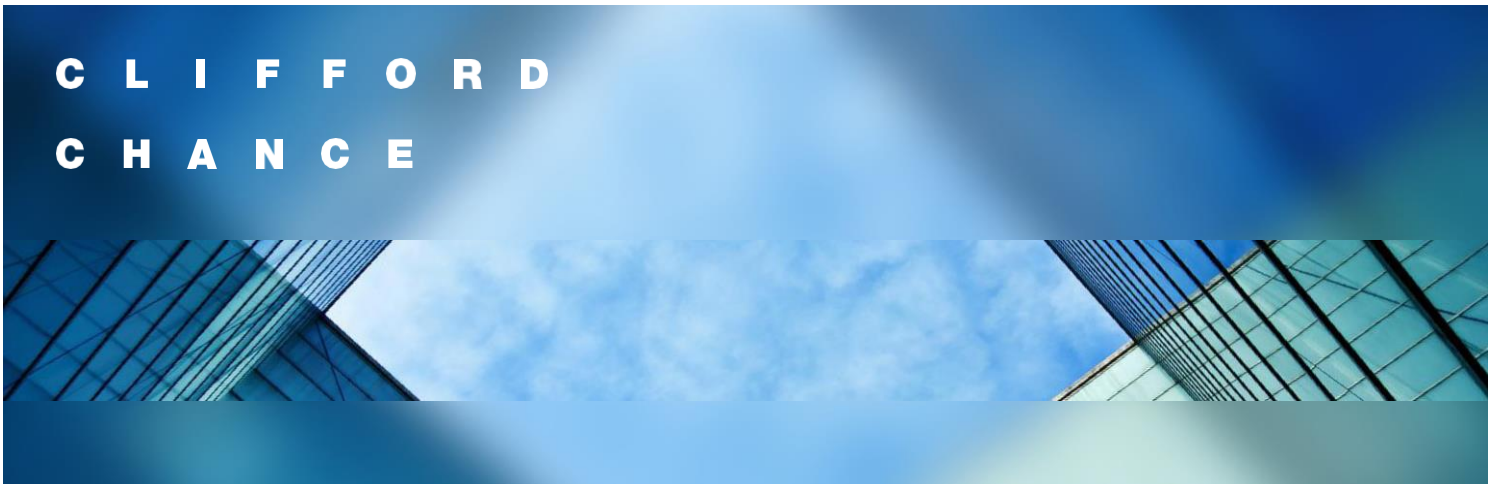

SEC PRIVATE FUND ADVISER RULES

On August 23, 2023, the U.S. Securities Exchange Commission (the "**SEC**") adopted new rules and amendments under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"), which impose significant new restrictions and requirements on investment advisers to private funds (the "**Final PFA Rules**").[1] The Final PFA Rules represent the most comprehensive set of reforms affecting the private fund industry since the Dodd-Frank Act, and will have meaningful consequences for advisers, their private fund clients and fund investors.

In this briefing, we will provide a high-level comparison between the Proposed PFA Rules (as defined below) and the Final PFA Rules, highlighting changes made by the SEC following a lively comment period. While several of these changes benefit private fund advisers, in many respects the Final PFA Rules do not depart significantly from the Proposed PFA Rules. Additionally, for each rule, we will also provide some high-level takeaways for advisers to consider during the transition period prior to the applicable compliance dates. Over the coming weeks and months, we will provide a deeper dive into each rule to help affected advisers come into compliance during the transition period prior to the applicable compliance dates.

Scope of Advisers Subject to the Final PFA Rules

At the outset, we would note that the SEC has clarified the application of the Final PFA Rules to offshore (*i.e.,* non-U.S.) advisers.[2]

- *None* of the Final PFA Rules will apply with respect to the offshore fund clients of an SEC-registered offshore adviser, *even if the fund has U.S. investors*.
- Each of the Preferential Treatment Rule and Restricted Activities Rule (as defined below), which are generally applicable to all private fund advisers (whether or not registered), will not be applicable to offshore unregistered advisers (such as offshore advisers relying on the private fund adviser exemption and filing as an exempt reporting adviser ("**ERA**") or advisers relying on the foreign private adviser exemption) with respect to their offshore fund clients, *even if the fund has U.S. investors*.

1 SEC, Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release IA-6383 (Aug. 23, 2023) ("**Adopting Release**"). Additionally, the SEC finalized a rule that would require all SEC-registered investment advisers (including those that do not manage private funds) to document the annual review of their compliance policies and procedures required under Rule 206(4)-7 of the Advisers Act in writing. Advisers will need to comply with this change beginning with compliance reviews commencing 60 days after the rule is published in the Federal Register.

2 *Id.* at 47-50.

This approach reaffirms the SEC's historical position that it does not apply most of the substantive provisions of the Advisers Act with respect to the non-U.S. clients (including private funds) of an SEC-registered adviser and aligns the treatment of unregistered advisers with this position.

Background on the Final PFA Rules

In February 2022, the SEC proposed several rules and amendments under the Advisers Act to significantly increase the regulation of private fund advisers (the "**Proposed PFA Rules**").[3] The Proposed PFA Rules reflected the SEC's increased focus on the practices of private funds and their advisers under Chair Gary Gensler. As SEC Commissioner Hester Peirce remarked at the time, the Proposed PFA Rules "represent[ed] a sea change" by focusing the SEC's investor protection efforts on sophisticated institutions and high net worth individuals in private funds, rather than on retail investors.[4]

Following the issuance of the Proposed PFA Rules, the SEC received a significant number of comments from various market participants. Private fund advisers and their advisory associations argued, among other things: (i) that the SEC lacked statutory authority to promulgate the rules; (ii) that the rules would divert SEC resources away from the protection of retail investors in favor of investors less in need of governmental protection; (iii) that the rules would undermine the benefits to investors gained through extensive negotiation between sophisticated parties; (iv) that the rules would be prohibitively costly (particularly for new and emerging advisers) resulting in such costs inevitably being passed on to investors; and (v) that certain requirements (such as those around preferential treatment) would have negative consequences (foreseeable and not) for the relationship between advisers and investors in their funds.

Eighteen months after first issuing the Proposed PFA Rules, the SEC has now adopted the Final PFA Rules. The Final PFA Rules retain many of the elements of the Proposed PFA Rules, with certain notable changes to each rule.

Broadly, the Final PFA Rules will—

- require all investment advisers (including those that are not SEC-registered, such as exempt reporting advisers ("**ERAs**") and those relying on the "foreign private adviser" exemption to make certain disclosures of preferential terms offered to prospective and current investors and, subject to certain exemptions, prohibit advisers from providing certain types of preferential treatment that would have a material, negative effect on other investors (the "**Preferential Treatment Rule**");

3 SEC, Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release IA-5955 (Feb. 9, 2022).

4 SEC, Statement on Proposed Private Fund Advisers; Documentation of Investment Adviser Compliance Reviews Rulemaking, https://www.sec.gov/news/statement/peirce-statement-proposed-private-fund- advisers-020922.

- prohibit all investment advisers from engaging in certain activities with respect to a private fund unless they provide specified disclosure, and, in some cases, obtain investor consent (the "**Restricted Activities Rule**");
- require SEC-registered investment advisers to provide certain disclosures regarding fees, expenses, performance and adviser compensation in quarterly statements to fund investors (the "**Quarterly Statement Rule**");
- require SEC-registered investment advisers to obtain a financial statement audit of each advised private fund (the "**Audit Rule**"); and
- require SEC-registered advisers to obtain a fairness opinion or a valuation opinion from an independent opinion provider, as well as disclose conflicts with such provider, in connection with an adviser-led secondary transaction (the "**GP-Led Secondaries Rule**").

Each of the rules also imposes corresponding new recordkeeping requirements under Rule 204-2 of the Advisers Act (the "**Books and Records Rule**").

Preferential Treatment Rule *(applicable to all private fund advisers)*

Key Takeaways

- While certain forms of preferential treatment (such as preferential liquidity and information rights) will not be outright prohibited as proposed under the Proposed PFA Rule, the limited exceptions provided by the SEC that allow advisers to grant such terms may be difficult for advisers to satisfy, with the overall effect being a potential chilling of investor communications and the granting of side letter terms.
- The SEC has made it more difficult for a fund to offer different share classes, given that, for example, the exception to the preferential liquidity prohibition can only be relied upon if the same redemption ability is offered to all future investors without qualification (independent of commitment size, affiliation requirements, etc.).[5]
- Side letters that an adviser has already entered into with current private fund investors, as well as side letters that will be entered into with investors admitted to a fund prior to the compliance date (see page 5 for relevant dates), may be subject to disclosure to investors that invest in the fund after the compliance date.[6]

5 *See* Adopting Release, *supra* note 1, at 279.

6 *Id.* at 317.

Issue	Proposed PFA Rule	Final PFA Rule
Preferential liquidity	Private fund advisers would be prohibited from granting an investor in a private fund (or 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).	Private fund advisers will be prohibited from granting an investor in a private fund (or a 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 similar pool of assets) *unless (i) the redemption ability is required by applicable law, rule, regulation or order of certain governmental authorities or (ii) the adviser has offered the same redemption right to all existing investors and will continue to offer the same redemption ability to all future investors in the private fund (or similar pool of assets).*
Preferential information	Private fund advisers would be prohibited from providing information regarding portfolio holdings or exposures of a private fund (or of a substantially similar pool of assets) to any investor if the adviser reasonably expects the provision of such information to have a material, negative effect on other investors in that private fund (or in a substantially similar pool of assets).	Private fund advisers will be prohibited from providing information regarding portfolio holdings or exposures of a private fund (or of a similar pool of assets) to any investor if the adviser reasonably expects the provision of such information to have a material, negative effect on other investors in that private fund (or in a similar pool of assets) u*nless the 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.*
Other forms of preferential treatment	Private fund advisers would be prohibited from providing any other preferential treatment to any investor in the private fund unless the adviser delivers certain written disclosures to prospective investors (prior to the investor's investment) and current investors (annually) regarding all preferential treatment the adviser or its related persons provides to other investors in the same fund.	Private fund advisers will be prohibited from providing any other preferential treatment to any investor in the private fund *unless (i) the adviser provides advance written notice to a prospective investor of any preferential treatment related to material economic terms that the adviser or its related persons provides to other investors in the same fund and (ii) the adviser distributes to current investors a written notice of all preferential treatment provided to other investors in the same fund (A) for an illiquid fund (see page 7 for additional information regarding this definition), as soon as reasonably practicable following the end of the fund's fundraising period and (B) for a liquid fund (see page 7 for additional information regarding this definition), as soon as reasonably practicable following the investor's investment in the fund.*
Similar pool of assets	A "substantially 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) with substantially similar investment policies, objectives, or strategies to those of the private fund that is managed by the adviser or its related persons.	The SEC adopted this definition as proposed, except for changing the defined term to a "similar pool of assets."

Compliance date	12 months for all advisers.	Advisers with $1.5 billion or more in private fund assets under management ("**Large Private Fund Advisers**"): 12 months after the final rules are published in the Federal Register. Advisers with less than $1.5 billion in private fund assets under management ("**Small Private Fund Advisers**"): 18 months after the final rules are published in the Federal Register.
Grandfathering	Not discussed.	The preferential liquidity and preferential information rights aspects of the rule will not apply to governing agreements (such as LPAs, Subscription Agreements, Side Letters, and Credit Agreements) that were entered into prior to the relevant compliance date if the rule would require the parties to amend such an agreement and only to such agreements that had commenced operations as of the compliance date (*any bona fide* activity – such as investment, fundraising or operational activity – directed towards operating the fund).[7] The disclosure aspect of the rule, as set out in the other forms of preferential treatment, will not receive grandfathering status.

Restricted Activities Rule *(applicable to all private fund advisers)*

Key Takeaways

- Where consent is required prior to the adviser engaging in a particular activity, the SEC departs from common practice with respect to oversight and consent to conflicts by explicitly providing that such consent must be sought from all investors and obtained from a majority in interest of investors (and cannot be obtained through, for example, an LPAC or independent directors, each of which the SEC believes lacks sufficient independence, authority and accountability[8]).
- In the Proposed PFA Rules, the SEC made charging fees for unperformed services and limiting/eliminating liability explicitly prohibited activities; however, it has decided not to adopt these prohibitions in the Final PFA Rule on the grounds that, in the case of the former, charging such fees is already inconsistent with an adviser's federal fiduciary duty, and in the case of the latter, that it is not necessary to achieve the SEC's goals.[9] Unfortunately, the SEC's explanation for these changes raises additional questions regarding other types of activities the SEC may otherwise view as being inconsistent with an advisers federal fiduciary duty.

7 *Id.* at 317.

8 *Id.* at 208.

9 *Id.* at 251-261.

Issue	Proposed PFA Rule	Final PFA Rule
Charging regulatory, compliance and examination expenses	Private fund advisers would be prohibited from charging private fund clients for regulatory or compliance fees and expenses of the adviser or its related persons.	Private fund advisers will be prohibited from charging or allocating to private fund clients any regulatory or compliance fees and expenses, or fees or expenses associated with an examination, of the adviser or its related persons *unless the adviser distributes a written notice of any such fees and expenses (and the dollar amount thereof) to investors in writing on at least a quarterly basis (45 days after the end of the fiscal quarter).*
Charging investigation expenses	Private fund advisers would be prohibited from charging private fund clients for fees and expenses associated with an examination or investigation of the adviser or its related persons by any governmental or regulatory authority.	Private fund advisers will be prohibited from charging or allocating to private fund clients any fees and expenses associated with an *investigation* of the adviser or its related persons by any governmental or regulatory authority *unless the investment adviser requests each investor of the 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.* *Advisers will be prohibited without exception from charging or allocating to the fund fees or expenses related to an investigation that results in the imposition by a court or governmental authority of a sanction for violation of the Advisers Act or the rules thereunder.*
Reducing adviser clawbacks for taxes	Private fund advisers would be prohibited from 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.	Private fund advisers will be prohibited from reducing the amount of 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 adviser distributes a written notice to investors 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.*
Certain non-*pro rata* fee and expense allocations	Private fund advisers would be prohibited from directly or indirectly charging or allocating fees and 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 have invested (or propose to invest) in the same portfolio investment.	Private fund advisers will be prohibited from directly or indirectly charging or allocating fees and 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 have invested (or propose to invest) in the same portfolio investment *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 the fund, the 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.*

Borrowing from a fund client	Private fund advisers would be prohibited from, directly or indirectly, borrowing money, securities or other fund assets, or receiving a loan or an extension of credit, from a private fund client.	Private fund advisers will be prohibited from, directly or indirectly, borrowing money, securities or other fund assets, or receiving a loan or an extension of credit, from a private fund client *unless (i) the adviser distributes a written notice and description of the material terms of the borrowing to investors, (ii) seeks their consent for the borrowing and (iii) obtains written consent from at least a majority-in-interest of the fund's investors that are not related persons of the adviser.*
Charging fees for unperformed services	Private fund advisers would be prohibited from charging a portfolio investment for monitoring, servicing, consulting or other fees in respect of any services the adviser does not, or does not reasonably expect to, provide to the portfolio investment.	**The SEC declined to adopt this prohibition in the Final PFA Rules.** However, in the Adopting Release, the SEC stated that it believed charging fees without providing a corresponding service would be a violation of the adviser's fiduciary duty under the Advisers Act.
Limiting or eliminating liability	Private fund advisers would be prohibited from seeking 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.	**The SEC declined to adopt this prohibition in the Final PFA Rules.** However, the SEC stated it believed that a waiver of an adviser's compliance with its Federal antifraud liability for breach of its fiduciary duty to the private fund, or of any other provision of the Advisers Act or the rules thereunder, is invalid under the Advisers Act. An adviser may not seek reimbursement, indemnification or exculpation for breaching its Federal fiduciary duty because this would operate effectively as a waiver.[11]
Compliance date	12 months for all advisers.	Large Private Fund Advisers: 12 months after the final rules are published in the Federal Register. Small Private Fund Advisers: 18 months after the final rules are published in the Federal Register.
Grandfathering	Not discussed.	Provided for the borrowing and investigation fees and expenses aspects of the Restricted Activities Rule (due to the investor consent requirement).

Quarterly Statement Rule *(applicable to SEC-registered private fund advisers)*

Key Takeaways

- The SEC modified its definition of "illiquid fund" to focus specifically on the ability for investors to redeem their interests or withdraw from the fund. Practically, most traditional hedge funds will fall into the "liquid" fund category and most private equity and venture capital funds will fall into the "illiquid" fund category.
- The SEC expects that fee and expense disclosures will be presented with specificity, with separate line items for each category. Grouping of expenses into broader categories *(e.g.,* "Compliance expenses") will not be acceptable under the rule.

10 *Id.* at 251.

11 *Id.* at 260.

Issue	Proposed PFA Rule	Final PFA Rule
Fee and expense disclosure	Private fund advisers would be required to prepare and distribute quarterly statements for any private fund that it advises with detailed information regarding (i) fund fees and expenses, (ii) compensation paid or allocated to the adviser or its related persons by the fund and (iii) compensation paid or allocated to the adviser or its related persons by the fund's portfolio investments. These figures must be calculated both before and after the application of any offsets, rebates or waivers. Each statement must include prominent disclosure regarding the manner in which expenses, payments, allocations, rebates, waivers and offsets are calculated.	The SEC adopted the Quarterly Statement Rule largely as proposed, with minor modifications (such as, for example, removing the proposed requirement that advisers disclose the fund's ownership percentage of each covered portfolio investment).
Definition of "illiquid fund"	An illiquid fund would be defined as a private fund that: (i) has a limited life; (ii) does not continuously raise capital; (iii) is not required to redeem interests upon an investor's request; (iv) has as a predominant operating strategy the return of the proceeds from disposition of investments to investors; (v) has limited opportunities, if any, for investors to withdraw before termination of the fund; and (vi) does not routinely acquire (directly or indirectly) as part of its investment strategy market-traded securities and derivative instruments.	An illiquid fund will be defined as 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.
Performance disclosure – Liquid funds	Private fund advisers to liquid funds would be required to show performance based on net total return (i) on an annual basis since the fund's inception, (ii) over one-, five- and 10-calendar year periods and (iii) on a cumulative basis for the current calendar year as of the end of the most recent quarter.	Private fund advisers to liquid funds will be required to show performance based on net total return (i) on an annual basis since the fund's inception *or for each of the 10 fiscal years prior to the quarterly statement (whichever is shorter)*, (ii) over one-, five- and 10-fiscal year periods and (iii) on a cumulative basis for the current fiscal year as of the end of the most recent fiscal quarter.
Performance disclosure – Illiquid funds	Private fund advisers to illiquid funds would be required to report (i) gross and net IRR and MOIC for the fund and (iii) gross IRR and MOIC for the unrealized and realized portions of the fund's portfolio, shown since inception and calculated without the impact of any fund-level subscription facilities. Such advisers would also be required to provide investors with a statement of contributions and distributions for the fund.	The SEC adopted this requirement largely as proposed, except that private fund advisers to illiquid funds will be required to also calculate these figures *with* the impact of fund-level subscription facilities.

Distribution of statements	Private fund advisers would be required to distribute (unless another person prepares and distributes) the quarterly statement to investors within 45 days after the end of each calendar quarter. For newly-formed funds, the quarterly statement would need to be distributed beginning after the fund's second full quarter of generating operating results.	Private fund advisers will be required to distribute (unless another person prepares and distributes) the quarterly statement to investors *(i) if a private fund that is not a fund 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 and (ii) if a fund of funds, within 75 days after the first three fiscal quarter ends of each year and 120 days after the fiscal year end.* The SEC adopted the requirement for newly-formed funds as proposed.
Consolidated reporting	Private fund advisers would be required to consolidate reporting for similar pools of assets if doing so would provide more meaningful information to fund investors and is not misleading.	The SEC adopted this requirement as proposed.
Compliance date	12 months for all advisers.	All advisers: 18 months after the final rules are published in the Federal Register

Audit Rule *(applicable to SEC-registered private fund advisers)*

Key Takeaways

- The SEC has aligned the annual audit requirement with the current audit provisions of the Custody Rule applicable to pooled investment vehicles. Notably, it has declined to adopt the proposed changes requiring SEC notification in the Final PFA Rules, but it has proposed similar requirements in its proposed amendments to the Custody Rule (the "**Safeguarding Rule**"). As such it should be noted that at the same time as it adopted the Final PFA Rules, the SEC reopened the comment period for the Safeguarding Rule.
- The SEC acknowledges in the Adopting Release that the Audit Rule would effectively eliminate the surprise examination option under the Custody Rule for private fund advisers (which, in turn, could increase costs to investors).

12 SEC, Safeguarding Advisory Client Assets; Reopening of Comment Period, Investment Advisers Act Release No. IA-6384 (Aug. 23, 2023).

Issue	Proposed PFA Rule	Final PFA Rule
General audit requirement	Private fund advisers would be required to cause each private fund that it advises, directly or indirectly, to undergo a financial statement audit that meets certain requirements at least annually and upon liquidation, if the private fund does not otherwise undergo such an audit. These audits would need to be performed by an independent public accountant that meets certain standards of independence and is registered with and subject to regular inspection by the PCAOB, and the statements would need to be prepared in accordance with U.S. GAAP (or, for foreign private funds, contain information substantially similar to statements prepared in accordance with U.S. GAAP, with material differences with U.S. GAAP reconciled).	The SEC largely adopted this requirement as proposed; however, it aligned the requirements in accordance with the audit provision (and related audited financial statement delivery requirement) of the Advisers Act's Custody Rule.
Advisers not in a control relationship with the fund	For a fund that an adviser does not control and is neither controlled nor under common control with the adviser, the adviser needs to take all reasonable steps to cause the fund to undergo an audit in compliance with the rule.	The SEC adopted this requirement largely as proposed, however, it clarified that if a fund is already undergoing an audit, a non-control adviser *does not* have to take reasonable steps to cause the private fund to undergo an audit.
SEC notification	Private fund advisers would be required to enter into, or cause the private fund to enter into, a written agreement with the independent public accountant performing the audit to notify the SEC (i) promptly upon issuing an audit report to the private fund that contains a modified opinion and (ii) 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.	**The SEC did not adopt this requirement in the Final PFA Rules.**
Compliance date	12 months for all advisers.	All advisers: 18 months after the final rules are published in the Federal Register

GP-Led Secondaries Rule *(applicable to SEC-registered private fund advisers)*

Key Takeaways

- In response to several comments citing, among other things, the higher cost of obtaining a fairness opinion, the Final PFA Rules provide advisers with the option of obtaining and delivering a valuation opinion.
- The definition of "adviser-led secondary transaction" is meant to be evergreen; however, the SEC did make modifications in the Final PFA Rule to avoid capturing, for example, tender offers. Rebalancing between parallel funds and season and sell transactions between parallel funds would also generally not be captured, because the adviser is moving or reallocating assets between funds for legal and/or tax reasons, not offering investors the choice to sell or convert/exchange their fund interests.[13]

Issue	Proposed PFA Rule	Final PFA Rule
Definition of "adviser-led secondary transaction"	An "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 (i) sell all or a portion of their interests in the private fund or (ii) convert or exchange 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.	An "adviser-led secondary transaction" means any transaction initiated by the investment adviser or any of its related persons that offers the private fund's investors the choice between (i) selling all or a portion of their interests in the private fund and (ii) 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.
Opinion requirement	Private fund advisers would be required to obtain and distribute to investors a fairness opinion from an independent opinion provider.	Private fund advisers will be required to obtain and distribute to investors either a fairness opinion *or* a *valuation opinion* from an independent opinion provider.
Summary of material business relationships	Private fund advisers would be required to prepare and deliver to investors a written summary of any material business relationships the adviser or any of its related persons has, or has had, with the independent opinion provider within the past two years.	Private fund advisers will be required to prepare and deliver to investors a written summary of any material business relationships the adviser or any of its related persons has, or has had, with the independent opinion provider *within the two-year period immediately prior to the issuance of the fairness opinion or valuation opinion.*
Distribution requirement	The opinion and summary of material business relationships would have to be delivered to investors prior to the closing of the transaction.	The opinion and summary of material business relationships will have to be delivered to investors prior to the due date of the election form for the transaction.
Compliance date	12 months for all advisers.	Large Private Fund Advisers: 12 months after the final rules are published in the Federal Register. Small Private Fund Advisers: 18 months after the final rules are published in the Federal Register.

13 Adopting Release, *supra* note 1, at 193-194.

CONTACTS

Vadim Avdeychik
Partner

T +1 212 878 3055
E vadim.avdeychik
@cliffordchance.com

Jeff Berman
Partner

T +1 212 878 3460
E jeffrey.berman
@cliffordchance.com

Cliff Cone
Partner

T +1 212 878 3180
E clifford.cone
@cliffordchance.com

Steven Gatti
Partner

T +1 202 912 5095
E steven.gatti
@cliffordchance.com

Jefferey LeMaster
Partner

T +1 212 878 3206
E jefferey.lemaster
@cliffordchance.com

Eric Bernstein
Associate

T +1 212 878 3411
E eric.bernstein
@cliffordchance.com

Dennis Morrisroe
Associate

T +1 212 880 5708
Edennis.morrisroe
@cliffordchance.com

Andrew Nelson
Associate

T +1 212 878 8284
E andrew.nelson
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

Clifford Chance US LLP

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