

August 11, 2015

VIA ELECTRONIC DELIVERY

Mr. Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Investment Advisers Act Release No. 4091 (File No. S7-09-15), Amendments to
Form ADV and Investment Advisers Act Rules

Dear Mr. Fields:

We appreciate the opportunity to respond to the request by the U.S. Securities and Exchange Commission (“*SEC*” or “*Commission*”) for comments regarding certain proposed amendments to Form ADV and certain rules under the Investment Advisers Act of 1940 (“*Advisers Act*”) (“*Proposed Amendments*”).¹ The Proposed Amendments were designed to provide additional information about investment advisers, including information about their separately managed account (“*SMA*”) business. If adopted, the Proposed Amendments would also permit a single registration on Form ADV by a “filing adviser” and one or more “relying advisers” that collectively conduct a single advisory business (“*Umbrella Registration*”).

Dechert LLP is an international law firm with a wide-ranging financial services practice that serves clients in the United States and abroad. We represent a substantial number of U.S. and non-U.S. investment advisers, investment company complexes, private funds, fund administrators, broker-dealers, pension plans, insurance companies, commercial and investment banks, thrift institutions and third-party intermediaries. In developing these comments, we have drawn on our extensive experience in the financial services industry. Although we have discussed certain matters addressed in the Proposing Release with some of our clients, the comments that follow reflect only the views of a group of attorneys.

We fully support the Commission’s objectives in this rulemaking. We believe that additional census-type data about SMAs has the potential to strengthen the SEC’s risk-based examinations and other risk assessment and monitoring activities. However, we are concerned that the public reporting of holdings, derivatives and borrowings information with respect to SMAs has the

¹ See Amendments to Form ADV and Investment Advisers Act Rules, Investment Advisers Act Rel. No. 4091 (May 20, 2015) (“*Proposing Release*”).

potential to compromise the confidentiality of adviser clients and client investments and the proprietary nature of particular investment strategies and methodologies. For this reason, we strongly believe that, similar to comparable information reported to the Commission on Form PF with respect to private funds, this information should be protected from public disclosure.

We also believe that Umbrella Registration should be expanded to include investment advisers with clients that are not primarily private funds and investment advisers with their principal office and place of business outside the United States. We believe that expanding Umbrella Registration in this manner would provide the Commission with a better understanding of groups of investment advisers that conduct a single advisory business, as well as a more efficient and less costly registration system for investment advisers. We discuss these and other comments below.

I. Derivatives and Other Reporting For Separately Managed Accounts

A. Gross Notional Amounts can be a Misleading Indicator of Risk Exposure in Separately Managed Accounts

The Proposed Amendments to Form ADV would require investment advisers to provide more detailed information about SMAs. Under the Proposed Amendments, advisers with at least \$150 million in regulatory assets under management (“*RAUM*”) attributable to SMAs would be required to report: (1) the number of SMAs that correspond to specified categories of “gross notional exposure”²; and (2) the weighted average amount of borrowings in those SMAs. In addition, advisers with at least \$10 billion in RAUM attributable to SMAs would be required to report the weighted average “gross notional value”³ of derivatives in each of six specified categories of derivatives.

Although having gross notional amounts may assist the Commission in measuring the extent to which derivatives are used in SMAs, we believe that this information – *as a single data point* – can be a misleading indicator of risk exposure in SMAs. For example, although certain derivatives involve periodic payments based on notional amounts (*e.g.*, interest rate swaps), these

² “Gross notional exposure” of an SMA “is the percentage obtained by dividing (i) the sum of (a) the dollar amount of any borrowings and (b) the gross notional value of all derivatives, by (ii) the net asset value of the account.” *See* Section 5.K.(2) of Form ADV.

³ “Gross notional value” is the “gross nominal or notional value of all transactions that have been entered into but not yet settled as of the reporting date. For contracts with variable nominal or notional principal amounts, the basis for reporting is the nominal or notional principal amounts as of the reporting date. For options, use delta adjusted notional value.” *See* Form ADV: Glossary of Terms, No. 24.

payments would generally not equal the notional amount. We note that Form PF currently requires an adviser to provide a variety of information about derivatives in private funds, including, for certain derivatives, the aggregate net mark-to-market value. We believe that these additional data points would provide the SEC and its Staff with a more comprehensive understanding of the extent to which derivatives are used in SMAs and the relevant risks associated with these derivatives. As discussed below, we believe that, similar to Form PF, the reporting of derivatives exposures in SMAs should only be required if protected from public disclosure.

B. Certain Information in Amended Form ADV Should be Private to Protect the Confidentiality of Adviser Clients and Client Investments and the Proprietary Nature of Particular Investment Strategies and Methodologies

We believe that the public reporting or disclosure of holdings, derivatives and borrowings information has the potential to cause an investment adviser to disclose “the identity, investments, or affairs” of a particular client.⁴ Section 210(c) of the Advisers Act states that the Commission is not authorized to require an adviser to “disclose the identity, investments, or affairs of any client ... except insofar as such disclosure may be necessary or appropriate in a particular proceeding or investigation having as its object the enforcement of a provision or provisions of [the Advisers Act] or for purposes of assessment of potential systemic risk.”⁵ Although the additional reporting or disclosure of holdings, derivatives and borrowings information could enhance the SEC’s risk-based examinations and other risk assessment and monitoring activities, we do not believe that causing this information to be publicly available is necessary or appropriate “for purposes of assessment of potential systemic risk,” nor do we believe that there is a significant public interest in this information.

However, the Commission could accomplish the objectives of these additional reporting requirements without potentially compromising the confidentiality of advisory relationships and client investments by making this information protected from public disclosure. Section 210(a)

⁴ For example, an investment adviser may provide advisory services to a limited number of SMAs (or perhaps only a single SMA), and the identity of one or more of those SMAs may be widely known. If information is publicly available – even on an aggregated basis – market participants could, under certain circumstances, determine (or logically deduce) the investments of a particular SMA. This would be problematic and potentially harmful to that SMA.

⁵ See Section 210(c) of the Advisers Act. The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 amended Section 210(c) to permit the SEC to require the disclosure of the identity, investments or affairs of any advisory client as needed “for purposes of assessment of potential systemic risk.”

of the Advisers Act requires that “any registration application ... or amendment thereto be made available to the public, unless ... the Commission, by rules and regulations ..., finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors.”⁶ We believe that, under the circumstances (*i.e.*, preserving the confidentiality of advisory relationships and client investments), making this information publicly available is neither necessary nor appropriate for the SEC’s risk-based examinations and other risk assessment and monitoring activities. We believe that such a finding should be included in any rule adopted by the SEC.⁷ For similar reasons, we also believe that the holdings, derivatives and borrowings information about SMAs should be exempt from any request to make this information public under the U.S. Freedom of Information Act (“*FOIA*”) to the same extent as the information included in Form PF.⁸

II. Umbrella Registration Should be Permissive and Expanded

A. *Umbrella Registration Should be Permissive and not Mandatory*

We agree with the Commission’s decision to codify Umbrella Registration. However, Umbrella Registration should be permissive and not mandatory. Investment advisers that collectively conduct a single advisory business and who might qualify for Umbrella Registration under the Proposed Amendments should be permitted to register separately if they choose. Requiring Umbrella Registration would place an unnecessary burden on advisers to determine whether they initially satisfy (or, if they initially satisfy, whether they continue to comply with) the five conditions specified in the Proposed Amendments. Furthermore, mandatory Umbrella Registration could lead to a large number of advisers incorrectly using Umbrella Registration. Many advisers might incorrectly use Umbrella Registration, even if they were unsure if they qualified for it, out of concern of non-compliance with mandatory Umbrella Registration. The Commission would then need to deny a large number of registrations, which would be burdensome for both the SEC and advisers.

⁶ See Section 210(a) of the Advisers Act.

⁷ We also note that portions of Form ADV are not currently made available to the public. For example, the identity and contact information of an investment adviser’s chief compliance officer is not publicly available through the Investment Adviser Public Disclosure portal.

⁸ See 5 U.S.C. § 552 *et seq.* Alternatively, investment advisers should be permitted to “check a box” on Form ADV to request confidential treatment under FOIA. See Securities and Exchange Commission Confidential Treatment Procedure Under Rule 83, *available at* www.sec.gov/foia/conftrat.htm.

B. Eligibility to Register under the Advisers Act Should be Determined on a Consolidated Basis

Under the Proposed Amendments, each relying adviser would need to be independently eligible to register with the Commission.⁹ As the Commission recognizes, a single advisory business may be organized as a group of separate legal entities for “a variety of tax, legal and regulatory reasons.”¹⁰ The objectives behind the codification of Umbrella Registration are: (1) the establishment of a more efficient method for the registration of separate legal entities that collectively conduct a single advisory business; and (2) to facilitate the collection and consistency of data on umbrella registrants.¹¹ These objectives would be harmed if each relying adviser must independently qualify for SEC registration. Under the Proposed Amendments, it is not clear how advisers that collectively conduct a single advisory business and that, when “integrated,”¹² qualify for SEC registration, would complete an Umbrella Registration if any one relying advisor failed to qualify for SEC registration absent integration. This result is inconsistent with the notion that the filing adviser and each relying adviser *in the aggregate* is a single advisory business. Accordingly, we suggest that new Schedule R be modified to remove Section 2 (SEC Registration), which would require each relying adviser to specify the basis on which the adviser is eligible to register with the Commission. Alternatively, we believe that a relying adviser should be able to cite “integration” with the filing adviser as a basis for SEC registration.¹³

⁹ See Form ADV: Glossary of Terms, No. 53 (“relying adviser” defined as “an investment adviser eligible to register with the SEC that relies on a filing adviser to file (and amend) a single umbrella registration on its behalf.”).

¹⁰ See Proposing Release, at Section II.3 (“For a variety of tax, legal and regulatory reasons, advisers to private funds may be organized as a group of related advisers that are separate legal entities but effectively operate as – and appear to investors and regulators to be – a single advisory business.”)

¹¹ See *id.*

¹² The Commission has stated that it “would treat as a single adviser two or more affiliated advisers that are separately organized but operationally integrated, which could result in a requirement for one or both advisers to register.” See 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 Rel. No. 3222 (June 22, 2011), at footnote 506 and accompanying text (“*Exemptions Release*”).

¹³ This could be accomplished by a “check the box” item in new Schedule R.

C. *Investment Advisers whose Principal Office and Place of Business is Outside of the United States Should be Permitted to be Filing Advisers*

The second condition of Umbrella Registration is that the “filing adviser has its principal office and place of business in the United States,” and that “all of the substantive provisions of the Advisers Act and the rules thereunder apply to the filing adviser’s and each relying adviser’s dealings with each of its clients, regardless of whether any client or the filing adviser or relying adviser providing the advice is a United States person.”¹⁴

We suggest modifying a portion of the Proposed Amendments to permit an investment adviser whose principal office and place of business is *not* in the United States (“*Non-U.S. Adviser*”) to be a filing adviser. Moreover, we believe that, consistent with prior Commission and Staff guidance, the SEC should “not apply most of the substantive provisions of the Advisers Act to the non-U.S. clients of a non-U.S. adviser registered with the Commission,”¹⁵ irrespective of whether such Non-U.S. Adviser was registered under Umbrella Registration. We see no substantial policy justification for limiting Umbrella Registration to filing advisers that are investment advisers whose principal offices and places of business are *in* the United States (“*U.S. Advisers*”), nor do we see a substantial policy justification for extending the extraterritorial application of the Advisers Act to the non-U.S. clients of Non-U.S. Advisers registered with the SEC under Umbrella Registration.

In 2012, the Staff stated its concern “that, absent [the condition cited above], a group of related advisers based inside and outside of the United States could designate a non-U.S. adviser as a filing adviser and assert that the Advisers Act’s substantive provisions generally would not apply to the U.S.-based relying advisers’ dealings with their non-U.S. clients.”¹⁶ However, this concern is misplaced. A registered U.S. Adviser would be subject to the Advisers Act with respect to its dealings with both U.S. and non-U.S. clients, irrespective of whether such U.S. Adviser was a filing adviser or relying adviser under Umbrella Registration. The SEC could easily clarify this concept in Form ADV or the release adopting any amendments to Form ADV.

¹⁴ See Form ADV: General Instructions, at Instruction No. 5.

¹⁵ See Proposing Release, at footnote 57; see also Exemptions Release, at footnote 515 and accompanying text.

¹⁶ See American Bar Association, Business Law Section, SEC No-Action Letter (pub. avail. Jan. 18, 2012), at footnote 9 and accompanying text.

D. Umbrella Registration Should be Extended to Investment Advisers that Provide Advisory Services to Clients other than Private Funds

The first condition of Umbrella Registration is that the “filing adviser and each relying adviser advise only private funds and clients in separately managed accounts that are qualified clients and are otherwise eligible to invest in the private funds advised by the filing adviser or a relying adviser and whose accounts pursue investment objectives and strategies that are substantially similar or otherwise related to those private funds.”¹⁷ We see no substantial policy justification for limiting Umbrella Registration to investment advisers that advise only private funds and clients in SMAs that are qualified clients.

Today, there are many large organizations that provide advisory services to several types of clients, including: (1) investment companies registered under the Investment Company Act of 1940 (“**1940 Act**”); (2) pension plans subject to the Employee Retirement Income Security Act of 1974; (3) state and municipal government entities; and (4) other investment advisers registered under the Advisers Act. For a variety of tax, legal and regulatory reasons, these organizations may form separate legal entities for each client type and register each legal entity as an investment adviser under the Advisers Act. However, notwithstanding that they are organized as separate legal entities, these advisory affiliates may conduct a single advisory business subject to a unified compliance program.

Permitting a single registration on Form ADV by a filing adviser and one or more relying advisers that collectively conduct a single advisory business, irrespective of the types of clients managed by each adviser (but subject to the other conditions listed in the Proposed Amendments), would appear to further the Commission’s objective of establishing a more efficient method for the registration of separate legal entities that collectively conduct a single advisory business.¹⁸

III. Other Issues

A. Treatment of Mutual Fund Wholly Owned Subsidiaries

Today, there are many investment companies that are registered under the 1940 Act that seek exposure to the commodities market. For tax and other reasons, commodities market exposure may be accomplished through investments in wholly owned foreign subsidiaries (“**Subsidiaries**”)

¹⁷ See Form ADV: General Instructions, at Instruction No. 5.

¹⁸ See Proposing Release, at Section II.3

that, in turn, invest in commodity interests.¹⁹ Because of the nature of its holdings, a Subsidiary may be deemed to be an “investment company” as defined in Section 3(a)(1) of the 1940 Act. However, a Subsidiary is generally not required to register under the 1940 Act by virtue of the exceptions in Section 3(c)(1) and 3(c)(7) of the 1940 Act. Under these circumstances, a Subsidiary would generally be deemed to be a “private fund” under Form ADV²⁰ and, as a technical matter, the Subsidiary should be reported on Section 7.B.(1) of Schedule D of Form ADV and Form PF.

However, we understand that many registered investment companies that utilize Subsidiaries consolidate the holdings of the Subsidiaries in filings with the Commission (*e.g.*, Form N-CSR (Certified Shareholder Report of Registered Management Investment Companies) and Form N-Q (Quarterly Schedule of Portfolio Holdings of Registered Management Investment Companies)). This has the potential to duplicate information that is reported to the SEC, which would detract from the Commission’s risk-based examinations and other risk assessment and monitoring activities. We believe this could be avoided by clarifying that Subsidiaries utilized by registered investment companies should not be reported on either Form ADV or Form PF, if the holdings of the Subsidiary are consolidated with the holdings of the registered investment companies for financial reporting purposes.

B. Compliance Date of the Proposed Amendments

The Proposed Amendments involve significant new reporting requirements for investment advisers. Moreover, an adviser would be required to collect detailed information about SMAs and categorize this information in a manner consistent with the Proposed Amendments. This will take time. Accordingly, we suggest a compliance date of no sooner than one full year after the adoption of the final rules and form changes. For example, if the SEC adopts the final rules and form changes in December, 2015, the compliance date should be no sooner than December 31, 2016.²¹

¹⁹ One of the requirements for favorable tax treatment as a “regulated investment company” under the Internal Revenue Code of 1986 is that a registered investment company derive at least 90% of its gross income from certain qualifying sources of income.

²⁰ A “private fund” is defined as “an issuer that would be an investment company as defined in Section 3 of the [1940 Act] but for Section 3(c)(1) or 3(c)(7) of that Act.” *See* Form ADV: Glossary of Terms, No. 49.

²¹ Under this example, an investment adviser with a fiscal year end of December 31st would be required to incorporate the changes in its annual updating amendment in March 2017.

C. Exclusion of SMAs with a Net Asset Value of Less Than \$10 Million

Under the Proposed Amendments, an investment adviser is only required to report on the use of borrowings and derivatives with respect to SMAs with a net asset value of at least \$10 million. We believe that Form ADV should be clarified to permit an adviser to provide such information for these SMAs in its discretion. This change would simplify and reduce the costs of the reporting process for advisers that choose to report this information to the Commission.

D. Sub-Advisory Relationships

Under Section 5.K(2) of amended Form ADV, an investment adviser is required to report on the use of borrowings and derivatives. The instructions indicate that, “[i]f you are a sub-adviser to a separately managed account, you should only provide information with respect to the portion of the account that you sub-advise.” We believe that these instructions should be modified so that the primary adviser should not be required to report any information that is reported by a sub-adviser. Instead, the primary adviser should be required to indicate that a sub-adviser is reporting the applicable information. We also recommend that advisers with affiliated sub-advisers should be permitted to select and identify which entity (whether the adviser or sub-adviser) is reporting the information on the SMAs it advises in Section 5.K.

E. Chief Compliance Officer (“CCO”) Information

The Proposed Amendments would require an investment adviser to report whether its CCO is compensated or employed by any person other than the adviser (or a related person of the adviser) for providing CCO services. From time to time, an individual may serve as the CCO of both an adviser as well as any registered investment company managed by that adviser. Under these circumstances, the compensation of the CCO may be paid by both the adviser and the registered investment company. We believe that the instructions to this item should be clarified to exclude these types of arrangements from additional disclosure, as the disclosure of these arrangements would not appear to further the Commission’s objective in requiring this information (*e.g.*, to assess the potential risks of particular service providers).

F. Categorizing Asset Types

Under the Proposed Amendments, investment advisers would be required to disclose the approximate percentage of SMA RAUM invested in ten broad asset categories, including exchange-traded equity securities, U.S. government/agency bonds and investment grade and non-investment grade corporate bonds. We believe that advisers may not maintain systems that permit them to efficiently categorize assets attributable to SMAs based on the asset types under the Proposed Amendments. The Commission should recognize that advisers may categorize

assets under a number of other reasonable methodologies. The SEC should therefore permit advisers to use, in good faith, reasonable and documented methodologies to determine the asset category to which an instrument belongs.

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If the Commission or its Staff wishes to discuss the matters mentioned in this letter, please contact David A. Vaughan at [REDACTED], Michael L. Sherman at [REDACTED] or Brenden P. Carroll at [REDACTED].

Respectfully yours,

/s/ Dechert LLP

Dechert LLP

cc: The Honorable Mary Jo White, Chair
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner

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