

2023 SEC Rulemaking Priorities for Investment Advisers

by David Tang and Michael Schmieder

In 2022, the U.S. Securities and Exchange Commission (the “SEC”) proposed numerous new and amended rules (“proposals”) that would apply to SEC-registered investment advisers (“Registered Advisers”), including private fund advisers, and in certain instances, exempt reporting advisers (“ERAs”). This eUpdate provides an overview of certain key proposals, which are all listed on the SEC’s most recently released rulemaking agenda as being in the Final Rule Stage, with the exception of the “Outsourcing by Investment Advisers Proposal,” which is in the Proposed Rule Stage.¹

Enhanced Private Fund Investor Protection Proposal

On February 9, 2022, the SEC proposed a sweeping set of new rules that would have a significant impact on private funds and private fund advisers.² The proposal would apply to private fund advisers that are Registered Advisers and, for certain aspects, ERAs.

The proposal, among other things, would require all Registered Advisers to:

- Provide investors with quarterly statements detailing information about private fund performance, fees, and expenses;
- Obtain an annual audit for each private fund and cause the private fund’s auditor to notify the SEC upon certain events; and
- In connection with an adviser-led secondary transaction, distribute to investors a fairness opinion and a written summary of certain material business relationships between the adviser and the opinion provider.

All private fund advisers, including ERAs, would be prohibited from engaging in certain activities and practices that are contrary to the public interest and the protection of investors including:

- Charging certain fees and expenses to a private fund or its portfolio investments, such as fees for unperformed services (e.g., accelerated monitoring fees) and fees associated with an examination or investigation of the adviser;
- Seeking reimbursement, indemnification, exculpation, or limitation of its liability for

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Related Capabilities

- Investment Funds
- Investment Management

- certain activity, including simple negligence; and
- Borrowing or receiving an extension of credit from a private fund client.

All Registered Advisers would be required to document in writing their annual compliance reviews pursuant to Rule 206(4)-7 under the Investment Advisers Act of 1940 (the “Advisers Act”).

Form PF Proposals

The SEC proposed two amendments to Form PF in 2022.

On January 26, 2022, the SEC proposed amendments to Form PF that would require private equity advisers and large hedge fund advisers to file current reports within one business day of the occurrence of certain reporting events.³

- Private equity funds advisers would be required to report one or more reporting events pertaining to the execution of adviser-led secondary transactions, implementation of general partner or limited partner clawbacks, removal of a fund’s general partner, termination of a fund’s investment period, or termination of a fund.
- Large hedge fund advisers would be required to report one or more reporting events with respect to their qualifying hedge funds pertaining to certain extraordinary investment losses, significant margin and counterparty default events, material changes in prime broker relationships, changes in unencumbered cash, operations events, and events associated with withdrawals and redemptions.

The proposed amendments would also reduce the threshold for reporting as a large private equity adviser from \$2 billion to \$1.5 billion in private equity fund assets under management.

On August 10, 2022, the SEC proposed changes to Form PF that would require private fund advisers to report more detailed information about hedge fund investment strategies, counterparty exposures, and trading and clearing mechanisms. In addition, the proposal would require Registered Advisers to report separately each component fund in complex fund structures, such as master-feeder arrangements and parallel fund structures.⁴

Cybersecurity Reporting Proposal

On February 9, 2022, the SEC proposed new Rule 206(4)-9 under the Advisers Act, which would require Registered Advisers to adopt and implement written policies and procedures to address cybersecurity risks. Registered Advisers would also be required to report significant cybersecurity incidents to the SEC on new Form ADV-C and disclose such incidents and other cybersecurity risks to clients in Form ADV Part 2A.⁵

ESG Disclosure Proposal

On May 22, 2022, the SEC proposed amendments that would require Registered Advisers and ERAs to disclose their ESG strategies on Form ADV Part 1A. With respect to Registered Advisers, Form ADV Part 2A would be amended to require: (i) a

description of the ESG factor or factors it considers for each significant investment strategy or method of analysis; (ii) disclosure of any material relationship or arrangement that the adviser has with any related person that is an ESG consultant or other ESG service provider; and (iii) disclosure if the adviser has proxy voting policies or procedures that include ESG considerations.⁶

Outsourcing by Investment Advisers

On October 26, 2022, the SEC proposed new Rule 206(4)-11, which would require Registered Advisers to perform due diligence, oversight, and written record keeping service providers prior to outsourcing certain functions to them.⁷ In general, the requirements would apply to outsourcing valuation, sub-adviser, client services, cybersecurity, investment risk, portfolio accounting, pricing, reconciliation, trading desk, trade communication and allocation, and investment adviser compliance.

Modernization of Beneficial Ownership Reporting

On February 10, 2022, the SEC proposed amendments to the rules governing beneficial ownership reporting.⁸ The proposal would accelerate the filing deadlines for Schedules 13D and 13G; expand the application of Regulation 13D-G to certain derivative securities; and clarify the circumstances under which two or more persons have formed a “group” that would be subject to beneficial ownership reporting obligations.

Short Position and Short Activity Reporting by Institutional Investment Managers Proposal

On February 25, 2022, the SEC proposed new Rule 13f-2 and amendments to Regulation SHO under the Securities Exchange Act of 1934 and the consolidated audit trail (CAT) to increase market transparency for short selling.⁹ The proposed rule would require market participants to collect and submit certain short sale-related data to the SEC on a monthly basis on proposed Form SHO. The SEC would aggregate data about large short positions, including daily short sale activity data, available to the public for individual securities.

Dorsey Observations

These proposals highlight the SEC’s expanding regulation of investment advisers, including in particular, advisers to private funds. Dorsey will closely monitor and report on the SEC’s investment adviser-related rulemaking efforts. Dorsey’s investment adviser compliance services provides ongoing regulatory advice and outsourced assistance to investment advisers and ERAs on the application and implementation of new and amended rules.

¹ SEC Agency Rule List - Fall 2022 *available [here](#)*.

²“Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews,” Investment Advisers Act Release No. 5955 (February 9, 2022) available at

<https://www.sec.gov/rules/proposed/2022/ia-5955.pdf>.

³ “Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers,” Investment Advisers Act Release No. 5950 (January 26, 2022) *available at* <https://www.sec.gov/rules/proposed/2022/ia-5950.pdf>. ERAs are not required to file Form PF. See Form PF, General Instruction 1, *available at* <https://www.sec.gov/files/formpf.pdf>.

⁴ “Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers,” Investment Advisers Act Release No. 6083 (August 10, 2022) *available at* <https://www.sec.gov/rules/proposed/2022/ia-6083.pdf>.

⁵ “Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies,” Release Nos. 33-11028; 34-94197; IA-5956; IC-34497 (February 9, 2022) *available at* <https://www.sec.gov/rules/proposed/2022/33-11028.pdf>.

⁶ “Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices,” Release Nos. IA-6034; IC-34594 (May 22, 2022) *available at* <https://www.sec.gov/rules/proposed/2022/ia-6034.pdf>.

⁷ “Outsourcing by Investment Advisers,” Investment Advisers Act Release No. 6176 (October 26, 2022) *available at* <https://www.sec.gov/rules/proposed/2022/ia-6176.pdf>.

⁸ “Modernization of Beneficial Ownership Reporting,” Release Nos. 33-11030; 34-94211 (February 10, 2022) *available at* <https://www.sec.gov/rules/proposed/2022/33-11030.pdf>.

⁹ “Short Position and Short Activity Reporting by Institutional Investment Managers,” Release No. 34-94313 (February 25, 2022) *available at* <https://www.sec.gov/rules/proposed/2022/34-94313.pdf>.