

SPOTLIGHT

CERTAIN INVESTMENT ADVISER FILINGS UNDER THE MICHIGAN UNIFORM SECURITIES ACT

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The Corporations, Securities, and Commercial Licensing Bureau (“Bureau”) within the State of Michigan Department of Licensing and Regulatory Affairs regulates the offer and sale of securities; broker-dealers; agents; investment advisers; and investment adviser representatives under the Michigan Uniform Securities Act, 2008 PA 551, as amended, MCL 451.2101 *et seq* (“the Michigan Uniform Securities Act”).

This Spotlight addresses two separate form filing issues for investment advisers who are registered or exempt from registration under the Securities Act and the rules (“the Securities Rules”) promulgated pursuant to it:

- Q: Are investment advisers registered under the Securities Act required to prepare, file, and deliver the newly adopted Form ADV, Part 3?
 - A: No, Michigan-registered investment advisers are not currently required to prepare, file, or deliver the new Form ADV, Part 3. The reasons for this conclusion are discussed below.
- Q: Are private fund advisers who rely on the Rule 451.4.5 private fund adviser exemption required to file the limited Form ADV required of exempt reporting advisers if the private fund adviser relies on the 17 CFR 275.203A(a)(1)(A) “small adviser” exemption at the federal level?
 - A: Yes, all private fund advisers relying on Rule 451.4.5 are required to file with the state those documents that an exempt reporting adviser is required to file under 17 CFR 275.204-4. The reasons for this conclusion are discussed below.

I. Form ADV, Part 3

Investment advisers registered under the Michigan Uniform Securities Act are not required to prepare, file, or deliver to clients the Form ADV, Part 3 adopted by the United States Securities and Exchange Commission (“SEC”) through its Regulation Best Interest¹ (“Regulation BI”) rule package on June 5, 2019 with a compliance date of June 30, 2020.

Investment advisers in Michigan are required to be registered or exempt from registration pursuant to MCL 451.2403(1). Rule 451.4.10 under the Securities Act requires an applicant for

¹ <https://www.sec.gov/rules/proposed/2019/33-10734.pdf>

investment adviser registration to complete Form ADV and file it electronically with the Investment Adviser Registration Depository, or IARD, pursuant to the form's instructions.² Instructions to Form ADV, Part 3³ state, "If you do not have any retail investors to whom you must deliver a relationship summary, you are not required to prepare or file one."

Investment advisers registered under the Michigan Uniform Securities Act are only required under the current rules – specifically, Rule 451.4.19 – to prepare, file, and deliver to clients the Form ADV, Part 2 brochure. The Form ADV, Part 3 is not required to be delivered to clients under the Michigan Uniform Securities Act or the Securities Rules; therefore, the instructions do not require it to be filed as a part of an investment adviser's application for registration through the IARD at this time.

Michigan-registered investment advisers are not required to prepare, file, or deliver to clients the Form ADV, Part 3 unless the Securities Rules are amended to require it. Advisers should be aware of the Securities Rules and watch for amendments which might be proposed by the Bureau in the future.

II. Form ADV for Exempt Private Fund Advisers under Rule 451.4.5

The Bureau received an inquiry from a member of the public asking if an investment adviser relying on the registration exemption at Rule 451.4.5 can avoid the limited Form ADV filing required by Subrule 451.4.5(3)(b) if the adviser qualifies for the SEC's federal "small adviser" registration prohibition at 17 CFR 275.203A(a)(1)(A) for advisers with less than \$25,000,000 in assets under management.

Yes, an investment adviser relying on the Rule 451.4.5 private fund investment adviser exemption must file with the state each report that an exempt reporting adviser is required to file with the SEC pursuant to 17 CFR 275.204-4.

The plain language of the rule uses the definite article "the" private fund adviser when describing the person subject to the requirement to file each report and amendment with the state in order to satisfy the exemption. In describing what report must be filed with the state by "the" private fund adviser, the rule uses the indefinite article "an" exempt reporting adviser under 17 CFR 275.204-4. The report to be filed by "the" adviser with the state is whatever would be filed by "an" exempt reporting adviser under 17 CFR 275.204-4. The rule does not state that the adviser must file with the state whatever report the adviser files with the SEC; if that was the intent of the rule, then the language would have been clear on that point.

17 CFR 275.204-4(a) requires filing of a Form ADV according to its instructions by an exempt reporting adviser. Subrule 204-4(a) states:

² https://dtmb.state.mi.us/ORRDocs/AdminCode/1957_11010_AdminCode.pdf

³ <https://www.sec.gov/rules/final/2019/34-86032-appendix-b.pdf>

(a) *Exempt reporting advisers.* If you are an investment adviser relying on the exemption from registration with the Commission under section 203(l) or (m) of the Act [internal citations omitted], you must complete and file reports on Form ADV (17 CFR 279.1) by following the instructions in the Form, which specify the information that an exempt reporting adviser must provide.⁴

The instructions to Form ADV limit the amount of information to be provided by an exempt reporting adviser to specific parts of the Form ADV.⁵ Specifically, the exempt reporting adviser is only responsible for the following items along with their corresponding schedules:

- Item 1 – Legal name, other names under which business is conducted, places of business, hours of operation, website, chief compliance officer name, books and records location, public company status, etc.
- Item 2 – Registration status (checkbox State Exempt Reporting Adviser);
- Item 3 – Form of organization checkbox (corporation, LLC, etc.);
- Item 6 – Checkbox for Other Business Activities, if any;
- Item 7 – Checkbox for whether adviser advises private funds; if yes, identify the name of the fund;
- Item 10 – Control persons. Identify owners and executive officers.
- Item 11 – Disclosure Information. Identify relevant disciplinary history.

⁴ <https://www.govinfo.gov/content/pkg/CFR-2016-title17-vol4/pdf/CFR-2016-title17-vol4-sec275-204-4.pdf>

⁵ <https://www.sec.gov/about/forms/formadv-instructions.pdf>