

Legal Update

SEC Releases Final Private Fund Adviser Rules: Key Changes and Takeaways

On August 23, 2023, the US Securities and Exchange Commission (the "SEC") adopted final rules imposing additional obligations on and restricting certain practices by advisers to "private funds" (the "Final Rules").

We summarize below certain high-level differences between the Final Rules and the proposal which was issued on February 9, 2022 (the "Proposal").¹ In addition, we have several general takeaways as follows:

1. Securitized asset funds (i.e., CLOs) are not subject to the Final Rules (although advisers to such vehicles will be subject to the revised compliance program requirements that apply to all SEC-registered investment advisers ("RIAs")).
2. The SEC's long-standing application of *Unibanco* principles remains intact (i.e., the substantive provisions of the Final Rules will not apply to non-US advisers (whether registered or unregistered) with respect to their non-US private funds).
3. The rules on restricted activities apply to both registered and un-registered advisers (including exempt reporting advisers).
4. Consent to certain practices (e.g., charging of investigation costs) will require majority third-party investor consent. It is not clear if negative consent is permitted.
5. The Final Rules reflect primarily a return to the disclosure (and consent-based) regime of the Investment Advisers Act of 1940 ("Advisers Act").

Our in-depth analysis of the Final Rules will be available in the days ahead.

PROPOSAL	FINAL RULES
Scope	
Applied to all "private funds."	Applies to all "private funds," but provides key exceptions from certain provisions for "securitized asset funds" using the same definition from Form ADV and Form PF.

PROPOSAL	FINAL RULES
Transition	
Did not grandfather existing funds.	Provides limited grandfathering through “legacy status” for certain aspects of preferential treatment rule (i.e., side letters) and restricted activities that require investor consent. ² Please see conformance period table for more information.
Would have provided a one-year transition period.	Provides a staggered phase-in period for compliance, with different phasing in at different times for advisers with different levels of private fund assets under management. Please see conformance period table for more information.
Prohibited/Restricted Activities	
All advisers to private funds are <i>prohibited</i> from:	All advisers to private funds <i>may engage</i> in the following activities subject to providing <i>disclosure</i> and/or receiving <i>consent</i>,³ as noted:
<p>Charging certain fees and expenses:</p> <ul style="list-style-type: none"> • To a portfolio investment in respect of services the adviser does not, or does not reasonably expect to, provide. • To a private fund for examinations or investigations of the adviser or its related persons by governmental or regulatory authorities. • To a private fund for regulatory or compliance expenses or fees of the adviser or its related persons. • On a non-pro rata basis when multiple private funds and/or other adviser clients invest (or propose to invest) in the same portfolio investment. 	<p>Charging <i>or allocating</i> certain fees and expenses:</p> <ul style="list-style-type: none"> • Not adopted. (Though the SEC believes this activity generally already runs contrary to an adviser’s federal fiduciary obligations to its clients.) • To a private fund for investigations of the adviser or its related persons by governmental or regulatory authorities without prior written notice to, and consent from, a majority of third-party investors; <u>provided, however</u>, that a private fund cannot (irrespective of investor disclosure and consent) be charged for investigations that result in a sanction for any Advisers Act violation. • [...as proposed] <u>unless</u> the adviser provides itemized written notice of any such fees or expenses to investors within 45 days after the end of the fiscal quarter in which the charge occurs. • [...as proposed] unless the adviser determines, and provides prior written notice describing how, the non-pro rata charge or allocation is fair and equitable under the circumstances.

PROPOSAL	FINAL RULES
Reducing any clawback obligation by actual, potential or hypothetical taxes.	[...as proposed] <u>unless</u> the adviser provides written notice of the pre-tax and post-tax amount of clawback within 45 days after the end of the fiscal quarter in which such clawback occurs.
Seeking reimbursement, indemnification, exculpation or limitation of liability for simple negligence or breach of fiduciary duty.	Not adopted.
Waiving, disclaiming or otherwise limiting their fiduciary duties under the Advisers Act or state law.	Not adopted. (But the adopting release provides guidance regarding the interaction between “hedge clauses” and waivers of fiduciary duty.)
Borrowing money, securities or other fund assets, or receiving a loan or an extension of credit, from a private fund.	Borrowing money, securities or other fund assets, or receiving a loan or an extension of credit, from a private fund without (i) written disclosure of the material terms to each fund investor and (ii) consent from at least a majority in interest of unrelated third party fund investors.
Preferential Treatment All advisers to private funds are <i>prohibited</i> from:	
Providing preferential terms to certain investors regarding the following terms if the adviser reasonably expects it would have a material, negative effect on other investors: <ul style="list-style-type: none"> granting redemption rights, and providing information regarding portfolio holdings or exposures. 	As proposed, except that... <ul style="list-style-type: none"> adds exceptions for redemption rights (i) required by applicable laws, rules, regulations or orders of any government or (ii) offered to all other existing and future investors, without qualification; and adds an exception if the adviser offers such information to all other existing investors at the same or substantially the same time.
Providing any other preferential treatment to any investor unless the adviser provides: <ul style="list-style-type: none"> to each prospective investor, prior to its investment, specific information of preferential treatment of other investors; and to each current investor, on an annual basis, specific information of preferential treatment of other investors since the last notice. 	As proposed, except that... <ul style="list-style-type: none"> applies the prospective investor advance disclosure requirement only to <u>material economic terms</u>; and retains the annual notice requirement and adds a notice requirement for (i) illiquid funds, following the end of the fundraising period and (ii) liquid funds, following the investor’s investment.

PROPOSAL	FINAL RULES
Additional Requirements RIAs are required to:	
Obtain a fairness opinion in connection with an “adviser-led secondary” transaction and disclose material business relationships with fairness opinion provider	As proposed, but now also permits a valuation opinion alternative to a fairness opinion . Definition of adviser-led secondary revised to exclude most “tender offers.”
Deliver quarterly reports. <ul style="list-style-type: none"> • Due within 45 days after each calendar quarter end. • Detailed, line-item disclosures of fund-level fees and expenses. • Different requirements for performance returns depending on whether a fund is a “liquid” or “illiquid” fund. • Requirement that illiquid funds report performance without impact of fund-level subscription facilities. 	Deliver quarterly reports. <ul style="list-style-type: none"> • Largely adopted as proposed. • Delivery dates slightly modified: <ul style="list-style-type: none"> ○ For non-fund of funds: First three fiscal quarters remain due within 45 days, fourth fiscal quarter due within 90 days. ○ For funds of funds: First three fiscal quarters now due within 75 days, fourth fiscal quarter due within 120 days. • Definition of “illiquid fund” reduced to a private fund that (i) is not required to redeem interests upon an investor’s request and (ii) has limited opportunities, if any, for investors to withdraw before termination of the fund. • “Illiquid fund” must report performance <i>with</i> (added in Final Rules) and without impact of fund-level subscription facilities. • Liquid funds standard performance disclosure requirements largely the same, but the annual net total return requirement is now for each of the most recent 10 fiscal years or since inception (whichever is shorter).
Obtain annual audit for private funds (meeting separate conditions than the custody rule).	Obtain annual audit for private funds that meets the requirements under the custody rule.
Written Annual Reports for All RIAs	
Required registered advisers to document in writing their annual review of compliance policies and procedures under Rule 206(4)-7.	No change from Proposal.

Final Rules Conformance Period Following Publication in the *Federal Register*

RULE	LARGER PRIVATE FUND ADVISERS COMPLIANCE DATES (Private funds AUM greater than or equal to \$1.5 billion ⁴)	SMALLER PRIVATE FUND ADVISERS COMPLIANCE DATES (Private funds AUM of less than \$1.5 billion)	LEGACY TREATMENT; OTHER NOTES Legacy status only applies to private funds that commenced operations as of the compliance date.
<i>Rule 211(h)(1)-2</i> Quarterly Statement Reporting	18 months	18 months	None.
<i>Rule 206(4)-10</i> Audit Rule Compliance	18 months	18 months	None.
<i>Rule 211(h)(2)-1</i> Restricted Activities	12 months	18 months	Legacy treatment only for (a) aspects that require investor consent , e.g. adviser borrowing from a fund (specifically calls out that if borrowing document is already entered into then need not seek investor consent), and (b) charging for certain investigation fees and expense. No need to amend organizational or borrowing documents entered into prior to compliance. ⁵
<i>Rule 211(h)(2)-2</i> Adviser-Led Secondaries	12 months	18 months	None.
<i>Rule 211(h)(2)-3</i> Preferential Treatment	12 months	18 months	Legacy treatment only for (a) preferential redemption rights and (b) information rights about portfolio holdings. No need to amend organizational or borrowing documents entered into prior to compliance.
<i>Rule 206(4)-7(b)</i> Amended Advisers Act Compliance Rule RIAs must document annual review of their compliance policies and procedures in writing.	60 days	60 days	Applies to ALL advisers, whether they advise private funds or not. All advisers must document, in writing, their <u>next review commenced within the 12 months following compliance date.</u>

Blackline of Proposal vs. Final Rules

Mayer Brown LLP

Text of Private Funds ~~Proposed~~Final Rule

§ 275.206(4)-10

Private fund adviser audits.

(a) As a means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, an investment adviser that is registered or required to be registered under section 203 of the Investment Advisers Act of 1940 shall cause each private fund that it advises (other than a securitized asset fund), directly or indirectly, to undergo a financial statement audit (as follows at least annually and upon liquidation defined in § 210.1-02(d) of this chapter (rule 1-02(d) of Regulation S-X)) that meets the requirements of paragraphs (b)(4)(i) through (b)(4)(iii) of § 275.206(4)-2(b)(4) and shall cause audited financial statements to be delivered in accordance with § 275.206(4)-2(c), if the private fund does not otherwise undergo such an audit;

~~(a) The audit is performed by an independent public accountant that meets the standards of independence described in 17 CFR 210.2-01(b) and (c) [Rule 2-01(b) and (c) of Regulation S-X] and that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year end, by, the Public Company Accounting Oversight Board in accordance with its rules;~~

~~(b) The audit meets the definition in 17 CFR 210.1-02(d) [Rule 1-02(d) of Regulation S-X], the professional engagement period of which shall begin and end as indicated in Rule 2-01(f)(5) of Regulation S-X;~~

~~(c) Audited financial statements are prepared in accordance with U.S. Generally Accepted Accounting Principles (“U.S. GAAP”) or, in the case of financial statements of private funds organized under non-U.S. law or that have a general partner or other manager with a principal place of business outside the United States (“foreign private funds”), contain information substantially similar to statements prepared in accordance with U.S. GAAP and material differences with U.S. GAAP are reconciled;~~

~~(d) Promptly after the completion of the audit, the private fund’s audited financial statements, which includes any reconciliation to U.S. GAAP prepared for a foreign private fund, including supplementary U.S. GAAP disclosures, as applicable, are distributed;~~

~~(e) Pursuant to a written agreement between the independent public accountant and the adviser or the private fund, the independent public accountant that completes the audit notifies the Commission by electronic means directed to the Division of Examinations:~~

~~(1) Promptly upon issuing an audit report to the private fund that contains a modified opinion; and~~

~~(2) Within four business days of resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed;~~

(~~h~~) For a private fund (other than a securitized asset fund) that the adviser does not *control* and is neither *controlled* by nor under common *control* with, the adviser is prohibited from providing investment advice, directly or indirectly, to the private fund if the adviser fails to take all reasonable steps to cause the private fund to undergo a financial statement audit that meets the requirements of ~~paragraphs (a) through (e) of this section~~ § 275.206(4)-2(b)(4) and to cause audited financial statements to be delivered in accordance with § 275.206(4)-2(c), if the private fund does not otherwise undergo such an audit; and

(~~g~~) For purposes of this section, defined terms shall have the meanings set forth in § 275.206(4)-2(d), except for the term *securitized asset fund*, which shall have the meaning set forth in § 275.211(h)(1)-1.

§ 275.211(h)(1)-1

Definitions.

For purposes of §§ 275.206(4)-10, 275.211(h)(1)-2, 275.211(h)(2)-~~3-1~~, 275.211(h)(2)-~~1-2~~, and 275.211(h)(2)-~~2-3~~:

Adviser clawback means any obligation of the adviser, its *related persons*, or their respective owners or interest holders to restore or otherwise return *performance-based compensation* to the private fund pursuant to the private fund's governing agreements.

Adviser-led secondary transaction means any transaction initiated by the investment adviser or any of its *related persons* that offers private fund investors the choice ~~to~~ between:

- (1) ~~Sell~~ Selling all or a portion of their interests in the private fund; ~~or~~ and
- (2) ~~Convert or exchange~~ 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*.

Committed capital means any commitment pursuant to which a person is obligated to acquire an interest in, or make capital contributions to, the private fund.

Control means the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise. For the purposes of this definition, control includes:

- (1) Each of an investment adviser's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control the investment adviser;
- (2) A person is presumed to control a corporation if the person:
 - (i) Directly or indirectly has the right to vote 25% percent or more of a class of the corporation's voting securities; or

(ii) Has the power to sell or direct the sale of 25% [percent](#) or more of a class of the corporation's voting securities;

(3) A person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25% [percent](#) or more of the capital of the partnership;

(4) A person is presumed to control a limited liability company if the person:

(i) Directly or indirectly has the right to vote 25% [percent](#) or more of a class of the interests of the limited liability company;

(ii) Has the right to receive upon dissolution, or has contributed, 25% [percent](#) or more of the capital of the limited liability company; or

(iii) Is an elected manager of the limited liability company; ~~or~~

(5) A person is presumed to control a trust if the person is a trustee or managing agent of the trust.

Covered portfolio investment means a *portfolio investment* that allocated or paid the investment adviser or its *related persons portfolio investment compensation* during the *reporting period*.

Distribute, distributes, or distributed means send or sent to all of the private fund's investors, [unless the context otherwise requires](#); provided that, if an investor is a pooled investment vehicle that is *controlling, controlled by, or under common control* with (a "control relationship") the adviser or its *related persons*, the adviser must look through that pool (and any pools in a control relationship with the adviser or its *related persons*) in order to send to investors in those pools.

[Election form](#) means a written solicitation *distributed by, or on behalf of, the adviser or any related person requesting private fund investors to make a binding election to participate in an adviser-led secondary transaction*.

Fairness opinion means a written opinion stating that the price being offered to the private fund for any assets being sold as part of an *adviser-led secondary transaction* is fair.

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.

Gross IRR means an *internal rate of return* that is calculated gross of all fees, expenses, and *performance-based compensation* borne by the private fund.

Gross MOIC means a multiple of *invested capital* that is calculated gross of all fees, expenses, and *performance-based compensation* borne by the private fund.

Illiquid fund means a private fund that:

~~(1) Has a limited life;~~

~~(2) Does not continuously raise capital;~~

~~(3)~~ Is not required to redeem interests upon an investor's request; and

~~(4) Has as a predominant operating strategy the return of the proceeds from disposition of investments to investors;~~

~~(5)~~ Has limited opportunities, if any, for investors to withdraw before termination of the fund; and

~~(6) Does not routinely acquire (directly or indirectly) as part of its investment strategy market traded securities and derivative instruments.~~

Independent opinion provider means ~~an entity~~ a person that:

(1) Provides *fairness opinions* or valuation opinions in the ordinary course of its business; and

(2) Is not a *related person* of the adviser.

Internal rate of return means the discount rate that causes the net present value of all cash flows throughout the life of the fund to be equal to zero.

Liquid fund means a private fund that is not an *illiquid fund*.

Multiple of invested capital means, as of the end of the applicable ~~calendar~~ fiscal quarter:

(1) The sum of:

(i) The unrealized value of the *illiquid fund*; and

(ii) The value of all distributions made by the *illiquid fund*;

(2) Divided by the total capital contributed to the *illiquid fund* by its investors.

Net IRR means an internal rate of return that is calculated net of all fees, expenses, and *performance-based compensation* borne by the private fund.

Net MOIC means a *multiple of invested capital* that is calculated net of all fees, expenses, and *performance-based compensation* borne by the private fund.

Performance-based compensation means allocations, payments, or distributions of capital based on the private fund's (or any of its ~~portfolio~~ investments') capital gains, capital appreciation and/or ~~capital appreciation~~ other profit.

Portfolio investment means any entity or issuer in which the private fund has directly or indirectly invested.

Portfolio investment compensation means any compensation, fees, and other amounts allocated or paid to the investment adviser or any of its 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.

Related person means:

- (1) All officers, partners, or directors (or any person performing similar functions) of the adviser;
- (2) All persons directly or indirectly *controlling* or *controlled* by the adviser;
- (3) All current employees (other than employees performing only clerical, administrative, support or similar functions) of the adviser; and
- (4) Any person under common *control* with the adviser.

Reporting period means the private fund's ealendarfiscal quarter covered by the quarterly statement or, for the initial quarterly statement of a newly formed private fund, the period covering the private fund's first two full ealendarfiscal quarters of operating results.

Securitized asset fund means any private fund whose primary purpose is to issue asset backed securities and whose investors are primarily debt holders.

~~*Statement of Contributions and Distributions* means a document that presents:~~

- ~~(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~~
- ~~(2) The net asset value of the private fund as of the end of the reporting period.~~

~~*Substantially similar*~~ *Similar* *pool of assets* means a pooled investment vehicle (other than an investment company registered under the Investment Company Act of 1940 ~~or~~ a company that elects to be regulated as such or a securitized asset fund) with substantially similar investment policies, objectives, or strategies to those of the *private fund* managed by the investment adviser or its *related persons*.

Statement of contributions and distributions means a document that presents:

- (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

(2) The net asset value of the private fund as of the end of the reporting period.

Unfunded capital commitments means *committed capital* that has not yet been contributed to the private fund by investors.

Valuation opinion means a written opinion stating the value (as a single amount or a range) of any assets being sold as part of an adviser-led secondary transaction.

§ 275. 211(h)(1)-2

Private fund quarterly statements.

(a) *Quarterly statements.* As a means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, an investment adviser that is registered or required to be registered under section 203 of the Investment Advisers Act of 1940 shall prepare a quarterly statement that complies with paragraphs (a) through (g) of this section for any private fund (other than a securitized asset fund) that it advises, directly or indirectly, that has at least two full ~~calendar~~fiscal quarters of operating results, and *distribute* the quarterly statement to the private fund's investors, if such private fund is not a fund of funds, within 45 days after each calendar quarter end~~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 and, if such private fund is a fund of funds, 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, in either case,~~ unless such a quarterly statement is prepared and *distributed* by another person.

(b) *Fund table.* The quarterly statement must include a table for the private fund that discloses, at a minimum, the following information, presented both before and after the application of any offsets, rebates, or waivers for the information required by paragraphs (b)(1) and (2) of this section:

(1) A detailed accounting of all compensation, fees, and other amounts allocated or paid to the investment adviser or any of its *related persons* by the private fund during the *reporting period*, 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 *performance-based compensation*;

(2) A detailed accounting of all fees and expenses allocated to or paid by the private fund during the *reporting period* (other than those listed in paragraph (b)(1) of this section), 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; and

(3) 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 *related persons*.

(c) *Portfolio investment table.* The quarterly statement must include a separate table for the private fund's *covered portfolio investments* that discloses, at a minimum, the following information for each *covered portfolio investment*:

a ~~(1)~~ ~~A~~ detailed accounting of all *portfolio investment compensation* allocated or paid to the investment adviser or any of its *related persons* by the *covered portfolio investment* 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; ~~and~~.

~~(2) The fund's ownership percentage of each such covered portfolio investment as of the end of the reporting period, or zero, if the fund does not have an ownership interest in the covered portfolio investment, along with a brief description of the fund's investment.~~

(d) *Calculations and* ~~cross-references~~ 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.

(e) *Performance.*

(1) No later than the time the adviser sends the initial quarterly statement, the adviser must determine that the private fund is an *illiquid fund* or a *liquid fund*.

(2) The quarterly statement must present the following with equal prominence:

(i) *Liquid funds.* For a *liquid fund*:

(A) ~~(A)~~ Annual net total returns for each calendar fiscal year over the past 10 fiscal years or since inception, whichever time period is shorter;

(B) ~~(B)~~ Average annual net total returns over the one-, five-, and ~~ten-~~ calendar year 10-fiscal-year periods; and

(C) ~~(C)~~ The cumulative net total return for the current calendar fiscal year as of the end of the most recent calendar fiscal quarter covered by the quarterly statement.

(ii) *Illiquid funds.* For an *illiquid fund*:

(A) 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 with and without the impact of any *fund-level subscription facilities*:

(1) ~~(1)~~ *Gross IRR* and *gross MOIC* for the *illiquid fund*;

~~(2)~~ ~~(-2)~~ Net IRR and net MOIC for the illiquid fund; and

~~(3)~~ ~~(-3)~~ 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; and.

~~(4B)~~ A statement of contributions and distributions for the illiquid fund.

~~(B)~~ [Reserved]

(iii) Other matters. The quarterly statement must include the date as of which the performance information is current through and prominent disclosure of the criteria used and assumptions made in calculating the performance.

(f) Consolidated reporting. To the extent doing so would provide more meaningful information to the private fund's investors and would not be misleading, the adviser must consolidate the reporting required by paragraphs (a) through (e) of this section to cover ~~substantially~~ similar pools of assets.

(g) Format and content. The quarterly statement must use clear, concise, plain English and be presented in a format that facilitates review from one quarterly statement to the next.

(h) Definitions. For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)-1.

§ 275.211(h)(2)-1

Private fund adviser ~~prohibited~~ restricted activities.

(a) An investment adviser to a private fund (other than a securitized asset fund) may not, directly or indirectly, do the following with respect to the private fund, or any investor in that private fund:

~~(1) Charge a portfolio investment for monitoring, servicing, consulting, or other fees in respect of any services that the investment adviser does not, or does not reasonably expect to, provide to the portfolio investment;~~

~~(2) Charge or allocate to the private fund for fees or expenses associated with an examination or investigation of the adviser or its related persons by any governmental or regulatory authority; 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; 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 Investment Advisers Act of 1940 or the rules promulgated thereunder;~~

~~(32)~~ Charge or allocate to the private fund ~~for~~ any regulatory or compliance fees or expenses, or fees or expenses associated with an examination, of the adviser or its *related persons*; 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;

~~(43)~~ Reduce the amount of ~~any~~ an *adviser clawback* by actual, potential, or hypothetical taxes applicable to the adviser, its *related persons*, or their respective owners or interest holders; 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 for actual, potential, or hypothetical taxes within 45 days after the end of the fiscal quarter in which the adviser clawback occurs;

~~(5) Seek reimbursement, indemnification, exculpation, or limitation of its liability by the private fund or its investors for a breach of fiduciary duty, willful misfeasance, bad faith, negligence, or recklessness in providing services to the private fund;~~

~~(64)~~ Charge or allocate fees ~~and~~ 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*; ~~and~~, 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; and

~~(75)~~ Borrow money, securities, or other private fund assets, or receive a loan or an extension of credit, from a private fund client; 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.

(b) Paragraphs (a)(1) and (a)(5) of this section shall not apply with respect to contractual agreements governing a private fund (and, with respect to paragraph (a)(5), contractual agreements governing a borrowing, loan, or extension of credit entered into by a private fund) that has commenced operations as of the compliance date and that were entered into in writing prior to the compliance date if paragraph (a)(1) or (a)(5), as applicable, would require the parties to amend such governing agreements; provided that this paragraph (b) does not permit an investment adviser to such a fund to 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 Investment Advisers Act of 1940 or the rules promulgated thereunder.

~~(b)~~ For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)-1.

§ 275.211(h)(2)-2

Adviser-led secondaries.

(a) As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the ~~Act (15 U.S.C. 80b-6(4))~~, it is unlawful for any Investment Advisers Act of 1940 (15 U.S.C. 80b-6(4)), an investment adviser that is registered or required to be registered under section 203 of the Act ~~to complete~~ (15 U.S.C. 80b-3) conducting an adviser-led secondary transaction with respect to any private fund; unless the that it advises (other than a securitized asset fund) shall comply with paragraphs (a)(1) and (a)(2) of this section. The investment adviser shall:

- (1) ~~Obtains~~Obtain, and ~~distributes~~distribute to investors in the private fund, a *fairness opinion or valuation opinion* from an *independent opinion provider*; and
- (2) ~~Prepares~~Prepare, and ~~distributes~~distribute 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~~two-year period immediately prior to the issuance of the fairness opinion or valuation opinion, with the *independent opinion provider*; in each case, prior to the ~~closing~~due date of the election form in respect of the *adviser-led secondary transaction*.

(b) For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)-1.

§ 275.211(h)(2)-3

Preferential treatment.

(a) An investment adviser to a private fund (other than a securitized asset fund) may not, directly or indirectly, do the following with respect to the private fund, or any investor in that private fund:

(1) Grant an investor in the private fund or in a ~~substantially~~-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 ~~substantially~~-similar pool of assets; ~~or~~, except:

(i) If such ability to redeem is 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 similar pool of assets is subject; or

(ii) 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 similar pool of assets;

(2) Provide information regarding the portfolio holdings or exposures of the private fund, or of a ~~substantially~~-similar pool of assets, 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 ~~substantially~~-similar pool of assets, except if the investment adviser

offers such information to all other existing investors in the private fund and any similar pool of assets at the same time or substantially the same time.

(b) An investment adviser to a private fund (other than a securitized asset fund) may not, directly or indirectly, provide any ~~other~~ preferential treatment to any investor in the private fund unless the adviser provides written notices as follows:

(1) *Advance written notice for prospective investors in a private fund.* The investment adviser shall 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.

(2) ~~Annual written~~ Written notice for current investors in a private fund. The investment adviser shall *distribute* to current investors, ~~on~~ ;

(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 section, if any.

(c) For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)-1.

(d) Paragraph (a) of this section shall not apply with respect to contractual agreements governing a private fund that has commenced operations as of the compliance date and that were entered into in writing prior to the compliance date if paragraph (a) would require the parties to amend such governing agreements.

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Endnotes

- ¹ A detailed analysis of the Proposal is available at [SEC Proposal Significantly Impacts Private Fund Advisers and Investors](#).
- ² Provisions eligible for legacy status are noted with shading.
- ³ Note that the Final Rules require consents from third-party *investors* for these matters, not consents provided by a Limited Partner Advisory Committee or similar body.
- ⁴ Private funds AUMW calculated as of last business day of the most recently completed fiscal year, in accordance with Part 1A, Instruction 5.b of Form ADV, for assets under management attributable to private funds it advises.
- ⁵ Advisers may not amend a side letter to add parties to indirectly obtain legacy treatment. However, admitting new investors to an existing fund (and therefore its organizational documents) will not violate so long as all terms are set forth in the organizational docs and are applicable to all investors.

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