

[Securities Regulation Daily Wrap Up, SEC NEWS AND SPEECHES—Commission approves new rules to broaden private fund oversight, compliance, \(Aug. 23, 2023\)](#)

Securities Regulation Daily Wrap Up

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By Suzanne Cosgrove

Staffers say the rules are designed to protect private fund investors by increasing transparency and competition in the private funds market, but the Commission’s approval is controversial.

The SEC passed final rules and amendments governing private funds under the Investment Advisors Act of 1940 (Advisers Act) Wednesday by a 3-2 vote, with SEC Commissioners Hester Peirce and Mark Uyeda voting against the changes.

The rules require private fund advisers who are registered with the Commission to provide investors with quarterly statements regarding private fund performance, fees and expenses. The advisers also will be required to have each private fund audited annually, and to solicit a fairness opinion in connection with an adviser-led secondary transaction.

“Private funds and their advisers play an important role in nearly every sector of the capital markets,” said SEC Chair Gary Gensler in [a press release](#). “By enhancing advisers’ transparency and integrity, we will help promote greater competition and thereby efficiency.

“On one side are the funds’ investors, such as retirement plans or endowments. Standing behind those entities are millions of investors like municipal workers, teachers, firefighters, professors, students, and more,” [Gensler noted](#). “On the other side are issuers (who are) raising capital from private funds, ranging from startups to late-stage companies.”

Among the changes, [the final rules](#) prohibit private fund advisers from engaging in certain activities and practices that the SEC characterizes as contrary to public and investor interests unless they provide certain disclosures to investors, and in some cases, receive investor consent. The rules also bar preferential treatment that has a negative material effect on other investors, and they prohibit other types of preferential treatment unless disclosed to investors.

Further, rule amendments require all registered advisers, including those that do not advise private funds, to document an annual review of their compliance policies and procedures.

Industry objects. The Managed Fund Association, an industry trade group, was quick to voice its disapproval of the Commission’s action. “MFA continues to have concerns that the final rule will increase costs, undermine competition, and reduce investment opportunities for pensions, foundations, and endowments,” [said Bryan Corbett](#), MFA president and CEO.

“MFA will assess the final rule and work with our members to determine the appropriate next steps to protect the interests of alternative asset managers and their investors, including potential litigation,” Corbett added.

In addition, the House Financial Services Committee chairman, Patrick McHenry (R-N.C.), issued [a statement](#) in which he urged the SEC “to rescind this ill-advised rule.” Chairman Gensler’s SEC “is exceeding its statutory authority to impose onerous and costly mandates—this time on private funds,” said McHenry. “By applying a framework designed for retail funds used by everyday investors to private funds, this rule fails to acknowledge the differences between these markets.”

Statutory authority. The issue of the SEC’s “questionable” authority to enact the private fund rule changes also was taken up by Commissioner [Mark Uyeda](#), who said the SEC failed to consider “the aggregate impact of the

multitude of rules promulgated since 2022 affecting investment advisers, and dismisses warnings that it will have a disparate impact on smaller advisers, including those that are minority- and women-owned.”

However, Chairman Gensler defended the SEC’s rulemaking, noting in the Dodd-Frank Act of 2010, Congress effectively required most private fund advisers to register with the SEC and gave the Commission specific new authorities under the Advisers Act to prohibit or restrict advisers’ sales practices, conflicts, and compensation schemes.

“This built upon our existing authorities to regulate advisers with respect to their books and records as well as with respect to fraudulent, deceptive, or manipulative practices, among others,” Gensler said.

A bigger piece of the pie. The private fund sector has grown rapidly in the last decade. The Commission estimated the number of private funds has more than tripled in the 10 years from 2012 to 2022, reaching a total of \$26.6 trillion under management in 2022.

“Private capital leaves virtually no corner of the markets untouched,” said Commissioner Caroline Crenshaw [in a statement](#). Private funds own real estate—from office buildings and warehouses to single-family rental units, pharmaceutical companies and hospitals, as well as infrastructure and energy businesses, Crenshaw added. In addition, in the wake of recent regional bank failures, “we’ve seen private credit funds step in to take on a new prominence in the asset backed and other lending markets,” she said.

“While we have stark legal and regulatory distinctions between investors in private funds and investors in the public markets, the ultimate, beneficial investor base of any given private fund investment likely looks very similar to that of a public company,” Crenshaw said.

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