

August 11, 2015

Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

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

Dear Mr. Fields:

The Private Equity Growth Capital Council (the “PEGCC”) appreciates the opportunity to comment on the proposed amendments (the “Proposed Amendments”) to Form ADV and certain rules under the Investment Advisers Act of 1940, as amended (the “Advisers Act”).<sup>1</sup> The PEGCC is an advocacy, communications and research organization established to develop, analyze and distribute information about the private equity and growth capital investment industry and its contributions to the national and global economy. Established in 2007, and formerly known as the Private Equity Council, the PEGCC is based in Washington, D.C. The PEGCC members are the world’s leading private equity and growth capital firms united by their commitment to growing and strengthening the businesses in which they invest.

The PEGCC generally supports the efforts of the Securities and Exchange Commission (the “Commission” or the “SEC”) to modernize Form ADV, particularly changes that reduce burdens on private fund sponsors. The PEGCC respectfully submits the following comments, discussed in more detail below:

- The definition of “separately managed accounts” should be narrowed to exclude (1) non-U.S. clients where the adviser’s principal place of business is outside the United States and (2) all pooled investment vehicles. In addition, the information on separately managed accounts of private fund sponsors (or at least those managed in parallel with private funds) should be reported on Form PF to the extent that the Commission believes that such information is necessary to assist in the SEC staff’s ability to effectively carry out its risk-based examination program and other risk assessment and monitoring activities.
- The PEGCC strongly supports the Commission’s proposal to codify “umbrella registration” for private fund advisers. Umbrella registration is an important option for private fund sponsors and, we believe, makes the registration process

---

<sup>1</sup> SEC Release No. IA-4091 (May 20, 2015) (the “Proposing Release”).

far more efficient both for registrants and the SEC staff. However, the SEC should consider additional revisions to make the reporting requirements for registered investment advisers that use this option less burdensome, in particular with respect to reporting ownership and officer information.

- The proposed books and records rule on performance communications should not be adopted or, if adopted, should be narrower to exclude one-on-one communications responding to specific investor requests and one-on-one communications with sophisticated investors.
- The PEGCC recommends that the Commission modify its concept of “total assets” to allow for any necessary deductions for managed or other non-proprietary assets, which would produce a figure that includes only the consolidated assets of the investment adviser that are at risk, regardless of the adviser’s accounting treatment of managed assets. With respect to the other additional information included in the Proposed Amendments, the PEGCC does not support the disclosure of the use of third-party compliance auditors.

#### I. Definition of “Separately Managed Accounts” Should Be Narrowed and Information Regarding Parallel Managed Accounts Should Be Moved to Form PF

Several of the amendments to Form ADV are designed to collect more specific information about advisers’ separately managed accounts – that is, “advisory accounts other than those that are pooled investment vehicles (*i.e.*, registered investment companies, business development companies, and pooled investment vehicles that are not investment companies (*i.e.*, private funds)).”

The PEGCC recommends that (i) the definition of “separately managed accounts” should be clarified and narrowed and (ii) private fund sponsors should be permitted to report information concerning separately managed accounts on Form PF rather than on Form ADV.

We believe that the definition of “separately managed accounts” is overly broad. First, similar to disclosure of private funds on Section 7.B.(1) of Schedule D, an adviser whose principal place of business is outside of the U.S. should be permitted to exclude non-U.S. clients.<sup>2</sup> Second, we believe that the definition should be clarified so that it excludes all pooled investment vehicles that are not private funds, registered investment companies or business development companies. For example, certain non-U.S. funds may not rely on Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 and, therefore, would not be “private funds” for purposes of the Advisers Act; however, these types of funds would also clearly not be “separately managed accounts.”

---

<sup>2</sup> See Instructions for Part 1A of Form ADV, Instruction 6.a.

We also note that many of the separately managed accounts managed by investment advisers whose principal advisory activities involve managing private funds are managed in parallel with, and have similar investments as, the private funds. This concept is currently recognized in Form PF, which requires certain information to be reported with respect to “parallel managed accounts” – that is “any managed account or other pool of assets . . . that pursue substantially the same investment and strategy and invest side by side in substantially the same positions as the identified private fund.”

The PEGCC believes that information about separately managed accounts (or at least accounts managed in parallel with reported private funds) should be reported in Form PF rather than Form ADV. This would accomplish two objectives. First, it would place all relevant information concerning private funds and related accounts in a single report that is designed to achieve many of the same objectives as the proposed amendments to Form ADV.<sup>3</sup> Permitting such consolidated reporting would reduce the burden on private fund sponsors, present more coherent data to the SEC for its systemic risk<sup>4</sup> and other assessments, and ensure that any confidential data with respect to separately managed accounts are protected to the same extent as the data with respect to private funds.

Second, providing for this information to be reported in Form PF would help prevent the disclosure of confidential information for a private fund sponsor who also files Form PF.<sup>5</sup> The Proposing Release implicitly acknowledges the information requested with respect to

---

<sup>3</sup> While Form PF was designed to assist the Financial Stability Oversight Council in its assessment of systemic risk in the U.S. financial system, in adopting the Form the SEC noted that it would also assist the Commission in its regulatory programs, including examinations, investigations and investor protection efforts relating to private fund advisers.

<sup>4</sup> As the PEGCC noted at several points during the regulatory process regarding systemically important financial institutions in the United States, private equity firms and funds are not systemically important. See PEGCC Letter to the Financial Stability Oversight Council (“FSOC”) (Mar. 25, 2015) (commenting on the Notice Seeking Comment on Asset Management Products and Activities – Docket No. FSOC-2014-001); PEGCC Letter to the FSOC (Dec. 16, 2011) (commenting on the Second Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies – Docket No. FSOC 2011-0001); see also PEGCC Letter to the Federal Reserve Board (March 30, 2011) (commenting on Proposed Rule for Definitions of “Predominantly Engaged in Financial Activities” and “Significant” Nonbank Financial Company and Bank Holding Company – Docket No. R-1405); PEGCC Letter to the FSOC (Feb. 25, 2011) (commenting on the Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies – Docket No. FSOC 2011-0001); PEGCC Letter to the FSOC (Nov. 5, 2010) (commenting on the Advance Notice of Proposed Rulemaking Regarding Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies – Docket No. FSOC 2010-0001).

<sup>5</sup> See Item 11 of Form PF (asking for the value of parallel separate accounts related to a reporting fund) and Proposing Release at p. 11 (stating that “[w]e are proposing to use these measures because they are commonly used metrics in assessing the use of derivatives and are comparable to information collected on Form PF regarding private funds.”)

separately managed accounts is similar to that which is requested on Form PF with respect to private funds.<sup>6</sup> In addition, the Proposing Release acknowledges that one of the reasons for collecting certain of the information for advisers with greater than \$150 AUM of separate accounts is for systemic risk assessment, which is the primary purpose of Form PF.<sup>7</sup>

The Commission recognized the importance of maintaining the confidentiality of data concerning private funds when it adopted Form PF – confidentiality mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Requiring information concerning the management of separately managed accounts, particularly those that are managed in parallel with private funds, could result in the disclosure of information that Congress and the Commission intended to be kept confidential. This result could be avoided if the information on parallel managed accounts is reported in Form PF.

## II. Umbrella Registration Should Be Adopted and Further Enhancements Should Be Made to Form ADV

The PEGCC strongly supports umbrella registration and amending Form ADV to make umbrella registration administratively simpler and less confusing. As the SEC noted in the Proposing Release, many private fund sponsors conduct a single advisory business through several different legal entities for a range of tax, regulatory, legal or other reasons. Promoting umbrella registration will provide the SEC with more coherent data, will reduce the burden on private fund sponsors and will be less confusing to investors or other members of the public who search the IARD database.

To this end, we also support the continued ability of private fund sponsors to rely on existing SEC staff guidance with respect to general partners and other similar special purpose vehicles.<sup>8</sup> It is critical that the Commission confirm that the SEC staff guidance regarding these entities remains in effect.<sup>9</sup>

---

<sup>6</sup> See Proposing Release at fn. 15 – 17.

<sup>7</sup> See Proposing Release at p. 8 (discussing FSOC’s need for more separate account data); Proposing Release at p. 11, fn. 19 (discussing citing to FSOC as one of the reasons for requesting borrowing and derivatives data).

<sup>8</sup> American Bar Association, Business Law Section, SEC Staff No-Action Letter (Jan. 18, 2012) (the “2012 ABA Letter”). See also ABA Subcommittee on Private Investment Entities, SEC Staff No-Action Letter (Dec. 8, 2005) (the “2005 ABA Letter”).

<sup>9</sup> We note that general partners and managing members do not present the same reporting issues on Form ADV, so there is not the same need to amend the Form to facilitate their reliance on the filing adviser’s Form ADV. We note that, as discussed in fn. 3 of the 2012 ABA Letter, these general partners and other special purpose vehicles are still registered investment advisers and required to comply with all provisions of the Advisers Act and the rules thereunder.

We also support introducing a new Schedule R for providing information on relying advisers, because the current Form and, in particular, Schedules A & B of Part 1A were not structured in an efficient manner to permit umbrella registration. The proposed new Schedule R includes an option to pre-fill the ownership and officer disclosure as the same as the filing adviser's information on Schedules A & B, which we believe is a useful first step, because it would facilitate the initial completion of Schedule R if the ownership is the same or substantially similar to the filing adviser's ownership. However, we think that the SEC should consider additional revisions to the Form and the instructions that would further streamline the reporting of the ownerships and officers of relying advisers.

These revisions could include providing an option to link the disclosure in Section 4 to be identical to Schedules A & B of Part 1A. We note that, while the pre-fill option would permit this for the first filing, any subsequent changes to Schedules A & B would need to be repeated on each Schedule R. A "linking" option would allow an adviser to make a single change on Schedules A or B that is reflected automatically on Schedule R.

In addition, we would support the ability to reference entities whose ownership is already disclosed on Schedules A & B of Part 1A. For example, many relying advisers are direct subsidiaries of the filing adviser or direct subsidiaries of the same parent company as the filing adviser. In these circumstances, we believe that the adviser should be able to include a reference to ownership chain on Schedule A & B, rather than duplicating the same ownership chain on Schedule R. Taking this approach would ease the administrative burden on advisers and also make it less likely that they would make inadvertent errors by failing to update each Schedule in the event of a change in the ownership chain. This approach would also benefit the SEC because it would more clearly show the ownership links between the filing adviser and the relying advisers and reduce the likelihood that the data the SEC is analyzing has inadvertent errors.

### III. The Proposed Amendments to Books and Records Rule Should Not Be Adopted

The Proposed Amendments to Rule 204-2 would require advisers to make and keep supporting documentation that demonstrates performance calculations or rates of return in *any* written communications that the adviser circulates or distributes, directly or indirectly, to any person. The Proposed Amendments also would require advisers to maintain originals of all written communications received and copies of written communications sent by an investment adviser related to the performance or rate of return of any or all managed accounts or securities recommendations. This is in contrast to the current rule, which only imposes this requirement on communications that are distributed to ten or more persons.

The PEGCC disagrees with the Proposed Amendments to Rule 204-2. The Commission appears to have significantly understated the burdens that this proposal would impose on registered investment advisers and presents little evidence or analysis of why the

Commission believes that the burden will be so light.<sup>10</sup> The perceived benefits, on the other hand, seem intangible or episodic.<sup>11</sup> For example, the Proposing Release states that “[t]he veracity of performance information is important regardless of whether it is a personalized client communication or in an advertisement sent to ten or more persons.” However, the Commission does not suggest how a burdensome books and records requirement will facilitate that objective or whether there are other, less burdensome methods to achieve that objective. For example, the proposal does not show any consideration for the practical difficulties of capturing all such communications or the fact that performance communications may be the result of specific requests by sophisticated investors during one-on-one interactions. Thus, we do not believe that the Proposed Amendments to Rule 204-2 should be adopted.

The PEGCC believes that if the proposed requirement is adopted, then it should be modified to exclude (i) one-on-one communications that are customized responses from investors (*e.g.*, in respect to a due diligence questionnaire) and (ii) one-on-one communications with sophisticated investors or clients (*e.g.*, qualified clients or knowledgeable employees).

#### IV. Disclosure Concerning Adviser’s Own Assets Should Reflect “At Risk” Assets and Additional Information Regarding Third-Party Compliance Auditors on Form ADV Should Not Be Adopted

The Proposed Amendments include a new requirement that the adviser disclose its own total assets in certain ranges if it exceeds \$1 billion. The instructions to that Item state that an adviser should determine its total assets based on the total assets on its balance sheet for the most recent fiscal year end. The PEGCC is concerned that this measure of “total assets” may be misleading because it may incorporate certain assets managed by the firm for third parties. For this reason, the PEGCC recommends that the Commission modify its concept of “total assets” to allow for any necessary deductions for managed or other non-proprietary assets, which would produce a figure that includes only the consolidated assets of the investment adviser that are at risk, regardless of the adviser’s accounting treatment of managed assets.

In addition, the Commission should clarify the proposed language in Item 1.O. The proposed language reads, “[i]f yes, what is the approximate amount of your assets[.]” This proposed language implies a real-time asset calculation that would need to be updated periodically by advisers. The PEGCC does not believe that this is the Commission’s intent, and instead that the calculation is intended to be a yearly static

---

<sup>10</sup> See Proposing Release at fn. 115 (estimating that it would increase the burden by 0.5 hours per adviser annually).

<sup>11</sup> The basis for this new requirement appears to be one unsuccessful enforcement action. See Proposing Release at fn. 95 and the accompanying text.

calculation to be performed at the end of the adviser's most recent fiscal year. Accordingly, the Commission should clarify the proposed language in Item 1.O to state "the approximate amount of your assets at the end of your most recent fiscal year."

With respect to the other additional information included in the Proposed Amendments, we do not support the disclosure of the use of third-party compliance auditors. The decision to use a third-party compliance auditor is complex and depends on the particular adviser's own risk assessments, the adviser's internal capabilities and the auditor's costs and capabilities. Furthermore, third-party compliance auditors are used in a wide range of roles that would be difficult to specify on Form ADV, including for annual compliance reviews, one-off full mock audits, one-off assessments of a particular compliance area, and as a resource for answering compliance questions. We do not believe that the decision to use a third-party compliance auditor provides additional insight on the SEC's risk assessment of an investment adviser. In addition, we are concerned that the inclusion of such an item may create the mistaken impression that the use of a third-party compliance auditor is the industry practice or "best practices." Such a result would impose additional costs on small and medium-size investment advisers that are not warranted by compliance risks they face.

\* \* \*

The PEGCC appreciates the SEC's consideration of this letter and is available to discuss any questions that the SEC may have.

Respectfully submitted,



Jason Mulvihill  
General Counsel  
Private Equity Growth Capital Council