

SUPPORTING STATEMENT
For the Paperwork Reduction Act Information Collection Submission for
Rule 211(h)(2)-2 under the Investment Advisers Act of 1940

A. JUSTIFICATION

1. Necessity for the Information Collection

On February 9, 2022, the Commission proposed rules related to private fund transparency and conflicts of interest as well as amendments to certain rules that govern investment adviser and fund disclosures under the Investment Advisers Act of 1940 (the “Advisers Act”).¹ The proposed rules and amendments are designed protect those who directly or indirectly invest in private funds by increasing visibility into certain practices, establishing requirements to address certain practices that have the potential to lead to investor harm, and prohibiting adviser activity that is contrary to the public interest and the protection of investors.

The Commission proposed new rule 211(h)(2)-2² to prohibit an adviser registered or required to be registered with the Commission from completing an adviser-led secondary transaction with respect to any private fund, unless the adviser, prior to the closing of the transaction, distributes to investors in the private fund a fairness opinion from an independent opinion provider and a summary of any material business relationships the adviser or any of its related persons has, or has had within the past two years, with the independent opinion provider. This rule would provide an important check against an adviser’s conflicts of interest in structuring and leading a transaction from which it may stand to profit at the expense of private fund investors and would help ensure that private fund investors are offered a fair price for their private fund interests.

The collection of information is necessary to provide investors with information about securities transactions in which they may engage. Moreover, this requirement is designed to help ensure that investors receive the benefit of an independent price assessment, which is designed to improve their decision-making ability and their overall confidence in the transaction.

2. Purpose and Use of the Information Collection

Rule 211(h)(2)-2 would require an adviser to obtain a fairness opinion in connection with certain adviser-led secondary transactions where an adviser offers fund investors the option to sell their interests in the private fund, or to exchange them for new interests in another vehicle advised by the adviser. This would provide an important check against an adviser’s conflicts of interest in structuring and leading a transaction from which it may stand to profit at the expense of private fund investors. Moreover, as noted above, this requirement is designed to help ensure

¹ 15 U.S.C. 80b-1 *et seq.*; Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews Release Nos. IA-5955 (Feb. 9, 2022) available at <https://www.sec.gov/rules/proposed/2022/ia-5955.pdf> (“Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews”).

² 17 CFR 275.211(h)(2)-2.

that investors receive the benefit of an independent price assessment, which will improve their decision-making ability and their overall confidence in the transaction.

3. Consideration Given to Information Technology

Rule 211(h)(2)-2 would not require the reporting of any information or the filing of any documents with the Commission. Proposed amendments to rule 204-2, however, would require an adviser to retain a copy of any fairness opinion and summary of material business relationships distributed pursuant to the rule along with a record of each addressee and the corresponding date(s) sent, address(es), and delivery method(s) for each such addressee.³

4. Duplication

The collection of information requirements are not duplicated elsewhere.

5. Effect on Small Entities

Rule 211(h)(2)-2 would not affect most investment advisers that are small entities (“small advisers”) because this rule would apply only to advisers that are registered with the Commission, and small advisers are generally not registered or are registered with one or more state securities authorities and not with the Commission. There are approximately 29 small advisers to private funds currently registered with the Commission, and we estimate that 100 percent of these advisers would be subject to rule 211(h)(2)-2. As discussed below, we expect that rule 211(h)(2)-2 would create a new annual burden of approximately 7 hours per adviser, which totals 21 hours in aggregate for small advisers.⁴ We therefore expect the annual monetized aggregate cost to small advisers associated with rule 211(h)(2)-2 would be \$129,805.92.⁵ The Commission believes that it could not adjust the rule to lessen the burden on small entities of complying with the rule without jeopardizing the interests of investors. The Commission reviews all rules periodically, as required by the Regulatory Flexibility Act, to identify methods to minimize recordkeeping or reporting requirements affecting small businesses.

6. Consequences of Not Conducting Collection

The collection of information required by the rule is necessary to protect investors by providing investors with information about the adviser, its business, and its conflicts of interest.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

This collection is not inconsistent with 5 CFR 1320.5(d)(2).

³ See proposed rule 204-2(a)(23).

⁴ We assume that 10% (~3) of all small advisers will conduct an adviser-led secondary transaction on an annual basis.

⁵ This includes the internal time cost and the annual external cost burden, as set forth below.

8. Consultation Outside the Agency

The Commission and the staff of the Division of Investment Management participate in an ongoing dialogue with representatives of the investment management industry through public conferences, meetings, and informal exchanges. These various forums provide the Commission and staff with a means of ascertaining and acting upon paperwork burdens confronting the industry. In addition, the Commission has requested public comment on rule 211(h)(2)-2. Before adopting rule 211(h)(2)-2, the Commission will receive and evaluate public comments on the rule and its associated collection of information requirements.

9. Payment or Gift

No payment or gift to respondents was provided.

10. Confidentiality

The information collected pursuant to rule 211(h)(2)-2 would be by delivery of information and documentation to private fund investors. These disclosures would not be kept confidential, but there is no requirement that this information be filed with the Commission or publicly disclosed.

11. Sensitive Questions

Not applicable.

12. Burden of Information Collection

The following estimates of average burden hours and costs are made solely for purposes of the Paperwork Reduction Act of 1995⁶ and are not derived from a comprehensive or even representative survey or study of the cost of Commission rules and forms.

Based on Investment Adviser Registration Depository (IARD) data, as of November 30, 2021, there were 14,832 investment advisers registered with the Commission. According to this data, 5,037 registered advisers provide advice to private funds.⁷ Of these 5,037 advisers, we estimate that 10%, or approximately 504 advisers, conduct an adviser-led secondary transaction each year. Of these advisers, we further estimate that each conducts one adviser-led secondary transaction each year. As a result, an adviser would have obligations under the rule with regard to 67 investors.⁸ As noted above, because the information collected pursuant to rule 211(h)(2)-2 would require disclosures to private fund investors, these disclosures would not be kept confidential.

⁶ 44 U.S.C. 3501 *et seq.*

⁷ *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1).

⁸ *See* section V.B. of Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews.

We have made certain estimates of this data solely for the purpose of this analysis. The table below summarizes the initial and ongoing annual burden estimates associated with rule 211(h)(2)-2.

Table 1: Rule 211(h)(2)-2 Estimates

| | Internal initial burden hours | Internal annual burden hours | Wage rate ¹ | Internal time cost | Annual external cost burden |
|---|-------------------------------|------------------------------|---|--------------------|-----------------------------|
| PROPOSED ESTIMATES | | | | | |
| Preparation/Procurement of fairness opinion | 0 hours | 4 hours ² | \$376.66 (blended rate for compliance attorney (\$373), assistant general counsel (\$476), and senior business analyst (\$281)) | \$1,506.64 | \$40,000 ³ |
| Preparation of material business relationship summary | 0 hours | 2 hours | \$424.50 (blended rate for compliance attorney (\$373) and assistant general counsel (\$476)) | \$849 | \$496 ⁴ |
| Distribution of fairness opinion and material business relationship summary | 0 hours | 1 hour | \$64 (rate for general clerk) | \$64 | \$0 |
| Total new annual burden per private fund | | 7 hours | | \$2,419.64 | \$40,849 |
| Number of advisers | | 504 advisers ⁵ | | 504 advisers | 504 advisers |
| Total new annual burden | | 3,528 hours | | \$1,219,498.56 | \$20,587,896 |

Notes:

1. The Commission's estimates of the relevant wage rates are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013. The estimated figures are modified by firm size, employee benefits, overhead, and adjusted to account for the effects of inflation. See Securities Industry and Financial Markets Association, Report on Management & Professional Earnings in the Securities Industry 2013.

2. Includes the time an adviser would spend gathering materials to provide to the independent opinion provider so that the latter can prepare the fairness opinion.

3. This estimated burden is based on our understanding of the general cost of a fairness opinion in the current market. The cost will vary based on, among other things, the complexity, terms, and size of the adviser-led secondary transaction, as well as the nature of the assets of the fund.

4. This estimated burden is based on the estimated wage rate of \$496/hour, for 1 hours, for outside legal services at the same frequency as the internal burden hours estimate. The Commission's estimates of the relevant wage rates for external time costs, such as outside legal services, takes into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

5. We estimate that 10% of all registered private fund advisers conduct in an adviser-led secondary transaction each year.

13. Cost to Respondents

Cost burden is the cost of goods and services purchased to meet the requirements of rule 211(h)(2)-2, such as for the services of outside counsel. The cost burden does not include the hour burden discussed in Item 12 above. Estimates are based on the Commission's experience.

As summarized in Table 1 above, Commission staff estimates that the annual cost of outside services associated with rule 211(h)(2)-2 would be approximately \$40,849 per applicable adviser and the total annual external cost burden for rule 211(h)(2)-2 would be \$20,587,896.⁹

14. Cost to the Federal Government

There are no costs to the government directly attributable to the rule.

15. Change in Burden

New collection.

16. Information Collection Planned for Statistical Purposes

Not applicable.

17. Approval to Omit OMB Expiration Date

Not applicable.

18. Exceptions to Certification Statement for Paperwork Reduction Act Submission

Not applicable.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable.

⁹ As noted above, we estimate that 10% of all registered private fund advisers conduct in an adviser-led secondary transaction each year.