

## SEC Form PF Amendments Show Private Fund Adviser Focus

By **Douglas Elsbeck, Steven Blau and Jake Heyka** (June 13, 2023, 3:17 PM EDT)

On May 3, the U.S. Securities and Exchange Commission adopted amendments<sup>[1]</sup> to Form PF that will establish new event-reporting requirements for "private equity fund advisers"<sup>[2]</sup> and "large hedge fund advisers,"<sup>[3]</sup> and will require certain additional information from "large private equity fund advisers" in their annual Form PF filings, as each of those quoted terms are defined for purposes of Form PF.

These Form PF amendments reflect an increased SEC focus on private funds, private fund advisers and private markets generally, which has been borne out through both significant rule proposals and increased prominence in the commission's stated examination priorities, as well as speeches from the SEC chair and certain commissioners.<sup>[4]</sup>

In addition to rule proposals that would apply to SEC-registered investment advisers generally — RIA outsourcing<sup>[5]</sup> and custody<sup>[6]</sup> — (1) in August 2022, the SEC and the Commodity Futures Trading Commission jointly proposed another set of Form PF amendments, which currently remain in the proposed rulemaking stage, and (2) in February 2022, the SEC proposed what would be, if fully adopted, sweeping changes to the regulatory scheme for private funds.<sup>[7]</sup>

Furthermore, the SEC's 2023 examination priorities note registered investment advisers to private funds as a "notable new and significant focus area."<sup>[8]</sup>

### Overview of Amendments

For private equity fund advisers, the amendments add a new Section 6 quarterly report for advisers to private equity funds that will need to be filed within 60 calendar days of the end of the quarter if any of the following events have occurred during the prior quarter: (1) an adviser-led secondary transaction<sup>[9]</sup>, or (2) fund investors (a) removed the adviser or its affiliate as the general partner or similar control person of the reporting fund, (b) elected to terminate the reporting fund's investment period, or (c) elected to terminate the reporting fund.

For large private equity fund advisers, the amendments add to Section 4, which is filed annually, three new questions, including regarding general partner or certain limited partner clawbacks. The SEC also amended four existing questions, generally to call for additional information.



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For large hedge fund advisers, the amendments will require reporting of certain events as soon as practicable upon, but no later than 72 hours after, their occurrence.

### ***Effective Dates***

The effective date for the amendments to current and quarterly event reporting is 180 days after publication of the adopting release in the Federal Register. The effective date for the amendments to large private equity fund adviser annual reporting is 365 days after publication of the adopting release in the Federal Register.

### **Quarterly Private Equity Event Reports**

Private equity fund advisers will be required to report the following events on Form PF Section 6 within 60 calendar days of the quarter in which they occurred. The January 2022 proposal would have required reporting of such events within one business day.

### ***Adviser-Led Secondary Transactions: Section 6, Item B***

Amended Form PF defines "adviser-led secondary transaction" as

[a]ny transaction initiated by the adviser or any of its related persons that offers private fund investors the choice to: (i) sell all or a portion of their interests in the private fund; or (ii) convert or exchange all or a portion of their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons.

### ***Removal of General Partner, Termination of the Investment Period or Termination of a Fund: Section 6, Items C and D***

Item C will require the adviser to report when a reporting fund receives notification that fund investors have: (1) removed the adviser or an affiliate as the general partner or similar control person of a fund; (2) elected to terminate the fund's investment period; or (3) elected to terminate the fund, in each case as contemplated by the fund documents — each a "removal event," as described in the amended form. The reporting obligations will not be limited to for cause events.

With respect to the reporting requirement for adviser-led secondary transactions, the adopting release passages in support of the requirement may be indicative with respect to an SEC focus on the same, particularly given the adopting release's acknowledgment that private equity event reports may be used by the commission and its staff in examinations and investigations.

### **Additional Questions for Large Private Equity Fund Adviser Annual Reporting**

The amendments to Form PF include the addition of new questions to Section 4, which must be completed on an annual basis by large private equity fund advisers — i.e., an adviser with \$2 billion in private equity fund assets under management — with respect to reporting funds, as well as amendments to three existing questions:

### ***General Partner or Limited Partner Clawback: Section 4, Question 82***

This new question will require reporting of (1) any general partner clawback or (2) any limited partner clawback, or clawbacks, in excess of an aggregate amount equal to 10% of a fund's aggregate capital commitments. The required LP clawback reporting will be triggered when the aggregate limited partner clawbacks over the course of a reporting fund's life exceed 10% of such fund's aggregate capital commitments at such time.

Clawbacks, for purposes of Form PF, are certain obligations of the general partner or limited partners, as applicable, to return distributions made by the fund.

***Investment Strategy: Section 4, Question 66***

This new question will have a drop-down menu from which advisers will be required to select one or more investment strategies applicable to the reporting fund:

- Private credit, and associated sub-strategies such as distressed debt, senior debt, special situations, etc.;
- Private equity, and associated sub-strategies such as early stage, buyout, growth, etc.;
- Real estate;
- Annuity and life insurance policies;
- Litigation finance;
- Digital assets;
- General partner stakes investing; and
- Other.

In a modification from the January 2022 proposal, the amended form will not define the term "digital assets."

***Additional Information On Fund-Level Borrowings: Section 4, Question 68***

This new question will require advisers to report additional information on fund-level borrowing. If a reporting fund engages in fund-level borrowing, this question will require the adviser to provide (1) information on each borrowing or other cash financing available to the fund, (2) the total dollar amount available, and (3) the average amount borrowed over the reporting period. The adopting release's discussion of this question expressly and particularly noted subscription lines of credit.

***Events of Default, Bridge Financing to Controlled Portfolio Companies and Geographic Breakdown of Investment: Section 4, Questions 74, 75 and 78***

Amended Form PF will revise these three questions, in general by soliciting more granular detail.

**New Expedited Current Reporting Requirements For Large Hedge Fund Advisers**

Under the amended Form PF, large hedge fund advisers will need to file current reports for certain reporting events as soon as is practicable — but no later than 72 hours — after the occurrence of a trigger event:

***Extraordinary Investment Losses: Section 5, Item B***

Reporting under this item will be required if, on any business day, the 10-business-day holding period return of the reporting fund is less than or equal to 20% of a fund's reporting fund aggregate calculated value, or RFACV.[10]

***Significant Margin and Default Events: Section 5, Items C through E***

These new questions will require current reporting of certain margin and default events:

- Item C — margin, collateral or equivalent increase — will require advisers to report in the event of increases in the reporting fund's posted margin, collateral or an equivalent over a 10-business-day period of equal to or greater than 20% of the RFACV.
- Item D — notice of margin default or determination of inability to meet a call for margin, collateral or equivalents — will require advisers to report if a reporting fund receives notification that it is defaulting on a call for margin, collateral or an equivalent — subject to certain provisions for a contractually agreed-upon cure period — or if the adviser determines that the reporting fund is unable to meet a call for increased margin, collateral or an equivalent, subject to limited exceptions.
- Item E — counterparty default — will require advisers to report certain counterparty defaults. A report would be required if a counterparty to the reporting fund (1) does not meet a call for margin, collateral or equivalent, or fails to make any other payment in the time and form contractually required, taking into account any contractually agreed cure period; and (2) the amount involved is greater than 5% of the RFACV.

***Prime Broker Relationship Terminated or Materially Restricted: Section 5, Item F***

Item F will require advisers to report, subject to certain exceptions, if (1) the prime broker terminates or materially restricts the reporting fund's relationship with a prime broker, in whole or in part, in markets where that prime broker continues to be active; or (2) the relationship between the prime broker and the reporting fund was terminated by either the reporting fund or the prime broker in the previous 72 hours, and a termination event was activated in the prime brokerage agreement or related agreements within the last 12 months.

***Certain Operations Events: Section 5, Item G***

Item G will require the adviser to report when the adviser or reporting fund experiences a "significant disruption or degradation" of the reporting fund's "critical operations," whether as a result of an event at the reporting fund, the adviser or other service provider to the reporting fund.

Critical operations means, for this purpose, operations necessary for (1) the investment, trading, valuation, reporting and risk management of the reporting fund; as well as (2) the operation of the reporting fund in accordance with the federal securities laws and regulations.

### ***Withdrawals and Redemptions: Section 5, Items H and I***

Item H will require advisers to report if the adviser receives cumulative requests for redemption from a reporting fund exceeding 50% of the most recent net asset value — after netting against subscriptions and other contributions from investors received and contractually committed.

Item I will require advisers to report if the reporting fund is (1) unable to pay redemption requests, or (2) has suspended redemptions and the suspension lasts for more than five consecutive business days.

### **Summary of Certain Key Aspects and Next Steps**

These amendments to Form PF create an obligation for real estate and private equity fund advisers that are Form PF reporters to report, on a quarterly basis, adviser-led secondary transactions and determinations by investors to remove the general partner, terminate an investment period or terminate a reporting fund.

This reporting, and the adopting release discussion of the same, may herald increased SEC scrutiny over the same in examinations and investigations. These obligations will take effect in fairly short order — 180 days after publication of the adopting release in the Federal Register.

Large hedge fund advisers will be subject under the amended Form PF to current event reporting for various events described above, the reporting deadline in respect of which is as soon as is practicable — but no later than 72 hours — after the occurrence of the trigger event. These obligations will also go effective 180 days after publication of the release in the Federal Register.

These Form PF amendments are an example of how advisers to private funds are increasingly in the SEC's focus, reflected both in increased prominence in the SEC's stated examination priorities and significant rule proposals.

Form PF reporters should review internal processes to ensure they are responsive to these additional reporting obligations.

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[1] SEC Release IA-6297, Amendments to Form PF to Require Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers and to Amend Reporting Requirements for Large Private Equity Fund Advisers, available at <https://www.sec.gov/rules/final/2023/ia-6297.pdf>. In addition to the amendments adopted on May 3, 2023, the SEC and CFTC in August 2022 proposed other amendments to Form PF, in a proposed rulemaking titled Form PF; Reporting Requirements for All Filers and Large

Hedge Fund Advisers (SEC Release No. IA-6083, available at <https://www.sec.gov/rules/proposed/2022/ia-6083.pdf>) (the "August 2022 Proposed Amendments"). The August 2022 Proposed Amendments would, among other changes, (i) amend Form PF reporting requirements in respect of certain fund structures, including master-feeder structures, parallel managed accounts, and certain SPVs, and, (ii) require additional reporting and more detailed information, particularly for large hedge fund advisers. The proposed rulemaking is noted on the SEC's Spring 2022 Regulatory Agenda as slated for final action in April 2023.

[2] SEC Release IA-6297, Amendments to Form PF to Require Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers and to Amend Reporting Requirements for Large Private Equity Fund Advisers, available at <https://www.sec.gov/rules/final/2023/ia-6297.pdf>. In addition to the amendments adopted on May 3, 2023, the SEC and CFTC in August 2022 proposed other amendments to Form PF, in a proposed rulemaking titled Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers (SEC Release No. IA-6083, available at <https://www.sec.gov/rules/proposed/2022/ia-6083.pdf>) (the "August 2022 Proposed Amendments"). The August 2022 Proposed Amendments would, among other changes, (i) amend Form PF reporting requirements in respect of certain fund structures, including master-feeder structures, parallel managed accounts, and certain SPVs, and, (ii) require additional reporting and more detailed information, particularly for large hedge fund advisers. The proposed rulemaking is noted on the SEC's Spring 2022 Regulatory Agenda as slated for final action in April 2023.

[3] An adviser is a "large hedge fund adviser" if it or its related persons, collectively, had at least \$1.5 billion in "hedge fund assets under management" as of the last day of any month in the fiscal quarter immediately preceding the adviser's most recently completed fiscal quarter. A "hedge fund" is defined for purposes of Form PF as "[a]ny private fund (other than a securitized asset fund): (a) with respect to which one or more investment advisers (or related persons of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses); (b) that may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or (c) that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration)."

[4] See, for example, Statement on Private Funds Advisers Proposal by Chair Gensler, available at <https://www.sec.gov/news/statement/gensler-statement-private-fund-advisers-proposal-020922> ("Why do private funds matter? First, they matter because they're large, and they're growing in size, complexity, and number. These funds, including hedge funds, private equity funds, venture capital funds, and liquidity funds, currently have approximately \$18 trillion in gross assets.")

Beyond their size, though, these funds matter because of what, or who, stands on either side of them.

[5] See, for example, SEC Proposes RIA Outsourcing Rule, available at <https://www.kslaw.com/news-and-insights/sec-proposes-ria-outsourcing-rule>.

[6] See, for example, SEC Proposes Enhanced Safeguarding Rule for Registered Investment Advisers, available at <https://www.sec.gov/news/press-release/2023-30>.

[7] See, for example, SEC Issues Significant Private Fund Proposal: Standardized Prohibitions and

Requirements, available

at [https://www.kslaw.com/attachments/000/009/471/original/SEC\\_Issues\\_Significant\\_Private\\_Fund\\_Proposal\\_-\\_Standardized\\_Prohibitions\\_and\\_Requirements.pdf?1645741907](https://www.kslaw.com/attachments/000/009/471/original/SEC_Issues_Significant_Private_Fund_Proposal_-_Standardized_Prohibitions_and_Requirements.pdf?1645741907).

[8] Available at <https://www.sec.gov/files/2023-exam-priorities.pdf>.

[9] An adviser-led secondary transaction is defined for purposes of Form PF as "[a]ny transaction initiated by the adviser or any of its related persons that offers private fund investors the choice to: (i) sell all or a portion of their interests in the private fund; or (ii) convert or exchange all or a portion of their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons."

[10] RFACV is defined as "[e]very position in the reporting fund's portfolio, including cash and cash equivalents, short positions, and any fund-level borrowing, with the most recent price or value applied to the position for purposes of managing the investment portfolio. The reporting fund aggregate calculated value is a signed value calculated on a net basis and not on a gross basis. Where one or more portfolio positions are valued less frequently than daily, the last price used should be carried forward, though a current foreign exchange rate may be applied if the position is not valued in U.S. dollars. It is not necessary to adjust the reporting fund aggregate calculated value for accrued fees or expenses. Reporting fund aggregate calculated value does not need to be subjected to fair valuation procedures. The inclusion of income accruals is recommended but not required; however, the approach should be consistent over time. The reporting fund aggregate calculated value may be calculated using the adviser's own internal methodologies and conventions of the adviser's service providers, provided that these are consistent with information reported internally."