HAYNES BOONE

SUMMARY TABLE OF NEW PRIVATE FUND ADVISER RULES

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On August 30, 2023, we released a detailed summary of controversial new rules[1] and amendments under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**") recently adopted by the Securities and Exchange Commission (the "**SEC**") that will substantially alter the reporting, disclosure, recordkeeping, and other obligations of investment advisers to private funds[2] (the "**Final Rules**"). Several trade groups and industry associations have petitioned the Fifth Circuit Court of Appeals to review and set aside the Final Rules in their entirety.[3] The Final Rules apply entirely to investment advisers registered with the SEC ("**RIAs**") and partly to exempt reporting advisers, state-registered advisers, and other advisers not registered with the SEC (collectively, "**non-RIAs**" and together with RIAs, "**Advisers**"). A table summarizing the Final Rules is set forth below.

Requirement	Advisers Subject	Compliance Date[4]	Final Rules
QUARTERLY STATEMENTS[5]	RIAs	March 14, 2025	RIAs must distribute Quarterly Statements containing: • a detailed accounting of all compensation, fees, and other amounts allocated or paid to the investment adviser or any of its related persons as separate line items (including any paid by a covered portfolio investment); • a detailed accounting of all fees and expenses allocated to or paid by the private fund during the reporting period, with separate line items for each category of fee or expense reflecting the total dollar amount (e.g., tax, legal, travel); and • the amount of any offsets or rebates carried forward during the reporting period to subsequent periods to reduce future payments/allocations to the adviser. Quarterly Statements must be delivered by: • Non-Fund of Funds o within 45 days of the end of the Q1–Q3 fiscal quarters; and o within 90 days of the end of the Q4 fiscal quarter. • Fund of Funds o within 75 days of the end of the Q1–Q3 fiscal quarters; and o within 120 days of the end of the Q4 fiscal quarter.

[1] Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 6383, 88 Fed. Reg. 63206 (September 14, 2023) (to be codified at 17 C.F.R. pt. 275), [hereinafter *Final Rules*] available here; *see also* Madelyn Calabrese, Evan Hall, & Stuart Slayton, *SEC Adopts Significant New Rules for Advisers and Private Funds*, HAYNES AND BOONE, LLP (Aug. 30, 2023), [hereinafter *HB Summary*] available here.

[2] A "private fund" is an issuer of securities (e.g., limited partnership interests) that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of that Act. *See* Form ADV, Glossary of Terms, at 34, available here.

[3] Petition for Review at 5, National Association of Private Fund Managers et al. v. SEC, No. 23-60471 (5th Cir. September 1, 2023), available here.

[4] Compliance and effective dates are determined with respect to the date the Final Rules are published in the Federal Register. *See Final Rules*, at 315. The Final Rules were published in the Federal Register on September 14, 2023. Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 6383, 88 Fed. Reg. 63206 (September 14, 2023) (to be codified at 17 C.F.R. pt. 275).

[5] *Final Rules*, at 60–161 (to be codified at 17 C.F.R. § 275.211(h)(1)-2); *see also HB Summary*, at 9–11.

Requirement	Advisers Subject	Compliance Date[4]		Final Rules
MANDATORY AUDITS[6]	RIAs	March 14, 2025		All RIAs must prepare and distribute audited financial statements at least annually to all investors. Such audits must meet certain requirements set forth in the Custody Rule, such as: • Delivery must occur within 120 days of fiscal year end; • The auditor must be registered with the Public Company Accounting Oversight Board; and • Such an audit is required upon liquidation.
ADVISER- LED SECONDARY TRANSACTIONS[7]	RIAs	≥ $1.5b AUM September 14, 2024	< $1.5b AUM March 14, 2025	Before investors' binding election form for an adviser-led secondary transaction[8] is due, RIAs must obtain and distribute to investors in the applicable fund a fairness opinion or a valuation opinion regarding the transaction, as well as a written summary of the material business relationships the RIA or its related persons has had with the opinion provider in the two years immediately prior to the issuance of such opinion.
COMPLIANCE RULE DOCUMENTATION[9]	RIAs	November 13, 2023		At least annually, RIAs must document in writing the annual review of its compliance policies and procedures RIAs already must conduct under previously adopted regulations.[10]
RESTRICTED ACTIVITIES[11]				
Charging or Allocating Investigation Expenses (Allowed with Consent)[12]	RIAs; Non-RIAs ***Legacy Status Afforded***[13]	≥ $1.5b AUM September 14, 2024	< $1.5b AUM March 14, 2025	***Only*** with the prior written consent of at least a majority in interest of investors that are not related persons of the Adviser may Advisers charge or allocate fees or expenses associated with a particular investigation of the Adviser or its related persons. ***However***, even with such consent, Advisers may ***not*** charge or allocate such amounts if that investigation results in a sanction for a violation of the Advisers Act.

[6] *Final Rules*, at 161–86 (to be codified at 17 C.F.R. § 275.206(4)-10); *see also HB Summary*, at 11–12.

[7] *Final Rules*, at 186–205 (to be codified at 17 C.F.R. § 275.211(h)(2)-2); *see also HB Summary*, at 12.

[8] Adviser-led secondary transactions are defined as any transaction initiated by an investment adviser or any of its related persons that offers private fund 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 investment adviser or any of its related persons. *Final Rules*, at 191–92 (to be codified at 17 C.F.R. § 275.211(h)(1)-1).

[9] *Final Rules*, at 302–08 (to be codified at 17 C.F.R. § 275.206(4)-7); *see also HB Summary*, at 12.

[10] *See* Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204, 38 Fed. Reg. 74,714 (proposed Dec. 17, 2003).

[11] *Final Rules*, at 205–51 (to be codified at 17 C.F.R. § 275.211(h)(2)-1); *see also HB Summary*, at 2–9.

[12] *Final Rules*, at 236–42 (to be codified at 17 C.F.R. § 275.211(h)(2)-1(a)(1)); *see also HB Summary*, at 2.

[13] With respect to private funds that have commenced operations as of the compliance date, these restrictions on charging and allocating investigation expenses will not apply to contracts (e.g., limited partnership agreements, subscription credit facility agreements, subscription agreements, side letters, etc.) that were entered into in writing prior to the compliance date if the rule would require the parties to amend such contract, but the restriction on charging or allocating such expenses related an investigation that resulted in a sanction **will** apply. Final Rules, at 316 (to be codified at 17 C.F.R. § 275.211(h)(2)-1(b)); *see also HB Summary*, at 8.

Requirement	Advisers Subject	Compliance Date[4]		Final Rules
Borrowing (Allowed with Consent)[14]	RIAs; Non-RIAs ***Legacy Status Afforded***[15]	***≥ $1.5b AUM*** September 14, 2024	***< $1.5b AUM*** March 14, 2025	If, ***and only if***, i. the Adviser distributes to each investor a written description of the material terms of a borrowing, loan, or extension of credit ***from a private fund client*** of the Adviser to the Adviser; ii. the Adviser requests each such investor's consent to such borrowing, loan, or extension of credit; and iii. a majority in interest of such private fund's investors that are not related persons of the Adviser provide their written consent to such borrowing, loan, or extension of credit, then the Adviser may borrow ***from its private fund client***.
Charging or Allocating Compliance Expenses (Allowed with Disclosure)[16]	RIAs Non-RIAs	***≥ $1.5b AUM*** September 14, 2024	***< $1.5b AUM*** March 14, 2025	An Adviser may charge or allocate regulatory or compliances fees or expenses (including those associated with an examination) if, ***and only if***, the Adviser notifies investors in writing of any such fees and expenses and the amount thereof within 45 days after the end of the fiscal quarter in which such charge or allocation to the private fund occurs.
Reducing Adviser Clawbacks for Taxes (Allowed with Disclosure)[17]	RIAs; Non-RIAs	***≥ $1.5b AUM*** September 14, 2024	***< $1.5b AUM*** March 14, 2025	An Adviser may reduce the amount of any adviser or general partner carried interest clawback for actual, potential, or hypothetical taxes applicable to the Adviser, its related persons, or their respective owners or interest holders if, ***and only if***, the Adviser notifies investors in writing of the aggregate dollar amounts of the adviser clawback before and after any such reduction within 45 days after the end of the fiscal quarter in which the reduction occurs.
Non-Pro Rata Fee & Expense Allocations (Allowed with Disclosure)[18]	RIAs; Non-RIAs	***≥ $1.5b AUM*** September 14, 2024	***< $1.5b AUM*** March 14, 2025	An Adviser may charge or allocate fees or expenses related to a portfolio investment on a non-pro rata basis between multiple funds or clients of the Adviser or its related persons that invest (or propose to invest) in such portfolio investment if, ***and only if***, i. charging or allocating such amounts on a non-pro rata basis is fair and equitable under the circumstances;

[14] *Final Rules*, at 243–251 (to be codified at 17 C.F.R. § 275.211(h)(2)-1(a)(5)); *see also HB Summary*, at 3.

[15] With respect to private funds that have commenced operations as of the compliance date, these restrictions on borrowing will not apply to contracts (e.g., limited partnership agreements, subscription credit facility agreements, subscription agreements, side letters, etc.) that were entered into in writing prior to the compliance date if the rule would require the parties to amend such contract. Final Rules, at 316 (to be codified at 17 C.F.R. § 275.211(h)(2)-1(b)); *see also HB Summary*, at 8.

[16] *Final Rules*, at 212–18 (to be codified at 17 C.F.R. § 275.211(h)(2)-1(a)(2)); *see also HB Summary*, at 3.

[17] *Final Rules*, at 218–24 (to be codified at 17 C.F.R. § 275.211(h)(2)-1(a)(3)); *see also HB Summary*, at 4.

[18] *Final Rules*, at 224–36 (to be codified at 17 C.F.R. § 275.211(h)(2)-1(a)(4)); *see also HB Summary*, at 4–5.

Requirement	Advisers Subject	Compliance Date[4]		Final Rules
				ii. prior to making such charge or allocation, the Adviser notifies each investor of the applicable funds in writing that a non-pro rata charge of fees and expenses of such funds will occur; and iii. such written notification describes how such non-pro rata charge or allocation is fair and equitable under the circumstances.
PREFERENTIAL TREATMENT[19]				
Redemptions[20]	RIAs; Non-RIAs ***Legacy Status Afforded***[21]	≥ $1.5b AUM September 14, 2024	< $1.5b AUM March 14, 2025	If the Adviser reasonably expects that granting preferential redemption rights to less than all investors would have a material, negative effect on the other investors in the applicable private fund ***or in a similar pool of assets***, then the Adviser may not grant preferential redemption rights to an investor, ***except if***: i. such preferential redemption rights are required by applicable law; or ii. such preferential redemption rights are offered to all other existing and future investors in the private fund or similar pool of assets.
Transparency[22]	RIAs; Non-RIAs ***Legacy Status Afforded***[23]	≥ $1.5b AUM September 14, 2024	< $1.5b AUM March 14, 2025	If the Adviser reasonably expects that providing information regarding the portfolio holdings or exposures of the private fund, ***or of a similar pool of assets***, to any investor in a private fund would have a ***material, negative effect*** on the other investors in the applicable private fund, ***or in a similar pool of assets***, then the Adviser may only provide such information if it is provided to all other existing investors in the private fund and any similar pool of assets at the same time or substantially the same time.
Disclosure of All Preferential Treatment; Retention of Notices to Prospective Investors[24]	RIAs; Non-RIAs	≥ $1.5b AUM September 14, 2024	< $1.5b AUM March 14, 2025	***Preferential, material economic terms must be disclosed to prospective investors prior to their investment***. Such notices must be retained under the books and record rule as amended by the Final Rules. All preferential treatment must be disclosed in writing, to current investors on the following timeline: • Illiquid Funds: as soon as reasonably practicable following the end of the private fund's fundraising period; • Liquid Funds: as soon as reasonably practicable following the investor's investment in the private fund; and • All Funds: with respect to preferential treatment granted thereafter, no less than annually.

[19] *Final Rules*, at 261–302 (to be codified at 17 C.F.R. § 275.211(h)(2)-3); *see also HB Summary*, at 5–8.

[20] *Final Rules*, at 274–80 (to be codified at 17 C.F.R. § 275.211(h)(2)-3(a)(1)); *see also HB Summary*, at 6.

[21] With respect to private funds that have commenced operations as of the compliance date, these restrictions on preferential liquidity and information will not apply to contracts (e.g., limited partnership agreements, subscription credit facility agreements, subscription agreements, side letters, etc.) that were entered into in writing prior to the compliance date if the rule would require the parties to amend such contract, but such preferential treatment is still subject to disclosure following the compliance date. Final Rules, at 317 (to be codified at 17 C.F.R. § 275.211(h)(2)-3(d)); *see also HB Summary*, at 8–9.

[22] *Final Rules*, at 280–86 (to be codified at 17 C.F.R. § 275.211(h)(2)-3(a)(2)); *see also HB Summary*, at 6–7.

[23] *See supra* note 21.

[24] *Final Rules*, at 290–301 (to be codified at 17 C.F.R. § 275.211(h)(2)-3(b)); *see also HB Summary*, at 7–8.

Requirement	Advisers Subject	Compliance Date[4]	Final Rules
ADVISER MISCONDUCT[25]			
Fees for Unperformed Services[26]	RIAs; Non-RIAs	N/A (Not Adopted)	While not formally adopted in the Final Rules, the SEC stated in the release that 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 violates the Adviser's fiduciary duties, as doing so puts the Adviser's interests ahead of its clients and often "involves a misrepresentation or an omission of a material fact."[27]
Standard of Liability[28]	RIAs; Non-RIAs	N/A (Not Adopted)	While not formally adopted in the Final Rules, the SEC stated its view that an Adviser may not waive "its Federal antifraud liability for breach of its fiduciary duty to the private fund or otherwise, or of any other provision of the Advisers Act, or rules thereunder,"[29] and "a breach of the Federal fiduciary duty may involve conduct that is intentional, reckless, or negligent."[30] For such breaches, an Adviser may not seek reimbursement, indemnification, or exculpation because it would operate as a waiver of the unwaivable Federal fiduciary duty. Notably, the SEC seems to have impliedly blessed "savings clauses" commonly used in indemnification and exculpation clauses. These clauses generally state that notwithstanding any general waiver language in fund documents, an investor may retain non-waivable rights under applicable law.[31]

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For more information, or if you have any questions, please contact one of the following Haynes and Boone attorneys:

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[25] *Final Rules*, at 251–61; *see also HB Summary*, at 12–13.
[26] *Final Rules*, at 251–56; *see also HB Summary*, at 12–13.
[27] *Final Rules*, at 253–54.
[28] *Final Rules*, at 256–61; *see also HB Summary*, at 13.
[29] *Final Rules*, at 258; *see also Final Rules*, at 260n.782 (asserting that only a showing of ***simple*** negligence is needed under Section 206(2) of the Advisers Act, which prohibits "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. § 80b-6(2).).
[30] *Final Rules*, at 260.
[31] *Final Rules*, at 260n.781