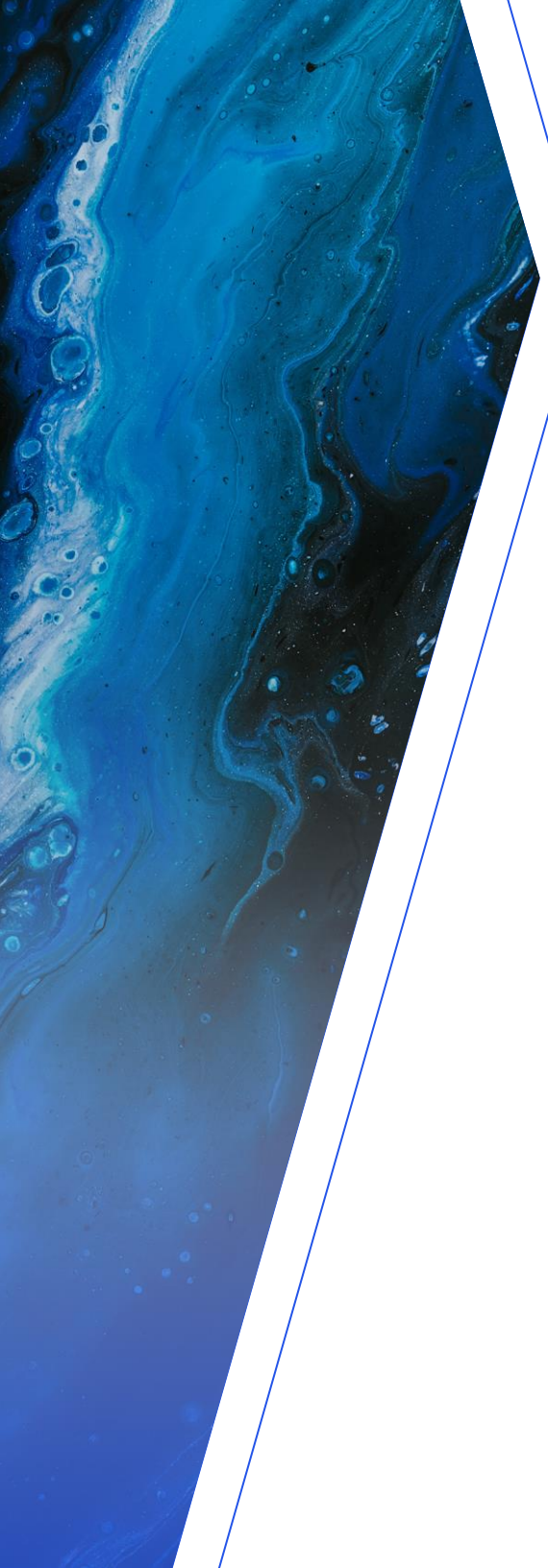


KIRKLAND & ELLIS

NOVEMBER 2023

Private Funds Rule: Implementation Considerations and Key Takeaways

Contents

Advisers Act Private Funds Rules - Overview

- On August 23, 2023, SEC adopted (in a 3-2 vote of the Commissioners) sweeping new rules under the Investment Advisers Act of 1940 (the “Advisers Act”) to increase the regulation of private fund advisers (the “Adopted Rules”)
- Represents the most extensive overhaul of the regulatory framework for private fund advisers since passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which required most private fund advisers to register with the SEC
- Expected to have an unprecedented impact on private fund adviser practices and to increase regulatory burdens for all covered advisers
- The Adopted Rules will:
  - Entail significant compliance challenges
  - Considerably shift the overall regulatory landscape for private fund advisers
  - Impose significant increased costs (including for private fund investors)

Advisers Act Private Funds Rules – Overview *(cont.)*

- **Legal Challenges**
  - Several private fund industry groups filed a petition for review in the U.S. Court of Appeals for the Fifth Circuit on September 1, 2023, challenging, among other things, SEC's statutory authority to promulgate the Adopted Rules
  - Outcome and timing of any adjudication is uncertain and we recommend that advisers continue to prepare to implement the Adopted Rules by the relevant compliance dates
- **Compliance Dates**
  - Effective date of the Adopted Rules is November 13, 2023, with staggered later compliance dates
    - Other than with respect to annual written compliance reviews (compliance date November 13, 2023), the earliest of the Adopted Rules' staggered compliance dates is September 14, 2024
    - See chart, discussed below, for additional detail regarding these compliance dates

Advisers Act Private Funds Rules - Scope

- **Covered Advisers**
  - Adopted Rules:
    - Apply to SEC-registered advisers (with an exception for certain non-U.S. advisers) to private funds
    - Apply, in part, to non-SEC-registered advisers to private funds, such as:
      - Exempt reporting advisers ("ERAs") using the mid-sized private fund (AUM of less than $150M) or venture capital exemption (with an exception for certain non-U.S. advisers)
      - Smaller state-registered advisers (generally with AUM under $100 million)
    - Do ***not*** apply to non-U.S.-domiciled advisers to non-U.S.-domiciled private funds (including even those funds with U.S. person investors), whether they are registered with the SEC or not
      - However, important interpretive questions remain for non-U.S.-domiciled advisers with U.S.-based advisory affiliates (e.g., sub-advisers) or U.S.-domiciled private funds
    - Do ***not*** apply to firms outside the definition of "investment adviser," such as family offices relying on the Advisers Act Family Office Rule

Advisers Act Private Funds Rules – Scope *(cont.)*

- **Covered Funds**
  - Adopted Rules:
    - Generally apply only with respect to "private funds," *i.e.*, issuers qualifying for an exemption from investment company status under Investment Company Act of 1940 ("Investment Company Act") Section 3(c)(1) (100-or-fewer beneficial owners) and/or 3(c)(7) (solely owned by qualified purchasers)
      - Includes most private equity / buyout funds, credit funds, venture capital funds, and hedge funds
    - Generally do ***not*** apply to other investment vehicles, such as:
      - Real estate funds exempt under Investment Company Act Section 3(c)(5)(C)
      - Real estate / infrastructure / real asset vehicles falling outside the definition of "investment company" under the Investment Company Act
      - Holding companies / vehicles falling outside the definition of "investment company" under the Investment Company Act
    - Do ***not*** apply to securitized asset funds (e.g., CLO funds) ("SAFs"), even if relying upon a Section 3(c)(1) or 3(c)(7) exemption

Advisers Act Private Funds Rules – Scope *(cont.)*

▶ Summary Chart: Rule Application by Domicile and Kind of Adviser

Rule	U.S.-Domiciled SEC-Registered Advisers	U.S.-Domiciled Non-Registered Advisers	Non-U.S. Advisers to Non-U.S. Funds*	Advisers to SAFs	Exempt Family Offices**
Quarterly Statement Rule	Yes	No	No	No	No
Private Fund Annual Audit Rule	Yes	No	No	No	No
Secondary Transaction Requirements	Yes	No	No	No	No
Books and Records Requirements	Yes	No	No	No	No
Restricted Activities Rules	Yes	Yes	No	No	No
Preferential Treatment Rule	Yes	Yes	No	No	No
Documenting Annual Compliance Reviews	Yes***	No	No****	Yes, if SEC-registered	No

*Non-U.S.-domiciled advisers that have U.S.-based advisory affiliates (e.g., a U.S.-based sub-adviser) generally are pulled into the Adopted Rules (e.g., annual fund audit rule) absent further guidance from SEC, and would be expected to receive treatment similar to their U.S.-domiciled counterparts. The presence of U.S. person investors in non-U.S.-domiciled funds alone is not sufficient to draw a non-U.S.-domiciled adviser into the Adopted Rules' regime. Non-U.S.-domiciled advisers that advise U.S.-domiciled (e.g., Delaware) funds are likely to be pulled into the relevant Adopted Rules at least with respect to the U.S.-domiciled private funds that they advise.

**Multi-family family offices and other family offices that have registered with SEC as investment advisers are subject to the Adopted Rules in the same manner as their non-family office SEC-registered counterparts.

***Applies to all U.S.-domiciled SEC-registered advisers, even if advising clients other than private funds.

****Remains an industry best practice.

Advisers Act Private Funds Rules – Scope *(cont.)*

- **Significant Changes from Proposed Rules**
  - SEC removed or modified some of the most contentious provisions from the proposed rules—in particular:
    - Modifying prohibitions on certain adviser activities / expense practices to permit nearly all of such activities / expense practices with appropriate disclosure and, in certain instances, investor consent
    - Removing the proposed changes to the negotiated standard of liability and related indemnification / exculpation in a private fund's governing documents to a simple negligence standard, instead reiterating that adviser's fiduciary duties under the Advisers Act cannot be waived by agreement
    - Replacing the prohibition on reducing carried interest clawbacks for taxes with a disclosure requirement
    - Removing the prohibitions on charging private funds or their portfolio investments for "underperformed services" (*e.g.*, accelerated monitoring fees), although SEC indicated that it views these practices as already inconsistent with an adviser's fiduciary duties
    - The Adopted Rules provide "legacy status" (*i.e.*, grandfathering) with respect to certain rules

Advisers Act Private Funds Rules – Scope *(cont.)*

- **Significant Changes from Proposed Rules: Key Takeaways**
  - The adopting release notes that to the extent a waiver clause is unclear as to whether it applies to the Advisers Act fiduciary duty, state law fiduciary duty or both, the SEC will interpret the clause as purporting to waive Advisers Act fiduciary duties
    - Accordingly, advisers should make sure indemnification and exculpation provisions are clear on this point
  - While the Adopted Rules provide "legacy status" (*i.e.*, grandfathering) with respect to certain rules, Advisers should understand which aspects of the grandfathering rules apply with respect to which practices as there are certain aspects of the Adopted Rules to which legacy status applies only in part

Advisers Act Private Funds Rules – Quarterly Statements

- **Overview and Delivery**
  - SEC-registered advisers must prepare and deliver quarterly statements to investors in private funds within 45 days after the end of the private fund's first three fiscal quarters and 90 days after the end of the fiscal year (75 and 120 days, respectively, for fund-of-funds)
    - Generally applies to sub-advisers unless primary adviser is SEC-registered and prepares and delivers the required statements
    - First quarterly statement due following the *second full fiscal quarter* of a private fund's operating results
    - Must be presented in a standardized, table format that is generally consistent quarter to quarter
    - Must be clear, concise and in plain English

Advisers Act Private Funds Rules – Quarterly Statements *(cont.)*

- **Overview and Delivery *(continued)***
  - Information across "similar pools of assets" (*e.g.*, across master-feeder or parallel fund structures) must be consolidated to the extent doing so provides more meaningful information to investors and is not misleading
  - May be delivered by posting on a data site, *provided that* the adviser notifies investors it has been posted
  - Failure to deliver the statements within the timeframe can be excused if (i) the delay was due to reasonably unforeseeable circumstances (ii) the adviser reasonably believed the statements would be delivered by the deadline, and (iii) the adviser delivers the statement as promptly as practicable

Advisers Act Private Funds Rules – Quarterly Statements *(cont.)*

- **Fund- and Portfolio-Level Information**
  - Must provide detailed disclosure of certain information, including:
    - For each private fund (or consolidated funds, if applicable), a table detailing, during the reporting period:
      1. All forms of compensation paid or allocated to the adviser or any of its related persons (e.g., control affiliates and personnel of the adviser) from the private fund
      2. All fees and expenses paid by or allocated to the private fund
         - All adviser and related person amounts must be disclosed under category (1) above, including any private fund expense that also could be characterized as adviser compensation
         - Back-office, in-house legal, accounting or administration provided by the adviser would be disclosed in (1) above
      3. The amount of any offsets, rebates, or waivers carried forward to subsequent periods

Advisers Act Private Funds Rules – Quarterly Statements *(cont.)*

- **Fund- and Portfolio-Level Information *(continued)***
  - Must provide detailed disclosure of certain information, including:
    - For each portfolio investment of a private fund, a table detailing all forms of compensation paid or allocated to the adviser or its related persons from each portfolio investment making such payment or allocation during the quarter
    - Each form of compensation or fee or expense must be shown as a separate line item detailing the total amount paid or allocated, and presented both before and after the application of any offsets, rebates or waivers
    - Must provide cross-references to the relevant section(s) of private fund's governing documents that set forth the applicable fee / expense and calculation methodology

Advisers Act Private Funds Rules – Quarterly Statements *(cont.)*

- **"Illiquid Fund" Performance Reporting**
  - "Illiquid Funds" (*e.g.*, most private equity or other closed-end funds) must report the following performance information (calculated generally as of fiscal quarter end or, if not available, as of the most recent practicable date):
    - Gross *and* net IRR and MOIC for the *full fund portfolio* since the fund's inception, shown *with and without* the use of fund-level subscription facilities
    - Gross IRR and MOIC for the *realized and unrealized portions* of the fund's portfolio since inception, shown *with and without* the use of fund-level subscription facilities
    - A statement of aggregate contributions and distributions since the fund's inception, including the value and date of each inflow and outflow
    - A statement of the fund's net asset value as of the end of the relevant reporting period

Advisers Act Private Funds Rules – Quarterly Statements *(cont.)*

- **"Liquid Fund" Performance Reporting**
  - "Liquid Funds" (*i.e.*, all private funds other than illiquid funds) must report the following performance information (calculated generally as of fiscal quarter end or, if not available, as of the most recent practicable date):
    - Net total returns on an annual basis for each fiscal year during the 10 years prior to the quarterly statement, or since inception, whichever is shorter
    - Average annual net total returns over one-, five- and 10-fiscal-year periods
    - On a cumulative basis, net total return for the current fiscal year as of the end of the most recent fiscal quarter covered by the quarterly statement

Advisers Act Private Funds Rules – Quarterly Statements *(cont.)*

- **Additional Disclosures**
  - Must include disclosure regarding the criteria, assumptions and manner in which expenses, payments, allocations, rebates, waivers, offsets and performance information are calculated, *e.g.*:
    - Descriptions of the structure of, and method used to determine, performance-based compensation (*e.g.*, distribution waterfall)
    - Criteria on which each type of compensation is based
    - For illiquid funds:
      - For liquid funds, whethFee rate used for calculating net performance metrics (*e.g.*, blended rate, weighted average, whether it factored in discounted fee investors)
      - Methodology used to determine whether an investment is realized or unrealized
    - For liquid funds, whether dividends or other distributions are reinvested

Advisers Act Private Funds Rules – Quarterly Statements *(cont.)*

- **Key Takeaways**
  - This element of the Adopted Rules is expected to put significant strain on advisers' finance and compliance departments, particularly for initial implementation
  - Advisers should consider promptly undertaking a gap analysis to confirm whether their existing reporting functions generate the necessary detailed information and produce information in the timeframe required
  - Advisers should also consider whether any reconciliation should be made between their performance calculation methodologies for marketing materials and those required for the quarterly statements
  - Advisers should further consider whether any updates to their reporting processes and databases are needed and connect with external administrators soon if they anticipate an increased reliance on such administrators
  - Advisers will also need sufficient time to prepare templates to use to present the required information and how current reporting and marketing methods can best be integrated with or work alongside the new requirements.
  - Once effective, advisers should keep good records of all statements distributed, as well as all recipients and dates, in order to be ready for likely examination requests

Advisers Act Private Funds Rules – Preferential Treatment Rule

- **Redemption Rights Prohibition**
  - Advisers are prohibited from providing preferential treatment with respect to redemption rights that the adviser reasonably expects to have a *material, negative effect* on other investors in that private fund or a similar pool of assets, unless:
    - Redemptions are required pursuant to applicable law, rule, regulation, or an order of certain governmental authorities (e.g., state pay-to-play, ERISA, or banking laws); or
    - The adviser offers the same redemption rights to all existing and future investors in that private fund or any similar pool of assets without qualification (e.g., not based on commitment size, affiliation requirements or other limitations)
  - SEC extended legacy status to agreements entered into prior to the compliance date with respect to redemption rights

Advisers Act Private Funds Rules – Preferential Treatment Rule

(cont.)

- **Information Rights Prohibition**
  - Advisers are prohibited from providing preferential treatment with respect to enhanced information relating to portfolio holdings or exposures ("information rights") that the adviser reasonably expects to have a *material, negative effect* on other investors in that private fund or in a similar pool of assets, unless:
    - The adviser offers such information rights to all other existing investors in the private fund and any similar pool of assets at the same or substantially same time
  - SEC has not addressed how or when particular information would be considered a prohibited preferential information right other than to state generally that not all information rights will have a material, negative effect on other investors
    - Accordingly, advisers will be required to determine that granting any such custom reporting would not have a material, negative effect on other investors in the private fund or a similar pool of assets in order to be able to offer such information rights
  - SEC extended legacy status to agreements entered into prior to the compliance date with respect to information rights

Advisers Act Private Funds Rules – Preferential Treatment Rule

(cont.)

- **What is a "Material, Negative Effect"?**
  - Whether any particular preferential treatment is expected to have a "material, negative effect" on other investors in the private fund is a facts and circumstances analysis
  - SEC noted that an investor's ability to redeem is an important part of determining whether providing information rights would have a material, negative effect on other investors
  - SEC stated that it would generally not view preferential information rights provided to one or more investors in an "illiquid" private fund as having a material, negative effect on other investors but declined to include a blanket exemption for all closed-end private funds because, as noted in the adopting release, even closed-end private funds offer redemption rights in certain extraordinary circumstances

Advisers Act Private Funds Rules – Preferential Treatment Rule

(cont.)

- **What is a "Similar Pool of Assets"?**
  - "Similar pool of assets" is defined as a pooled investment vehicle (other than a registered investment company or business development company) managed by the adviser or its related persons, with substantially similar investment policies, objectives or strategies to those of the private fund
    - SEC altered the defined term from "substantially similar pool of assets" (as proposed) to "similar pool of assets" in order to signal the broad scope of the term
    - SEC noted that the term will capture parallel funds, funds-of-one and co-investment vehicles
    - Traditional separate managed accounts (*i.e.*, not private funds-of-one) are not included in the definition of "similar pool of assets"

Advisers Act Private Funds Rules – Preferential Treatment Rule

(cont.)

- **Pre-Commitment Disclosure of Material Economic Terms**
  - For preferential treatment provided to other investors in the *same private fund*, advisers must provide advance written notice to prospective investors of any "material economic terms" granted to other investors
    - Side letters or other arrangements, such as strategic relationship arrangements
    - SEC did not define "material, economic terms" other than by describing that these are terms that a prospective investor would find *"most important and that would significantly impact its bargaining position"* and gave the following examples:
      - Cost of Investing
      - Liquidity rights
      - Fee breaks
      - Co-investment rights

Advisers Act Private Funds Rules – Preferential Treatment Rule

(cont.)

- **Pre-Commitment Disclosure of Material Economic Terms *(continued)***
  - SEC indicated that the "material economic terms" concept is meant to narrow the scope of disclosures that advisers will be required to provide to prospective investors prior to closing
    - Intended to address comments regarding the impracticability of providing advance disclosure on all preferential terms because it would result in a cycle of "disclosure, discussion, and potential renegotiation"
  - SEC otherwise dismissed timing concerns and potential impediments to the closing process for closed-end private funds
  - SEC did not offer an approved approach regarding disclosure of side letters or other agreements related to material economic terms that are expected to be entered into at the same time as the relevant closing
    - Uncertain whether this would require disclosure at subsequent closings or at the contemporaneous closing of investors
  - Unclear from the adopting release how advisers are expected to address duplicative terms granted to various investors, or provisions that are largely duplicative save for a few slight modifications

Advisers Act Private Funds Rules – Preferential Treatment Rule

(cont.)

- **Post-Commitment Disclosure Requirements**
  - For all other preferential treatment provided that are not "material economic terms," advisers must provide notice to investors as soon as reasonably practicable (generally within four weeks) following:
    - For illiquid funds, the end of the private fund's fundraising period
    - For liquid funds, the date of the investor's investment

Advisers Act Private Funds Rules – Preferential Treatment Rule

(cont.)

- **Annual Disclosure Requirements**
  - In addition to pre- and post-commitment disclosures, advisers are required to provide current investors, on at least an annual basis, comprehensive disclosure of all preferential treatment the adviser has provided since the last notice
    - SEC noted that a private fund that does not admit new investors or provide new terms to existing investors following the end of its fundraising period does not need to deliver an annual notice
    - However, in the closed-ended fund context, new disclosure obligations could arise in circumstances where private fund advisers enter into new side letters with a transferee in connection with an investor transfer
  - Unclear whether SEC expects advisers to provide annual disclosures following the relevant compliance date for private funds that are no longer actively fundraising but not liquidated or wound up

Advisers Act Private Funds Rules – Preferential Treatment Rule

(cont.)

- **Content of Disclosure Requirements and Legacy Status**
  - Advisers may comply with the disclosure requirements by providing anonymized copies of side letters or a written summary of the preferential terms provided to investors
    - If a summary is provided, the preferential treatment must be disclosed with specificity (*e.g.*, disclosing that some investors pay a lower fee would not be sufficient; advisers must describe the lower fee terms, including the applicable rate or range of rates)
    - The existing MFN process currently employed by many private fund advisers would likely not be considered an adequate substitute if it does not include the requisite level of specificity under the Adopted Rules and/or does not require disclosure of all provisions to all investors
  - SEC did ***not*** extend legacy status with respect to the Preferential Treatment Rule's disclosure requirements

Advisers Act Private Funds Rules – Preferential Treatment Rule

(cont.)

- **Key Takeaways**
  - Given that preferential treatment need not be in a formal side letter, advisers will need to undergo a scoping exercise to determine where preferential treatment has been granted
    - For example, agreements with large investors where the adviser has a strategic relationship across multiple funds or arrangements with minority investors in the adviser that also have arrangements with respect to their investments in the adviser's private funds may be subject to the Preferential Treatment Rule
    - Preferential treatment may also be covered by the Adopted Rules even if such treatment was not historically subject to MFN under the fund's governing documents
  - Pre-commitment disclosure of material economic terms will likely result in implementation challenges for sponsors and will require a change in current practice of distributing side letter compendiums and MFN elections following a private fund's final closing
  - Advisers should consider implementing processes to ensure compliance by the required compliance date and should consider whether the new requirements warrant increased negotiated limits on organizational expenses in future private funds' governing documents

Advisers Act Private Funds Rules – Restricted Activities Rule

- **Overview**
  - The Proposed Rules' prohibitions on certain adviser activities and expense practices were modified in the Adopted Rules to permit such activities / expense practices with appropriate disclosure and, in certain instances, investor (*e.g.*, limited partner) consent
    - SEC noted that, in its view, LPACs (or equivalent bodies) may not have sufficient independence, authority or accountability to provide the required consents under the Restricted Activities Rule
      - Contrary to SEC's historical approach on deferring to LPACs
    - Accordingly, advisers will need to seek consent of the underlying fund investors when the Restricted Activities Rule requires investor consent

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Overview – Summary Chart**

Restriction	LP Prior Consent Requirements to Avoid Restriction	LP Disclosure	Legacy Treatment
1. Restriction on adviser charging fund for governmental / regulatory investigations	Yes	Disclosure made in connection with LP consent	Yes, for fund governing documents prior to the compliance date
2. Restriction of adviser charging adviser's regulatory, compliance and examination fees	No	Disclosure required within 45 days of Q-end	---
3. Adviser restricted from tax adjusting any GP clawback	No	Disclosure required within 45 days of Q-end	---
4. Adviser restricted from charging fees/expenses on non-pro rata basis for multiple funds/clients' investments	No	Advance disclosure to LPs required; allocation must be fair and equitable	---
5. Adviser restricted from borrowing from a fund	Yes	Disclosure made in connection with LP consent	Yes, for fund governing documents prior to compliance date

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Investigation Fees and Expenses**
  - Advisers are restricted from charging a fund for fees or expenses associated with an investigation of the adviser or its related persons by *any governmental or regulatory authority*, unless:
    - The adviser obtains written consent from at least a majority-in-interest of the fund's investors that are not related persons of the adviser
  - Adopted Rules do not define "investigation," and therefore the requirement is not limited to SEC investigations and broadly applies to any governmental or regulatory authority
    - May include state investigations into "blue sky" laws or portfolio investment investigations that name the adviser or its personnel (*e.g.*, antitrust regulators or other governmental authorities regulating a portfolio company), which may previously have been appropriately paid on behalf of or reimbursed to the adviser and/or its related persons without restriction
  - SEC extended legacy status to this restriction for fund governing documents entered into prior to the compliance date that permit such fees or expenses to be charged or allocated to a fund, and so consent need not be received for such charges prior to the relevant compliance date

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Investigation Fees and Expenses – Advisers Act Violations**
  - Advisers are prohibited, in all instances, from charging a fund for fees or expenses relating to an investigation that results in sanctions for an *Advisers Act violation* (including where the adviser consented to a sanction without admitting or denying SEC's findings)

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Regulatory, Compliance and Examination Fees and Expenses**
  - Advisers are restricted from charging a fund for any regulatory, compliance or examination fees or expenses of the adviser or its related persons, unless:
    - The adviser distributes specific written disclosure regarding any such fees and expenses, and the dollar amount thereof, to the investors in writing within 45 days after the end of the fiscal quarter in which the charge occurs
      - Requires line item disclosure of each specific category of fees or expenses with the dollar amounts
      - Broad categorizations such as “compliance expenses” would not be sufficient

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Reducing Adviser/General Partner Clawback for Taxes**
  - Advisers are restricted from reducing any general partner clawback by any actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their owners, unless:
    - The adviser provides written notice of the pre-tax and post-tax aggregate dollar amounts of the clawback to investors within 45 days after the quarter end in which the clawback occurs
    - The notice may be included in the quarterly statement provided the 45-day timeframe is met
  - A "clawback" is defined as any obligation of the adviser, its related persons (*e.g.*, a private fund general partner) or owners to restore or otherwise return any performance-based compensation to the private fund required under its governing documents

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Reducing Adviser/General Partner Clawback for Taxes *(continued)***
  - These disclosures and after-tax clawback computations will need to consider a number of factors, including:
    - Use of assumed tax rates versus actual tax rates
    - Applicable jurisdictions when computing state and/or local taxes
    - Assumptions regarding the deductibility of state and/or local taxes and loss carryforwards; and
    - Timing methodologies
  - Disclosures will also be required prior to the end of a fund's life if an interim clawback provision in the private fund's governing documents is triggered

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Certain Non-*Pro Rata* Fee and Expense Allocations**
  - Advisers are restricted from charging or allocating fees or expenses on a non-*pro rata* basis related to a private fund's and other clients' portfolio investment (or proposed portfolio investment), unless:
    - The non-*pro rata* charge or allocation is fair and equitable under the circumstances; and
    - The adviser distributes advance written notice to investors of the non-*pro rata* charge or allocation that includes a description of how the approach is fair and equitable under the circumstances
      - Note: SEC indicated that advisers should consider addressing relevant factors in the notice, including the non-pro rata allocation approach used and why the adviser believes the approach is fair and equitable under the circumstances
  - SEC did not address how advisers should disclose recurring non-pro rata allocations (*e.g.*, fees and expenses attributable to some parallel funds' portfolio investment structure but not others) or whether upfront disclosure (*e.g.*, pre-commitment disclosure in a fund's offering document) is sufficient
  - SEC declined to define "pro rata" in the Adopted Rules and indicated that a number of methods for determining pro rata may be appropriate, including based on ownership percentages of an investment

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Certain Non-*Pro Rata* Fee and Expense Allocations *(continued)***
  - The Restricted Activities Rule does not distinguish between fees and expenses attributable to unconsummated investments (or "broken deal expenses") and consummated investments
    - Accordingly, if more than one fund or other client would have participated in an investment that generated "broken deal" or other fees and expenses, all such funds and clients (regardless of strategy) should bear their pro rata share of such amount, unless not doing so would be fair and equitable and the investor notice requirement is met
      - Note: SEC acknowledged in its proposing release that, to the extent a potential co-investor has not executed a binding agreement to participate in the transaction through a co-investment vehicle (or another fund) managed by the adviser, the proposed rules would not restrict the adviser from allocating "broken deal" fees and expenses attributable to such potential co-investor to a fund that would have participated in the transaction, so long as the practice is authorized by the fund's governing documents
        - Nothing in the Adopting Release that specifically contradicts or limits that acknowledgement; however, even if existing fund governing documents allow for non-pro rata expense allocation of "broken deal" expenses, any such allocation may remain subject to the Adopted Rules' requirements relating to notice and a determination that the allocation is "fair and equitable"

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Borrowing from a Private Fund Client**
  - Advisers are restricted from directly or indirectly borrowing money, securities or other assets, or receiving a loan or an extension of credit, from a private fund, unless:
    - The adviser discloses the material terms of the borrowing to, and obtains written consent from, a majority in interest of the private fund's investors that are not related persons of the adviser
  - However, the SEC indicated that tthe Restricted Activities Rule is not intended to prohibit certain practices that have the potential to benefit or not harm fund investors, namely:
    - Borrowings from a third party on the private fund's behalf (*e.g.*, subscription lines of credit)
    - Advisers borrowing from individual investors outside of the private fund context (*e.g.*, from a lender that is invested in the fund)
    - Ordinary course tax advances to an adviser from a private fund (provided such advances are structured only to reduce an adviser's future income and are not structured as amounts to be repaid to the fund)
    - Management fee offsets reducing future management fees payable to the adviser
  - Borrowing restrictions are afforded legacy status for loans or borrowing provisions in place prior to the compliance date

Advisers Act Private Funds Rules – Restricted Activities Rule

(cont.)

- **Key Takeaways**
  - Advisers will need to carefully monitor for situations in which non-*pro rata* allocations of expenses may occur, such as in connection with certain taxes that might be specially allocated to some investors upon sales of or distributions for portfolio companies
  - The *pro rata* requirement may pose challenges and require disclosure due to non-*pro rata* allocation of expenses that potentially will arise with respect to a credit fund that invests alongside one or more equity funds
  - Advisers will need to review expense and borrowing practices, together with authorizing provisions and disclosures in their funds' governing documents and other investor-facing materials to determine whether consents or additional disclosures are required
  - Because the Adopting Release does not clarify which compliance fees and expenses are categorized as related to the adviser's versus the private funds' activities, it is likely that advisers will gravitate towards over-disclosure unless and until SEC provides further guidance

Advisers Act Private Funds Rules – Other Rules

- **Adviser-Led Secondary Transactions**
  - SEC-registered advisers seeking to complete an "adviser-led secondary transaction" must distribute to the selling fund's investors, prior to the due date of the investors' election decision, a written:
    - Fairness or valuation opinion from an independent provider that provides such opinions in the ordinary course of its business
    - Summary of any material business relationships between the opinion provider and the adviser or its related persons within the two years immediately prior to the issuance of the opinion
  - Covers any transaction initiated by an adviser or any of its related persons that offers fund investors the choice between: (i) selling all or a portion of their fund interests and (ii) converting or exchanging their fund interests into interests in another vehicle managed by the adviser or its related persons
    - Generally excludes tender offers, cross-trades and rebalancing or season and sell transactions where investors are not offered the option to obtain liquidity or convert or exchange their interests for interests in another vehicle

Advisers Act Private Funds Rules – Other Rules *(cont.)*

- **Adviser-Led Secondary Transactions: Key Takeaways**
  - When offering investors the option to sell, convert or exchange interests in a private fund, advisers should consider whether the proposed transaction would qualify as an "adviser-led secondary transaction" both under the Adopted Rules' definition and the separate Form PF definition (discussed below) — and, if so, whether structuring transactions to fall outside of these definitions is feasible
  - Advisers should consider including the costs and benefits of the required third-party fairness or valuation opinions in any discussions with the applicable limited partner advisory committee or equivalent body regarding the proposed transaction
  - Advisers will need to negotiate carveouts to typical confidentiality provisions with opinion providers in order to allow for the required distribution of the opinion to investors

Advisers Act Private Funds Rules – Other Rules *(cont.)*

- **Annual Audits**
  - SEC-registered advisers (whether or not such adviser has "custody" of fund cash or securities under the Custody Rule) are required to obtain an annual and liquidating audit of the financial statements of all managed or advised private funds—such audit must be:
    - Performed by an independent public accountant
    - In accordance with Generally Accepted Accounting Principles as promulgated in the United States ("U.S. GAAP"), or for certain non-U.S. funds, contain information substantially similar to statements prepared in accordance with U.S. GAAP and with any material differences reconciled
    - With respect to annual audits, distributed to current investors within 120 days of the end of the private fund's fiscal year
  - Rule also applies to SEC-registered sub-advisers even if the primary adviser is not SEC-registered
    - However, if SEC registered sub-adviser is *unaffiliated* with the primary adviser, the sub-adviser must only take all "reasonable steps" to obtain such audit
  - Effectively eliminates the "surprise examination" option for private funds

Advisers Act Private Funds Rules – Other Rules *(cont.)*

- **Annual Audits: Key Takeaways**
  - SEC-registered advisers that currently comply with the Custody Rule by obtaining a surprise examination for one or more of their private funds will need to obtain an audit for these funds to comply with the Adopted Rules
  - The Adopted Rules may pose challenges to U.S. SEC-registered sub-advisers to affiliated non-U.S. non-registered advisers when the U.S. affiliate has not historically had custody of private fund assets
  - Auditors may have difficulties beginning to generate work papers for private funds that have been in existence for longer periods and are being audited for the first time
  - Advisers that historically have not procured audits for certain vehicles, whether because they historically have not had "custody" under the Custody Rule definition or for other reasons, should undertake a review of their audit approach to these vehicles, as many are likely to fall within the new requirement that all private funds be audited

Advisers Act Private Funds Rules – Other Rules *(cont.)*

- **Written Annual Review of Compliance Reviews**
  - Under the Adopted Rules, all SEC-registered advisers are required to document the annual review of their compliance policies and procedures in writing (not limited to advisers to private funds)
- **Recordkeeping Requirements**
  - SEC-registered advisers are required to retain records to facilitate SEC's ability to assess adviser compliance with the Adopted Rules, including delivery of quarterly statements and annual audited financials to investors
  - Advisers must make and retain records evidencing the calculation of all expenses, payments, allocations, rebates, offsets and performance including in each quarterly statement
  - Advisers must retain substantiating records regarding its determination as to whether a private fund is liquid or illiquid

Advisers Act Private Funds Rules – Compliance Timeline

Rule	Larger Private Fund Adviser Compliance Date*	Smaller Private Fund Adviser Compliance Date**	Legacy Status
Quarterly Statement Rules	March 14, 2025	March 14, 2025	None
Private Fund Annual Audit Rule	March 14, 2025	March 14, 2025	None
Secondary Transaction Requirements	September 14, 2024	March 14, 2025	None
Books and Records Requirements	Ties to effective date of Adopted Rule for which books and records are required		None
Restricted Activities Rules	September 14, 2024	March 14, 2025	Expense disclosure requirements, and prohibition on charging costs relating to adverse Advisers Act findings, apply to all private funds of covered advisers, even if operations commenced*** prior to the compliance date Organizational or borrowing documents for funds that commenced operations prior to the compliance date need not be amended and do not require investor consent
Preferential Treatment Rule	September 14, 2024	March 14, 2025	Legacy status extended only to preferential redemption rights and information rights granted prior to the compliance date Organizational documents for funds that commenced operations prior to the compliance date need not be amended
Documenting Annual Compliance Reviews	November 13, 2023****		None

*I.e., for advisers with $1.5BB or greater "private funds assets under management," a formula tying to SEC's Form PF definition and counting only the portion of an adviser's regulatory assets under management that are attributable to the private funds it advises.

**I.e., for advisers with less than $1.5BB "private funds assets under management."

***The Adopting Release ties commencement of operations to any bona fide activity directed toward operating a private fund, including investment, fundraising or operational activity, and cites as examples the issuance of capital calls, setting up a subscription facility, holding an initial closing, conducting due diligence on potential investments or making investments.

****Covered advisers will be required to document in writing their annual compliance reviews, beginning with the review completed within the 12 months following November 13, 2023.

****Remains an industry best practice.

Legislative, Rulemaking and Other Regulatory Developments – Other Proposals

TOPIC	DESCRIPTION	RULEMAKING STAGE	RELEVANT DATES
Predictive Data Analytics	Proposed new rules would address certain conflicts of interest associated with investment advisers' or broker-dealers' use of predictive data analytics in investor interactions.	Proposed	Proposed: July 26, 2023 Comments Due: Oct. 10, 2023
Regulation S-P	Proposed enhancements to Regulation S-P would require advisers to adopt incident response programs to address cyber breaches and broaden the scope of information covered under the safeguarding and disposal rules, among other changes.	Proposed	Proposed: Mar. 15, 2023 Comments Due: June 5, 2023 Proposed Transition Period: One Year
Custody	Proposed rule changes would significantly amend and redesignate Rule 206(4)-2 under the Advisers Act and make related recordkeeping and reporting changes to address how investment advisers safeguard client assets.	Proposed	Proposed: Feb. 15, 2023 Comments Due: May 8, 2023 Comment Period Re-Opened: Aug. 23, 2023 Comments Due: Oct. 30, 2023 Proposed Transition Period: One Year, or for advisers with AUM $1 bn or less, 18 Months
Adviser Outsourcing	A new rule would require SEC-registered advisers to undertake due diligence assessments before engaging service providers for certain core advisory-related services and functions and to periodically monitor the service provider's performance and reassess the appropriateness of the outsourcing arrangement. Related books and records requirements include a provision specifically addressing the retention of outsourced recordkeepers.	Proposed	Proposed: Oct. 26, 2022 Comments Due: Dec. 27, 2022 Proposed Transition Period: 10 months

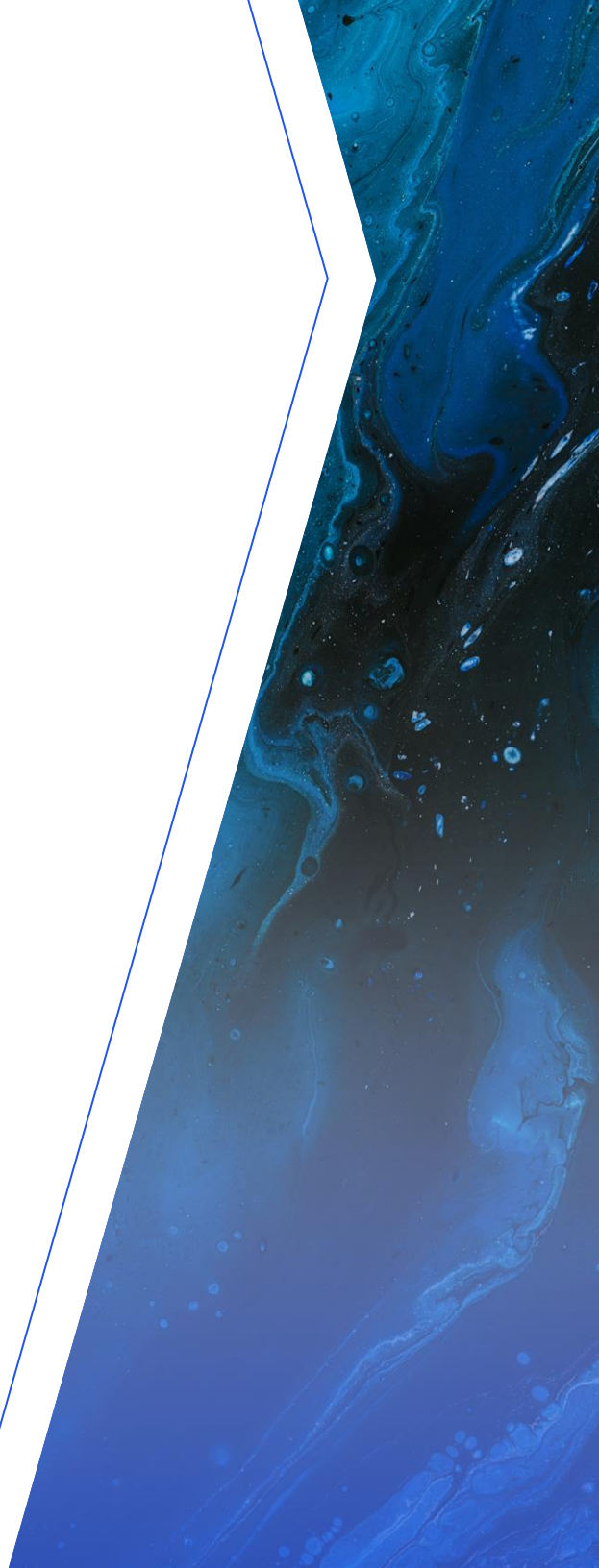
Note: Additional detail regarding the proposals is available in the Appendix.

Legislative, Rulemaking and Other Regulatory Developments – Other Proposals

TOPIC	DESCRIPTION	RULEMAKING STAGE	RELEVANT DATES
Form PF (Round 2)	Amendments to Form PF proposed jointly by SEC and the CFTC would increase the scope and granularity of information required by the Form's sections that are jointly administered by the agencies. This does not include section 4 which is completed by large private equity advisers. Private equity advisers would be subject to significant changes that impact all Form PF filers, however, and the proposed changes are in addition to the amendments to Form PF that SEC adopted on May 3, 2023.	Proposed	Proposed: Aug. 10, 2022 Comments Due: Oct. 11, 2022
ESG Investment Practices	SEC-registered advisers and ERAs would be required to include new narrative disclosures in brochures and census-like information in Part 1-A of their Form ADVs regarding Environmental, Social or Governance ("ESG") factors the adviser considers in implementing its investment strategies, with separate ESG reporting for each private fund the adviser is required to identify in Part 1A.	Proposed	Proposed: May 25, 2022 Comments Due: Aug. 16, 2022 Comment Period Re-Opened: Oct. 7, 2022 Comments Due: Nov. 1, 2022 Proposed Transition Period: One Year
Cybersecurity	More detailed and prescriptive than existing SEC cybersecurity guidance and rules, the new rules would impose new reporting and disclosure obligations on SEC-registered advisers relating to cybersecurity incidents and risks, and potentially require advisers to enhance their cybersecurity policies and procedures.	Proposed	Proposed: Feb. 9, 2022 Comments Due: April 11, 2022 Comment Period Re-Opened: Mar. 15, 2023 Comments Due: May 22, 2023

Note: Additional detail regarding the proposals is available in the Appendix.

Attorney Biographies



Alpa Patel, P.C.

Partner, Investment Funds

Kirkland & Ellis LLP
Washington, D.C.
alpa.patel@kirkland.com
T + 1 202 389 3062

EDUCATION

The George Washington University Law School, J.D., 2007

Emory University, BBA, Finance, 2004

ADMISSIONS & QUALIFICATIONS

- Illinois
- District of Columbia
- New York

Alpa Patel is a partner in the Investment Funds Regulatory Solutions Group of Kirkland & Ellis LLP in Washington, D.C. Ms. Patel's practice focuses on counseling U.S. and non-U.S. investment advisers and family offices on a broad range of compliance, regulatory, and legal matters affecting private funds. Widely regarded as a leading regulatory lawyer, Ms. Patel has been ranked by *Chambers* for years, including her 2023 selection for Band 1 in *Chambers USA*. She counsels some of the most complex and sophisticated asset management firms on issues related to the registration, structure, and operations of their advisory businesses and navigating complex SEC compliance examinations and enforcement investigations. She provides counsel to all types of investment advisers and their vehicles, including private equity funds, venture capital funds, credit funds, hedge funds, and real estate funds. Ms. Patel also routinely counsels private fund sponsors on strategic transactions such as minority investments and other liquidity events.

Prior to joining Kirkland, Ms. Patel served as Branch Chief of the Private Funds Branch of the Investment Adviser Regulation Office in the SEC's Division of Investment Management in Washington, D.C. In that role, Ms. Patel helped develop various rule proposals under the Advisers Act and provided technical assistance on the interpretation and application of the Advisers Act rules to all types of registered investment advisers. As head of the Private Funds Branch in the Division of Investment Management, she was a key adviser on all private fund-related projects and priorities across the SEC. She regularly consulted with the Division of Examinations and the Division of Enforcement on interpretive matters regarding the application of the securities laws to private fund advisers, as well as market practices in the private equity and hedge fund industries. She also represented the SEC on various interagency projects with the Department of Treasury, the Federal Reserve Board, and other agencies regarding policy matters which had implications for asset managers and the private fund industry in particular.

Ms. Patel is a frequent speaker on regulatory issues related to the asset management industry.

REPRESENTATIVE CLIENTS

- Vista Equity Partners
- GLP Capital Partners
- Patient Square Capital
- GTCR
- Clearlake Capital Group
- New Enterprise Associates
- General Catalyst
- Warburg Pincus
- Arctos Partners
- Whitehorse Liquidity Partners
- Thrive Capital

PRIOR EXPERIENCE

- Branch Chief, Division of Investment Management — Private Funds Branch, US Securities and Exchange Commission, 2014–2017
- Senior Counsel, Division of Investment Management — Private Funds Branch, 2011–2014
- Associate, Dechert LLP, 2007–2011

Alpa Patel, P.C.

Partner, Investment Funds

RECOGNITION

Chambers Global, Investment Funds: Regulatory & Compliance

Chambers USA, Investment Funds: Regulatory & Compliance

Who's Who Legal: Private Funds - Regulatory

THOUGHT LEADERSHIP

Seminars

- Panelist, "Regulatory & Compliance," National Venture Capital CFO Conference (November 2023, upcoming)
- Kirkland & Ellis Webinar, "Implementing the SEC's New Marketing Rule" (June 2022)
- TechGC Webinar, Venture Funds Regulatory Update (May 2022)
- Kirkland & Ellis Webinar, Emerging Topics in Private Fund Examinations (July 2021)
- Kirkland & Ellis Webinar, The Biden Administration: Implications for PE Regarding SEC, CFIUS, Antitrust and Tax (April 2021)
- Investment Advisers Association Compliance Conference, Private Equity Funds Update (March 2021)
- Private Equity International's Private Fund Compliance Spring Forum Virtual Experience 2021, Women's Networking Roundtable (May 2021)
- WeChat, TikTok & Messaging Applications: U.S. Regulatory Implications for Private Fund Sponsors (September 2020)
- Unconventional Paths to Liquidity: Fund-Related Solutions to Existing Portfolio Companies (August 2020)
- A Closer Look at the SEC's Private Fund Examination Priorities for Private Equity Advisers (July 2020)
- Developments in Private Equity Amid the COVID-19 Pandemic (May 2020)
- Investment Advisers Association Compliance Workshop, Chicago (November 2019)
- Speaker, Kirkland & Ellis Liquidity Solutions Academy, "SEC Scrutiny of Secondary Transactions / Fund Restructurings," New York City, New York (November 6, 2019)
- International Venture Capital Association, How to Manage an Exam, Chicago (October 2019)
- Investment Advisers Association Private Equity Group Subcommittee, Exam Update, New York (September 2019)
- American Investment Council Chief Compliance Officer Working Group, Chicago (September 2019)
- Lecturer, Howard University "Private Equity and Hedge Fund Regulation" (Fall 2018)
- American Investment Council General Counsels Day (November 2018)
- National Society of Compliance Professionals panel on "2018 Regulatory Priorities & Best Practices" (October 2018)
- American Investment Council Chief Compliance Officer Working Group (September 2018)
- Women in Private Equity Network (PEWIN) Roundtable, "Straight Talk: Fee Transparency and Other SEC Hot Buttons in Private Equity" (April 2018)
- IA Watch 20th Annual IA Compliance Conference: The Full 360 View East, "Meeting the Unique Compliance Challenges of the Private Fund Adviser" (March 2018)
- Investment Adviser Association 2018 Compliance Conference "Advertising, Marketing Materials and Social Media" (March 2018)
- National Society of Compliance Professionals Seminars on updated Form ADV Compliance (February and March 2018)
- PLI Private Fund Regulatory Developments and Compliance Challenges (February 2018)
- Kirkland & Ellis Seminar - "Making a Move into Credit Funds" (November 2017)

Katie A. St. Peters, P.C.

Partner, Investment Funds

Kirkland & Ellis LLP
Chicago
katie.stpeters@kirkland.com
T + 1 312 862 2367

EDUCATION

Vanderbilt University Law School J.D., 2010

- Grace Wilson Sims Medal in Transnational Law
- Executive Managing Editor, Vanderbilt Journal of Transnational Law

Georgetown University, B.S.F.S., International Politics, 2006

- *cum laude*

ADMISSIONS AND QUALIFICATIONS

2011, New York

2014, Illinois

Katie St. Peters is a partner in the Investment Funds Group, where her practice focuses on advising private investment fund sponsors on all aspects of their business, including the establishment of private investment funds, fund investment activities, product and strategy expansion, co-investment programs, warehousing arrangements, alternative investment structures, fund regulatory and compliance matters, conflicts issues, investor relations matters and firm ownership and operational issues, including governance matters, succession planning and separation arrangements.

Katie has advised a wide variety of private fund sponsors in connection with structuring and forming private investment funds ranging from a hundred million to tens of billions of dollars, as well as structuring and establishing separate account structures for a variety of U.S. and non-U.S institutional investors. Her experience includes advising sponsors ranging from emerging managers to leading global asset managers across a variety of investment strategies.

Katie has been recognized for her work as a leading investment funds lawyer by numerous publications. Most recently in 2022, Katie was named *Law360's* "MVP of the Year" for Fund Formation, an award that recognizes leading lawyers for their involvement in record-breaking deals and complex global matters. In 2021, Katie was named by *Law360* to the Fund Formation "Rising Stars" list, an annual ranking that recognizes outstanding legal talent under 40 years old. *IFLR1000* recognized Katie as a "Notable Practitioner" in Fund Formation, and she has been recognized as a Next Generation Lawyer for Private Equity Funds by *The Legal 500* every year since 2017.

Outside of her client work, Katie serves on Kirkland's Firmwide Diversity and Inclusion Committee and Benefits Committee and is a member of the Chicago Office Recruiting Committee and Associate Review Committee. Katie also serves on the board of directors of OneGoal Chicago.

REPRESENTATIVE MATTERS

- Bessemer Venture Partners (Bessemer) on the close of its inaugural BVP Forge fund at $780 million.
- Clearhaven Partners LP in the
  - acquisition of TimeTrade Systems, Inc.
  - formation of Clearhaven Fund I, a $312 million fund.
- CIVC Partners, LP in the formation of its $400 million CIVC Partners Fund V.
- Frontenac in the formation of its $520 million Frontenac XII.
- Incline Equity Partners on the formation of:
  - Incline Equity Partners V, a $1.165 billion fund.
  - Incline Elevate Fund II, a $630 million fund.
  - Incline Equity Partners IV, a $601 million fund.
  - Incline Elevate Fund, a $314.5 million fund.
  - Incline Ascent Fund, a $310 million fund.

Katie A. St. Peters, P.C.

Partner, Investment Funds

REPRESENTATIVE MATTERS (CONTINUED)

- Marlin Equity Partners in the:
  - formation of Marlin Equity V, a $2.5 billion fund.
  - formation of Marlin Heritage II, a $750 million fund.
  - formation of Marlin Heritage Europe II, a €675 million fund.
  - formation of Marlin Heritage Europe, a €325 million fund.
  - strategic minority investment in its business by Blackstone's Strategic Capital Group.
- Pfingsten Partners in the formation of its $382 million Pfingsten Partners Fund V.
- Silversmith Capital Partners of its $1.25 Billion Raise for Fourth Growth Equity Fund.
- Thoma Bravo, L.P. in the formation of:
  - Thoma Bravo Fund XIV, a $17.8 billion fund.
  - Thoma Bravo Fund XIII, a $12.6 billion fund.
  - Thoma Bravo Fund XII, a $7.6 billion fund.
  - Thoma Bravo Explore Fund, a $1.1 billion fund.
  - Thoma Bravo Discover Fund III, a $3.9 billion fund.
  - Thoma Bravo Discover Fund II, a $2.4 billion fund.
  - Thoma Bravo Discover Fund, a $1.074 billion fund.

PRIOR EXPERIENCE

Paul, Weiss, Rifkind, Wharton & Garrison LLP, 2010–2013

THOUGHT LEADERSHIP

Seminars

- Workshop, "Insights from a Funds Lawyer," Wharton Women in Investing Inaugural Conference, February 11, 2022

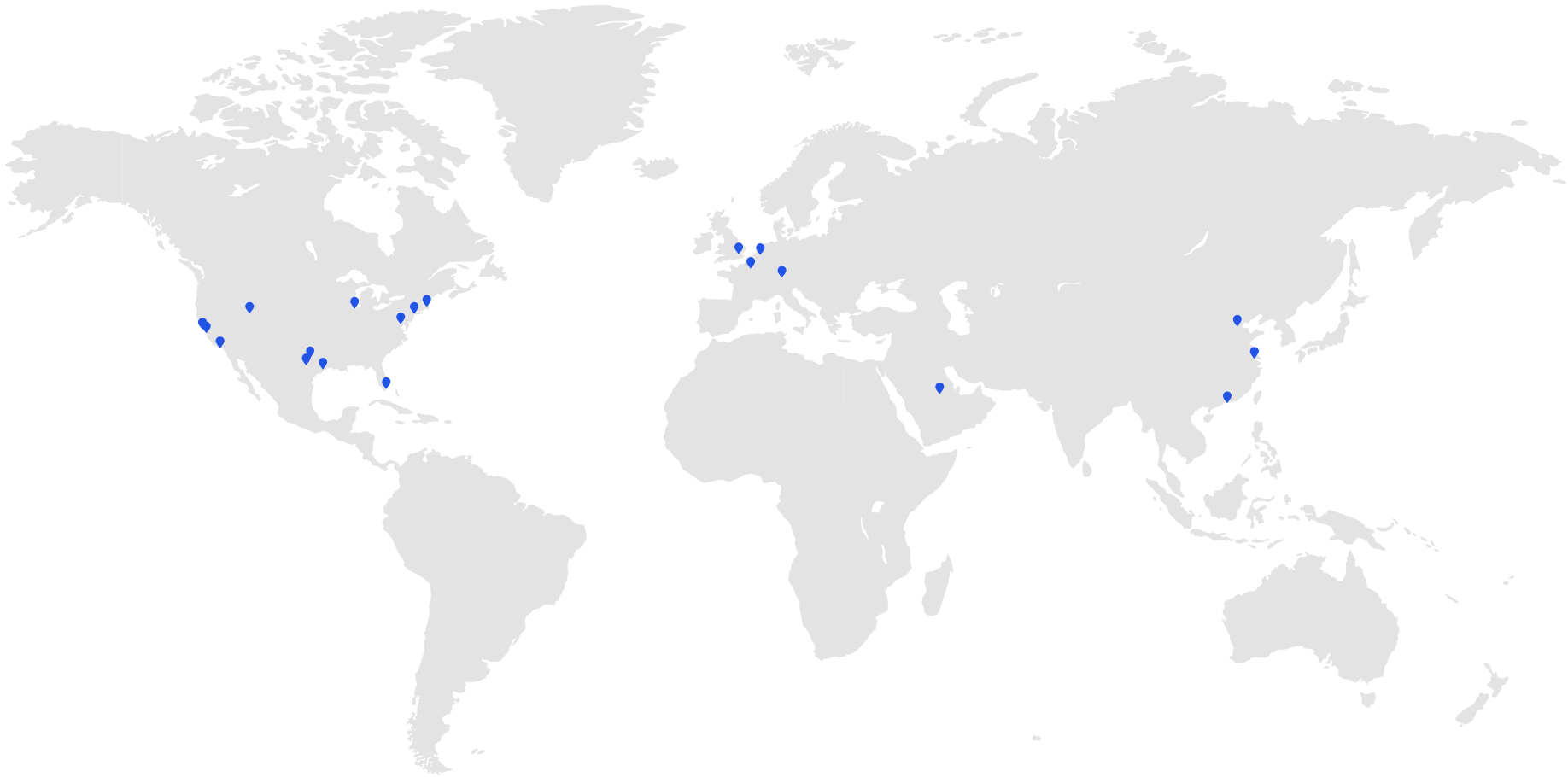
RECOGNITION

- Recognized by *Law360* as a "Rising Star" in Fund Formation, 2021
- Recognized by *IFLR1000* as a "Notable Practitioner" in Fund Formation, 2019–2023
- Recognized by *The Legal 500* as a Next Generation Lawyer for Private Equity Funds, 2017–2023

MEMBERSHIPS & AFFILIATIONS

- American Bar Association
- New York State Bar Association

International Reach



Austin	Brussels	Houston	Munich	Salt Lake City
Bay Area	Chicago	London	New York	Shanghai
Beijing	Dallas	Los Angeles	Paris	Washington, D.C.
Boston	Hong Kong	Miami	Riyadh	