Disclaimer: On June 5, 2024, the U.S. Court of Appeals for the Fifth Circuit issued an opinion in National Association of Private Fund Managers v. SEC, No. 23-60471 (5th Cir. 2024) vacating the “Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews” rules (the “Final Rules”). As a result, these rules that were newly adopted under the Final Rules have been vacated and are no longer in effect.

§ 275.206(4)-9 [*Reserved*]

§ 275.206(4)-10 Private fund adviser audits.

(a) As a means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, an investment adviser that is registered or required to be registered under section 203 of the Investment Advisers Act of 1940 shall cause each private fund that it advises (other than a securitized asset fund), directly or indirectly, to undergo a financial statement audit (as defined in § 210.1-02(d) of this chapter (rule 1-02(d) of Regulation S-X)) that meets the requirements of § 275.206(4)-2(b)(4)(i) through (b)(4)(iii) and shall cause audited financial statements to be delivered in accordance with § 275.206(4)-2(c), if the private fund does not otherwise undergo such an audit;

(b) For a private fund (other than a securitized asset fund) that the adviser does not control and is neither controlled by nor under common control with, the adviser is prohibited from providing investment advice, directly or indirectly, to the private fund if the adviser fails to take all reasonable steps to cause the private fund to undergo a financial statement audit that meets the requirements of § 275.206(4)-2(b)(4) and to cause audited financial statements to be delivered in accordance with § 275.206(4)-2(c), if the private fund does not otherwise undergo such an audit; and

(c) For purposes of this section, defined terms shall have the meanings set forth in § 275.206(4)-2(d), except for the term securitized asset fund, which shall have the meaning set forth in § 275.211(h)(1)-1.

§ 275.211(h)(1)-1 *Definitions.*

For purposes of §§ 275.206(4)-10, 275.211(h)(1)-2, 275.211(h)(2)-1, 275.211(h)(2)-2, and 275.211(h)(2)-3:

Adviser clawback means any obligation of the adviser, its related persons, or their respective owners or interest holders to restore or otherwise return performance-based compensation to the private fund pursuant to the private fund's governing agreements.

Adviser-led secondary transaction means any transaction initiated by the investment adviser or any of its related persons that offers private fund investors the choice between:

(1) Selling all or a portion of their interests in the private fund; and

(2) Converting or exchanging 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.

Committed capital means any commitment pursuant to which a person is obligated to acquire an interest in, or make capital contributions to, the private fund.

Control means the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise. For the purposes of this definition, control includes:

(1) Each of an investment adviser's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control the investment adviser;

(2) A person is presumed to control a corporation if the person:

(i) Directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or

(ii) Has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities;

(3) A person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership;

(4) A person is presumed to control a limited liability company if the person:

(i) Directly or indirectly has the right to vote 25 percent or more of a class of the interests of the limited liability company;

(ii) Has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the limited liability company; or

(iii) Is an elected manager of the limited liability company;

(5) A person is presumed to control a trust if the person is a trustee or managing agent of the trust.

Covered portfolio investment means a portfolio investment that allocated or paid the investment adviser or its related persons portfolio investment compensation during the reporting period.

Distribute, distributes, or *distributed* means send or sent to all of the private fund's investors, unless the context otherwise requires; provided that, if an investor is a pooled investment vehicle that is controlling, controlled by, or under common control with (a "control relationship") the adviser or its related persons, the adviser must look through that pool (and any pools in a control relationship with the adviser or its related persons) in order to send to investors in those pools.

Election form means a written solicitation distributed by, or on behalf of, the adviser or any related person requesting private fund investors to make a binding election to participate in an adviser-led secondary transaction.

Fairness opinion means a written opinion stating that the price being offered to the private fund for any assets being sold as part of an adviser-led secondary transaction is fair.

Fund-level subscription facilities means any subscription facilities, subscription line financing, capital call facilities, capital commitment facilities, bridge lines, or other indebtedness incurred by the private fund that is secured by the unfunded capital commitments of the private fund's investors.

Gross IRR means an internal rate of return that is calculated gross of all fees, expenses, and *performance-based compensation* borne by the private fund.

Gross MOIC means a multiple of invested capital that is calculated gross of all fees, expenses, and performance-based compensation borne by the private fund.

Illiquid fund means a private fund that:

(1) Is not required to redeem interests upon an investor's request; and

(2) Has limited opportunities, if any, for investors to withdraw before termination of the fund.

Independent opinion provider means a person that:

(1) Provides fairness opinions or valuation opinions in the ordinary course of its business; and

(2) Is not a related person of the adviser.

Internal rate of return means the discount rate that causes the net present value of all cash flows throughout the life of the fund to be equal to zero.

Liquid fund means a private fund that is not an illiquid fund.

Multiple of invested capital means, as of the end of the applicable fiscal quarter:

(1) The sum of:

(i) The unrealized value of the illiquid fund; and

(ii) The value of all distributions made by the illiquid fund;

(2) Divided by the total capital contributed to the illiquid fund by its investors.

Net IRR means an internal rate of return that is calculated net of all fees, expenses, and performance-based compensation borne by the private fund.

Net MOIC means a multiple of invested capital that is calculated net of all fees, expenses, and performance-based compensation borne by the private fund.

Performance-based compensation means allocations, payments, or distributions of capital based on the private fund's (or any of its investments') capital gains, capital appreciation and/or other profit.

Portfolio investment means any entity or issuer in which the private fund has directly or indirectly invested.

Portfolio investment compensation means any compensation, fees, and other amounts allocated or paid to the investment adviser or any of its related persons by the portfolio investment attributable to the private fund's interest in such portfolio investment, including, but not limited to, origination, management, consulting, monitoring, servicing, transaction, administrative, advisory, closing, disposition, directors, trustees or similar fees or payments.

Related person means:

(1) All officers, partners, or directors (or any person performing similar functions) of the adviser;

(2) All persons directly or indirectly controlling or controlled by the adviser;

(3) All current employees (other than employees performing only clerical, administrative, support or similar functions) of the adviser; and

(4) Any person under common control with the adviser.

Reporting period means the private fund's fiscal quarter covered by the quarterly statement or, for the initial quarterly statement of a newly formed private fund, the period covering the private fund's first two full fiscal quarters of operating results.

Securitized asset fund means any private fund whose primary purpose is to issue asset backed securities and whose investors are primarily debt holders.

Similar pool of assets means a pooled investment vehicle (other than an investment company registered under the Investment Company Act of 1940, a company that elects to be regulated as such, or a securitized asset fund) with substantially similar investment policies, objectives, or strategies to those of the *private fund* managed by the investment adviser or its related persons.

Statement of contributions and distributions means a document that presents:

(1) All capital inflows the private fund has received from investors and all capital outflows the private fund has distributed to investors since the private fund's inception, with the value and date of each inflow and outflow; and

(2) The net asset value of the private fund as of the end of the reporting period.

Unfunded capital commitments means committed capital that has not yet been contributed to the private fund by investors.

Valuation opinion means a written opinion stating the value (as a single amount or a range) of any assets being sold as part of an adviser-led secondary transaction.

§ 275.211(h)(1)-2 *Private fund quarterly statements.*

(a) *Quarterly statements.* As a means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, an investment adviser that is registered or required to be registered under section 203 of the Investment Advisers Act of 1940 shall prepare a quarterly statement that complies with paragraphs (a) through (g) of this section for any private fund (other than a securitized asset fund) that it advises, directly or indirectly, that has at least two full fiscal quarters of operating results, and distribute the quarterly statement to the private fund's investors, if such private fund is not a fund of funds, within 45 days after the end of each of the first three fiscal quarters of each fiscal year of the private fund and 90 days after the end of each fiscal year of the private fund and, if such private fund is a fund of funds, within 75 days after the end of the first three fiscal quarters of each fiscal year and 120 days after the end of each fiscal year, in either case, unless such a quarterly statement is prepared and distributed by another person.

(b) *Fund table.* The quarterly statement must include a table for the private fund that discloses, at a minimum, the following information, presented both before and after the application of any offsets, rebates, or waivers for the information required by paragraphs (b)(1) and (2) of this section:

(1) A detailed accounting of all compensation, fees, and other amounts allocated or paid to the investment adviser or any of its related persons by the private fund during the reporting period, with separate line items for each category of allocation or payment reflecting the total dollar amount, including, but not limited to, management, advisory, sub-advisory, or similar fees or payments, and performance-based compensation;

(2) A detailed accounting of all fees and expenses allocated to or paid by the private fund during the reporting period (other than those listed in paragraph (b)(1) of this section), with separate line items for each category of fee or expense reflecting the total dollar amount, including, but not limited to, organizational, accounting, legal, administration, audit, tax, due diligence, and travel fees and expenses; and

(3) The amount of any offsets or rebates carried forward during the reporting period to subsequent periods to reduce future payments or allocations to the adviser or its related persons.

(c) *Portfolio investment table.* The quarterly statement must include a separate table for the private fund's covered portfolio investments that discloses, at a minimum, the following information for each covered portfolio investment: a detailed accounting of all portfolio investment compensation allocated or paid to the investment adviser or any of its related persons by the covered portfolio investment during the reporting period, with separate line items for each category of allocation or payment reflecting the total dollar amount, presented both before and after the application of any offsets, rebates, or waivers.

(d) *Calculations and cross-references.* The quarterly statement must include prominent disclosure regarding the manner in which all expenses, payments, allocations, rebates, waivers, and offsets are calculated and include cross references to the sections of the private fund's organizational and offering documents that set forth the applicable calculation methodology.

(e) *Performance.*

(1) No later than the time the adviser sends the initial quarterly statement, the adviser must determine that the private fund is an illiquid fund or a liquid fund.

(2) The quarterly statement must present the following with equal prominence:

(i) *Liquid funds.* For a liquid fund:

(A) Annual net total returns for each fiscal year over the past 10 fiscal years or since inception, whichever time period is shorter;

(B) Average annual net total returns over the one-, five-, and 10-fiscal-year periods; and

(C) The cumulative net total return for the current fiscal year as of the end of the most recent fiscal quarter covered by the quarterly statement.

(ii) *Illiquid funds.* For an illiquid fund:

(A) The following performance measures, shown since inception of the illiquid fund through the end of the quarter covered by the quarterly statement (or, to the extent quarter-end numbers are not available at the time the adviser distributes the quarterly statement, through the most recent practicable date) and computed with and without the impact of any fund-level subscription facilities:

(*1*) Gross IRR and gross MOIC for the illiquid fund;

(*2*) Net IRR and net MOIC for the illiquid fund; and

(*3*) Gross IRR and gross MOIC for the realized and unrealized portions of the illiquid fund's portfolio, with the realized and unrealized performance shown separately.

(B) A statement of contributions and distributions for the illiquid fund.

(iii) *Other matters.* The quarterly statement must include the date as of which the performance information is current through and prominent disclosure of the criteria used and assumptions made in calculating the performance.

(f) *Consolidated reporting.* To the extent doing so would provide more meaningful information to the private fund's investors and would not be misleading, the adviser must consolidate the reporting required by paragraphs (a) through (e) of this section to cover *similar pools of assets.*

(g) *Format and content.* The quarterly statement must use clear, concise, plain English and be presented in a format that facilitates review from one quarterly statement to the next.

(h) *Definitions.* For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)-1.

§ 275.211(h)(2)-1 *Private fund adviser restricted activities.*

(a) An investment adviser to a private fund (other than a securitized asset fund) may not, directly or indirectly, do the following with respect to the private fund, or any investor in that private fund:

(1) Charge or allocate to the private fund fees or expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority, unless the investment adviser requests each investor of the private fund to consent to, and obtains written consent from at least a majority in interest of the private fund's investors that are not related persons of the adviser for, such charge or allocation; provided, however, that the investment adviser may not charge or allocate to the private fund fees or expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Investment Advisers Act of 1940 or the rules promulgated thereunder;

(2) Charge or allocate to the private fund any regulatory or compliance fees or expenses, or fees or expenses associated with an examination, of the adviser or its related persons, unless the investment adviser distributes a written notice of any such fees or expenses, and the dollar amount thereof, to the investors of such private fund client in writing within 45 days after the end of the fiscal quarter in which the charge occurs;

(3) Reduce the amount of an adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders, unless the investment adviser distributes a written notice to the investors of such private fund client that sets forth the aggregate dollar amounts of the adviser clawback before and after any reduction for actual, potential, or hypothetical taxes within 45 days after the end of the fiscal quarter in which the adviser clawback occurs;

(4) Charge or allocate fees or expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons (other than a securitized asset fund) have invested (or propose to invest) in the same portfolio investment, unless:

(i) The non-pro rata charge or allocation is fair and equitable under the circumstances; and

(ii) Prior to charging or allocating such fees or expenses to a private fund client, the investment adviser distributes to each investor of the private fund a written notice of the non-pro rata charge or allocation and a description of how it is fair and equitable under the circumstances; and

(5) Borrow money, securities, or other private fund assets, or receive a loan or an extension of credit, from a private fund client, unless the adviser:

(i) Distributes to each investor a written description of the material terms of, and requests each investor to consent to, such borrowing, loan, or extension of credit; and

(ii) Obtains written consent from at least a majority in interest of the private fund's investors that are not related persons of the adviser.

(b) Paragraphs (a)(1) and (a)(5) of this section shall not apply with respect to contractual agreements governing a private fund (and, with respect to paragraph (a)(5) of this section, contractual agreements governing a borrowing, loan, or extension of credit entered into by a private fund) that has commenced operations as of the compliance date and that were entered into in writing prior to the compliance date if paragraph (a)(1) or (a)(5) of this section, as applicable, would require the parties to amend such governing agreements; provided that this paragraph (b) does not permit an investment adviser to such a fund to charge or allocate to the private fund fees or expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Investment Advisers Act of 1940 or the rules promulgated thereunder.

(c) For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)-1.

§ 275.211(h)(2)-2 *Adviser-led secondaries.*

(a) As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(4), an investment adviser that is registered or required to be registered under section 203 of the Act (15 U.S.C. 80b-3) conducting an adviser-led secondary transaction with respect to any private fund that it advises (other than a securitized asset fund) shall comply with paragraphs (a)(1) and (2) of this section. The investment adviser shall:

(1) Obtain, and distribute to investors in the private fund, a fairness opinion or valuation opinion from an independent opinion provider; and

(2) Prepare, and distribute to investors in the private fund, a written summary of any material business relationships the adviser or any of its related persons has, or has had within the two-year period immediately prior to the issuance of the fairness opinion or valuation opinion, with the independent opinion provider; in each case, prior to the due date of the election form in respect of the adviser-led secondary transaction.

(b) For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)-1.

§ 275.211(h)(2)-3 *Preferential treatment*.

(a) An investment adviser to a private fund (other than a securitized asset fund) may not, directly or indirectly, do the following with respect to the private fund, or any investor in that private fund:

(1) Grant an investor in the private fund or in a similar pool of assets the ability to redeem its interest on terms 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, except:

(i) If such ability to redeem is required by the applicable laws, rules, regulations, or orders of any relevant foreign or U.S. Government, State, or political subdivision to which the investor, the private fund, or any similar pool of assets is subject; or

(ii) If the investment adviser has offered the same redemption ability to all other existing investors, and will continue to offer such redemption ability to all future investors, in the private fund and any similar pool of assets;

(2) Provide information regarding the portfolio holdings or exposures of the private fund, or of a similar pool of assets, to any investor in the private fund if the adviser reasonably expects that providing the information would have a material, negative effect on other investors in that private fund or in a similar pool of assets, except if the investment adviser offers such information to all other existing investors in the private fund and any similar pool of assets at the same time or substantially the same time.

(b) An investment adviser to a private fund (other than a securitized asset fund) may not, directly or indirectly, provide any preferential treatment to any investor in the private fund unless the adviser provides written notices as follows:

(1) *Advance written notice for prospective investors in a private fund.* The investment adviser shall provide to each prospective investor in the private fund, prior to the investor's investment in the private fund, a written notice that provides specific information regarding any preferential treatment related to any material economic terms that the adviser or its *related persons* provide to other investors in the same private fund.

(2) *Written notice for current investors in a private fund.* The investment adviser shall *distribute* to current investors:

(i) For an illiquid fund, as soon as reasonably practicable following the end of the private fund's fundraising period, written disclosure of all preferential treatment the adviser or its *related persons* has provided to other investors in the same private fund;

(ii) For a liquid fund, as soon as reasonably practicable following the investor's investment in the private fund, written disclosure of all preferential treatment the adviser or its related persons has provided to other investors in the same private fund; and

(iii) On at least an annual basis, a written notice that provides specific information regarding any preferential treatment provided by the adviser or its related persons to other investors in the same private fund since the last written notice provided in accordance with this section, if any.

(c) For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)-1.

(d) Paragraph (a) of this section shall not apply with respect to contractual agreements governing a private fund that has commenced operations as of the compliance date and that were entered into in writing prior to the compliance date if paragraph (a) of this section would require the parties to amend such governing agreements.