

Fund Finance Industry Avoids Biggest Impacts of SEC's Private Funds Rulemaking

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On August 23, 2023, the Securities and Exchange Commission (the “**SEC**”) adopted new rules under the Investment Advisers Act of 1940 that apply, in certain cases, only to registered private fund advisers and in others, to all private fund advisers (such adopted rules, collectively, the “**Final Rule**”). The adoption of the Final Rule was a long time coming. More than 18 months earlier on February 9, 2022, under Chairperson Gary Gensler, the SEC published a historically sweeping proposal of rules to further regulate the private funds industry in a 342-page document including discussion, commentary, legal basis, questions for consideration, proposed rule text, economic analysis and alternative rules considered (the rules included in such earlier proposal, collectively, the “**Proposed Rule**”).

While the Proposed Rule produced hundreds of comment submissions from both investor and private fund trade associations, as well as other interested parties, and sought outright bans on commonly accepted business practices by private fund managers, the SEC's adoption of the Final Rule last week brings relatively little disruption for the fund finance market. This is because the portions of the Final Rule that relate to or are tangential to fund finance have largely been adopted in the form articulated in the Proposed Rule, which, in our view, was never going to “chill” subscription financings, as had been suggested when the Proposed Rule was published. While certain portions of the Final Rule relate to or are relevant to fund finance market participants, including new mandated investor disclosure of fund performance metrics *without impact of a subscription line*, the Final Rule in no way restricts the use of frequently-utilized fund finance products. This is certainly a favorable outcome for the fund finance industry, but the Final Rule does impose a host of new requirements and restrictions on the private funds industry that are unprecedented in scope and likely to present commercial challenges (i.e., with respect to side letters and other arrangements with “anchor” or strategically significant investor relationships vis a vis other investors) to a variety of fund sponsors, irrespective of asset class or platform scale.

In this article, we summarize the portions of the Final Rule we consider to be of interest to fund finance market participants. In doing so, we can't help but note that the most interesting thing about the Final Rule is that even though some version of a subscription financing (in its infancy) has existed since as early as 1987, the Final Rule is the first instance we're aware of in which a regulatory body, via administrative rulemaking, has codified the concept of a “subscription facility”—perhaps the ultimate signal of a mature product or perhaps the size of the industry has grown to a point where it could no longer be ignored by regulators? Either way, the adoption of the Final Rule was a significant event for fund finance market participants.

[For the full Fund Finance article about the SEC adopted rule, please click here.](#)

For a more comprehensive discussion of the new rules and their implications under the Investment Advisers Act of 1940, please see the [Haynes Boone Investment Management Alert](#) published Aug. 30.