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Private Fund Adviser Rulemaking

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By a 3-2 party-line vote, on Aug. 23, 2023, the Securities and Exchange Commission (the "**SEC**") adopted some of the most significant new rules under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**"), since the elimination of the old "15 or fewer" exemption that most private fund advisers had relied upon prior to the 2010 enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act. While some of the most controversial aspects of the new private fund adviser rules, which the SEC had originally proposed on Feb. 9, 2022 (the "**Proposed Rules**"), were omitted or scaled back in the adopted version of these rules (the "**Final Rules**"), the Final Rules nonetheless impose numerous onerous restrictions and requirements on nearly all investment advisers to private funds[1] ("**Private Fund Advisers**"), whether or not they are SEC-registered or exempt from registration. The Final Rules not only require substantial additional disclosures, but also mandate informed consent with respect to certain activities and certain fees and expenses, thereby adding a significant compliance burden on Private Fund Advisers, which burden was also recently amplified under the SEC's new marketing rule that registered investment advisers were required to comply with as of Nov. 4, 2022 (the "**Marketing Rule**"). In addition, the SEC also adopted rule amendments requiring *all* registered investment advisers to document their annual compliance reviews in writing (the "**Compliance Rule**").

Only two categories of Private Fund Advisers are completely exempt from the Final Rules: (i) advisers to securitized asset funds, which generally include issuers of collateralized loan obligations (CLOs), and (ii) Private Fund Advisers whose principal offices and places of business are outside of the United States ("**non-U.S. Advisers**") with respect to any funds they advise that are domiciled in non-U.S. jurisdictions, even if U.S. investors have invested in such funds.[2] Throughout this GT Alert, the term Private Fund Advisers should be read to exclude these two categories of investment advisers. Exempt reporting advisers (ERAs) and other Private Fund Advisers that are not SEC-registered are not subject to the Quarterly Statement Rule, the Fund Audit Rule, or the Adviser-Led

Secondaries Rule, but are subject to all other aspects of the Final Rules (i.e., the Preferential Treatment Rule, the Restricted Activities Rule, and the Compliance Rule).

Below is a substantive overview of the Final Rules and a discussion of certain key deviations from the Proposed Rules.[3]

Click here to continue reading the full GT Alert.

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[1] The adopting release cites the Advisers Act's definition of a "**private fund**" contained in Section 202(a)(29) thereof, "an issuer that would be an investment company, as defined in section 3 of the Investment Company Act…but for section 3(c)(1) or 3(c)(7) of that Act," and goes on to say that, subject to the exception for securitized asset funds discussed herein, the terms "private fund" and "fund" as used by the SEC have this meaning. Based on this usage and in light of other guidance provided by the SEC in the past, the Final Rules do not apply to other pooled investment vehicles exempt from the Investment Company Act of 1940, as amended (the "**Investment Company Act**"), for other reasons, unless the investment adviser thereto has chosen to treat any such vehicle as relying upon the exemption contained in Section 3(c)(1) or Section 3(c)(7) of the Investment Company Act (for example, in order that the investment adviser can rely upon the private fund adviser exemption from SEC registration under Section 203(m) of the Advisers Act).

[2] However, non-U.S. Advisers are subject to the Final Rules with respect to the U.S.-domiciled private funds that they advise.

[3] We are mindful that certain industry trade groups have suggested that they plan to pursue legal challenges to the Final Rules.

Jonathan Van Duren, Law Clerk/JD in the firm's Chicago office, also contributed to this article.

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