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SEC Adopts Significant Amendments to Form PF Reporting and Filing Requirements

Client Alert | May 9, 2023

I. Overview

On May 3, 2023, the U.S. Securities and Exchange Commission (the "***SEC***" or the "***Commission***"), by a three-to-two vote, adopted significant amendments (the "***Amendments***") to Form PF, the confidential reporting form created in 2011 as part of the Dodd-Frank Act that is intended to provide the Commission and the Financial Stability Oversight Council ("***FSOC***") with important data and information about private funds. The Commission, citing Form PF's historical role in allowing both the Commission and FSOC to monitor systemic risk in the private funds industry, stated that the Amendments will provide regulators with "timely and critical information in times of market stress or volatility" as they attempt to "stem the tides on a potential crisis and help prevent investor harm."[1]

Form PF is required to be completed and filed by entities which are (i) registered or required to register with the SEC as an investment adviser, (ii) manage one or more private funds, and (iii) together with their related persons, collectively, had at least $150 million in private fund assets under management as of the last day of the most recently completed fiscal year.[2] The Amendments, which introduce two new sections to Form PF, apply to three categories of advisers: (1) hedge fund advisers[3] with at least $1.5 billion in hedge fund assets under management ("***Large Hedge Fund Advisers***"), (2) investment advisers with at least $150 million in private fund assets under management ("***Private Equity Advisers***"), and (3) investment advisers with at least $2 billion in private equity fund assets under management ("***Large Private Equity Advisers***")[4]. The first new section applies to all Private Equity Advisers, and requires that they make filings within 60 days following the end of any fiscal quarter in which a specified trigger event occurred (the "***Quarterly Reporting Window***"). The other new section applies only to Large Hedge Fund Advisers, and requires that they make filings as soon as practicable, but no later than 72 hours following certain "significant events that have the potential for broad impacts or investor loss" (the "***72 hour Reporting Window***").[5] Finally, the Amendments require that Large Private Equity Advisers report additional data in their annual Form PF filings. The below table summarizes the applicable filing requirements, and each of these changes is described in greater detail below.

Related People

Gregory Merz

Lauren Cook Jackson

Shannon Errico

Robert W. Harrington

Triggering Event	Large Hedge Fund Advisers with $1.5bn+ in hedge fund AUM	Private Equity Advisers with $150m+ in private fund AUM	Large Private Equity Advisers with $2bn+ private equity fund AUM
The investment adviser instigates a secondary transaction		File within 60 days of quarter end	File within 60 days of quarter end
Investors elect to remove the general partner (with or without cause)		File within 60 days of quarter end	File within 60 days of quarter end

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Investors elect to terminate the fund (for any reason)		File within 60 days of quarter end	File within 60 days of quarter end
Investors elect to terminate the investment period (for any reason)		File within 60 days of quarter end	File within 60 days of quarter end
10-business day holding period return of fund is less than or equal to 20% of aggregate calculated value	File within 72 hours		
10 business day change in posted margin, collateral, or equivalent is greater than or equal to 20% of average daily aggregate calculated value during same period	File within 72 hours		
Fund is in default on a call for margin, collateral or an equivalent that it cannot cover, or adviser determines that fund will not be able to meet such call	File within 72 hours		
A counterparty to a reporting fund (a) does not meet a call for margin, collateral or equivalent or fails to make any other payment on time and in the form contractually required and (b) the amount involved is greater than 5% of aggregate calculated value	File within 72 hours		
Termination or material restriction of a reporting fund's relationship with a prime broker	File within 72 hours		
There is a "significant disruption or degradation of the reporting fund's critical operations"	File within 72 hours		
Fund receives cumulative requests for withdrawals or redemptions equal to at least 50% of the most recent net asset value	File within 72 hours		
Fund is unable to pay redemption requests	File within 72 hours		
Fund has suspended redemptions for at least 5 consecutive business days	File within 72 hours		

II. Private Equity Advisers are required to file Form PF on a quarterly basis following the occurrence of certain "trigger" events

The Amendments require that all Private Equity Advisers file Form PF in the Quarterly Reporting Window after the end of a fiscal quarter in which either (1) an adviser-led secondary transaction occurred or (2) a fund's investors elect to remove the general partner, terminate the fund, or terminate the fund's investment period.[6] Accordingly, Private Equity Advisers are recommended to institute a process wherein they check on a quarterly basis whether a filing is required as a result of such activity.

A. Adviser-Led Secondary Transactions

Private Equity Advisers will be required to file Form PF within the Quarterly Reporting Window after an adviser-led secondary transaction, which the Amendments define as "any transaction initiated by the adviser or any of its related persons that offers private fund investors the choice to: (1) sell all or a portion of their interests in the private fund; or (2) 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."[7] A filing is only required if the transaction is "initiated" by a fund's Private Equity Adviser (or a related person), which the Commission conceded will require an analysis of the relevant facts and circumstances and noted would generally not include a scenario where the adviser, at the unsolicited request of an investor, participates in a secondary sale of such investor's fund interest.[8] Importantly, *the requirement does not contain exceptions for ordinary-course transactions or situations where the fund's investors or advisory committee have*

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approved the transaction, as the Commission noted that such approvals, while helpful, "do not always ameliorate investor protection concerns."[9]

B. Removal of General Partner, Termination of Fund or Termination of Investment Period

Private Equity Advisers will also be required to file Form PF within the Quarterly Reporting Window following: (1) the removal of the adviser or an affiliate thereof as the general partner (or similar control person) of a fund, (2) the election by the fund's investors to terminate the fund, or (3) the election by the fund's investors to terminate the fund's investment period.[10] In each case, the Private Equity Adviser will be required to disclose the effective date of the removal or termination event, as applicable, and a description of such event, and each requirement is triggered upon the adviser receiving notification of the investors' decision.[11] The Commission noted that only removals or terminations made by the election of the investors would require a filing, but stressed the filing requirement was not limited to "for cause" removals or terminations, noting that such instances are inherently "serious departures from ordinary course operations."[12]

III. Large Hedge Fund Advisers are required to file Form PF within 72 hours of specified "trigger" events

Under the Amendments, Large Hedge Fund Advisers will be required to file Form PF within the 72 hour Reporting Window following certain triggering events, which are summarized below. As a practical matter, this means that Large Hedge Fund Advisers will need to add a significant number of items to the list of calculations that they run daily in order to determine whether a filing is required.

A. *Extraordinary Investment Losses*. Filing required if, as of any business day, the 10-business day holding period return of a reporting fund is less than or equal to 20% of the reporting fund aggregate calculated value.[13]

B. *Significant Margin and Default Events*. Filing required if (a) during any 10 business days, the change in a reporting fund's posted margin, collateral, or equivalent is greater than or equal to 20% of such reporting fund's average daily aggregate calculated value during the same period or (b) the adviser receives notice that a reporting fund is in default on a call for margin, collateral or an equivalent that it cannot cover with additional funds (or determines that such reporting fund will not be able to meet such call).[14]

C. *Counterparty Default*. Filing required if a counterparty to a reporting fund (a) does not meet a call for margin, collateral or equivalent or fails to make any other payment on time and in the form contractually required and (b) the amount involved is greater than 5% of the reporting fund aggregate calculated value.[15]

D. *Prime Broker Relationship Terminated or Materially Restricted*. Filing required following the termination or material restriction of a reporting fund's relationship with a prime broker.[16]

E. *Operations Events*. Filing required following an "operations event," which is defined as a "significant disruption or degradation of the reporting fund's critical operations" (*e.g.*, operations necessary for the investment, trading, valuation, reporting, and risk management of the reporting fund or the operation of the reporting fund in accordance with federal securities laws and regulations).[17]

F. *Redemptions*. Filing required if a reporting fund (a) receives cumulative requests for withdrawals or redemptions equal to at least 50% of the most recent net asset value (after netting against subscriptions or other contributions from investors received and contractually committed), (b) is unable to pay redemption requests, or (c) has suspended redemptions for at least 5 consecutive business days.[18]

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The portion of the Amendments covered in sections II and III above will become effective six months after publication of the adopting release in the Federal Register.

IV. Large Private Equity Advisers are required to report additional data as part of their routine Form PF filings

Finally, the Amendments add and amend various questions to Section 4 of Form PF, which is only required to be completed by Large Private Equity Advisers. Most importantly, such advisers will now be required to report whether any reporting fund has effectuated (1) a limited partner clawback (or clawbacks) in excess of an aggregate amount equal to 10% of such fund's aggregate capital commitments or (2) any general partner clawback, and must provide the reason for such clawback.[19]

The Amendments will also require Large Private Equity Advisers to answer new questions regarding investment strategies of their private equity funds and fund-level borrowing (including with regard to the value of the fund's borrowings, the types of creditors, and whether the fund can borrow at the fund-level as an alternative or complement to financing of portfolio companies). Additionally, the Amendments will require more granular details regarding certain events of default, bridge financing arrangements (including identifying the institution that provides any bridge loan to a controlled portfolio company), and the geographical breakdown of a fund's investments (based on a percentage of NAV).[20] Unlike the "trigger" based filing requirements outlined above, changes to Section 4 will become effective one year following publication, and thus should not be relevant for advisers with a December fiscal year end until their annual filings are due in 2025.[21]

V. Analysis

The Amendments will require Private Equity Advisers to add to their quarterly compliance checklists a question as to whether they need to make a filing as a result of a GP-initiated secondary transaction, or a vote of the limited partners to remove the general partner, terminate the fund, or end the investment period early. In addition to paying attention to the other filing requirements described above, Large Hedge Fund Advisers will now need to perform specified calculations on a daily basis (*see* section III.A. and B. above) and will need to closely monitor redemption requests to determine if they have exceeded 50% of the most recently calculated NAV.

It is not clear what the effect of making a filing under the new requirements will be, but as the Amendments are intended to allow the SEC to monitor systemic risk, such filings will presumably lead to additional questions from the staff, and raise the probability of an SEC inspection.

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[1] Press Release, U.S. Securities and Exchange Commission, "Statement on Amendments to Form PF" (May 3, 2023), available at https://www.sec.gov/news/statement/crenshaw-statement-form-pf-050323.

[2] Form PF General Instructions, available at https://www.sec.gov/files/formpf.pdf.

[3] A "hedge fund" generally includes any private fund (other than a securitized asset fund):

(a) with respect to which one or more investment advisers (or related persons of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses);

(b) that may borrow an amount in excess of one-half of its net asset value (including any

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committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or

(c) that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration).

Solely for purposes of Form PF, any commodity pool about which you are reporting or required to report on Form PF is categorized as a hedge fund.

For purposes of this definition, long and short positions should not be netted and any borrowings or notional exposure of another person that are guaranteed by the private fund or that the private fund may otherwise be obligated to satisfy should be included.

In general, advisers managing open-ended real asset funds are not considered to be "hedge funds" under Form PF and will not need to make the additional filings included in the Amendments for Large Hedge Fund Advisers. Should you have any questions about the proper filing status of one of your funds, please contact the Gibson Dunn lawyer with whom you usually work, or one of the authors listed herein.

[4] "Regulatory assets under management" corresponds to the same figure reported in the adviser's Form ADV filing ("**RAUM**"). "Private fund assets under management" refers to the portion of an adviser's RAUM attributable to private funds, "private equity fund assets under management" refers to the portion of an adviser's RAUM attributable to private equity funds, and "hedge fund assets under management" refers to the portion of an adviser's RAUM attributable to hedge funds.

[5] Press Release, U.S. Securities and Exchange Commission, "Statement on Amendments to Form PF" (May 3, 2023), available at https://www.sec.gov/news/statement/crenshaw-statement-form-pf-050323.

[6] Amendments to Form PF to Require Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers and to Amend Reporting Requirements for Large Private Equity Advisers, SEC Rel. No. IA-6297 (May 3, 2023). Available at https://www.sec.gov/news/press-release/2023-86?utm_medium=email&utm_source=govdelivery.

[7] *Id.* at 61.

[8] *Id.*

[9] *Id.* at 64.

[10] *Id.* at 64-65.

[11] *Id.* at 65.

[12] *Id.* at 67.

[13] *Id.* at 17. "Reporting fund aggregate calculated value" is defined as follows: Every position in the reporting fund's portfolio, including cash and cash equivalents, short positions, and any fund-level borrowing, with the most recent price or value applied to the position for purposes of managing the investment portfolio. The reporting fund aggregate calculated value is a signed value calculated on a net basis and not on a gross basis. Where one or more portfolio positions are valued less frequently than daily, the last price used should be carried forward, though a current foreign exchange rate may be applied if the position is not valued in U.S. dollars. It is not necessary to adjust the reporting fund aggregate calculated value for accrued fees or expenses. Reporting fund aggregate calculated value does not need to be subjected to fair valuation procedures. The inclusion of income accruals is recommended but not required; however, the approach should be

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consistent over time. The reporting fund aggregate calculated value may be calculated using the adviser's own internal methodologies and conventions of the adviser's service providers, provided that these are consistent with the information reported internally. "Holding period return" is defined as the cumulative 'daily rate of return' over the holding period calculated by geometrically linking the daily rates of return.

[14] *Id.* at 22-31.

[15] *Id.* at 31-34.

[16] *Id.* at 35. Termination events that are set forth in the prime broker (or related) agreement that are isolated to the financial state, activities or other conditions *solely of the prime broker* do not require a filing.

[17] *Id.* at 41-48.

[18] *Id.* at 49-54. While "cumulative" isn't defined, a filing will be required if, at any time, total withdrawal or redemption requests which have not been granted exceed 50% of NAV.

[19] *Id.* at 72-78. For purposes of the Amendments, a "limited partner clawback" is defined as "an obligation of a fund's investors to return all or any portion of a distribution made by the fund to satisfy a liability, obligation, or expense of the fund pursuant to the fund's governing agreements," and a "general partner clawback" is defined as "any obligation of the general partner, its related persons, or their respective owners or interest holders to restore or otherwise return performance-based compensation to the fund pursuant to the fund's governing agreements."

[20] *Id.* at 79-83.

[21] *Id.* at 87-88.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding the issues and considerations discussed above. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Investment Funds practice group, or the following authors:

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