

SEC Adopts Sweeping Final Private Fund Adviser Rules

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The Securities and Exchange Commission (the “SEC”) adopted on August 23, 2023, a final set of rules (the “Final Rules” or “Rules”) under the Investment Advisers Act of 1940, as amended (the “Advisers Act”) which are expected to have significant impact on the private funds industry. The Final Rules significantly increase the compliance requirements applicable to advisers to private funds who are registered with the SEC pursuant to the Advisers Act. Exempt reporting advisers and state investment advisers who advise private funds are subject to many, although not all, of the Final Rules.

The Rules subject private fund advisers to new regulations applicable to practices the SEC has determined have the potential to lead to investor harm and to substantial recordkeeping requirements regarding compliance with the Final Rules. The Rules also prohibit certain practices that the SEC has deemed to be contrary to public interest and to the protection of investors, subject, in most instances, to an exception if the adviser adequately discloses such practices and obtains investors’ consent. While the Final Rules generally apply only to private fund advisers, they require that all registered investment advisers (“RIAs”), regardless of whether they advise private funds, document an annual review of their compliance policies and procedures.

The Final Rules require that RIAs annually obtain audited financial statements of each private fund advised and, with respect to secondary transactions led by the adviser, obtain a fairness opinion or valuation opinion from an independent opinion provider. The Rules require that private fund advisers (whether or not they are RIAs) provide investors with disclosures regarding certain practices involving compensation schemes, preferential treatment of select investors, and conflicts of interest and, with respect to certain such practices, obtain investors’ consent.

Although far reaching, the Final Rules do not go as far as prior SEC proposals which would have introduced outright prohibitions on several practices that have become commonplace in the fund management industry, including limiting carried interest clawbacks to after-tax distributions, allocating certain expenses among related funds on an other-than-pro rata basis, and indemnifying and reimbursing the manager for costs of certain regulatory exams, investigations and enforcement proceedings involving the manager. The SEC opted to subject these practices to disclosure and consent requirements in lieu of imposing an outright prohibition in response to significant feedback and comments received by the SEC from asset management industry groups, institutional investors, private fund advisers and others.

The Rules are subject to a series of compliance dates. The requirement that RIAs document the annual review of their compliance policies and procedures goes into effect 60 days from the publication of the Final Rules in the Federal Register (which is the Rules’ “Effective Date”), and additional compliance dates, generally running from either 12 months or 18 months from the Effective Date, apply to other provisions of the Final Rules. The Final Rules provide existing private funds with only narrow exemptions from certain of the Rules’ prohibitions on manager practices but not from its other compliance requirements.

We will provide more detailed guidance with respect the Final Rules and their expected impact on managers of private funds in a forthcoming alert.

In the meanwhile, RPCK's lawyers are available to assist with any questions you may have regarding the Final Rules and their implications and requirements. Please contact the RPCK attorney with whom you usually work in RPCK's investment funds practice group or [Tom Scriven](mailto:Tom.Scriven@rpck.com), Senior Counsel and head of RPCK's Denver office at tom.scriven@rpck.com or (720) 778-3062.