

Big Changes Ahead for Private Funds? SEC Chair's Transparent Intent

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SEC Chair Gary Gensler closed out 2021 with remarks at a recent Institutional Limited Partners Association Summit, focusing on a number of issues facing private equity and hedge funds.

He started with examining why these funds are important: size, complexity, and number. Although he did not specifically mention the numerous funds that support privately offered investment options under variable insurance products, those private funds also present most of the issues that Gensler highlighted. He asked: “Are we protecting investors?” “Are we facilitating capital formation?” “Are we maintaining fair, orderly, and efficient markets in the middle?”

In addressing those questions, the remainder of his speech focused on the following key areas:

- **Fees and Expenses.** Gensler hopes to promote added transparency for fees and expenses.
- **Side Letters.** Gensler believes that limited partners negotiating their own deals within a particular private fund create a potential “uneven playing field.” He then emphasized that he hopes to “level the playing field and strengthen transparency,” potentially reevaluating whether some types of side letter provisions should be permitted.
- **Performance Metrics.** Next, he discussed performance metrics for private funds, noting that private fund performance information can be relatively opaque. Gensler said, however, that he has asked the SEC staff “to consider what we can do to enhance ... transparency” for such performance metrics.

- **Fiduciary Duties and Conflict of Interest.** He then criticized the practice of having investors waive general partners’ performance of their fiduciary duties, stating: “Contract provisions purporting to waive the adviser’s federal fiduciary duty are inconsistent with the Advisers Act ... regardless of the sophistication of the client.”
- **Form PF.** Lastly, Gensler stated that he seeks to “freshen up” Form PF to create transparency to regulators. He described this form as “critical” to protecting investors and providing oversight of private fund advisers, citing the adoption of Form PF as a large source of information into hedge funds and private equity.

In closing, Gensler expressed his hope of getting things “right” with private funds, which could have big benefits across the market. Although he framed much of his talk in terms of promoting “transparency,” this did not obscure his apparent hope that this would also prompt major substantive changes that he would like to see in private fund practices.

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