

## Statement

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# The Changing Nature of Form PF: Statement on Amendments to Form PF



Commissioner Hester M. Peirce

**May 3, 2023**

Thank you, Chair Gensler. This expansion of Form PF data collection is the latest reflection of the Commission's unquestioning faith in the Benevolent Power of More, a faith that I do not share. We have not explained sufficiently why we need the information we are mandating and why we need it so quickly. The additional information may tempt regulators to intervene in markets in ways that would undermine long-term market resilience and exceed jurisdictional bounds. Accordingly, I cannot support the rule.

The Financial Stability Oversight Council ("FSOC") and the SEC do need high-quality information about the markets and the firms participating in those markets, but more is not always better. Congress envisioned Form PF primarily as a tool to assist the FSOC in carrying out its systemic risk monitoring role. Today's amendments to Form PF, despite the release's generally unconvincing nods to systemic risk, largely appear to be an SEC compliance exercise—part of an effort to recast private fund regulation in the mold of retail fund regulation.<sup>[i]</sup> Form PF is turning into a compiler of routine events for the purpose of sweeping private fund advisers into examinations and enforcement actions.<sup>[ii]</sup> The release, for example, highlights that certain disclosures are intended to facilitate the Commission's policing of potentially conflicted activities, such as adviser-led secondary transactions, the administration of step-downs in fees following an investor election to terminate a fund's investment period, and clawbacks. A cynical read of this release could even find an intent to discourage certain private advisers from engaging at all in certain activities.<sup>[iii]</sup> While the SEC has a role to play in protecting private fund investors, the statutory framework intentionally gives broader latitude to private funds vis-a-vis their relationship with investors than it does to registered investment companies. Investors who want more guardrails can invest in registered funds. As we shift retail-oriented rulemaking, examination, and enforcement resources toward protecting investors in private funds, we subtly depart from the statutory model.

The expansion of Form PF requirements ironically could be harmful from a systemic risk perspective. By demanding almost real-time data about some relatively commonplace events, we send a message to the markets that the government is a back-up risk manager for funds. To the extent reporting events are triggered during real periods of stress, private fund managers should focus on managing their risks, not filling out SEC forms. Far from improving our ability to understand what is going on with private funds in times of stress, requiring funds to provide granular information on a compressed timeline on a government form could impede free-flowing, productive communication between fund advisers and the SEC.<sup>[iv]</sup>

The release hints repeatedly that timely notification of a variety of new triggering events will allow the Commission and FSOC "to assess whether any regulatory action could mitigate the potential for contagion or harm to

investors.”<sup>[v]</sup>The release does not explain what such a response would entail, which is not surprising given that the SEC is neither equipped nor authorized to tell private funds how to manage their risks, let alone to rescue private funds in times of stress. All we can do is respond to discrete calls for relief from regulatory obligations. While other agencies represented at FSOC have a few more arrows in their quivers, the shaft on which they sometimes rely is bailing out private entities that did not manage their risk properly. By definition, the entities from which Form PF seeks information should not be on the bailout list. The private fund industry is dynamic precisely because advisers can enter the industry easily and cannot count on anyone to rescue them if they fail.

In addition to being out of line with its statutory purpose, the newly expanded Form PF raises additional practical implementation problems, including:

- *Short and operationally difficult reporting timeline.* Abandoning the proposed one business day reporting requirement following certain triggering events is a positive change, but the final rule requires reporting “as soon as reasonably practicable, but no later than 72 hours upon the occurrence of the event.” The tacking on of “as soon as practicable” lessens the benefits of backing off the one-day requirement. Moreover, measuring the reporting timeline in hours instead of days suggests rather unrealistically that the onset of each of these events occurs at a precise hour in time and that funds’ reporting systems are able to capture that precise moment.
- *Unnecessarily short compliance period.* The release adopts two compliance dates—six months for the new sections of the form and one year for the amended sections of the form—both of which are unnecessarily short given the likely need for systems redesign to capture and report newly required information.<sup>[vi]</sup> The release does not offer any substantive explanation for why such haste is necessary.
- *Lack of coordination with the other Form PF rulemaking.* A second rulemaking that we are conducting jointly with the Commodity Futures Trading Commission, if adopted, will also amend Form PF. We should have coordinated the rules’ adoption and compliance dates.<sup>[vii]</sup>

As always, my inability to support a particular rulemaking is not a criticism of the dedicated people who drafted it. Indeed, the recommendation before us seeks to respond to comments in a number of ways, including the decision not to lower the reporting threshold for large private equity fund advisers from \$2 billion to \$1.5 billion, the decision not to proceed with a proposed unencumbered cash report, and the decision not to base reporting of extraordinary investment losses and margin increase on outdated NAV figures. Thank you to staff in the Divisions of Investment Management and Economic and Risk Analysis, the Office of General Counsel, and others throughout the Commission who worked on this release. I know that much time went into this release, including many hours over at least one very taxing weekend put in by Melissa Rovers Harke, Robert Holowka, Sirimal Mukerjee, Adele Kittredge Murray, Neema Nassiri-Motlagh, Jill Pritzker, David Stevens, Thomas Strumpf, Sarah ten Siethoff, and Samuel K. Thomas.

#### Questions:

1. Please walk me through the compliance dates and explain why such short timelines are needed?
2. Why not wait and adopt these amendments at the same time as the joint CFTC amendments?
3. How is a firm to calculate the 72-hour timeline if it cannot precisely pinpoint the time at which a triggering event occurred?

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<sup>[i]</sup> As I have pointed out before, “the Commission’s use of Form PF information in conducting its regulatory program is ancillary to the underlying purpose of facilitating FSOC’s monitoring for systemic risk.” See, e.g., Hester M. Peirce, Commissioner, SEC, Statement on Proposed Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers (Jan. 26, 2022), [https://www.sec.gov/news/statement/peirce-form-pf-20220122#\\_ftnref1](https://www.sec.gov/news/statement/peirce-form-pf-20220122#_ftnref1) (citing Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF,

Advisers Act Release No. 3308 (Oct. 31, 2011), [76 FR 71128 (Nov. 16, 2011)], <https://www.sec.gov/rules/final/2011/ia-3308.pdf> at 17 (“Form PF is primarily intended to assist FSOC in its monitoring obligations under the Dodd-Frank Act, but the Commissions may use information collected on Form PF in their regulatory programs, including examinations, investigations and investor protection efforts relating to private fund advisers.”)). Some commenters share my concern that these amendments exceed our limited statutory mandate. *See, e.g.*, Comment letter from the Alternative Credit Council and the Alternative Investment Management Association at 15 (March 21, 2022) (stating that the new reporting requirements go beyond Congress’s mandate and the current Form PF Rule’s stated objectives to foster the Commission’s more general objectives: data collection to support examinations, and its regulatory and enforcement programs) <https://www.sec.gov/comments/s7-01-22/s70122-20120606-272794.pdf> (“ACA/AIMA Comment Letter”); and Comment Letter from the American Investment Council at 6 (March 21, 2022) (explaining that gathering additional information that is merely potentially useful to the SEC as a compliance monitoring tool in administering its examination and enforcement programs is not an appropriate justification for significantly expanding reporting on Form PF and is inconsistent with the primary purpose of Form PF and the intent of Congress) <https://www.sec.gov/comments/s7-01-22/s70122-20120742-272896.pdf>.

[ii] As one commenter pointed out, not only are “[s]econdary transactions [] part of routine private-equity-fund business, designed to provide liquidity,” “subsequent reporting” of these transactions “will not serve the Commission’s stated policy goals.” Comment letter from the Investment Adviser Association at 12 (March 21, 2022) <https://www.sec.gov/comments/s7-01-22/s70122-20120729-272886.pdf>. (“IAA Comment Letter”) Similarly, with respect to the requirement that large hedge fund advisers report “extraordinary investment losses,” several commenters viewed the proposed threshold of 20% as too low and not indicative of insolvency or “material stress.” *See* IAA Comment Letter at 8. *See also* ACA/AIMA Comment Letter at 20 (“Unless the extraordinary investment losses are sufficient to trigger a suspension or cause the fund to be unable to meet redemption requests in accordance with the fund’s terms, which might then cause a fire sale of the fund’s remaining assets, the investment losses should not be the concern of the Commission.”). Another commenter questioned the value of reports triggered by significant, but discrete events that affected all market participants. *See* Comment letter from the Managed Fund Association at 8 (March 21, 2022) (“Consider that, for a \$500 million Qualifying Hedge Fund, a Section 5.B. report would be triggered at a \$100 million loss. When there are market corrections or significant market events [e.g., what recently happened in the markets as a result of Russia invading Ukraine], this is generally known to all market participants, and, accordingly, may result in a large number of filings for temporary events that do not show broader market implications.”) <https://www.sec.gov/comments/s7-01-22/s70122-20120683-272854.pdf>.

[iii] *See, e.g.*, Adopting Release at note 170 (“[W]e view adviser-led secondaries as presenting significant, intrinsic conflicts of interest due to their nature as fund-level conflicted transactions that often affect all investor capital in a fund.”).

[iv] The release, however, optimistically “encourage[s] engagement with Commission staff in periods of stress or otherwise.” Adopting Release at note 34.

[v] *See* Adopting Release at pp. 12, 110. Similar language is used in other places in the release.

[vi] *See, e.g.*, Comment Letter from the Managed Fund Association at 5 (March 16, 2022) (“The implementation of both Proposed Rules will require a significant amount of time because they will require significant changes to advisers’ systems as well as service providers’ systems that help many advisers prepare their Form PF filings. The need to develop, build, and test those systems will require significant time, especially because the Proposed Rules significantly change and expand the scope of information required to be reported on Form PF. . . . Given the complexity of these changes and the need for the same persons at a firm to design and test the new systems, it is far more efficient and costs-effective if advisers are able to implement all of the changes to Form PF at the same time when they can consider the effects of the changes together rather than having to update their Form PF

reporting system only to fundamentally rebuild it again later.”). <https://www.sec.gov/comments/s7-22-22/s72222-20159964-328328.pdf>. (“MFA Comment Letter – March 16, 2022”)

[vii] See MFA Comment Letter – March 16, 2022 at 6 (“[W]e believe the SEC should not adopt the February Proposed Rules and require firms to comply with the new rules prior to the Commissions jointly adopting the September Proposed Rules.”).