

Press Coverage | June 22, 2022

Managers Brace for SEC's Next Move on Private Fund Disclosure Rule

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Genna Garver

Genna Garver, a partner in Troutman Pepper's Corporate Practice Group, was quoted in the June 22, 2022 FundFire article, "[Managers Brace for SEC's Next Move on Private Fund Disclosure Rule](#)."

While manager and industry association letters aimed at a range of topics in the proposed rule, a proposed ban on language to indemnify managers for gross negligence in private fund contracts was among the most common targets for discussion. It remains on the radar for both managers and limited partners

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The gross negligence standard and the liability discussion is the biggest concern on the table. There is concern on both sides of the industry about the unintended consequences of pushing for that.

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Many aspects of the proposed rule would actually codify the SEC's stand on industry practices that it had already made clear through enforcement actions in recent years.

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We already had cases on accelerated monitoring fees. A good chunk of the rules are duplicative.

But the indemnification changes are new territory. It's not an area where there has been public industry debate.

I do not see the industry calling for it in general. I'm not aware of any institutional investors asking for that in the context of negotiations in their fund subscriptions...we're not seeing a cry for it.

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The proposed indemnification change can be "a clunky concept," because of the intersection of private contracts, fiduciary duty and Advisers Act enforcement. There also may be conflicts with other SEC rules, including the updated marketing rule set to go into effect later this year.

The SEC may end up clarifying scenarios where managers might be able to get needed consent for certain

practices from a fund's limited partner advisor committee, though the proposed rule now contains significant "ambiguity" on these points.

The question becomes under a contract could you have a different standard. Can you shape the...contract in a manner that includes a gross negligence standard but meets fiduciary duty under the Advisers Act?

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