Systemic Risk Reporting Letter; PEGCC Systemic Risk Reporting Letter; SIFMA Systemic Risk Reporting Letter; TCW Systemic Risk Reporting Letter. These commenters generally argued that clauses (b) and (c) should focus on actual or contemplated use of these practices rather than potential use. We have not made changes to the "hedge fund" definition in response to these comments because we continue to believe that clauses (b) and (c) properly focus on a fund's ability to engage in these practices. Even a fund for which leverage or short selling is an important part of its strategy may not engage in that practice during every reporting period. We would, however, not regard a private fund to be a "hedge fund" solely because its organizational documents fail to prohibit the fund from borrowing or incurring derivative exposures in excess of the specified amounts or from engaging in short selling so long as the fund in fact does not engage in these practices (other than, in the case of clause (c), short selling for the purpose of hedging currency exposure or managing

changes to the private fund definitions discussed above will provide for a more accurate classification of private funds and reduce the number of funds categorized as hedge funds.

Part B of Section 7.B.(1), as amended, requires advisers to report information concerning five types of service providers that generally perform important roles as "gatekeepers" for private funds — auditors, prime brokers, custodians, administrators, and marketers.[256] An adviser must identify each of these service providers, report their locations, and indicate which of them, if any, are related persons of the adviser.[257] In addition, for certain types of service providers, an adviser would report information intended to help us and investors understand the nature of the services provided. For instance, with respect to each prime broker, an adviser must indicate whether the prime broker has custody of fund assets.[258]

We are adopting Part B with minor changes from the Implementing Proposing Release that are designed to clarify instructions. Where we ask for the percentage of the fund's assets valued by a third party, we have revised the question and instructions to clarify that a person should be viewed as valuing an asset for this purpose only if that person carried out the valuation procedure for that asset (if any) and that person's determination as to value was used for purposes of subscriptions, redemptions, distributions and fee calculations.[259] We have decided not to require advisers to report the name and location of the third parties performing these valuations because we recognize, as commenters pointed out, that identifying the specific person

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duration) and a reasonable investor would understand, based on the fund's offering documents, that the fund will not engage in these practices.

256 *See* amended Form ADV, Part 1A, Section 7.B.(1)B. of Schedule D.

257 *Id*. questions 23-28.

258 *Id*. question 24(e). *See also id.* questions 23(a), 23(g), 23(h), 26(e), 26(f), 28(f), and 28(g).

259 *Id*. question 27. We are making this change in response to commenter requests for clarification regarding "what constitutes assets 'valued' by a third-party administrator." IAA General Letter; *see also* ABA Committees Letter.

carrying out the valuation could be difficult where two or more third parties are involved (such as where an unaffiliated administrator obtains a quote from an electronic pricing service).[260] In addition, we are modifying question 23, which requires information about the relevant private fund's auditing firm, so that advisers must indicate whether the fund's auditor issued an unqualified opinion on the fund's financial statements.[261] By requiring this information in question 23, we are able to relieve advisers from the burden of reporting similar information with respect to private funds in Section 9.C. of Schedule D.[262] Few commenters specifically addressed the proposed reporting requirements in Part B.[263]

Many commenters who addressed the private fund reporting requirements did not comment on specific items but provided comments more generally on the proposals. Several expressed strong support for the proposal as a whole,[264] and some agreed with our assessment that the new information will allow us to identify harmful practices, to improve risk assessment,

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260 *See* IAA General Letter and ABA Committees Letter, each discussing the difficulty of identifying who is "valuing" an asset. *See* the Implementing Proposing Release for the as proposed version of Form ADV, Part 1A, Section 7.B.(1)B. of Schedule D, question 28(f)(2) and (3).

261 *See* amended Form ADV, Part 1A, Section 7.B.(1)B. of Schedule D, question 23(h).

262 *See* amended Form ADV, Part 1A, Item 9.C., which provides that "[i]f you checked Item 9.C.(2), you do not have to list auditor information in Section 9.C. of Schedule D if you already provided this information with respect to the private funds you advise in Section 7.B.(1) of Schedule D." An adviser must still complete Section 9.C. of Schedule D with respect to clients other than private funds to the extent required by the instructions to Item 9.C.

263 *See, e.g.*, Debevoise General Letter (contending that the service provider information "goes beyond what is necessary" because it requests "**both** the legal name of the custodian as well as the custodian's primary business name" (original emphasis)); Shearman Letter (arguing that a "fund's investors will generally already receive [information identifying the fund's service providers] and it generally has little public interest"). With respect to the comment in the Debevoise General Letter, we are not persuaded that providing both a legal name and business name will significantly increase the reporting burden, and the information will assist both the Commission and the public in quickly and accurately identifying the relevant custodian. With respect to the comment in the Shearman Letter, see the discussion accompanying note 272 below regarding the value of public disclosure of Section 7.B.(1) information generally.

264 *See, e.g.*, AFL-CIO Letter; AFR Letter; Better Markets Letter; CII Letter; CPIC Letter; comment letter of U.S. Senator Carl Levin ("Sen. Levin Letter").

and to more efficiently target examinations.[265] A few recommended that we expand the requirements to include reporting of performance information.[266] Many commenters offered more measured support, generally agreeing with the Commission's proposal but expressing reservations about the public availability of the information or concerns about the difficulty of responding to specific reporting items.[267] Often citing these same concerns, some commenters disagreed more generally with the Commission's proposal.[268]

Critics of the proposal most frequently focused on public disclosure of the information required by Section 7.B., arguing that all or part of the required private fund information is competitively sensitive or proprietary.[269] As discussed above, we have made several changes to Part A of Section 7.B.(1) to address some of these concerns. However, we continue to believe

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265 *See, e.g.*, CII Letter; CPIC Letter; NASAA Letter; Sen. Levin Letter (also asserting that the data would assist FSOC in monitoring systemic risk).

266 *See* AFL-CIO Letter and AFR Letter, each favoring public disclosure of 1-, 5- and 10-year performance numbers. We note that performance data may be important to our investor protection mission and to FSOC's systemic risk monitoring activities, and we will consider these comments in connection with our consideration of other comments on proposed Form PF. *See* Systemic Risk Reporting Release, *supra* note 71.

267 *See, e.g.*, IAA General Letter (supporting the "increased oversight of private funds and increased information gathering" but arguing that "the Commission should limit the public availability of private fund information provided on Part 1 of Form ADV."); MFA Letter ("MFA strongly supports private fund managers reporting to the Commission information about their businesses or the funds they manage. We believe, however, that the Commission should carefully consider whether the additional step of publicly disclosing information it collects would enhance its oversight capabilities, and whether any such benefits would outweigh the potentially significant costs to managers in sharing sensitive business information with market participants."); Dechert General Letter (stating that they "generally agree with the information the Revised Form ADV would be soliciting with respect to private funds managed by registered or exempt reporting advisers" but expressing reservations regarding the requirement to report private fund assets and liabilities by class and categorization in the fair value hierarchy established under GAAP). *See also* DLA Piper VC Letter; Merkl Implementing Letter; NVCA Letter.

268 *See, e.g.*, AIMA Letter; AV Letter; CompliGlobe Letter; Debevoise General Letter; Katten Foreign Advisers Letter; NRS Letter; NYSBA Committee Letter; Seward Letter; Shearman Letter; AV Letter.

269 *See, e.g.*, ABA Committees Letter; AIMA Letter; AV Letter; CompliGlobe Letter; Debevoise Letter; DLA Piper VC Letter; Gunderson Letter; IAA General Letter; Katten Foreign Advisers Letter; MFA Letter; NRS Letter; NVCA Letter; NYSBA Committee Letter; O'Melveny Letter; Seward Letter; Shearman Letter.

that, as a general matter, the information we collect in response to Item 7.B. is important for several reasons, including to inform prospective clients and other investors.[270] Moreover, and as we discussed in the Implementing Proposing Release, the public availability of this information will serve as a check on fund managers, helping to deter fraud and other misconduct.[271] We are not persuaded that public disclosure is unnecessary simply because, as some commenters asserted, investors in these pooled investment vehicles meet certain sophistication standards or may otherwise receive similar information from advisers.[272] To the contrary, it is precisely the ability of these investors to compare Form ADV information to the information they have received in offering documents and due diligence that makes public disclosure valuable. We also believe that public disclosure could reduce the likelihood of advisers making false representations regarding fund service providers, such as administrators and auditors, who could uncover false representations by reviewing the information that advisers report to us and comparing it to their own client lists.[273] In addition, as discussed above, the Advisers Act requires that information filed in a report with the Commission be made available to the public unless the Commission finds that public disclosure is neither necessary nor appropriate in the

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270 Several commenters agreed. *See, e.g.*, AFL-CIO Letter ("This information will assist investors as they perform due diligence before making investment decisions..."); AFR Letter ("making clear and uniform information on private investment funds available to the public will make it easier for investors to perform due diligence..."); CII Letter; CPIC Letter ("The additional information that the revised Form will collect... should also be of use to investors as they conduct due diligence and research the background of fund managers.").

271 *See* Implementing Proposing Release, *supra* note 7, at nn.150 and 175 and accompanying text. *See also* CII Letter (agreeing that "the public availability of such basic information would aid investors in their due diligence efforts and help investors and other industry participants protect against fraud").

272 *See, e.g.*, ABA Committees Letter; AV Letter; NRS Letter; NYSBA Committee Letter; Shearman Letter.

273 *See, e.g.*, *In the Matter of John Hunting Whittier*, Investment Advisers Act Release No. 2637 (Aug. 21, 2007) (settled action against hedge fund manager for, among other things, misrepresenting to fund investors that a particular auditor audited certain hedge funds, when in fact it did not).

public interest or for the protection of investors.[274] We are not convinced that withholding the private fund information reported on Form ADV is in the public interest. Therefore, as proposed, it will be available to the public.

Commenters expressing disagreement with all or parts of our proposal also pointed to what they viewed as an excessive reporting burden, particularly where valuation or ownership information would be required.[275] As discussed above, we are adopting Part A of Section 7.B.(1) with several changes that reduce the amount of information required in respect of private funds. We are not convinced that the burden associated with Item 7.B. and Schedule D will be excessive, in part because commenters confirmed that much of the required information is readily available to private fund advisers.[276] These commenters also acknowledged that the required information is similar to, and at times less extensive than, the information that investors in hedge funds and other private funds commonly receive in response to due diligence questionnaires or in offering documents.[277] Moreover, responses to many of the items are unlikely to change from year to year.

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274 Advisers Act section 210(a). *See supra* section II.B.3. for discussion of public availability of exempt reporting adviser filings.

275 *See, e.g.*, AIMA Letter; AV Letter; BCLBE Letter; Debevoise General Letter; comment letter of Dechert LLP (on behalf of foreign asset manager) (Jan. 24, 2011) ("Dechert Foreign Adviser Letter"); Gunderson Letter; Katten Foreign Advisers Letter; NRS Letter; Seward Letter; Shearman Letter; Village Ventures Letter.

276 *See, e.g.*, ABA Committees Letter ("We expect that most ERAs will already have most of the information requested by Form ADV Part 1 readily available."); Katten Foreign Advisers Letter ("Virtually all of the requested information would already have been provided to investors in the fund through an offering document or follow up status reports."); NRS Letter (arguing that the expanded private fund disclosures on Schedule D would "replicate the due diligence questionnaire information....").

277 *See, e.g.*, ABA Committees Letter; NRS Letter. *See also* AIMA's Illustrative Questionnaire For Due Diligence of Hedge Fund Managers, available at (registration required) http://www.aima.org/en/knowledge_centre/index.cfm.

Finally, a few commenters expressed concern that an adviser's required public disclosure on Section 7.B.(1) of Schedule D could call into question a private fund's reliance on the non-public offering exemption in the Securities Act.[278] We believe public disclosure of the information required by Section 7.B.(1) of Schedule D through IAPD would not, in and of itself, jeopardize the fund's reliance on that exemption (or the safe harbor for offshore offerings provided by Regulation S under the Securities Act).[279]

2. Advisory Business Information: Employees, Clients and Advisory Activities: Item 5

Item 5 of Part 1A requires a registered adviser to provide basic information regarding the business of the adviser that allows us to identify the scope of the adviser's business, the types of services it provides, and the types of clients to whom it provides those services. The item also requires information from the adviser about the number of its employees, the amount of assets it manages, and the number and types of its clients.

We are adopting the amendments that we proposed to Item 5.B., which require an adviser to indicate how many of its employees are registered as investment adviser representatives or are licensed insurance agents.[280] An adviser must also provide a single numerical approximation (instead of a range) in response to these questions as well as to the existing questions that ask about employees that perform investment advisory functions or are registered representatives of

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278 *See* IAA General Letter; MFA Letter. The non-public offering exemption is found in Section 4(2) of the Securities Act. Offers and sale of securities by an issuer that satisfy the conditions of Rule 506 of Regulation D (17 CFR 230.501 et seq.) are deemed to be non-public within the meaning of Section 4(2).

279 We have previously taken a similar position with respect to mandatory reporting in Part 2 of Form ADV. *See* Part 2 Release, *supra* note 67, at n. 276 and accompanying text. Regulation S is codified at 17 CFR 230.901 *et seq*.

280 Amended Form ADV, Part 1A, Items 5.B.(1) - (5).

a broker-dealer, and firms that solicit advisory clients.[281] Commenters did not object to these new questions and revisions.

We are adopting amendments to Items 5.C. and 5.D., which require advisers to report the number and types of clients the adviser services. Specifically, the amendments require each registered adviser to: (i) provide an approximate number of clients it has if over 100;[282] (ii) report the approximate percentage of its clients that are not United States persons;[283] (iii) specify the types of clients that it advises (adding categories for business development companies, other investment advisers, and insurance companies) and the percentage that each client type comprises of its total number of clients (adding a box to check if 100% of an adviser's clients are a particular type);[284] and (iv) report in a new item the approximate percentage (in broad ranges) of assets under management attributable to each client type.[285] These form amendments are designed to help us better understand an adviser's business.

Commenters did not address our proposed amendments to Item 5.C., which we are adopting as proposed. We are making one change to Item 5.D., as suggested by one commenter, so that advisers report approximate percentages of assets under management by client type in broad ranges (*i.e.*, 25 percent segments).[286] This change will decrease the burden on advisers gathering the data necessary to respond to this item while retaining the substance of the information we need for our risk-assessment program. We are also, at the suggestion of a

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281 Amended Form ADV, Part 1A, Item 5.B.(6).

282 Amended Form ADV, Part 1A, Item 5.C.(1).

283 Amended Form ADV, Part 1A, Item 5.C.(2). *See supra* note 225 (discussing the definition of "United States person").

284 Amended Form ADV Part 1A, Item 5.D.(1).

285 Amended Form ADV Part 1A, Item 5.D.(2).

286 Advisers should not, however, include as clients the investors in a private fund they advise unless they have a separate advisory relationship with those investors. Amended Form ADV, Part 1A, Items 5.C., 5.D. and 5.H.

commenter, adding a note to Items 5.D.(1) and (2) to clarify that an adviser should check all applicable boxes.[287]

We are adopting, as proposed, amendments to Item 5.G. that require an adviser to select from a list set forth in the form the types of advisory services that it provides, and that add two additional types of services: (i) portfolio management for pooled investment vehicles, *other* than registered investment companies; and (ii) educational seminars or workshops.[288] At the request of a commenter, we are clarifying that educational seminars and workshops would not include episodic meetings at which advisers educate existing clients about issues related to the ongoing management of their accounts.[289] In addition, the revised item requires that if an adviser selects from that list "portfolio management for an investment company," the adviser must provide the SEC file number for the registered investment company, as well as business development companies that have made an election pursuant to section 54 of the Investment Company Act of 1940, in Section 5.G.(3) of Schedule D. This information will connect information reported on Form ADV to information reported on forms filed through our EDGAR system by investment companies managed by these advisers. We have made a few technical changes to avoid potential overlap of some of the listed types of advisory services.[290]

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287 *See* IAA General Letter. For example, an adviser to a state pension plan should check boxes for both "pension and profit sharing plans" and "state or municipal government entities." We also note that we are not adopting our proposal to divide the category for pension and profit sharing plans into those subject to ERISA and those that are not. *See id.* (noting that there could be substantial confusion about what it means to be "subject to" ERISA because some plans are subject to some, but not all, of ERISA's provisions).

288 Amended Form ADV, Part 1A, Item 5.G.

289 *See* IAA General Letter (requesting clarification that such episodic meetings would not be reportable educational seminars or workshops). We also confirm this commenter's understanding that educational seminars and workshops would not include events sponsored by third parties that are merely attended by an adviser's supervised persons.

290 *See* amended Form ADV, Part 1A, Items 5.G.(4) and 5.G.(5).

We are adopting new Item 5.J. to require advisers to indicate whether they report, in response to Item 4.B. of Part 2A of Form ADV, that they provide investment advice only with respect to limited types of investments. We had proposed to require advisers to indicate the types of investments they provided advice about during the previous fiscal year. Commenters expressed skepticism about whether such an item would provide us with much useful information because many advisers would simply indicate all the items.[291] We agree, and have revised the item to provide us with information that will identify advisers that disclose to their clients that they provide specialized advice, which is the type of information we had intended to collect.

3. Other Business Activities and Financial Industry Affiliations: Items 6 and 7

Items 6 and 7 of Part 1A require advisers, including exempt reporting advisers, to report those financial services the adviser or a related person is actively engaged in providing, from lists of financial services set forth in the items. We are adopting amendments to these items largely as proposed to provide us with a more complete picture of the activities of an adviser and its related persons, which would better enable us to assess the conflicts of interest and risks that may be created by those relationships and to identify affiliated financial service businesses.

First, we are expanding the lists of types of financial service businesses in both Items 6.A. and 7.A. As a result, an adviser must also report whether it or a related person is a trust company, registered municipal advisor, registered security-based swap dealer, or major security-based swap participant, the latter three of which are or will be new SEC-registrants under the

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[291] IAA General Letter.

Dodd-Frank Act's amendments to the Exchange Act.[292] Second, to parallel Item 7.A. for related persons, an adviser must also report if it is an accountant (or accounting firm) or lawyer (or law firm). Last, amendments to Item 7.A. require an adviser to report if a related person is a sponsor, general partner or managing member of a pooled investment vehicle,[293] and add an instruction to clarify that advisers' responses must include related persons that are foreign affiliates, regardless of whether they are registered or required to be registered in the United States. One commenter expressed support for the additions we proposed to make to the lists in Items 6.A. and 7.A., which we are adopting as proposed.[294] In response to commenters, we are clarifying that for responses to Item 7.A. relating to natural persons (*e.g.*, accountant, lawyer), the adviser should respond affirmatively only for such persons that have a separate business in that field rather than for those persons that the adviser may employ as accountants or lawyers.[295]

We also are amending Schedule D, which contains expanded reporting requirements that correspond to Items 6 and 7. Section 6.A. of Schedule D requires an adviser that checks the box in Item 6.A. to indicate that it is engaged in another financial service business under a different

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292 Amended Form ADV, Part 1A, Items 6.A. and 7.A. Section 975 of the Dodd-Frank Act amends the Exchange Act to require "municipal advisors" to register with the Commission; Section 761 of that Act amends the Exchange Act to define the terms "security-based swap dealer" and "major security-based swap participant"; and section 764 amends the Exchange Act to require these entities to register with the Commission.

293 This serves to retain information about related persons that would otherwise not be required as a result of amendments we are adopting to Item 7.B. Amended Item 7.B. and section 7.B.(1) of Schedule D require advisers to report private fund information only about funds they advise, not funds advised by a related person. *See supra* section II.C.1. We have also deleted "investment company" from the list in Item 7 as duplicative of information we obtain in another category of Item 7.A., as well as Item 5. *See, e.g.*, amended Form ADV, Part 1A, Items 5.D., 5.G., Section 5.G.(3) of Schedule D, and Item 7.A.(2).

294 NRS Letter.

295 NEA Letter; IAA General Letter. Many of the questions in Item 5.B. elicit information about an adviser's employees acting in the scope of employment. We note that because Item 6 asks questions about the advisory *firm*, responses should not relate to natural persons, unless the adviser is operating as a sole proprietor.

name, to list that other business name, and to identify the other lines of business in which the adviser engages using that name.[296] Sections 6.B.(2) and 6.B.(3) of Schedule D similarly require advisers that are primarily engaged in another business or that sell products or provide services other than investment advice to advisory clients to describe that business and provide the name under which it conducts that business, if different. One commenter, an association comprised of state regulators, expressed particular support for the Schedule D reporting requirement we are adopting with respect to 6.B.(3).[297]

Section 7.A. of Schedule D, requires advisers to provide certain identifying information for any type of related person listed in Item 7.A. as well as to provide more details about the relationship between the adviser and the related person, including whether the related person is registered with a foreign financial regulatory authority, whether they share employees or the same physical location, and, if the adviser is reporting a related person investment adviser, whether the related person is exempt from registration.[298] Responses to these questions will allow us to link disparate pieces of information to which we have access concerning an adviser and its affiliates as well as to identify whether the adviser controls the affiliate or vice versa. It will also provide us with a tool to identify where there may be advisory activities by unregistered affiliates.

Commenters who addressed Section 7.A. of Schedule D urged that we limit the reporting of related persons, which could be significant in the case of advisers that are part of a large

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[296] For example, an adviser registered with us under the name "Adam Bob Charlie Advisers LLC" that is also actively engaged in business as an insurance agent under the name "ABC Insurance LLC" would put the name "ABC Insurance LLC" in Section 6.A. of Schedule D and would check the box for "Insurance broker or agent."

[297] NASAA Letter. We note, "6.B.(3)" was inadvertently renumbered in Part 1A of Form ADV as "6.C." in our proposal.

[298] The questions we are adopting in Section 7.A. of Schedule D contain a few minor modifications from the proposal to renumber the questions and to clarify wording (*e.g.*, questions 11 and 12).

organization.[299] Many of these commenters pointed out that in some cases the adviser and its clients have no business dealings with some affiliates and thus there is less of a chance of conflicts developing. We agree and have revised the proposed item to permit an adviser to omit reporting about certain related persons in a manner that is similar to the approach suggested by a commenter.[300] In particular, an adviser need not complete Section 7.A. of Schedule D for any related person if: (1) the adviser has no business dealings with the related person in connection with advisory services it provides to its clients; (2) the adviser does not conduct shared operations with the related person; (3) the adviser does not refer clients or business to the related person, and the related person does not refer prospective clients or business to the adviser; (4) the adviser does not share supervised persons or premises with the related person; and (5) the adviser has no reason to believe that its relationship with the related person otherwise creates a conflict of interest with its clients.[301] These criteria are designed so that advisers need not report about affiliates who are likely to present little, if any, potential for conflicts of interest. Under these criteria, an adviser may omit, for example, an offshore adviser that has no business dealings with the adviser, a bank that merely provides payroll services to the adviser, an accounting firm that prepares the adviser's annual tax return filings, or a real estate broker that represents the adviser in securing office space. However, an adviser may *not* omit an affiliated adviser with whom the adviser shares information technology infrastructure, for example, as the advisers would be considered to share operations.

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299 *See, e.g.*, Shearman Letter.

300 *See* IAA General Letter (suggesting we adopt a standard for omitting a related person based on factors established several years ago by our staff in Frequently Asked Questions on Form ADV and IARD).

301 Amended Form ADV, Part 1A, Item 7.A.

Finally, we have moved to this item a question that had been in Item 9 that requires advisers to report whether a related person foreign financial institution acts as a qualified custodian for client assets under the adviser custody rule, to centralize reporting of related qualified custodians in a single item.[302]

4. Participation in Client Transactions: Item 8

Item 8 requires a registered adviser to report information about its transactions, if any, with clients, including whether the adviser or a related person (including a foreign related person) engages in transactions with clients as a principal, otherwise sells securities to clients, or has discretionary authority over client assets. We are adopting three amendments to this item. First, an adviser that indicates it has discretionary authority to determine the brokers or dealers for client transactions or that it recommends brokers or dealers to clients[303] must additionally report whether any of such brokers or dealers are related persons of the adviser.[304] Second, an adviser that indicates that it receives "soft dollar benefits" must also report whether all those benefits qualify for the safe harbor under section 28(e) of the Exchange Act for eligible research or brokerage services.[305] Third, an adviser must report whether it or its related person receives direct or indirect compensation for client referrals.[306] These amendments, which we are adopting as proposed, are designed to enhance our ability to identify additional conflicts of interest that

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302 Amended Form ADV, Part 1A, Section 7.A. of Schedule D, question 8. At the suggestion of commenters, we have also modified this question to include the remainder of the questions in what had been Section 9.D. of the previous version of Form ADV Part 1A, which we inadvertently failed to include when we relocated this question in Proposed Form ADV Part 1A. Consequently, we have also eliminated Section 9.D. *See* IAA General Letter; Schnase Letter.

303 Amended Form ADV, Part 1A, Items 8.C.3. and 8.E.

304 Amended Form ADV, Part 1A, Items 8.D. and 8.F.

305 Amended Form ADV, Part 1A, Item 8.G.(2). *See also Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934*, Exchange Act Release No. 54165 (July 18, 2006) [71 FR 41978 (July 24, 2006)] ("28(e) Release").

306 Amended Form ADV, Part 1A, Items 8.H. and 8.I.

advisers may face that we have identified through our experience administering the Advisers Act.

Comments on these amendments were limited to the question about soft dollars, which commenters supported, but these commenters urged us to permit advisers to answer based on an adviser's reasonable belief that the benefits received are eligible research and brokerage services under the safe harbor provided by section 28(e) of the Exchange Act.[307] We are not making this change as the safe harbor itself does not include a "reasonable belief" standard and the Form ADV item is intended to track the language of the statute. We also remind advisers that we have issued interpretive guidance on section 28(e) of the Exchange Act and direct advisers to it if relying on this safe harbor.[308]

5. Custody: Item 9

We are amending Item 9 to require each registered adviser to indicate the *total* number of persons that act as qualified custodians for the adviser's clients in connection with advisory services the adviser provides to its clients.[309] In 2009, we amended certain items of Form ADV in connection with amendments we made to Advisers Act rule 206(4)-2 (the "2009 Custody Amendments"). At that time, we modified Item 9 to elicit information about the adviser or its related person(s) acting as qualified custodian.[310] We did not, however, request information about *other* qualified custodians. This additional data will provide us with a more complete

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307 *See* ICI Letter; IAA General Letter.

308 *See* 28(e) Release, *supra* note 305, at Sections II.B. and III.

309 Amended Form ADV, Part 1A, Item 9.F. We have also made a minor modification from the proposal to make clear that an adviser need only respond if it has custody of client funds or securities, including if it has custody because a related person has custody in connection with advisory services the adviser provides to its clients.

310 *See Custody of Funds or Securities of Clients by Investment Advisers*, Investment Advisers Act Release No. 2968 (Dec. 30, 2009) [75 FR 1456 (Jan. 11, 2010)] ("2009 Custody Release").

picture of an adviser's custodial practices.[311] Commenters suggested that advisers be permitted to provide an approximate number of qualified custodians in response to this item.[312] We have not made such a change. An adviser with custody of client funds or securities must maintain those assets with a qualified custodian,[313] and must therefore know the identity (and therefore number) of qualified custodians that maintain its clients' assets.

We are also adopting several clarifications urged by commenters, and to make certain technical changes.[314] The first of these changes clarifies that Item 9 asks whether the adviser or a related person has custody of funds and securities of clients that are not registered investment companies. The questions in Item 9 relate to various provisions of rule 206(4)-2 (the custody rule), and advisers are not required to comply with rule 206(4)-2 with respect to the account of an investment company registered under the Investment Company Act.[315] Second, we are amending the notes within Item 9.A. to correct a drafting error.[316] The amended note within Item 9.A. requires an adviser to exclude from 9.A. and to report in 9.B. only client assets for

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311 Consistent with the updating requirements for Items 9.A.(2), 9.B.(2), and 9.E., advisers are required to update new Item 9.F. only annually. *See* amended Form ADV: General Instruction 4.

312 IAA General Letter; NRS Letter. *But see* NRS Letter (indicating that many advisers have only one or two qualified custodians).

313 Rule 206(4)-2(a)(1) (defining "qualified custodian").

314 Investment advisers registered with us were required to begin completing revised Item 9 in connection with amendments we made to rule 206(4)-2 (the custody rule) as of their first annual updating amendment after January 1, 2011. *See* 2009 Custody Release, *supra* note 310 at n.161 and accompanying text. We are also making a technical amendment to Form ADV-E to reflect the requirement that the accountant's report be filed electronically. Staff notified advisers in November 2010 that the IARD system had been programmed to accept Form ADV-E. *See* 2009 Custody Release, *supra* note 310 at n.53 and accompanying text (establishing the requirement for Form ADV-E to be filed electronically, explaining that accountants performing surprise examinations should continue paper filing of Form ADV-E until the IARD system is programmed to accept Form ADV-E, and noting that advisers would be informed when that programming was completed).

315 Rule 206(4)-2(b)(5). These advisers must instead comply with custody requirements under the Investment Company Act.

316 *See* IAA General Letter; Pickard Letter; Schnase Letter (each urging us to correct this drafting error).

which custody is attributed to the adviser as a result of related person custody.[317] Third, we are also clarifying in Items 9.B. and 9.C. that advisers' responses must include funds and securities of which a related person has custody *in connection with advisory services the adviser provides to clients*.[318] This clarification aligns the reporting requirements of these items with the amended definition of custody adopted in the 2009 Custody Amendments.[319] Finally, amended question (6) within Section 9.C. of Schedule D enables an adviser to check a box to indicate that it has not yet received a report prepared by an independent accountant that audited a pooled investment vehicle or that examined internal controls.[320] Under the previous version of this question, an adviser who had not yet received the independent public accountant's report by the time the adviser submitted its Form ADV filing could not accurately respond. The updating requirements of Item 9.C. and Section 9.C. of Schedule D, however, require advisers to promptly file an amendment to update their response when the accountant's report is available.[321]

6. Reporting $1 Billion in Assets: Item 1.O.

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317 When we adopted the 2009 Custody Amendments we explained that Items 9.A. and 9.B. require a registered adviser to report to us whether the adviser or a related person *has custody* of client funds or securities, and if so, both the total U.S. dollar amount of those assets as well as the number of clients for whose accounts the adviser or its related person *has custody*. *See* 2009 Custody Release, *supra* note 310 at n.145 and accompanying text. Item 9.A., which was intended to limit reporting of assets the adviser has custody of other than through a related person, inadvertently required the adviser to include assets attributable to it in certain circumstances where a related person had custody of the assets.

We also are making a technical revision to the note within Item 9.A. to remind advisers that their responses should not include assets of which they have custody solely because they deduct advisory fees from client accounts.

318 *See* IAA General Letter.

319 We amended the definition of "custody" to include circumstances under which a related person "holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, *in connection with advisory services [an adviser] provide[s] to clients*." *See* rule 206(4)-2(d)(2).

320 Question 6 does not require a response about reports related to an independent verification (or "surprise examination") of client assets because the independent public accountant that conducts the surprise examination separately files a certificate on Form ADV-E. *See* rule 206(4)-2(a)(4).

321 *See* amended Form ADV: General Instruction 4.

We are adopting, as proposed, Item 1.O. and related instructions to require each adviser to indicate whether it had $1 billion or more in total assets shown on the adviser's balance sheet as of the last day of the most recent fiscal year,[322] which we will use to identify those advisers that could be subject to rules regarding certain excessive incentive-based compensation arrangements required by section 956 of the Dodd-Frank Act.[323] Two commenters supported the proposal,[324] while another suggested that we allow an adviser to exclude certain assets from the calculation so that certain advisers would not be covered by any future rule regarding section 956.[325] Although we retain certain flexibility to adopt a different standard for purposes of the incentive-based compensation rule,[326] we believe, as noted above, that this new item will assist us in identifying the advisers that may be subject to such future rule.[327]

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322 *See* amended Form ADV, Part 1A, Item 1.O. (adviser must mark "yes" or "no" to indicate whether it has $1 billion or more in assets). For purposes of this reporting requirement only, the amount of assets will be determined in the same manner as the amount of "total assets" is determined on the adviser's balance sheet for its most recent fiscal year end, using the same accounting method used to prepare the balance sheet. *See* amended Form ADV: Instructions for Part 1A, instr. 1.b. We are not requiring advisers to use GAAP or another accounting method.

323 The Commission and other federal regulators proposed a joint rule that addresses certain excessive incentive-based compensation arrangements, including those of investment advisers with $1 billion or more in assets, pursuant to section 956 of the Dodd-Frank Act. *See Incentive-Based Compensation Arrangements*, Release No. 34-64140 (Mar. 29, 2011) [76 FR 21170 (Apr. 14, 2011)] ("Incentive Compensation Proposing Release"). We construe section 956 as specifying, and thus define "assets" to mean, the total assets of the advisory firm rather than the total "assets under management," *i.e.*, assets managed on behalf of clients. *See* Implementing Proposing Release, *supra* note 7, at n.196; Incentive Compensation Proposing Release, at section III.

324 *See* IAA Letter; ICI Letter. One commenter argued that Form ADV is not the correct reporting mechanism for this information, but did not recommend an alternative way to identify these advisers. NRS Letter.

325 MFA Letter.

326 In the Incentive Compensation Proposing Release, we invited comments on whether the determination of total balance sheet assets should be further tailored for certain types of advisers. *See* Incentive Compensation Proposing Release, *supra* note 323, at section III.

327 We also note that almost all of the other covered financial institutions under section 956 already report the amount of their total assets to their federal regulator. *See* Incentive Compensation

7. Other Amendments to Form ADV

The amendments we are adopting today also include a number of additional changes unrelated to the Dodd-Frank Act that are intended to improve our ability to assess compliance risks. To improve certain identifying information we obtain from other items of Part 1A of Form ADV, we are amending Item 1.J. to require an adviser to provide contact information for its chief compliance officer to give us direct access to the person designated to be in charge of its compliance program.[328] An adviser also has the option, in Item 1.K., to provide an additional regulatory contact for Form ADV.[329] Neither Items 1.K. nor 1.J. will be viewable by the public on our website.[330] One commenter expressed its support for this change to the form.[331] We are also amending Item 1 to require an adviser to indicate whether it or any of its control persons is a public reporting company under the Exchange Act.[332] An affirmative response to this item will provide a signal, not only to us, but to investors and to prospective investors, that additional public information is available about the adviser and/or its control persons. New Item 1.P.

Proposing Release, supra note 323, at section III. (proposing to calculate "total consolidated assets" based on reports filed with each federal regulator).

328 Amended Form ADV, Part 1A, Item 1.J. An adviser is also required to provide the name of its chief compliance officer on Schedule A of Form ADV. *See also* 17 CFR 275.206(4)-7; *Compliance Programs of Investment Companies and Investment Advisers*, Investment Advisers Act Release No. 2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (adopting rule 206(4)-7 requiring registered investment advisers to designate a chief compliance officer). An exempt reporting adviser that does not have a chief compliance officer must instead provide a designated person's contact information in Item 1.K. Likewise, an exempt reporting adviser need not provide the name of a chief compliance officer on Schedule A of Form ADV.

329 Amended Form ADV, Part 1A, Item 1.K.

330 We note that clients will be provided with a supervisory contact in brochure supplements. *See* Part 2 Release, *supra* note 67.

331 *See* NRS Letter.

332 Amended Form ADV, Part 1A, Items 1.N. and 10.B., and Section 10.B. of Schedule D.

requires an adviser to provide a "legal entity identifier" if it has one.[333] In addition, we are adding "Limited Partnership" as another choice advisers may select to indicate how their organization is legally formed.[334] Other than the addition of Item 1.P., we are adopting amended Item 1 as proposed.

We are also adopting three technical changes with respect to the reporting of disciplinary events. First, with commenters' support, we are adding a box to Item 11, as proposed, for advisers to check if any disciplinary information reported in that item and the corresponding disclosure reporting pages is being reported about the adviser or any of its supervised persons.[335] Second, we are adding a third reason to each disclosure reporting page ("DRP") that permits an adviser to remove the DRP from its filing by adding a box an adviser could check if it was filed in error. One commenter supported this aspect of the proposal.[336] Third, we are amending Item 3.D. of Part 2B, the brochure supplement, to correct a drafting error regarding when a brochure supplement would need to include disclosure regarding the revocation or suspension of a professional attainment, designation, or license. Advisers are required to include in brochure supplements disclosure regarding hearings or formal adjudications relating to the revocation or

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333 Amended Form ADV, Part 1A, Item 1.P. *See also* Amended Form ADV: Glossary (defining "Legal Entity Identifier"). A legal entity identifier is a unique number that companies use to identify each other in the financial marketplace. It is a number assigned by or on behalf of an internationally recognized standards setting body and it is required for reporting purposes by the U.S. Department of the Treasury's Office of Financial Research or a financial regulator. The legal entity identifier standard is still in development, and an adviser may not have one. An adviser is required to respond to Item 1.P. only if it has a legal entity identifier.

334 Amended Form ADV, Part 1A, Item 3.A.

335 Amended Form ADV, Part 1A, Item 11. *See* IAA General Letter; Pickard Letter.

336 *See* NRS Letter.

suspension of a professional attainment, designation, or license of the supervised person by the designating authority.[337]

Finally, we had requested comment in the Implementing Proposing Release on whether we should accelerate the deadline for filing an annual updating amendment to an adviser's Form ADV filing from 90 to 60 days after the adviser's fiscal year end.[338] All of the commenters who responded to the question opposed it.[339] We are not adopting a requirement to accelerate the annual updating amendment deadline at this time.

D. Other Amendments

1. Amendments to "Pay to Play" Rule

We are adopting amendments to rule 206(4)-5, the "pay to play" rule, to address certain consequences arising from the Dodd-Frank Act's amendments to the Advisers Act and the Exchange Act.[340] First, we are amending the scope of the rule, as proposed, so that it applies

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337 As originally adopted, this item stated "Any other *proceeding* in which a professional attainment, designation, or license of the supervised person was revoked or suspended because of a violation of rules relating to professional conduct. If the supervised person resigned (or otherwise relinquished his attainment, designation, or license) in anticipation of such a proceeding (and the adviser knows, or should have known, of such resignation or relinquishment), disclose the event." (emphasis added).

338 *See* Implementing Proposing Release, *supra* note 7, at nn.207 and 208 and accompanying text.

339 Pickard Letter (citing additional burdens it would place on advisory firm personnel and resources); IAA General Letter (stating that many advisers need the full 90 days to ensure accurate and complete disclosures); ICI Letter (urging the Commission to at least give advisers time to become acclimated with all of the new filing requirements before imposing an accelerated deadline); NRS Letter (claiming it will add little benefit and will impose a substantial burden); Schnase Letter.

340 *See* amended rule 206(4)-5. We are not, however, adopting an amendment we proposed to specify that a legal entity, not just a natural person, that is a general partner or managing member of an investment adviser would meet the definition of "covered associate" in the rule. Upon reflection, it would broaden the application of the rule more than we intended. For example, because political action committees ("PACs") controlled by a covered associate are themselves treated as covered associates, were we to make this amendment, contributions by an adviser's parent company's PAC could trigger the two-year time out. However, as we noted in the release adopting the pay to play rule, depending on facts and circumstances, there may be instances in which a supervisor of an adviser's covered associate (who, for example, engages in solicitation of

both to exempt reporting advisers and foreign private advisers.[341] The rule currently applies to advisers either registered with the Commission or unregistered in reliance on the "private adviser" exemption under section 203(b)(3) of the Advisers Act.[342] The amendment prevents the unintended narrowing of the application of the rule resulting from the repeal of the "private adviser" exemption.[343]

Commenters generally favored the amendment,[344] although one commenter opposed applying the rule to foreign private advisers and foreign exempt reporting advisers, contending that the costs of doing so would outweigh the benefits.[345] However, many advisers that will qualify for the foreign private adviser exemption are currently subject to the pay to play rule, either because they are currently registered with us or exempt under the "private adviser" exemption. We continue to believe that the pay to play rule is necessary and appropriate to prevent these advisers and others from engaging in fraudulent pay to play practices in the U.S.

Second, we are amending the rule to add municipal advisors to the categories of registered entities – referred to as "regulated persons" – excepted from the rule's prohibition on

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government entity clients for the adviser) formally resides at a parent company, but whose contributions should trigger the two-year time out because they raise the same conflict of interest issues that we are concerned about, irrespective of that person's location or title. *See* Political Contributions by Certain Investment Advisers, Investment Advisers Act Release No. 3043, n. 179 (Jul. 1, 2010) [75 FR 41018 (Jul. 15, 2010)] ("Pay to Play Release").

341 *See* amended rule 206(4)-5(a)(1); Implementing Proposing Release, *supra* note 7, at section II.D.1. *See also* sections 403, 407 and 408 of the Dodd-Frank Act (replacing the "private adviser" exemption at section 203(b)(3) of the Advisers Act with an exemption for "foreign private advisers" and adding exemptions for exempt reporting advisers at sections 203(l) and 203(m) of the Advisers Act).

342 *See* rule 206(4)-5(a).

343 Section 203(b)(3) was revised by the Dodd-Frank Act to create a new exemption for foreign private advisers. *See supra* note 4.

344 *See, e.g.*, Better Markets Letter; NRS Letter; NYSBA Committee Letter; Schnase Letter.

345 *See* Dechert General Letter.

advisers paying third parties to solicit government entities.[346] To qualify as a "municipal advisor" (and thereby a "regulated person"), a solicitor must be registered under section 15B of the Exchange Act and subject to pay to play rules adopted by the Municipal Securities Rulemaking Board ("MSRB").[347] Notably, for municipal advisors to qualify as "regulated persons," we must find that applicable MSRB pay to play rules: (i) impose substantially equivalent or more stringent restrictions on municipal advisors than the pay to play rule imposes on investment advisers; and (ii) are consistent with the objectives of the pay to play rule.[348]

We had proposed to limit the exception to the third-party solicitation ban to registered municipal advisors.[349] But commenters urged us to preserve the existing "regulated person" exception as well.[350] Commenters explained that affiliated broker-dealers or investment advisers – which would not meet the statutory definition of a "municipal advisor" under section 15B(e)(4)

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346 *See* amended rule 206(4)-5(a)(2)(i)(A), (f)(9). "Regulated persons" also include registered investment advisers and broker-dealers subject to the rules of a registered national securities association, such as the Financial Industry Regulatory Authority ("FINRA"), that has adopted pay to play rules that the Commission determines satisfy the criteria of amended rule 206(4)-5(f)(9)(iii)(B).

347 *See* amended rule 206(4)-5(f)(9)(iii).

348 *See* amended rule 206(4)-5(f)(9)(iii)(B). The MSRB issued a draft pay to play rule for municipal advisors and request for comment on January 14, 2011. *See* MSRB, *Request for Comment on Pay to Play Rule for Municipal Advisors*, MSRB Notice 2011-04 (Jan. 14, 2011) *available at* http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-04.aspx?n=1. The Commission's authority to consider rules proposed by a self-regulatory organization is governed by section 19(b) of the Exchange Act [15 U.S.C. 78s(b)] ("No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.").

349 *See* Implementing Proposing Release, *supra* note 7, at sections II.D.1.

350 *See* Comment letter of Debevoise & Plimpton LLP (Feb. 22, 2011) ("Debevoise Pay to Play Letter"); Dechert General Letter; comment letter of Investment Adviser Association (by Monique S. Botkin) (Jan. 24, 2011) ("IAA Pay to Play Letter"); ICI Letter; comment letter of Securities Industry and Financial Markets Association (Jan. 24, 2011) ("SIFMA Letter"); comment letter of T. Rowe Price Associates, Inc. (Jan. 24, 2011) ("T. Rowe Letter"). *But see* NRS Letter (supporting the proposal).

of the Exchange Act if they solicit government entities only on behalf of *affiliates*[351] – are often paid by investment advisers to solicit on their behalf.[352] While commenters recognized that adviser-affiliated solicitors may be permitted to voluntarily register as municipal advisors, they argued that voluntary registration of these solicitors would subject them to regulatory requirements unrelated to pay to play practices and thus impose significant additional costs, which they argued are unnecessary, particularly when they already are subject to a comprehensive regulatory regime as broker-dealers or advisers.[353]

The amended rule retains the approach of the current rule by permitting advisers to compensate persons that are "regulated persons" for soliciting government entities if they are subject to restrictions at least as stringent as the pay to play rule. We have expanded "regulated persons" to include registered municipal advisors. Accordingly, the pay to play rule continues to impose critical restrictions on third-party solicitors and their personnel designed to minimize the potential for their engaging in pay to play on behalf of investment advisers. Advisers may only compensate third-party solicitors that are subject to the Commission's regulatory oversight and

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351 *See* section 15B(e)(4) of the Exchange Act (defining "municipal advisor" to include "a person (who is not a municipal entity or an employee of a municipal entity) that…undertakes a solicitation of a municipal entity"); section 15B(e)(9) of the Exchange Act (defining "solicitation of a municipal entity or obligated person" to mean "a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of…[an] investment adviser…*that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation* for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person…of an investment adviser to provide investment advisory services to or on behalf of a municipal entity" (emphasis added)). In recognition of this limitation, we separately proposed to allow adviser-affiliated solicitors to register voluntarily as municipal advisors. *See Registration of Municipal Advisors*, Exchange Act Release No. 63576, at nn. 102-104 and accompanying text (Dec. 20, 2010) [76 FR 824, (Jan. 6, 2011)] ("Municipal Advisors Registration Release").

352 *See, e.g.*, IAA Pay to Play Letter; SIFMA Letter.

353 *See* Municipal Advisor Registration Release, *supra* note 351, at 831 (stating that solicitors acting on behalf of affiliates may voluntarily register as municipal advisors).

examination and to a regulatory regime that the Commission has determined is equally or more stringent than the pay to play rule.[354]

Finally, we are extending the date by which advisers must comply with the ban on third-party solicitation from September 13, 2011 to June 13, 2012 due to the fact that we are modifying our proposal and expanding the definition of "regulated persons."[355] This extension will provide time for the MSRB and FINRA to adopt pay to play rules if they choose to do so and give third-party solicitors additional time to come into compliance with such rules.[356]

2. Technical and Conforming Amendments

a. Rules 203(b)(3)-1 and 203(b)(3)-2

We are rescinding rules 203(b)(3)-1[357] and 203(b)(3)-2[358] under the Advisers Act. These rules specify how advisers "count clients" for purposes of determining whether the adviser is eligible for the private adviser exemption of section 203(b)(3) of the Advisers Act (which, as

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354 Several commenters further urged the Commission to amend the pay to play rule also to permit an adviser to pay any affiliate and/or its employees to solicit clients on the adviser's behalf so long as the adviser treats such solicitors as its own "covered associates." *See* Debevoise Pay to Play Letter; IAA Pay to Play Letter; ICI Letter; NYSBA Committee Letter; comment letter of Skadden, Arps, Slate, Meagher & Flom LLP (Mar. 8, 2011) ("Skadden Letter"); T. Rowe Letter. In light of the approach we are adopting (discussed above), we believe that such an amendment is unnecessary.

355 *See* comment letter of American Council of Life Insurers (Jan. 24, 2011) ("ACLI Pay to Play Letter"); IAA Pay to Play Letter; ICI Letter (suggesting that the Commission extend the compliance date for the third-party solicitation ban). *See also* SIFMA Letter (suggesting that the Commission delay adoption of amendments to the pay to play rule until it completes its municipal advisor registration rulemaking).

356 The extension applies only to the third-party solicitation ban and not to any other provisions in the pay to play rule. *See supra* note 348 (referencing the MSRB's issuance of a draft pay to play rule for municipal advisors).

357 Rule 203(b)(3)-1.

358 Rule 203(b)(3)-2. We adopted rule 203(b)(3)-2 in 2004 in order to require certain hedge fund advisers to register under the Act. *See Registration under the Advisers Act of Certain Hedge Fund Advisers*, Investment Advisers Act Release No. 2333 (Dec. 2, 2004) [69 FR 72054 (Dec. 10, 2004)]. That rule, and certain amendments to rule 203(b)(3)-1 and other rules, were vacated by a federal appeals, but have remained in the CFR. *See Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. June 23, 2006) ("Goldstein").*

discussed above, Congress repealed in section 403 of the Dodd-Frank Act). In the Exemptions Adopting Release, we are adopting a new client counting rule, rule 202(a)(30)-1, for purposes of the new foreign private adviser exemption.[359]

b. Rule 204-2

We are adopting amendments to rule 204-2 under the Advisers Act, the "books and records" rule. The first amendment updates the rule's "grandfathering provision" for investment advisers that are currently exempt from registration under the "private adviser" exemption, but will be required to register after the exemption is eliminated on July 21, 2011.[360] Upon registration, these advisers will become subject to the recordkeeping requirements of the Act, including the requirement to keep certain records relating to performance.[361] The amendment clarifies that these advisers are not obligated to keep certain performance-related records for any period when they were not registered with the Commission; however, to the extent that these advisers preserved these performance-related records even though they were not required to keep them, they must continue to preserve them.[362] As discussed in section III, we are providing these

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359 *See* Exemptions Adopting Release, *supra* note 4, at section II.C.1.

360 *See* amended rule 204-2(e)(3)(ii); Implementing Proposing Release, *supra* note 7, at section III.D.2.b. Our proposal would have applied the grandfathering provision only to those periods prior to the date that the Dodd-Frank Act removes the "private adviser" exemption in section 203(b)(3)—July 21, 2011. However, as discussed in section III of this Release, we are providing a transition period for advisers relying on the "private adviser" exemption, requiring that they register by March 30, 2012 and comply with all Advisers Act provisions and rules by that date. To reflect this transition period in the grandfathering provision in rule 204-2, we are adopting a modification from our proposal to provide that the grandfathering period applies to any period prior to such adviser's registration.

361 *See* rule 204-2(a)(16).

362 *See* amended rule 204-2(e)(3)(ii) (stating, "[i]f you are an investment adviser that was, prior to July 21, 2011, exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b-3(b)(3)), as in effect on July 20, 2011, [this rule] does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under [certain sections of this rule] to the extent those books and records pertain to the performance or rate of return of such private fund (as defined in section 202(a)(29) of the Act (15 U.S.C. 80b-2(a)(29)), or other account you advise for any period ended prior to your registration, provided that that you

advisers with additional time to register and establish compliance with rules under the Advisers Act to which they will become subject as registered advisers, including rule 204-2.[363] The second amendment modifies rule 204-2(e)(3)(ii) to cross-reference the new definition of "private fund" added by the Dodd-Frank Act.[364] The third amendment rescinds rule 204-2(l)[365] because it was vacated by the federal appeals court in *Goldstein* and because the Dodd-Frank Act's addition of section 204(b)(2) to the Advisers Act codifies this approach in the Advisers Act itself.[366]

We received three comment letters in favor of the proposed amendment to apply the grandfathering provision to advisers that will be required to register due to the Dodd-Frank Act's elimination of the "private adviser" exemption.[367]

c. Rule 0-7

We are adopting, as proposed, an amendment to rule 0-7(a)(1)[368] under the Advisers Act to update a cross reference to section 203A(a)(2) of the Advisers Act, which has been renumbered as section 203A(a)(3) by the Dodd-Frank Act.[369]

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continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period." Advisers to private funds that registered with the Commission based on adoption of rule 203(b)(3)-2 in the Hedge Fund Adviser Registration Release and then withdrew their registration based upon the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Goldstein* are permitted to rely on the grandfathering provision for periods during which they were unregistered.

363 An adviser that must register with the Commission because of the Dodd-Frank Act's elimination of the "private adviser" exemption and that files an application for registration on or before the transition deadline of March 30, 2012, may rely on the grandfathering provision for any period prior to registering, but must begin keeping performance-related records in accordance with the rule upon registering.

364 *See* rule 204-2(e)(3)(ii) (using the term "private fund" without reference to a definition). We are adding a parenthetical noting that the term is defined in section 202(a)(29) of the Advisers Act.

365 Rule 204-2(l) states that books and records of a private fund are, under certain circumstances, treated as books and records of its adviser.

366 Section 404 of the Dodd-Frank Act (adding section 204(b)(2) to the Advisers Act, which states that "[t]he records and reports of any private fund to which an investment adviser registered under this title provides investment advice shall be deemed to be the records and reports of the investment adviser.").

367 *See* MFA Letter; NYSBA Committee Letter; Seward Letter.

d. Rule 222-1

We are replacing, as proposed, the term "principal place of business" in rule 222-1(b)[370] under the Advisers Act with the term "principal office and place of business" to conform to the Dodd-Frank Act's amendments to section 222 of the Advisers Act.[371] We are not modifying the definition.

e. Rule 222-2

We are adopting, as proposed, amendments to rule 222-2 to define "client" for purposes of the national *de minimis* standard by cross-referencing the definition of "client" in rule 202(a)(30)-1 rather than the definition in rule 203(b)(3)-1. The cross-reference to rule 203(b)(3)-1 must be updated because we are rescinding rule 203(b)(3)-1.[372] We are also changing, as proposed, a cross-reference to paragraph (b)(6) of rule 203(b)(3)-1 to paragraph (b)(4) of rule 202(a)(30)-1 to account for the changed location of that particular provision.

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368 Rule 0-7(a) defines "small entities" under the Advisers Act for purposes of the Regulatory Flexibility Act.

369 *See* amended rule 0-7(a)(1) (stating that the term "small business" or "small organization" for purposes of the Advisers Act means an investment adviser that: "Has assets under management, as defined under Section 203A(a)(3) of the Act (15 U.S.C. 80b-3a(a)(3)) and reported on its annual updating amendment to Form ADV [17 CFR 279.1], of less than $25 million, or such higher amount as the Commission may by rule deem appropriate . . . ."); Implementing Proposing Release, *supra* note 7, at section II.D.2.c.

370 Rule 222-1 contains definitions relevant to section 222 of the Advisers Act's provisions regarding state regulation of investment advisers. Amended rule 222-1(b) defines "principal office and place of business" exactly as it defined "principal place of business" of an investment adviser: "the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser."

371 *See* section 985 of the Dodd-Frank Act (replacing the term "principal place of business" each time it appears – *i.e.*, six times – with the term "principal office and place of business" in section 222 of the Advisers Act).

372 *See supra* section II.D.2.a. (discussing rescinding rule 203(b)(3)-1); new rule 202(a)(30)-1; Exemptions Adopting Release, *supra* note 4, at section II.C.1. (discussing the definition of "client" in rule 202(a)(30)-1).

We are not adopting a proposed amendment to specify that, for purposes of the national *de minimis* standard, an adviser is not required to count as a client any person for whom the adviser provides investment advisory services without compensation.[373] We received a comment letter opposing this amendment, citing the fact that under proposed rule 202(a)(30)-1, an adviser would be required to count such a person as a client for purposes of the "foreign private adviser" definition in section 202(a)(30) of the Act.[374] The commenter stated that it would be confusing and inconsistent to require an adviser to count the same person as a client for purposes of the "foreign private adviser" definition, but not for the national *de minimis* standard. We agree. Thus, in the interests of consistency and clarity, advisers must count such clients for both purposes.

f. Rule 202(a)(11)-1

We are rescinding rule 202(a)(11)-1 under the Advisers Act.[375] Although the rule was vacated by a federal appeals court (and is therefore not in effect), it has remained in the CFR.[376]

III. EFFECTIVE AND COMPLIANCE DATES

A. Effective Dates

The effective date of rules 204-4 and 203A-5(b) and (c), amendments to rules 0-7, 203A-1, 203A-2, 203A-3, 204-1, 204-2, 206(4)-5, 222-1, and 222-2, and amendments to Forms ADV, ADV-E, ADV-H, and ADV-NR is [insert 60 days from date of publication in the Federal Register]. The effective date of rule 203A-5(a) and the amendment to rule 203-1 is July 21,

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373 *See* Implementing Proposing Release, *supra* note 7, at section II.D.2.e.

374 *See* NASAA Letter; Exemptions Adopting Release, *supra* note 4, at section II.C.1.

375 Rule 202(a)(11)-1. Rule 202(a)(11)-1 addressed the application of the Advisers Act to broker-dealers offering certain types of brokerage programs.

376 *See Financial Planning Association v. SEC*, 482 F.3d 481 (D.C. Cir. 2007).

2011.[377] Rules 202(a)(11)-1, 203(b)(3)-1, 203(b)(3)-2, and 203A-4 are rescinded effective [insert 60 days from date of publication in the Federal Register].

B. Compliance Dates

1. Transition to State Registration and Form ADV

As discussed in section II.A.1 above, new rule 203A-5 provides 90 days from December 31, 2011 for each adviser registered with us to determine whether it is eligible for Commission registration.[378] Accordingly, the rule requires all registered advisers to file an amended Form ADV by March 30, 2012,[379] which for most of our registrants will be their annual updating amendments that are due 90 days after their December 31, 2011 fiscal year ends.[380] For an adviser that is no longer eligible to remain registered with us, rule 203A-5 provides an additional 90 days for it to register in one or more of the states and withdraw its registration with us.[381] After January 1, 2012, any adviser filing an amendment to Form ADV to meet the filing requirements of rule 203A-5 or for any other purpose will be required to provide responses to the form revisions we are adopting today.[382] Our staff is working closely with FINRA, our IARD contractor, to re-program IARD and we understand that the system is expected to be able to

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377 *See* section IV *infra* (discussing certain administrative law matters associated with the effective date for new rule 203A-5(a) and amended rule 203-1(e)).

378 *See* new rule 203A-5; *supra* section II.A.1.

379 *See* new rule 203A-5(b); *supra* section II.A.1.

380 Advisers not filing an annual updating amendment from January 1 to March 30, 2012, must file an other than annual amendment updating Form ADV.

381 *See* new rule 203A-5(c)(1). A mid-sized adviser that must switch to state registration may not withdraw its SEC registration until January 1, 2012. *See* new rule 203A-5(a); *supra* section II.A.1.

382 *See supra* note 25 and accompanying text.

accept filings of revised Form ADV by January 1, 2012.[383] Investment advisers filing initial applications for registration after the IARD is re-programmed to accommodate filing of the revised Form ADV must complete the revised form.

2. Advisers Previously Exempt under Section 203(b)(3)

We are adopting a transition provision in rule 203-1 for advisers that are newly required to register due to the Dodd-Frank Act's repeal of the "private adviser" exemption in section 203(b)(3).[384] Under rule 203-1(e), an adviser that was relying on, and was entitled to rely on, the "private adviser" exemption in section 203(b)(3) on July 20, 2011, may delay registering with the Commission until March 30, 2012.[385] Because initial applications for registration can take up to 45 days to be approved, advisers relying on this transition provision to remain unregistered until March 30, 2012 should file a complete application, both Part 1 and a brochure(s) meeting the requirements of Part 2 of Form ADV at least by February 14, 2012.[386]

To qualify for the delayed transition under rule 203-1(e) an adviser must, during the course of the preceding 12 months, have had fewer than 15 clients and neither hold itself out generally to the public as an investment adviser nor act as an adviser to a registered investment

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383 As discussed in section II.B.1, we are also making technical amendments to Forms ADV-H and ADV-NR to account for the fact that exempt reporting advisers, along with registered advisers, will file these forms.

384 *See* amended rule 203-1(e); section 203(b)(3) of the Advisers Act.

385 *See* amended rule 203-1(e). *See also* Letter from Robert E. Plaze, Associate Director, Division of Investment Management, U.S. Securities and Exchange Commission, to David Massey, Deputy Securities Administrator, North Carolina Securities Division, and President, NASAA (Apr. 8, 2011) *available at* http://www.sec.gov/rules/proposed/2010/ia-3110-letter-to-nasaa.pdf (stating that the Commission would potentially consider extending the date by which these advisers must register and come into compliance with the obligations of a registered adviser until the first quarter of 2012).

386 *See* section 203(c)(2) of the Advisers Act (providing that the Commission will grant registration or institute proceedings to determine whether registration should be denied within 45 days of the date an adviser files and application for registration).

company or business development company.[387] The transition period will provide these advisers with needed additional time to work through any technical issues associated with applying for registration and to establish compliance with Advisers Act provisions and rules to which they are newly subject as advisers required to register.[388] As such, we believe that the temporary extension of the registration deadline provided by rule 203-1(e) will assure an orderly transition to registration that will minimize costs to these advisers and their clients.

3. Exempt Reporting Advisers

Exempt reporting advisers must file their first reports on Form ADV through IARD between January 1 and March 30, 2012. We originally proposed to require exempt reporting advisers to file initial reports by August 20, 2011.[389] However, we are further delaying the compliance date to accommodate re-programming of the IARD system on which these reports

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387 *See* amended rule 203-1(e). An adviser relying on the transition provision must come into compliance with Advisers Act statutory provisions and rules applicable to registered advisers by the time it is registered, which must occur no later than March 30, 2012. However, nothing in the transition provision exempts these advisers from Advisers Act provisions and rules to which they are currently subject. For example, the Advisers Act pay to play rule, rule 206(4)-5, currently applies to advisers exempt from registration under the "private adviser" exemption in section 203(b)(3) of the Act. *See supra* section II.D.1. (discussing our amendments to the pay to play rule, one of which is designed so that advisers exempt from registration under the "private adviser" exemption in section 203(b)(3) continue to be subject to the pay to play rule after the Dodd-Frank Act eliminates the exemption).

388 We received a number of comment letters requesting that these advisers have additional time after July 21, 2011 (the date the Dodd-Frank Act's repeal of the section 203(b)(3) private adviser exemption becomes effective) to become registered and to establish compliance with all provisions of the Advisers Act and rules thereunder to which they are newly subject by virtue of their required registration. *See* CompliGlobe Letter; MFA Letter; Schnase Letter; Shearman Letter. We are using our authority under section 206A of the Act to implement this transition to registration. We believe that providing advisers newly required to register with this additional transition period is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Advisers Act.

389 *See* Implementing Proposing Release, *supra* note 7, at section II.B.4.

will be filed.[390] The extended deadline of March 30, 2012 will also address concerns raised by commenters that advisers will not have sufficient time to determine whether they qualify for the new exemptions, familiarize themselves with Form ADV and IARD, collect the data necessary to file an initial report, and to file the report.[391]

4. Other Amendments

As discussed in section II.A.5., advisers may rely on our amendments to rule 203A-2 beginning on [insert date that is 60 days from date of publication in the Federal Register].[392] These include our amendments to increase the threshold for pension consultants from $50 million to $200 million and to create a uniform threshold for small and mid-sized advisers that permits them to register with the Commission if they are required to register in 15 or more states.[393] Advisers may begin relying on our amendment to the buffer in rule 203A-1 on [insert date that is 60 days from date of publication in the Federal Register]. In addition, as discussed in section II.D.1, we are extending the compliance date for the pay to play rule's ban on third-party solicitation from September 13, 2011 to June 13, 2012. Advisers must comply with any other amendments not discussed in this section III.B by their effective dates.

IV. CERTAIN ADMINISTRATIVE LAW MATTERS

As discussed in section III.A above, the effective date for rule 203A-5(a) and the amendment to rule 203-1 is July 21, 2011. The Administrative Procedure Act generally requires that an agency publish a final rule in the Federal Register not less than 30 days before its

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390 *See supra* section II.A.1. (discussing the expectation that the IARD will be re-programmed in November 2011).

391 *See* ABA Committees Letter; Merkl Implementing Letter.

392 *See supra* note 118.

393 *See supra* section II.A.5.

effective date.[394] However, this requirement does not apply if the rule is a substantive rule which grants or recognizes an exemption or relieves a restriction, if the rule is interpretive, or if the agency finds good cause to make the rule effective less than 30 days after its date of publication in the Federal Register.[395] Effective July 21, 2011, the Dodd-Frank Act amends section 203A of the Advisers Act to prohibit certain mid-sized advisers from registering with the Commission, and eliminates the "private adviser" exemption in section 203(b)(3), requiring advisers relying on that exemption to register as of July 21, 2011.[396] Rule 203A-5(a) provides a temporary extension of the deadline by which certain mid-sized advisers must withdraw their Commission registration, and rule 203-1(e) provides a temporary extension of the registration deadline for advisers relying on the "private adviser" exemption in section 203(b)(3).[397] Thus, both rule 203A-5(a) and rule 203-1(e) recognize an exemption or relieve a restriction. Furthermore, as discussed in sections II.A and III.B.2 of this Release, we believe that these temporary extensions are necessary to facilitate an orderly process for advisers relying on the "private adviser" exemption in section 203(b)(3) to apply for registration and for mid-sized advisers to withdraw from registration, and to provide sufficient time for the re-programming of IARD. Thus, we find good cause to make rules 203A-5(a) and 203-1(e) effective on July 21, 2011.

V. COST-BENEFIT ANALYSIS

We are sensitive to the costs and benefits imposed by our rules, and understand that there will be costs associated with compliance with the new rules and rule amendments. The new rules and amendments we are adopting are designed to give effect to provisions of Title IV of the

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394 *See* 5 U.S.C. 553(d).

395 *See id.*

396 *See* sections 403, 410, and 419 of the Dodd-Frank Act; sections 203(b)(3), 203A(a)(2) of the Advisers Act; *supra* sections I and II.A.

397 *See* amended rule 203-1(e) and new rule 203A-5(a); *supra* section II.A and section III.B.2.

Dodd-Frank Act that: (i) reallocate responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain mid-sized advisers; (ii) repeal the "private adviser" exemption contained in section 203(b)(3) of the Advisers Act; and (iii) provide for reporting by advisers to certain types of private funds that are exempt from registration. As part of these amendments, we are also adopting amendments to the Advisers Act pay to play rule, rule 206(4)-5. Additionally, we are identifying the advisers that may be subject to the Dodd-Frank Act's requirements concerning certain incentive-based compensation arrangements. Because many of the new rules and rule amendments will implement or clarify provisions of the Dodd-Frank Act, they will not create benefits and costs separate from the benefits and costs considered by Congress in passing the Dodd-Frank Act.[398] However, certain of the rules and rule amendments that we are adopting will generate costs and benefits independent of those generated by the Dodd-Frank Act itself. These costs and benefits are discussed below.[399]

In the Implementing Proposing Release, we requested comment on the proposed rules and amendments, suggestions for additional changes to the existing rules, and comment on other matters that might have an effect on our proposals. We received approximately 73 comment letters on the proposal. Commenters generally supported our approach facilitating mid-sized advisers' transition from Commission to state registration, and our amendments to Form ADV

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398 *See* Dodd-Frank Act, *supra* note 2; Conference Committee Report, *supra* note 136; Senate Committee Report, *supra* note 18; *supra* section I. Rules and amendments not generating costs and benefits independent of those generated by the Dodd-Frank Act include the amendments to rules 0-7, 204-2, 222-1, 222-2 and our rescinding of rules 202(a)(11)-1, 203(b)(3)-1, and 203(b)(3)-2.

399 To indicate the scale of the market which is addressed by Title IV of the Dodd-Frank Act and the amendments to Advisers Act rules we are adopting today—the market for investment advisory services—based on IARD data as of April 7, 2011, our staff estimates that SEC-registered advisers manage approximately $43.822 trillion in assets.

requiring disclosure of additional information about private funds. Many, however, urged us to take a different approach to revising the pay to play rule.

A. Benefits

1. Eligibility to Register with the Commission: Section 410

Section 410 of the Dodd-Frank Act amends section 203A of the Advisers Act to create a new category of "mid-sized advisers" and shifts primary responsibility for their regulatory oversight to the states. Specifically, section 410 prohibits an investment adviser from registering with the Commission if the adviser is required to be registered and is subject to examination as an investment adviser in the state in which it maintains its principal office and place of business, and has assets under management between $25 million and $100 million.[400] We are adopting rules and rule amendments that provide us with a means of identifying advisers that must transition to state regulation, clarify the application of new statutory provisions, and modify certain exemptions we previously adopted under section 203A of the Act.

Transition to State Registration

We are adopting new rule 203A-5, which requires *each* investment adviser registered with us on January 1, 2012 to file an amendment to its Form ADV no later than March 30, 2012, and withdraw from Commission registration by June 28, 2012, if no longer eligible.[401] As a consequence of section 410 of the Dodd-Frank Act, we estimate that approximately 3,200 SEC-registered advisers will be required to withdraw their registration and register with one or more

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400 *See supra* notes 18-19 and accompanying text (discussing section 410 of the Dodd-Frank Act, which amends section 203A of the Advisers Act to increase the threshold above which all investment advisers must register with the Commission from $25 million to $100 million).

401 New rule 203A-5(b)-(c); *supra* section II.A.1. Mid-sized advisers registered with the Commission as of July 21, 2011 must remain registered with the Commission (unless an exemption from Commission registration otherwise is available) until January 1, 2012. New rule 203A-5(a). *See supra* note 28.

state securities authorities.[402] We believe this filing is necessary for each adviser to confirm its current eligibility for Commission registration in light of multiple statutory changes (as well as changes to the rules that we are today adopting) that could affect whether the adviser may register with the Commission.[403] Given this significant realignment of regulatory authority over numerous advisers, requiring all advisers to file the new Form ADV and complete all items also will allow us and the state securities authorities to easily and efficiently identify the advisers that are subject to our regulatory authority and which advisers have switched to state registration after the implementation of the Dodd-Frank Act's amendment to section 203A of the Advisers Act. Additionally, the filing will help minimize any potential uncertainty among investors and other market participants about the effects of the Dodd-Frank Act on the registration status of a particular adviser by providing a simple, efficient means of determining an adviser's registration status after the implementation of the Dodd-Frank Act through the IARD as of a specific date. This could help minimize any disruption in advisory business that such uncertainty could provoke. One commenter agreed with our expectation that the transition rule will benefit advisers, noting that the rule will "assist mid-sized advisers in transitioning from federal to state registration."[404]

Rule 203A-5 that we are adopting today differs from the one we proposed in several respects. First, rule 203A-5 requires advisers already registered with the Commission to refile Form ADV beginning on January 1, 2012, instead of beginning on July 21, 2011 as proposed.[405]

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402 *See supra* note 22 and accompanying text.

403 In addition, we believe that requiring advisers to complete all of the items will provide the Commission and the state regulatory authorities with essential information about the advisers that are transitioning to state registration and the advisers that are remaining registered with the Commission. *See infra* section II.C.

404 Pickard Letter.

405 *See* new rule 203A-5(b); proposed rule 203A-5(a); *supra* section II.A.1.

We stated in the Implementing Proposing Release that a delay might be necessary if the IARD was not re-programmed to reflect the revised Form ADV by July 21.[406] We now understand that beginning in November 2011, the IARD will be updated to reflect the revisions to Form ADV that we are adopting today.[407] Several commenters agreed with our approach to delay the transition instead of adopting alternative requirements, such as requiring interim paper filings, to reduce burdens for both advisers and regulators.[408] Additionally, we believe that delaying the beginning of the transition until January 1, 2012 will allow the Commission and state regulators to manage the transition of mid-sized advisers in an orderly manner, and will accommodate the re-programming of the IARD that eliminates the need and cost of alternatives such as interim paper filings.

Second, rule 203A-5 provides a 180-day transition period, which is longer than the 90-day period we proposed.[409] Advisers will be required to file an amended Form ADV by March 30, 2012 (instead of August 20, 2011, as proposed), and mid-sized advisers no longer eligible for Commission registration will be required to withdraw by June 28, 2012 (instead of October 19, 2011, as proposed).[410] Changing the deadline for advisers to refile amended Form ADV to March 30, 2012, which coincides with most advisers' required annual updating amendment,

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406 Implementing Proposing Release, *supra* note 7, at section II.A.1.

407 FINRA informed us that the IARD will be updated to reflect the revisions to Form ADV that we are adopting today beginning in November. *See supra* section II.A.1.

408 *See* Dezellem Letter (urging the Commission to wait for the IARD to be reprogrammed because it is efficient and reduces risks of misplacing paper documents and possible filing errors); NASAA Letter ("the benefits of electronic filing, including easy public access to the documents, are significant and would outweigh any disadvantages imposed by a delay in filing deadlines."); NRS Letter (urging Commission not to "regress to paper filings" which would be "a huge step into the past" and "appears to be counter to Dodd-Frank Act purposes of transparency and consistency."). *See also* NYSBA Committee Letter.

409 *See* new rule 203A-5(b)-(c); proposed rule 203A-5(a)-(b) and *supra* section II.A.1.

410 *See* new rule 203A-5(b)-(c); proposed rule 203A-5(a)-(b); Implementing Proposing Release, *supra* note 7, at section II.A.1.

significantly reduces the burden of rule 203A-5 by eliminating the costs associated with a special one-time filing requirement for most registered advisers.[411] In addition, the change in deadline to refile also coincides with the filing deadline for newly registering private fund advisers, which, as one commenter pointed out, eliminates the need for these advisers also to file Form ADV solely for the purposes of determining eligibility for registration.[412] Also, the June 28, 2012 deadline to withdraw from registration will provide additional time for advisers to complete the switch to state registration and to comply with their obligations under state law, and will reduce administrative burdens for the state securities authorities that must review and process mid-sized adviser state registrations, as underscored by several commenters.[413] Several commenters expressed concerns about the burdens of requiring all advisers to amend all of Form ADV solely to indicate their eligibility to register[414] and requiring mid-sized advisers to switch to state

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411 *See, e.g.*, CMC Letter (suggesting "timing of the transition from federal to state registration could be centered around renewals for 2012"). As of April 7, 2011, 10,636 SEC-registered advisers had a fiscal year ending on December 31. We expect that these advisers will comply with new rule 203A-5(b)'s Form ADV filing requirement by submitting their annual updating amendment. The 868 SEC-registered advisers not required to file an annual updating amendment between January 1, 2012 and March 30, 2012 will file an other-than-annual amendment, but they will complete all of the items on the form (not just the items required to be updated in a typical other-than-annual amendment). *See supra* note 48.

412 *See* MFA Letter.

413 Many commenters urged us to provide additional time for mid-sized advisers to complete the switch to state registration. *See* ABA Committees Letter; Altruist Letter; CMC Letter; Dezellem Letter; Dinel Letter; FSI Letter; Klein Letter; NRS Letter; NYSBA Committee Letter; Sadis Letter; Schnase Letter; Seward Letter; Shearman Letter. Several commenters echoed concerns about timely state processing of applications, noting, in particular, additional registration and compliance requirements in many states and expected delays to approve state registrations given the increase in filings as a result of the Dodd-Frank Act. *See* ABA Committees Letter ("some states may be unable to process such filings in a timely and efficient manner."); Altruist Letter (noting that it took 122 days for a state to approve its application). *See also* CMC Letter; Dezellem Letter; Klein Letter; NRS Letter; NYSBA Committee Letter; Schnase Letter; Seward Letter. One commenter, while supporting the method and timeline for transition contained in proposed rule 203A-5, suggested that it would be prudent to include in the rule flexibility to extend this timeline if necessary. *See* NASAA Letter.

414 *See, e.g.*, ICI Letter; MFA Letter; NYSBA Committee Letter; Shearman Letter.

registration within 90 days after July 21, 2011.[415] The revised transition discussed above should allay these concerns. We believe that providing advisers with 180 days, rather than 90 days, to transition to state registration will allow them to do so in a more orderly manner.[416] It will provide them greater time to collect the information necessary for state registration and to assess and to come into compliance with state regulations governing advisers. As such, it may promote efficiency and reduce advisers' costs.

Finally, we are providing additional flexibility for an adviser to choose the date by which it must calculate its assets under management that it reports on Form ADV by requiring the same 90 day period as in Form ADV today, instead of 30 days, as proposed.[417] This change will make an additional administrative burden unnecessary for the majority of advisers that already value assets on a quarterly basis, as underscored by several commenters.[418]

Switching Between State and Commission Registration

Rule 203A-1 is designed to prevent an adviser from having to switch frequently between state and Commission registration as a result of changes in the value of its assets under management or the departure of one or more clients. We are amending the rule to eliminate the

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415 *See, e.g.,* ABA Committees Letter; Altruist Letter; CMC Letter; Dezellem Letter; Dinel Letter; FSI Letter; Klein Letter; NRS Letter; NYSBA Committee Letter; Sadis Letter; Schnase Letter; Seward Letter; Shearman Letter. Only one commenter supported the proposed 90-day grace period. Pickard Letter.

416 Our current rules provide an SEC-registered adviser that has to switch to state registration a period of 180 days after its fiscal year end to file an annual amendment to Form ADV and to withdraw its SEC registration after reporting to us that it is no longer eligible to remain registered with us. *See* rule 203A-1(b)(2); *cf.* rule 204-1(a). Several commenters recommended the Commission match the current 180-day period. *See* Altruist Letter; Dezellem Letter; FSI Letter; Klein Letter; NYSBA Committee Letter; Schnase Letter; Seward Letter; Shearman Letter.

417 *See* new rule 203A-5(b); amended Form ADV: Instructions for Part 1A, instr. 5.b.(4); *supra* section II.A.1.

418 Several commenters recommended that advisers be able to calculate assets under management as of the quarter-end. *See* Altruist Letter; NYSBA Committee Letter; Seward Letter; Shearman Letter.

current buffer for advisers with assets under management between $25 million and $30 million that permits these advisers to remain regulated by the states, and we are replacing it with a similar buffer for mid-sized advisers with assets under management of close to $100 million.[419] The rule raises the threshold above which a mid-sized adviser must register with the Commission to $110 million; but, once registered with the Commission, an adviser need not withdraw its registration until it has less than $90 million of assets under management.[420] Commenters did not object to elimination of the current buffer, but several argued that we need to include a new buffer for mid-sized advisers that have close to $100 million of assets under management.[421] These comments persuaded us to adopt a buffer that, as discussed below, may prevent costs and disruption to advisers that otherwise may have had to switch between federal and state registration frequently.[422] The rule also maintains the 180-day grace period from the adviser's fiscal year end for advisers no longer eligible to switch to state registration,[423] which further addresses commenters' concerns about advisers frequently having to switch registration.[424]

We are eliminating the current $5 million buffer, as proposed, because, as one commenter noted, it seems "unnecessary and potentially confusing,"[425] particularly in light of Congress's determination generally to require most advisers having between $25 million and $100 million of

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419 *See* amended rule 203A-1(a); *supra* note 103 and accompanying text.

420 *See* amended rule 203A-1(a); *supra* note 106.

421 *See* Altruist Letter; Dezellem Letter; Dinel Letter; FSI Letter; ICW Letter; JVL Associates Letter; Merkl Implementing Letter; NASAA Letter; NRS Letter; NYSBA Committee Letter; Wealth Coach Letter; WJM Letter.

422 Several commenters discussed the costs of switching frequently between federal and state registration. *See, e.g.*, Altruist Letter; ICW Letter; JVL Associates Letter; NRS Letter; Wealth Coach Letter.

423 *See* amended rule 203A-1(b)(2); *supra* note 104 and accompanying text.

424 *See* Altruist Letter; Dezellem Letter; Dinel Letter; FSI Letter; ICW Letter; JVL Associates Letter; Merkl Implementing Letter; NRS Letter; NYSBA Committee Letter; Wealth Coach Letter; WJM Letter.

425 ABA Committees Letter.

assets under management to be registered with the states.[426] Elimination of the current buffer also promotes efficiency and competition by making the registration requirements for advisers with assets under management between $25 million and $30 million consistent with the requirements for advisers with assets under management between $30 million and $100 million.

The new buffer yields several benefits, also identified by commenters, including enhancing efficiency because it will prevent advisers from frequently switching to and from Commission registration due to market fluctuations.[427] The buffer also will eliminate the additional costs and resulting competitive disadvantages these advisers would therefore incur (such as paying filing fees and changing compliance programs to reflect a different regulatory regime).[428] The amendment operates to provide a buffer of 20 percent of the $100 million statutory threshold for registration with the Commission, which is the same percentage as the current buffer. We believe a 20 percent buffer is appropriate because it is large enough to create a flexible regime that accommodates market fluctuations or the departure of one or more clients, and does not substantially increase or decrease the $100 million threshold set by Congress in the

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426 *See supra* note 18.

427 Commenters said a 20 percent buffer should prevent advisers from having to switch as a result of changes in market values due to volatility in the securities markets. *See, e.g.,* Dezellem Letter; Dinel Letter; WJM Letter. *See also* Altruist Letter; FSI Letter; ICW Letter; Merkl Implementing Letter; NYSBA Committee Letter. Several advisers with close to $100 million of assets under management asserted that a buffer is necessary to prevent them from switching to and from Commission registration. ICW Letter (for three years, adviser's assets under management have fluctuated above and below $100 million due to market volatility); JVL Associates Letter (adviser's assets under management have fluctuated around $100 million since 2007). *See also* Wealth Coach Letter (from October 2008 through March 2009, adviser's total assets under management fell over 25 percent).

428 *See* ICW Letter (having to switch back and forth "would create a disproportionate regulatory burden and cost structure" and would "place them at a significant operating and financial disadvantage to advisory firms clearly exposed to only one regulatory regime that is not likely to change."); WJM Letter (not having a buffer potentially puts an unreasonable and unfair burden on the smaller SEC advisers and could mean they would re-register several times before getting into a "safe" zone). *See also* Dezellem Letter; FSI Letter; Wealth Coach Letter.

Dodd-Frank Act.[429] Commenters further asserted that the buffer will reduce burdens for investors, clients and regulators,[430] and will provide regulatory flexibility.[431]

Exemptions from the Prohibition on Registration with the Commission

We are amending three of the exemptions from the prohibition on registration in rule 203A-2 to reflect developments since their original adoption, including the enactment of the Dodd-Frank Act.[432] First, we are eliminating the exemption in rule 203A-2(a) from the prohibition on Commission registration for NRSROs.[433] Currently, no advisers indicate that they are NRSROs by marking Item 2.A.(5) of Part 1A of Form ADV.[434] Given that NRSROs do not currently rely on the exemption and Congress excluded certain NRSROs from the Act's definition of "investment adviser" since we adopted this exemption,[435] the amendment will not generate any benefits or costs and will not impact efficiency, competition or capital formation,

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429 *See supra* note 117.

430 *See* Dezellem Letter (arguing new registrations are time consuming and costly for regulators and advisers, and adopting a buffer will decrease investor confusion); FSI Letter (arguing a buffer will reduce costs associated with re-registration that would be passed on to investors); Wealth Coach Letter (arguing different registrations could overwhelm clients, and the resources required to change registration could negatively impact an adviser's client services and portfolio management); WJM Letter (arguing clients would be "puzzled or concerned" by registration changes, and multiple re-registrations would put additional burdens on states).

431 *See* NASAA Letter (arguing a buffer "provides an element of regulatory flexibility.").

432 *See* amended rule 203A-2; *supra* section II.A.5. We are also renumbering and making minor conforming changes to rule 203A-2(c), (d) and (f). *See* amended rule 203A-2(b), (c) and (e). Each of the exemptions from the prohibition on registration in rule 203A-2 (including those we are not amending) also apply to mid-sized advisers, which one commenter asserted "promotes uniformity, clarity and a consistent standard for all." NRS Letter. *See supra* note 119.

433 *See supra* section II.A.5.a.

434 Based on IARD data as of April 7, 2011.

435 *See supra* notes 121-122.

separate from the benefit of simplifying our rules and, as one commenter noted, will increase "consistency across legislative and regulatory requirements."[436]

Second, we are amending the exemption available to pension consultants in rule 203A-2(b) to increase the minimum value of plan assets on which an adviser must consult from $50 million to $200 million.[437] We are increasing the threshold to $200 million in light of Congress's determination to increase from $25 million to $100 million the amount of assets under management that requires advisers to register with the Commission, and to maintain the same ratio as today of plan assets to the statutory threshold for registration.[438] This amendment will provide the benefit to these firms of registering with a single securities regulator, and will provide the regulatory benefit of allowing the Commission to focus its resources on oversight of those pension consultants that are more likely to have an effect on national markets.[439]

Finally, we are amending the multi-state adviser exemption to align the rule with the multi-state exemption Congress provided for mid-sized advisers in section 410 of the Dodd-Frank Act.[440] Amended rule 203A-2(d) permits all investment advisers who are required to register as an investment adviser with 15 or more states to register with the Commission, rather than 30 states, as currently required.[441] An adviser relying on the rule must withdraw from

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436 NRS Letter (asserting that the proposal is consistent with the Credit Rating Agency Reform Act, which amended the Advisers Act to exclude NRSROs and to provide for a separate regulatory regime for them under the Exchange Act). *See also* Pickard Letter (asserting that continued availability of the NRSRO exemption is causing confusion among advisers).

437 *See* amended rule 203A-2(a); *supra* section II.A.5.b.

438 *See supra* note 127.

439 One commenter expressed support for the $200 million threshold. *See* NRS Letter (agreeing that the $200 million threshold would continue to ensure that the activities of a pension consultant registered with the Commission are significant enough to have an impact on national markets).

440 *See* amended rule 203A-2(d); *supra* section II.A.5.c.

441 *See supra* note 131.

registration with the Commission when it is no longer required to register with 15 states.[442] We believe this change reflects the Congressional determination to set the threshold at 15 states.[443] This amendment reduces the regulatory burdens on advisers required to be registered with at least 15 states, but less than 30, by allowing them to register with a single securities regulator — the Commission.[444] Additionally, the amendment promotes efficiency and reduces the effect on competition between small and mid-sized investment advisers by imposing a consistent multi-state exemption standard.[445] We also are rescinding, as proposed, the provision in the current rule that permits advisers to remain registered until the number of states in which they must register falls below 25 states, and we are not adopting a similar cushion for the 15-state threshold.[446] We do not see any significant benefit of retaining this buffer, and we believe it is unnecessary because advisers elect to rely on the exemption and we are lowering the number of states from 30 to 15. As one commenter observed, eliminating the buffer also simplifies the requirements of the exemption.[447]

Elimination of Safe Harbor

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442 *See supra* note 132.

443 *See supra* note 136.

444 *See* Seward Letter, and Shearman Letter (in each case supporting the 15-state threshold we proposed, and suggesting the burdens of maintaining multiple state registrations can be significant). *See also* NEA Letter. One of these commenters also would support further decreasing the number of states to five and requiring advisers relying on the exemption to have at least $25 million of assets under management. Seward Letter. Another "would support an even lower threshold." Shearman Letter.

445 NASAA Letter (supporting amendment "as an effort to be more consistent in the registration requirements for all advisers when analyzing the thresholds for registration with the SEC or the states."); NRS Letter ("Establishing one uniform standard for all advisers of a 15-state requirement provides a uniform and clear standard."). *See also* NEA Letter (strongly recommending the 15-state threshold be applied to both small and mid-sized advisers).

446 *See* rule 203A-2(e)(1); *supra* section II.A.5.c.

447 *See* NRS Letter ("The Dodd-Frank Act has addressed the multi-state adviser exemption to simplify the requirements of this exemption.").

We are rescinding, as proposed, rule 203A-4, which has provided a safe harbor from Commission registration for an investment adviser that is registered with the state securities authority of the state in which it has its principal office and place of business based on a reasonable belief that it is prohibited from registering with the Commission because it does not have sufficient assets under management.[448] As discussed above, the safe harbor was designed for smaller advisory businesses with assets under management of less than $30 million, which may not employ the same tools or otherwise have a need to calculate assets as precisely as advisers with greater assets under management.[449] We also believe that the revisions we are adopting to the Form ADV instructions to implement a uniform method for advisers to calculate assets under management will clarify the requirements and reduce confusion among advisers.[450] Moreover, the rule is a safe harbor only from our enforcement actions, and to our knowledge few, if any, advisers have relied upon it in the 14 years since it was adopted.[451] We believe rescinding the safe harbor will simplify our rules in general, thereby marginally reducing costs of compliance, and will have little, if any, other effect on efficiency, competition or capital formation.

Mid-Sized Advisers

The Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is "required to be registered" or is "subject to examination" by a particular state securities authority for purposes of section 203A(a)(2)'s prohibition on mid-sized advisers registering with the

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448 *See r*ule 203A-4; *supra* section II.A.6.

449 *See supra* note 140.

450 *See supra* note 141.

451 *See supra* note 142.

Commission.[452] We are providing in the instructions to Form ADV an explanation of how we construe these statutory provisions.[453] Our instructions are intended to clarify the meaning of these provisions, promoting efficiency by mitigating uncertainty about their meaning. For example, as underscored by commenters, because we are identifying to advisers filing on the IARD the states that do not subject advisers to examination, a mid-sized adviser will not be required to independently determine whether it is subject to examination in a particular state.[454] Simplifying the process for mid-sized advisers to determine whether they are required to register with us would decrease any competitive disadvantages compared to smaller advisers.

2. Exempt Reporting Advisers: Sections 407 and 408

Congress gave us broad authority under sections 203(l) and 203(m) of the Advisers Act to require exempt reporting advisers to file reports as necessary or appropriate in the public interest or for the protection of investors.[455] To implement these new sections of the Advisers Act, we are adopting new rule 204-4, as proposed, that requires exempt reporting advisers to submit to us, and to periodically update, reports that consist of a limited subset of items on Form ADV.[456] We are also adopting the amendments we proposed to Form ADV to permit the form to

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452 *See supra* note 145.

453 *See* amended Form ADV: Instructions for Part 1A, instr. 2.b.; *supra* section II.A.7.

454 *See* NRS Letter (noting "the wide range of state regulatory regimes and processes" and supporting "efforts to verify those states which do or will subject advisers to examinations."); Sadis Letter (noting different state examination practices and arguing that clarification of registration requirements "is vital to the compliance of mid-sized advisers in states…which do not have routine examination programs in place for its investment advisers.").

455 *See* sections 407 and 408 of the Dodd-Frank Act, codified as new sections 203(l) and 203(m) of the Advisers Act.

456 New rule 204-4(a); amended Form ADV: General Instructions 3 and 4. *See supra* section II.B.

serve as both a reporting and registration form and to specify the seven items that exempt reporting advisers must complete.[457]

While the benefits of the reporting requirement under new rule 204-4 are difficult to quantify, we believe they are substantial. The information exempt reporting advisers provide on Form ADV will be beneficial to both the Commission and investors. This information will help us to identify exempt reporting advisers, their owners, and their business models and will provide us with information as to whether these advisers or their activities might present concerns sufficient to warrant our further attention in order to protect their clients, investors, and other market participants.[458] The reports, which will be publicly available, will also provide investors with some basic information about these advisers and their businesses. Several commenters agreed, expressing general support for the proposed reporting requirements.[459]

Under rule 204-4, exempt reporting advisers are required to file their Form ADV reports electronically through the IARD.[460] We believe that using Form ADV and the IARD for exempt reporting adviser reports will yield several important benefits. For instance, using Form ADV and the IARD creates efficiencies that benefit both us and filers by taking advantage of an established and proven filing system, while avoiding the expense and delay of developing a new form and filing system. Several commenters agreed,[461] and one explained that, in its view, there

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457 *See supra* section II.B.2.

458 One commenter agreed. ABA Committees Letter.

459 *See, e.g.*, AFL-CIO Letter; CII Letter; NRS Letter; Better Markets Letter; ABA Committees Letter; NASAA Letter.

460 New rule 204-4(b) and (d).

461 *See, e.g.*, AFL-CIO Letter; Better Markets Letter; NRS Letter; NASAA Letter. Responding to our request for comment regarding the possible use of EDGAR in place of the IARD, one commenter argued that "[s]uch an approach would be confusing and burdensome for any adviser that transitions between [exempt reporting adviser] and SEC-registered status." ABA Committees Letter.

is "no reason to create a new form or filing system when the existing ones have been designed for use by advisers and are suitable for that purpose."[462] In addition, because an exempt reporting adviser may be required to register on Form ADV with one or more state securities authorities, use of the existing form and filing system (which is shared with the states) should reduce regulatory burdens for exempt reporting advisers because they can satisfy multiple filing obligations through a uniform form.[463] Commenters agreed with our expectation that regulatory burdens would be diminished for an exempt reporting adviser that later finds it can no longer rely on an exemption and would be required to register with us because the adviser would simply file an amendment to its current Form ADV to apply for Commission registration.[464] Finally, certain items in Form ADV Part 1 are also linked to Form BD, which will create efficiencies if the exempt reporting adviser were to apply for broker-dealer registration.[465]

Requiring exempt reporting advisers to file their reports through the IARD will also benefit investors, prospective investors, and other members of the public who can readily access the information, without cost, through the Commission's website on the Investment Adviser Public Disclosure (IAPD) system. Investors will have access to some information that may have been previously unavailable or not easily attainable, such as whether an exempt reporting adviser has certain disciplinary events and whether its affiliates present conflicts of interest or allow broader access to other financial services.

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462 ABA Committees Letter.

463 *See supra* note 170 and accompanying text.

464 *See* ABA Committees Letter; Better Markets Letter; NRS Letter; NASAA Letter. Form ADV, as amended, permits an adviser to transition from filing reports with us to applying for registration under the Act by simply amending its Form ADV; the adviser would check the box to indicate it is filing an initial application for registration, complete the items it did not have to answer as an exempt reporting adviser, and update the pre-populated items that it already has on file. *See* amended Form ADV: General Instruction 15 (providing procedural guidance to advisers that no longer meet the definition of exempt reporting adviser).

465 Form BD is the Uniform Application for Broker-Dealer Registration. 17 CFR 249.501.

Several commenters supported the public availability of exempt reporting adviser reports as beneficial to the protection of investors.[466] Investor advocacy groups, for instance, lauded the Commission's initiative to create, for the first time, a database of public information on advisers to private investment funds.[467] Others added that an investor would be better able to perform due diligence if the information were made available to the public,[468] and could make an informed decision regarding the integrity of a prospective adviser if he or she were able to review the disciplinary history of the exempt reporting adviser and its employees.[469] In addition, requiring exempt reporting advisers to complete Section 7.B. of Schedule D for each private fund they manage should result in many of the same benefits that this information produces with respect to registered advisers that we address in the discussion of the amendments to Form ADV below.[470]

We have considered the broad public interest in making this information generally available, and we agree with commenters who assert there will be important benefits of providing information about these advisers to the public. In addition to furnishing us with important data about the private funds advised by exempt reporting advisers that we can use to identify practices that may harm investors,[471] and to administer our regulatory programs, these

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466 AFL-CIO Letter; CII Letter; Better Markets Letter.

467 *Id.*

468 Merkl Implementing Letter.

469 CII Letter.

470 *See infra* notes 483-488 and accompanying text.

471 For instance, census data about a private fund's gatekeepers, including administrators and auditors, would be available on amended Section 7.B.(1) of Schedule D and would be verifiable by investors and the Commission. Recent enforcement actions suggest that the availability of such information could be helpful. *See, e.g.*, *SEC v. Grant Ivan Grieve, et al*., Litigation Release No. 21402 (Feb. 2, 2010) (default judgment against hedge fund adviser that was alleged to have fabricated and disseminated false financial information for the fund that was "certified" by a sham independent back-office administrator and phony accounting firm); *In the Matter of John Hunting Whittier*, Investment Advisers Act Release No. 2637 (Aug. 21, 2007) (settled action against hedge fund manager for, among other things, misrepresenting to fund investors that a particular auditor audited certain hedge funds, when in fact it did not).

reports will create a publicly accessible foundation of basic information that could aid investors and prospective investors in conducting due diligence and could further help investors and other industry participants protect against fraud.[472] The easy availability of information about these advisers and their advisory affiliates may also discourage advisers from engaging in certain practices (such as maintaining client assets with a related person custodian) or hiring certain persons (such as those with disciplinary history). Investors' access to information may also facilitate greater competition among advisers, which may in turn benefit clients.

Electronic reporting by exempt reporting advisers of certain items within Form ADV will give us better access to information about these advisers, which will improve the administration of our regulatory programs and allow us to identify advisers whose activities suggest a need for closer scrutiny. We routinely use the IARD to generate reports on the advisory industry, its characteristics and trends. These reports would help us anticipate regulatory problems, identify potential conflicts of interest, allocate our resources, and more fully evaluate various regulatory actions we may consider taking, which should increase both the efficiency and effectiveness of our programs and thus increase investor protection.

We are also amending rule 204-1 under the Advisers Act, which addresses when and how advisers must amend their Form ADV, to require that exempt reporting advisers file updating amendments to reports filed on Form ADV.[473] As amended, rule 204-1 requires an exempt reporting adviser, like a registered adviser, to amend its reports on Form ADV: (i) at least annually, within 90 days after the end of the adviser's fiscal year; and (ii) more frequently, if required by the instructions to Form ADV. Similarly, we are amending General Instruction 4 to Form ADV to require an exempt reporting adviser, like a registered adviser, to update promptly

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472 *See infra* section V.A.3.

473 Amended rule 204-1. *See supra* section II.B.4.

Items 1 (Identification Information), 3 (Form of Organization), and 11 (Disciplinary Information) if they become inaccurate in any way, and to update Item 10 (Control Persons) if it becomes materially inaccurate.[474]

Requiring advisers to amend and update their reports assures that we have access to updated information. For example, these updates will allow us to know when an exempt reporting adviser has added or no longer advises a private fund client or has reported a disciplinary event, which will provide us with the information necessary to assess whether the adviser might present sufficient concerns to warrant our further inquiry. Updated information also benefits investors, prospective investors, and other members of the public that could use this information in evaluating, for example, whether to invest in a venture capital fund managed by an exempt reporting adviser. Many commenters who addressed updating and amendment requirements agreed with our approach to update the report annually and to amend it according to the same schedule as is applicable to registered advisers.[475]

When an adviser ceases to be an exempt reporting adviser, new rule 204-4 requires the adviser to file an amendment to its Form ADV to indicate that it is filing a final report.[476] Final report filings will allow us and the public to distinguish such a filer from one that is failing to

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474 *See* Form ADV: General Instruction 4.

475 *See* NRS Letter (expressing general support); Merkl Implementing Letter (stating that less frequent reporting would result in information that is less useful or materially inaccurate); CII Letter (expressing general support); ABA Committees Letter (asserting that information reported by exempt reporting advisers that is allowed to become significantly outdated or inaccurate would not serve the Commission's or public's interest or protect investors as mandated by the Dodd-Frank Act, and could be misleading).

476 New rule 204-4(f); Form ADV: General Instruction 15. *See* section II.B.5.

meet its filing obligations.[477] Commenters who addressed the proposal to require a final report endorsed the Commission's approach.[478]

To accommodate their use by exempt reporting advisers, we also are making technical amendments to Form ADV-H, the form advisers use to request a hardship exemption from electronic filing,[479] and Form ADV-NR, the form certain non-resident advisers use to appoint the Secretary of the Commission as an agent for service of process.[480] Rule 204-4(e) and the amendments to Form ADV-H benefit exempt reporting advisers by allowing them to avoid non-compliance with reporting requirements based purely on unanticipated technical difficulties. The amendments to Form ADV-NR benefit investors by allowing us to obtain appropriate consent to permit the Commission and other parties to bring actions against non-resident partners or agents for violations of the federal securities laws. Commenters did not specifically address these changes to Form ADV-H and ADV-NR.

3. Form ADV Amendments

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477 New rule 204-4(f). Advisers filing a final report are required only to update Item 1 of Part 1A of Form ADV and are not required to pay a filing fee. An adviser that failed to file a final report would violate rule 204-4(f).

478 ABA Committees Letter (agreeing that a final report is a reasonable way for an exempt reporting adviser to notify the Commission that it is no longer an exempt reporting adviser and endorsing the concept of allowing exempt reporting advisers that are transitioning to registration to use a single Form ADV filing for the purposes of submitting their final report and their application for registration); Merkl Implementing Letter (indicating that the Commission should not require some other approach than a final report when an adviser ceases to be an exempt reporting adviser).

479 New rule 204-4(e) allows exempt reporting advisers having unanticipated technical difficulties that prevent submission of a filing to the IARD to request a temporary hardship exemption from electronic filing requirements.

480 *See* amended Form ADV-H; amended Form ADV-NR; amended Form ADV: General Instruction 19. The amendments to Form ADV-H and Form ADV-NR reflect that exempt reporting advisers use the forms in the same way and for the same purpose as they are currently used by registered investment advisers.

As discussed above, we are adopting amendments to Form ADV that will require advisers to provide us additional information about: (i) the private funds they advise, (ii) their advisory business and conflicts of interest, and (iii) their non-advisory activities and financial industry affiliations.[481] We are also adopting certain additional changes intended to improve our ability to assess compliance risks and to identify the advisers that are covered by section 956 of the Dodd-Frank Act, which addresses certain incentive-based compensation arrangements.

Private Fund Reporting Requirements

We are adopting amendments to Item 7.B. and Schedule D of Form ADV that expand the information advisers must report to us about the private funds they advise. This reporting will provide us with information designed to help us better understand private fund investment activities and the scope and potential impact of those activities on investors and markets. The information will also assist us in identifying particular practices that may harm investors and will allow us to conduct targeted examinations of private fund advisers based on these practices or other criteria. The amended reporting items are designed to improve our ability to assess risk, identify funds with service provider arrangements that raise a "red flag," identify firms for examination, and allow us to more efficiently conduct examinations. For instance, it would be relevant to us to know that a private fund is using a service provider that we are separately investigating for alleged misconduct. Responses to the service provider questions will also allow us to identify private funds that do not make use of independent service providers and provide other key information regarding the identity and role of these private fund gatekeepers. Advisers are required to report the gross asset value of the fund, which will help us understand the scope

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481 *See supra* section II.C.

of its operations.[482] While no particular item of information may by itself indicate an elevated risk of a compliance failure, the reporting as a whole is designed to serve as an input to the risk metrics by which our staff identifies potential risk and allocates examination resources. The staff conducts similar analyses today, but with fewer inputs.

Several commenters agreed with our assessment that the new information will allow us to identify harmful practices, improve risk assessment and more efficiently target examinations,[483] and a U.S. Senator added that the data would aid the Financial Stability Oversight Council in monitoring systemic risk.[484] In its comment letter, NASAA wrote that "the information required of these advisers will be of critical importance to regulators in identifying practices that may harm investors." One commenter who criticized certain aspects of the proposal nonetheless conceded that "these disclosures would assist the Commission in seeking to achieve these goals [protecting against fraud and assisting in systemic risk evaluation]."[485]

Prospective and current private fund investors will also benefit from the public disclosure of this expanded private fund reporting. Private fund advisers must report information about their business, affiliates, owners, gatekeepers, and disciplinary history. This will create a publicly accessible foundation of basic information that could aid investors in conducting due diligence and could further help investors and other industry participants protect against fraud. For example, investors (and their consultants) will be able to compare representations made on Schedule D with those made in private offering documents or other materials provided to prospective investors. Fund service providers, such as administrators and auditors, may review

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482 *See* amended Form ADV, Part 1A, Schedule D, Section 7.B.(1)A., question 11.

483 *See infra* note 265.

484 Sen. Levin Letter.

485 Seward Letter.

the information that advisers report in order to uncover false representations regarding the identity of service providers.[486] Some commenters agreed that the public availability of private fund data would aid investors.[487] We continue to believe that public disclosure of this information will be valuable to investors precisely because they will be able to compare the Form ADV information to the information they have received in offering documents and as a result of due diligence.[488]

The expanded private fund reporting will also benefit investors and market participants by providing us and other policy makers with improved data. This data will enhance our ability to form and frame regulatory policies regarding the private fund industry and its advisers, and to evaluate the effect of our policies and programs on this industry, including for the protection of private fund investors. Today, we frequently have to rely on data from other sources, when available. Private fund reporting will provide us with important information about this rapidly growing segment of the U.S. financial system.

Other Amendments to Form ADV

We are adopting other amendments to Form ADV that refine or expand existing questions. These changes will give us a more complete picture of an adviser's practices, help us better understand an adviser's operations, business and services, and provide us with more information to determine an adviser's risk profile and prepare for examinations. The information reported will help us to identify practices that may harm clients, including by detecting data or patterns that suggest further inquiry may be warranted and distinguishing additional conflicts of

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486 *See* Implementing Proposing Release, *supra* note 7, at n.149 and accompanying text.

487 *See, e.g.*, AFL-CIO Letter; CII Letter; Better Markets Letter (each lauding the Commission's initiative to create, for the first time, a database of public information on private investment funds).

488 *See supra* note 270. *See, e.g.*, Merkl Implementing Letter (noting that a potential investor would be better able to perform due diligence if the information were made available to the public).

interest that advisers may face. For example, the new reporting on related persons will allow us to link disparate pieces of information to which we have access concerning an adviser and its affiliates to identify whether those relationships present conflicts of interest that create higher risks for advisory clients. Another example is the amendment that requires advisers to switch from ranges to approximate numbers of employees; although this change refines data we previously received, it will enable us to better develop risk-based profiles of advisers. The expanded list of activities in which an adviser might engage will help us better understand the operations of advisers. Additionally, requiring advisers to report whether they have $1 billion or more in assets will help us to identify the advisers that could be subject to rules regarding certain excessive incentive-based compensation arrangements required by section 956 of the Dodd-Frank Act. Overall, the information to be collected on amended Form ADV is designed to improve our risk-assessment capabilities and help us improve our allocation of examination resources. Commenters who addressed these proposed amendments to Form ADV expressed general support.[489] One commenter, for instance, agreed that these amendments will improve our ability to gather data about firms, to conduct appropriate inquiries, inspections, and other activities based on that data, and to focus examination and enforcement resources on those advisers that appear to present greater compliance risks.[490] Another indicated that the additional information the amended form will collect would assist the Commission to identify fund advisers, to verify the existence and location of assets and to carry out general market surveillance.[491]

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489 *See supra* note 216.

490 *See* IAA General Letter.

491 *See* CPIC Letter.

Advisory clients and prospective clients will also benefit from the changes to Form ADV. As one commenter indicated, information reported on Form ADV is publicly available, allowing investors to use the IAPD as a resource in evaluating potential managers and understanding their practices.[492] For example, clients and prospective clients will be able to see whether an adviser or one of its control persons is a public reporting company registered under the Exchange Act and then access additional public information about the adviser and/or the control person on the EDGAR system. Requiring an adviser to report whether it has $1 billion or more of assets helps to inform the adviser, its clients and the public whether or not the adviser may be subject to section 956 of the Dodd-Frank Act and any rules or guidelines thereunder. The additional information about the adviser's related persons will assist investors that compare business practices, strategies, and conflicts of a number of advisers, which may help them to select the most appropriate adviser for them. Clients may also benefit indirectly because advisers may be incentivized to implement stronger controls and practices, particularly related to any conflicts of interest or business practices that may result in additional risks, because of enhanced client awareness. Third parties will also be able to access the new information reported in filings of the amended form, allowing academics, businesses, and others to access additional information about registered investment advisers and exempt reporting advisers, which they can use to study the advisory industry.

Among the amendments to Form ADV are improvements to its instructions. We expect these changes to assist advisers in determining their regulatory assets under management and whether they are eligible or required to register with us, which may result in cost savings for

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[492] CPIC Letter.

some advisers because they may more readily be able to make this determination.[493] Eliminating the choices we have given advisers in the Form ADV instructions for calculating assets under management, for example, provides for a uniform method of determining assets under management for purposes of the form and the new exemptions from registration under the Advisers Act. These updates will also include, for the first time, specific instructions on how to determine the amount of private fund assets an adviser has under management. We expect that these changes will promote competition, increase certainty when an adviser chooses to rely on an exemption from registration, and improve consistency in reporting across the industry.[494] Some of the technical amendments we are adopting, such as those to Item 9, are designed, at commenter request, to alleviate adviser confusion.[495]

4. Amendments to Pay to Play Rule

We are making two amendments to the pay to play rule that we believe are appropriate as a result of the enactment of the Dodd-Frank Act.[496] First, we are amending the rule to make it continue to apply to advisers that previously relied on the "private adviser" exemption, including exempt reporting advisers and foreign private advisers.[497] We are making this amendment to prevent the narrowing of the application of the rule as a result of the amendments

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493 *See* section II.A.3.

494 *See id. See also* Exemptions Adopting Release at sections II.B.2., II.C., II.C.5. (discussing exemption for foreign private advisers and certain private fund advisers).

495 *See supra* section II.C.5. We are also making a technical amendment to Form ADV-E to reflect the requirement that the accountant's report be filed electronically. Staff notified advisers in November 2010 that the IARD system had been programmed to accept Form ADV-E. *See* 2009 Custody Release, *supra* note 310 at n.53 and accompanying text (establishing the requirement for Form ADV-E to be filed electronically, explaining that accountants performing surprise examinations should continue paper filing of Form ADV-E until the IARD system is programmed to accept Form ADV-E, and noting that advisers would be informed when that programming was completed). This technical change will alleviate adviser confusion about the appropriate filing method for this form.

496 *See* section II.D.1.

497 Rule 206(4)-5(a). *See* section II.D.1.

to the Act made by the Dodd-Frank Act.[498] We do not believe that this amendment will create any benefits (or costs) beyond those created by the rule as originally adopted,[499] but rather will merely assure that the rule continues to apply to the same advisers as we intended when we adopted the rule.

Second, we are amending the rule to add municipal advisors to the categories of registered entities – referred to as "regulated persons" – excepted from the rule's prohibition on advisers paying third parties to solicit government entities.[500] To qualify as a "municipal advisor" (and thereby a "regulated person"), a solicitor must be registered under section 15B of the Securities Exchange Act and subject to pay to play rules adopted by the MSRB.[501] Notably, for municipal advisors to qualify as "regulated persons," we must find that applicable MSRB pay to play rules: (i) impose substantially equivalent or more stringent restrictions on municipal advisors than the pay to play rule imposes on investment advisers; and (ii) are consistent with the objectives of the pay to play rule.[502]

Our amendment will continue to permit advisers to pay two other categories of persons to solicit government entities on their behalf—investment advisers and broker-dealers—so long as

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498 *See supra* section II.D.1. Rule 206(4)-5 currently applies to "private advisers" exempt from registration with the Commission under section 203(b)(3) of the Advisers Act. As discussed in note 4, the Dodd-Frank Act has eliminated the "private adviser" exemption from registration with the Commission in section 203(b)(3), but has created new exemptions for exempt reporting advisers and foreign private advisers. Advisers that qualify for these new exemptions generally are subsets of the advisers that qualify for the existing section 203(b)(3) "private adviser" exemption.

499 *See* Pay to Play Release, *supra* note 340, at section IV.

500 *See* amended rule 206(4)-5(a)(2)(i)(A), (f)(9). "Regulated persons" also include registered investment advisers and broker-dealers subject to the rules of a registered national securities association, such as FINRA, that has adopted pay to play rules that the Commission determines satisfy the criteria of amended rule 206(4)-5(f)(9)(iii)(B).

501 *See* amended rule 206(4)-5(f)(9)(iii).

502 *See* amended rule 206(4)-5(f)(9)(iii)(B).

such third parties are registered with us and subject to pay to play rules of their own.[503] Due to the fact that the definition of a municipal advisor may include categories of persons other than registered investment advisers and broker-dealers, our amendment may increase the number of solicitors that an adviser could hire.[504] This could benefit advisers by increasing competition in the market for solicitation services and reducing the cost of such services. It could also benefit those solicitors that are not registered investment advisers or broker-dealers, but may meet the municipal advisor definition, by allowing advisers to hire them.

5. Advisers Previously Exempt under Section 203(b)(3)

We are adopting a transition provision in rule 203-1 for advisers that are newly required to register due to the Dodd-Frank Act's repeal of the "private adviser" exemption in section 203(b)(3).[505] Specifically, under rule 203-1(e), an adviser that was relying on, and was permitted to rely on, the "private adviser" exemption in section 203(b)(3) on July 20, 2011, may delay registering with the Commission until March 30, 2012.[506] The transition period will provide these advisers with needed additional time to work through any technical issues associated with

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503 Pay to Play Release, *supra* note 340, at section II.B.2.(b).

504 Our current "regulated person" definition does not include, for example, advisers prohibited from registering with the Commission under section 203A of the Advisers Act, such as state-registered advisers, or advisers unregistered in reliance on an exemption other than section 203(b)(3) of the Act. The definition of "municipal advisor" does not exclude these advisers. *See* section 975 of the Dodd-Frank Act. We adopted the third party solicitor ban to prevent advisers from circumventing the rule through third parties. *See* section II.B.2.(b) of the Pay to Play Release. Given the Dodd-Frank Act's creation of the "municipal advisor" category, and given that it requires these persons to register with the Commission and subjects them to MSRB rulemaking authority, we believe that expanding the current "regulated person" exception to the third party solicitor ban to include registered municipal advisors subject to pay to play rules would not undermine the ban's purpose. By allowing advisers to choose from a broader set of potential third party solicitors, we believe our amendments may promote efficiency and competition in the market for advisory services to the extent third party solicitors that are not registered investment advisers or broker-dealers participate.

505 *See* rule 203-1(e); section 203(b)(3) of the Advisers Act; *supra* section III.B.2.

506 *See* rule 203-1(e); *supra* note 385.

applying for registration and to establish compliance with Advisers Act provisions and rules to which they are newly subject as advisers required to register.[507] As such, we believe that the temporary extension of the registration deadline provided by rule 203(e)-1 will assure an orderly transition to registration that will minimize costs to these advisers—costs that could otherwise be passed on to clients. We believe that maintaining an orderly transition process promotes efficiency and may reduce the costs of filing an initial application for registration and coming into compliance with Advisers Act provisions and rules to which these advisers are newly subject.

B. Costs

1. Eligibility to Register with the Commission: Section 410

Transition to State Registration

Rule 203A-5 will impose one-time costs on certain investment advisers registered with us by requiring them to file an amendment to Form ADV, and on advisers that are no longer eligible to remain registered with us by requiring them to file Form ADV-W to withdraw from Commission registration.[508] According to IARD data, approximately 11,500 investment advisers are registered with us and will be required to file an amended Form ADV,[509] and approximately 3,200 of those advisers will be required to withdraw their registration and register with one or

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507 We received a number of comment letters requesting that these advisers have additional time after July 21, 2011 (the date the Dodd-Frank Act's repeal of the section 203(b)(3) private adviser exemption becomes effective) to become registered and to establish compliance with all provisions of the Advisers Act and rules thereunder to which they are newly subject by virtue of their required registration. *See* CompliGlobe Letter; MFA Letter; Schnase Letter; Shearman Letter.

508 *See* new rule 203A-5; *supra* section II.A.1.

509 Based on IARD data as of April 7, 2011, 11,504 investment advisers are registered with the Commission. We have rounded this number to 11,500 for purposes of our analysis.

more state securities authorities.[510] As we discuss below, although all SEC-registered advisers will be required to file Form ADV, we estimate that only 3,900 of them will have to make an additional filing not in the usual course of business.[511]

Some commenters argued that we should decrease the costs of proposed rule 203A-5 by exempting advisers unaffected by the statutory changes from the Form ADV filing

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[510] According to data from the IARD as of April 7, 2011, 3,531 SEC-registered advisers either: (i) had assets under management between $25 million and $90 million and did not indicate on Form ADV Part 1A that they are relying on an exemption from the prohibition on Commission registration; or (ii) were permitted to register with us because they rely on the registration of an SEC-registered affiliate that has assets under management between $25 million and $90 million and are not relying on an exemption from registration. We estimate that 350 of these advisers will not switch to state registration because their principal office and place of business is located in Minnesota, New York, or Wyoming. *See supra* note 152 (according to IARD data as of April 7, 2011, there were 63 mid-sized advisers in Minnesota, 286 in New York, and 1 in Wyoming). As a result, we estimate that approximately 3,200 advisers will switch to state registration. 3,531 SEC-registered advisers – 350 advisers not switching to state registration = 3,181 advisers. In the Implementing Proposing Release, we estimated that approximately 4,100 SEC-registered advisers would be required to withdraw their registrations and register with one or more state securities authorities, based on IARD data as of September 1, 2010. *See* Implementing Proposing Release, *supra* note 7, at n.15. We have lowered our estimate by 900 advisers to account for the advisers that have between $90 million and $100 million of assets under management that may remain registered with us as a result of the amendments we are adopting to rule 203A-1, the advisers that have withdrawn their registrations with us since that time, and as discussed above, the advisers that will not switch registration because they have a principal office and place of business in Minnesota, New York or Wyoming. *See supra* note 22.

[511] Based on IARD data as of April 7, 2011, 10,636 advisers reported on Form ADV a December 31 fiscal year end, of which we estimate approximately 3,013 will file a Form ADV to comply with the Form ADV filing requirement of new rule 203A-5 before switching to state registration because they reported assets under management of less than $90 million and either: (i) they did not indicate on Part 1A of Form ADV that they are relying on an exemption from the prohibition on Commission registration; or (ii) they do not have a principal office and place of business in Minnesota, New York or Wyoming. Additionally, 868 advisers reported a fiscal year end other than December 31 and will file an additional, other-than-annual amendment to comply with new rule 203A-5. 3,013 + 868 = 3,881. We have rounded this number to 3,900 for purposes of our analysis. The revised PRA burden for Form ADV includes the annual amendment filing by the approximately 7,623 advisers with a December 31 fiscal year end that we estimate will remain registered with us after the switch because they reported assets under management of more than $90 million, indicated on Part 1A of Form ADV that they are relying on an exemption from the prohibition on Commission registration, or have a principal office and place of business in Minnesota, New York or Wyoming. *See infra* section VI.B. We have rounded this number to 7,600 for purposes of our analysis.

requirement,[512] or only requiring advisers to report their assets under management.[513] As discussed above, we believe there are significant benefits of requiring all advisers to file Form ADV, including having each adviser confirm its eligibility for Commission registration in light of multiple statutory and rule changes, and allowing us and the state regulatory authorities to easily and efficiently identify the advisers that are transitioning to state registration and the advisers that are remaining registered with the Commission.[514] We also note that commenters' concerns also should be allayed by the new March 30, 2012 deadline for filing Form ADV that will coincide with most advisers' required annual updating amendment, eliminating the requirement that they file an additional amendment to their Form ADV,[515] and that will coincide with the filing requirements for newly registering private fund advisers.[516] In addition, providing additional flexibility for an adviser to choose the date by which it must calculate its assets under management reported on Form ADV further reduces the cost of the filing and promotes uniformity by requiring the same 90 day period as in Form ADV today.[517] We believe that the rule will have little impact on competition among advisers registered with us because they will

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512 ICI Letter (recommending exempting advisers that do not rely on assets under management to register with the SEC); MFA Letter (recommending exempting private fund advisers that file an initial Form ADV by July 21); NYSBA Committee Letter (recommending exempting advisers who will continue to be eligible for Commission registration and advisers relying on the section 203(b)(3) exemption that we proposed would have to register with the Commission by July 21, 2011).

513 Shearman Letter.

514 *See supra* section II.C.

515 *See supra* note 511.

516 *See* MFA Letter ("Requiring private fund managers to file two Form ADV's would be costly, inefficient and potentially confusing."). *See also supra* section III.

517 *See* new rule 203A-5(b); Form ADV: Instructions for Part 1A, instr. 5.b.(4). Several commenters that requested more flexibility asserted that the use of end of quarter numbers precludes an administrate burden for many advisers that value assets on a quarterly basis because most advisers already value assets quarterly to calculate fees. *See, e.g.,* Altruist Letter; NYSBA Committee Letter; Seward Letter; Shearman Letter.

all be subject to these requirements, but the rule could have an impact of limited duration on competition between advisers registered with us as of July 21, 2011 who are subject to the rule, and state-registered advisers who are not.[518] We also believe that the rule will have little, if any, effect on capital formation.

For purposes of calculating the currently approved Paperwork Reduction Act ("PRA") burden for Form ADV, we estimated that an annual updating amendment will take each adviser approximately 6 hours,[519] and we estimate the one-time transition amendment will have a similar burden. In addition, for purposes of the increased PRA burden for Form ADV, we estimate that the amendments to Part 1A of Form ADV will take each adviser approximately 4.5 hours, on average, to complete.[520] As a result, we estimate a total average time burden of 10.5 hours for each adviser completing the amendment to Form ADV required by rule 203A-5 (excluding private fund information which is addressed below).[521] We estimate that each adviser will incur average costs of approximately $2,667.[522]

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518 For example, the rule requires mid-sized advisers registered with us on July 21, 2011 to remain registered (unless an exemption from Commission registration is available) until they switch to state registration in 2012. *See supra* note 23. All of these advisers must file an amended Form ADV with us by March 30, 2012, and any advisers maintaining dual registrations with the SEC and states will incur renewal fees and compliance costs to maintain both registrations until the beginning of 2012. *See, e.g., infra* note 543. Mid-sized advisers that are not registered with us on July 21, 2011 will not have similar costs.

519 *See infra* section VI.B.2.a.iii.

520 *See infra* sections VI.B.1.a.

521 6 hours (Form ADV amendment) + 4.5 hours (new Form ADV items) = 10.5 hours.

522 We expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the Securities Industry Financial Markets Association's *Management & Professional Earnings in the Securities Industry 2010* ("SIFMA Management and Earnings Report"), modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for a senior compliance examiner and a compliance manager are $235 and $273 per hour, respectively. (5.25 hours x $235 = $1,233.75) + (5.25 hours x $273 = $1,433.25) = $2,667.

Proposed rule 203A-5 would have required all advisers registered with us on July 21, 2011 to file a Form ADV amendment, in addition to the amendment that each adviser is required to file annually,[523] and we estimated that 11,850 advisers would file the form.[524] To address commenters' concerns about the burdens of an additional filing,[525] we modified the rule so that approximately 7,600 advisers that will remain registered with the SEC after the transition will satisfy the Form ADV filing requirement by filing their annual amendment following their fiscal year ending on December 31, 2011.[526] This reduces the number of advisers that will file an additional Form ADV attributable to the rule 203A-5 to approximately 3,900.[527] As a result, the total aggregate cost of the Form ADV filing requirement will be approximately $10,401,300.[528] In addition, of these 3,900 registered advisers, we estimate that 850 advise one or more private funds and will have to complete the private fund reporting requirements.[529] We expect this will take 8,373 hours,[530] in the aggregate, for a total cost of $2,126,742.[531] As a result, the total

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523 *See* proposed rule 203A-5(a).

524 *See* Implementing Proposing Release, *supra* note 7, at n.293 and accompanying text.

525 *See supra* note 414 and accompanying text.

526 *See supra* note 511.

527 *See id.*

528 3,900 advisers x $2,667 = $10,401,300.

529 Based on IARD data as of April 7, 2011, 839 advisers out of the estimated 3,700 current SEC-registered advisers that advise private funds do not have a December fiscal year end or are expected to switch to state registration. We have rounded this number to 850 for purposes of this analysis.

530 Based on IARD data as of April 7, 2011, we estimate that approximately 52 percent of these 850 private fund advisers, or 442, currently advise an average of 3 private funds each; 43 percent, or 365 advisers, currently advise an average of 10 private funds each; and the remaining 5 percent, or 43 advisers, currently advise an average of 79 private funds each. *See infra* note 697 and accompanying text. (442 advisers x 3 funds x 1 burden hour per fund) + (365 x 10 funds x 1 burden hour per fund) + (43 advisers x 79 funds x 1 burden hour per fund) = 1,326 hours + 3,650 hours + 3,397 hours = 8,373 hours.

531 (4,186.5 hours x $235) + (4,186.5 x $273) = $983,827.5 + $1,142,914.5 = $2,126,742. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 522.

estimated costs associated with filing amended Form ADV as required by rule 203A-5 will be $12,528,042.[532]

For the estimated 3,200 advisers that will be required to withdraw their registrations, we estimate that the average burden for each respondent is 0.25 hours for filing a partial withdrawal on Form ADV-W.[533] An adviser will likely use compliance clerks to prepare the filings and review the prepared Form ADV-W.[534] We estimate that each adviser will incur average costs of approximately $16.75[535] to comply with the Form ADV-W filing requirements, for a total one-time cost of $53,600.[536] As a result, rule 203A-5 will result in a total one-time cost of $12,581,642.[537]

Switching Between State and Commission Registration

We are adopting amendments to rule 203A-1 to eliminate the $5 million buffer that permits, but does not require, an adviser to register with the Commission if the adviser has

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532 $10,401,300 (total cost for Form ADV filing excluding private fund reporting) + $2,126,742 (total cost for private fund reporting) = $12,528,042 (total cost for Form ADV filing).

533 Form ADV-W is designed to accommodate the different types of withdrawals an investment adviser may file. An investment adviser ceasing operations will complete the entire form to withdraw from all of the jurisdictions in which it is registered (full withdrawal), while an adviser withdrawing from some, but not all, of the jurisdictions in which it is registered will omit certain items that we do not need from an adviser continuing in business as a state-registered adviser. We expect that advisers required to file Form ADV-W will file only a partial withdrawal because switching to state registration only requires a partial withdrawal. Compliance with the requirement to complete Form ADV-W imposes an average burden of 0.25 hours for an adviser filing for partial withdrawal.

534 We have assumed for purposes of the current approved PRA burden for rule 203-2 and Form ADV-W that advisers will use clerical staff to file a partial withdrawal. Data from the Securities Industry Financial Markets Association's *Office Salaries in the Securities Industry 2010* ("SIFMA Office Salaries Report") modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the hourly rate for a compliance clerk is $67.

535 0.25 hours x $67 (hourly wage for clerk) = $16.75 (total cost for Form ADV-W filing).

536 $16.75 x 3,200 = $53,600.

537 $12,528,042 (total cost for Form ADV filing) + $53,600 (total cost for Form ADV-W filing) = $12,581,642 (total cost for new rule 203A-5).

between $25 million and $30 million of assets under management.[538] Specifically, the amendment will require advisers with between $25 million and $30 million in assets under management that relied on the buffer to switch their registration to the states.[539] As of April 7, 2011, approximately 300 advisers registered with the Commission had between $25 million and $30 million of assets under management.[540] Because the Dodd-Frank Act has amended section 203A to prohibit approximately 240 of these advisers from registering with the Commission, we believe that 240 advisers will see increased costs as a result of the amendment.[541] These costs include those associated with withdrawing their registration with the Commission and registering with the states, including filing a notice of withdrawal on Form ADV-W in accordance with rule 203-2 under the Advisers Act. We have estimated for purposes of our current approved hour

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538 *See* amended rule 203A-1(a); *supra* section II.A.4.

539 *See supra* section II.A.4. Under the Dodd-Frank Act, a mid-sized adviser (with at least $25 million of assets under management) is not prohibited from registering with the Commission if: (i) the adviser is not required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the state in which it maintains its principal office and place of business; (ii) if registered, the adviser will not be subject to examination as an investment adviser by that securities commissioner; or (iii) the adviser is required to register in 15 or more states. *See* section 410 of the Dodd-Frank Act; *supra* section II.A.

540 Based on IARD data as of April 7, 2011, 305 advisers registered with the Commission had between $25 million and $30 million of assets under management. We have rounded this number to 300 for purposes of this analysis.

541 *See supra* section II.A. (discussing new section 203A(a)(2) of the Advisers Act, which prohibits certain mid-sized advisers from registering with the Commission). Based on IARD data as of April 7, 2011, 242 advisers registered with the Commission had between $25 million and $30 million of assets under management. For purposes of this analysis, we have rounded this number to 240 and assume that all of these advisers will not remain eligible to register with the Commission because they will be required to be registered and subject to examination by securities authorities in the states where they maintain their respective principal offices and places of business. *See* Advisers Act section 203A(a)(2) (as amended by the Dodd-Frank Act); *supra* section II.A.7.b. (discussing the fact that each state securities commissioner (or official with similar authority) advised our staff whether investment advisers registered in the state will be subject to examination as an investment adviser by that state's securities commissioner (or agency or office with similar authority)). All state securities authorities other than Minnesota, New York, and Wyoming have advised our staff that advisers registered with them are subject to examination. *See supra* note 152.

burden under the PRA for rule 203-2 and Form ADV that a partial withdrawal imposes an average burden of approximately 0.25 hours for an adviser, and the filing (and costs associated with the filing) by these 240 advisers are included in our discussion above of the Form ADV-W filing requirement under rule 203A-5.[542] These advisers also will incur the costs of state registration and of compliance with state laws and regulations, which we expect will vary widely depending on the number of, and which, states with which each adviser is required to register. For example, individual state registration fees generally range from approximately $60 to $400 annually, and some states require advisers to submit documentation in addition to Form ADV.[543]

The buffer we are adopting for mid-sized advisers with assets under management of close to $100 million may marginally increase costs for advisers initially as they determine how to comply with the new requirements and complete the amended Form ADV,[544] but, as underscored by several commenters, the buffer decreases costs for advisers in the aggregate.[545] As discussed

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542 *See supra* notes 533-536 and accompanying text (addressing the costs of filing Form ADV-W for advisers that will be required to withdraw their registrations).

543 *See, e.g.*, Colorado Division of Securities Fee Schedule ($60 registration fee), *available at* http://www.dora.state.co.us/securities/feeschedule.htm; Illinois Secretary of State, Securities Fees ($400 registration fee), *available at* http://www.sos.state.il.us/departments/securities/investment_advisers/fees.html; OHIO REV. CODE § 1707.17(B)(3) (2010) ($100 registration fee); ARK. CODE § 23-42-304(a)(3) (2010) ($300 registration fee); Texas State Securities Board, Check Sheet For a Sole Proprietor Corporation LLC or Partnership Applying For Registration as an Investment Adviser ($275 registration fee and requiring copies of adviser's organizational documents, balance sheet, fee schedule, advisory contract, and brochure or disclosure document delivered to clients), *available at* http://www.ssb.state.tx.us/Dealer_And_Investment_Adviser_Registration/Check_Sheet_For_a_Sole_Proprieter_Corporation_LLC_or_Partnership_Applying_For_Registration_as_an_Investment_Adviser.php; North American Securities Administrators Association, Inc., *State Securities Regulators Report on Regulatory Effectiveness and Resources with Respect to Broker-Dealers and Investment Advisers*, 7 (2010) (among other things, states review registrants' disclosure history, financial status, business practices, and provisions in client contracts).

544 The PRA burdens for Form ADV and rule 203A-5 include a burden of 4.5 hours per adviser to complete the amended Form ADV, including the assets under management calculation and eligibility requirements. *See infra* sections IV.B.1. and IV.C.

545 Several commenters argued that the buffer would decrease costs, for example, by preventing advisers with close to $100 million of assets under management from having to switch to and

above, the buffer permits mid-sized advisers to determine whether and when to switch between state and Commission registration, which will prevent costs and disruption for these advisers to frequently switch their registrations.[546] We believe these amendments will have little, if any, effect on capital formation.

Exemptions from the Prohibition on Registration with the Commission

Amending the exemption from the prohibition on registration available to pension consultants in rule 203A-2(b) to increase the minimum value of plan assets from $50 million to $200 million[547] may impose costs on some of the approximately 325 advisers that currently rely on the exemption.[548] These costs, which include those associated with withdrawing their registration with the Commission and registering with the states, if required, will have a negative impact on competition for the advisers that no longer qualify for the exemption and potentially must register as an adviser with more than one state securities authority. We estimate that 50 of the 325 advisers relying on the exemption will have to file a notice of withdrawal on Form ADV-W in accordance with rule 203-2 under the Advisers Act and withdraw their registration.[549] We

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from Commission registration frequently. *See, e.g.,* Altruist Letter; Dezellem Letter; Dinel Letter; FSI Letter; ICW Letter; JVL Associates Letter; Merkl Implementing Letter; NRS Letter; Wealth Coach Letter; and WJM Letter.

546 *See supra* notes 427-428 and accompanying text.

547 *See* amended rule 203A-2(a); *supra* section II.A.5.b.

548 Based on IARD data as of April 7, 2011, 322 SEC-registered advisers, which we rounded to 325, indicated that they rely on the exemption for pension consultants by marking Item 2.A.(6) on Part 1A of Form ADV. These advisers do not report the amount of plan assets for which they provide investment advice, so we are unable to determine how many have between $50 million and $200 million of plan assets and, therefore, may have to register with the state securities authorities as a result of the amendment. It is also difficult to determine whether such advisers will be prohibited from registering with the Commission because they are required to register with and are subject to examination by the state securities authority where they maintain a principal office and place of business under the Dodd-Frank Act.

549 Based on IARD data as of April 7, 2011, approximately 190 pension consultants reported assets under management of less than $90 million, and 166 of those advisers reported assets under management of less than $25 million. We believe that most pension consultants relying on the

have estimated that a partial withdrawal imposes an average burden of approximately 0.25 hours for an adviser.[550] Thus, we estimate that the amendment to rule 203A-2(b) associated with filing Form ADV-W will generate a burden of 12.5 hours[551] at a cost of approximately $840.[552] These advisers will incur the costs of state registration, which we expect will vary widely depending on the number of, and which, states with which an adviser is required to register.[553] We believe the amendment will have little, if any, effect on capital formation.

As discussed above, the amendment to the multi-state adviser exemption in rule 203A-2(e) will reduce costs for advisers in the aggregate because more advisers will be permitted to register with one securities regulator – the Commission – rather than being required to register with multiple states.[554] Advisers newly relying on the amended exemption will incur costs associated with completing and filing Form ADV for purposes of registration with the Commission, and all of the advisers relying on the exemption will incur the costs associated with keeping records sufficient to demonstrate that they would be required to register with 15 or more states. In addition, these advisers will incur costs of complying with the Advisers Act and our rules.

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exemption provide advice regarding a large amount of plan assets, so we expect the number of advisers affected by the amendment to be one quarter of the advisers with less than $25 million of assets under management, or 42 advisers (which is approximately 15 percent of all advisers relying on this exemption). We have rounded this number to 50 for purposes of our analysis. We expect that advisers that will be required to file Form ADV-W will file only a partial withdrawal because they will be registering with the states. *See supra* note 533. Compliance with the requirement to complete Form ADV-W imposes an average burden of approximately 0.25 hours for an adviser filing for partial withdrawal. *See id.*

550 *See supra* note 533.

551 50 responses on Form ADV-W x 0.25 hours = 12.5 hours.

552 12.5 hours x $67 = $837.50.

553 *See supra* note 543.

554 *See* amended rule 203A-2(d); *supra* section II.A.5.c. Several commenters suggested that the burdens of maintaining multiple state registrations can be significant. *See* Seward Letter; Shearman Letter. *See also* NEA Letter.

We estimate that, in addition to the approximately 40 advisers that rely on the exemption currently, approximately 115 will rely on the exemption as amended.[555] For purposes of the PRA, we have estimated that these advisers will incur an average one-time initial burden of approximately 8 hours, and an average ongoing burden of approximately 8 hours per year, to keep records sufficient to demonstrate that they meet the 15-state threshold.[556] We further estimate that a senior operations manager will maintain the records at an hourly rate of $331, resulting in average initial and annual recordkeeping costs associated with our amendments to rule 203A-2(e) of $2,648 per adviser,[557] and total increased costs of approximately $304,520 per year.[558] Advisers newly relying on the amended exemption will also incur costs associated with completing and filing Form ADV for purposes of registration with the Commission. For purposes of the increase in our PRA burden for Form ADV, we have estimated that advisers newly registering with the Commission will incur an average amortized hour burden of

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555 Based on IARD data as of April 7, 2011, of the approximately 11,500 SEC-registered advisers, 40 checked Item 2.A.(9) of Part 1A of Form ADV to indicate their basis for SEC registration under the multi-state advisers rule. Of the advisers that have less than $90 million of assets under management, approximately 100 currently file notice filings with 15 or more states. However, state notice filing requirements for SEC-registered advisers may differ from registration requirements because Form ADV does not distinguish between states where registration is mandatory and where registration is voluntary. In addition, we estimate that 15 advisers currently registered with 15 or more states could rely on the exemption and register with us. Thus, we estimate that approximately 155 advisers will rely on the exemption (40 currently relying on it + estimated 100 advisers eligible based on IARD data + 15 advisers required to be registered in 15 or more states that are not registered with us today).

556 These estimates are based on an estimate that each year an investment adviser will spend approximately 0.5 hours creating a record of its determination whether it must register as an investment adviser with each of the 15 states required to rely on the exemption, and approximately 0.5 hours to maintain the record, for a total of 8 hours. *See infra* note 665 and accompanying text.

557 8 hours x $331 = $2,648. The $331 compensation rate used is the rate for a senior operations manager in the SIFMA Management and Earnings Report, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

558 115 new advisers relying on the exemption x $2,648 = $304,520.

approximately 13.58 hours per year,[559] resulting in costs of approximately $3,450 per adviser[560] and total increased costs of approximately $396,750 per year.[561] Additionally, we estimate that approximately 30 of the newly registering advisers will use outside legal services, and 60 will use outside compliance consulting services, to assist them in preparing their Part 2 brochures,[562] for a cost of $132,000, and $300,000, respectively, resulting in a total non-labor cost among the newly registering advisers of $432,000.[563] The rule could also impact competition between advisers who rely on the exemption and are subject to our full regulatory program, including examinations and our rules, and state-registered advisers who do not rely on the exemption. We believe these amendments will have little, if any, effect on capital formation.

Mid-Sized Advisers

As discussed above, the Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is "required to be registered" or is "subject to examination" by a particular state securities authority for purposes of section 203A(a)(2)'s prohibition on mid-sized advisers

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559 *See infra* note 695 and accompanying text.

560 We expect that the performance of this function will most likely be equally allocated between a senior compliance examiner at $235 per hour and a compliance manager at $273 per hour. *See infra* note 579. (6.79 hours x $235 = $1,596) + (6.79 hours x $273 = $1,854) = $3,450.

561 115 advisers relying on the exemption x $3,450 = $396,750.

562 We estimate that a quarter of medium-sized advisers seek the help of outside legal services and half seek the help of compliance consulting services. *See* section VI.B.2.a.iv. As discussed above, we have estimated that 115 new advisers will begin relying on the exemption, in addition to the 40 advisers that currently rely on it. *See supra* note 555. 0.25 x 115 new advisers relying on the exemption = 28.75 advisers seeking outside legal services. 0.5 x 115 new advisers relying on the exemption = 57.5 advisers seeking compliance consulting services. We have rounded these numbers to 30 and 60, respectively, for the purpose of this analysis.

563 We estimate that the initial cost related to preparation of Part 2 of Form ADV would be $4,400 for legal services and $5,000 for compliance consulting services for those medium-sized advisers who engage legal counsel or consultants. *See infra* note 729 and accompanying text. (30 advisers seeking outside legal services x $4,400 for legal services) + (60 advisers seeking compliance consulting services x $5,000 for compliance consulting services) = $132,000 for legal services + $300,000 for compliance consulting services = $432,000. The currently approved burden associated with Form ADV already accounts for similar estimated costs to be incurred by current registrants. *See id.*

registering with the Commission, and we are providing in Form ADV an explanation of how we construe these provisions.[564] We do not, however, believe that they will generate costs independent of any costs associated with Congress' enactment of section 203A(a)(2), and will have little, if any, effect on capital formation.

2. Exempt Reporting Advisers: Sections 407 and 408

While we believe that our approach to implementing the Dodd-Frank Act's reporting provisions applicable to exempt reporting advisers will minimize costs inherent in such reporting, we acknowledge that it will impose costs on these advisers.[565] These costs include filing fees, although not significant, paid for submitting initial and annual filings through the IARD. We anticipate that filing fees, which the Commission will consider separately, will be the same as those for registered investment advisers, which currently range from $40 to $225 based on the amount of assets an adviser has under management.[566] In order to estimate the costs associated with filing fees, we assume for purposes of this analysis that exempt reporting advisers will pay a fee of $225 per initial or annual report.[567] We estimate that approximately 2,000 advisers will qualify as exempt reporting advisers pursuant to section 203(l) of the Advisers Act, as added by the Dodd-Frank Act, and rule 203(m)-1 thereunder, and will have to file Form ADV on the IARD.[568] As a result, we expect exempt reporting advisers to incur a total

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564 *See supra* section II.A.7.

565 *See* amended rule 204-1 and new rule 204-4; amended Form ADV, Part 1A; *supra* section II.B.

566 The current fee schedule for registered advisers may be found on our website at http://www.sec.gov/divisions/investment/iard/iardfee.shtml. We amended this fee schedule in December 2010. *See Order Approving Investment Adviser Registration Depository Filing Fees*, Investment Advisers Act Release No. 3126 (Dec. 22, 2010), available at http://www.sec.gov/rules/other/2010/ia-3126.pdf.

567 This is the fee applicable to registered advisers with $100 million or more in assets under management. There will be no fee for filing an other-than-annual amendment to a report.

568 *See infra* note 734. While this is an estimate of the total number of advisers that may file reports rather than register with the Commission, a number of these advisers may choose to register with

annual cost of approximately $450,000 in filing fees.[569]

In addition to filing fees, exempt reporting advisers will incur internal costs associated with collecting, reviewing, reporting, and updating a limited subset of Form ADV items in Part 1A, including Items 1, 2.B., 3, 6, 7, 10, 11 and corresponding schedules. We expect this cost to be substantially less than that incurred by registered advisers because exempt reporting advisers are not required to complete the remainder of Part 1A or Part 2 of Form ADV. The costs of completing the relevant items of Form ADV will vary from adviser to adviser, depending in large part on the number of private funds an adviser manages.

We believe, and several commenters confirmed, that the information these items require should be readily available to any adviser (particularly the identifying, private fund and control person information required by Items 1, 3, 7.B. and 10), which mitigates the costs and burdens of reporting.[570] Similarly, Item 6 requires the adviser to indicate if it engages in other specific business activities, information which we believe should also be readily available to these advisers. Item 2.B. elicits the information an exempt reporting adviser would already have gathered for purposes of determining if it is eligible for an exemption from registration under section 203(l) of the Act or rule 203(m)-1 thereunder, and as such, this item should impose few,

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the Commission rather than file reports. We cannot determine in advance the precise number of these advisers that will choose to register rather than report. Therefore, in order to avoid under-estimating the costs of these amendments, we are using the total number of potential exempt reporting advisers in our estimates.

569 2,000 exempt reporting advisers x $225 per year = $450,000. Advisers pay for initial Form ADV submissions and for annual amendments; there is no charge for an interim amendment.

570 *See* ABA Committees Letter ("We expect that most [exempt reporting advisers] will already have most of the information requested by Form ADV Part 1 readily available."); Merkl Implementing Letter (confirming that the disclosure requirements would not impose a significant burden on advisers). *See also*, with respect to private fund reporting under Item 7.B. specifically, Katten Foreign Advisers Letter ("Virtually all of the requested information would already have been provided to investors in the fund through an offering document or follow up status reports.") and NRS Letter (arguing that the expanded private fund disclosures on Schedule D would "replicate the due diligence questionnaire information....").

if any, costs to complete. Commenters who addressed Section 7.A. of Schedule D urged that we limit the reporting of related persons, which could be significant in the case of advisers that are part of a large organization.[571] Many of these commenters pointed out that in some cases the adviser and its clients have no business dealings with some affiliates and thus there is less of a chance of conflicts developing.[572] We agree and have revised the proposed item to permit an adviser to omit reporting about certain related persons in a manner that is similar to the approach suggested by a commenter.[573] We are neither reducing nor eliminating the disciplinary reporting requirements that we proposed in Item 11, and no commenters suggested that we do so.[574] Although we believe, as noted above, that the information an adviser needs to complete Section 7.B.(1) is readily available in fund offering documents, we acknowledge that this Section of Form ADV could be time-consuming to complete, particularly for an exempt reporting adviser's initial filing, depending on the number of funds the exempt reporting adviser manages. The primarily check-the-box style of this item and most of the other items exempt reporting advisers must complete, as well as some of the features of the IARD (such as drop-down boxes for common responses and the ability to pre-populate responses) should help decrease the average completion time for these advisers. Based on views expressed by some commenters,[575] we expect the changes we are adopting to Section 7.B.(1) (including the removal of some of the questions that commenters identified as most burdensome) that reduce the amount of information

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571 *See, e.g.*, Shearman Letter.

572 *See* IAA General Letter.

573 *See supra* note 300 and accompanying text.

574 Indeed, one commenter that urged us to substantially reduce the amount of information these advisers are required to report did not advocate to eliminate disciplinary reporting. Village Ventures Letter.

575 *See supra* note 570.

required in respect of private funds[576] will also alleviate concerns that the reports require too much information or that the requirements will impose excessive burdens.[577]

For purposes of the PRA, we estimate that exempt reporting advisers, in the aggregate, will spend 16,000 hours to prepare and submit their initial reports on Form ADV.[578] Based on this estimate, we expect that exempt reporting advisers will incur costs of approximately $4,064,000 to prepare and submit their initial report on Form ADV.[579] Additionally, for PRA purposes, we estimate that exempt reporting advisers in the aggregate will spend 2,200 hours per year on amendments to their filings and on final filings.[580] Based on this estimate, we expect that exempt reporting advisers will incur costs of approximately $558,800 to prepare and submit annual amendments to their reports on Form ADV and final filings.[581] One commenter argued that these estimates should include costs of retaining outside counsel to review the disclosures.[582] We disagree. Exempt reporting advisers are only required to complete a limited subset of Part 1A of Form ADV. As noted above, this part of the form generally calls for readily available

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576 *See supra* section II.C.1. We are adopting Form ADV with several other changes from the proposal, some of which will affect the reporting by exempt reporting advisers. *See* section II.C. for details concerning these changes to Form ADV.

577 AIMA Letter; Avoca Letter; BCLBE Letter; Shearman Letter; Village Ventures Letter. A broader discussion about the costs associated with Section 7.B.(1) appears below. *See infra* section V.C.3.

578 *See infra* note 738; *infra* section VI.B.1.b.

579 We expect that the performance of this function would most likely be equally allocated between a senior compliance examiner and a compliance manager, or persons performing similar functions. Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $235 and $273 per hour, respectively. (8,000 hours x $235 = $1,880,000) + (8,000 hours x $273 = 2,184,000) = $4,064,000. For an exempt reporting adviser that does not already have a senior compliance examiner or a compliance manager, we expect that a person performing a similar function would have similar hourly costs.

580 *See infra* note 744.

581 (1,100 hours x $235 = $258,500) + (1,100 hours x $273 = $300,300) = $558,800.

582 *See* BCLBE Letter.

information to be reported as approximate numerical responses, as short answers, or by checking a box. Unlike Part 2 of Form ADV, which requires free-form narrative responses, we do not believe that advisers will require outside legal advice in order to provide the factual information that Part 1A requires.[583] Commenters who asserted that our estimates were too low did not provide empirical data by which to recalculate our estimates, making it difficult to evaluate these assertions or determine the magnitude by which their estimates would differ from ours.[584] The changes we are making from the proposal will reduce the amount of information that advisers must file and result in decreased burdens for advisers from the proposal. However, in light of the general comments we received about burdens we are not reducing our burden estimates.[585]

In the Implementing Proposing Release we discussed that the reporting requirements we are adopting may result in other non-quantifiable additional costs for exempt reporting advisers. For example, the new disclosure requirements could influence the business or other decisions of exempt reporting advisers, such as whether to form additional private funds or manage private funds at all. In addition, some of the information made available to the public, such as the identification of owners of the adviser or disciplinary information, may impose costs on the

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583 Certain items in Part 1A of Form ADV call for information about which an adviser may consult with outside legal counsel, such as the exemption on which the adviser relies (Item 2.B.) or the exemption on which the adviser's private fund relies (Section 7.B.(1) of Schedule D, question 4). These determinations, however, are part of the adviser's compliance burdens associated with and accounted for as a part of other regulatory requirements (*e.g.*, rule 203(m)-1) and are not, therefore, costs associated with the reporting requirements we are adopting today.

584 *See, e.g.*, Village Ventures Letter (asserting that the Commission's "relatively modest cost estimates... understate the true costs that will be required to assure compliance..."); AV Letter; Avoca Letter; Debevoise Letter.

585 See *supra* notes 246, 247, 262, 300, 302 and accompanying text for a discussion of these modifications. Some of the estimates provided in this section differ from those provided in the Implementing Proposing Release, but these differences reflect updated information regarding employment costs and the number of advisers subject to the reporting, not a change in the estimated time an adviser would spend on the reporting or the out-of-pocket costs an adviser would incur.

advisers and, in some cases their supervised persons or owners, including the potential loss of business to competitors, as this information was not typically made available to others previously. Commenters neither agreed nor disagreed with these costs.[586]

Several commenters argued that public reporting would be inconsistent with the intent of the Dodd-Frank Act exemptions for these advisers.[587] They did not, however, identify any specific costs associated with these concerns. As discussed above, we do not believe public reporting is inconsistent with the intent of the Dodd-Frank Act. Congress sought to protect only certain proprietary or sensitive information submitted by advisers about their private funds in reports for the assessment of systemic risk.[588]

Some commenters expressed concern that certain of the information we proposed be publicly reported also could include proprietary or competitively sensitive information regarding private funds.[589] One such commenter's competitive concerns related to such things as access to human resource talent among venture capital fund advisers, and composition of a venture capital fund's investor base, control persons and strategic relationships.[590] These commenters, however, did not identify any specific costs associated with these concerns. As discussed elsewhere in this Release, we have responded to these concerns by declining to adopt questions we had proposed

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586 Several commenters argued that while the reporting may be valuable to the Commission, making the information publicly available would provide little benefit to investors, and they asserted that the benefits were insufficient to justify the costs. *See* BCLBE Letter; NRS Letter; Seward Letter.

587 Avoca Letter; ABA Committees Letter; Shearman Letter.

588 *See supra* notes 196-197 and accompanying text.

589 *See, e.g.*, MFA Letter; NVCA Letter; O'Melveny Letter. Another commenter, however, refuted these competitive concerns, stating that none of the items that exempt reporting advisers would complete would require the disclosure of proprietary or competitively sensitive information. Merkl Implementing Letter.

590 NVCA Letter. As noted above, while this information could result in competitive effects among these advisers, the effects are not unique to these advisers, and they may result in benefits. *See supra* note 200.

that commenters found most burdensome and persuaded us may likely be proprietary or competitively sensitive.[591]

Finally, some commenters expressed concern that access to this information by the general public may cause confusion because an exempt reporting adviser's information would be displayed using the same search function in the IAPD that is used to search registered advisers.[592] These commenters, however, did not identify any specific costs associated with these concerns. We are working with FINRA, our IARD contractor, to ensure that the IAPD search results distinguish between an exempt reporting adviser and a registered adviser.

Completing and filing Form ADV-H and Form ADV-NR will also impose costs on exempt reporting advisers. In the Implementing Proposing Release, we estimated that approximately two exempt reporting advisers would file Form ADV-H annually and that it would impose an average burden per response of one hour, for an increase in the total annual hour burden associated with Form ADV-H of two hours.[593] We did not receive comments on these estimates and continue to believe they are appropriate. We further estimate that for each hour required by the form, professional staff time will comprise 0.625 hours, and clerical staff time will comprise 0.375 hours. We estimate the hourly wage for a compliance manager to be $273 per hour,[594] and the hourly wage for general clerks to be $50 per hour.[595] Accordingly, we

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591 *See supra* notes 238-247 and accompanying text.

592 Shearman Letter; Seward Letter. *See also supra* note 172 and accompanying text.

593 *See* Implementing Proposing Release, *supra* note 7, at sections IV.B, V.F. 2 responses x 1 hour = 2 hours.

594 Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a compliance manager is approximately $273 per hour.

595 Data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a general clerk is approximately $50 per hour.

estimate the average cost per response imposed on exempt reporting advisers by rule 204-4 and amended Form ADV-H will be $189,[596] for a total annual cost of $378.[597] This represents a decrease of $28 from our estimate in the Implementing Proposing Release, which is attributable to updated wage and salary information.

With regard to Form ADV-NR, we continue to estimate that exempt reporting advisers will file Form ADV-NR at the same annual rate (0.17 percent) as advisers registered with us.[598] Thus, we estimate that the amendments will be filed by approximately three exempt reporting advisers annually,[599] imposing an annual burden of approximately three hours.[600] We further estimate that for each hour required by the form, compliance clerk time will comprise 0.75 hours and general clerk time will comprise 0.25 hours.[601] Therefore, we estimate that the amendments to Form ADV-NR will impose approximately $188 in total additional annual costs for exempt reporting advisers.[602] This represents an increase from our estimate in the Implementing Proposing Release, which is attributable to updated wage and salary information.

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596 (0.625 hours x $273) + (0.375 hours x $50) = approximately $189.

597 $189 per response x 2 responses annually = $378.

598 *See infra* text accompanying note 776.

599 0.17% (rate of filing) x 2,000 estimated exempt reporting advisers = 3 exempt reporting advisers filing Form ADV-NR.

600 3 exempt reporting advisers filing Form ADV-NR x 1 hour per Form ADV-NR = approximately 3 hours. In calculating the costs of our amendments to Form ADV-NR in the Implementing Proposing Release, we subtracted cost savings resulting from the Dodd-Frank Act's reduction in the number of total registered advisers (and the commensurate reduction in Form ADV-NR filings) from the total costs associated with completing and filing Form ADV-NR. *See* Implementing Proposing Release, *supra* note 7, at section IV.B. We now believe, however, that it is more accurate to calculate the costs of our amendments to Form ADV-NR without subtracting these savings directly attributable to the Dodd-Frank Act.

601 Data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a General Clerk is approximately $50 per hour and cost for a Compliance Clerk is approximately $67 per hour.

602 3 hours x ((0.75 hours x $67) + (0.25 hours x $50)) = approximately $188.

3. Form ADV Amendments

The costs of completing these new and amended items will vary among advisers.[603] One-time monetary costs we expect certain current registrants to incur to complete the amendments we are adopting to Form ADV in connection with the transition filing are discussed above, but that discussion does not take into account costs we expect to be borne by (1) 7,600 current registrants with a December 31 fiscal year end that we expect to remain registered with us,[604] or (2) 700[605] advisers we expect will register with us within the next year as a result of normal annual growth of our population of registered advisers.[606] We estimate these 8,300 advisers will spend, on average, 4.5 hours to respond to the new and amended questions we are adopting today

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603 We note that we do not estimate there to be costs associated with the technical amendment we are making to Form ADV-E to reflect the obligation that the accountant's report be filed electronically because those costs were addressed in the 2009 Custody Release. Staff notified advisers in November 2010 that the IARD system had been programmed to accept Form ADV-E. *See* 2009 Custody Release, *supra* note 310 at n.53 and accompanying text (establishing the requirement for Form ADV-E to be filed electronically, explaining that accountants performing surprise examinations should continue paper filing of Form ADV-E until the IARD system is programmed to accept Form ADV-E, and noting that advisers would be informed when that programming was completed).

604 *See supra* note 511.

605 *See infra* note 691.

606 Of the 9,750 advisers we estimate will remain registered or will be newly registered with us after the transition filing, the one-time monetary costs of filing Form ADV that we estimate will be borne by approximately 700 advisers with a fiscal year end other than December 31 are discussed above in section V.B.1. The one-time monetary costs that we estimate will be borne by the remaining 9,050 advisers are discussed here (8,300 discussed in this paragraph + 750 discussed in the next). For a discussion of our PRA estimate of 9,750 advisers, see note 655 below and section VI.B.2.a.i. below.

(other than the private fund reporting, which is discussed below),[607] at an aggregate cost of $9,486,900.[608]

In our PRA analysis, we also project that 750 new advisers will register with us as a result of the Dodd-Frank Act's elimination of the private adviser exemption.[609] Because this group of advisers was not formerly required to register with us, we have not previously accounted for the costs to them of completing and submitting Form ADV. As a result, rather than the incremental burden of 4.5 hours per adviser used in our estimates above, we expect that these advisers will spend the full 40.74 hours per adviser filing their initial reports on Form ADV (other than the private fund reporting, which is discussed separately below).[610] These advisers will also spend time preparing and filing interim updating amendments to the form, preparing brochure supplements and delivering codes of ethics to clients. In the aggregate, we expect that

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607 *See infra* section VI.B.1.a. We are calculating costs only of the increased burden because we have previously assessed the costs of the other items of Form ADV for registered advisers and for new advisers attributed to annual growth. The amendments we are adopting today would neither increase the burden associated with the other items on Form ADV, nor would they increase the external costs associated with certain Part 2 requirements.

608 We expect that the performance of this function would most likely be equally allocated between a senior compliance examiner and a compliance manager, or persons performing similar functions. Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $235 and $273 per hour, respectively. 8,300 advisers x 4.5 hours = 37,350 hours. (18,675 hours x $235 = $4,388,625) + (18,675 hours x $273 = $5,098,275) = $9,486,900.

609 *See* Implementing Proposing Release, *supra* note 7, at n.375 and accompanying text.

610 *See infra* IV.B.1. of this Release.

these 750 private fund advisers will spend 37,905 hours on these activities,[611] for a total cost of $9,627,871.[612]

Commenters that addressed burdens associated with amendments to Form ADV (other than private fund reporting discussed separately below) focused on costs associated with gathering information necessary to complete proposed Item 5.D. and Section 7.A. of Schedule D.[613] These commenters did not specifically address our estimates or provide empirical data by which to recalculate these estimates. We are making changes from the proposal that will reduce the amount of information that advisers must file and result in decreased burdens for advisers from the proposal.[614] However, in light of the general comments we received about burdens we are not reducing our burden estimates.

In addition to the costs to complete Form ADV for which we account above, some registered advisers will be required to file information regarding the private funds they advise. Specifically, filings will be required by: (i) 2,850 of the 7,600 current registrants with a December 31 fiscal year end that we expect to remain registered with us;[615] (ii) 200 of the 700 advisers we expect will register with us within the next year as a result of normal annual growth of our population of registered advisers;[616] and (iii) 750 private fund advisers registering as a

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611 750 advisers x (40.74 hours per adviser to complete entire form (except private fund reporting requirements) + (1 annual updating amendment x 6.0 hours) + (1 interim updating amendment per year x 0.5 hours) + 1 hour on new brochure supplements + 1 hour on interim amendments to brochure supplements + 1.3 hours delivering codes of ethics to clients) = 37,905 hours. *See infra* notes 679, 709, 710 and accompanying text.

612 (18,952.5 hours x $235 = $4,453,838) + (18,952.5 hours x $273 = $5,174,033) = $9,627,871. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 608.

613 *See, e.g.*, IAA General Letter; Shearman Letter.

614 *See supra* sections II.C.2 and II.C.3.

615 *See infra* note 696.

616 *See infra* note 699.

result of the elimination of the private adviser exemption. We estimate this will take 33,500 hours[617] for a total cost of $8,509,000.[618] Most of the commenters that addressed Form ADV costs focused on these private fund reporting requirements, particularly where valuation or ownership information would be required.[619] Several commenters wrote that the burden of the proposed reporting would be significant.[620] As a whole, these commenters suggested that the costs of the proposed amendments would outweigh the benefits, but only a few disagreed with the Commission's estimates of those costs, which they considered too low.[621] Although we believe, as noted above, that the information an adviser needs to complete Section 7.B.(1) is readily available in fund offering documents, we acknowledge that this Section of Form ADV could be time-consuming to complete, particularly for an adviser's initial filing, depending on the number of funds the adviser manages. The primarily check-the-box and short-answer style of Section 7.B.(1), as well as some of the features of the IARD (such as drop-down boxes for common responses and ability to pre-populate responses) should help to decrease the average completion time for these advisers. Based on views expressed by some commenters,[622] we expect these factors will alleviate concerns of other commenters, who argued that the reports

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617 *See infra* note 703.

618 (16,750 hours x $235 = $3,936,250) + (16,750 hours x $273 = $4,572,750) = $8,509,000. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 608.

619 *See* AIMA Letter; Avoca Letter; BCLBE Letter; Shearman Letter; Village Ventures Letter.

620 *See, e.g.*, AIMA Letter; AV Letter; BCLBE Letter; Debevoise Letter; Dechert Foreign Adviser Letter; Gunderson Letter; Katten Foreign Adviser Letter; NRS Letter; Seward Letter; Shearman Letter; VVL Letter. Several of these commenters were writing with respect to exempt reporting adviser reporting, but some of their comments would apply equally to registered advisers. *See supra* Section V.B.2. for a discussion of the estimated costs of reporting for exempt reporting advisers.

621 *Id.*

622 *See supra* note 570.

require too much information or that the requirements would impose significant burdens.[623] In addition, as discussed above, we are adopting Section 7.B.(1) with several changes (including the removal of some of the questions that commenters persuaded us may likely be proprietary or competitively sensitive) that reduce the amount of information required in respect of private funds.[624]

Based on the foregoing estimates, we expect that the total costs associated with the completion and submission of all of the amendments we are adopting to Form ADV, other than estimated costs above related to the transition described below,[625] therefore, are $27,623,771.[626]

In addition, we estimate for purposes of the PRA that approximately a quarter (or 350) of the 1,450 advisers estimated to register with us as a result of normal annual growth and as a result of the elimination of the private adviser exemption will use outside legal services, and half (or 725) will use outside compliance consulting services, to assist them in preparing their Part 2 brochures, for a total cost of $1,540,000, and $3,625,000, respectively, resulting in a total non-labor cost among all these newly registering advisers of $5,165,000.[627]

A few commenters objected to the amount of information required by Form ADV as a result of the amendments we proposed and suggested streamlining the form or eliminating what

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623 AIMA Letter; Avoca Letter; BCLBE Letter; Shearman Letter; Village Ventures Letter.

624 *See* section II.C.1.

625 *See* section V.B.1.

626 $9,486,900 in one-time monetary costs of complying with amendments we are adopting today for current registrants and newly registering advisers as a result of normal growth + $9,627,871 in costs of completing and filing Form ADV (other than private fund reporting) for the 750 newly registering private fund advisers as a result of the elimination of the private adviser exemption + $8,509,000 in aggregate private fund reporting costs attributable to the foregoing filers = $27,623,771.

627 *See infra* note 732 an accompanying text. The currently approved burden associated with Form ADV already accounts for similar estimated costs to be incurred by current registrants, and it already accounts for a percentage of annual growth in our population of registered advisers. *See also infra* section VI.B.2.iv.

they saw as duplicative reporting.[628] We acknowledge some overlap in information required to be reported, but note that the two parts of Form ADV serve different purposes and that overlap in some cases may be necessary so that investors receiving a brochure are provided with full information about a practice or conflict, and that we are able to collect data on the matter for regulatory purposes. We believe that the information required by most of these items should be readily available to any adviser, and several commenters confirmed our belief.[629] The check-the-box style of most of these items, as well as some of the features of the IARD (such as drop-down boxes for common responses) should also help minimize costs by reducing the average completion time. The changes we are making from the proposal will, as a whole, reduce the amount of information that advisers must file and result in decreased burdens for advisers.[630] However, in light of the general comments we receive about burdens we are not reducing our burden estimates.

The amendments to Form ADV that we are adopting will also result in other costs, none of which commenters specifically addressed. For instance, changes to the instructions on calculating regulatory assets under management, and rule 203A-3(d), will cause some advisers to report greater assets under management than they do today and preclude some advisers from excluding certain assets from their calculation in order to remain below the new asset threshold

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628 *See* IAA General Letter (citing page 48 of the Implementing Proposing Release and stating that it "do[es] not agree that the new requirements 'should impose few additional regulatory burdens.'"). *See also* NRS Letter and Seward Letter, arguing that parts of the proposed amendments would result in duplicative reporting.

629 *See, e.g., supra* note 570.

630 *See supra* notes 245-247, 262, 286, 300, 302 and accompanying text for a discussion of these modifications. Some of the estimates provided in this section differ from those provided in the Implementing Proposing Release, but these differences reflect updated information regarding employment costs and the number of advisers subject to the reporting, not a change from the proposed estimate of time an adviser would spend on the reporting or the out of pocket costs an adviser would incur.

for registration with the Commission. The impact of these changes may result in a limited number of state-registered advisers that report assets under management of less than $30 million under the current Form ADV reporting requirements to register with us if, under the revised instructions, they would report $100 million or more in assets under management.[631]

We are also amending Form ADV to require advisers to private funds to use the market value of private fund assets, or the fair value of private fund assets where market value is unavailable, for determining regulatory assets under management.[632] Advisers to private funds that do not use fair value methodologies will likely incur costs to comply with the requirement to report the fair value of those assets on Form ADV, which could (but is not required to) include reliance on a third party or outside valuation service. We anticipate that these costs will vary, but we understand that private fund advisers, including those that may not use fair value methodologies for reporting purposes, perform administrative services, including valuing assets, internally as a matter of business practice.[633] Based on registered advisers' responses to Items 5.D., 7.B., and 9.C. of Form ADV,[634] we estimate that approximately 3% of registered advisers

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631 A registered investment adviser that reports more than $30 million in assets under management under the current instructions to Item 5 of Form ADV would be required to register with the Commission. These advisers would not have additional costs associated with registration as they would already be incurring those costs.

632 *See* Form ADV: Instructions for Part 1A, inst. 5.b.(4).

633 For example, an adviser to a hedge fund may value fund assets for purposes of allowing new investments in the fund or redemptions by existing investors, which may be permitted on a regular basis after an initial lock-up period. An adviser to a private equity fund may obtain valuation of portfolio companies in which the fund invests in connection with financing obtained by those companies. Advisers to private funds also may value portfolio companies each time the fund makes (or considers making) a follow-on investment in the company. Private fund advisers could use these valuations as a basis for complying with the fair valuation requirement with respect to private fund assets.

634 Item 5.D. asks advisers to identify the types of clients they have, including clients that are pooled investment vehicles. Item 7.B. asks if the adviser or its related person is a general partner in an investment-related limited partnership or manager of an investment-related limited liability company, or if the adviser advises any other "private fund." Item 9.C. asks whether an

have at least one private fund client that may not be audited.[635] These advisers therefore may incur costs to fair value their private fund assets.[636] We estimate that approximately 4,270 registered advisers have, or after registering with us will have, at least one private fund client.[637] We therefore estimate that approximately 130 registered advisers may incur costs as a result of the fair value requirement.[638] We estimated in the Implementing Proposing Release that an adviser without the internal capacity to value specific illiquid assets would obtain pricing or valuation services from an outside administrator or other service provider at a cost ranging from $250 to $75,000 annually.[639] Commenters did not address these estimates and for reasons discussed above, we continue to believe they are accurate.[640] Accordingly, we estimate that the 130 advisers would incur costs of $37,625 each on an annual basis, which is the middle of the range of estimated fair value costs, for an aggregate annual cost of $4,891,250.[641]

Requiring advisers to report whether they have $1 billion or more in assets also may have costs for advisers that are not publicly traded or otherwise do not publicly disclose the amount of

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independent public accountant audits annually the pooled investment vehicles that the adviser manages and if audited financial statements are distributed to investors in the pools.

635 A fund that is relying on the audit provision in our custody rule will have provided the fair value of its assets in its audited financial statements that are prepared in accordance with GAAP.

636 We note, however, that at least some of these advisers may currently fair value private fund assets. For instance, funds that do not prepare financial statements in accordance with GAAP (which is required to rely on an exception in our custody rule) may nonetheless use a fair value standard other than that specified in GAAP and thus may not incur any additional costs. *See supra* notes 98-99 and accompanying text (explaining that while many advisers will calculate fair value in accordance with GAAP or another international accounting standard, other advisers acting consistently and in good faith may utilize another fair valuation standard).

637 Based on IARD data as of April 7, 2011. 3,320 current SEC-registered advisers to private funds remaining registered with the SEC + 750 newly registering private fund advisers as a result of the elimination of the private adviser exemption + 200 additional advisers to private funds each year = 4,270 advisers.

638 4,270 x 0.03 = 128.1.

639 *See* Implementing Proposing Release, *supra* note 7, at n.369 and accompanying text.

640 *See supra* section II.A.3.

641 130 x $37,625 = $4,891,250.

their own assets. There may also be, as discussed below, competitive effects of this change and other of the amendments to Form ADV. We believe these changes will have little, if any, effect on capital formation.

In addition, some of the amendments to Form ADV could impose costs, including potential competitive effects, as information that may not typically be provided to others becomes publicly available. For example, for advisers that may previously have only disclosed to certain clients and prospective clients, or only upon request, information such as census data about the private funds and the amount of private fund assets that the adviser manages, disclosure of state registrations of the adviser's employees, financial industry affiliates, and the service providers to each private fund that the adviser manages could be costly. As noted above, some commenters voiced these types of concerns with respect to private fund disclosures they consider competitively sensitive or proprietary.[642] As also discussed above, we have adopted certain modifications from our proposal that are designed to address some of these concerns.[643] The competitive effects of Form ADV reporting requirements, however, could create benefits as well as costs. For instance, unregistered advisers will not incur the expense of producing and reporting publicly this information, but clients and investors may have greater confidence in advisers that provide more fulsome disclosure and are subject to our oversight.

4. Amendment to Pay to Play Rule

Our amendment to include registered municipal advisors in the definition of "regulated persons" excepted from the pay to play rule's ban on third-party solicitation may result in

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642 *See supra* note 238 and accompanying text.

643 *See supra* notes 245-247 and accompanying text.

additional costs to comply with the rule.[644] Specifically, advisers that have created compliance programs based on the original "regulated person" definition, which included only registered investment advisers and broker-dealers, may have to make adjustments to those programs to account for the broadened definition. But, as explained above, our amendment will allow them greater latitude in hiring placement agents.

As discussed in section II.D.1 of this Release, we received a number of comment letters opposing our proposal to replace the exception for "regulated persons" with an exception for registered municipal advisors.[645] Among other things, commenters argued that the amendment would force persons soliciting only on behalf of affiliated investment advisers to register as municipal advisors, which they argued would subject them to regulatory requirements unrelated to pay to play practices and thus impose significant additional and unnecessary costs.[646] We are persuaded by commenters and have instead modified the definition of "regulated person" to include registered municipal advisors, which we believe is a lower-cost means to recognize this new category of registrant in our rule.

5. Advisers Previously Exempt under Section 203(b)(3)

The transition provision in rule 203-1(e) for advisers exempt under the private adviser exemption will impose costs. It will delay the public disclosure of information about these advisers on Form ADV. As such, current clients and potential clients will not have access to this

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644 *See* amended rule 206(4)-5(a)(2), (f)(9). As discussed in section V.A.4., we believe that our amendment to rule 206(4)-5 to make it apply to exempt reporting advisers and foreign private advisers will not generate new costs.

645 *See* Better Markets Letter; Debevoise Letter; Dechert General Letter; IAA Pay to Play Letter; ICI Letter; NYSBA Letter; SIFMA Letter; T. Rowe Price Letter. *But see* NRS Letter (supporting the proposal).

646 *See, e.g.*, IAA Pay to Play Letter; SIFMA Letter. *See also supra* section II.D.1.

information as quickly as they would without the transition period.[647] In addition, rule 203-1(e) will delay the deadline for these advisers to comply with all of our rules under the Advisers Act applicable to registered advisers, and thus will delay the full protection of these rules for clients and potential clients. However, we believe that providing a short transition period to effect an orderly transition to registration and full compliance for these advisers is appropriate. Furthermore, notwithstanding the transition period, these advisers continue to be subject to the Adviser's Act's antifraud provisions.[648]

VI. PAPERWORK REDUCTION ACT ANALYSIS

Certain provisions of the rules and rule amendments that the Commission is adopting today contain "collection of information" requirements within the meaning of the PRA. In the Implementing Proposing Release, the Commission solicited comment on the proposed collection of information requirements. The Commission also submitted the proposed collections of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The titles for the collections of information we are adopting or amending are: (i) "Exemption for Certain Multi-State Investment Advisers (Rule 203A-2(d));"[649] (ii) "Form ADV"; (iii) "Rule 203A-5;" (iv) "Rule 0-2 and Form ADV-NR under the Investment Advisers Act of 1940;" (v) "Rule 203-2 and Form ADV-W under the Investment Advisers Act of

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647 We note, however, that the IARD system will not be updated to reflect our revisions to Form ADV, including the amendments requiring additional disclosure about private funds, until November. *See infra* note 759. Thus, even without regard to rule 203-1(e), disclosure of this information would be delayed.

648 *See, e.g.,* Advisers Act section 206. They are also subject to antifraud provisions of other federal securities laws, including rule 10b-5 under the Securities Exchange act of 1934. *See* 17 CFR 240.10b-5.

649 The current title for this collection of information is "Exemption for Certain Multi-State Investment Advisers (Rule 203A-2(e))" which we are re-titling "Exemption for Certain Multi-State Investment Advisers (Rule 203A-2(d))" to reflect the renumbering of this provision.

1940;" (vi) "Form ADV-H;"[650] and (vii) "Rule 204-2 under the Investment Advisers Act of 1940."[651] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

While our new rules and rule amendments will impose new collection of information burdens for certain advisers and change existing burdens on advisers under our rules, the Dodd-Frank Act also will impact our total burden estimates for certain of our rules, principally by changing the number of advisers subject to these rules. Specifically, we estimate the Dodd-Frank Act's amendments to section 203A to reallocate regulatory responsibility over numerous registered advisers to the states will result in approximately 3,200 registered advisers switching from Commission to state registration.[652] At the same time, we estimate that the Dodd-Frank Act's elimination of the private adviser exemption in section 203(b)(3) of the Advisers Act will result in approximately 750 additional private fund advisers registering with the Commission.[653] Based on IARD data as of April 7, 2011, we estimate that approximately 11,500 advisers are currently registered with the Commission. We further estimate that approximately 700

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650 The current title for the collection of information on Form ADV-H is "Rule 203-3 and Form ADV-H under the Investment Advisers Act of 1940" because currently only registered advisers file Form ADV-H under rule 203-3. However, because we are proposing to amend Form ADV-H to allow exempt reporting advisers to apply for a temporary hardship exemption on Form ADV-H under rule 204-4, we are re-titling the collection of information simply "Form ADV-H."

651 We note that the PRA analysis associated with the requirement that an accountant's report be filed electronically was included in our adoption of substantive amendments to that form. Today, we are making only a technical amendment to Form ADV-E to conform to that prior rulemaking. *See* 2009 Custody Release, *supra* note 310 at section IV.C.

652 *See supra* section II.A. (discussing the Dodd-Frank Act's amendments to section 203A). Based on IARD data as of April 7, 2011, we estimate that approximately 3,200 will switch to state registration because they have assets under management of less than $90 million. This estimate includes approximately 5 advisers that will switch to state registration because they are relying on the registration of an affiliated adviser with the same principal office and place of business that will be switching to state registration. *See supra* note 422.

653 *See* Exemptions Adopting Release at section I. (discussing elimination of the private adviser exemption in section 203(b)(3)).

additional advisers register with the Commission each year.[654] Therefore, for purposes of calculating the burdens of our proposed rules and amendments under the PRA, we estimate that the number of advisers registering with the Commission after the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) become effective will be approximately 9,750.[655]

A. Rule 203A-2(d)

Rule 203A-2(d), as amended, exempts certain multi-state investment advisers from section 203A's prohibition on registration with the Commission. We have renumbered and amended the exemption to permit all investment advisers who are required to register as an investment adviser with 15 or more states to register with the Commission, rather than 30 states, as currently required.[656] An adviser relying on this exemption is required to maintain in an easily accessible place a record of the states in which the investment adviser has determined it would, but for the exemption, be required to register for a period of not less than five years from the filing of a Form ADV relying on the rule.[657] We submitted this collection of information to OMB for review, and OMB has not yet assigned this collection a control number.

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654 Over the past several years, approximately 1,000 new advisers have registered with us annually. Due to the Dodd-Frank Act's reallocation of regulatory responsibility for advisers with assets under management of less than $100 million, we estimate that approximately 700 new advisers will register with us annually based on reducing the current growth rates by the gross reduction in the number of advisers due to the Dodd-Frank Act. (3,200 (SEC advisers withdrawing) / 11,500 (total SEC advisers)) x 1000 (number of new advisers each year) = 0.28 x 1000 = 280 (number of additional new advisers registering with the states, not the SEC). 1000 - 280 = 720. We have rounded this number to 700 for purposes of our analysis.

655 11,500 (total SEC advisers) – 3,200 (SEC advisers withdrawing) + 750 (private advisers registering with the SEC) + 700 (new SEC advisers each year) = 9,750.

656 *See* amended rule 203A-2(d).

657 *See* amended rule 203A-2(d)(3). An investment adviser relying on this exemption also will continue to be required to: (i) include a representation on Schedule D of Form ADV that the investment adviser has reviewed applicable law and concluded that it must register as an investment adviser with 15 or more states; and (ii) undertake on Schedule D to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that the investment adviser will be required by the laws of fewer than 15 states to

Respondents to this collection of information will be investment advisers who would be required to register in 15 or more states absent the exemption (that rely on amended rule 203A-2(d) to register with the Commission). This collection of information is mandatory for those advisers. The records kept by investment advisers in compliance with the rule are necessary for the Commission staff to use in its examination and oversight program, and the information in these records generally will be kept confidential.[658]

The amendments to the rule that we are adopting today do not differ from our proposed amendments. Commenters did not discuss the rule's collection of information requirements, but generally agreed with our proposal to align our multi-state exemption for small advisers with the statutory exemption for mid-sized advisers.[659] A few, however, recommended a lower threshold of required state registrations for eligibility for the multi-state exemption,[660] but we have determined not to lower the threshold further in light of the Congressional determination to set the threshold at 15 states and our stated purpose to align the rule with the Dodd-Frank Act.[661]

In the Implementing Proposing Release, the Commission estimated that approximately 150 advisers would rely on the exemption.[662] As of April 7, 2011, there were approximately 40 advisers relying on the multi-state exemption.[663] Although it is difficult to determine a precise number of advisers that will rely on the exemption as amended because such reliance is entirely

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register as an investment adviser with the state. *See* amended rule 203A-2(d)(2). The increase in the PRA burden for Form ADV reflects these requirements. *See infra* section VI.B.

658 *See* section 210(b) of the Advisers Act.

659 *See* NASAA Letter; NEA Letter; NRS Letter; Pickard Letter; Seward Letter; Shearman Letter.

660 *See* NEA Letter; Seward Letter; Shearman Letter.

661 *See supra* note 136.

662 *See* Implementing Proposing Release, *supra* note 7, at n.382.

663 Based on IARD data as of April 7, 2011, of the approximately 11,500 SEC-registered advisers, 40 checked Item 2.A.(9) of Part 1A of Form ADV to indicate their basis for SEC registration under the multi-state advisers rule.

voluntary, we estimate that approximately 155 advisers will rely on the exemption.[664] These advisers will incur an average one-time initial burden of approximately 8 hours, and an average ongoing burden of approximately 8 hours per year, to keep records sufficient to demonstrate that they meet the 15-state threshold. These estimates are based on an estimate that each year an investment adviser will spend approximately 0.5 hours creating a record of its determination whether it must register as an investment adviser with each of the 15 states required to rely on the exemption, and approximately 0.5 hours to maintain these records.[665] Accordingly, the revised total initial and annual burden of the recordkeeping requirements of rule 203A-2(d) will be 1,240 hours (an additional 920 hours).[666]

B. Form ADV

Form ADV (OMB Control No. 3235-0049) is the two-part investment adviser registration and exempt adviser reporting form. Part 1 of Form ADV contains information designed for use by Commission staff, and Part 2 is the client brochure. We use the information collected on Form ADV to determine eligibility for registration with us and to manage our regulatory and examination programs. Clients use certain of the information to determine whether to hire or

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664 Based on IARD data as of April 7, 2011, 100 of the advisers that have less than $90 million of assets under management currently file notice filings with 15 or more states. This number may overestimate the number of advisers required to be registered with 15 or more states, and therefore eligible for the amended multi-state exemption, because notice filing requirements may differ from registration requirements. In addition, we are unable to determine the number of advisers currently registered with the states that are registered with 15 or more states that may rely on the exemption and register with us. We expect this number to be small based on the scope of business of an adviser that has less than $25 million in assets under management and because section 222(d) of the Advisers Act provides a de minimis exemption for limited state operations without registration. For purposes of this analysis, we estimate the number is 15. As a result, we estimate that approximately 155 advisers will rely on the exemption (40 currently relying on it + estimated 100 eligible based on IARD data + 15 advisers required to be registered in 15 or more states that are not registered with us today).

665 0.5 hours x 15 states = 7.5 hours + 0.5 hours = 8 hours.

666 155 advisers relying on the exemption x 8 hours = 1,240 hours. 1,240 new burden hours – 320 current burden hours = 920 additional burden hours.

retain an adviser. Rule 203-1 requires every person applying for investment adviser registration with the Commission to file Form ADV. Rule 204-4 requires exempt reporting advisers to file reports with the Commission by completing a limited subset of items on Form ADV. Rule 204-1 requires each registered and exempt reporting adviser to file amendments to Form ADV at least annually, and requires advisers to submit electronic filings through the IARD. These collections of information are found at 17 CFR 275.203-1, 275.204-1, 275.204-4, and 279.1 and are mandatory. The paperwork burdens associated with rules 203-1 and 204-1 are, and the paperwork burdens associated with rule 204-4 will be, included in the approved annual burden associated with Form ADV and, thus, do not entail separate collections of information. Responses are not kept confidential. The respondents to this information collection are investment advisers registered or applying for registration with us and exempt reporting advisers.

As discussed above, in order to give effect to provisions in Title IV of the Dodd-Frank Act, we are amending Part 1A of Form ADV to reflect the new statutory threshold for registration with the Commission and to accommodate filings by exempt reporting advisers. In addition, to enhance our ability to oversee investment advisers, we are amending Part 1A of Form ADV to require advisers to provide us additional information regarding: (i) the private funds they advise; (ii) their advisory business and business practices that may present significant conflicts of interest; and (iii) their non-advisory activities and financial industry affiliations.[667] We are also adopting certain additional amendments intended to improve our ability to assess compliance risks and to enable us to identify the advisers that are covered by section 956 of the Dodd-Frank Act, which addresses certain incentive-based compensation arrangements.

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667 *See supra* section II.C. In addition, we are adopting several clarifying or minor amendments based on frequently asked questions we receive from advisers and our experience administering the form.

The currently approved total annual burden of completing, amending, and filing Parts 1 and 2 of Form ADV is 268,457 hours.[668] The currently approved burden is based on an average total hour burden of 36.24 hours per adviser for the first year that an adviser completes Form ADV. The currently approved total annual cost burden for Form ADV is $22,775,400, consisting of costs for outside legal and consulting services associated with initial preparation of Part 2.[669]

The amendments we are adopting will increase the information requested in Part 1A of Form ADV, and we expect that this will correspondingly increase the average burden to an adviser filing Form ADV. As we explained in the Implementing Proposing Release, however, we expect that the total annual burden associated with Form ADV will experience a net decrease because the reduction in burden resulting from the decrease in the number of respondents that are registered advisers will have a greater effect on the total burden than the increase resulting from the use of the form by exempt reporting advisers and the additional information required by the amendments to the form.[670] We provided initial estimates of the revised burdens and requested comment on these estimates and our initial PRA analysis in the Implementing Proposing

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668 *See* section VI of the Part 2 Release at notes 341 and 342 and accompanying text. The approved burden is comprised of 12,658 advisers preparing an initial filing of Form ADV at 36.24 hours, which is amortized over a three-year period (the estimated period that advisers are expected to use Form ADV) for an annual burden of 152,909 hours. The burden also includes two amendments to Form ADV annually, one annual amendment and one other-than-annual amendment, for an annual burden of 87,435 hours; an annual burden of 11,658 hours to account for new brochure supplements that advisers are required to prepare; and 16,455 hours attributable to the obligation to deliver to clients codes of ethics upon request.

669 These costs are expected to vary based on the size of the adviser, and we have assumed that fewer than all advisers will use these services in connection with preparing their initial Part 2 brochures. For outside legal services, ($4,400 x 535 medium advisers) + ($3,200 x 2,370 small advisers)) + ($10,400 x 36 large advisers) = $ 10,312,400. For compliance consulting services, ($3,000 x 2,371 small advisers) + ($5,000 x 1,070 medium advisers) = $12,463,000. $10,312,400 + $12,463,000 = $22,775,400. *See* Part 2 Release, *supra* note 668, for a discussion of these estimates.

670 *See* Implementing Proposing Release, *supra* note 7, at section V.B.

Release.[671] As discussed in detail in sections II.B., II.C., V.A.2., V.A.3., V.B.2 and V.B.3. of this Release, we received a number of comments that addressed whether the amendments to the collection of information are necessary for the proper performance of our functions, whether there are ways to enhance the quality, utility, and clarity of the information to be collected, and whether we could further minimize the burden. Only a few commenters addressed the accuracy of our burden estimates for the proposed collection of information, and suggesting in general terms that our estimates were too low.[672] These commenters did not provide empirical data or suggest alternatives by which to recalculate our estimates, making it difficult to evaluate these assertions or determine the magnitude by which their estimates differ from ours.

To address these and other comments we received, we are adopting Form ADV with a number of changes that improve the clarity and utility of the information collected and reduce the amount of information required by the amendments.[673] Many of these changes include removing or re-formulating proposed questions that commenters identified as most burdensome.[674] We continue to believe that the check-the-box style of most of the Form ADV items, as well as some of the features of the IARD (such as drop-down boxes for common responses and the ability to pre-populate data), will mitigate the reporting burden, and several commenters confirmed our assumption that much of the information required by the amendments should be readily available to most advisers.[675] The changes we are making from the proposal will reduce the amount of information that advisers must file and result in decreased burdens for

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671 *Id*.

672 AIMA Letter; BCLBE Letter; Gunderson Letter; IAA General Letter. *See also supra* notes 577, 584, 613, 619 and 620.

673 *See* section II.C.

674 *See supra* notes 245-247, 262, 286, 300, 302 and accompanying text.

675 *See supra* note 570.

advisers from the proposal. However, in light of the general comments we received about burdens, we are also not reducing our burden estimates.[676]

We discuss below, in three sub-sections, the estimated revised collection of information requirements for Form ADV: first, we provide estimates for the revised and new burdens resulting from the amendments to Part 1A; second, we determine how those estimates will be reflected in the annual burdens attributable to Form ADV; and third, we calculate the total revised burdens associated with Form ADV.

1. Changes in Average Burden Estimates and New Burden Estimates

a. Estimated Change in Burden Related to Part 1A Amendments (Not Including Private Fund Reporting)

We are adopting amendments to several items in Part 1A, some that are merely technical changes or very simple in nature, and others that will require more of an adviser's time. The paperwork burdens of filing an amended Part 1A of Form ADV will, however, vary among advisers, depending on factors such as the size of the adviser, the complexity of its operations, and the number or extent of its affiliations. Although burdens will vary among advisers, we believe that the revisions to Part 1A will impose few additional burdens on advisers in collecting information because advisers should have ready access to all the information necessary to respond to the revised items in their normal course of operations. We also are working with FINRA, as our IARD contractor, to implement measures intended to minimize the burden for advisers filing the amended Form ADV on the IARD (*e.g.*, pre-populating fields and drop-down boxes for common responses). We anticipate, moreover, that the responses to many of the

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676 Some of the estimates provided in this section differ from those provided in the Implementing Proposing Release, but these differences reflect updated information regarding employment costs and the number of advisers subject to the reporting, not a change to the proposed estimate of time an adviser would spend on the reporting or the out-of-pocket costs an adviser would incur.

questions are unlikely to change from year to year, minimizing the ongoing reporting burden associated with these questions.

As we explained in the Implementing Proposing Release, in large part, the changes we are making to Part 1A of Form ADV, including those to account for the statutory increase in the threshold for Commission registration, primarily refine or expand existing questions or request information advisers already have for compliance or fund offering purposes. For instance, some of the changes to Item 5 require advisers to provide numerical responses to certain questions about their employees. An adviser likely already had this information in order to respond to those questions in the previous version of the form by checking boxes that correspond to a range of numbers. Likewise, the amendments to Item 8 require an adviser to expand on information it provided in response to Item 8 in the previous version of the form, such as whether the broker-dealers the adviser recommends or has discretion to select for client transactions are related persons of the adviser. Other questions expand upon existing requirements to elicit information advisers already have available for compliance purposes, such as whether the soft dollar benefits they reported receiving under the previous version of Item 8 qualify for the safe harbor under section 28(e) of the Exchange Act for eligible research or brokerage services. As amended, Item 2 requires an adviser to report to us its basis for registration or reporting, as already determined for compliance purposes. Other amendments to Items 5, 6 and 7 expand lists of information advisers already provided to us on the previous version of Form ADV, such as types of advisory activities the advisers perform and other types of business engaged in by advisers and their related persons. Amendments to Item 9 better align the information required to be reported with information advisers have for purposes of complying with rule 206(4)-2. Finally,

we believe that several of the new questions merely require advisers to provide readily available or easily accessible information.[677]

We anticipate that other amended questions may take longer for advisers to complete, even with readily available information, such as calculating regulatory assets under management according to our revised instruction. Other new items will likely present greater burdens for some advisers but not others, depending on the nature and complexity of their businesses, such as the requirement to provide a list of the Commission file numbers of investment companies they advise or providing expanded information about related person financial industry affiliates.[678]

We estimate that these amendments, taken as a whole, will require an average of approximately 4.5 hours per adviser to complete. We have arrived at this estimate, in part, by comparing the relative complexity and availability of the information elicited by the amended items and the nature of the response required (*i.e.*, checking a box as opposed to providing a narrative response) to the current form and its approved burden. As a result, we estimate that the average total collection of information burden will increase to 40.74 hours per adviser for the first year that an adviser completes Form ADV (Part 1 and Part 2).[679]

b. New Estimated Burden Related to Private Fund Reporting Requirements

Revised Item 7.B. and Section 7.B. of Schedule D will provide us with basic census data on private funds and will permit us to conduct a more robust risk assessment of private fund

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677 For example, Item 1 requires advisers to provide contact information for their Chief Compliance Officers and report whether they have $1 billion or more in assets; Item 3 requires advisers to indicate their form of organization. *See supra* section II.C.6.

678 Advisers may, however, omit certain related persons from their Schedule D reporting requirements in accordance with our revised instruction. We expect this change from the proposal will significantly reduce burdens associated with this item. *See supra* note 300.

679 Current approved per adviser total (36.24) + estimated per adviser increase (4.5) = 40.74.

advisers for purposes of targeting our examinations. As discussed in the Implementing Proposing Release, the information will include fund data such as basic organizational, operational, and investment characteristics of the fund; the gross amount of assets held by the fund; and the fund's service providers, or gatekeepers. We believe much of this information is readily available to private fund advisers because, among other things, it is information that private fund investors commonly seek in their due diligence questionnaires or it is the kind of information that is often included in a private placement memorandum offering fund shares, and commenters confirmed our understanding.[680]

Although we understand that the required information is readily available to private fund advisers, we expect that these amendments could subject advisers, particularly those with many private funds, to a significantly increased paperwork burden. For this reason, as we explained in the Implementing Proposing Release, we have included several measures to minimize the increased burden associated with private fund reporting. First, an adviser will be permitted to exclude from its reporting on Section 7.B.(1) of Schedule D any private fund for which another adviser is filing Section 7.B.(1).[681] Second, an adviser managing a master-feeder arrangement will be permitted to submit a single Schedule D for the master fund and all of the feeder funds if separately submitted data would otherwise be substantially identical.[682] Finally, an adviser with a principal office and place of business outside the United States may omit from Section 7.B.(1)

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680 *See*, with respect to private fund reporting under Item 7.B. specifically, Katten Foreign Advisers Letter ("Virtually all of the requested information would already have been provided to investors in the fund through an offering document or follow up status reports.") and NRS Letter (arguing that the expanded private fund disclosures on Schedule D would "replicate the due diligence questionnaire information...."). *See also* ABA Committees Letter ("We expect that most [exempt reporting advisers] will already have most of the information requested by Form ADV Part 1 readily available."); Merkl Implementing Letter (confirming that the disclosure requirements would not impose a significant burden on advisers). *See also supra* note 570.

681 *See supra* note 223.

682 *See supra* note 224 and accompanying text.

of Schedule D any private fund that, during the adviser's last fiscal year, was not a United States person, was not offered in the United States and was not beneficially owned by any United States person.[683] We are also working with FINRA to implement measures in the IARD intended to minimize the burden for advisers filing amended Form ADV, such as the ability to automatically pre-populate private fund service provider information provided for other funds managed by the same adviser. In addition, although we are generally expanding the information previously required in Section 7.B.(1), we have removed the requirement that advisers report the funds that their related persons manage.

Considering the changes to Item 7.B. and Section 7.B. of Schedule D as a whole, as well as our efforts to mitigate the reporting burden and to make technological upgrades to the IARD, we estimate that each adviser managing private funds will spend, on average, 1 hour per private fund to complete these questions.

c. New Estimated Burden Related to Exempt Reporting Adviser Reporting Requirements

Exempt reporting advisers are required to complete a limited number of items in Part 1A of Form ADV (consisting of Items 1, 2.B., 3, 6, 7, 10, 11 and corresponding schedules), and are not required to complete Part 2. We believe the information required by these items should be readily available to any adviser, particularly the identifying data and control person information required by Items 1, 3, and 10, and commenters agreed.[684] As we noted in the Implementing Proposing Release, the check-the-box style of most of these items, as well as some of the features of the IARD (such as drop-down boxes for common responses) should also keep the

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683 *See supra* note 225 and accompanying text.

684 *See supra* notes 570 and 680.

average completion time for these advisers to a minimum.[685] Moreover, in our staff's experience, the types of advisers that will meet the criteria for exempt reporting advisers are unlikely to have significantly large numbers of affiliations, and we do not expect that they will need to report disciplinary events at a greater rate than currently registered advisers.[686] We estimate that these items, other than Item 7.B., will take each exempt reporting adviser approximately 2 hours to complete. We anticipate that, like registered advisers, exempt reporting advisers will each spend 1 additional hour per private fund to complete Item 7.B. and Section 7.B of Schedule D.

2. Annual Burden Estimates

a. Estimated Annual Burden Applicable to All Registered Investment Advisers

i. Estimated Initial Hour Burden (Not Including Burden Applicable to Private Funds)

As a result of the transition filing discussed above,[687] we expect the total number of registered advisers responding to this collection of information will be 9,750.[688] Approximately 11,500 investment advisers are currently registered with the Commission.[689] We expect 3,200 will withdraw from registration.[690] We expect about 750 advisers who currently rely on the private adviser exemption to apply for registration with us, and we estimate that approximately

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685 *See* Implementing Proposing Release, *supra* note 7, at section V.B.1.c.

686 As of April 7, 2011, approximately 13% of SEC-registered investment advisers reported a disclosure in Item 11 of Form ADV.

687 *See supra* section V.B.1.

688 *See supra* note 655.

689 Based on IARD data as of April 7, 2011.

690 As a consequence of section 410 of the Dodd-Frank Act, we estimate that approximately 3,200 advisers currently registered with the Commission will be required to withdraw their registration and register with one or more state securities authorities. *See supra* section V.B.1.

700 new advisers will register with us each year following effectiveness of the Dodd-Frank Act amendments.[691]

The estimated total annual burden applicable to these registered advisers, including new registrants, but excluding private fund reporting requirements, is 397,215 hours.[692] As discussed in the Implementing Proposing Release, we believe that most of the paperwork burden will be incurred in advisers' initial submission of the new and amended items of Part 1A of Form ADV, and that over time this burden will decrease substantially because advisers will generally only need to report updating information.[693] Amortizing this total burden over a three-year period to reflect the anticipated average period of time that advisers will use the revised form will result in an average estimated burden of 132,405 hours per year,[694] or 13.58 hours per year for each new applicant and for each currently registered adviser that will remain registered with the Commission.[695]

ii. Estimated Initial Hour Burden Applicable to All Registered Advisers to Private Funds

The amount of time that a registered adviser managing private funds will incur to complete Item 7.B. and Section 7.B. of Schedule D will vary depending on the number of private funds the adviser manages. Of the advisers currently registered with us, we estimate that approximately 2,850 advise private funds, will remain registered with us following effectiveness

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691 (3,200 (SEC advisers expected to withdraw from registration) / 11,500 (total SEC advisers)) x 1000 (average number of new advisers registered with the Commission each year) = 0.28 x 1000 = 280 (number of additional new advisers registering with the states, not the SEC). 1000 - 280 = 720. We have rounded this number to 700 for purposes of our analysis. *See also supra* note 609 and *infra* note 734.

692 40.74 per-adviser burden x 9,750 = 397,215 hours.

693 *See* Implementing Proposing Release, *supra* note 7, at section V.B.2.a.i.

694 397,215 / 3 = 132,405.

695 132,405 / 9,750 = 13.58.

of the Dodd-Frank Act amendments and have a December 31 fiscal year end.[696] Based on these advisers' Form ADV filings, we estimate that 52% of them, or approximately 1,480, currently advise an average of 3 private funds each; 43%, or approximately 1,230 advisers, currently advise an average of 10 private funds each; and the remaining 5%, or approximately 140 advisers, currently advise an average of 79 private funds each.[697] As we discussed above, we estimate that private fund advisers will spend, on average, 1 hour per private fund completing Item 7.B. and Section 7.B. of Schedule D. As a result, the private fund reporting requirements that will be applicable to registered investment advisers will add 27,800 hours to the overall annual burden applicable to registered advisers.[698]

In addition to currently registered private fund advisers, we estimate that about 200 new private fund advisers will register with us annually[699] and that 750 advisers will register with us that previously relied on the private adviser exemption. We believe that these 950 newly registering private fund advisers will, on average, be similar to the currently registered private fund advisers. However, in contrast to the currently registered advisers, this group is unlikely to

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696 IARD data as of April 7, 2011 show that 3,700 advisers indicate by reporting a fund in Schedule D, Section 7.B. that they, or a related person, advise private funds or investment-related funds. Based on IARD data, we estimate that 850 of these 3,700 advisers have a fiscal year end other than December 31 or will switch to state registration. *See supra* note 529. With respect to these 850 advisers, the burden of reporting this information is accounted for under rule 203A-5. *See infra* note 768. 3,700 – 850 = 2,850.

697 Based on IARD data as of April 7, 2011. Form ADV currently asks for an adviser to report about investment-related partnerships and limited liability companies advised by the adviser *and* its related persons. As a result, the data we have obtained from IARD over-estimates the average number of funds as a result of reporting of the same fund multiple times by affiliated registered advisers.

698 (1,480 advisers x 3 hours (3 funds x 1 hour per fund)) + (1,230 advisers x 10 hours (10 funds x 1 hour per fund)) + (140 advisers x 79 hours x 1 hour per fund)) = 4,440 + 12,300 + 11,060 = 27,800.

699 About 30% of current registrants report that they advise one or more private funds. (3,700 advisers to private funds / 11,500 registered advisers). Applying the same proportion to the 700 new registrants that we have estimated will register with us annually results in approximately 200 additional advisers to private funds each year. (700 x 0.30 = 210).

include any advisers managing a large number of private funds. For example, among the 750 advisers that currently rely on the private adviser exemption, we would not expect any of them to have more than 14 private fund clients, the most that had been allowed under the exemption provided by section 203(b)(3) of the Advisers Act. In addition, for the 200 new private fund advisers that we expect to register each year, the elimination of the private adviser exemption means that they will be subject to registration requirements even if they have only a single private fund client as long as they are not eligible for another exemption. As a result, we estimate that the average newly registering private fund adviser will (like the average currently registered private fund adviser) manage approximately 6 private funds,[700] but we do not anticipate that any subgroup of these new registrants will manage a large number of private funds (unlike the 5% of currently registered private fund advisers that we estimate manage an average of 79 private funds each). Based on these estimates, we expect that private fund reporting requirements will add 4,500 hours attributable to the 750 advisers registering because of the elimination of the private adviser exemption[701] and 1,200 hours attributable to private fund advisers registering as a result of normal growth.[702]

The total annual burden related to private fund reporting by registered advisers is 33,500 hours.[703] As we discussed in the Implementing Proposing Release, we believe that most of the paperwork burden will be incurred in connection with advisers' initial submission of private fund

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700 Approximately 65% of advisers that reported a fund in Schedule D, Section 7.B. listed five or fewer funds and 72% of advisers that registered since April 1, 2010 and reported a fund reported five or fewer private funds. The average number of private funds reported by new registrants in the past year is about 6 funds.

701 750 advisers x 6 private funds on average x 1 hour/private fund = 4,500.

702 200 advisers x 6 private funds on average x 1 hour/private fund = 1,200.

703 27,800 for existing registered advisers + 4,500 for no longer exempt advisers + 1,200 for estimated new registrants due to growth = 33,500.

data, and that over time this burden would decrease substantially because the paperwork burden will be limited to updating information.[704] Amortizing this total burden imposed by Form ADV over a three-year period, as we did above with respect to the initial filing or re-filing of the rest of the form, results in an average estimated burden of 11,167 hours per year,[705] or 2.94 hours per year for each new private fund adviser and for each private fund adviser currently registered with the Commission.[706]

iii. Estimated Annual Burden Associated with Amendments, New Brochure Supplements and Delivery Obligations

The currently approved collection of information burden for Form ADV has three elements not discussed above: (i) the annual burden associated with annual and other amendments to Form ADV; (ii) the annual burden associated with creating new Part 2 brochure supplements for advisory employees and filing interim amendments to existing brochure supplements throughout the year; and (iii) the annual burden associated with delivering codes of ethics to clients as a result of the offer of such codes contained in the brochure. Although we do not anticipate that the amendments we are adopting to Form ADV will affect the per adviser burden imposed by these three elements, the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) will change our estimates of the number of advisers subject to them, which will result in a change to the total annual burden associated with these elements of the collection of information for Form ADV.[707]

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704 *See* Implementing Proposing Release, *supra* note 7, at section V.B.2.a.ii.

705 33,500 / 3 = 11,167.

706 11,167 / (2,850 + 200 + 750) = 2.94.

707 We anticipate that the clarification we are making to the brochure supplement (Part 2B) would not affect this burden estimate. *See* note 337 and accompanying text for a discussion of this clarifying amendment.

Based on IARD data, we continue to estimate that, on average, each adviser filing Form ADV through the IARD will amend its form two times during the year.[708] On average, these consist of one interim updating amendment (at an estimated 0.5 hours per amendment) and one annual updating amendment (at an estimated 6 hours per amendment) each year. In addition, we estimate that each adviser will, on average, spend 1 hour per year making interim amendments to brochure supplements and an additional 1 hour per year to prepare new brochure supplements as required by Part 2.[709] We also expect advisers to continue to spend an average of 1.3 hours annually to meet obligations to deliver codes of ethics to clients.[710] These obligations will add 95,550 hours annually to the collection of information, consisting of 63,375 hours attributable to annual and interim updating amendments,[711] 9,750 hours attributable to interim amendments to brochure supplements,[712] 9,750 hours attributable to the creation of new brochure supplements,[713] and 12,675 hours for delivery of codes of ethics.[714]

iv. Estimated Annual Cost Burden

The currently approved collection of information burden for Form ADV has a one-time initial cost for outside legal and compliance consulting fees in connection with the initial preparation of Part 2 of Form ADV. Although we do not anticipate that the amendments we are adopting to Form ADV will affect the per adviser cost burden estimates for outside legal and

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708 Based on IARD data regarding the number of filings of Form ADV amendments. *See* Part 2 Release, *supra* note 67 at n.329.

709 *See* Part 2 Release, *supra* note 668 at nn.333, 336-37 and accompanying text.

710 *Id*.

711 (9,750 advisers x 0.5 hours/other than annual amendment) + (9,750 advisers x 6 hours/annual amendment) = 63,375.

712 9,750 advisers x 1 hour = 9,750.

713 9,750 advisers x 1 hour = 9,750.

714 9,750 advisers x 1.3 hours = 12,675.

compliance consulting fees, the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) of the Advisers Act will result in a significant change to our estimates of the number of advisers subject to these costs. We discuss this aspect of the annual cost burden more fully below. In addition to the estimated legal and compliance consulting fees, we also anticipate that some registered advisers may incur additional outside costs related to the Form ADV amendments we are adopting today that require advisers to report the fair value of private fund assets.[715]

Advisers to private funds that do not use fair value methodologies will likely incur costs to comply with the requirement to report the fair value of those assets on Form ADV, which could (but is not required to) include reliance on a third party or outside valuation service. We anticipate that these costs will vary, but we understand that private fund advisers, including those that may not use fair value methodologies for reporting purposes, perform administrative services, including valuing assets, internally as a matter of business practice.[716] Based on registered advisers' responses to Items 5.D., 7.B., and 9.C. of Form ADV,[717] we estimate that approximately 3% of registered advisers have at least one private fund client that may not be

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715 *See* Form ADV: Instructions for Part 1A, instr. 5.b.(4).

716 For example, an adviser to a hedge fund may value fund assets for purposes of allowing new investments in the fund or redemptions by existing investors, which may be permitted on a regular basis after an initial lock-up period. An adviser to a private equity fund may obtain valuation of portfolio companies in which the fund invests in connection with financing obtained by those companies. Advisers to private funds also may value portfolio companies each time the fund makes (or considers making) a follow-on investment in the company. Private fund advisers could use these valuations as a basis for complying with the fair valuation requirement with respect to private fund assets.

717 Item 5.D. asks advisers to identify the types of clients they have, including clients that are pooled investment vehicles. Item 7.B. asks if the adviser or its related person is a general partner in an investment-related limited partnership or manager of an investment-related limited liability company, or if the adviser advises any other "private fund." Item 9.C. asks whether an independent public accountant audits annually the pooled investment vehicles that the adviser manages and if audited financial statements are distributed to investors in the pools.

audited.[718] These advisers therefore may incur costs to fair value their private fund assets.[719] As explained above, we estimate that approximately 4,270 registered advisers have, or after registering with us will have, at least one private fund client.[720] We therefore estimate that approximately 130 registered advisers may incur costs as a result of the fair value requirement.[721] We estimated in the Implementing Proposing Release that an adviser without the internal capacity to value specific illiquid assets would obtain pricing or valuation services from an outside administrator or other service provider at a cost ranging from $250 to $75,000 annually.[722] Commenters did not address these estimates, and we continue to believe they are accurate. Accordingly, we estimate that the 130 advisers would incur costs of $37,625 each on an annual basis, which is the middle of the range of estimated fair value costs, for an aggregate annual cost of $4,891,250.[723]

With respect to outside legal assistance or outside consulting services, the currently approved collection of information burden is based on an estimate that some, but not all, registered advisers will elect to obtain these services on a one-time basis to draft the new

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718 A fund that is relying on the audit provision in our custody rule will have provided the fair value of its assets in its audited financial statements that are prepared in accordance with GAAP.

719 We note, however, that at least some of these advisers may currently fair value private fund assets. For instance, funds that do not prepare financial statements in accordance with GAAP (which is required to rely on an exception in our custody rule) may nonetheless use a fair value standard other than that specified in GAAP and thus may not incur any additional costs. *See supra* notes 98-100 and accompanying text (explaining that an adviser may adopt a fair valuation standard other than GAAP or another international accounting standard that will satisfy the requirement, if developed and applied in good faith).

720 *See supra* note 637.

721 4,270 x 0.03 = 128.1.

722 *See* Implementing Proposing Release, *supra* note 7, at n.369 and accompanying text.

723 130 x $37,625 = $4,891,250.

narrative brochure for a total cost of $22,775,400.[724] By the time the amendments to Form ADV that we are adopting today become effective, substantially all registered advisers will have completed their initial filing of the narrative brochure required by our recent amendments to Part 2 of Form ADV and will have already incurred these estimated one-time costs.[725] As a result, the only respondents that we expect will incur legal and consulting costs for the initial drafting of Part 2 of Form ADV, subsequent to the effective date of the amendments to Form ADV we are adopting today, will consist of the estimated 700 new advisers that we expect to register annually and the estimated 750 advisers that will have to register as a result of the elimination of the private adviser exemption.[726]

For purposes of estimating the currently approved amount of this one-time cost, we divided advisers into three groups – small, medium and large – based on their number of employees. Different costs per adviser were assigned based on the group to which the adviser belongs.[727] We expect that the 750 newly registering private fund advisers and 700 new advisers registering annually will be medium-sized.[728] In the Part 2 Release, we estimated that the initial cost related to preparation of Part 2 of Form ADV would be $4,400 for legal services and $5,000 for compliance consulting services, in each case, for those medium-sized advisers who engaged

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724 *See* Part 2 Release, *supra* note 67, at text accompanying n.328. We estimated that a total of 2,941 advisers would elect to obtain outside legal assistance and that 3,441 advisers would elect to obtain outside consulting services.

725 *See id*. at section V.

726 *See supra* note 691 and text following note 699.

727 For purposes of this estimate, we categorize small advisers as advisers with 10 or fewer employees, medium advisers as having between 11 and 1,000 employees, and large advisers as those with 1,000 or more employees. *See* Part 2 Release, *supra* note 668, at nn.301 and 324.

728 We would not expect these advisers to be large in this sense because advisers are likely to have become subject to registration obligations before engaging 1,000 or more employees. Some of these advisers may be small, but the increase in the threshold for registration with the Commission will limit the number of small advisers registering with us.

legal counsel or consultants.[729] The currently approved burden anticipates that a quarter of medium-sized advisers would seek the help of outside legal services and half would seek the help of compliance consulting services. Accordingly, we estimate that 350 of these advisers would use outside legal services, for a total cost burden of $1,540,000,[730] and 725 advisers would use outside compliance consulting services, for a total cost burden of $3,625,000,[731] resulting in a total cost burden among all respondents of $5,165,000 for outside legal and compliance consulting fees related to drafting narrative brochures.[732]

Together, we estimate that the total cost burden among all respondents for outside legal and compliance consulting fees related to drafting narrative brochures and for third party or outside valuation services to be $10,056,250.[733]

b. Estimated Annual Burden Applicable to Exempt Reporting Advisers

i. Estimated Initial Hour Burden

Based on publications, reports, and general information publicly available from trade organizations, financial research companies, and news organizations as well as safe harbor filings with the SEC, we expect approximately 2,000 investment advisers will qualify for an exemption from registration but will be required to submit reports to us on Form ADV.[734] As we

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729 *See* Part 2 Release, *supra* note 67, at text accompanying nn.324 and 325.

730 25% x (750 private fund advisers + 700 new advisers registering annually) = approximately 350 advisers. $4,400 for legal services x 350 advisers = $1,540,000.

731 50% x (750 private fund advisers + 700 new advisers registering annually) = 725 advisers. $5,000 for consulting services x 725 advisers = $3,625,000.

732 $1,540,000 + $3,625,000 = $5,165,000.

733 $5,165,000 (legal and consulting services) + $4,891,250 (third party fair valuation services) = $10,056,250

734 This estimate was collectively derived from various sources including the National Venture Capital Association's 2010 Yearbook (http://www.nvca.org), First Research reports (http://www.firstresearch.com), Preqin reports (http://www.preqin.com), Bloomberg

explained in the Implementing Proposing Release, the paperwork burden applicable to these new exempt reporting advisers will consist of the burden attributable to completing a limited number of items in Part 1A as well as the burden attributable to the private fund reporting requirements of Item 7.B. and Section 7.B. of Schedule D.[735] We estimated the burden to complete the subset of items in Part 1A applicable to exempt reporting advisers to be 2 hours, which would result in an annual burden of approximately 4,000 hours.

As discussed above, we estimate the private fund reporting requirements of the form to be 1 hour per private fund. We assume that each exempt reporting adviser currently relies on the private adviser exemption and, therefore, has 14 or fewer private fund clients. Based on reporting by registered advisers to private funds and industry publications and reports, we expect each of these advisers, on average, advises 6 private funds.[736] Accordingly, we attribute an additional 12,000 burden hours to exempt reporting advisers' private fund reporting requirements.[737]

(http://www.bloomberg.com), the Managed Funds Association (http://www.managedfunds.org), PerTrac data (http://www.pertrac.com), and Form D data. Specific data relevant to the number or types of advisers that would be exempt reporting advisers were not available, but the information located did inform the staff to the probable number of exempt reporting advisers.

735 *See* Implementing Proposing Release, *supra* note 7, at section V.B.2.b.i.

736 *Id*. Based upon the reported general number of private funds and the estimated number of advisers to these private funds, it is estimated that each adviser advises 6 private funds on average. Approximately 2,000 exempt reporting advisers x 6 private funds/adviser = 12,000 private funds. This represents an increase from our estimate of 10,000 private funds in the Implementing Proposing Release, which is attributable to updated IARD data that indicate each private fund adviser now advises approximately 6 funds, instead of 5. *Compare supra* note 700 *with* Implementing Proposing Release, *supra* note 7, at n.406.

737 2,000 exempt reporting advisers x 6 private funds/adviser x 1 hour/private fund = 12,000.

The estimated total annual hour burden applicable to exempt reporting advisers is 16,000 hours.[738] We believe that most of the paperwork burden will be incurred in respect of the initial submission of Form ADV, and that over time this burden will decrease substantially because the paperwork burden will be limited to updating information. Amortizing this total burden imposed by Form ADV over a three-year period, as we did above with respect to the initial filing for registered advisers, results in an average burden of an estimated 5,330 hours per year,[739] or 2.67 hours per year, on average, for each exempt reporting adviser.[740]

ii. Estimated Annual Burden Associated with Amendments and Final Filings

In addition to the burdens associated with initial completion and filing of the portion of the form that exempt reporting advisers will be required to prepare, as in the Implementing Proposing Release, we estimate that, on average: (i) each exempt reporting adviser will prepare an annual updating amendment; (ii) 20% of these advisers will file an interim updating amendment; [741] and (iii) 5% of these advisers will file a final filing.[742]

With respect to an exempt reporting adviser's annual updating amendment of Form ADV, we expect that advisers will not need to spend a significant amount of time entering

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738 4,000 hours attributable to the portions of Form ADV that these advisers are required to file other than the private fund reporting + 12,000 hours attributable to private fund reporting = 16,000 hours.

739 16,000 / 3 = 5,330.

740 5,330 / 2,000 = 2.67.

741 Approximately 20% of advisers with a fiscal year end of December that filed an other-than-annual amendment changed Item 1 or 11 between April 1, 2009, and December 31, 2009 (period between annual amendment filing time).

742 Approximately 5% of advisers withdrew their SEC registrations in 2010 and did not switch to state registration, based on IARD data. We are assuming the same percentage of exempt reporting advisers will submit final reports and not simultaneously apply for registration with the Commission. Exempt reporting advisers filing a final report because they are applying for registration are not included in this count because there is no independent burden associated with making this type of final filing; they are, therefore, included in the number of advisers expected to register each year as a result of normal annual growth. *See supra* note 691.

responses into the electronic version of the form to file their annual updating amendments because the IARD will automatically pre-populate their prior responses. Based on this consideration, we estimate that the average exempt reporting adviser will spend 1 hour per year completing its annual updating amendment to Form ADV. This estimate is based on our estimate for registered advisers, but it is 85% shorter because exempt reporting advisers will be required to complete and update only a limited number of items in Part 1A of the form. We also estimate that 20% of the exempt reporting advisers will file an interim updating amendment to Items 1, 3, 10 or 11 of Form ADV,[743] and we estimate that each such amendment will require 0.5 hours. Based on the foregoing estimates, the total paperwork burden of amendments to Form ADV and final filings on Form ADV will be 2,200 hours per year for all exempt reporting advisers.[744]

3. Total Revised Burdens

The revised total annual collection of information burden for registered advisers to file and complete the revised Form ADV (Parts 1 and 2), including the initial burden for both existing and anticipated new registrants, including private fund advisers, plus the burden associated with amendments to the form, preparing brochure supplements, and delivering codes of ethics to clients is estimated to be approximately 239,122 hours per year.[745] This represents a

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743 *See* amended Form ADV: General Instruction 4.

744 2,000 advisers x 1 hour = 2,000 hours per year for annual amendments. (2,000 advisers x 20%) x 0.5 hours = 200 hours per year for interim amendments. 200 + 2,000 = 2,200 hours. Exempt reporting advisers are not required to complete Part 2 of Form ADV and so will not incur an hour burden to prepare new brochure supplements or the cost burden that registered advisers will incur with respect to that part of the form. Exempt reporting advisers also will not be required to meet obligations to deliver codes of ethics to clients, as is required of registered advisers.

745 132,405 hours per year attributable to initial preparation of Form ADV + 11,167 hours per year attributable to initial private fund reporting requirements + 63,375 hours per year for amendments to Form ADV + 9,750 hours per year for brochure supplements for new employees + 9,750 hours per year for brochure interim amendments + 12,675 hours per year to meet code of ethics delivery obligations = 239,122 hours.

decrease of 29,335 hours from the currently approved burden.[746] This decrease is primarily attributable to the anticipated withdrawal of 3,200 advisers from SEC registration.

Registered investment advisers are also expected to incur an annual cost burden of $10,056,250, a reduction from the current approved cost burden of $22,775,400. The decrease in annual cost burden is attributable to the nature of the costs, which are one-time initial costs to draft the narrative brochure. The transition to the narrative brochure will have substantially been completed, so the newly incurred one-time costs arise solely from new registrants.

We further estimate that the total annual collection of information burden for exempt reporting advisers to file and complete the required items of Part 1A of Form ADV, including the burden associated with amendments to the form and final filings, will be 7,530 hours.[747]

Based on the foregoing, the total annual hour burden for Form ADV will decrease by 21,805 hours to 246,652.[748] Accordingly, we estimate that the blended average per adviser amortized burden for Form ADV will be 20.99 hours,[749] consisting of an average annual amortized burden of 24.52 hours for the estimated 9,750 registered advisers and 3.77 hours for the estimated 2,000 exempt reporting advisers.[750]

C. Rule 203A-5

Rule 203A-5 requires *each* investment adviser registered with us on January 1, 2012 to file an amendment to its Form ADV no later than March 30, 2012, and withdraw from

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[746] Current approved burden of 268,457 hours - revised burden 239,122 hours = 29,335 decrease in hours.

[747] 5,330 hours per year attributable to initial preparation of Form ADV + 2,200 hours per year for amendments = 7,530 hours.

[748] 239,122 + 7,530 = 246,652.

[749] 246,652 / 11,750 = 20.99.

[750] Registered advisers (239,122 / 9,750 = 24.52), exempt reporting advisers (7,530 / 2,000 = 3.77).

Commission registration by June 28, 2012, if no longer eligible.[751] The amendments to Form ADV will, among other things, require each adviser to declare whether it remains eligible for Commission registration and to report the market value of its assets under management determined within 90 days of the filing.[752] The respondents to this information collection are all investment advisers registered with the Commission on January 1, 2012. Compliance with this collection of information is mandatory, and the information collected on Form ADV is not kept confidential.

Rule 203A-5 that we are adopting today differs from our proposed rule in several respects. First, the transition period begins on January 1, 2012, not the July 21, 2011 effective date of the Dodd-Frank Act, as proposed.[753] Second, advisers will be required to file an amended Form ADV by March 30, 2012 (instead of August 20, 2011, as proposed), and mid-sized advisers no longer eligible for Commission registration will be required to withdraw by June 28, 2012 (instead of October 19, 2011, as proposed), which provides 180 days instead of the 90 days we proposed.[754] Third, we are providing additional flexibility for an adviser to choose the date by which it must calculate its assets under management that it reports on Form ADV by requiring the same 90 day period as in Form ADV today, instead of 30 days, as proposed.[755]

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751 New rule 203A-5(b)-(c). *See supra* section II.A.1. Advisers registered with us on July 21, 2011 that have at least $25 million in assets under management will be exempt from the new prohibition on Commission registration for mid-sized advisers until 2012, when the rule will require them to switch to state registration and withdraw their registration with us. *See* new rule 203A-5(a); *supra* section II.A.1., note 28.

752 *See supra* sections II.A.1. and II.A.2.

753 *See* proposed rule 203A-5(a)-(b); *supra* section II.A.1.

754 *See* proposed rule 203A-5(b)-(c); *supra* section II.A.1.

755 *See* new rule 203A-5(b); amended Form ADV: Instructions for Part 1A, instr. 5.b.(4); *supra* section II.A.1.

As noted above, we requested comment on the PRA analysis contained in the Implementing Proposing Release. Several commenters expressed general concerns about the paperwork burdens of requiring all advisers to make an additional one-time filing of Form ADV.[756] Some commenters argued that we should decrease the paperwork burden by exempting advisers unaffected by the statutory changes from the Form ADV filing requirement,[757] or only requiring advisers to report their assets under management.[758] Several commenters agreed with us that the transition should be delayed until the IARD is able to accept filings of reviewed Form ADV, instead of implementing an alternative, such as requiring interim paper filings that would increase the paperwork burdens.[759]

Changing the deadline under rule 203A-5 for advisers to re-file amended Form ADV to March 30, 2012, which coincides with most advisers' required annual updating amendment, significantly reduces the paperwork burden of rule 203A-5 by eliminating the requirement that

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756 *See, e.g.*, ICI Letter; MFA Letter; NYSBA Committee Letter; Shearman Letter.

757 ICI Letter (recommending exempting advisers that do not rely on assets under management to register with the SEC); MFA Letter (recommending exempting private fund advisers that file an initial Form ADV by July 21); NYSBA Committee Letter (recommending exempting advisers who will continue to be eligible for Commission registration and advisers relying on the section 203(b)(3) exemption that we proposed would have to register with the Commission by July 21, 2011).

758 Shearman Letter.

759 *See* NASAA Letter ("the benefits of electronic filing, including easy public access to the documents, are significant and would outweigh any disadvantages imposed by a delay in filing deadlines."); NRS Letter (urging Commission not to "regress to paper filings" which would be "a huge step into the past" and "appears to be counter to Dodd-Frank Act purposes of transparency and consistency."). *See also* Dezellem Letter (the IARD is efficient and reduces risks of misplacing paper documents and possible filing errors); NYSBA Committee Letter (the IARD is the "most efficient mechanism for advisers and exempt reporting advisers to meet their filing obligations and make such filings to the public."). FINRA informed us that the IARD will be updated to reflect the revisions to Form ADV that we are adopting today beginning in November. *See supra* section II.A.1.

these advisers incur the costs associated with a special one-time filing requirement.[760] This deadline also coincides with the filing deadline for newly registering private fund advisers, which, as one commenter points out results in "a single, comprehensive Form ADV filing to register with the Commission" instead of requiring two filings that "would be costly, inefficient and potentially confusing."[761]

We estimate that there will be approximately 3,900 respondents to this collection of information filing an amendment to Form ADV.[762] Each respondent will respond once. For purposes of the collection of information burden for Form ADV, we estimate that the amendment will take each adviser approximately 6 hours per amendment, on average,[763] and that the proposed amendments to Part 1A of Form ADV will take each adviser approximately 4.5 hours, on average, to complete.[764] We estimated that the total one-time burden for completing the proposed Form ADV amendments to be 124,425 hours, plus an additional 33,350 hours for private fund reporting, for a total of 157,775 hours.[765] As discussed above, however, the number of advisers that we estimate will complete an additional Form ADV amendment will be lower than under proposed rule 203A-5. We estimate that 700 advisers that will remain registered with the Commission after the switch will file an other-than-annual amendment, and 3,200 mid-sized

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760 *See supra* note 511. *See also* CMC Letter (suggesting "timing of the transition from federal to state registration could be centered around renewals for 2012").

761 *See* MFA Letter.

762 *See supra* note 511. The PRA burden for filing Form ADV-W is part of the PRA burden submitted for Form ADV-W. *See infra* section VI.E. The Implementing Proposing Release erroneously included Form ADV-W both in the PRA burden for proposed rule 203A-5 and for Form ADV-W. *See* sections V.C. and V.E. of the Implementing Proposing Release.

763 We anticipate that the hour burden for the refiling of Form ADV for purposes of new rule 203A-5 will be the same as an adviser's annual amendment filing, which has an approved burden of 6 hours. *See supra* section VI.B.2.a.iii.

764 *See supra* sectionsVI.B.1.a.

765 *See* Implementing Proposing Release, *supra* note 7, at nn. 403, 444.

advisers will file a Form ADV amendment with us before they switch to state registration.[766] In addition, of these 3,900 registered advisers, we estimate that 850 advise one or more private funds and will have to complete the private fund reporting requirements.[767] We expect this will take 8,373 hours, and we estimate that the total one-time burden for completing the Form ADV amendments to be 52,473 hours.[768]

D. Form ADV-NR

We are making minor amendments to Form ADV-NR (OMB Control No.: 3235-0238), the form used to appoint the Secretary of the Commission as an agent for service of process for certain non-resident advisers.[769] Non-resident general partners or managing agents of SEC-registered investment advisers must make a one-time filing of Form ADV-NR with the Commission. Form ADV-NR requires these non-resident general partners or managing agents to furnish us with a written irrevocable consent and power of attorney that designates the Commission as an agent for service of process, and that stipulates and agrees that any civil suit or action against such person may be commenced by service of process on the Commission. The amendments we are adopting reflect that exempt reporting advisers will be filing reports on the IARD, and that they will use Form ADV-NR in the same way and for the same purpose as it is currently used by registered investment advisers. The collection of information is necessary for

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766 *See supra* note 511.

767 Based on IARD data as of April 7, 2011, 839 advisers out of the estimated 3,700 current SEC-registered advisers that advise private funds do not have a December fiscal year end or are expected to switch to state registration. We have rounded this number to 850 for purposes of this analysis.

768 *See supra* notes 520-522, 528-532. ((6 hours (annual amendment) + 4.5 hours (new items)) x 4,200) + ((442 advisers x 3 funds x 1 burden hour per fund) + (365 x 10 funds x 1 burden hour per fund) + (43 advisers x 79 funds x 1 burden hour per fund)) = 44,100 (burden hours for Form ADV filing excluding private fund reporting + 8,373 (burden hours for private fund reporting) = 52,473 total burden hours for Form ADV filing.

769 *See* amended Form ADV-NR; Form ADV: General Instruction 16.

us to obtain appropriate consent to permit the Commission and other parties to bring actions against non-resident partners or agents for violations of the federal securities laws. This collection of information is found at 17 CFR 279.4. The collection of information is mandatory, and the information provided in response to the collection is not kept confidential. The currently approved collection of information in Form ADV-NR is 18 hours.

In the Implementing Proposing Release, we estimated that approximately 9,150[770] investment advisers would be registered with the Commission after the Dodd-Frank Act amendments to the Advisers Act take effect and that approximately 2,000[771] exempt reporting advisers would file reports with the Commission, and that these advisers would file Form ADV-NR at the same annual rate (0.17 percent) as advisers registered with us.[772] Accordingly, we estimated that the annual aggregate information collection burden for Form ADV-NR would be 19 hours, an increase of one hour over the currently approved burden.[773] We did not receive comments on these estimates. Based on updated IARD data, we now estimate that approximately 9,750[774] investment advisers will be registered with the Commission and continue to estimate that approximately 2,000[775] exempt reporting advisers will file reports with the Commission, and that these advisers will file Form ADV-NR at an annual rate of 0.17 percent,[776] for a total of approximately 20 filings annually.[777] We continue to estimate that ADV-NR

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770 *See* Implementing Proposing Release, *supra* note 7, at section V.D.

771 *See id.*

772 *See id.*

773 *See id.*

774 *See supra* note 655 and accompanying text.

775 *See supra* note 734 and accompanying text.

776 *See* Implementing Proposing Release, *supra* note 7, at n.450.

777 0.17% (rate of filing) x (9,750 estimated registered investment advisers + 2,000 estimated exempt reporting advisers) = approximately 20 Form ADV-NR filings.

requires an average of one hour to complete. Accordingly, we estimate that as a result of the amendments to Form ADV-NR and the change in the number of filers after the effectiveness of the Dodd-Frank Act, the annual aggregate information collection burden for Form ADV-NR will be 20 hours, an increase of two hours over the currently approved burden of 18 hours.[778]

E. Rule 203-2 and Form ADV-W

We are amending rule 203A-2(b), the exemption from the prohibition on registration for certain pension consultants. The amendments will increase the minimum value of plan assets which an adviser must consult from $50 to $200 million annually.[779] An investment adviser will have to be a pension consultant with respect to assets of plans having an aggregate value of $200 million or more to be able to register with the Commission. Those pension consultants providing consulting services to plans of less than $200 million will be required to file a notice of withdrawal of their registration in accordance with rule 203-2 on Form ADV-W (OMB Control No. 3235-0313). The collection of information on Form ADV-W is mandatory and is not kept confidential. The currently approved collection of information for Form ADV-W is 500 hours for 1,000 responses.

The amendments to the rule that we are adopting today do not differ from our proposed amendments. Commenters supported our proposal and did not discuss the proposal's collection of information estimates.[780] In the Implementing Proposing Release, we estimated that approximately 50 of the current advisers relying on this exemption from the prohibition on registration would no longer be eligible to rely on the exemption if adopted as proposed, and approximately 4,100 advisers also would have to withdraw their Commission registration as a

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[778] 20 ADV-NR filings x 1 hour per filing = 20 hours. 20 hours – 18 hours = 2 hours.

[779] *See* amended rule 203A-2(a)(1).

[780] NRS Letter; Pickard Letter.

result of the Dodd-Frank Act.[781] We have lowered our estimate of advisers withdrawing from Commission registration to 3,200 based on more current IARD data,[782] but we continue to estimate that 50 of the current advisers relying on this exemption from the prohibition on registration will no longer be eligible to rely on the exemption as adopted.[783]

The estimated 50 advisers no longer eligible to rely on the exemption, however, will have to file a notice of withdrawal on Form ADV-W in accordance with rule 203-2 under the Advisers Act and withdraw their registration based on the amendment to rule 203A-2(b).[784] In addition, as noted above, we estimate that approximately 3,200 advisers also will have to withdraw their Commission registration as a result of the Dodd-Frank Act. Because these advisers are registered today, we further anticipate that these advisers will be switching from SEC to state registration, and as a result will be filing a "partial" Form ADV-W. We have estimated for purposes of our current approved burden under the PRA for rule 203-2 and Form ADV-W, that a partial withdrawal imposes an average burden of approximately 0.25 hours for an adviser.[785] Thus, we estimate that the amendment to rule 203A-2(b) associated with filing Form ADV-W will generate a burden of approximately 813 additional hours[786] in addition to the approved burden of 500 hours for a total of 1,313 hours.

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781 *See* Implementing Proposing Release, *supra* note 7, at n.453 and accompanying and following text.

782 *See supra* note 510.

783 Based on IARD data as of April 7, 2011, there are 322 advisers relying on the pension consultant exemption from registration, and we estimate that approximately 15 percent will no longer be eligible to rely on the exemption as adopted. This estimate is based on our understanding that a typical pension consultant will have plan assets far in excess of the higher threshold, in light of the fact that most pension plans contain a significant amount of assets.

784 *See supra* note 549 (discussing the fact that advisers filing Form ADV-W due to our amendment to rule 203A-2(b) will likely file partial withdrawals).

785 *See supra* note 533.

786 (3,200 + 50) responses on Form ADV-W x 0.25 hours = 812.5 hours.

F. Form ADV-H

Rule 204-4(e) provides a temporary hardship exemption for an exempt reporting adviser having unanticipated technical difficulties that prevent submission of a filing to the IARD system.[787] Rule 203-3(a) provides a similar temporary hardship exemption for registered advisers that file an application on Form ADV-H (OMB Control No. 3235-0538).[788] Like rule 203-3(a), rule 204-4(e) requires advisers relying on the temporary hardship exemption to file an application on Form ADV-H in paper format no later than one business day after the filing that is the subject of the Form ADV-H was due, and submit the filing on Form ADV in electronic format with the IARD no later than seven business days after the filing was due.[789] Because we are adopting rule 204-4, respondents to the collection of information on Form ADV-H will now include exempt reporting advisers, in addition to registered advisers. The collection of information on Form ADV-H is mandatory for registered advisers and exempt reporting advisers relying on a temporary hardship exemption. The information collected on Form ADV-H is not kept confidential.

In the Implementing Proposing Release, we estimated that exempt reporting advisers would file approximately two responses to Form ADV-H annually.[790] We also estimated that Form ADV-H would impose the same average burden per response on exempt reporting advisers as it imposes on registered advisers—one hour. Thus, we estimated that rule 204-4 would result in an increase of two hours in the total hour burden associated with Form ADV-H.[791] We did not receive comments on our estimates. We continue to estimate that exempt reporting advisers will

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787 New rule 204-4(e).

788 Rule 203-3(a); 17 CFR 279.3 (Form ADV-H).

789 New rule 204-4(e).

790 *See* Implementing Proposing Release, *supra* note 7, at section V.F.

791 *See id.*

file approximately two responses to Form ADV-H annually, with each response requiring an average of one hour, for an estimated annual burden of two hours.[792] However, as discussed above, the number of registered advisers will decrease due to the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) from 11,500 to 9,750.[793] Given the reduction in registered advisers, we estimate that Form ADV-H will receive 10 annual responses from registered advisers.[794] We continue to estimate that Form ADV-H will require an average of one hour to complete, and thus estimate that the total annual burden for registered advisers to be 10 hours.[795] Thus, the total burden associated with Form ADV-H will increase one hour to 12 hours.[796]

G. Rule 204-2

Rule 204-2 (OMB Control No. 3235-0278) requires investment advisers registered, or required to be registered under section 203 of the Act, to keep certain books and records relating to their advisory business.[797] The collection of information under rule 204-2 is necessary for the Commission staff to use in its examination and oversight program, and the information is generally kept confidential.[798] The collection of information is mandatory.

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792 To estimate the currently approved total burden associated with Form ADV-H, we estimated that registered advisers file approximately 11 responses to Form ADV-H per year, which, given the then-estimated 11,850 advisers registered with the Commission, meant that approximately 1 response is filed per 1,000 advisers (11,850 registered advisers / 11 responses = approximately 1 response per 1,000 registered advisers). We estimate that approximately 2,000 exempt reporting advisers will file reports on Form ADV in accordance with rule 204-4. Thus, we estimate two responses to Form ADV-H in accordance with rule 204-4 (2,000 exempt reporting advisers x 1 response per 1000 advisers = 2 responses).

793 *See supra* note 655.

794 9,750 registered advisers x 1 response per 1,000 advisers = 9.75 responses.

795 10 responses x 1 hour = 10 hours.

796 The current approved burden is 11 hours. Our new estimate is 10 hours for registered advisers + 2 hours for exempt reporting advisers = 12 hours.

797 Rule 204-2.

798 *See* section 210(b) of the Advisers Act.

We are amending rule 204-2 to update the rule's "grandfathering provision" for investment advisers that are currently exempt from registration under the "private adviser" exemption, but will be required to register after the Dodd-Frank Act eliminates the "private adviser" exemption on July 21, 2011.[799] Upon registration, these advisers will become subject to the recordkeeping requirements of the Act, including the requirement to keep certain records relating to performance.[800] The amendment clarifies that these advisers are not obligated to keep certain performance-related records for any period when they were not registered with the Commission; however, to the extent that these advisers preserved these performance-related records even though they were not required to keep them, they must continue to preserve them.[801] Most, if not all, advisers likely gather the records and documents necessary to support the calculation of performance or rate of return as those records or documents are produced or at the time a calculation is made. Thus, we do not believe that the amendment to the grandfathering provision will reduce our current approved average annual hourly burden per adviser under rule 204-2.

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799 *See* amended rule 204-2(e)(3)(ii); section II.D.2.b. In addition, we are amending rule 204-2(e)(3)(ii) to cross-reference the new definition of "private fund" added to the Advisers Act by the Dodd-Frank Act where that term is used in rule 204-2. This amendment is technical and will not increase or decrease the collection burden on advisers. We are also rescinding rule 204-2(l) because that section was vacated by a federal appeals court in *Goldstein.*

800 *See* amended rule 204-2(a)(16).

801 *See* amended rule 204-2(e)(3)(ii) (stating, "[i]f you are an investment adviser that was, prior to July 21, 2011, exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b-3(b)(3)), as in effect on July 20, 2011, [this rule] does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under [certain sections of this rule] to the extent those books and records pertain to the performance or rate of return of such private fund (as defined in section 202(a)(29) of the Act (15 U.S.C. 80b-2(a)(29)), or other account you advise for any period ended prior to your registration, provided that that you continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period." (emphasis added)).

Although we do not anticipate that our amendments to rule 204-2 will affect the per adviser burden imposed by the rule, the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) will change our estimates of the total annual burden associated with the rule.[802] The current approved burden for rule 204-2 is based an estimate of 11,658 registered advisers subject to rule 204-2 and an estimated average burden of 181.45 burden hours each year per adviser, for a total of 2,115,376 hours. We estimated in the Implementing Proposing Release that the Dodd-Frank Act will reduce the number of registered advisers to 9,150.[803] We did not receive comments on these estimates. However, based on updated IARD data, we now estimate that the Dodd-Frank Act will reduce the number of registered advisers to 9,750.[804] Thus, we estimate that the total burden under amended rule 204-2 will be 1,769,138 hours,[805] a reduction of 346,238 hours.[806]

The reduction in the number of advisers subject to the rule will also reduce the total non-labor cost burden of the rule. The current approved non-labor cost burden associated with rule 204-2 is $34,965,063, or an average of approximately $3,000 per adviser.[807] Due to the reduction in the number of advisers subject to rule 204-2, we estimate that the new total non-labor cost burden will be $29,250,000,[808] a reduction of $5,715,063.[809]

VII. FINAL REGULATORY FLEXIBILITY ANALYSIS

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802 Exempt reporting advisers are not subject to rule 204-2, and therefore there is no offsetting increase in the number of advisers subject to the rule.

803 *See* Implementing Proposing Release, *supra* note 7, at n.377 and accompanying text.

804 *See supra* note 655 and accompanying text.

805 9,750 registered advisers x 181.45 hours = approximately 1,769,138.

806 2,115,376 hours – 1,769,138 hours = 346,238 hours.

807 $34,965,063 / 11,658 advisers = approximately $3,000.

808 9,750 x $3,000 = $29,250,000.

809 $34,965,063 - $29,250,000 = $5,715,063.

The Commission has prepared the following Final Regulatory Flexibility Analysis ("FRFA"), in accordance with section 4(a) of the Regulatory Flexibility Act, regarding the rules and rule amendments we are adopting today to give effect to the Dodd-Frank Act's amendments to the Advisers Act.[810] It relates to new rules 203A-5 and 204-4, amendments to rules 0-7, 203-1, 203A-1, 203A-2, 203A-3, 203A-4, 204-1, 204-2, 206(4)-5, 222-1, 222-2, and amendments to Form ADV, Form ADV-NR and Form ADV-H under the Advisers Act.[811] We prepared an Initial Regulatory Flexibility Analysis ("IRFA") in conjunction with the Implementing Proposing Release in November 2010.[812]

A. Need for and Objectives of the New Rules and Rule Amendments

The new rules and rule amendments are necessary to give effect to provisions of the Dodd-Frank Act which, among other things, amend certain provisions of the Advisers Act, and to respond to a number of other changes made by the Dodd-Frank Act, including the Commission's pay to play rule. In addition, in light of our increased responsibility for oversight of private funds, we are requiring advisers to those funds to provide us with additional information about the operation of those funds, which will permit us to better oversee those advisers by focusing our examination and enforcement resources on those advisers to private funds that appear to present greater compliance risks. We also are requiring all registered advisers to provide us with additional information on their operations to allow us to more efficiently allocate our examination resources, to better prepare for on-site examinations, and to provide us with a better understanding of the investment advisory industry to assist our

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810 5 U.S.C. 604(a).

811 We note that the FRFA analysis associated with the requirement that an accountant's report be filed electronically was included in our adoption of substantive amendments to Form ADV-E. Today, we are making only a technical amendment to Form ADV-E to conform to that prior rulemaking. *See* 2009 Custody Release, *supra* note 310, at section VI.

812 *See* Implementing Proposing Release, *supra* note 7, at section VI.

evaluation of the implications of policy choices we must make in administering the Advisers Act.

Specifically, the new rules and rule amendments give effect to provisions of Title IV of the Dodd-Frank Act that: (i) reallocate responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain mid-sized advisers; (ii) repeal the "private adviser" exemption contained in section 203(b)(3) of the Advisers Act; and (iii) provide for reporting by advisers to certain types of private funds that are exempt from registration.[813] New rule 203A-5 and amendments to rules 203A-1, 203A-2, 203A-3, and 203A-4 are intended to provide us a means of identifying advisers that must transition to state regulation, clarify the application of the new statutory provisions under the Dodd-Frank Act, and extend certain of the exemptions we have adopted under section 203A of the Act to mid-sized advisers. Rule 203-1(e) is intended to provide an orderly transition to registration for advisers that previously relied on the "private adviser" exemption in section 203(b)(3) of the Advisers Act. New rule 204-4 and amendments to rule 204-1 are intended to require exempt reporting advisers to submit, and to update periodically, reports to us by completing several items on Form ADV. The amendments to rule 204-2 are intended to account for the Dodd-Frank Act's elimination of the "private adviser" exemption under section 203(b)(3) of the Advisers Act and its addition of a definition of "private fund" to the Advisers Act.[814] The amendments to Form ADV will permit the form to serve as a reporting, as well as a registration, form and to specify the seven items exempt reporting advisers must complete. The amendments to Form ADV also will provide additional information on the operations of registered investment advisers. The amendments to Forms

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[813] *See supra* section I.

[814] *See supra* section II.D.2.b. As discussed above, we are also rescinding rule 204-2(l), which was vacated by the federal appeals court in *Goldstein.*

ADV-NR and ADV-H will revise the forms for use by exempt reporting advisers. Additionally, we are amending the Advisers Act pay to play rule, rule 206(4)-5, to make it apply both to exempt reporting advisers and foreign private advisers, thereby preventing the unintended narrowing of the application of the rule resulting from the repeal of the "private adviser" exemption.[815] Furthermore, we are amending the rule to add the new "municipal advisor" category of registrant created by the Dodd-Frank Act to the categories of registered entities – referred to as "regulated persons" – excepted from the rule's prohibition on advisers paying third parties to solicit government entities.[816]

B. Significant Issues Raised by Public Comment

In the Implementing Proposing Release, we requested comment on the IRFA. In particular, we sought comment on the number of small entities, particularly small advisers, to which the new rules and rule amendments would apply and the effect on those entities, including whether the effects would be economically significant. None of the comment letters we received specifically addressed the IRFA. A couple of commenters made specific comments about the proposed rule and rule amendments' impact on smaller advisers, generally. In response to a question in the Implementing Proposing Release, one commenter stated that a shortened deadline, from 90 to 60 days, for filing an annual update to Form ADV would be particularly burdensome on small advisers because they have limited resources.[817] As discussed above, in light of this and similar concerns raised by other commenters, we are not adopting a requirement to accelerate the annual updating amendment deadline.[818] Another commenter asserted that we

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815 *See* amended rule 206(4)-5; *supra* section II.D.1.

816 *See id.*

817 Pickard Letter.

818 *See supra* section II.C. 7.

should retain the rule 203A-4 safe harbor for state-registered advisers that have a reasonable belief that they are prohibited from registration with the Commission as there has been, and continues to be, confusion among small advisers in calculating assets under management.[819] We have not retained the safe harbor, which, as we explain above, was designed for smaller advisory businesses (with assets under management of less than $30 million) that may not employ the same tools or otherwise have a need to calculate assets as precisely as advisers with greater assets under management.[820] Moreover, such a safe harbor would no longer apply to small advisers as it would be used, if at all, by advisers managing close to the new $100 million threshold for SEC registration and not the $30 million threshold that existed prior to the Dodd-Frank amendments to the Advisers Act.

C. Small Entities Subject to Rules and Rule Amendments

In developing these new rules and rule amendments, we have considered their potential impact on small entities to which they will apply. The rules and rule amendments will affect all advisers registered with the Commission and exempt reporting advisers, including small entities. Under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[821]

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819 NRS Letter.

820 *See supra* section II.A.6.

821 Rule 0-7(a) [17 CFR 275.0-7(a)].

Our rule and form amendments will not affect most advisers that are small entities ("small advisers") because they are generally registered with one or more state securities authorities and not with us. Under section 203A of the Advisers Act, most small advisers are prohibited from registering with the Commission and are regulated by state regulators.[822] We estimate that as of April 7, 2011, approximately 570 advisers that were small advisers were registered with the Commission.[823] Because these advisers are registered, they will be subject to new rule 203A-5 and amendments to rules 0-7, 203-1, 204-2, 203A-1, 203A-2, 203A-3, and 203A-4, and Forms ADV and ADV-NR. In addition, we estimate that, due to the Dodd-Frank Act's elimination of the "private adviser" exemption in section 203(b)(3), an additional two small advisers will become subject to these rules.[824] Further, as a result of the amendments to rule 203A-2, we estimate that 15 additional multi-state small advisers will register with us and be subject to these rules,[825] and 18 pension consultants that are small advisers will be required to withdraw from registration with us and will no longer be subject to these rules.[826] We estimate

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822 *See supra* section II.A.7.a.

823 Based on IARD data as of April 7, 2011, 572 advisers registered with the Commission were small advisers. We have rounded this number to 570 for purposes of this analysis.

824 We believe that the only small advisers that would become subject to registration as a result of the elimination of the private adviser exemption in section 203(b)(3) would be advisers to private funds that maintain their principal office and place of business in Wyoming. Based on IARD data as of April 7, 2011, we estimate that 28 SEC-registered small advisers are required to be registered with us because they have a principal office and place of business in Wyoming, which is 0.2% of all SEC-registered advisers (28 / 11,500 SEC-registered advisers = approximately 0.2%). We estimate that a similar proportion of the approximately 750 advisers to private funds that will register with the Commission due to the elimination of the private adviser exemption in section 203(b)(3) would be Wyoming-based small advisers. As a result, we estimate that approximately two small advisers to private funds will register with the Commission (750 private fund advisers x 0.2% = approximately two).

825 *See supra* note 555.

826 Based on IARD data as of April 7, 2011, 118 of the advisers that would be considered small advisers rely on the pension consultant exemption from registration. We estimate that approximately 15%, or 18, of these advisers would no longer be eligible to rely on the exemption

that four exempt reporting advisers that are small advisers will be subject to rule 204-4, and the amendments to rule 204-1, Form ADV, Form ADV-NR and Form ADV-H to give effect to the Dodd-Frank Act's reporting requirements by exempt reporting advisers.[827] We also estimate that four exempt reporting advisers that are small advisers will be subject to the amendments to rule 206(4)-5. Finally, all investment advisers, whether they are small advisers or not, will be subject to the technical amendments to rules 222-1 and 222-2. The small advisers subject to these amendments include approximately four exempt reporting advisers and approximately 14,600 state-registered advisers.[828]

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as amended. This ratio is consistent with our estimate for the PRA burden. *See supra* section VI.E. and note 783.

827 The only small adviser exempt reporting advisers that would be subject to the rule and amendments would be exempt reporting advisers that maintain their principal office and place of business in Wyoming. The current practical effect of section 203A(a)(1) is to prohibit U.S. advisers with less than $25 million in assets under management from registering with the Commission *unless* they maintain their principal office or place of business in Wyoming. *See* NSMIA Adopting Release, *supra* note 17, at section II.E. Currently, all U.S. states except Wyoming require certain investment advisers to register. See Transition Rule for Ohio Investment Advisers, Investment Advisers Act Release No. 1794, n. 4 (Mar. 25, 1999) [64 FR 15680 (Apr. 1, 1999)]. New rule 204-4 requires an adviser relying on an exemption under new sections 203(l) or (m) of the Advisers Act to complete and file reports on Form ADV. *See* new rule 204-4; *supra* section II.B.1. The exemptions from registration in sections 203(l) and (m) apply to advisers solely to venture capital funds and advisers solely to private funds with less than $150 million in assets under management, respectively. Small Wyoming-based advisers to venture capital funds or private funds may be required to register with the Commission but for the exemptions in section 203(l) or (m). Thus, these advisers would be subject to rule 204-4 and the amendments to rule 204-1, Form ADV, and Form ADV-H to give effect to the Dodd-Frank Act's mandate for reporting by exempt reporting advisers. Assuming that the proportion of registered Wyoming-based small advisers to registered advisers is similar to the proportion of small Wyoming-based exempt reporting advisers to exempt reporting advisers generally, we estimate that approximately four exempt reporting advisers that are small advisers would be subject to rule 204-4 and the amendments to rule 204-1, Form ADV, and Form ADV-H (2,000 exempt reporting advisers x 0.2% = four small Wyoming-based exempt reporting advisers).

828 Based on IARD data as of January 1, 2011, we estimate that there were approximately 14,600 state-registered advisers. Because section 203A currently precludes most advisers with less than $25 million in assets under management from registering with the Commission, we assume that nearly all of the 14,600 state-registered advisers are small advisers. Therefore, 14,600 small advisers (registered with the states as of January 1, 2011) + 18 small advisers (registering with the states due to the amendment to the pension consultant exemption in rule 203A-2(b)) – 2 small advisers (registering with the Commission due to elimination of the private adviser exemption in

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The rules and rule amendments we are adopting today impose certain reporting, recordkeeping, and compliance requirements on advisers, including small advisers. The rules and amendments require all of the small advisers registered with us to file an amended Form ADV, require some to file Form ADV-W, and require some to file reports as exempt reporting advisers. The amendments also cause the advisers to be subject to the existing recordkeeping and compliance requirements for SEC-registered advisers. These requirements and the burdens on small advisers are discussed below.[829]

Transition to State Registration

Rule 203A-5 imposes costs on all investment advisers, including small advisers, by requiring *each* investment adviser registered with us on January 1, 2012 to file an amendment to its Form ADV no later than March 30, 2012, and withdraw from Commission registration by June 28, 2012, if no longer eligible.[830] We estimate that all of the 570 small advisers currently registered with the Commission will file Form ADV, but none will withdraw registration because the Dodd-Frank Act does not change the eligibility requirements for small advisers registered with us since they already rely on one or more of the exemptions from the prohibition on registration.[831]

Switching Between State and Commission Registration

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section 203(b)(3)) – 15 small advisers (de-registering with the states and registering with the Commission due to the amendment to the multi-state adviser exemption in rule 203A-2(e)) = approximately 14,600 state-registered advisers that are small advisers.

829 *Supra* sections I. through II. describe these requirements in more detail.

830 New rule 203A-5(b)-(c). *See supra* section II.A.1.

831 *See* section 410 of the Dodd-Frank Act; rule 203A-2.

The amendments to rule 203A-1 eliminate the $5 million buffer in current rule 203A-1(a), which permits an adviser to register with the Commission if the adviser has between $25 million and $30 million of assets under management, and replaces it with a similar buffer for mid-sized advisers with assets under management of close to $100 million.[832] By definition, a small adviser under the Advisers Act has less than $25 million in assets under management; as such, these amendments should have no impact on small advisers.[833]

Exemptions from the Prohibition on Registration with the Commission

The amendments we are adopting to two of the three exemptions from the prohibition on registration in rule 203A-2 will cause small advisers to be subject to new reporting, recordkeeping, and other compliance requirements.[834] The amendment to the exemption from the prohibition on registration available to pension consultants in rule 203A-2(b) will increase the minimum value of plan assets on which an adviser must consult from $50 million to $200 million.[835] We estimate that this may cause approximately 18 small adviser pension consultants to be required to withdraw from registration with us by filing Form ADV-W and thus no longer be subject to Commission rules.[836] These advisers will likely need to register with one or more states, and comply with the states' recordkeeping and other regulatory requirements. These additional costs will have a negative impact on competition for these advisers compared to

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832 *See* amended rule 203A-1; *supra* section II.A.4.

833 *See* rule 0-7(a)(1).

834 *See* amended rule 203A-2; *supra* section II.A.5. The elimination of the exemption from the prohibition on Commission registration for NRSROs in rule 203A-2(a) will not affect small advisers because, based on IARD data as of April 7, 2011, none of the advisers registered with us relies on the exemption.

835 We also are renumbering the rule as rule 203A-2(a). *See* amended rule 203A-2(a); *supra* section II.A.5.b.

836 *See supra* note 826 and accompanying text.

pension consultants with more than $200 million of plan assets that will remain registered with the Commission.

The amendment to the multi-state adviser exemption in rule 203A-2(e) will permit all investment advisers who are required to register as an investment adviser with 15 or more states to register with the Commission, rather than 30 states, as currently required.[837] An adviser relying on this exemption will continue to report certain information on Form ADV[838] and maintain a record of the states in which the investment adviser has determined it would, but for the exemption, be required to register. This will promote competition by making the standards for the multi-state exemption consistent for small and mid-sized advisers. We estimate that, in addition to the approximately 19 small advisers that rely on the exemption currently,[839] approximately 15 will begin relying on the exemption, as amended.[840] Advisers newly relying on the amended exemption will incur costs associated with completing and filing Form ADV for purposes of registration with the Commission, and all of the advisers relying on the exemption will incur the costs associated with keeping records sufficient to demonstrate that they would be required to register with 15 or more states. In addition, these advisers will incur costs of

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837 We also are renumbering the rule as rule 203A-2(d). *See* amended rule 203A-2(d); *supra* section II.A.5.c.

838 Advisers will be required to: (i) include a representation on Schedule D of Form ADV that the investment adviser has concluded that it must register as an investment adviser with 15 or more states; and (ii) undertake to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that the investment adviser would be required by the laws of fewer than 15 states to register as an investment adviser with those states. *See* amended rule 203A-2(d)(2).

839 Based on IARD data as of April 7, 2011, 19 advisers checked Item 12 of Part 1A of Form ADV to indicate that they are small advisers and checked Item 2.A.(9) to indicate their basis for SEC registration under the multi-state rule.

840 *See supra* note 555.

complying with the Advisers Act and our rules, but they may see an absolute reduction in compliance costs by registering with the Commission instead of 15 or more states.[841]

Elimination of Safe Harbor

Eliminating rule 203A-4, which has provided a safe harbor from Commission registration for an investment adviser that is registered with state securities authorities based on a reasonable belief that it is prohibited from registering with the Commission because it does not have at least $30 million of assets under management, will not create new requirements for small advisers.[842] These advisers will not have at least $30 million of assets under management, and advisers have not, in our experience, relied on this safe harbor.

Mid-Sized Advisers

Providing in instructions to Form ADV an explanation of whether a mid-sized adviser is "required to be registered" or is "subject to examination" by a particular state securities authority for purposes of section 203A(a)(2)'s prohibition on mid-sized advisers from registering with the Commission will not create new reporting requirements for small advisers.[843] The mid-sized adviser requirements will only apply to advisers with assets under management between $25 million and $100 million and therefore will not apply to small advisers.

Exempt Reporting Advisers

Rule 204-4 and the amendments to rules 204-1, Form ADV, and Form ADV-H require exempt reporting advisers to file reports with the Commission electronically on Form ADV and impose reporting requirements on an estimated four small advisers.[844] As discussed above, we

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841 *See supra* section II.A.5.c., note 543 and accompanying text.

842 Rule 203A-4. *See supra* section II.A.6.

843 *See* amended Form ADV: Instructions for Part 1A, instr. 2.b.; *supra* section II.A.7.

844 *See supra* section II.B. and note 827.

estimate that completing and filing Form ADV will cost $2,032 for each exempt reporting adviser.[845] In addition, small exempt reporting advisers would be required to pay an estimated filing fee of $225 annually,[846] for a total of $900 for the estimated four small exempt reporting advisers.[847] Finally, under rule 204-4 exempt reporting advisers that seek a temporary hardship exemption from electronic filing must complete and file Form ADV-H.[848] To the extent any of the four small exempt reporting advisers file Form ADV-H, we have estimated that it would require one burden hour at a total cost of $189.[849]

Amendments to Form ADV

The amendments to Form ADV that we are adopting today will require registered advisers to report information that is different from, or in addition to, what is currently required. Approximately 570 currently registered small advisers, and two small advisers currently relying on the private adviser exemption that we expect will register with us, will be subject to these requirements.[850] We expect these 570 advisers will spend, on average, 4.5 hours to respond to the new and amended questions on Form ADV, other than the private fund reporting requirements.[851] We expect the aggregate cost associated with this process will be $651,511.[852]

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845 *See supra* note 579 and accompanying text. $4,064,000 / 2,000 = $2,032.

846 *See supra* notes 567-568 and accompanying text (discussing the potential filing fee).

847 $225 x 4 small exempt reporting advisers = $900.

848 New rule 204-4(e).

849 *See supra* note 596 and accompanying text.

850 *See supra* notes 823 and 824 and accompanying text.

851 *See supra* text preceding note 679. We are calculating costs only of the increased burden because we have previously assessed the costs of the other items of Form ADV for registered advisers and for new advisers attributed to annual growth. The amendments to Form ADV increase neither the burden associated with these items on Form ADV, nor the external costs associated with certain Part 2 requirements.

852 We expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to

The two anticipated newly registering advisers will spend, in the aggregate, about 101 hours total to complete the form (Part 1 except for the private fund reporting requirements, and Part 2) as well as to amend the form periodically, to prepare brochure supplements, and to deliver codes of ethics to clients,[853] for a total cost of $25,655.[854] In addition, of these approximately 572 registered advisers, we estimate that 50 advise one or more private funds and will have to complete the private fund reporting requirements we are adopting today.[855] We expect this will take 150 hours,[856] in the aggregate, for a total cost of $38,100.[857] The total estimated labor costs associated with our Form ADV amendments that we expect will be borne by small advisers, therefore, are $715,266. Additionally, we estimate that one of the newly registering advisers will

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account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $235 and $273 per hour, respectively. 570 advisers x 4.5 hours = 2,565 hours. (1,282.5 hours x $235 = $301,388) + (1,282.5 hours x $273 = $350,123) = $651,511.

853 2 advisers x (40.74 hours per adviser to complete entire form (except private fund reporting requirements)) + (1 annual updating amendment x 6.0 hours) + (1 interim updating amendment per year x 0.5 hours) + (1 hour on new brochure supplements) + (1 hour on interim amendments to brochure supplements) + (1.3 hours delivering codes of ethics to clients)) = 101 hours. *See supra* notes 679, 709, 710 and accompanying text.

854 (50.5 hours x $235 = $11,868) + (50.5 hours x $273 = $13,787) = $25,655. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 618.

855 Based on IARD data as of April 7, 2011. Form ADV currently asks an adviser to report about investment-related partnerships and limited liability companies advised by the adviser *and* its related persons. As a result, the data we have obtained from IARD over-estimates the average number of funds as a result of reporting of the same fund multiple times by affiliated registered advisers. We note the decrease in the estimated number of small advisers to private funds in the Implementing Proposing Release is primarily attributable to an increase in these advisers' assets under management, rendering them no longer "small" for purposes of FRFA. *See* Implementing Proposing Release, *supra* note 7 at n.516 and accompanying text.

856 We expect these advisers are likely to advise 3 funds each. *See* text accompanying note 698. We estimated above that private fund reporting would take an adviser approximately 1 hour per fund to complete. 50 advisers x 3 hours = 150 hours.

857 (75 hours x $235 = $17,625) + (75 hours x $273 = $20,475) = $38,100. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 522.

use outside legal services to assist them in preparing their Part 2 brochure, for a total non-labor cost of $3,200.[858]

Amendments to Pay to Play Rule

Our amendment to the pay to play rule to make it apply to exempt reporting advisers and foreign private advisers will not create new reporting, recordkeeping, or other compliance requirements for these advisers.[859] Rather, we are adopting this amendment to assure that the rule continues to apply to these advisers and to prevent the unintended narrowing of the rule.[860] Our amendment to the pay to play rule to add registered municipal advisors to the definition of "regulated persons" (*i.e.*, those excepted from the rule's ban on third-party solicitation) may create new recordkeeping and compliance requirements on investment advisers that are small advisers subject to the rule to the extent that they have to verify and document that persons that they hire to solicit government entities are indeed registered municipal advisors, if these solicitors do not otherwise meet the "regulated person" definition.[861]

Other Amendments

Our amendments to rule 204-2's grandfathering provision are meant to assure that private fund advisers that are required to register as a result of the Dodd-Frank Act's elimination of the private fund exemption in section 203(b)(3) will not face a retroactively imposed recordkeeping requirement.[862] We are also making a technical amendment to rule 204-2(e)(3)(ii) to a cross-

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858 The currently approved burden associated with Form ADV already accounts for similar estimated costs to be incurred by current registrants. The non-labor costs for Form ADV are based on an estimate that 50% of small advisers will retain either legal services (at $3,200) or compliance consulting services (at $3,000) to assist in the preparation of Form ADV. *See supra* notes 668 and 669 and accompanying text.

859 *See supra* section II.D.1 (discussing this amendment).

860 *See id.*

861 *See id.*

862 *See supra* section II.D.2.b.

reference to the new definition of a private fund in section 202(a)(29) of the Advisers Act.[863] These amendments will not create reporting, recordkeeping, and other compliance requirements for small advisers independent of the reporting, recordkeeping, and other compliance requirements imposed by current rule 204-2.[864]

We do not believe that our technical amendments to rules 0-7 and 222-1 will impose reporting, recordkeeping, and other compliance requirements on small advisers. Our amendment to rule 203-1 will not impose reporting, recordkeeping, and other compliance requirements on small advisers. Rather, it delays reporting, recordkeeping, and other compliance requirements on such advisers to the extent that they currently rely on the "private adviser" exemption in section 203(b)(3).[865] Because our amendments to rule 222-2 will require advisers to count clients from whom they do not receive compensation for purposes of the national *de minimis* standard, some small advisers may be required to register with one or more states, and comply with the states' recordkeeping and other regulatory requirements.[866]

E. Agency Action to Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small advisers. In considering whether to adopt the new rules and rule amendments, the Commission considered the following alternatives: (i) the establishment of differing

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863 *See id*.

864 The Dodd-Frank Act's removal of the private adviser exemption in section 203(b)(3) may require additional small advisers to register with the Commission. Therefore, these small advisers would become subject to rule 204-2 with its reporting, recordkeeping, and other compliance burdens. However, subjecting these entities to rule 204-2 is a function of the Dodd-Frank Act's removal of the private adviser exemption in section 203(b)(3), not our amendments to rule 204-2.

865 *See supra* section III.B.2.

866 *See supra* section II.D.2.e (discussing the amendments to rule 222-2).

compliance or reporting requirements or timetables that take into account the resources available to small advisers; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small advisers; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rules, or any part thereof, for such small advisers.

Regarding the first and fourth alternatives, we do not believe that differing compliance or reporting requirements or an exemption from coverage of the new rules or rule amendments, or any part thereof, for small advisers would be appropriate or consistent with investor protection or with Congress's mandate in the Dodd-Frank Act, to the extent the new rule or amendment is being adopted due to a Congressional mandate. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small advisory firms, it would be inconsistent with the purposes of the Act to specify different requirements for small advisers under the new rules and amendments unless expressly required to do so by Congress.

Regarding the second alternative, rule 203A-5 will enable small advisers to easily and efficiently identify whether they are subject to our regulatory authority after the Dodd-Frank Act's amendment to section 203A becomes effective, and will also help minimize any potential uncertainty about the effects of the Dodd-Frank Act on their registration status by providing a simple, efficient means of determining their post-Dodd-Frank registration status as of a specific date. The amendments to rule 203A-1 eliminate the $5 million buffer because it seems unnecessary in light of Congress's determination generally to require most advisers having between $30 million and $100 million of assets under management to be registered with the states,[867] and makes the registration requirements for advisers with assets under management

[867] *See supra* note 426 and accompanying text.

between $25 million and $30 million uniform with the requirements for advisers with assets under management between $30 million and $100 million. The buffer for advisers with close to $100 million of assets under management will prevent advisers from frequently having to switch to and from Commission registration due to market fluctuations and will eliminate the additional associated costs they would therefore incur.[868] Amending the multi-state adviser exemption in rule 203A-2(e) also will consolidate and simplify compliance for small advisers by aligning the rule with the multi-state exemption Congress built into the mid-sized adviser provision under section 410 of the Dodd-Frank Act and by requiring one standard for advisers relying on the exemption.[869] This amendment also will reduce the compliance burdens on advisers required to be registered with at least 15 states, but less than 30, by allowing them to register with a single securities regulator—the Commission. Furthermore, requiring the use of an existing form, Form ADV, and an existing filing system, the IARD, for reporting and registration purposes will clarify and simplify the processes of registering and/or reporting for small advisers because: (i) all of the information collection requirements for both registration and reporting will be consolidated in a single form; (ii) a small exempt reporting adviser will be able to use the same form and filing system both for reporting and for purposes of registering with one or more state securities authorities; and (iii) a small exempt reporting adviser may find that it can no longer

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868 *See supra* note 427 and accompanying text.

869 *See* amended rule 203A-2(d); *supra* section V.A.1. Under rule 203A-2(e), the prohibition on registration with the Commission does not apply to an investment adviser that is required to register with 30 or more states. Once registered with the Commission, the adviser remains eligible for Commission registration as long as it would be obligated, absent the exemption, to register with at least 25 states. We are amending rule 203A-2(e) to permit all investment advisers required to register as an investment adviser with 15 or more states to register with the Commission.

rely on an exemption from registration with the Commission and will be able to register simply by filing an amendment to its current Form ADV to apply for registration.[870]

Regarding the third alternative, we do not consider using performance rather than design standards to be consistent with Congress's mandate in the Dodd-Frank Act.

VIII. EFFECTS ON COMPETITION, EFFICIENCY AND CAPITAL FORMATION

The Commission is adopting certain new rules and amending others pursuant to its authority under sections 204(a) and 206A of the Advisers Act,[871] and sections 23(a) and 28(e)(2) of the Exchange Act.[872] Section 204(a) of the Advisers Act and section 28(e)(2) of the Exchange Act require the Commission, when engaging in rulemaking under the authority provided in those sections, to consider whether the rule is "necessary or appropriate in the public interest or for the protection of investors."[873] Section 202(c) of the Advisers Act requires that whenever the Commission is engaged in rulemaking and is required, pursuant to the Advisers Act, to consider or determine whether an action is necessary or appropriate in the public interest, the Commission must also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[874] Section 3(f) of the Exchange Act imposes the same requirements on the Commission's Exchange Act rulemakings.[875] Section 23(a) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition, and prohibits the Commission from

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870 *See supra* section II.C.

871 15 U.S.C. 80b-4(a), 80b-6A.

872 15 U.S.C. 78w(a) and 78bb(e)(2).

873 15 U.S.C. 80b-4(a) and 78bb(e)(2).

874 15 U.S.C. 80b-2(c).

875 15 U.S.C. 78c(f).

adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[876]

The Commission is adopting rule 204-4 and amending rules 203-1, 204-1, and 204-2 and Forms ADV, ADV-NR, and ADV-H.[877] The new rule and rule amendments are designed to give effect to provisions of Title IV of the Dodd-Frank Act.[878] We are adopting new rule 204-4 to require exempt reporting advisers to file reports with the Commission electronically on Form ADV.[879] We are adopting amendments to Form ADV to improve our risk-assessment capabilities and so that it can serve the dual purpose of an SEC reporting form for exempt reporting advisers and, as it is used today, a registration form for both state and SEC-registered firms.[880] In addition to requiring that exempt reporting advisers use Form ADV, rule 204-4 will require these advisers to submit reports through the IARD and to pay a filing fee.[881] We are also amending rule 204-1, which addresses when and how advisers must amend their Form ADV, to add a requirement that exempt reporting advisers file updating amendments to reports filed on

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876 15 U.S.C. 78w(a)(2).

877 In contrast, we are adopting new rule 203A-5 and amendments to rules 203A-1, 203A-2, 203A-3, and 203A-4 pursuant to our authority set forth in sections 203A(a)(2), 203A(c) and 211(a), amendments to rules 0-7, 222-1, and 222-2 pursuant to our authority set forth in section 211(a), and amendments to rule 206(4)-5 pursuant to our authority set forth in sections 206(4) and 211(a). For a discussion of the effects of this new rule and rule amendments on competition, efficiency, and capital formation, see *supra* sections V., VI., and VII. We note that our analysis of the effects on competition, efficiency, and capital formation associated with the requirement that an accountant's report be filed electronically was included in our adoption of substantive amendments to that form. Today, we are making only a technical amendment to Form ADV-E to conform to that prior rulemaking. *See* 2009 Custody Release, *supra* note 310 at section VII.

878 For a discussion of the overall objectives of our rules and rule amendments, see *supra* section I.

879 New rule 204-4. *See supra* section II.B.1.

880 *See supra* sections II.B. and II.C.

881 New rule 204-4(b). New rule 204-4(e) also allows exempt reporting advisers having unanticipated technical difficulties that prevent submission of a filing to the IARD system to request a temporary hardship exemption from electronic filing requirements by filing Form ADV-H. We are also adopting technical amendments to Form ADV-H for this purpose.

Form ADV.[882] Finally, we are amending rule 203-1 to allow an adviser that was relying on, and was permitted to rely on, the "private adviser" exemption in section 203(b)(3) on July 20, 2011, to delay registering with the Commission until March 30, 2012.[883]

In the Implementing Proposing Release, we solicited comment on whether the proposed rule and rule amendments would, if adopted, promote efficiency, competition, and capital formation. We further encouraged commenters to provide empirical data to support their views. We did not receive any empirical data in this regard concerning the proposed amendments. We received some comments, addressing competition and efficiency generally, which are addressed below.

A. Exempt Reporting Adviser Reporting Requirements

The Dodd-Frank Act provides for the Commission to require reporting by exempt reporting advisers, but it does not indicate the information we should collect or the filing method by which it should be collected. Our choices, in adopting rule 204-4 to require these advisers to complete a subset of items contained in Form ADV and to file through the IARD, and in amending rule 204-1 to impose periodic updating requirements of those filings, will impose costs on exempt reporting advisers.[884] However, as we asserted in the Implementing Proposing Release, our choices also will create efficiencies that benefit both us and filers by taking advantage of an established and proven adviser filing system and avoiding the expense and delay of developing a new form and filing system. Commenters widely agreed with us,[885] with one

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882 *See* amended rule 204-1; *supra* section II.B.3.

883 *See* amended rule 203-1(e); *supra* section III.B.2.

884 For a discussion of the costs of the reporting obligations we are applying to exempt reporting advisers, see section V.B.2.

885 Two commenters urged that we create a separate reporting system. Merkl Implementing Letter; Seward Letter. *See also* Shearman Letter (making arguments regarding the potential for investor confusion, but not advocating use of a different form or reporting system). However, as we stated

stating that, in its view, there is "no reason to create a new form or filing system when the existing ones have been designed for use by advisers and are suitable for that purpose."[886] In addition, because an exempt reporting adviser may be required to register on Form ADV with one or more state securities authorities, use of the existing form and filing system (which is shared with the states) should reduce regulatory burdens for them because they can satisfy multiple filing obligations through a uniform reporting instrument.[887] Several commenters agreed and also expressed the view that use of Form ADV and the IARD for exempt reporting advisers would be efficient, because the system is familiar to many advisers.[888] Similarly, commenters agreed with our expectation that regulatory burdens would be diminished for an exempt reporting adviser that later finds it can no longer rely on an exemption and would be required to register with us because the adviser would simply file an amendment to its current Form ADV to apply for Commission registration.[889] Finally, certain items in Form ADV Part 1 are also linked to Form BD, which would create efficiencies if the exempt reporting adviser were to apply for broker-dealer registration.

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above, the expense and delay of developing a system with adequate functionality, which neither commenter addressed, argues against these commenters' recommendations for a new form and electronic filing system. *See supra* section II.B.1.

886 ABA Committees Letter. *See also* AFL-CIO Letter; NRS Letter; Better Markets Letter; NASAA Letter; ABA Committees Letter. We anticipate that the IARD's ability to pre-populate prior responses and allow drop-down boxes for common responses will also save time for advisers.

887 *See supra* note 170 and accompanying text.

888 *See* Better Markets Letter; NRS Letter; NASAA Letter. Responding to our request for comment regarding the possible use of EDGAR in place of the IARD, one commenter argued that "[s]uch an approach would be confusing and burdensome for any adviser that transitions between [exempt reporting adviser] and Commission-registered status." ABA Committees Letter.

889 *See* ABA Committees Letter; Better Markets Letter; NRS Letter; NASAA Letter. Form ADV, as amended, permits an adviser to transition from filing reports with us to applying for registration under the Act by simply amending its Form ADV; the adviser would check the box to indicate it is filing an initial application for registration, complete the items it did not have to answer as an exempt reporting adviser, and update the pre-populated items that it already has on file. *See* amended Form ADV: General Instruction 15 (providing procedural guidance to advisers that no longer meet the definition of exempt reporting adviser).

Using Form ADV and the IARD also will enable investors to access information on our website that may have previously been unavailable or not easily attainable, such as whether a prospective exempt reporting adviser has reported disciplinary events and whether its relationships with affiliates present conflicts of interest or potential efficiencies. Indeed, commenters indicated that an investor would be better able to perform due diligence if the information was made available to the public,[890] and could make an informed decision regarding the integrity of a prospective adviser if he or she were able to review the disciplinary history of the exempt reporting adviser and its employees.[891] As we asserted in the Implementing Proposing Release, public access to this information, which may previously have been undisclosed, may promote competition to the extent that it will allow private fund investors to make informed decisions about these advisers, avoiding the burdens and costs associated with selling private funds to switch advisers at a later date, and thereby potentially creating efficiency gains in the marketplace and enhancing allocative efficiency of client assets among investment advisers.[892] The availability of disciplinary information, in particular, about these advisers and their supervised persons may also enhance competition if, for example, firms and personnel with better disciplinary records outcompete those with worse records. Greater competition among advisers may, in turn, benefit clients. Access to the information we are requiring exempt reporting advisers to report may also increase clients' and prospective clients' trust in investment advisers, which may encourage them to seek professional investment advice and encourage them to invest their financial assets. This may enhance capital formation by making more assets available for investment and enhancing the allocation of capital generally.

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890 Merkl Implementing Letter.

891 CII Letter.

892 *See* Implementing Proposing Release, *supra* note 7, at section VII.A.

Several commenters, however, stated that public availability of the information we proposed to be reported would impose costs on advisers (and in some cases their supervised persons or owners) including the potential loss of business to competitors, as the information was not typically made available to others previously and may not be required of unregistered competitors.[893] Some commenters expressed concerns that some of the information we proposed to require also could include proprietary or competitively sensitive information regarding private funds.[894] We have responded to some of these concerns by declining to adopt certain questions that commenters suggested could require particularly proprietary or competitively sensitive information, such as certain data about beneficial owners.[895] Nonetheless, as discussed above in greater detail, based on section 210 of the Act, which presumes reports submitted to us by advisers will be publicly available, together with the Freedom of Information Act, which generally supports disclosure of such documents, we decline to deny the public access to all of this information at this time.[896]

Finally, to the extent that the information we collect and the filing method by which we collect it impose costs on exempt reporting advisers that are then passed on to clients, this may deter clients from seeking professional investment advice and investing their financial assets. As

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893 *See* BCLBE Letter; NRS Letter; Seward Letter (claiming that the reporting may be valuable to the Commission, but making the information publicly available would provide little benefit to investors, and asserting that the benefits were insufficient to justify the costs).

894 *See, e.g.*, MFA Letter; NVCA Letter; O'Melveny Letter. Another commenter, however, refuted these competitive concerns, stating that none of the items that exempt reporting advisers would complete would require the disclosure of proprietary or competitively sensitive information. Merkl Implementing Letter.

895 *See supra* notes 245-247 and accompanying text.

896 *See supra* section II.B.3.

we acknowledged in the Implementing Proposing Release, this may result in inefficiencies in the market for advisory services and hinder capital formation.[897]

B. Risk-Assessment Amendments to Form ADV

The amendments to Form ADV we are adopting today are designed to improve advisers' disclosure of their business practices (particularly those relating to advising private funds), non-advisory activities, financial industry affiliations, and conflicts of interest. Private fund reporting, in particular, will benefit private fund investors and other market participants and will provide us and other policy makers with better data. Better data will enhance our ability to form and frame regulatory policies regarding the private fund industry and fund advisers and to evaluate the effect of our policies and programs on this industry. Private fund reporting will provide us with important information about this rapidly growing segment of the U.S. financial system. Additionally, data about which advisers have $1 billion or more in total balance sheet assets will enable us to identify the advisers that are covered by section 956 of the Dodd-Frank Act, which addresses certain incentive-based compensation arrangements.

As acknowledged above with respect to exempt reporting advisers, there may also be a competitive impact among registered investment advisers as a result of the collection of the additional information on Form ADV in connection with the amendments we are adopting today. We raised several examples of competitive impacts in the Implementing Proposing Release.[898] For instance, information regarding the amount of assets under management by specific types of clients could be used by competitors when marketing their own advisory services.[899] We are adopting a modified version of this item as it was proposed, which we expect will alleviate

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897 *See* Implementing Proposing Release, *supra* note 7, at section VII.A.

898 *See id.* at section VII.B.

899 *See supra* section II.C.2. (discussing Item 5.D.(2)).

commenters' concerns about the costs and burdens of the proposed item,[900] but which we do not expect will alter this competitive impact. Another example we noted in the Implementing Proposing Release includes the information concerning private funds that registered and exempt reporting advisers are required to submit on Form ADV, which could assist private fund investors in assessing investment choices or screening funds based on certain parameters, such as the identification of certain fund service providers or gatekeepers. Amendments we are adopting to Form ADV will not prevent this information from being used by other financial service providers (such as banks or broker-dealers) that do not provide similar information publicly.

We continue to believe that increased competition among investment advisers (both exempt reporting and registered) and other financial service providers will result in capital being allocated more efficiently, benefiting clients and certain advisers. Commenters did not address the above examples or provide empirical data about the competitive effects of the proposal.

Finally, as noted above and in the Implementing Proposing Release, better disclosure may increase clients' and prospective clients' trust in investment advisers, which may encourage them to seek professional investment advice and encourage them to invest their financial assets.[901] This also may enhance capital formation by making more assets available for investment and enhancing the allocation of capital generally. On the other hand, if the rule amendments we are adopting increase costs for investment advisers and these cost increases are passed on to clients, this may deter clients from seeking professional investment advice and investing their financial assets. This may result in inefficiencies in the market for advisory services and hinder capital formation.

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900 *See id*. *See* IAA General Letter.

901 *See* Implementing Proposing Release, *supra* note 7, at section VII.B.

C. Other Amendments

Finally, we are amending rule 203-1 to allow an adviser that was relying on, and was permitted to rely on, the "private adviser" exemption in section 203(b)(3) on July 20, 2011, to delay registering with the Commission until March 30, 2012. We believe that this temporary extension of the registration deadline will assure an orderly transition to registration and thus will promote efficiency. We believe that this temporary extension will have minimal, if any, effects on competition or capital formation.

We are also amending rule 204-2 to cross-reference the new definition of private fund and add a grandfathering provision relieving firms that were exempt from registration prior to the effectiveness of the Dodd-Frank Act's elimination of the "private adviser" exemption from certain recordkeeping obligations applicable to registered advisers.[902] Finally, we are amending Forms ADV-NR and Form ADV-H to provide for their use by exempt reporting advisers. The amendments to rule 204-2, Form ADV-NR, and Form ADV-H are technical in nature. We do not anticipate that they will have any bearing on efficiency, competition, or capital formation.

IX. STATUTORY AUTHORITY

The Commission is removing rules 202(a)(11)-1, 203(b)(3)-1, and 203(b)(3)-2 under the Investment Advisers Act of 1940 pursuant to the authority set forth in section 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-11(a)], adopting new rule 203A-5 and amendments to rules 203A-2, 203A-3, and 203A-4 under the Advisers Act pursuant to the authority set forth in sections 203A(c) and 211(a) of the Advisers Act [15 U.S.C. 80b-3A(c) and 80b-11(a)]; amendments to rule 203A-1 under the Advisers Act pursuant to the authority set forth in sections 203A(a)(2)(B)(ii) (as amended by section 410 of the Dodd-Frank Act), 203A(c),

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[902] *See supra* section II.D.2.b.

and 211(a) of the Advisers Act [15 U.S.C. 80b-3A(a)(2)(B)(ii), 80b-3A(c), and 80b-11(a)]; amendments to rule 203-1 under the Advisers Act pursuant to the authority set forth in section 206A of the Advisers Act [15 U.S.C. 80b-6A]; new rule 204-4 and amendments to rules 204-1 and 204-2 under the Advisers Act pursuant to the authority set forth in sections 204 and 211(a) of the Advisers Act [15 U.S.C. 80b-4 and 80b-11(a)]; amendments to rule 206(4)-5 under the Advisers Act pursuant to authority set forth in sections 206(4) and 211(a) of the Advisers Act [15 U.S.C. 80b-6(4) and 80b-11(a)]; amendments to rules 0-7, 222-1, and 222-2 under the Advisers Act pursuant to authority set forth in section 211(a) of the Advisers Act [15 U.S.C. 80b-11(a)]; and to amend Form ADV under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Exchange Act [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act [15 U.S.C. 78a-37(a)], and sections 203(c)(1), 204, and 211(a) of the Advisers Act [15 U.S.C. 80b-3(c)(1), 80b-4, and 80b-11(a)]; Form ADV-NR under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], section 23(a) of the Exchange Act [15 U.S.C. 78w(a)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act [15 U.S.C. 78a-37(a)], and sections 203(c)(1), 204, and 211(a) of the Advisers Act [15 U.S.C. 80b-3(c)(1), 80b-4, and 80b-11(a)]; Form ADV-H pursuant to the authority set forth in sections 203(c)(1), 204, and 211(a) of the Advisers Act [15 U.S.C. 80b-3(c)(1), 80b-4, 80b-11(a)]; and Form ADV-E pursuant to authority set forth in sections 204, 206(4), and 211(a) of the Advisers Act [15 U.S.C. 80b-4, 80b-6(4), and 80b-11(a)].

List of Subjects in 17 CFR Parts 275 and 279

Reporting and recordkeeping requirements; Securities.

TEXT OF RULE AND FORM AMENDMENTS

For the reasons set out in the preamble, Title 17 Chapter II of the Code of Federal Regulations is proposed to be amended as follows.

PART 275 -- RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The authority citation for Part 275 is amended by revising the general authority and by adding authority for sections 275.203A-3, 275.203A-5, 275.204-1 and 275.204-4 in numerical order to read as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(G), 80b-2(a)(11)(H), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

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Section 275.203A-3 is also issued under 15 U.S.C. 80b-3a.

Section 275.203A-5 is also issued under 15 U.S.C. 80b-3a.

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Section 275.204-1 is also issued under sec. 407 and 408, Pub. L. 111-203, 124 Stat. 1376.

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Section 275.204-4 is also issued under sec. 407 and 408, Pub. L. 111-203, 124 Stat. 1376.

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2. Section 275.0-7 is amended by revising the reference to “Section 203A(a)(2)” in paragraph (a)(1) to read “Section 203A(a)(3).”

3. Section 275.202(a)(11)-1 is removed.

4. Section 275.203-1 is amended by adding paragraph (e) to read as follows:

§ 275.203-1 Application for investment adviser registration.

* * * * *

(e) *"Private Adviser" Transition Rule.* If you are exempt from registration with the Commission as an investment adviser under, and are not registered in reliance on, section 203(b)(3) of the Act (15 U.S.C. 80b-3(b)(3)) on July 20, 2011, you are exempt from registration with the Commission as an investment adviser until March 30, 2012, provided that you:

(1) During the course of the preceding twelve months, have had fewer than fifteen clients; and

(2) Neither hold yourself out generally to the public as an investment adviser nor act as an investment adviser to any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a), or a company which has elected to be a business development company pursuant to section 54 of that Act (15 U.S.C. 80a-54) and has not withdrawn its election.

5. Section 275.203(b)(3)-1 is removed.

6. Section 275.203(b)(3)-2 is removed.

7. Section 275.203A-1 is revised to read as follows:

§ 275.203A-1 Eligibility for SEC registration; Switching to or from SEC registration.

(a) *Eligibility for SEC registration of mid-sized investment advisers*—If you are an investment adviser described in section 203A(a)(2)(B) of the Act (15 U.S.C. 80b-3a(a)(2)(B)):

(1) *Threshold for SEC registration and registration buffer.* You may, but are not required to register with the Commission if you have assets under management of at least $100,000,000 but less than $110,000,000, and you need not withdraw your registration unless you have less than $90,000,000 of assets under management.

(2) *Exceptions*. This paragraph (a) does not apply if:

(i) You are an investment adviser to an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) or to a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a-54), and has not withdrawn the election; or

(ii) You are eligible for an exemption described in § 275.203A-2 of this chapter.

(b) *Switching to or from SEC registration*—

(1) *State-registered advisers—switching to SEC registration.* If you are registered with a state securities authority, you must apply for registration with the Commission within 90 days of filing an annual updating amendment to your Form ADV reporting that you are eligible for SEC registration and are not relying on an exemption from registration under sections 203(l) or 203(m) of the Act (15 U.S.C. 80b-3(l), (m)).

(2) *SEC-registered advisers—switching to State registration.* If you are registered with the Commission and file an annual updating amendment to your Form ADV reporting that you are not eligible for SEC registration and are not relying on an exemption from registration under sections 203(l) or 203(m) of the Act (15 U.S.C. 80b-3(l), (m)), you must file Form ADV-W (17 CFR 279.2) to withdraw your SEC registration within 180 days of your fiscal year end (unless you then are eligible for SEC registration). During this period while you are registered with both the Commission and one or more state securities authorities, the Act and applicable State law will apply to your advisory activities.

8. Section 275.203A-2 is amended by:

a. Removing paragraph (a);

b. Redesignating paragraphs (b) through (f) as paragraphs (a) through (e);

c. Revising newly designated paragraph (a)(1);

d. Revising the reference to "paragraph (b) of this section" in newly designated paragraph (a)(2) to read "paragraph (a) of this section";

e. Revising newly designated paragraph (c)(1);

f. Revising newly designated paragraph (d)(1);

g. Further redesignating newly designated paragraphs (d)(2) and (d)(3) as paragraphs (d)(2)(i) and (d)(2)(ii);

h. Adding new introductory text to paragraph (d)(2) and revising newly designated paragraphs (d)(2)(i) and (d)(2)(ii);

i. Further redesignating newly designated paragraph (d)(4) as paragraph (d)(3);

j. Revising the reference to "paragraph (f) of this section" in newly designated paragraphs (e)(1)(ii), (e)(1)(iii), and (e)(2) to read "paragraph (e) of this section";

k. Revising the reference to "paragraph (f)(1)(i) of this section" in newly designated paragraphs (e)(1)(ii) and (e)(3) to read "paragraph (e)(1)(i) of this section";

l. Revising the reference to "paragraph (c) of this section" in newly designated paragraph (e)(1)(iii) to read "paragraph (b) of this section"; and

m. Revising the reference "§ 275.203(b)(3)-1" in newly designated paragraph (e)(3) to read "§ 275.202(a)(30)-1".

The revisions and additions read as follows:

§ 275.203A-2 Exemptions from prohibition on Commission registration.

(a) *Pension Consultants.* (1) An investment adviser that is a "pension consultant," as defined in this section, with respect to assets of plans having an aggregate value of at least $200,000,000.

* * * * *

(c) * * *

(1) Immediately before it registers with the Commission, is not registered or required to be registered with the Commission or a state securities authority of any State and has a reasonable expectation that it would be eligible to register with the Commission within 120 days after the date the investment adviser's registration with the Commission becomes effective;

* * * * *

(d) * * *

(1) Upon submission of its application for registration with the Commission, is required by the laws of 15 or more States to register as an investment adviser with the state securities authority in the respective States, and thereafter would, but for this section, be required by the laws of at least 15 States to register as an investment adviser with the state securities authority in the respective States;

(2) Elects to rely on paragraph (d) of this section by:

(i) Indicating on Schedule D of its Form ADV that the investment adviser has reviewed the applicable State and federal laws and has concluded that, in the case of an application for registration with the Commission, it is required by the laws of 15 or more States to register as an investment adviser with the state securities authorities in the respective States or, in the case of an amendment to Form ADV, it would be required by the laws of at least 15 States to register as an investment adviser with the state securities authorities in the respective States, within 90 days prior to the date of filing Form ADV; and

(ii) Undertaking on Schedule D of its Form ADV to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that the

investment adviser would be required by the laws of fewer than 15 States to register as an investment adviser with the state securities authority in the respective States, and that the investment adviser would be prohibited by section 203A(a) of the Act (15 U.S.C. 80b–3a(a)) from registering with the Commission, by filing a completed Form ADV-W within 180 days of the adviser's fiscal year end (unless the adviser then is eligible for SEC registration); and

* * * * *

9. Section 275.203A-3 is amended by revising paragraph (a)(4) and adding paragraphs (d) and (e) to read as follows:

§ 275.203A-3 Definitions.

* * * * *

(a) * * *

(4) Supervised persons may rely on the definition of "client" in §275.202(a)(30)–1 to identify clients for purposes of paragraph (a)(1) of this section, except that supervised persons need not count clients that are not residents of the United States.

* * * * *

(d) *Assets under management*. Determine "assets under management" by calculating the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services as reported on the investment adviser's Form ADV (17 CFR 279.1).

(e) *State securities authority*. "State securities authority" means the securities commissioner or commission (or any agency, office or officer performing like functions) of any State.

10. Section 275.203A-4 is removed and reserved.

11. Section 275.203A-5 is added to read as follows:

§ 275.203A-5 Transition rules.

(a) *Temporary exemption from prohibition on Commission registration for mid-sized investment advisers.* Until January 1, 2012, the prohibition of section 203A(a)(2) of the Act (15 U.S.C. 80b–3a(a)(2)) does not apply to an investment adviser registered with the Commission on July 21, 2011.

(b) *SEC-registered advisers—Form ADV filing.* Every investment adviser registered with the Commission on January 1, 2012 shall file an amendment to Form ADV (17 CFR 279.1) no later than March 30, 2012 and shall determine its assets under management based on the current market value of the assets as determined within 90 days prior to the date of filing the Form ADV.

(c) *Mid-sized investment advisers—withdrawing from Commission registration.*

(1) If an investment adviser registered with the Commission on January 1, 2012 would be prohibited from registering with the Commission under section 203A(a)(2) of the Act (15 U.S.C. 80b-3a(a)(2)), and is not otherwise exempted by § 275.203A-2 from such prohibition, such investment adviser shall withdraw from registration with the Commission by filing Form ADV-W (17 CFR 279.2) no later than June 28, 2012. During this period while an investment adviser is registered with both the Commission and one or more state securities authorities, the Act and applicable State law will apply to the investment adviser's advisory activities.

(2) If, prior to the effective date of the withdrawal from registration of an investment adviser on Form ADV-W, the Commission has instituted a proceeding pursuant to section 203(e) of the Act (15 U.S.C. 80b-3(e)) to suspend or revoke registration, or pursuant to section 203(h) of the Act (15 U.S.C. 80b-3(h)) to impose terms or conditions upon withdrawal, the withdrawal

from registration shall not become effective except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

12. Section 275.204-1 is amended by revising the heading, paragraphs (b) and (c) to read as follows:

§ 275.204-1 Amendments to Form ADV.

* * * * *

(b) Electronic filing of amendments.

(1) Subject to paragraph (c), you must file all amendments to Part 1A of Form ADV and Part 2A of Form ADV electronically with the IARD, unless you have received a continuing hardship exemption under §275.203-3. You are not required to file with the Commission amendments to brochure supplements required by Part 2B of Form ADV.

(2) If you have received a continuing hardship exemption under §275.203-3, you must, when you are required to amend your Form ADV, file a completed Part 1A and Part 2A of Form ADV on paper with the SEC by mailing it to FINRA.

Note to paragraphs (a) and (b): Information on how to file with the IARD is available on our website at www.sec.gov/iard. For the annual updating amendment: summaries of material changes that are not included in the adviser's brochure must be filed with the Commission as an exhibit to Part 2A in the same electronic file; and if you are not required to prepare a brochure, a summary of material changes, or an annual updating amendment to your brochure, you are not required to file them with the Commission. See the instructions for Part 2A of Form ADV.

(c) Transition to electronic filing. If you are required to file a brochure and your fiscal year ends on or after December 31, 2010, you must amend your Form ADV by

electronically filing with the IARD one or more brochures that satisfy the requirements of Part 2A of Form ADV (as amended effective October 12, 2010) as part of the next annual updating amendment that you are required to file.

* * * * *

13. Section 275.204-2 is amended by:

a. Removing paragraph (l);

b. In paragraph (a)(14)(ii), revising the reference to "assets under management" to read "regulatory assets under management"; and

c. Revising paragraph (e)(3)(ii) to read as follows:

§ 275.204-2 Books and records to be maintained by investment advisers.

* * * * *

(e) * * *

(3) * * *

(ii) *Transition rule*. If you are an investment adviser that was, prior to July 21, 2011, exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b-3(b)(3)), as in effect on July 20, 2011, paragraph (e)(3)(i) of this section does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under the provisions of paragraph (a)(16) of this section to the extent those books and records pertain to the performance or rate of return of such private fund (as defined in section 202(a)(29) of the Act (15 U.S.C. 80b-2(a)(29)), or other account you advise for any period ended prior to your registration, provided that you continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period.

* * * * *

14. Section 275.204-4 is added to read as follows:

§ 275.204-4 Reporting by exempt reporting advisers.

(a) *Exempt reporting advisers*. If you are an investment adviser relying on the exemption from registering with the Commission under section 203(l) or (m) of the Act (15 U.S.C. 80b-3(l) or 80b-3(m)), you must complete and file reports on Form ADV (17 CFR 279.1) by following the instructions in the Form, which specify the information that an exempt reporting adviser must provide.

(b) *Electronic filing*. You must file Form ADV electronically with the Investment Adviser Registration Depository (IARD) unless you have received a hardship exemption under paragraph (e) of this section.

Note to paragraph (b): Information on how to file with the IARD is available on the Commission's website at http://www.sec.gov/iard.

(c) *When filed*. Each Form ADV is considered filed with the Commission upon acceptance by the IARD.

(d) *Filing fees*. You must pay FINRA (the operator of the IARD) a filing fee. The Commission has approved the amount of the filing fee. No portion of the filing fee is refundable. Your completed Form ADV will not be accepted by FINRA, and thus will not be considered filed with the Commission, until you have paid the filing fee.

(e) *Temporary hardship exemption*.

(1) *Eligibility for exemption*. If you have unanticipated technical difficulties that prevent submission of a filing to the IARD, you may request a temporary hardship exemption from the requirements of this chapter to file electronically.

(2) *Application procedures*. To request a temporary hardship exemption, you must:

(i) File Form ADV-H (17 CFR 279.3) in paper format no later than one business day after the filing that is the subject of the ADV-H was due; and

(ii) Submit the filing that is the subject of the Form ADV-H in electronic format with the IARD no later than seven business days after the filing was due.

(3) *Effective date – upon filing*. The temporary hardship exemption will be granted when you file a completed Form ADV-H.

(f) *Final report*. You must file a final report in accordance with instructions in Form ADV when:

(1) You cease operation as an investment adviser;

(2) You no longer meet the definition of exempt reporting adviser under paragraph (a); or

(3) You apply for registration with the Commission.

Note to paragraph (f): You do not have to pay a filing fee to file a final report on Form ADV through the IARD.

15. Section 275.206(4)-5 is amended by:

a. In paragraph (f)(2)(i), removing the term “individual” and adding in its place the term “person”; and

b. Revising paragraphs (a)(1), (a)(2) introductory text, (a)(2)(i), (d), and (f)(9) to read as follows:

§ 275.206(4)-5 Political contributions by certain investment advisers.

(a) * * *

(1) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b-3(b)(3)), or that is an exempt reporting adviser, as defined in section 275.204-4(a), to provide investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate of the investment adviser (including a person who becomes a covered associate within two years after the contribution is made); and

(2) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b-3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates:

(i) To provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is:

(A) A regulated person; or

(B) An executive officer, general partner, managing member (or, in each case, a person with a similar status or function), or employee of the investment adviser; and

* * * * *

(d) Further prohibition. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts, practices, or courses of business within the meaning of section 206(4) of Advisers Act (15 U.S.C. 80b-6(4)), it shall be unlawful for any investment adviser

registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b-3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates to do anything indirectly which, if done directly, would result in a violation of this section.

* * * * *

(f) * * *

(9) Regulated person means:

(i) An investment adviser registered with the Commission that has not, and whose covered associates have not, within two years of soliciting a government entity:

(A) Made a contribution to an official of that government entity, other than as described in paragraph (b)(1) of this section; and

(B) Coordinated or solicited any person or political action committee to make any contribution or payment described in paragraphs (a)(2)(ii)(A) and (B) of this section;

(ii) A "broker," as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)) or a "dealer," as defined in section 3(a)(5) of that Act (15 U.S.C. 78c(a)(5)), that is registered with the Commission, and is a member of a national securities association registered under 15A of that Act (15 U.S.C. 78o-3), provided that:

(A) The rules of the association prohibit members from engaging in distribution or solicitation activities if certain political contributions have been made; and

(B) The Commission, by order, finds that such rules impose substantially equivalent or more stringent restrictions on broker-dealers than this section imposes on investment advisers and that such rules are consistent with the objectives of this section; and

(iii) A "municipal advisor" registered with the Commission under section 15B of the Exchange Act and subject to rules of the Municipal Securities Rulemaking Board, provided that:

(A) Such rules prohibit municipal advisors from engaging in distribution or solicitation activities if certain political contributions have been made; and

(B) The Commission, by order, finds that such rules impose substantially equivalent or more stringent restrictions on municipal advisors than this section imposes on investment advisers and that such rules are consistent with the objectives of this section.

* * * * *

16. Section 275.222-1 is amended by revising the phrase "Principal place of business" to read "Principal office and place of business" in both the heading and the first sentence of paragraph (b).

17. Section 275.222-2 is revised to read as follows:

§ 275.222-2 Definition of "client" for purposes of the national de minimis standard.

For purposes of section 222(d)(2) of the Act (15 U.S.C. 80b-18a(d)(2)), an investment adviser may rely upon the definition of "client" provided by § 275.202(a)(30)-1, without giving regard to paragraph (b)(4) of that section.

PART 279 -- FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

18. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b.

§ 279.1 [Amended]

19. Form ADV [referenced in § 279.1] is amended by:

a. In the instructions to the form, revising the section entitled "Form ADV: General Instructions." The revised version of Form ADV: General Instructions is attached as Appendix A;

b. In the instructions to the form, revising the section entitled "Form ADV: Instructions for Part 1A." The revised version of Form ADV: Instructions for Part 1A is attached as Appendix B;

c. In the instructions to the form, revising the section entitled "Form ADV: Glossary of Terms." The revised version of Form ADV: Glossary of Terms is attached as Appendix C;

d. In the form, revising Part 1A. The revised version of Form ADV, Part 1A is attached as Appendix D;

e. In the form, revising the reference to "proceeding" in Item 3.D. of Part 2B to read "hearing or formal adjudication";

f. In the form, revising the reference to "assets under management" in the Note to Item 4.E of Part 2A to read "regulatory assets under management"; and

g. In the form, revising the section entitled "Form ADV: Domestic Investment Adviser Execution Page." The revised version of Form ADV: Domestic Investment Adviser Execution Page is attached as Appendix E.

The revisions read as follows:

Note: The text of Form ADV does not and the amendments will not appear in the Code of Federal Regulations.

* * * * *

Form ADV: Part 2B

* * *

Item 3. * * *

D. Any other hearing or formal adjudication in which a professional attainment, designation, or license of the supervised person was revoked or suspended because of a violation of rules relating to professional conduct. If the supervised person resigned (or otherwise relinquished the attainment, designation, or license) in anticipation of such a hearing or formal adjudication (and the adviser knows, or should have known, of such resignation or relinquishment), disclose the event.

* * * * *

§ 279.3 [Amended]

20. Form ADV-H [referenced in § 279.3] is amended by revising the form. The revised version of Form ADV-H is attached as Appendix F.

Note: The text of Form ADV-H does not and the amendments will not appear in the Code of Federal Regulations.

§ 279.4 [Amended]

21. Form ADV-NR [referenced in § 279.4] is amended by revising the form. The revised version of Form ADV-NR is attached as Appendix G.

Note: The text of Form ADV-NR does not and the amendments will not appear in the Code of Federal Regulations.

§ 279.8 [Amended]

22. Form ADV-E [referenced in § 279.4] is amended by revising the form. The revised version of Form ADV-E is attached as Appendix H.

Note: The text of Form ADV-E does not and the amendments will not appear in the Code of Federal Regulations.

By the Commission.

Elizabeth M. Murphy

Secretary

June 22, 2011