Final Private Funds Rules Reference Guide

Applicable to SEC-Registered Investment Advisers

Rule & Due Date	Requirements	Noteworthy Observations
Quarterly Statements **Due Date** March 14, 2025 All SEC-registered advisers, regardless of size	**Fee & Expense Reporting** SEC-registered investment advisers must provide fund investors with quarterly statements (within 45 days after the end of the first three fiscal quarters of each fiscal year and within 90 days after the end of each fiscal year, and in the case of fund of funds, within 75 days after the end of the first three fiscal quarters of each fiscal year and within 120 days after the end of each fiscal year) that include the following: ▪ A table with a detailed accounting of all fees, compensation and other amounts paid to the adviser or any of its related persons by the fund, all other fees and expenses paid by the fund during the reporting period, and the amount of any offsets of rebates carried forward to reduce future compensation to the adviser or its related persons. ▪ A table with detailed accounting of all "portfolio investment compensation" allocated or paid by each covered portfolio investment during the reporting period ("Portfolio investment compensation" includes any compensation, fees, and other amounts allocated or paid to the adviser or any of its related persons by the portfolio investment attributable to the private fund's interest in the portfolio investment, including, but not limited to, origination, management, servicing, consulting, monitoring, transaction, administrative, advisory, closing, disposition, directors, trustees or similar fees or payments). The adopting release states that "portfolio investment compensation" does not include return of capital or distributions of profit. ▪ Prominent disclosures regarding the calculation methodology of fees and expenses, allocations, rebates, waivers and offsets and include cross-references to relevant sections of fund's organizational and offering documents.	▪ The adopting release states that the reporting requirements are a baseline and does not limit or restrict any additional reporting (e.g., required reporting negotiated under investor side letters). ▪ If the quarterly statement is distributed electronically via a data room, advisers must notify investors that the quarterly statement has been uploaded. ▪ Advisers to newly formed private funds are required to distribute reports after the second full fiscal quarter of a fund's operations. ▪ Expense items that are reimbursed to the adviser (or related person) by a fund should be reported at the time of reimbursement, not at the time in which they were paid by the adviser. ▪ De minimis expense amounts may not be grouped into broad or "miscellaneous" categories. ▪ "Portfolio investment" is broadly defined and may include more than one entity or issuer that a private fund invests in (i.e., the definition would capture subsidiaries of a holdco investment). ▪ Only "covered portfolio investments" are required to be included in the quarterly statement (i.e., portfolio investments that allocated or paid compensation to the adviser or related persons during the reporting period. ▪ Reporting of "portfolio investment compensation" should only reflect the portion attributable to the private fund's interest in the portfolio investment (i.e., reporting should not include any interest attributable to a co-investment interest). ▪ The quarterly statement rule does not apply to securitized asset funds or offshore offerings.

Rule & Due Date	Requirements	Noteworthy Observations
Quarterly Statements **Due Date** March 14, 2025 All SEC-registered advisers, regardless of size	**Performance Reporting** In addition to the fee and expense reporting obligations referenced above, the quarterly statement rule requires advisers to present standardized fund performance measures by fund classification type and include prominent disclosures regarding the criteria and assumptions used to calculate performance data, including, but not limited to, whether dividends were reinvested, or whether any fee rates or discounts were assumed in the calculation of net performance measures. Advisers must determine whether a private fund is a "liquid" or "illiquid" vehicle prior to sending the initial quarterly reporting statement. Illiquid funds are defined as private funds that do not have any redemption mechanisms and have limited opportunities for withdrawal. Liquid funds are defined under the rule as any funds that are not illiquid funds. Generally speaking, if a private fund allows voluntary redemption/withdrawals, it is a liquid fund. The reporting requirements for illiquid and liquid funds are as follows: ▪ **Illiquid Funds:** (i) inception-to-date performance based on internal rates of return and multiples of invested capital (gross and net) for both realized and unrealized portions of the fund's portfolio, and (ii) a statement of contributions and distributions. ▪ **Liquid Funds:** (i) Annual net total returns for each fiscal year for the 10 fiscal years prior to the quarterly statement, or since inception if less than 10 years; (ii) average annual net total returns over one-, five-, and ten- fiscal year periods, and (iii) cumulative net total return for the current fiscal year as of the end of the most recent fiscal quarter. Prominent disclosures regarding the calculation methodology of fees and expenses, allocations, rebates, waivers and offsets and include cross-references to relevant sections of fund's organizational and offering documents.	▪ According to the rule: ○ IRR is defined as: the discount rate that causes the net present value of all cash flows throughout the life of the fund to be equal to zero. ○ MOIC is defined as: the sum of the unrealized value of the illiquid fund and the value of all distributions made, divided by the total capital contributions. ▪ The adviser must disclose the use of any assumed fee rates, including whether the adviser is using fee rates set forth in the fund documents, whether it is using a blended rate or weighted average that would factor in any discounts, or whether it is using a different method for calculating net performance. The rule requires the disclosure to be within the quarterly statement. ▪ The rule requires advisers to illiquid funds to calculate performance measures with and without the impact of subscription facilities (this provision does not apply to liquid funds). ▪ For performance measures with the impact of fund-level subscription facilities ("levered returns"), the rule requires advisers to calculate performance measures reflecting the actual capital activity from both investors and fund-level subscription facilities, including, for the avoidance of doubt, any activity prior to investor capital contributions as a result of the fund drawing down on fund-level subscription facilities. ▪ For performance measures without the impact of fund-level subscription facilities ("unlevered returns"), the rule requires advisers to calculate performance measures as if the private fund called investor capital, rather than drawing down on fund-level subscription facilities. ▪ The rule states that only gross returns are required when presenting the realized and unrealized portions of an illiquid fund, which is inconsistent with the requirement to present net performance of extracted portfolios under the new marketing rule. ○ Any quarterly reporting that is used for marketing activities will therefore be required to meet the requirements under the marketing rule.

Rule & Due Date	Requirements	Noteworthy Observations
Private Fund Audit **Due Date** March 14, 2025 All SEC-registered advisers, regardless of size.	SEC-registered investment advisers must obtain an annual audit for each private fund that meets the requirements of the audit provision in the Custody Rule (Rule 206(4)-2 of the Advisers Act) and deliver the audited financial statements to investors within 120 days of the end of the fund's fiscal year-end (or within 180 days of the fund's fiscal year-end in the case of fund of funds). Illiquid Funds – (i) inception-to-date performance based on internal rates of return and multiples of invested capital (gross and net) for both realized and unrealized portions of the fund's portfolio, and (ii) a statement of contributions and distributions.	▪ For advisers that currently rely on the audit exemption under the Custody Rule, this new rule will not require any changes to business practices. ▪ Advisers will no longer be able to opt out of the audit requirement using surprise examinations. ▪ The new rule's adopting release states that the requirement to receive an audit for an SPV is determined by whether the adviser treats the SPV as a separate client vehicle. ▪ The private fund audit rule does not apply to securitized asset funds ("CLOs") or offshore offerings.
Adviser-led Secondaries **Due Date** September 14, 2024 Larger Advisers with $1.5B or more in AUM March 14, 2025 Smaller Advisers with less than $1.5B in AUM	SEC-registered investment advisers are required to obtain and distribute (prior to the date of investor election) a fairness opinion or a valuation opinion from an independent opinion provider, as well as disclose any material business relationships the adviser has had with the independent opinion provider within the previous two years.	▪ Any secondary funds that have commenced operations prior to the compliance date will not be required to retroactively obtain an independent fairness opinion. ▪ The rule does not apply to cross trades, rebalancing, season and sell transactions and tender offers (i.e., the investor is electing to sell all or a portion of its interests in a private fund). ▪ The adviser-led secondaries rule does not apply to securitized asset funds or offshore offerings.
Annual Written Review Compliance Rule Amendment Due **Due Date** November 13, 2023 All SEC-registered advisers, regardless of size	SEC-registered investment advisers, including those without private fund clients, must annually review and document in writing the adequacy of their compliance policies and procedures and the effectiveness of their implementation under Rule 206(4)-7 of the Advisers Act.	▪ The compliance rule amendment does not prescribe any specific format for the annual written report. ▪ The SEC stated in the adopting release that the rule will not apply to any partial-year periods that pre-date the compliance date. ▪ The compliance rule amendment does not provide for any exemptions for securitized asset funds or offshore offerings.

Applicable to All Advisers to Private Funds (Including Registered Advisers, Exempt Reporting Advisers, State Registered Advisers, Foreign Private Advisers, and Unregistered Advisers)

Rule & Due Date	Requirements	Noteworthy Observations
Restricted Activities **Due Date** September 14, 2024 Larger Advisers with $1.5B or more in AUM March 14, 2025 Smaller Advisers with less than $1.5B in AUM	All advisers to private funds will be restricted from engaging in the following activities: ▪ **Investigation Costs:** Advisers may not charge or allocate fees or expenses associated with an investigation of the adviser to private fund clients without disclosing as much and receiving consent from a majority in interest of fund investors (excluding the adviser and its related persons), and advisers are prohibited from charging the private fund client for fees and expenses for any investigation that results in violations of the Advisers Act. ▪ **Regulatory/Compliance Costs:** Advisers may not charge or allocate fees or expenses relating to regulatory, examination or compliance activities to private fund clients unless they are disclosed to investors within 45 days after the quarter-end in which the charges occurred. ▪ **After-tax Clawback**: Advisers may not reduce the amount of a clawback by amounts due for taxes, unless the pre and post-tax amounts of the clawback are disclosed to investors within 45 days after the quarter-end in which the clawback occurred. ▪ **Non-Pro Rata Investment Level Allocations:** Advisers may not charge or allocate fees or expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis across multiple funds or clients, unless the allocation is "fair and equitable," and the adviser distributes advanced disclosure detailing the charges and justifying the fairness and equitability. ▪ **Borrowing from a Fund:** Advisers may not borrow from or receive an extension of credit from a private fund client unless the adviser distributes to each investor a written description of the material terms of, and requests each investor to consent to, such borrowing, loan or extension of credit; and obtains written consent from at least a majority in interest of the private fund's investors that are not related persons of the adviser. Material terms may include the amount of money to be borrowed, the rate of interest and the repayment schedule.	▪ Legacy status does apply to the investigation costs provision of the restricted activities rule, provided that the adviser does not charge or allocate any expenses related to an investigation that results in a violation of the Advisers Act. ▪ Legacy status is not available for the regulatory and compliance costs provision of the restricted activities rule. ▪ Charging private fund clients for regulatory, compliance or other similar costs directly related to the activities of the fund (e.g., Form D filings) would not trigger the disclosure requirement. ○ While the SEC did not clarify which regulatory or compliance related activities would be attributable to the adviser or a fund, the adopting release suggests that Form PF is an adviser expense, which would require disclosure if the costs were allocated to a fund). ▪ Legacy status is not available for the after-tax clawback provision of the restricted activities rule. ▪ The restricted activities rule requires that advisers determine the fairness and equitability for each non-pro rata allocation of investment expenses and provide disclosure detailing and justifying the allocations (i.e., general pre-commitment disclosure will not be sufficient). ▪ The restricted activities rule does not explicitly exempt co-investment vehicles from the non-pro rata allocation requirements; however, the rule states that its application is for the allocation of fees and expenses on a non-pro rata basis across "multiple private funds and other clients" (i.e., if a co-investment is not determined to be a private fund or client, it would not be required to share in fee and expense allocations on a pro rata basis or satisfy the fair and equitable standards for disclosure). ○ The SEC did not address the determination of client status in the adopting release. ▪ Legacy status does apply to existing borrowings from a private fund, but new borrowings from such a fund are restricted under the rule. ▪ The restricted activities rule does not apply to securitized asset funds but does however apply to offshore offerings.

Rule & Due Date	Requirements	Noteworthy Observations
Preferential Treatment **Due Date** September 14, 2024 Larger Advisers with $1.5B or more in AUM March 14, 2025 Smaller Advisers with less than $1.5B in AUM	Advisers are prohibited from granting any investors in a private fund: ▪ Preferential liquidity rights that the adviser reasonably expects such terms to have a material, negative effect on other investors, unless such ability is required by law or is offered to all other existing and prospective investors; and ▪ Access to information regarding portfolio holdings or exposures of a private fund client if the adviser reasonably expects that providing such preferential information would have a material, negative effect on other investors, unless the information is offered to all investors. Other forms of preferential treatment are prohibited unless (i) material economic terms are disclosed in writing to prospective investors, and (ii) all preferential terms are disclosed to investors as soon as practicable following an investment. ▪ Advisers may grant preferential treatment to investors so long as the preferential treatment is disclosed in a written notice to prospective and current investors. ○ Written notice to prospective investors is required prior to investment in the fund. ○ Written notice to current investors is required as soon as reasonably practicable after the final closing of a closed-end fund, or the admission of a new investor in an open-end fund, and at least annually thereafter if preferential treatment terms are provided that were not previously disclosed.	▪ The SEC noted that the mere disclosure that other investors are paying lower fees is insufficient. Instead, an adviser must describe the lower fee terms (including applicable rate, if relevant) to provide the information required by the rule. ▪ Legacy status does apply to the preferential treatment prohibitions provision of the rule but not to the disclosure obligations provision. ○ It is unclear whether the SEC will take the position that advisers will be required to disclose all preferential treatment to investors for private funds that commenced operations prior to the compliance date. ▪ The preferential treatment rule does not apply to securitized asset funds but it does however apply to offshore offerings.
Books & Records **Due Date** In practice, records will be required to be maintained based on the compliance date for the corresponding rule for which records are required.	Advisers subject to the rule requirements must retain books and records demonstrating compliance, along with a list of recipients and dates sent for the following: ▪ Quarterly statements (SEC-registered advisers) ▪ Audited financial statements (SEC-registered advisers) ▪ A copy of any fairness opinion, valuation opinion, or material business relationship summary (SEC-registered advisers) ▪ Written annual compliance program reviews (SEC-registered advisers) ▪ Notices sent in connection with preferential treatment (all advisers) ▪ Notices, consents, or other documentation distributed or received in connection with restricted activities (all advisers)	▪ Exempt reporting advisers and advisers not required to register need only maintain books and records relating to Restricted Activities and Preferential Treatment provisions of the private funds rule.