SEC Proposes Sweeping Amendments to the Advisers Act for Private Fund Advisors

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On February 9, 2022, the Securities and Exchange Commission (the SEC) issued proposed rules under the Investment Advisers Act of 1940, as amended (Advisers Act), for investment advisers to private funds registered under the Advisers Act. If adopted, the proposed rules represent significant changes to the rules applicable to private fund advisers, and indicate a continued focus on private funds and their advisers by the SEC.

The proposed rules would require that advisers:
(1) distribute quarterly statements to investors disclosing certain detailed information regarding fees, expenses and performance; (2) obtain annual audits of the financial statements of the private funds they manage, in accordance with generally accepted accounting principles (GAAP) by an independent public accountant, and require such accountant to notify the SEC of certain material events; (3) in connection with certain adviser-led secondary transactions, obtain and distribute to investors a fairness opinion; and (4) document annual compliance reviews in writing.

In addition, the proposed rules would also contain a set of prohibitions applicable to all investment advisers to private funds—regardless of whether registered with the SEC, exempt from registration, or prohibited from registration. Advisers would be prohibited from:

- charging fees to a portfolio investment for any services the adviser does not, or does not reasonably expect to, provide to the portfolio investment (i.e., accelerated payments);
- charging fees or expenses to a private fund associated with government or regulatory examinations or investigations, and regulatory and compliance fees and expenses of the adviser or its related persons;
- reducing the amount of any ‘adviser clawback’ (i.e., a return of performance fees by the

adviser and/or its affiliates) by the amount of certain taxes;

- seeking reimbursement, indemnification, exculpation, or limitation of liability from a private fund for an adviser's wrongful conduct including but not limited to for breach of fiduciary duty (i.e., hedge clauses);
- charging or allocating fees and expenses related to a portfolio investment on a non-pro rata basis, when multiple other clients of the adviser and its related persons have invested or propose to invest in the portfolio investment;
- borrowing money, securities or other assets, or receiving an extension of credit from a private fund; and
- providing certain types of preferential terms to investors (for example, side letters), including preferential liquidity or enhanced portfolio information, absent certain written disclosures to prospective and current investors.

A detailed analysis of the proposed rules is forthcoming.

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