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The SEC's Law of Unintended Consequences

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Genna Garver

Genna Garver, a partner in Troutman Pepper's Corporate Practice Group, was quoted in the August 28, 2023 *Alternatives Watch* article, "The SEC's Law of Unintended Consequences."

"The preferential treatment rules are likely the most problematic," commented Genna Garver, partner at Troutman Pepper. "While the final version includes much needed modifications to address concerns from both LPs and GPs, it's unclear how the dust will settle"

Garver added, "Certain smaller or less established GPs may have been willing to negotiate terms to get money in the door and may see this as losing a bargaining chip to attract larger investors — we do this in all walks of life, not just private funds." She used the example of a new landscaping company who may want to offer new customers a promotional rate.

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Garver also sees compliance becoming a challenge, especially with preferential transparency because right now it's not evident how an advisor can make a determination as to whether providing information would have a material, negative effect on other investors.

"The adopting releases states that the ability to redeem is an important part of determining whether providing information would have a material, negative effect on other investors and thus whether an adviser triggers the preferential information prohibition," Garver said.

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Troutman Pepper's Garver said that the proposed waiver or indemnification prohibition that would seek reimbursement or limitation of liability by the private fund or its investors for a breach of fiduciary duty was removed, which could spark problems. "The SEC seems to have done some gymnastics to thread the needle for issuing private funds rules under Section 211," Garver added. "It's possible we may see a challenge to that authority."

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