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SEC's Onerous Form PF Proposal Puts PE Firms On Notice

By **Benjamin Horney**

Law360 (February 2, 2022, 7:43 PM EST) -- The U.S. Securities and Exchange Commission is causing a stir with potential new rules related to an obscure form meant to help evaluate systemic risks posed by private equity funds, and the proposal highlights the Biden administration's aim of increased oversight, attorneys say.

The proposed rules, unveiled by the SEC on Jan. 26, relate to Form PF, which was instituted as part of the Dodd-Frank Act of 2010. The forms, which are filed on a quarterly basis, help the SEC's Financial Stability Oversight Council monitor industry trends and inform rulemaking.

Under the proposal, hedge and private equity fund managers would be required to use Form PFs to provide more information than they currently have to, and in some cases on a much tighter timeline. The proposed rules would require PE funds to make the filing within one business day of certain triggering events, such as the execution of adviser-led secondary transactions, the implementation of a new general partner, and the termination of a fund, among other items.

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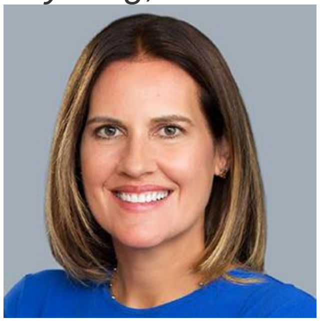

SARAH MCLEAN
Shearman & Sterling

If the SEC is going to expect private equity players to provide these filings within one business day of a significant event, which would result in a larger number of filings, perhaps the regulator should consider an overhaul of the Form PF filing system, according to David Blass, a partner in the Simpson Thacher & Bartlett LLP investment funds practice.

The filing system is already unwieldy, Blass said. He explained that not only does one need filing numbers on hand, but only certain people are approved to make filings. Blass posed the question: What happens if the people with access to the system are out of the office, or sick, on the day a Form PF filing is required?

"It's a big ask," he said. "I don't think it's realistic. It feels like it sets up firms for potential compliance pitfalls more than it provides a reasonable method to inform the [SEC] and its staff of important events."

The proposal also begs the question of whether the SEC has adequate staffing and resources to proficiently parse through an increased load of Form PFs.

"It would be interesting to see a study on how many additional filings this will cause, and what that workload would look like," McLean said. "I do worry about manpower to stay on top of it within the agency."

According to Brian T. Daly, a partner at Akin Gump Strauss Hauer & Feld LLP who advises private equity and hedge fund managers on regulatory, compliance and operational matters, the one-day reporting requirement would represent the shortest reporting deadline under the U.S. securities laws.

Further, he said, the tight deadline for filings would be "very burdensome for non-U.S. [fund] managers, many of whom will effectively have same-day reporting obligations."

"This is also an issue for portfolios that are priced off non-U.S. market closing prices," Daly noted.

The SEC's desire for such a short turnaround is just one of the issues that has some PE attorneys scratching their heads. The proposed rules would also lower the reporting threshold for what constitutes a large private equity fund adviser from $2 billion in assets under management to $1.5 billion. According to the SEC, the new threshold would help it receive information from a "similar proportion of the U.S. private equity industry based on committed capital as we did when Form PF was initially adopted." The regulator has been collecting intel from the forms since July 2012.

"It's unusual to see a ratcheting down of thresholds over time rather than an inflation adjustment upward," Blass said.

Additionally, the proposed rules seek particulars about PE portfolio companies that haven't historically been required, such as details of portfolio company financings, as well as information about portfolio company borrowings, restructurings and recapitalizations.

"Every intuition I have tells me that's going to be a source of some consternation, requiring disclosure of portfolio company financings, which are things that happen in regular courses for M&A matters," Blass said. "The immediate reaction was to the one-business-day requirement, but I think the next set of reactions will be more focused on portfolio company disclosures."

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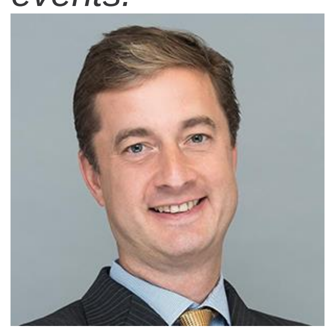

DAVID BLASS
Simpson Thacher

Blass explained that there are other avenues the SEC could take if it wants to receive this information that might make more sense and provide for adequate time. For instance, the SEC could require fund managers to include the information in an annual Form ADV amendment, which is a filing used to formally register as an investment adviser. Or the regulator could say that fund managers have to make a "prompt" Form ADV filing. The word "prompt" is commonly understood to be 30 days, he said.

"That would be a more logical place to require that disclosure rather than the Form-PF, and that kind of timing makes more sense, too," he said.

The specifics of what the SEC is seeking with its proposed rules may be causing confusion, but the overall idea is clear: Increased oversight is a priority for the federal government while President Joe Biden is in the White House. That's evident from the fact that, on the same day it issued the Form PF guidance, the SEC also proposed an expansion of Regulation ATS, which governs alternative trading systems, to oversee Treasury-trading platforms that function similarly to exchanges but are not registered as such.

"Part of the motivation may be to show that the SEC is looking at private equity and hedge funds and is taking tough action," Blass said. "Political winds may have been part of the apparatus for moving the sails of this proposal."

The proposal is open for public comment for 30 days, meaning anyone interested in making their thoughts known to the SEC has until Feb. 25 to do so. As of Wednesday afternoon, there were 23 public comments about the Form PF proposal on the SEC's website. The overwhelming majority appear to be from individual retail investors who are in favor of the increased transparency, although many of them might not know exactly what it is they are commenting on.

"The Form PF is a confidential filing with the agency, so there's no public transparency here," Shearman's McLean said. "The only transparency is vis-à-vis the agency."

"Unless they are saying that the agency is going to do a great job of seeing what's coming in, looking at trends, seeing problems and then adjusting rulemaking and enforcement accordingly, those comments are probably a little bit misinformed," she added.

--Additional reporting by Tom Zanki. Editing by Kelly Duncan and Orlando Lorenzo.

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