

ALERTS

CLOs Excluded From SEC's New Private Fund Advisers Rules

August 24, 2023

On Aug. 23, 2023, the Securities and Exchange Commission ("SEC") adopted a new series of rules and amendments ("Release") under the Investment Advisers Act of 1940 ("Advisers Act"), which will apply to private fund managers and advisers registered with the SEC.[1] The newly adopted rules are meant to regulate the activities of investment advisers managing private funds.[2]

The rules adopted by the SEC require private fund advisers to: (i) provide quarterly statements to investors, (ii) provide an annual audit for each private fund, (iii) provide fairness or valuation opinions for adviser-led secondary transactions, (iv) require disclosure and in some cases investor consent for activities contrary to the public interest, and (v) prohibit preferential treatment to investors in a private fund (unless disclosed).[3] However, in the Release, the SEC said that the five private fund adviser rules do not apply to investment advisers ("SAF advisers") with respect to securitized asset funds ("SAFs") with respect to the securitized asset funds that they advise.[4] The final rule defines a SAF as "any private fund whose primary purpose is to issue asset backed securities and whose investors are primarily debt holders," which is based on the corresponding definition for "securitized asset fund" in Form PF and Form ADV.[5] The SEC acknowledged that this is designed to capture vehicles established for the purpose of issuing asset backed securities, such as collateralized loan obligations ("CLOs").[6]

Therefore, as the five private fund rules will not be applicable to SAF advisers, they will not be applicable for CLO transactions.

The SEC amended the Advisers Act Rule 206(4)-(7) (“Compliance Rule”) which requires all advisers, not just those to private funds, to document the annual review of their compliance policies and procedures in writing. [7] These requirements will apply to advisers with respect to their SAFs. [8]

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. IA-6383 (Aug. 23, 2023) (“Release”), available at <https://www.sec.gov/files/rules/final/2023/ia-6383.pdf>.

[2] Fact Sheet Private Fund Advisers Reforms: Final Rules Release AI-6383 (Aug. 23, 2022) (“Fact Sheet”), available at <https://www.sec.gov/files/ia-6383-fact-sheet.pdf>; The Release uses the Advisers Act definition for “private fund”, which is an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (“ICA”), but for section 3(c)(1) or 3(c)(7) of the ICA, Private Fund Advisers, No. AI-6383, at 7.

[3] Private Fund Advisers, No. AI-6383, at 1-2.

[4] Release, at 53.

[5] *Id.* at 54. See also Form PF, available at <https://www.sec.gov/files/formpf.pdf>, at 63, and Form ADV at <https://www.sec.gov/about/forms/formadv-instructions.pdf>, at 24.

[6] Release, at 55.

[7] *Id.* at 543.

[8] *Id.*

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