Proskauer

Amendments to Form PF Require Hedge Funds and Private Equity Funds to Make Ad Hoc Reports to the SEC Regarding Significant Events

May 10, 2023

On May 3, 2023, the Securities and Exchange Commission ("SEC") adopted a set of amendments to Form PF, first proposed by the agency in January 2022 (the "Amendments" or "Amended Form PF").[1] Amended Form PF includes several new questions in the section applicable to large private equity funds, and creates two entirely new sections: *Section 5 – Current report for large hedge fund advisers to qualifying hedge funds* and *Section 6 – Quarterly event report for advisers to private equity funds*. ***[2]*** With respect to large hedge fund advisers, new Section 5 will require filings with the SEC within 72 hours, upon the occurrence of certain significant events. With private equity fund advisers, new Section 6 will require filings within 60 days after the quarter end after certain events occur within 60 days after the quarter end.

The SEC has delayed the consideration of a separate set of proposed amendments to Form PF, which the agency introduced in a joint proposal with the Commodity Futures Trading Commission in August 2022.[3]

I. Background

Form PF is a confidential filing required for registered investment advisers with at least $150 million in "private fund assets under management." All Form PF filers complete Sections 1a and 1b of the form, on which they report certain identifying information about themselves and the private funds they advise. The Amendments will impact certain large hedge funds and all private equity funds. Current reporting obligations differ across the three categories of private funds that are impacted by the Amendments:

- *Large hedge fund advisers*, those with at least $1.5 billion in hedge fund assets under management, must provide certain detailed information about all hedge fund assets in Section 1c and Section 2 of Form PF. Reports must be made within 60

days after the end of each fiscal quarter.

- *All private equity fund advisers*, those with at least $150 million of private equity assets under management, must report annually within 120 days after fiscal year end. Unless also a large private equity fund adviser, noted below, such advisers are only required to complete Section 1a and 1b.
- *Large private equity fund advisers*, those with at least $2 billion of private equity assets under management, must provide certain detailed information about the funds they advise in Section 4, annually within 120 days after fiscal year end.

II. New Requirements

The Amendments, once effective, require:

- *Large hedge fund advisers* that manage one or more Qualified Hedge Funds (a reportable hedge fund having a net asset value ("NAV") of at least $500 million) to complete Section 5 and file Form PF within 72 hours upon the occurrence of any of the following:
  - Investment losses of 20% or more within a ten-day period;
  - Increase in margin, collateral or equivalent of 20% or more within a ten-day period;
  - Notice of default by a fund for its inability to meet a call for margin, collateral, or equivalent;
  - Default by a fund counterparty;
  - A prime broker terminates or materially restricts its relationship with a fund;
  - A fund or its adviser experiences a significant disruption or degradation of its critical operations;
  - A fund receives cumulative withdrawal or redemption requests exceeding 50% of assets; or
  - A fund is unable to satisfy redemption requests or suspends redemptions.
- *All Private equity fund advisers* to complete Section 6 and file Form PF within 60 calendar days following the end of any fiscal quarter, in which any of the following events occurs:
  - Completion of an adviser-led secondary transaction;
  - Notification that investors have removed the fund's General Partner (or similar control person); or
  - Notification that investors have terminated the fund or its investment period.

- *Large private equity fund adviser* to answer additional questions as part of their annual filing, due within 120 calendar days after the fiscal year-end, including:
    - The occurrence of a general partner or limited partner clawback(s) of 10% or more of aggregate commitments;
    - The amount, counterparty, and collateral of fund borrowings (e.g., asset-based and/or subscription backed);
    - The investment strategy of the reporting fund (e.g., private equity, private credit, real estate, litigation finance, digital assets, general partner stakes, and others); and
    - The nature of any default by the fund or one of its portfolio companies (i.e., identification of whether it is a fund and/or portfolio company default).

III. Implementation and Effective Date

The effective date and compliance date for Sections 5 and 6 is December 11, 2023, while the effective date and compliance date for amendments to Section 4 that impacts large private equity funds is June 11, 2024. .

IV. Real-Time Reporting by Large Hedge Funds

The proposed amendments to Form PF that the SEC originally released would have imposed a 24-hour filing deadline for events triggering a Section 5 filing (or Section 6 filing). The Amendments will still require advisers to file Section 5 within a short window of 72 hours. Thus, operations and compliance personnel will need to implement new monitoring policies and procedures to ensure they are identifying reportable events and complying with the 72-hour deadline. In several instances, reportable events require a calculation of fund's asset value using a new metric, and defined term, called reporting fund aggregate calculated value ("RFACV"). In short, RFACV is a simplified approach to net asset value ("NAV") that can be defined broadly by advisers depending on their own internal practices, and does not require, among other things, fair valuation procedures, fee and expense accruals, and income accruals.

On the other hand, Section 5 of Amended Form PF also includes new questions that could be interpreted broadly and require advisers to make challenging interpretations. For example, a filing is required in the event of a disruption or degradation to "critical operations", which is defined as those operations that are necessary for (i) the investment, trading, valuation, reporting, and risk management of the reporting fund; or (ii) the operation of the reporting fund in accordance with the Federal securities laws and regulations.[4] The later, if stretched, could implicate significant disruptions to an adviser's compliance program. However, it is unlikely the intent of the Amended Form PF is to impose such a unique requirement solely on advisers to Qualified Hedge Funds. Furthermore, in assessing their filing obligations, certain advisers that experience disruptions to their critical operations, but quickly resolve the issue within the 72-hour filing deadline, will be faced with a question of whether the duration of the event was enough to cause an actual disruption or degradation (e.g., the lack of trading capabilities by an adviser that trades infrequently). Given the various scenarios that may occur, it is advisable for advisers to modify their existing policies and procedures, or adopt new policies and procedures, to address these new reporting requirements and the monitoring that is required.

V. Quarterly Reporting by Private Equity Funds

All private equity advisers that file Form PF (i.e., registered investment advisers with $150M of private equity assets under management) will be required to file Section 6 within 60 days after the fiscal quarter in which a reportable event occurs. A quarterly filing of Section 6 is only required when a reportable event has occurred, and there is no obligation to report the absence of reportable events.

Among those events that would trigger a Section 6 filing is the completion of an "adviser-led secondary transaction".[5] A filing is not triggered by a secondary transaction involving parties other than the adviser or its related person, or a secondary transaction that is initiated by a person other than the adviser or its related persons. The Amended Form PF targets those secondary transactions that are initiated by the adviser, and thus have inherent conflicts which may be challenging to address in the limited time between initiation and completion of the transactions.

The Amended Form PF also requires adviser to report any “general partner clawback” or “limited partner clawback(s)” greater than 10% of the reportable fund’s aggregate commitments. This requirement is part of the annual reporting of large private equity advisers in Section 4, and unlike the Proposed Amendments, is not made by all private equity advisers and does not trigger an ad-hoc filing obligation.

Conclusion

Advisers should consider the need to adopt policies and procedures that address their ad-hoc filing obligations and mitigate the risk that a decision to file or not file an ad-hoc report is second guessed. The SEC staff has previously brought actions in the against advisers that have failed to meet their Form PF filing obligations.[6] Furthermore, advisers will need to be mindful that the Amended Form PF’s new Sections 5 and 6 will likely serve as a self-reporting mechanism that allows SEC examination and enforcement staff to census those registrants involved in events that the staff has deemed risky and subject to heightened conflicts of interest.

[1] *Amendments to Form PF to Require Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers and to Amend Reporting Requirements for Large Private Equity Fund Advisers*, Advisers Act Rel. No. 6297 (May 3, 2023) ("Adopting Release"), *see also* Amendments to Form PF to Amend Reporting Requirements for All Filers and Large Hedge Fund Advisers, Advisers Act Rel. No. 6083 (Jan. 26, 2022) ("Proposing Release" or “Proposed Amendments”).

[2] *Section 5 – Advisers requesting a temporary hardship exemption* in the current version of Form PF will be relocated to a new Section 7.

[3] *Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers*, Advisers Act Rel. No. 6083 (Aug 3, 2023)

[4] See *Adopting Release* at n. 119 (“… Accordingly, we are clarifying the definition of ‘critical operations’ by defining the term as operations ‘necessary for (1) the investment, trading, valuation, reporting, and risk management of the reporting fund; ***or*** (2) the operation of the reporting fund in accordance with the Federal securities laws and regulations’ (emphasis added).”)

[5] An “adviser-led secondary transaction” is defined as “any transaction initiated by the adviser or any of its related persons that offers private fund investors the choice to: (i) sell all or a portion of their interests in the private fund; or (ii) convert or exchange all or a portion of their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons.” *See* Amended Form PF Glossary.

[6] *See SEC Charges 13 Private Fund Advisers for Repeated Filing Failures*, Press Release 2018-100.

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