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## Overview of New Private Fund Rules' Scope and Compliance Dates

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The SEC recently adopted new rules (the “*Private Fund Rules*”) [1] that will require additional reporting requirements and impose restrictions on certain activities of investment advisers to private funds (“*Private Funds*”). [2] While the Private Fund Rules, as adopted, are less restrictive than the version originally proposed by the SEC, there a number of new requirements that private fund advisers (“*Private Fund Advisers*”) [3] will need to incorporate into their business and fund management practices, regardless of whether they are registered with the SEC. [4]

A brief summary of the key components of the Private Fund Rules is set forth below, including a description of which types of Private Fund Advisers each requirement applies to (*i.e.*, all Private Fund Advisers or only those registered with the SEC) and applicable compliance dates. As noted below, compliance dates for certain components are earlier for Private Fund Advisers with \$1.5 billion or more in private fund assets under management (“*Large Private Fund Advisers*”).

### 1. Quarterly Statements

*Scope: SEC-registered Private Fund Advisers only*

*Compliance Date: March 14, 2025*

SEC-registered Private Fund Advisers must prepare, for each Private Fund managed by the Private Fund Adviser, a quarterly statement that details information regarding fees and expenses (at both fund and portfolio company levels) and the Private Funds performance. [5] Each statement must be delivered to investors by the following dates:

- a. If the Private Fund is a fund-of-funds, within 75 days after the first three fiscal quarter ends of each fiscal year and 130 days after the end of the Private Funds fiscal year; and
- b. If the Private Fund is not a fund-of-of funds, within 45 days after the first three fiscal quarter ends of each fiscal year and 90 days after the end of each fiscal year.



A Private Fund Adviser will need to prepare consolidated reporting for similar pools of assets where doing so would provide more meaningful information to investors and not be misleading (e.g., master-feeder structures).

## 2. Annual Audits

*Scope: SEC-registered Private Fund Advisers only*

*Compliance Date: March 14, 2025*

Private Fund Advisers that are registered with the SEC may no longer rely on the Custody Rules surprise exam requirement with respect to the Private Funds for which the Private Fund Adviser directly or indirectly provides investment advice. Instead, Private Fund Advisers must cause an annual audit to be performed for these Private Funds by an independent public accountant that is registered with, and subject to regular inspection by, the PCAOB. The audited financial statements must be delivered to the Private Funds investors within 120 days of the end of the Private Funds fiscal year [\[6\]](#) and promptly upon liquidation.

## 3. Secondary Transactions

*Scope: SEC-registered Private Fund Advisers only*

*Compliance Date: September 14, 2024 for Large Private Fund Advisers; March 14, 2025 for all other Private Fund Advisers*

If a Private Fund Adviser conducts an adviser-led secondary [\[7\]](#) with respect to any Private Fund it manages, the Private Fund Adviser must provide the Private Funds investors with the following, prior to the due date for each such investors election to participate in the transaction:

- a. A fairness or valuation opinion from an independent opinion provider; and
- b. A summary of any material business relationship between the Private Fund Adviser or any of its related persons, on the one hand, and with the independent opinion provider, on the other, that has existed at any time within the two-year period immediately preceding the opinion issuance date.

## 4. Preferential Treatment

*Scope: All Private Fund Advisers*



*Compliance Date: September 14, 2024 for Large Private Fund Advisers; March 14, 2025 for all other Private Fund Advisers*

With certain exceptions, Private Fund Advisers (even those who are exempt reporting advisers) are generally prohibited from doing any of the following, directly or indirectly, if the Private Fund Adviser reasonably believes that doing so would have a material, negative effect on other Private Fund investors:

- a. Providing preferential redemption terms to any one investor in the Private Fund; or
- b. Providing certain information about portfolio holdings or exposures to any one investor in the Private Fund.

However, it is permissible under the Private Fund Rules to offer other preferential rights to particular Private Fund Investors if such preferential treatment is disclosed in a written notice to both current investors (delivered as soon as reasonably practicable following (a) the end of the Private Funds fundraising period (for illiquid funds) or (b) the investors investment (for liquid funds), as well as certain annual disclosures) and prospective investors (delivered prior to the investors investment in the private fund if pertaining to certain material economic terms).

## **5. Restricted Activities**

*Scope: All Private Fund Advisers*

*Compliance Date: September 14, 2024 for Large Private Fund Advisers; March 14, 2025 for all other Private Fund Advisers*

No Private Fund Adviser may participate in any of the following activities unless they comply with certain disclosure and/or consent requirements outlined in the Private Fund Rules:

- a. Charging or allocating fees and expenses related to an actual or potential portfolio investment (including dead deal costs) on a non-pro rata basis where multiple persons advised by the Private Fund Adviser or its affiliate have invested in the same portfolio investment;
- b. Reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders;
- c. Charging or allocating to a Private Fund any regulatory or compliance fees or expenses, or fees or expenses associated with an examination, of the Private Fund Adviser or its related persons;[\[8\]](#)
- d. Charging or allocating to a Private Fund fees or expenses related to an investigation of the Private



- Fund Adviser or its related persons by any governmental or regulatory authority; or
- e. Borrowing money, securities, or other assets of the Private Fund, or receiving a loan or an extension of credit, from any Private Fund managed by the Private Fund Adviser.

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The status of the Private Fund Rules is currently in flux, as industry groups filed a lawsuit last month against the SEC, challenging the validity and enforceability of the Private Fund Rules. However, the Private Fund Rules' effective date and compliance dates have not been affected by this litigation, and Private Fund Advisers should continue to operate under the assumption that they will need to comply with the various components of the Private Fund Rules by the applicable compliance dates outlined above.

Compliance with the Private Fund Rules will require consideration of numerous issues related to the current structure and operation of Private Fund Advisers' businesses, as well as the drafting of clear and thoughtful disclosures in connection with the various reports, notices, and consents required by the Private Fund Rules. As such, Private Fund Advisers should consider with the effect of the Private Fund Rules on their existing Private Fund structures and developing a plan to comply with the new requirements.

If you have any questions about the Private Fund Rules or the regulation of private funds and their investment managers generally, please feel free to contact us.

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By the **Investment Management and Broker-Dealer Team at Kilpatrick Townsend & Stockton**

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[1] *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, SEC Rel. No. IA 63-83 (<https://www.sec.gov/files/rules/final/2023/ia-6383.pdf>).

[2] The term “private funds” includes entities that would be deemed “investment companies” under the Investment Company Act of 1940, as amended (the “Investment Company Act”), but for Sections 3(c)(1) or 3(c)(7) of the Investment Company Act. However, the Private Fund Rules do not apply to investment advisers with respect to securitized asset funds they advise.

[3] The term “private fund adviser” encompasses any person that acts as an investment adviser to a Private Fund, regardless of whether such person is required to be registered under the Investment Advisers Act of 1940.

[4] Except as indicated below, the Private Fund Rules generally apply to all investment advisers to Private Funds, including exempt reporting advisers.

[5] For newly formed Private Funds, this quarterly statement requirement begins following the end of the Private Funds second fiscal quarter.

[6] Similar to guidance under the Custody Rule, (1) fund of funds and (2) fund of funds of funds are subject to later deadlines.

[7] An “adviser-led secondary” is a transaction led by the Private Fund Adviser or its related persons that offers the Private Fund investors to either (a) sell all or a portion of their interests in the Private Fund, or (b) convert or exchange all or a portion of their interests in the Private Fund for interests in another vehicle managed by the Private Fund Adviser or its related persons.

[8] Note that it is permissible under the Private Fund Rules to charge regulatory and compliance fees directly related to the Private Funds activities to the Fund, such as Form D and state blue sky filing fees.