

SEC Adopts Amendments to Form PF for Registered Investment Advisers to Private Funds

By **Scott H. Moss**, **Arik Hirschfeld**, and **Michael J. Scales**

On May 3, 2023, the U.S. Securities and Exchange Commission (“SEC”) adopted amendments to Form PF, the confidential form by which certain SEC-registered investment advisers report information pertaining to the private funds they advise.¹ While current Form PF reporting requires these advisers to file Form PF reports on either a quarterly or annual basis, the amendments require: (i) large hedge fund advisers² to file current reports with respect to certain events the SEC believes may indicate stress at the private fund; (ii) all private equity fund advisers reporting on Form PF to file quarterly reports regarding certain enumerated events; and (iii) additional reporting by large private equity fund advisers,³ which the SEC believes will assist regulators in monitoring systemic risks.

Background

Form PF provides the SEC and the Financial Stability Oversight Council (“FSOC”) with confidential information about the operations and strategies of private funds. Section 204(b) of the Advisers Act provides the basis for the SEC’s collection of such information. Currently, Form PF imposes certain quarterly and annual reporting obligations on private fund advisers.

On January 26, 2022, the SEC issued a release proposing various amendments to Form PF (the “Proposal” or “proposed amendments”).⁴ In the Proposal, the SEC stated it had almost a decade of

experience analyzing the information collected on Form PF and, in that time, the private fund industry had grown in size and evolved in terms of business practices, complexity of fund structures, and investment strategies and exposures. The SEC stated it had identified gaps where more granular and timely information would improve its understanding of the private fund industry and the potential systemic risks within it. After considering comments on the Proposal, on May 3, 2023, the SEC announced its adoption of amendments to Form PF (the “Adopting Release” or “amendments”),⁵ as described below.

The Amendments

Current Reporting for Large Hedge Fund Advisers to Qualifying Hedge Funds

The amendments to Form PF create a new Section 5 pursuant to which large hedge fund advisers to qualifying hedge funds⁶ are required to report as soon as practicable, but in no case later than 72 hours, upon the occurrence of certain enumerated events impacting the qualifying hedge fund(s). The SEC believes these events could indicate significant fund stress or potential systemic risk. The new reporting time frame differs from the current quarterly and annual Form PF reporting time frames applicable to large hedge fund advisers but provides more time than the “one business day” reporting requirement originally proposed by the SEC.

¹ The Investment Advisers Act of 1940, as amended (“Advisers Act”), defines the term “private fund” as an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940, but for sections 3(c)(1) or 3(c)(7) of that Act. Rule 204(b)-1 under the Advisers Act requires registered investment advisers that manage private fund assets of at least \$150 million, as of the end of their most recently completed fiscal year, to file Form PF.

² “Large hedge fund advisers” are advisers having at least \$1.5 billion in regulatory assets under management attributable to hedge funds.

³ “Large private equity fund advisers” are advisers having at least \$2 billion in regulatory assets under management attributable to private equity funds.

⁴ The text of the Proposal is available [here](#). The Lowenstein Sandler Investment Management Group alert addressing the proposed amendments is available [here](#).

⁵ The text of the Adopting Release is available [here](#).

⁶ “Qualifying hedge funds” are hedge funds that have a net asset value (individually or in combination with any feeder funds, parallel funds, and/or dependent parallel managed accounts) of at least \$500 million as of the last day of any month in the fiscal quarter immediately preceding the most recently completed fiscal quarter.

The amendments require current reporting (i.e., within 72 hours) by large hedge fund advisers upon the occurrence of the following events.

Extraordinary Investment Losses

If on any business day the 10-business-day holding period return of the reporting fund⁷ is less than or equal to -twenty percent (-20%) of the reporting fund's aggregate calculated value ("RFACV"), which is defined as "every position in the reporting fund's portfolio," including cash, short positions, and fund-level borrowing, with the most recent price or value applied to the position for purposes of managing the investment portfolio. The amendments use RFACV as the reporting fund value statistic rather than most recent net asset value ("NAV"), as the SEC originally proposed.

Significant Margin and Default Events

Upon the occurrence of the following margin and default events at the qualifying hedge funds they advise or at their counterparties:

- If the total dollar value or margin, collateral or an equivalent (collectively, "margin") posted by the reporting fund at the end of a rolling 10-business-day period less the total value of margin posted by the reporting fund at the beginning of that period is greater than or equal to twenty percent (20%) of the average daily RFACV during that period. The amendments utilize RFACV and not the most recent NAV, as proposed.
- If the large hedge fund adviser either (i) receives notification that the reporting fund is in default on a call for margin resulting in a deficit that the reporting fund will not be able to cover or address by adding additional funds; or (ii) determines that the reporting fund is unable to meet a call for increased margin, including in situations where there is a dispute regarding the amount or appropriateness of the margin call.
- If a counterparty to the reporting fund (i) does not meet a call for margin or fails to make any other payment in the time and form contractually required (considering any contractually agreed cure period); and (ii) the amount involved is greater than five percent (5%) of the RFACV.

As proposed, in the case of these current reporting events, the amendments require large hedge fund advisers to report information about the dates on which the events occurred and the dollar amounts of the margin increase, margin call, and/or default. With respect to current reporting for increases in margin, the amendments require large hedge fund advisers to report the average daily RFACV of the reporting fund during the 10-business-day period, an item not included in the Proposal.

Termination or Material Restriction of Prime Broker Relationship

If (i) a prime broker terminates or "materially restricts its relationship" with the reporting fund in markets where that prime broker continues to be active; or (ii) the relationship between the prime broker and the reporting fund was terminated by either party within the last 72 hours in accordance with the Section 5 current reporting period, and a termination event was activated in the prime brokerage agreement or a related agreement within the previous twelve (12) months. With respect to the first instruction, a prime broker will be considered to "materially restrict its relationship" with the reporting fund if it changes the terms of their agreement in a way that significantly limits the reporting fund's ability to operate under the terms of the original agreement, or significantly impairs the reporting fund's ability to trade. The SEC indicated the second instruction is designed to capture termination events indicative of fund stress (e.g., breaches of margin thresholds by the reporting fund), but for which the prime broker did not decide to terminate the relationship at the time of the event.

The amendments differ from the Proposal, which would have required the adviser to report a "material change" in the relationship between the reporting fund and its prime broker, a standard the SEC ultimately concluded was unnecessarily broad and would have captured relationship changes initiated for ordinary course business reasons and not indicative of stress.

Operations Events

If the large hedge fund adviser or reporting fund experiences a "significant disruption or degradation" of the reporting fund's "critical operations" as a result of an event at the reporting fund, the adviser, or one of the reporting fund's service providers. Critical operations are defined as those necessary for (i) the investment, trading, valuation, reporting, and risk management of the reporting fund; or (ii) the operation of the reporting fund in accordance with the federal securities laws. In a departure from the Proposal, the amendments do not define "significant disruption or degradation," which, as originally proposed, was a twenty percent (20%) decrease in normal volume or capacity, and instead do not associate that term with a number.

Large Withdrawals and Redemption Requests and Other Redemption Events

If the reporting fund (i) receives cumulative requests for withdrawals or redemptions equal to or exceeding fifty percent (50%) of the reporting fund's most recent NAV; (ii) is unable to pay redemption requests; or (iii) has suspended redemptions and the suspension lasts for more than five (5) consecutive business days.

⁷ "Holding period return" means the cumulative daily rate of return over the holding period calculated by geometrically linking the daily rates of return.

Large hedge fund advisers required to file a current report in Section 5 are not required to file any other sections of Form PF as part of such report.

Quarterly Reporting for All Private Equity Fund Advisers

The amendments to Form PF create a new Section 6, pursuant to which all private equity fund advisers reporting on Form PF are required to report on a quarterly basis (within sixty (60) calendar days after the end of the advisers' fiscal quarter) upon the occurrence during that fiscal quarter of the following events.

Adviser-Led Secondary Transactions

If the reporting fund closed an adviser-led secondary transaction. All private equity fund advisers are required to provide a brief description and the closing date of any such transaction initiated by the adviser or its related persons that offers the reporting fund's investors the choice to (i) sell all or a portion of their interests in the reporting fund; or (ii) convert or exchange those interests for interests in another vehicle advised by the adviser or any of its related persons.

Removal of General Partner or Termination of Investment Period or Fund

If investors of the reporting fund have (i) elected to remove the adviser or its affiliate as the general partner or similar control person of the reporting fund; (ii) elected to terminate the reporting fund's investment period; or (iii) elected to terminate the reporting fund, in each case as contemplated by the fund's governing documents.

The amendments differ from the Proposal, which would have required reporting of such events within one business day of the event's occurrence.

Private equity fund advisers required to file a quarterly report in Section 6 are not required to file any other sections of Form PF as part of such report.

Large Private Equity Fund Adviser Annual Reporting

The amendments to Form PF added certain questions and reporting requirements in Section 4, applicable to large private equity fund advisers, to be reported on an annual basis as part of the advisers' regular Form PF filing.

Investment Strategy, Exposure and Fund-Level Borrowing

New Question 66 requires large private equity fund advisers to report annually on their investment strategy by selecting from a drop-down list of investment strategies by percentage of deployed capital during the reporting period. Such strategies include: private credit (and associated sub-strategies

such as distressed debt, senior debt, special situations, etc.); private equity (and associated sub-strategies such as early stage, buyout, growth, etc.); real estate, annuity and life insurance policies; litigation finance; general partner stakes investing,⁸ and others. The question also provides an "other" investment strategy option, in which case the adviser will provide a narrative description of the strategy. The SEC also identified "digital assets" as a potential private equity fund investment strategy in the Adopting Release, but stated it was continuing to consider that term and would not be adopting it as part of Question 66 at this time. This question is structured similarly to current Question 20, which requires investment strategy information from hedge fund advisers.

New Question 67 requires large private equity fund advisers to identify, by ISO country code, each country to which the reporting fund's investments in portfolio companies represent exposure of ten percent (10%) or more of the reporting fund's NAV.

New Question 68 requires large private equity fund advisers to report – if the reporting fund engages in fund-level borrowing – information regarding the value of the reporting fund's borrowings (or similar cash financing) and types of creditors, including: (i) dollar amount of total borrowings; (ii) percentage borrowed from U.S. and non-U.S. financial institutions; (iii) percentage borrowed from U.S. and non-U.S. creditors that are not financial institutions; and (iv) the type of borrowing and for each such type listed (e.g., secured or unfunded commitments), the total dollar amount available and the average amount borrowed over the reporting period.

Default Events

New Question 77(a) requires large private equity fund advisers to identify the nature of any default events experienced by a reporting fund or any of its controlled portfolio companies, under any of its indentures, loan agreements or other instruments evidencing obligations for borrowed money, including (i) payment default by the reporting fund; (ii) payment default by the portfolio company; or (iii) a default relating to a failure to uphold terms under the applicable borrowing agreement, other than a failure to make regularly scheduled payments.

General Partner and Limited Partner Clawbacks

New Question 82 requires large private equity fund advisers to report annually if the reporting fund effectuates (i) any general partner clawback (i.e., any obligation of the general partner, or its related persons, or their owners or interest holders to restore or otherwise return performance-based compensation to the fund pursuant to the fund's governing agreements); or (ii) any limited partner clawback (i.e., any obligation of a fund's investor to return all or any portion of a distribution made by the fund to satisfy a fund liability, obligation, or

⁸ "General partner stakes investing" is an investment strategy that acquires non-controlling interests in alternative investment managers and other entities that provide advisory services to, or receive compensation from, private funds.

expense of the fund pursuant to the fund's governing agreements) in excess of an aggregate amount equal to ten percent (10%) of a reporting fund's aggregate capital commitments. This question differs from the Proposal, which would have required the same substantive reporting under Section 4 by *all* private equity fund advisers who report on Form PF within one business day of effectuation of the clawback.

Our Thoughts

Though the substance of the amendments largely tracks the Proposal, the SEC did not adopt a number of proposed amendments. For example, the SEC proposed but did not adopt an amendment that would have lowered the reporting threshold for large private equity fund advisers from \$2 billion to \$1.5 billion in private equity assets under management. The SEC stated it conducted additional analysis of the private equity fund industry after issuing the Proposal and concluded the \$2 billion figure remained the appropriate distinguishing threshold in light of recent accelerated growth in the relative percentage of large private equity fund advisers. The SEC also did not adopt a proposed amendment that would have required large hedge fund advisers to file a current report for any significant decline in the value of the fund's unencumbered cash, concluding such reporting could occur in the normal business course of some fund strategies and therefore may not be particularly indicative of fund stress. The SEC had also proposed new questions seeking information on the portfolio companies held by large private equity fund advisers, but ultimately decided not to adopt those questions.

In the Adopting Release, the SEC rationalizes the Form PF amendments concerning large hedge fund advisers and large private equity fund advisers on the basis that more information about their activities would help the SEC and FSOC monitor developing trends in the private funds industry and assess systemic risks in the financial markets. Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), FSOC is empowered to share information with and make recommendations to financial regulatory agencies about various activities in the financial markets. The amendments may indicate the SEC and FSOC desire to enhance their information-sharing relationship with respect to private equity and hedge fund activity. The SEC also rationalizes its Form PF amendments for private equity fund advisers on the basis that such reporting will promote investor protection. But since Form PF reports are confidential, we think the SEC must mean investor protection by means other than making more information available to support investment decision-making. For example, the SEC could use the new Form PF data it collects to inform its rulemaking agenda, prepare risk alerts and interpretive guidance published to the private funds industry, and inform the selection of targets and topics of focus for the Division of Examinations exam schedule. The SEC could also use this information to inform enforcement activity by the Division of Enforcement. In light of the expected increase in information sharing between FSOC and the SEC, these amendments, which will provide new

detailed information to regulators, could signal an increase in rulemaking, interpretive guidance, and even enforcement activity affecting the private funds industry.

Next Steps

The SEC is adopting two separate effective dates for the Form PF amendments. The requirements to file new Section 5 (current reporting for large hedge fund advisers to qualifying hedge funds upon the occurrence of the enumerated events) and new Section 6 (quarterly reporting for all private equity fund advisers upon the occurrence of the enumerated events) will go into effect 180 days after publication in the Federal Register. The new questions added to existing Section 4 (annual reporting for large private equity fund advisers) will go into effect 365 days after the date of publication in the Federal Register.

Registered investment advisers to private funds should review the amendments and new reporting requirements and their timing, and closely consider the impact on their advisory activities. For example, private equity fund advisers that previously only reported on Form PF annually may now have quarterly reporting requirements for certain events under Section 6. Given that the Adopting Release also covers amendments to Rule 204(b)-1 of the Advisers Act, advisers should assess and update their policies and procedures covering Form PF reporting and coordinate as needed on any operational and information requirements or enhancements in order to meet the new reporting time frames, including potentially within 72 hours. In addition, any reporting templates or fund accounting systems used to gather and collate information for Form PF reporting will need to be updated to reflect the addition of new Sections 5 and 6 and new questions in Section 4.

Please contact one of the listed authors of this Client Alert or your regular Lowenstein Sandler contact if you have any questions regarding these amendments.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

SCOTT H. MOSS

Partner

Chair, Fund Regulatory & Compliance

T: 646.414.6874

smoss@lowenstein.com

ARIK HIRSCHFELD

Counsel

T: 212.419.5978

ahirschfeld@lowenstein.com

MICHAEL J. SCALES

Associate

T: 973.422.6770

msscales@lowenstein.com

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

This Alert has been prepared by Lowenstein Sandler LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. Lowenstein Sandler assumes no responsibility to update the Alert based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. You should consult with counsel to determine applicable legal requirements in a specific fact situation. Attorney Advertising.