

COVID-19 Update

New SEC Guidance on PPP Loans, Form ADV Brochure Delivery and the Custody Rule

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On April 27, 2020, the staff of the Securities and Exchange Commission (the “SEC”) updated its Division of Investment Management Coronavirus (COVID-19) Response FAQs and Staff Responses to Questions About the Custody Rule FAQs to address the following topics in light of the COVID-19 pandemic:

1. Disclosure of Paycheck Protection Program (“PPP”) Loans: Whether an adviser needs to disclose receipt of a PPP loan in its Form ADV Part 2A (“Brochure”). In discussing this issue below, we also discuss the Small Business Administration’s (the “SBA”) recent guidance on a new Interim Final Rule.
2. Delay of Brochure Delivery for Wrap Fee Programs: How a participating adviser in a wrap fee program may rely on the SEC Order permitting the temporary delay of Brochure delivery.
3. Delay of Distribution of Pooled Audited Statements and Custody Rule: Whether the SEC will recommend enforcement for a violation of the Custody Rule if audited financial statements are not distributed in time due to certain unforeseen circumstances.

PPP Loans – Brochure Disclosure

(FAQ II.4, available [here](#))

The guidance states that investment advisers that receive a PPP loan (or other type of financial assistance) must disclose this arrangement if the circumstances that led the firm to seek the loan constitute “material facts relating to your advisory relationship with clients.” For example, it is the staff’s view that an adviser would be expected to provide disclosure if it requires financial assistance to pay the salaries of employees primarily responsible for performing advisory functions to clients. In addition, it is the staff’s view that an adviser may be required to disclose its financial condition in response to Brochure Item 18 (Financial Information) or as part of the Brochure’s Appendix 1 (wrap fee program brochure) if it is experiencing conditions that could impair its ability to meet contractual commitments to its clients. Such disclosure would consist of the nature, amounts and the effects of the financial assistance and arises from an investment adviser’s fiduciary duty to make full and fair disclosure to clients of all material facts relating to the advisory relationship.

PPP Loans – Eligibility Criteria

(Interim Final Rule, available [here](#))

On April 13, 2020, the SBA published supplemental guidance on an Interim Final Rule regarding the eligibility for PPP loans (effective April 24, 2020). The guidance makes clear (under Question 2.a.) that hedge funds and private equity firms are **not** eligible to receive a PPP loan because these entities are “primarily engaged in investment or speculation.” However, the guidance (under Question 2.b.) also provides that a portfolio company of a private equity fund may be eligible for a PPP loan in the same manner as any other business, including applicable affiliate rules.

Delay of Brochure Delivery for Wrap Fee Programs

(FAQ II.5, available [here](#))

A participating adviser that has contracted with a wrap fee program sponsor to deliver the Brochure to applicable clients may rely on the SEC Order (the “Order”) (available [here](#)) that permits delayed Brochure delivery in the event the program sponsor cannot deliver the Brochure by the appropriate deadline due to circumstances surrounding the COVID-19 pandemic. To rely on this temporary relief, the participating adviser must comply with the conditions of the Order. The guidance noted the following considerations with respect to wrap programs:

- The adviser must disclose on its public website (or if it does not have a public website, provide notice to clients) that it is relying on the Order. In the case of clients that primarily or exclusively interact with the participating adviser through the wrap program sponsor, the SEC staff believes the sponsor should also consider posting on its public website notice that the participating adviser is relying on the Order.
- The adviser must notify the SEC staff via e-mail that it is relying on the Order. It is the staff’s view that the program sponsor could provide such notice on the participating adviser’s behalf if in its e-mail, the program sponsor identifies each participating adviser that is relying on the Order and represents that it has the authority to submit the e-mail on behalf of those advisers. If the participating adviser is relying on the Order with respect to clients for which the program sponsor is not contractually obligated to deliver the Brochure, the participating adviser would need to separately satisfy the above notice conditions.

Delay of Distribution of Pooled Audited Statements and Custody Rule

(FAQ VI.9, available [here](#))

The SEC staff will not recommend enforcement against an investment adviser to a pooled investment vehicle where the adviser is relying on the “audit provision” of the Custody Rule and reasonably believed the pool’s audited financial statements would be distributed within the 120-day, 180-day (fund of funds or pool investing in fund of funds) or 260-day deadlines (top-tier pooled investment vehicle investing in one or more funds of funds), but failed to have them distributed in time under certain unforeseeable circumstances.

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