

1934 Act Registered Private Funds

Regulatory Requirements

Investment Company Act of 1940 (“1940 Act”)

- No registration required.
- Rely on Section 3(c)(7) exemption.
- Why? – Avoids 1940 Act registration, reporting requirements and rules.

Securities Act of 1933 (“1933 Act”)

- No registration required.
- Offered in reliance on Regulation D.
- Rule 506(b): Permits offerings to an unlimited number of accredited investors and up to 35 non-accredited investors; investors can self-verify accreditation status; non-accredited investors must be provided with additional disclosure documents; general solicitation not permitted
- Rule 506(c): Permits offerings to an unlimited number of accredited investors, provided the GP takes “reasonable steps” to verify each purchaser’s accreditation status; general solicitation permitted
- Why? – Avoids 1933 Act registration and reporting requirements, and if offered under 506(c), allows for general solicitation.

Exchange Act of 1934 (“1934 Act”)

- Registration required.
 - Subject to 1934 Act reporting requirements detailed on the next page and Sarbanes-Oxley requirements regarding, among other things, internal controls and related PEO/PFO certifications. No additional substantive governance or other requirements, but there are market expectations for things such as independent directors and audit committees.
 - Why? – Unlike a traditional private fund, 1934 Act registered private funds are not subject to the 2,000 investor limit.

Blue Sky

- State-by-state notice filings may be required

1934 Act Reporting Requirements

Form 10 (1934 Act registration statement)

- Requires similar information to Form 10-K.
- Subject to SEC review and comment.

Form 10-K (filed annually)

- Provides US GAAP annual financial statements of the fund, audited in accordance with US GAAS, as well as, risk disclosures, management discussion and analysis, and business performance details.
- Publicly files organizational documents and material agreements such as credit agreements, dealer manager agreements, and investment management agreements.

Form 10-Q (filed quarterly)

- Provides US GAAP interim financial statements (unaudited, but reviewed by independent accountant under applicable standards) of the fund and operational updates, including material agreements entered into during the quarter.

Form 8-K (filed to report specific events)

- Filed for major events such as mergers, management changes, and entry into certain material agreements, generally within 4 business days of event.
- Required to be filed for new subscriptions to the fund, including disclosure of the size of the subscription and NAV

Schedule 14A

- Proxy statement filed if shareholder voting is required.

Form 3, Form 4, and Form 5

- Beneficial ownership report for directors and officers.
- Required for insider holding and trading activity.

All 1934 Act reporting is publicly available.

1934 Act Registered Private Funds

Terms

Subscription Timing

- Perpetual-life vehicles.
- Investments typically fully funded at monthly closings where shareholders purchase shares at net asset value.

Liquidity

- 1934 Act does not require a fund to offer liquidity, but market expectations for alternative retail products are quarterly liquidity, at a minimum.
- Typically intend (but are not required) to hold periodic (quarterly) tender offers (i.e., opportunities for shareholders to tender their shares for cash funded by the fund) conducted pursuant to Rule 13e-4 under the 1934 Act (including filing Schedule TOs).
- Amount and timing of tender offers, if any, are set by the fund's general partner with the approval of the board of directors and are typically up to 3-5% of the fund (typically quarterly, though can also be semi-annual or annual).
- Shares may be subject to lock-up periods and redemption fees.

Management Fee

- Varies by class of units, but typically 0.875% to 1.25% of NAV.
- Sometimes waived for a specified period.

Performance Fee

- Generally, 12.5% of the fund's total return subject to a 5% annual hurdle amount and a high-water mark with 100% catch-up.

Subscription Fee and Servicing Fee

- Financial intermediaries may charge subscription fees on certain classes of units, typically 1.5% to 3.5% of the applicable class's NAV.
- Certain classes of units bear an ongoing servicing fee payable to the applicable financial intermediary. The servicing fee varies by class of units, but typically 0.25% to 0.85% of the applicable class's NAV, payable monthly.

Investor Qualifications

- Target investors are high net worth retail and/or institutional investors typically seeking access to private equity, infrastructure or any other alternative investment strategies.
- Investors must be "accredited investors" (as defined in Regulation D) and "qualified purchasers" (as defined in the 1940 Act).
- Offered through wirehouses, RIAs, broker-dealers, or other platforms typically used for private funds.

Governance Structure

- Typically, a Delaware limited partnership; the general partner is responsible for overall fund oversight, subject to certain oversight rights held by the fund's board of directors.
- The board of directors is typically responsible for overseeing a fund's periodic reports under the '34 Act and certain conflicts of interest related to the sponsor. The board of directors is typically comprised of several members, with at least one director who is "independent," as such term is defined in the NYSE Listed Company Manual. Each independent director is generally appointed for an indefinite term, subject to removal for cause, although at least one example in the market has a three-year term.

Leverage

- **No statutory leverage limit, unless provided for in operating agreement.**
- All funds currently in the market have a leverage ratio guideline of 30%, and some funds have the flexibility to exceed the ratio if brought back down within 9 or 12 months.

Tax Reporting

- Typically taxed as a partnership.
- Depends on a variety of factors, including application of the "publicly traded partnership" rules and the type of expected income.
- If taxed as a partnership, income will generally pass through to investors (whether or not currently distributed to investors), similar to many private equity funds.
- Required to distribute Schedule K-1s.