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SEC Adopts Private Fund Reform Rules

On August 23, 2023, in a 3-2 vote, the SEC adopted a rule package (the “**Adopted Rules**”) that establishes significant new obligations for private fund advisers under the Investment Advisers Act of 1940. While the Adopted Rules pare back some of the proposed rules’ flat prohibitions and institute important (but limited) exceptions from certain rule obligations for existing funds, the rule package remains in many respects a marked departure from the disclosure-based approach that has generally prevailed under the Advisers Act, particularly in the institutional context.

The Adopted Rules include the following, among other provisions/rule amendments:

- **Restricted Activities Rule:** Prohibits certain adviser charges to and relationships with a private fund unless the adviser meets certain investor disclosure or consent requirements.
- **Preferential Treatment Rule:** Prohibits granting redemption rights or providing information to an investor if the adviser reasonably expects either to have a material, negative effect on other investors (subject to exceptions), and requires disclosure with respect to other preferential terms.
- **Quarterly Statement Rule:** Requires quarterly statements that include three mandatory tables -- a “Fund Table” (regarding certain fees and expenses), a “Portfolio Investment Table” (regarding compensation the adviser or related persons receives from a portfolio investment), and a “Performance Table.”
- **Private Fund Audit Rule:** Requires audits for private funds (i.e., the investment adviser cannot rely on surprise examination under the Custody Rule with respect to vehicles that are within the definition of private fund).
- **Adviser-Led Secondaries Rule:** Requires a fairness or valuation opinion for adviser-led secondaries.



We note:

- Existing funds are provided a limited exclusion from certain provisions of the Restricted Activities Rule and the Preferential Treatment Rule.
- The scope of the Adopted Rules is, generally, limited to advisers to a “private fund”¹, defined as an issuer that would be an investment company but for Investment Company Act Section 3(c)(1) or a 3(c)(7).
- Certain of the Adopted Rules apply only to SEC-Registered Investment Advisers, while others apply to all investment advisers to private funds (i.e., including Exempt Reporting Advisers, state-registered advisers, and Foreign Private Advisers).
- Compliance dates:
 - *Adviser-Led Secondaries Rule, Preferential Treatment Rule, and Restricted Activities Rule:*
 - For advisers with \$1.5 billion or more in private funds assets under management, the compliance date is 12 months after the date of publication in the Federal Register.
 - For advisers with less than \$1.5 billion in private funds assets under management, the compliance date is 18 months after the date of publication in the Federal Register.
 - *Private Fund Audit Rule and Quarterly Statement Rule:* the compliance date is 18 months after the date of publication in the Federal Register.

RESTRICTED ACTIVITIES RULE

The Restricted Activities Rule establishes five categories of activities (generally, charges to and arrangements and relationships with a private fund) that are, directly or indirectly, prohibited unless disclosure is made or investor consents are obtained as described in the following chart.

As noted in the chart, three types of prohibitions are subject to disclosure-based exceptions, and two types of prohibitions are subject to consent-based exceptions. The disclosure-based exceptions require specific reporting either after the charge or allocation occurs or, in the case of non-pro rata allocation of expenses to a fund, prior to the charge or allocation.

The restrictions that are subject to consent-based exceptions will not apply to the contractual agreements governing legacy funds (i.e., a fund that has commenced operations as of the Restricted Activities Rule compliance date) to the extent that compliance with such provision would require the parties to amend such governing agreements.



Topic	Text of Prohibition	Notes
RESTRICTIONS WITH DISCLOSURE-BASED EXCEPTIONS (no carve-outs for legacy funds)		
Regulatory, Compliance, and Examination Expenses	Charge or allocate to the private fund any regulatory or compliance fees or expenses, or fees or expenses associated with an examination, of the adviser or its related persons, <i>unless the investment adviser distributes a written notice of any such fees or expenses, and the dollar amount thereof, to the investors of such private fund client in writing within 45 days after the end of the fiscal quarter in which the charge occurs</i> [Rule 211(h)(2)-1(a)(2)]	The proposing release noted that certain regulatory-related expenses would not implicate this obligation, such as “costs associated with a regulatory filing of the fund, such as Form D.” However, the adopting release notes further: “We are also reiterating that charging these expenses without authority in the governing documents is inconsistent with an adviser’s fiduciary duty.”
Reducing Adviser Clawback for Taxes	Reduce the amount of an adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders, <i>unless the investment adviser distributes a written notice to the investors of such private fund client that sets forth the aggregate dollar amounts of the adviser clawback before and after any reduction of the clawback for actual, potential, or hypothetical taxes within 45 days after the end of the fiscal quarter in which the adviser clawback occurs</i> [Rule 211(h)(2)-1(a)(3)]	The Rule defines “adviser clawback” as “any obligation of the adviser, <i>its related persons</i> , or their respective owners or interest holders to restore or otherwise return <i>performance-based compensation</i> to the private fund pursuant to the private fund’s governing agreements.” The Rule defines “performance-based compensation” as “allocations, payments, or distributions of capital based on the private fund’s (or any of its investments’) capital gains, capital appreciation and/or other profit.”
Allocating Fees and Expenses on a Non-Pro Rata Basis Among Funds	Charge or allocate fees or expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons (other than a securitized asset fund) have invested (or propose to invest) in the same portfolio investment, <i>unless (i) the non-pro rata charge or allocation is fair and equitable under the circumstances and (ii) prior to charging or allocating such fees or expenses to a private fund client, the investment adviser distributes to each investor of the private fund a written notice of the non-pro rata charge or allocation and a description of how it is fair and equitable under the circumstances</i> [Rule 211(h)(2)-1(a)(4)]	Unlike the disclosure requirements related to the provisions in the two rows above, the disclosure required for allocation of fees or expenses on a non-pro-rata basis is subject to a before -the-fact disclosure based exception (in addition to the requirement that the allocation be fair and reasonable). This topic had been in particular focus in the commenting period because of potential impact on co-investments.



Topic	Text of Prohibition	Notes
RESTRICTIONS WITH CONSENT-BASED EXCEPTIONS (includes carve-outs for legacy funds)		
Reimbursement for Certain Investigation Expenses	Charge or allocate to the private fund fees or expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority, <i>unless the investment adviser requests each investor of the private fund to consent to, and obtains written consent from at least a majority in interest of the private fund's investors that are not related persons of the adviser for, such charge or allocation</i> ; provided, however, that the investment adviser may not charge or allocate to the private fund fees or expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Advisers Act or the rules promulgated thereunder [Rule 211(h)(2)-1(a)(1)]	
Borrowing from the Fund	Borrow money, securities, or other private fund assets, or receive a loan or an extension of credit, from a private fund client, <i>unless the adviser: (i) distributes to each investor a written description of the material terms of, and requests each investor to consent to, such borrowing, loan, or extension of credit; and (ii) obtains written consent from at least a majority in interest of the private fund's investors that are not related persons of the adviser</i> [Rule 211(h)(2)-1(a)(5)]	The prohibition does not prohibit the adviser from lending to a private fund.

PREFERENTIAL TREATMENT RULE

The Preferential Treatment Rule, as described in the below chart:

- Prohibits advisers from granting certain types of preferential redemption or transparency rights to an investor that the adviser reasonably expects to have a material, negative effect on other investors, subject to exceptions; and,
- Requires advisers to provide written disclosures to prospective and current investors in a private fund regarding all preferential treatment the adviser or its related persons provide to other investors in the same fund.



PROHIBITED PREFERENTIAL TREATMENT (SUBJECT TO LIMITED EXCEPTIONS FOR LEGACY FUNDS)

Subject Matter	Text of Rule Prohibition
<p>Prohibition on Preferential Redemption Rights With Material, Negative Effect on Other Investors</p>	<p>“Grant an investor in the private fund or in a similar pool of assets the ability to redeem its interest on terms that the adviser reasonably expects to have a material, negative effect on other investors in that private fund or in a similar pool of assets” subject to exclusions for certain redemptions:</p> <p>-- “required by the applicable laws, rules, regulations, or orders of any relevant foreign or U.S. Government, State, or political subdivision to which the investor, the private fund, or any <i>similar pool of assets</i> is subject”; or</p> <p>--“if the investment adviser has offered the same redemption ability to all other existing investors, and will continue to offer such redemption ability to all future investors, in the private fund and any <i>similar pool of assets</i>.”</p> <p>The SEC states in the adopting release that to qualify for the latter exception “an adviser must have offered the same redemption ability to all other existing investors and must continue to offer such redemption ability to all future investors without qualification (e.g., no commitment size, affiliation requirements, or other limitations).” However, the release does contemplate an adviser varying redemption rights among share classes, if the share classes meet certain requirements.</p>
<p>Prohibition on Preferential Transparency Rights With Material, Negative Effect on Other Investors</p>	<p>“Provide information regarding the portfolio holdings or exposures of the private fund, or of a <i>similar pool of assets</i>, to any investor in the private fund if the adviser reasonably expects that providing the information would have a material, negative effect on other investors in that private fund or in a <i>similar pool of assets</i>, except if the investment adviser offers such information to all other existing investors in the private fund and any <i>similar pool of assets</i> at the same time or substantially the same time”.</p>

OTHER PREFERENTIAL TREATMENT

In addition to the categories of preferential treatment discussed in the chart above, the Preferential Treatment Rule also requires disclosure (on various timelines) of other types of preferential terms, as described below.

Pre-investment notice for preferential treatment regarding any material economic terms. Under the Rule, an adviser must provide to each prospective investor in the private fund, prior to the investor’s investment in the private fund, a written notice that provides specific information regarding any preferential treatment related to any material economic terms that the adviser or its related persons provide to other investors in the same private fund [*Rule 211(h)(2)-3(b)(1)*].

In discussing the Rule’s provisions requiring pre-investment disclosure of “material economic terms”, the adopting release refers to “those terms that a prospective investor would find most important and that would significantly impact its bargaining position”, citing, by way of non-exhaustive example, “the cost of investing, liquidity rights, fee breaks, and co-investment rights”.



Post-investment notice for other preferential terms (terms other than material economic terms): Under the Rule, an adviser must distribute to current investors:

- (i) For an illiquid fund, as soon as reasonably practicable following the end of the private fund's fundraising period, written disclosure of all preferential treatment the adviser or its related persons has provided to other investors in the same private fund;
- (ii) For a liquid fund, as soon as reasonably practicable following the investor's investment in the private fund, written disclosure of all preferential treatment the adviser or its related persons has provided to other investors in the same private fund; and
- (iii) On at least an annual basis, a written notice that provides specific information regarding any preferential treatment provided by the adviser or its related persons to other investors in the same private fund since the last written notice provided in accordance with this requirement, if any. [Rule 211(h)(2)-3(b)(2)]

The definitions of illiquid and liquid fund are discussed below in the section Quarterly Statements Rule.

The SEC's stated purpose in not requiring pre-investment notice of terms other than material economic terms was to allow advisers to wait until after an investor has invested in the fund to disclose the remaining preferential terms (i.e., all preferential terms that are not material economic terms) so as not to impede the closing process.

With respect to the disclosure that is required of preferential terms, the adopting release states: "the final rule will require an adviser to describe specifically the preferential treatment to convey its relevance... We do not believe that mere disclosure of the fact that other investors are paying lower fees is specific enough. For example, if an adviser provides an investor with lower fee terms in exchange for a significantly higher capital contribution than paid by others, an adviser must describe the lower fee terms, including the applicable rate (or range of rates if multiple investors pay such lower fees), in order to provide specific information as required by the rule...."

EXCEPTIONS FOR EXISTING FUNDS

Neither (i) the "preferential treatment" that is prohibited under the Preferential Treatment Rule, nor (ii) the portion of the Restricted Activities Rule with consent-based exceptions will apply with respect to contractual agreements governing a private fund that has commenced operations as of the relevant compliance date and that were entered into in writing prior to the compliance date if the provision would require the parties to amend such governing agreements.

The Adopting Release sets forth certain, non-exclusive scenarios that could indicate a fund had "commenced operations". In particular: "[t]he commencement of operations includes any bona fide activity directed towards operating a private fund, including investment, fundraising, or operational activity. Examples of activity that could indicate a private fund has commenced operations include issuing capital calls, setting up a subscription facility for the fund, holding an initial fund closing and conducting due diligence on potential fund investments, or making an investment on behalf of the fund."

We highlight that the exceptions provided for legacy funds:

- Are only exceptions from certain provisions of the Adopted Rules, and as such the fund will still need to comply with significant portions of the Adopted Rules; and
- Even with respect to the specific provisions from which legacy funds are excepted, close attention must be paid to the language of the exception, which carve-out is only with respect to the extent that compliance with such prohibition or restriction would require the parties to amend governing agreements.



QUARTERLY STATEMENT RULE

The Quarterly Statement Rule will require an RIA that advises a private fund to prepare and distribute quarterly statements that include three tables, as further described in the below chart:

- A “**Fund Table**” setting forth certain information regarding fees, expenses, and offsets or rebates paid to the adviser and its related persons, and fees and expenses paid to other persons;
- A “**Portfolio Investment Table**” identifying each “portfolio investment” that has paid compensation to the adviser or a related person in the reporting period; and,
- A “**Performance Table**” setting forth certain performance-related information that varies depending on whether the fund is a “liquid fund” or “illiquid fund” under the Rule, including, in the case of an illiquid fund, *Gross IRR* and *Gross MOIC* for the realized and unrealized portions of the illiquid fund’s portfolio, with the realized and unrealized performance shown separately. Performance must be shown both including and excluding the impact of any fund-level subscription facilities.

While the information required for those tables is generally tracked by advisers, additional processes will likely be needed to bring the same into the quarterly report process, to capture/calculate certain information under the Rule’s requirements, or to include the required cross-references to governing documents, among other considerations.

Other considerations:

- **Commencement of the requirement for new funds:** For a newly formed private fund, the Rule requires a quarterly statement to be prepared and distributed beginning after the fund has at least two full fiscal quarters of generating operating results.
- **Timing requirements for distribution of quarterly statements:**
 - Except for funds of funds, the adviser or another person must distribute the quarterly statement within 45 days after the end of each of the first three fiscal quarters of each fiscal year of the private fund and 90 days after the end of each fiscal year of the private fund.
 - For funds of funds, the adviser or another person must distribute the quarterly statement within 75 days after the end of the first three fiscal quarters of each fiscal year and 120 days after the end of each fiscal year.
- **Cross references:** The quarterly statement must include prominent disclosure regarding the manner in which all expenses, payments, allocations, rebates, waivers, and offsets are calculated and include cross references to the sections of the private fund’s organizational and offering documents that set forth the applicable calculation methodology.



	Required Content	Notes
<p>Fund Table</p>	<p>The Fund Table must disclose, at a minimum the following information, presented both before and after any offsets, rebates, or waivers:</p> <p>(1) Adviser compensation: A detailed accounting of all compensation, fees, and other amounts allocated or paid to the investment adviser or any of its <i>related persons</i> by the private fund during the <i>reporting period</i>, with separate line items for each category of allocation or payment reflecting the total dollar amount, including, but not limited to, management, advisory, sub-advisory, or similar fees or payments, and <i>performance-based compensation</i>.</p> <p>(2) Fund expenses: A detailed accounting of all fees and expenses allocated to or paid by the private fund during the <i>reporting period</i> (other than those above in “Adviser Compensation”), with separate line items for each category of fee or expense reflecting the total dollar amount, including, but not limited to, organizational, accounting, legal, administration, audit, tax, due diligence, and travel fees and expenses.</p> <p>(3) “Offsets or rebates carried forward”. The amount of any offsets or rebates carried forward during the reporting period to subsequent periods to reduce future payments or allocations to the adviser or its <i>related persons</i>.</p> <p>[Rule 211(h)(1)-2(b)]</p>	
<p>Portfolio Investment Table</p>	<p>The quarterly statement must include a separate table for the private fund’s covered <i>portfolio investments</i> that discloses, at a minimum, the following information for each:</p> <p>A detailed accounting of all <i>portfolio investment compensation</i> allocated or paid to the investment adviser or any of its <i>related persons</i> by the <i>covered portfolio investment</i> during the reporting period, with separate line items for each category of allocation or payment reflecting the total dollar amount, presented both before and after the application of any offsets, rebates, or waivers.</p> <p>[Rule 211(h)(1)-2(c)]</p>	<p>Covered portfolio investment means a <i>portfolio investment</i> that allocated or paid the investment adviser or its <i>related persons</i> <i>portfolio investment compensation</i> during the <i>reporting period</i>.</p> <p>Portfolio investment: means any entity or issuer in which the private fund has directly or indirectly invested.</p> <p>Portfolio investment compensation: means any compensation, fees, and other amounts allocated or paid to the investment adviser or any of its</p>



	Required Content	Notes
		<p>related persons by the portfolio investment attributable to the private fund's interest in such portfolio investment, including, but not limited to, origination, management, consulting, monitoring, servicing, transaction, administrative, advisory, closing, disposition, directors, trustees or similar fees or payments.</p>
<p>Performance Table</p>	<p>The adviser must determine where the private fund is an <i>illiquid fund</i> or a <i>liquid fund</i>, and each quarterly statement needs to present the following with equal prominence depending on the type of fund.</p> <p>Illiquid funds. The following performance measures, shown since inception of the illiquid fund through the end of the quarter covered by the quarterly statement (or, to the extent quarter-end numbers are not available at the time the adviser distributes the quarterly statement, through the most recent practicable date) and computed both with <u>and</u> without the impact of any <i>fund-level subscription facilities</i>:</p> <ol style="list-style-type: none"> 1. <i>Gross IRR</i> and <i>gross MOIC</i> for the illiquid fund; 2. <i>Net IRR</i> and <i>net MOIC</i> for the illiquid fund; 3. <i>Gross IRR</i> and <i>gross MOIC</i> for the realized and unrealized portions of the illiquid fund's portfolio, with the realized and unrealized performance shown separately; and, 4. A <i>statement of contributions and distributions</i> for the illiquid fund. <p>Liquid funds.</p> <ol style="list-style-type: none"> 1. Annual net total returns for each fiscal year over the past 10 fiscal years or since inception, whichever time period is shorter; 2. Average annual net total returns over the one-, five-, and 10-fiscal-year periods; and, 3. The cumulative net total return for the current fiscal year as of the end of the most recent fiscal quarter covered by the quarterly statement. 	<p>Illiquid fund: means a private fund that (i) Is not required to redeem interests upon an investor's request; (ii) Has limited opportunities, if any, for investors to withdraw before termination of the fund.</p> <p>Liquid fund: means a private fund that is not an illiquid fund.</p> <p>Fund-level subscription facilities: means any subscription facilities, subscription line financing, capital call facilities, capital commitment facilities, bridge lines, or other indebtedness incurred by the private fund that is secured by the unfunded capital commitments of the private fund's investors.</p> <p>Statement of contributions and distributions: means a document that presents:</p> <p>(1) All capital inflows the private fund has received from investors and all capital outflows the private fund has distributed to investors since the private fund's inception, with the value and date of each inflow and outflow; and</p>



	Required Content	Notes
	[Rule 211(h)(1)-2(e)]	(2) The net asset value of the private fund as of the end of the reporting period.

PRIVATE FUND AUDIT RULE

Rule 206(4)-10 will require RIAs to private funds to cause each private fund that it advises to undergo a financial statement audit that meets the requirements of the pooled investment vehicle audit exemption under the Advisers Act Custody Rule. As such, private funds would not be able to rely on the surprise examination provisions of the Custody Rule.

Timing requirements and other requirements for such audit will be as set forth in the Custody Rule and associated guidance. As such, audited financial statements must be distributed within 120 days of the end of the fund’s fiscal year.

ADVISER-LED SECONDARIES RULE

The Rule prohibits an SEC-Registered Investment Adviser that advises private funds from “conducting an adviser-led secondary transaction with respect to any private fund” unless the adviser:

- (i) obtains, and distributes to investors in the private fund, a “fairness opinion” or “valuation opinion” from an independent opinion provider; and
- (ii) prepares, and distributes to investors in the private fund, a written summary of any material business relationships the adviser or any of its related persons has, or has had within the past two years, with the independent opinion provider prior to the closing of the adviser-led secondary transaction.

“**Adviser-led secondary transactions**” is defined as: “any transaction initiated by the investment adviser or any of its related persons that offers private fund investors the choice between: (1) Selling all or a portion of their interests in the private fund; and (2) Converting or exchanging 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.”

WRITTEN DOCUMENTATION OF ANNUAL REVIEW OF COMPLIANCE PROGRAMS

Advisers Act Rule 206(4)-7 requires RIAs to annually review the adequacy of their policies and procedures established to comply with the Advisers Act’s provisions and the effectiveness of their implementation.

The amendments will revise Rule 206(4)-7 to expressly require written documentation of that annual review. The adopting release states that “the required written documentation of the annual review under the compliance rule is meant to be made available to the Commission and the Commission staff and therefore should promptly be produced upon request”.



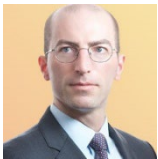
NEXT STEPS

The Adopted Rules' compliance dates are between 12 and 18 months after publication of the Adopted Rules in the Federal Register, depending on the rule provision and adviser private fund AuM. While the Adopted Rules generally pared back the proposed rules' more controversial elements, including certain per se prohibitions, and contained important exceptions for funds that have commenced operations as of the compliance date, private fund advisers will still find themselves with much to consider operationally, in terms of legal and compliance considerations, and in terms of investor relations. Advisers to private funds should consider the internal and external impacts of the Adopted Rules on their business and their next steps, which will vary based on the contours of the business.

While this alert focused primarily on summarizing the Adopted Rules, our team will be continuing to analyze the Adopted Rules and associated guidance with respect to specific impacts on private fund legal and business structures and next steps, and will continue to communicate updates.

Private Funds Global Team

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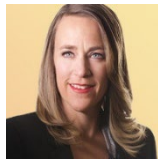
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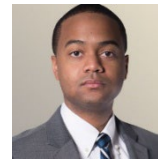
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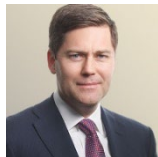


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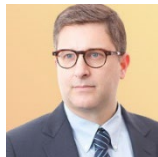
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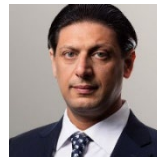
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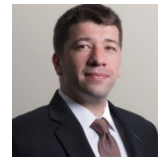
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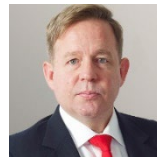
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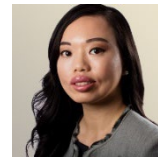
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¹ Securitized Asset Funds are generally excluded from the scope of the Adopted Rules.