ON**POINT** / A legal update from Dechert's Financial Services and Investment Management group

SEC Proposes Amendments to Form PF

Authored by Tricia J. Lee, Omoz Osayimwese, Mark D. Perlow, Kenneth Rasamny, Michael L. Sherman, Timothy Spangler, Lindsay Trapp, Ashley Rodriguez, and Alejandra Freer

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The Securities and Exchange Commission on January 26, 2022 voted three to one to propose amendments to Form PF, a confidential reporting form for certain SEC-registered investment advisers to private funds.[1] The amendments would: (1) require current reporting of certain key events for large hedge fund advisers and advisers to private equity funds, to aid in identifying fund distress or market instability; (2) reduce from $2 billion to $1.5 billion the reporting threshold for large private equity advisers, and require additional reporting regarding fund strategies to enhance information accessible to the SEC and FSOC;[2] and (3) revise reporting requirements for large liquidity fund advisers to be more in line with proposed reporting requirements for money market funds in order to assess the short-term financing markets. The amendments would impact large hedge fund advisers, private equity advisers and large liquidity fund advisers. The proposing release (Release) indicates that the amendments "are designed to enhance FSOC's monitoring and assessment of systemic risk" and to "collect additional data for the [SEC]'s use in its regulatory programs."[3]

The public comment period will remain open until March 21, 2022.

The Release is in a line of recent activity by the SEC and its staff focused squarely on the private fund industry. Following the Release, the SEC's Division of Examinations released a Risk Alert on the staff's observations from examinations of private fund advisers related to: disclosure; diligence regarding investments and service providers; and the use of hedge clauses.[4] Subsequently, the SEC voted to propose a set of new rules and rule amendments under the Investment Advisers Act of 1940 that collectively, if adopted, would represent the most significant changes to the regulation of private funds and their advisers since the Dodd-Frank Act. These proposed new rules and amendments would: create new requirements; prohibit certain behaviors; and tighten the requirements of the compliance rule for all advisers. In doing so, Chair Gensler explained that "[p]rivate fund advisers, through the funds they manage, touch so much of our economy. Thus, it's worth asking whether we can promote more efficiency, competition, and transparency in this field."[5]

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1 Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers, SEC Proposed Rule, SEC Rel. No. IA-5950 (Jan. 26, 2022). At times, this *OnPoint* tracks the Release without the use of quotation marks.

2 *See* Form PF: General Instructions.

3 The Release explains that the SEC consulted with FSOC to gain input on this proposal. The proposal seeks only to amend Form PF sections 3 and 4. However, because Form PF is a "joint form" with the Commodity Futures Trading Commission with respect to sections 1 and 2, Chair Gensler has instructed the SEC staff to work with the CFTC to consider additional amendments to these portions, as discussed at the meeting approving the proposal.

4 Observations from Examinations of Private Fund Advisers, Division of Examinations Risk Alert (Jan 27. 2022).

5 SEC Proposes to Enhance Private Fund Investor Protection, SEC Press Release (Feb. 9, 2022).

Background

In the wake of the financial crisis, the SEC adopted Form PF (as required by the Dodd-Frank Act) to gather information on private funds for use by FSOC in monitoring systemic risk, and registrants began filing the Form in respect of their fiscal year-end or quarter-end in 2012.[6] The net assets of the private fund industry as reported on Form PF have more than doubled from $5 trillion in 2013 to $11 trillion in 2020, and the number of private funds reported on Form PF has increased by nearly 70% over that same period.[7] In the Release, the SEC explained that it now has “almost a decade of experience analyzing the information collected,” and “[b]ased on this experience and in light of these changes, the [SEC] and FSOC have identified significant information gaps and situations where more granular and timely information would improve our understanding of the private fund industry and the potential systemic risk within it, and improve our ability to protect investors.” The SEC noted the importance to regulators of receiving current information, and it pointed to its experience with recent market events such as turmoil caused by COVID-19 in March 2020 and the market volatility of certain stocks in January 2021.[8]

The proposed amendments to Form PF should be viewed in light of a recent speech by Chair Gensler outlining a potentially more expansive role for the SEC in regulating private funds, including promoting additional financial resiliency through “freshen[ing] up” Form PF.[9] Since the adoption of Form PF in 2011, the private fund industry has evolved in structural complexity and business practices.

Form PF

A private fund adviser[10] must file a Form PF if the adviser and its “related persons” that are not separately operated have at least $150 million in private fund assets under management as of the last day of the most recently completed fiscal year. Generally, private fund advisers that must file are only required to complete section 1 of Form PF annually; however, “large private fund advisers” are required to provide additional data, and “large hedge fund advisers” and “large liquidity fund advisers” are required to file quarterly.[11] More specifically, once a private fund adviser meets the applicable threshold for “large,” a large hedge fund adviser must complete section 2 of Form PF, a

6 SEC Approves Confidential Private Fund Reporting, SEC Press Release (Oct. 26, 2011). At the time of the initial rulemaking, it was anticipated that “most private fund advisers will be regarded as smaller private fund advisers.” Private fund advisers with $5 billion in private fund assets began reporting following the end of their first fiscal year or quarter ending on or after June 15, 2012, with other advisers filing in respect of their fiscal year or quarter ending on or after December 15, 2012.

7 The SEC staff began publishing private fund statistics in 2015, including data from 2013. The data in this *OnPoint* is based on the private fund statistics released by the Division of Investment Management as of the fourth quarter 2020.

8 *See* SEC Fact Sheet: Proposed Amendments to Form PF.

9 SEC Chair Gary Gensler, Prepared Remarks at the Institutional Limited Partners Association Summit (Nov. 10, 2021). For further information, please refer to *Dechert OnPoint*, SEC Chair Gensler Signals Increased SEC Scrutiny of Private Funds.

10 A private fund adviser: is an SEC registered investment adviser or required to be so registered (including any adviser that also is registered or required to register with the CFTC as a commodity pool operator (CPO) or commodity trading advisor (CTA)); and that advises an issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of that act (private fund). *See* Form PF: Glossary of Terms (defining private fund adviser and private fund).

11 *See* Form PF: General Instructions at Instruction 1. Quotations in this *OnPoint* refer to the Release unless otherwise noted.

large liquidity fund adviser must complete section 3 of Form PF and a large private equity adviser must complete section 4 of Form PF.[12]

Form PF has not been significantly amended since its adoption.[13]

New Current Reporting Requirements for Large Hedge Fund Advisers and Advisers to Private Equity Funds

Presently, Form PF divides private fund advisers into large and small advisers, with small advisers reporting annually, and advisers that meet the definition of "large" providing additional and (except for large private equity advisers) more frequent quarterly reports. However, the Form does not require current reporting of any information from private fund advisers. The proposed amendments would require large hedge fund advisers and private equity advisers to file a current report within one day after certain events that may signal "significant stress," "potential systemic risk implications" or "potential areas of inquiry to prevent investor harm." Referring to "often stale" Form PF data (as forms are filed within a certain number of days or months after the quarter- or year-end), the Release states that reporting of certain key events of distress "would facilitate a regulatory response if appropriate and potentially mitigate the impact on investors and systemic risk."[14]

Practically, a one-day timeframe would require an adviser to evaluate and obtain the necessary data to confirm the existence of a reporting event and file the current report within a very tight timeframe (*e.g.*, if a reporting event occurs on Monday, a current report must be filed by the close of business on Tuesday). The adviser would still be allowed to file an amendment thereafter to correct any inaccuracies. The proposed reporting events "incorporate objective tests," with some using "quantifiable percentage threshold tests" at varying threshold levels, as well as a "number of temporal periods" intended to minimize the "potential for false positives and multiple unnecessary current reports." In addition, several reporting events include check boxes with pre-filled descriptions of the event, in order to provide additional context to assist the SEC and FSOC in analyzing and screening for false positives. A current report would include: certain identifying information about the adviser and fund; the reportable event and applicable reporting requirements; and an optional explanatory note field.

The proposal would require large hedge fund advisers to file current reports within one business day after the occurrence of one or more reporting events in a new Section 5 of Form PF relating to the following:

- **Item B. Extraordinary Investment Losses**. This proposed reporting item would be triggered by losses of 20% or more of a fund's most recent net asset value over a rolling period of 10 business days. To determine whether losses qualify as a reporting event, funds would compare losses to their "most recent net asset value,"

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12 There are three types of "large private fund advisers" that currently complete the additional information on Form PF, and only the threshold for a "large private equity adviser" is proposed to be lowered. However, it should be noted that an adviser becomes "a large hedge fund adviser" at $1.5 billion in regulatory assets under management attributable to hedge funds as of the end of any month in the prior fiscal quarter. *See* Form PF: General Instructions. The term "large private fund adviser" is inclusive of a "large private equity adviser" and advisers that are not considered a "large hedge fund adviser" or "large liquidity fund adviser," including (among others) most private credit funds and private real estate funds.

13 Form PF's section 3 was amended in 2014 in connection with certain money market reforms. Money Market Fund Reform; Amendments to Form PF, SEC Rel. No. IA-3879 (July 23, 2014).

14 All advisers file their annual updates within 120 calendar days after their fiscal year-ends. Additionally, large hedge fund advisers file within 60 calendar days after their first, second and third fiscal quarters, and large liquidity fund advisers must file within 15 calendar days after their first, second and third fiscal quarters. Form PF: General Instructions at Instruction 9.

which would equate to the most recent routine Form PF filing. In choosing this date, the Release acknowledges the potential for over-reporting if fund assets have appreciated substantially and under-reporting if fund assets have significantly depreciated. However, the Release reflects the SEC's belief that the limited information requested and advisers' ability to add an explanatory note mitigate these concerns. In the event the trigger is met, the adviser would be required to report "(1) the dates of the 10 business day period over which the loss occurred and (2) the dollar amount of the loss." If losses continue, the adviser would not be required to file an additional report on or after the end date stated in the initial report (*e.g.,* on or after that date, the fund would not be required to report again until the fund experiences a second loss of an additional 20% over a second rolling 10-day period). The reporting threshold is intended to "capture a significant loss at the reporting fund over a relatively short rolling period as well as a precipitous loss without capturing immaterial losses that may not be indicative of stress at the fund." The Release states that losses might indicate a precipitous liquidation or broader market instability, which could lead to greater margin or collateral requirements, financial costs and investor redemptions, and eventual defaults or fund liquidations. The Release posits that these events might signal a concern for similarly situated funds.

Reporting on Margin and Default Events by Qualifying Hedge Funds or their Counterparties. The Release explains that "margin" means "the reporting fund's requirements for margin, collateral, or an equivalent" and states that "significant increases in margin, inability to meet a margin call, margin default, and default of a counterparty are strong indicators of fund and potential market stress," and proposes additional items intended to be calibrated to signal fund or market instability.

- **Item C. Significant Increase in Margin Requirements.** This proposed reporting item would be triggered by an increase in margin of more than 20 percent of the fund's most recent net asset value over a rolling period of 10 business days. In the event the trigger is met, the adviser would be required to report "(a) the dates of the 10 business day period over which the increase occurred; (b) the cumulative dollar amount of the increase; and (c) the identity of the counterparty or counterparties requiring the increase(s)." If multiple counterparties increased margin requirements, the adviser would be required to list each counterparty. If margin requirements continued to increase, the adviser would be required to file an additional report on or after the end date stated in the current report. This reporting might indicate if a counterparty had concern about a fund's positions or if other counterparties could increase margin requirements on the fund. These events would be exacerbated if the fund had large amounts of leverage. This reporting requirement is intended to provide the SEC with an early indication of broader market stress for similarly situated funds. The adviser also would use check boxes to provide more detail about the circumstances of the margin increase. These check boxes would indicate: exchange requirements or known regulatory action affecting a counterparty; whether counterparties have increased margin requirements; a new relationship established with a counterparty; a new investment position, strategy or turnover; deteriorating positions or other credit trigger; and "other" reasons. The check boxes are intended to allow the SEC and FSOC to assess the scale of risk and to screen for false positives

- **Item D. Margin Default**. This proposed reporting item would be triggered by a margin default or the inability to meet a call for margin once any contractually agreed cure period has expired. However, reporting would not be required if there is a dispute as to the amount or appropriateness of a margin call if the fund has sufficient assets to meet the disputed amount. The adviser would be required to report for each counterparty: "(a) the date the adviser determines or is notified that a reporting fund is in margin default or will be unable to meet a margin call with respect to a counterparty; (b) the dollar amount of the margin, collateral or equivalent involved; and (c) the legal name and LEI (if any) of the counterparty." This reporting is intended to warn the SEC and FSOC of a risk of a margin call triggering the potential liquidation of a fund's positions that in turn could trigger broader risks to investors, counterparties and the financial system.

- The adviser also would use checkboxes to provide more detail about the circumstances of the default and/or inability to meet the margin call (*i.e.*, counterparty increase of margin requirement; losses in value of the portfolio or other credit ratings per the counterparty agreement; default or settlement failure of the counterparty; "other" reason).

- **Item E. Counterparty Default**. This proposed reporting requirement would be triggered if a counterparty to the fund has not timely met a margin call or failed to make any other payment as contractually required (taking into account any contractually agreed cure period), and if the amount involved is greater than 5% of the fund's most recent net asset value. The SEC chose the 5% threshold because, in its view, a counterparty default of that size "could affect a sizeable percentage of the fund's net asset value," and this figure already is used in Form PF to collect information on sizable exposures to creditors or counterparties. The adviser would be required to report: "(a) the date of the default; (b) the dollar amount of the default; and (c) the legal name and LEI (if any) of the counterparty." A report would be as of the date of the default, meaning that if multiple counterparties default on the same day, the adviser could file a single current report. If counterparties were to default on different days, the adviser would file a separate current report for each day a default occurred. According to the Release, there are no additional checkboxes for this item because the information provided would be speculative. The SEC asserts that a counterparty default could trigger forced selling by a fund and raise risks for other funds that transact with the same counterparty; this reporting is intended to give the SEC and FSOC warning of a potential liquidation that could trigger broader liquidations across the financial system.

- **Item F. Material Change to a Prime Broker Relationship**. This proposed reporting requirement would be triggered by such events as "material changes to the fund's ability to trade" or "termination of the prime brokerage relationship for default or breach" of contract. The adviser would be required to report: "the date of the material change"; and "the legal name and LEI (if any)" of the prime broker. The adviser also would use checkboxes (*i.e.*, to report material changes in the trading limits, investment restrictions or requests to reduce or unwind a position, as well as whether the relationship was terminated and by whom) to describe the circumstances leading to the change. This reporting is intended to provide the SEC with information regarding funds that brokers might view as an unacceptably risky counterparty, and could lead to a fund default or liquidation or otherwise create stress for the broker that in turn could have implications for the broader financial system.

- **Item G. Changes in Unencumbered Cash**. This proposed reporting requirement is intended to report "significant declines" in unencumbered cash, and would be triggered if the reporting fund's unencumbered cash declines by more than 20 percent of the reporting fund's most recent net asset value over a rolling 10 business day period. This report would be based on a daily unencumbered cash figure calculated as prescribed by question 33 on current Form PF. The adviser would be required to report the: "last day of the rolling 10 business-day period" when the decline occurred; and the "dollar amount of the unencumbered cash" on that day. If this decrease were to continue, another report would need to be filed on or after the end date stated in the initial Item G report. There also would be checkboxes to report the facts and circumstances surrounding the decline (*i.e.*, to report: the change attributable to fund redemptions, new investment positions, strategy or turnover; losses in fund's portfolio value; margin calls; or "other" reason). In the SEC's view, such a decrease in a fund's cash position could indicate an inability to access cash and affect the fund's ability to: purchase investments; satisfy redemptions; and meet margin calls. This reporting is intended to provide the SEC with what it believes are indications of a fund's overall health, which "may raise concerns of investor harm and systemic risk."

- **Item H. Operations Event**. This proposed reporting requirement would be triggered by a "significant disruption or degradation" (*i.e.*, a 20% "disruption or degradation of normal volume or capacity" of the fund's "key operations," whether resulting from the adviser, fund or service provider to the fund). Key operations would be defined as "operations necessary for (1) the investment, trading, valuation, reporting, and risk management of the reporting fund; as well as (2) the operation of the reporting fund in accordance with the Federal securities laws and regulations." A "significant disruption" would include a cybersecurity event, severe weather event or service provider outage. The adviser would be required to report: the "date of the operations event" or estimated date; the "date the operations event was discovered"; and whether the adviser had initiated its business continuity program. Additional narrative information would be provided in checkboxes (*i.e.*, whether the event related to: a service provider; a reporting fund, adviser or related person; a natural disaster or force majeure event; or an "other" event), which are intended to indicate the impact of the event on the fund's normal operations. This information is designed to enable the SEC and FSOC to quickly isolate the source of the event.

- **Withdrawals and Redemptions**. Large hedge fund advisers currently report redemptions on a quarterly basis, and the proposal would amend Items I and J to provide more detailed and timely information related to redemptions (including large requests, suspensions or inabilities to satisfy redemption requests). The Release indicates that a fund under stress or selling in periods of market volatility might not be able to sell its assets in an orderly manner to meet a large request, and thus might pursue "more extraordinary liquidity management measures," such as being forced to sell assets to the potential determinant of the fund and investors.

  – **Item I. Requests for Redemptions**. This proposed reporting item would be triggered if an adviser were to receive cumulative redemption requests exceeding 50% of the reporting fund's most recent net asset value. The adviser would be required to report the: "date on which the net redemption requests exceeded" 50% of the most recent net asset value; "net value of redemptions paid from the reporting fund between the last data reporting date" and the current report date; "percentage of the fund's net asset value the redemption requests represent"; and "whether the adviser has notified the investors that the reporting fund will liquidate." The Release expresses concern that a large redemption heightens the pressure to sell, which could potentially harm investors; such data could be used to analyze broader market implications of large redemption orders.

  – **Item J. Unsatisfied or Suspended Redemptions**. This proposed reporting requirement would be triggered if a qualifying hedge fund is unable to satisfy redemption requests or suspends redemptions for more than five consecutive business days. The adviser would be required to report the: "date the reporting fund was unable" to satisfy redemptions or suspended redemption; "percentage of redemptions requested but not yet paid"; and "whether the adviser has notified the investors that the reporting fund will liquidate." The Release indicates that this requirement is designed to provide the SEC and FSOC a potential early warning of a fund's liquidation, so that the regulators could quickly address potential harm to investors and evaluate any effects on the broader market.

The proposal would require advisers to private equity funds to file current reports within one business day after the occurrence of one or more reporting events pertaining to the following:

- **Item B. Adviser-led secondary transaction**. Under the proposal, advisers would need to report an adviser-led secondary transaction upon its completion. An “adviser-led secondary transaction” would be defined as “any transaction initiated by the adviser or any of its related person that offers” investors the option to sell some or all of their private fund interests or to convert or exchange some or all of their private fund interests for interests in another vehicle advised by the adviser (or its related persons). The adviser would be required to: report the “transaction completion date”; and provide a “description of the transaction.” The Release sets forth the SEC’s views that: adviser-led secondary transactions present conflicts of interest when the adviser is on both sides of a transaction; and could reflect that a fund might have difficulty in selling portfolio companies through traditional means, which could be indicative of a declining market. The SEC and FSOC intend to evaluate the data in an attempt to better track market trends.

- **Item C. General partner or limited partner clawback**. This proposed reporting requirement would be triggered when a general partner (or its related persons, or their respective owners or interest holders) is required to return any performance-based compensation in excess of the amount the relevant person or entity ultimately was entitled to receive, or when an adviser implements a limited partner clawback or giveback in excess of an aggregate amount of more than 10% of a fund’s aggregate capital commitments. The proposal would define “general partner clawback” and “limited partner clawback” in relation to returning an amount to a fund pursuant to the fund’s governing documents. The adviser would be required to report the “effective date of the clawback” and the “reason for the clawback.” The SEC believes that clawbacks of this magnitude could be indicative of a fund under stress or anticipating being under stress, which could indicate the fund’s financial instability.

- **Item D. Removal of general partner, termination of investment period or termination of a fund**. This proposed reporting requirement would be triggered if a fund is notified that fund investors have: removed the adviser or an affiliate as the general partner or a similar control person; elected to terminate the fund’s investment period; or elected to terminate the fund, in each case as contemplated by the fund’s organizational documents. The adviser would be required to report the effective date of the removal event and a “description of such removal event.” The Release asserts that these instances are “rare,” and could indicate market deterioration or investor protection concerns, including potential conflicts of interest. According to the Release, timely notification would allow for regulatory evaluation of potential consequences.

These sections also would include an explanatory note for the adviser to provide additional relevant information that it believes the SEC or FSOC could benefit from reviewing.

Advisers filing current reports would continue to do so in the Private Fund Reporting Depository (PFRD), by filing a new Section 5 in respect of large hedge fund advisers or a new Section 6 in respect of private equity advisers. Filing a current report would not trigger a requirement to file any other sections of Form PF; however, there would be a filing fee, which will be set in a separate SEC action.

The SEC requested comments as to: whether the one-day reporting window poses any challenges or is sufficient to eliminate or significantly reduce false positive reports; whether there are events that should require an adviser to contact the SEC more promptly than one day, via phone or email; and whether proposed section 6 disproportionately impacts or creates an undue burden on smaller private equity advisers. The SEC also seeks comments regarding the specific reporting events themselves, including: whether the event indicates a fund under stress or market risk;

whether the event is ascertainable and any objective criteria (*e.g.*, presence of contract) are clearly stated or require further definitions or guidance; whether a trigger is appropriately formulated as an “early warning of hedge fund or industry stress and potential systemic risk implications” (*e.g.*, whether the SEC is proposing the correct baseline, such as the “most recent net asset value”); whether the threshold should be higher or lower; whether the time period should be longer or shorter; whether any circumstances should be carved out (*e.g.*, margin in dispute; “transactions” should exclude an adviser’s related persons; “interim” clawbacks or end-of-law clawbacks should be subject to reporting requirements; keyperson events should be reported); whether the suggested formulae are practical or overly burdensome, or otherwise could be reported using existing metrics; whether any one event also could trigger another reporting event (such as Items C and D); whether there are alternative approaches to gathering the same information, as well as the structure of the required reporting information (*e.g.*, add, remove or modify information to be reported); whether more granular information could be useful to the SEC; and whether it is helpful to provide information in checkbox or narrative field format.

The Staff requests comment on the explanatory notes, including: whether these always should allow a narrative response; whether to require follow-up reporting in the form of a subsequent report or in the next routine Form PF filing; and whether all funds should need to report operating events. The Staff further seeks comment on the form and filing, including: whether another delivery method might be less burdensome (*e.g.*, secure email, IARD, EDGAR); whether a current report should be assessed a filing fee; and whether a temporary hardship exemption under rule 204(b)-1(f) should be available and, if so, under what conditions.

Large Private Equity Adviser Reporting

Currently, a “large private equity adviser” is an adviser with $2 billion in private equity fund assets under management as of the last day of its most-recently completed fiscal year.[15] Assets managed on behalf of a hedge fund, liquidity fund, real estate fund, securitized asset fund or venture capital fund where investors do not have redemption rights in the ordinary course count towards this threshold.[16]

The proposed amendments would reduce this threshold to $1.5 billion. Citing industry growth and an increase in the number of advisers below the current threshold,[17] the Release asserts that a threshold reduction would result in “a similar proportion of the U.S. private equity industry based on committed capital” reporting as when Form PF initially was adopted.

Further, the proposal would amend Section 4 of Form PF to require more information regarding the “activities of private equity funds, certain of their portfolio companies and the creditors involved in financing private equity transactions.” The additional and amended questions would collect information related to:

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15 Private equity fund assets under management are an adviser’s regulatory assets under management attributable to private equity funds. Large private equity advisers are required to complete section 4 of Form PF with respect to each private equity fund advised. The assets of an advisers’ related persons would count towards that amount unless the adviser is separately operated.

16 Form PF: Glossary Terms.

17 The Release states that the “private equity space has grown substantially since Form PF was initially adopted. There were 6,910 funds with $1.60 trillion in gross assets in first quarter of 2013 and 15,584 funds with $4.71 trillion in gross assets in the fourth quarter of 2020,” based on private fund statistics released by the Division of Investment Management in August 2021.

Private equity fund investment strategies. The proposal would require private equity fund advisers to make a selection from an exhaustive list of private equity strategies by percent of deployed capital, including an "other" category that would apply if a strategy is not listed. If a fund uses multiple strategies, the adviser would need to make a good faith estimate of the percentage of fund assets deployed in each strategy. Because different fund strategies carry different types and levels of risk, the Release asserts that this question is designed to allow FSOC to better monitor and analyze potential systemic risk and to identify emerging systemic risks.

- **Restructuring/recapitalization of a portfolio company**. The proposed amendments would require an adviser to specify if a portfolio company had been restructured or recapitalized after the fund's investment period ended, and if so, to provide the portfolio company name and the effective date of the restructuring. Information regarding post-investment period restructurings and recapitalizations could provide insight regarding the current market environment to the SEC and FSOC.

- **Investments in different levels of a single portfolio company's capital structure by related funds**. The proposal would require an adviser to report whether the reporting fund held a particular class, series or type of securities (*e.g.*, debt, equity) of a portfolio company while another fund advised by that adviser or its related person held an investment in a different class, series or type of securities of the same portfolio. The adviser would need to report the portfolio company name and provide a description of the class, series or type of securities held. With such information, the Release indicates that the SEC could better monitor conflict of interests (including when a portfolio company is under financial distress and cannot satisfy the claims of all classes of creditors). This question also aims to identify the practice of an adviser having exposure to the same portfolio company in multiple funds, in order to provide the SEC and FSOC with a more general understanding of market practice.

- **Fund-level borrowings and leverage**. The proposal would require advisers to report whether a reporting fund "borrows or has the ability to borrow at the fund-level" for alternative or complementary financing of portfolio companies. An adviser would be required to provide: "information on each borrowing or other cash financing available to the fund"; the "total dollar amount available"; and the "average amount borrowed over the reporting period." The Release states that this question is intended to provide a better understanding of a fund's risk profile by showing how the fund obtains leverage. According to the Release, fund-level leverage tends to result in larger and less-frequent capital calls; when multiple advisers are calling capital simultaneously, liquidity concerns could arise for those investors and potentially increase the risk of investor default.

- **Financing or credit provided to portfolio companies by the adviser and its related persons**. The proposal would require reporting by an adviser if it (or any of its related persons) "provide financing or otherwise extend credit to any portfolio company in which the reporting fund invests," and to value the financing or other extension of credit. The Release states that this question is designed to help identify potential conflicts of interest arising from such financing arrangements as well as potential systemic risk; for example, if an adviser is more likely to lend to portfolio companies that are unable to obtain credit through traditional sources, it could indicate that a portfolio company is in distress and be a signal of a potential market downturn.

- **Floating rate borrowings of controlled portfolio companies (CPCs) and the number of CPCs owned by a reporting fund**. The proposal would require reporting the "percentage of the aggregate borrowings of a reporting private equity fund's CPCs" set at a floating rate rather than a fixed rate. The Release asserts that this proposed requirement is intended to allow the SEC and FSOC to better monitor fund-level and portfolio-level risk profiles, because elevated CPC leverage (particularly at a floating rate) might indicate default risk.

- **CPCs owned by private equity funds**. The proposal would require advisers to report the number of CPCs owned by a reporting private equity fund. The proposal indicates that this proposed requirement would allow the SEC to better evaluate a fund's concentration risk and strategy, as well as the "interconnectedness" of funds and their portfolio companies.

- **Events of default, bridge financing provided to CPCs and the geographic breakdown of a fund's investments**. The proposal would amend three existing questions in Section 4 of Form PF. First, it would amend question 74 to require more granular information in respect of events of default, including a fund's payment default, CPC payment default or default related to upholding the borrowing agreement's terms. Second, it would amend question 75 in respect of any entity providing bridge financing to an adviser's CPC, to require reporting on the bridge financing institution's identity, the amount, additional counterparty identification information and whether the counterparty is affiliated with a major financial institution and its name. Further, it would amend question 78 to require a geographical breakdown of private equity fund investments by "greatest country exposures based on percent of net asset value" (by ISO country code) if the fund has exposure of at least 10% of its net asset value to that country, in a move away from the current regional approach. These measures are designed to provide additional data to the SEC and FSOC, for example regarding whether a number of private equity funds have investments in a country experiencing political instability or a natural disaster.

The Release states that the additional data would allow FSOC to analyze whether "private equity funds or their advisers pose systemic risk" and provide the SEC with further information for its regulatory programs.

The Staff requested comment on the following: whether the new reporting threshold is appropriate or could create an undue burden for those newly required to file; whether the event indicates a fund stress or market risk such that reporting should be required; whether additional categories of information would be appropriate or should be streamlined; and whether requested information is appropriately scoped or requires carve-outs.

Large Liquidity Fund Adviser Reporting

The proposed amendments would require large liquidity fund advisers to report "substantially the same information that money market funds would report on Form N-MFP," as the SEC proposed to amend such Form to improve the resiliency and transparency of money market funds.[18] These amendments would revise or expand large liquidity fund advisers' reporting of:

- **Operational information regarding whether the fund seeks to maintain a stable price per share**. The proposal would remove existing questions requiring reporting of whether a liquidity fund uses certain methodologies to compute its net asset value. Instead, advisers would need to report whether the fund seeks to maintain a stable price per share, and if so, the price it seeks to maintain. This requirement is designed to provide information that the SEC believes would allow it to identify funds "susceptible to runs," and therefore help monitor systemic risk.

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[18] *See* Money Market Fund Reforms, SEC Proposed Rule, SEC Rel. No. IC-34441 (Dec. 15, 2021). For further information, please refer to *Dechert OnPoint*, SEC Proposes New Round of Money Market Fund Reforms in Response to March 2020 Redemptions.

- **Assets and portfolio information (including reporting cash positions separately, and providing gross subscriptions and redemptions and more specific position-level information)**. The proposal would add clarifying instructions and request additional information including the following:

  - Require advisers to report cash positions separately from other categories of assets and repo collateral to improve data quality and comparability.

  - Revise how advisers report liquidity fund assets by requiring advisers to provide total gross subscriptions (including dividend reinvestments) and total gross redemptions for each month of a reporting period, and by clarifying the terms "weekly liquid asset" and "daily liquid asset." The Release indicates that these revisions are designed to help the SEC understand the cause of changes to net asset value during the reporting period, and improve data quality and comparability.

  - Revise how advisers report liquidity fund portfolio information, by adding instructions requiring advisers to provide information separately for the initial acquisition and any subsequent acquisition of each security held. An adviser would be required to report the trade date and yield of each security owned. The Release states that this level of detail is intended to facilitate the SEC's understanding of liquidity fund activity in normal and stressed markets.

  - Require advisers to report portfolio security identifying information, including the name of the counterparty of a repo. Under the proposed amendments, the form no longer would permit advisers to aggregate certain information when multiple securities of an issuer are subject to a repo.

  - Revise the categories of investments that identify the security, to distinguish between U.S. Government agency debt categorized as either a coupon-paying note or a no-coupon paying note. The Release states that this change is intended to provide more granular information to allow the SEC and FSOC to filter data for more efficient analysis and better risk assessment.

  - Require advisers to provide clearing information for repos to inform the SEC about liquidity fund activity.

- **Financing information regarding the identity of a fund's creditors**. The proposal would ask advisers to indicate whether a creditor is based in the United States and whether it is a "U.S. depository institution." However, the proposal does not request that advisers distinguish between non-U.S. creditors that are, and are not, depository institutions. This revision is designed to mirror the categories the Federal Reserve Board uses in its reports and analysis.

- **Investor information**. The proposal would require a liquidity fund to report whether it was established as a cash management vehicle for an adviser's (or its affiliates') other funds or accounts that are not cash management vehicles. The Release indicates that this reporting would help inform whether a liquidity fund is offered as a separate strategy or maintained in support of other investment strategies. The proposal further indicates that this reporting could reveal if there is a shift from registered money market funds to unregistered products, such as liquidity funds, and could help regulators better evaluate the corresponding risks of moving to unregistered funds.

  Further, more information regarding a reporting fund's beneficial owners would need to be reported. Not only would advisers need to report the number of investors that beneficially own at least five percent of the reporting fund's equity, advisers also would need to report the type of investor and the percent of the fund's equity owned by the investor. The Release states that this additional information as to the types of investors would indicate to the SEC and FSOC the liquidity and redemption risks of a fund posed by different types of investors and their related redemption risks. In particular, the SEC is concerned about liquidity funds with a homogenous investor base that might redeem contemporaneously.

- **The disposition of portfolio securities (*i.e.*, information regarding the specific instruments sold or disposed of during the reporting period)**. The proposal would require reporting as to the sale or disposition of portfolio securities for each month of the quarter (not including portfolio securities held until maturity). Additionally, advisers would report the amount and category of each investment. The Release explains that responses to this question would allow the SEC and FSOC to better understand a fund's liquidity management and secondary market activities under normal periods and times of distress. The proposal notes that information regarding sales activity would help the SEC and FSOC identify broader trends in the short-term financing markets in which liquidity funds invest.

- **Weighted average maturity and weighted average life (a change in the formulae for calculating WAM and WAL)**. WAM and WAL calculations indicate the average maturities of a portfolio's securities, weighted by each security's percentage of net assets. A longer WAM and WAL might indicate that a fund has more exposure to interest rate risks. The revised formula would require using a dollar-weighted average based on the percentage of each security's market value in the portfolio. The Release indicates that, as amended, this instruction would provide for a more consistent calculation, and therefore improve risk assessment.

The Release states that this additional data would enhance the ability of the SEC and FSOC to assess and oversee the short-term financing markets and their participants, and that the information would improve data quality and comparability with categories used in reports and analysis of the Federal Reserve Board.

The Staff requested comment as to: whether to amend the form as proposed; whether the information sought would meet the stated purpose of adding the information; whether any currently reported information could or should be removed because it becomes duplicative; whether definitions should be added or additional guidance provided; and whether there are any other methods to consider to improve data quality.

Conclusion

If adopted, the proposed form amendments would require large private fund advisers to provide the SEC with a large volume of additional information, much of it within a burdensome, and likely impractical, one-day time frame. Large private fund advisers would find themselves distracted during what might be a moment of crisis by the need to focus on completing and submitting to the SEC a report with potentially momentous consequences. Such advisers also likely would need to: invest in and implement information systems and controls to monitor for the reporting triggers; and provide the required information quickly. Further, such advisers would need to train and retain staff that is sufficiently experienced to make difficult judgment calls under pressure in order to implement these systems. As is often the case with such reporting requirements, the burdens and expenses would fall especially heavily on advisers with less scale. It is not clear that this burden, distraction and expense is justified by its stated purpose, since much of the current reporting information relates to events primarily with an investor protection objective for which it does not seem necessary that the SEC receive current reporting; instead, much of this information could be reported usefully within 30 days, the commonly understood standard for prompt reporting of material changes for Form ADV.

The proposed requirements generally, and the current reporting requirements particularly, also appear designed to transform Form PF into a tool for a more intrusive regulatory regime for large private fund advisers. The SEC has used Form PF since its inception both to monitor for systemic risk and for potential violations of the Advisers Act and investor harm. Importantly, the current regime is designed to gather systemic risk data at a macro level and to provide the SEC with data that is a small subset of the information that it uses in deciding whether and why to examine a private fund adviser. However, the proposed current reporting requirements imply a new, potentially more interventionist, posture by the SEC, particularly during times of fund and systemic stress. Moreover, the reporting requirements would conjoin investor protection concerns and systemic risk in ways that may confuse the regulatory analytic framework and related priorities, because the requirements imply that the staff and registrants may need to treat all triggering events (*e.g.*, redemptions above a certain size and adviser-led secondaries) as a potential emergency. In addition, the amended form, and in particular the large private equity adviser requirements, point toward a regulatory regime in which the SEC staff is policing transactions and terms that typically have been negotiated among sophisticated, well-resourced investors and advisers. Both the overall tone and the specific requirements of the proposal suggest that the SEC is trying to tilt the negotiating table toward investors. Compounding this effect, the private equity fund adviser questions seem designed to extend the regulatory regime deeper into the operations of portfolio companies.

The details of the proposed disclosures, and particularly the thresholds for the current reporting requirements, in many cases are not fully grounded in data or industry experience, and it is expected that these proposed disclosures will draw considerable industry comment. For example, the SEC has proposed an identical 20% threshold for many of the large hedge fund adviser current reports. This suggests that at least some of these thresholds are arbitrary. The key operating events that would require large hedge fund reporting are not well-defined, nor is the concept of a percentage degradation of normal operating capacity for processes whose most important elements are often not quantitatively measurable. Similarly, the definition of “adviser-led secondary transactions” is very broad and could capture transactions that do not present the concerns that the SEC believes exist.

The Release sets forth a number of requests for comment regarding each of the proposed form changes on these and many other items. Potentially impacted fund advisers should carefully consider the implications of the proposed changes and consider submitting feedback to the SEC on these proposed changes. The public comment period will remain open until March 21, 2022. This comment period follows the SEC’s recent practice of departing from the more typical 60- or 90-day comment periods of past proposals.

Additional proposed amendments to Form PF may be forthcoming. After the open meeting on January 26, 2022, Chair Gensler noted that he had directed the SEC staff to work with the CFTC to consider amending the joint portions of Form PF.

*The authors would like to thank **Jonathan Blaha** for his contributions to this *OnPoint*.

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