Proskauer

(Updated October 11, 2023)

Rule	Which Advisers Are Covered?	Compliance Date	Summary of Final Rule	Certain Changes from the Proposal
Quarterly Statement Rule	RIAs Only	Friday, March 14, 2025 *[18 months after publication in Federal Register]*	Requires RIAs to provide quarterly statements to private fund investors with detailed information on: • private fund fees and expenses; • compensation received by the RIA and its affiliates and personnel from the fund and from portfolio investments, and any related fee offsets; and • standardized fund performance. Statements must be delivered within 45 days (Q1-Q3) or 90 days (Q4) of quarter-end. For funds of funds, the deadlines are 75 days (Q1-Q3) and 120 days (Q4).	Expenses to be reported now include expenses **allocated** to the fund, in addition to expenses **paid by** the fund. Statement no longer needs to list the fund's ownership percentage of any portfolio investment. Illiquid funds must now report investment performance **with and** without (as opposed to just without) the effect of fund-level subscription facilities. Liquid funds are now not required to report investment returns since inception if inception is more than 10 years ago. Advisers now provided with additional time to distribute Q4 reports, and advisers to funds of funds now provided with additional time to distribute all reports. Timing of reporting now keyed off of the fund's fiscal year, not calendar year.
Private Fund Audit Rule	RIAs Only	Friday, March 14, 2025 *[18 months after publication in Federal Register]*	RIAs must ensure that each fund undergoes an annual financial statement audit.	Audit must now adhere to the same standards as the Custody Rule's audit requirements. If adviser is not in a control relationship with the fund (e.g., because it is an unaffiliated sub-adviser to the fund), the adviser must now maintain records documenting its attempts to undergo an

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				annual audit. Auditors will not be required to notify the SEC in connection with issues arising under audits.
Adviser-Led Secondaries Rule	RIAs Only	"Larger" private fund advisers ($1.5BN or more in private fund AUM): Saturday, September 14, 2024 *[12 months after publication in Federal Register]* "Smaller" private fund advisers (less than $1.5BN in private fund AUM): Friday, March 14, 2025 *[18 months after publication in Federal Register]*	RIAs causing a fund to undergo an adviser-led secondaries transaction must (i) obtain a fairness opinion or a valuation opinion and (ii) disclose any material business relationships the adviser has, or has had within the prior two years, with the opinion provider.	Advisers will have the option to obtain a fairness opinion **or** a valuation opinion. Opinion and summary of material business relationships must now be delivered prior to the due date of the investors' election form (instead of prior to closing). Definition of "adviser-led secondary transaction" now revised to exclude tender offers.
Compliance Rule Amendments	RIAs Only	Monday, November 13, 2023 *[60 days after publication in Federal Register]*	Amends the existing Compliance Rule to require all RIAs, including those that do not advise private funds, to document in writing the required annual review of their compliance policies and procedures.	No changes.

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Restricted Activities Rule	All Advisers, Whether Registered or Not	"Larger" private fund advisers ($1.5BN or more in private fund AUM): Saturday, September 14, 2024 *[12 months after publication in Federal Register]* "Smaller" private fund advisers (less than $1.5BN in private fund AUM): Friday, March 14, 2025 *[18 months after publication in Federal Register]*	Restricts all private fund advisers from the following activities **unless**, in certain cases, disclosed to or, in other cases, disclosed to and consented by, the fund investors. Disclosure is required **before** the fact in some cases, and **after** the fact in others. "Consent" means approval by a majority in interest of fund investors that are not related persons of the adviser. **The Adopting Release specifies that LPAC approval is not sufficient.** Permitted With Disclosure: • Causing fund to bear regulatory or compliance fees/expenses (must be disclosed **after** the fact). • Reducing GP clawback for taxes (pre-tax and post-tax clawback amounts must be disclosed **after** the fact). • Non-pro rata allocations of investment-related expenses across different funds investing in the same investment (fee/expense amounts must be disclosed **before** the fact, with accompanying explanation as to why the fund's allocation is fair and equitable). After the fact disclosures must be made within 45 days after quarter-end, and can be made as part of the Quarterly Report if it is distributed within 45 days of quarter-end (e.g., in	Initially proposed as outright prohibitions, most of these activities are **now permitted** if disclosed to, or if disclosed to and consented by, the fund investors (as described herein). The SEC also added the grandfathering provision described herein.

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			Q1-Q3 for non-fund of funds). But if a Quarterly Report would be distributed later than 45 days (e.g., within 60 days for Q4, or longer periods for funds of funds), disclosure would still need to be made within 45 days. Before the fact disclosures must be provided "prior to charging or allocating" such amounts to the fund (no specific timing is given, but the Release notes that the intent is "to enable investors to discuss the non-pro rata allocation with the adviser before being charged"). <u>Permitted With Disclosure And Consent</u>: • Causing a fund to bear fees/expenses relating to government or regulatory investigations (other than in cases where the adviser is sanctioned for violating the Advisers Act or the Rules thereunder ("sanctioned matters"), which is never permitted, even with disclosure and consent). • Adviser borrowing from a fund. Grandfathering applies (i.e., no need for consent) for all "legacy" agreements in-place as of the Compliance Date and that would otherwise require an amendment in order to avoid violating the Rule, other than agreements permitting a fund to bear expenses relating to "sanctioned matters", as described above, which	

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			are not grandfathered (see below).	
Preferential Treatment Rule	All Advisers, Whether Registered or Not	"Larger" private fund advisers ($1.5BN or more in private fund AUM): Saturday, September 14, 2024 *[12 months after publication in Federal Register]* "Smaller" private fund advisers (less than $1.5BN in private fund AUM): Friday, March 14, 2025 *[18 months after publication in Federal Register]*	Prohibits all advisers from providing preferential redemption or information rights to an investor in a fund or in a similar pool of assets that can reasonably be expected to have a material negative effect on other investors in the fund, **except for** (i) preferential redemption rights that are required by applicable law or (ii) preferential redemption rights or information rights that are offered to all other investors in the fund (and in all funds with similar portfolios). Grandfathering applies for all "legacy" preferential redemption and information rights agreements in-place as of the Compliance Date and that would otherwise require an amendment in order to avoid violating the Rule (see below). Also requires all advisers to disclose to each prospective investor in a fund, **before** the investor's investment in the fund, any preferential material economic terms provided to other investors in the same fund. Also requires all advisers to disclose to each investor in a fund, **after** the investor's investment in the fund, all preferential terms of any kind provided to any investors in the same fund.	Initially proposed as outright prohibitions, preferential redemption and information rights are **now permitted** if required by applicable law (redemption rights only) or offered to all other investors (redemption and information rights). The SEC also added the grandfathering provision described herein. Timing of notice delivery has also been changed, providing for post-closing delivery of notice regarding preferential rights that are not than material economic rights (as described herein).

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			Such disclosure would be required (x) after the end of fundraising (for illiquid funds) or (y) after the relevant investor has been admitted (for liquid funds). Also requires annual notices to all investors in a fund of any new preferential terms granted to other investors in the fund since the most recent prior notice. Disclosure requirements apply even as to any preferential treatment that is otherwise subject to grandfathering or other exceptions (i.e., grandfathered or excepted redemption or information rights).	
Carve-Out For Advisers To Securitized Asset Funds	As adopted, none of the Rules (other than the amended Compliance Rule) will apply to any advisers **to the extent that they advise securitized asset funds** (i.e., similarly to the definition appearing in Form PF and Form ADV, securitization vehicles or vehicles that issue asset-backed securities and whose investors are primarily debt holders). This carve-out would apply whether the adviser is registered or exempt. However, the carve-out would not extend to an adviser's activities in advising other types of funds that are not securitized asset funds, in which case the Rules would apply to any non-securitized asset fund activities. In addition, such advisers (if RIAs) would remain subject to the amended Compliance Rule.			
Carve-Out For "Offshore Advisers" Advising Non-U.S. Domiciled Funds	Confirming and clarifying a carve-out initially proposed in the Proposing Release, the SEC notes that none of the Rules (other than the amended Compliance Rule) will apply to advisers that have their principal office and place of business outside the United States ("offshore advisers") **to the extent that they advise non-U.S. domiciled funds**. This carve-out would apply whether the adviser is registered or exempt (e.g., as a non-U.S. ERA, or by relying on the foreign private adviser exemption). However, the carve-out would not extend to an offshore adviser's activities in advising any U.S. domiciled funds (e.g., a Delaware limited partnership), in which case the Rules would apply to any U.S. domiciled fund activities. In addition, offshore advisers (if RIAs) would remain subject to the amended Compliance Rule.			

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Grandfathering for Certain "Legacy" Agreements	The Restricted Activities Rule and the Preferential Treatment Rule provide for grandfathering with respect to certain of the Rules' provisions for any "legacy" contractual agreements that govern the fund (e.g., fund limited partnership agreement, subscription agreements and side letters) or that govern any borrowing, loan, or extension of credit entered into by a fund, if the agreements were entered into prior to the Compliance Date and that would otherwise require an amendment in order to avoid violating the applicable Rule. Specifically: • Legacy agreements relating to a fund bearing investigation-related expenses, or to the adviser borrowing from a fund, are grandfathered without the need to obtain investor consent other than agreements permitting a fund to bear expenses relating to "sanctioned matters", as described above, which are not grandfathered. • Legacy preferential redemption or information rights are grandfathered without a need to offer them to other investors. However, grandfathered terms must still be disclosed pursuant to the notice provisions described above.			
Proposed Provisions That Were Not Adopted	Prohibition on Limiting or Eliminating Liability: The SEC had initially proposed to prohibit an adviser to a private fund, directly or indirectly, from seeking reimbursement, indemnification, exculpation, or limitation of its liability by the private fund or its investors for a breach of fiduciary duty, willful misfeasance, bad faith, negligence, or recklessness in providing services to the private fund. Instead, the SEC took the opportunity in the Adopting Release to "reaffirm and clarify" its views on how an adviser's fiduciary duty applies to its private fund clients and how the antifraud provisions apply to the adviser's dealings with clients and fund investors. The SEC's statements largely repeat its earlier guidance from its 2019 Interpretive Release on investment adviser fiduciary duties, and highlight certain related observations by the staff of the Examination Division as well as a recent instance in which the SEC applied those principles in a settled enforcement action. However, in closing on the topic of waivers of liability in fund governing agreements, the SEC noted that "to the extent that a waiver clause is unclear as to whether it applies to the Federal fiduciary duty, State fiduciary duties, or both, we will interpret the clause as waiving the Federal fiduciary duty", and therefore as a breach of the Advisers Act. Prohibition on Fees for Services Not Performed: The SEC had initially proposed to prohibit an adviser from charging fees to a fund or to a portfolio investment without providing corresponding services (e.g., prepaid fund management fees where advisory services are performed for only part of the relevant period or accelerated monitoring fees payable to a private equity fund adviser). In the Adopting Release, the SEC noted that it had determined that it was unnecessary to include such a prohibition by Rule "because such activity already is inconsistent with the adviser's fiduciary duty". The SEC is therefore likely to treat this as a de facto prohibited practice even absent a specific Rule.			
"Illiquid Funds" vs. "Liquid Funds"	The definition of "illiquid fund", as used throughout these Rules, was simplified to a two-factor test from the initially proposed six-factor test. It is now defined to mean any private fund in which investors (i) do not have the right to request redemptions and (ii) have limited opportunities to withdraw before the fund's termination (formerly factors (iii) and (v) from the proposed version). As under the initially proposed version, the final definition of "liquid fund" means any private fund that is not an illiquid fund.			

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Fifth Circuit Legal Challenge	On Friday, September 1, 2023, a lawsuit was filed with the federal Court of Appeals in the Fifth Circuit challenging the validity and enforceability of the new Rules. The lawsuit was filed in the form of a Petition for Review pursuant to Section 213(a) of the Advisers Act, which authorizes such a petition for persons "aggrieved" by the actions of the SEC. The Petition asserts that the new Rules "exceed the Commission's statutory authority, were adopted without compliance with notice-and-comment requirements, and are otherwise arbitrary, capricious, an abuse of discretion, and contrary to law". The parties are proceeding on an expedited schedule and have requested a final ruling form the court by the end of May 2024. However, while the court has agreed to expedited scheduling as a general matter and as to certain of the parties' requested briefing deadlines, it has not agreed to all of the parties' specific requested dates, and accordingly the date of any final ruling is subject to change. The filing of such a lawsuit does not automatically delay the Rules' compliance dates. However, a stay of the compliance dates may be requested or granted, either by court order as part of the proceedings or as otherwise determined by the SEC. For additional information on this legal challenge, please see Proskauer's blog posting on The Capital Commitment.			