

CLIENT ALERT

# Reminder: Annual Update of Form ADV and Annual Requirement to Confirm Status of Investors Under the New Issue Rules

February 18, 2020

**AUTHOR**

**Martin R. Miller**

---

## Annual Update of Form ADV

The Securities and Exchange Commission (the “SEC”) requires SEC-registered investment advisers and Exempt Reporting Advisers<sup>1</sup> to annually update the information on their Form ADVs. Form ADV is filed electronically on the Investment Adviser Registration Depository (“IARD”) System. As in past years, the annual update filing must be made within 90 days of the adviser’s fiscal year-end and should update responses to all items answered on Form ADV (“Annual Updating Amendment”).<sup>2</sup>

---

<sup>1</sup> Exempt Reporting Advisers (“ERAs”), (i) advisers managing only venture capital funds and (ii) advisers managing only private funds with less than \$150 million in the aggregate of regulatory assets under management managed from a place of business in the U.S., are exempt from registration under the Investment Advisers Act of 1940, but are required to file a notice or “report” with the SEC. The reports are made using Form ADV, but with only certain sections completed. ERAs are only required to complete Items 1, 2, 3, 6, 7, 10, and 11 of Part 1A of Form ADV and any corresponding schedules.

<sup>2</sup> In addition to this requirement to update all responses on Form ADV once a year, the instructions for Form ADV require that registered advisers promptly report by amendment the addition or deletion of a Relying Adviser as part of an Umbrella Registration, and changes to Items 1 (except 1.O. and Section 1.F. of Schedule D), 3, 9 (except 9.A.(2), 9.B.(2), 9.E., and 9.F.), and 11 of Part 1A, Sections 1 or 3 of Schedule R, and, if applicable, Items 1, 2.A. through 2.F., and 2.I. of Part 1B, and material changes to Items 4, 8, and 10 of Part 1A, Section 10 of Schedule R and the Part 2A Brochure, and, if applicable, material changes to Item 2.G. of Part 1B. ERAs are also required to update all responses to the Items in Form

---

## Reminder: Annual Update of Form ADV and Annual Requirement to Confirm Status of Investors Under the New Issue Rules

SEC-registered investment advisers pay a fee determined by the amount of the particular adviser's regulatory assets under management<sup>3</sup> for filing Annual Updating Amendments.

<u>Regulatory Assets Under Management</u>	<u>Annual Updating Amendment Fee</u>
More than \$100 million	\$225
\$25 million to \$100 million	\$150
Less than \$25 million	\$40

Exempt Reporting Advisers will pay \$150 for filing Annual Updating Amendments. Advisers that register as advisers or file as Exempt Reporting Advisers with one or more states and not the SEC will not be charged a processing fee this year to file an Annual Updating Amendment.

Fees must be credited to the adviser firm's Flex-Funding Account on the IARD before filings may be submitted.<sup>4</sup> No fee is charged for filing an electronic amendment to Form ADV unless it is an Annual Updating Amendment.

### Annual Confirmation of Investors' Status Under the "New Issue" Rules

Financial Industry Regulatory Authority, Inc. ("FINRA") Rule 5130 precludes broker-dealers from selling New Issue securities (generally equity IPO securities) to accounts the beneficial owners of which are Restricted Persons as defined in that Rule. In addition, FINRA Rule 5131 restricts broker-dealers from selling New Issues to accounts that are beneficially owned by persons that are executive officers or directors of public companies and certain covered nonpublic companies having specified relationships with the broker-dealer, and persons materially supported by such persons ("Covered Persons").<sup>5</sup>

Because Rules 5130 and 5131 look to the beneficial owners of an account, managers of private investment funds that purchase New Issue securities for their funds are required to ask about the Restricted and Covered Person status of

---

ADV completed by ERAs in their Annual Updating Amendment. Additionally, any changes to Items 1 (except 1.O. and Section 1.F. of Schedule D), 3, and 11, and material changes to Item 10, must be amended promptly by ERAs.

<sup>3</sup> As calculated for Item 5.F. of Form ADV.

<sup>4</sup> Every adviser authorized to use the IARD System to make electronic filings of Form ADV has a financial account with the IARD. Firms may submit payments by check, wire transfer or electronic payment via Web CRD/IARD E-Bill. Instructions and relevant addresses are available [here](#). Investment advisers registered with or applying for registration with the SEC will continue to be subject to any applicable state notice filing fees.

<sup>5</sup> Please see our Firm's client memorandum, *FINRA Anti-Spinning Rule's Impact on Private Funds*, March 8, 2011, [here](#).

---

## Reminder: Annual Update of Form ADV and Annual Requirement to Confirm Status of Investors Under the New Issue Rules

investors in their funds. The Rules also require that the status of such investors as Non-Restricted and Covered Persons be confirmed every year.

Additionally, effective January 1, 2020, FINRA amended Rules 5130 and 5131 to change which persons are considered Restricted or Covered Persons under the Rules. Most of these changes allow managers of private investment funds purchasing New Issue securities to allocate profits and losses from New Issue securities to additional persons or entities that are the beneficial owners of those funds.<sup>6</sup> Therefore, managers that obtained questionnaires regarding the status of their investors under these Rules last year should update their questionnaires when confirming the status of such investors this year. Rule 5130 only requires that the manager annually reconfirm that an investor is **not** a Restricted Person and is thus able to participate in the profits and losses from New Issue securities.<sup>7</sup> Rule 5131 permits allocations of New Issues to an account in which the collective beneficial interests of Covered Persons associated with any one particular public company or covered nonpublic company represent 25% or less of the value of the account. Therefore, a manager may also want to ask investors to confirm that they are affiliated with the same company or companies as was the case in the prior year. Both Rules allow the annual confirmation of status to be in the form of a negative consent once an initial written confirmation has been obtained.

Thus, managers wishing to purchase New Issue securities should communicate, sometime before the anniversary date of the responses received last year, with each of their investors, advising them, based on the investor's answers from last year, whether the manager has treated the investor as a Covered Person and/or a Restricted Person and asking the investor to inform the manager of any changes in such investor's status. The manager may also state in the mailing that if it does not receive a reply by a certain date, it will assume that there has been no change in the investor's status.

---

<sup>6</sup> However, the exemption for foreign investment company investors, which was modified to provide alternative ways to qualify, now also has an additional restriction, that the foreign investment company was not formed for the specific purpose of permitting Restricted Persons to invest in New Issue securities. Please see our firm's client alert, *SEC Approves Amendments to the FINRA New Issue Rules*, November 25, 2019, [here](#).

<sup>7</sup> Some managers also annually ask investors classified as Restricted Persons if their status has changed. In that the Rule amendments have exempted a number of persons or entities previously considered to be Restricted or Covered Persons, this year managers that do not typically do so may want to confirm the status of all their investors.

---

## Reminder: Annual Update of Form ADV and Annual Requirement to Confirm Status of Investors Under the New Issue Rules

If you have any questions regarding this client alert, please contact the following attorney or the attorney with whom you regularly work.

---

**Martin R. Miller**

212 728 8690

[mmiller@willkie.com](mailto:mmiller@willkie.com)

Copyright © 2020 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Palo Alto, San Francisco, Paris, London, Frankfurt, Brussels, Milan and Rome. The Firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).