



# GlobalNote

## How to Register as an Investment Adviser with the SEC <sup>1</sup>

This Memorandum addresses the procedure by which an investment adviser registers with the U.S. Securities Exchange Commission (“SEC”) under the Investment Adviser’s Act of 1940, as amended (the “Advisers Act”).

### Summary of Steps and Obligations

Once an investment adviser determines that it is required to register or is eligible and wishes to register voluntarily with the SEC, the applicant must complete and file Form ADV, which can be found on the SEC’s website at <http://www.sec.gov>.<sup>2</sup> Form ADV contains two parts, which are described in more detail in Section III and IV of this memorandum:

- Part I of Form ADV must be filed electronically with the Investment Adviser Registration Depository (“IARD”). Information regarding the IARD filing can be found on the Commission’s website at: <http://www.sec.gov/divisions/investment/iard.shtml>. Part I provides for disclosure of detailed information about the applicant, which, once filed, will be publicly available on the IARD.
- Part II contains additional information about the adviser. An applicant is not required to file Part II of Form ADV with the SEC at this time (it is anticipated that the SEC will eventually adopt a revised Part II to be filed electronically). Rather, the applicant must maintain a copy of Part II of Form ADV in its files at all times. The copy of Part II of Form ADV maintained in the applicant’s file is considered filed with the SEC. An investment adviser must furnish Part II of Form ADV to a potential client not less than 48 hours before entering into any written or oral investment advisory contract, or at the time of entering into any such contract as long

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<sup>1</sup> This memo is for education purposes only, generic in nature, and should not be construed as legal advice to any person in any jurisdiction. Note also that the US Congress and the SEC are considering enhanced registration requirements and standards and as a result portions of this memo may become obsolete. Please be certain to check the latest rules before proceeding.

<sup>2</sup> A US adviser must have at least \$25 million of assets under management to be eligible to register as an investment adviser with the SEC. An adviser that has \$30 million or more of assets under management must register with the SEC unless such adviser qualifies for an exemption from registration under the Advisers Act. The AUM dollar amounts do not apply to non US advisers.

as the client has a right to terminate the contract without penalty within five business days after entering into the contract.

## **I. Getting Started – The SEC Registrant Entitlement Packet**

An applicant, i.e., the adviser, must designate at least one person to serve as the Account Administrator with respect to the IARD. An Account Administrator is the person responsible for maintaining and updating an adviser's Form ADV in the IARD system. As further described below, the Account Administrator will be provided with access codes to go into IARD and to update an adviser's Form ADV.

Before an applicant can complete and file Part I of Form ADV, the applicant must first establish an account with the IARD (referred to as the IARD User Account). To establish an IARD User Account, the applicant accesses the IARD website and completes the SEC Registrant Entitlement Packet that can be accessed at [http://www.iard.com/pdf/sec\\_reg\\_entitle\\_packet.pdf](http://www.iard.com/pdf/sec_reg_entitle_packet.pdf). The SEC Registrant Entitlement Packet consists of the following:

- A memorandum from the Financial Industry Regulatory Authority (the "FINRA")
- Three forms for completion:
  - (1) The FINRA Entitlement Agreement;
  - (2) The IARD Account Administrator Entitlement Form; and
  - (3) The CRD Participant IA-Only Account Administrator Entitlement Form (CRD Participant IA-Only AEFF)

The applicant submits (i) the FINRA Entitlement Agreement, (ii) the IARD Account Administrator Entitlement Form, and (iii) the CRD Participant IA-Only Account Administrator Entitlement Form (CRD Participant IA-Only AEFF) in paper form to the FINRA Entitlement Group. The FINRA Entitlement Group processes the three forms.

Thereafter, FINRA will contact the applicant's Account Administrator and provide the Account Administrator with the following:

- The adviser's CRD number
- The Account Administrator's User ID
- The initial password for accessing IARD

At that point, FINRA does the following:

- Sets up the applicant's IARD User Account; and
- Sets up the IARD Financial Account for billing and payment of fees.

Next, within seven to ten business days, FINRA will contact the Account Administrator via e-mail with a link to the IARD Confirmation Packet. The IARD Confirmation Packet

provides the Account Administrator with information regarding the Account Administrator's role, responsibilities, security information, and links to other information. The IARD Confirmation Packet contains the following six attachments:

- (1) Recommended Hardware/Software Configuration;
- (2) Account Management Tool General Overview;
- (3) IARD Account Administrator Roles & Responsibilities;
- (4) Password Change Instructions;
- (5) Password Change Instructions for IARD Users; and
- (6) FINRA Entitlement Program Support

## **II. The IARD Financial Account**

An applicant must have on deposit sufficient funds to cover the applicant's initial setup fee prior to filing Part I of Form ADV. Moreover, once the applicant has become a registered investment adviser, such adviser must ensure that there are sufficient funds in the IARD Financial Account to cover the annual updating fees. The fees charged depend on the amount of assets under management. Currently, the fee schedule is as follows:

<u>Fee Schedule</u>		
<u>Assets Under Management</u>	<u>Initial Set-Up Fee</u>	<u>Annual Updating Fee</u>
Less than \$25 million	\$150	\$100
\$25 million to \$100 million	\$800	\$400
More than \$100 million	\$1,100	\$550

An applicant may send the appropriate fees by Web E-Pay, check or by wire. Details on how to submit funds by Web CRD/IARD E-Pay, check or wire can be found at <http://www.iard.com/fees.asp>. An applicant should allow 48 hours for the processing of funds. Once the funds are credited to the applicant's IARD Financial Account, the applicant may now proceed with its filing.

## **III. Completing Part I of Form ADV**

### A. General

Part I of Form ADV requires the applicant, i.e., the adviser, to disclose information about the adviser's business, the persons who own or control the adviser and whether the adviser or its key personnel have been sanctioned for violating securities or other laws. It is critical that the applicant provide full disclosure because it is unlawful under the Advisers Act to willfully make an untrue statement of material fact or to willfully omit a material fact in any registration application or report.<sup>3</sup> An applicant that fails to comply

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<sup>3</sup> Section 207 of the Advisers Act.

runs the risk of having its registration revoked and/or potentially being subject to administrative proceedings and civil penalties.

## B. Responses and Disclosures

When completing Part I of Form ADV, an applicant is required to disclose the following:

- The adviser's principal office and place of business, its contact information, and business hours.
- The adviser's web site address, if any.
- Where the adviser's books and records are maintained.
- Whether the applicant has filed notice as an investment adviser at the state-level and, if so, with which states.
- The adviser's form of organization - corporation, sole proprietorship, limited liability company, partnership, limited liability partnership or other.
- The number of employees and their functions.
- The number of clients and type of client.
- Compensation arrangement (details regarding the adviser's existing compensation arrangements with its clients).
- The amount of assets under management.
- Whether the adviser is registered in another capacity, e.g. a commodity pool operator.
- Whether the adviser is affiliated with another financial institution, e.g. a broker-dealer.
- Whether the adviser engages in principal transactions or agency cross transactions.
- Whether the adviser has custody of its clients cash and securities.<sup>4</sup>
- The identity of the adviser's direct owners, indirect owners and executive officers.<sup>5</sup>
- The disciplinary history of the adviser.
- The disciplinary history of the adviser's "advisory affiliates."<sup>6</sup>

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<sup>4</sup> In the context of U.S.-domiciled funds, a hedge fund manager acting as the general partner to a limited partnership (or as the managing member to a limited liability company) is deemed to have custody and therefore must comply with the custody rule under Rule 206(4)-2 under the Advisers Act. In the context of non-U.S. domiciled funds, the SEC staff has taken the position that if a member of the investment adviser is acting as one of the directors of the non-U.S. domiciled fund, the SEC may deem the investment adviser to have custody because the position of being a director gives that person the power to direct funds and securities and therefore such a person can potentially abscond with the funds and securities.

<sup>5</sup> Note that Rule 206(4)-7 of the Advisers Act requires a registered investment adviser to identify the Chief Compliance Officer on Schedule A, Item 2(a) of Form ADV Part I.

<sup>6</sup> "Advisory affiliates" are (1) all of the adviser's current employees (other than employees performing only clerical, administrative, support or similar functions); (2) all of the adviser's officers, partners, or directors (or any person performing similar functions); and (3) all persons directly or indirectly controlling the adviser or controlled by the adviser.

### C. Approval

Once Part I of Form ADV is filed with the SEC, the SEC generally has 45 days after receipt of the Form ADV to declare an applicant's registration effective or to institute a proceeding to determine whether to deny registration. The SEC will mail an Effective Order to an applicant once an applicant's registration is declared effective. In practice, an applicant can expect a response from the SEC granting registration within two week after filing Part I of Form ADV.

### **IV. Completing Part II of Form ADV**

Part II of Form ADV is commonly referred to as the "brochure," and it is a written disclosure statement that sets forth information about the adviser's business practices, the education and business background of the adviser's principal executives and members of its investment committee, fees and conflicts of interests. An adviser must also provide a summary of its proxy voting policy and a summary of its Code of Ethics. If an adviser uses third-parties to solicit clients, such adviser must describe its solicitation practices. Also, if an adviser uses soft dollars, the adviser is required to describe its soft dollar practices.

Hedge fund managers should note that they are to describe the funds that they manage, the funds' investment strategies, and their method of analysis when responding to Items 2, 3, and 4 of Part II of Form ADV.

### **V. Continuing Obligations with Respect to Part I of Form ADV**

A registered investment adviser is obligated to file certain amendments to Form ADV Part I through the IARD system as follows:

#### A. Prompt Amendments

An adviser must promptly file an amendment if:

- i. Information provided in the most recent Form ADV in response to the following items in Part 1A becomes inaccurate in any way:
  - identifying information, including name of the adviser, address, contact person, etc. (Item 1);
  - type of entity (e.g. limited liability company, limited liability partnership, corporation, etc.) and/or state of organization or fiscal year information (Item 3);
  - changes to an adviser's or related person's custody of client assets (Item 9); and
  - disciplinary disclosure for the adviser and its "advisory affiliates" (Item 11).

- ii. Information provided in the most recent Form ADV in response to the following items in Part 1A becomes materially inaccurate in any way:
  - succession to the business of another adviser (Item 4);
  - participation or interest in client transactions (including any proprietary or sales interest or changes in investment or brokerage discretion) (Item 8); and
  - direct and indirect control persons of the adviser (Item 10).

B. Annual Amendments

With respect to any other changes to Part I of Form ADV, amendments are required to be filed annually within 90 days after the adviser's fiscal year end.

The adviser will be charged the IARD annual fee at the time the adviser makes its annual amendment, which is due within 90 days after the adviser's fiscal year end.

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If you have any questions or comments regarding registering as an investment adviser with the SEC as discussed in this memorandum or with compliance under the Advisers Act, please feel free to contact the attorney at the law firm with whom you work or any partner in the Financial Services Private Funds Group.

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