AMERICAN INVESTMENT COUNCIL
Growth Through Long-Term Investment

March 21, 2022

VIA ELECTRONIC SUBMISSION
Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers (SEC Release No. IA-5950; File No. S7-01-22 (February 17, 2022)).

Dear Ms. Countryman:

The American Investment Council (the "AIC") appreciates the opportunity to submit this letter to the Securities and Exchange Commission (the "SEC") on the proposal (the "Proposed Amendments") to amend Form PF under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") along with certain other related amendments.[1]

The AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investment. In this effort, the AIC develops, analyzes, and distributes information about the private equity and private credit industries and their contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC's members are the world's leading private equity and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest.[2]

The private equity and private credit industries are playing a positive role in communities across America. During the pandemic, private equity and private credit investment supported millions of jobs, thousands of small businesses, and delivered the strongest returns for public pensions. The AIC has supported and continues to support efforts to identify potential systemic risks to the financial stability of the United States before they arise, and appreciates the opportunity to provide comments on potential challenges that the implementation of the Proposed Amendments would have on investment advisers and especially on private equity and

[1] Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers, SEC Release No. IA-5950; File No. S7-01-22 (Jan. 26, 2022) (the "Proposing Release").

[2] For further information about the AIC and its members, please visit our website at http://www.investmentcouncil.org.

private credit fund advisers.[3] We are concerned, however, that the Proposed Amendments are a solution in search of a problem since nothing in the Proposed Amendments will improve upon that job creation or those strong returns for investors, and that the Proposed Amendments do not reflect the private equity and private credit industries' consistent, positive record of transparency and disclosure.

To summarize our key points:

1. Given the significance of the Proposed Amendments, the comment period is significantly shorter than other recent rulemaking comment periods and does not provide sufficient time for AIC's members to adequately understand and assess the changes included in the Proposed Amendments. Importantly, the comment period is impractical for all commenters to provide economic analysis, including the potential costs and benefits of the Proposed Amendments and alternatives thereto, and whether the amendments would promote efficiency, competition, and capital formation. We request that the comment period be extended beyond its current deadline.[4]

2. The Proposed Amendments impose new requirements to report specific events and transactions and to provide additional information about a private equity adviser's funds and fund investments that are not related to the monitoring of systemic risk and the protection of investors, and are therefore inconsistent with the primary Congressional and agency intent for which Form PF was adopted.[5] The SEC provides no support that reporting the specific events and transactions listed in the Proposed Amendments to the SEC and the Financial Stability Oversight Council ("FSOC") is consistent with the purpose of Form PF or fulfills the SEC's mission to protect investors, or that the Proposed Amendments increase the types of benefits that private equity and private credit investments historically have provided. The new reporting requirements, and in particular the requirement to report on adviser-led secondary transactions, should be eliminated.

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[3] For purposes of this letter, we generally refer to private equity and private credit fund advisers as "private equity advisers" and the funds such advisers manage as "private equity funds." We note that the Proposed Amendments include private credit funds within the private equity funds classification for purposes of Form PF.

[4] The AIC, along with a number of other trade and advocacy organizations, submitted a separate letter to the SEC requesting extensions of the comment period for the Proposed Amendments and other amendments of rules under the Investment Advisers Act of 1940, as amended. See Comment Letter of Gail Bernstein, et al. (March 1, 2022) (available at https://www.sec.gov/comments/s7-01-22/s70122-20118198-271109.pdf).

[5] *See*, S. REP. NO. 111-176, at 39 (2010) ("Senate Committee Report") ("The required disclosures include information on fund size, use of leverage, counterparty credit risk exposure, trading and investment positions, valuation policies, types of assets held, and any other information that the SEC, in consultation with the Financial Stability Oversight Council, determines is necessary and appropriate to protect investors or assess systemic risk"). *See also*, Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, SEC Release IA-3308; File No. S7-05-11 (October 31, 2011) ("Form PF Adopting Release") ("Form PF is primarily intended to assist FSOC in its monitoring obligations under the Dodd-Frank Act, but the Commissions may use information collected on Form PF in their regulatory programs, including examinations, investigations and investor protection efforts relating to private fund advisers.").

3. A one-day reporting requirement imposed on private equity advisers for any reason is unprecedented, and reporting of the specific transactions and events deemed by the SEC to be systemically important is wholly unsupported by the SEC.

4. The Proposed Amendments to Section 4 of Form PF impose onerous new reporting requirements thereby forcing "large private fund advisers" to report sensitive information wholly unrelated to monitoring for systemic risk that will be burdensome for regulators to review.

5. The significant added cost and timing burdens of the Proposed Amendments neither provide investors with commensurate benefits nor enhance systemic risk monitoring, and do not increase the types of benefits that private equity and private credit investments historically have provided.

6. As set out in greater detail below, the reduction of the reporting threshold for private equity advisers to $1.5 billion to capture 75% of the U.S. private equity industry based on committed capital is arbitrary because the SEC has not adequately explained why the current, large proportion of private equity advisers who already report under the current threshold is insufficient to monitor systemic risk.

I. The Related Comment Period Is Much Shorter than Comparable SEC Rulemaking Comment Periods and Does Not Provide Adequate Time for Analysis.

The SEC has set a deadline for comments on the Proposed Amendments of March 21, 2022. Given the breadth and volume of the Proposed Amendments as well as other recent, significant SEC proposals to amend rules under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), the 30-day comment period does not provide enough time for us (and others in the industry) to conduct and submit the analyses that the SEC itself has requested and properly recognizes are material to understanding the Proposed Amendments' impacts, "including the potential costs and benefits of the proposed amendments and alternatives thereto, and whether the amendments would promote efficiency, competition, and capital formation."[6] "Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates."[7] Meaningful stakeholder input will be crucial to inform the SEC's deliberations and judgments about whether and how to move forward with this proposal. In the past, for significant rulemakings such as this one, the SEC has provided more reasonable comment periods.

[6] Proposing Release, at pp. 121-122.

[7] Proposing Release, at p. 155.

II. Private Equity Funds and Sponsors Do Not Present Systemic Risk Concerns, and the Newly Requested Information Does Not Relate to Systemic Risk Monitoring or the Protection of Investors.

Form PF is intended to assist the FSOC in its monitoring for systemic risk to the U.S. financial system.[8] Private equity funds and their sponsors, however, do not present and have never presented systemic risk concerns. This lack of systemic risk has been considerably communicated by the AIC to the SEC, including in connection with the SEC's original proposal to adopt Form PF.[9]

Private equity funds and private equity sponsors are not meaningfully interconnected with other financial system participants and have very limited counterparty exposure, and there is no demonstrated or meaningful financial interconnection among a private equity sponsor, its funds or its portfolio companies. Private equity funds pursue long-term investing strategies and typically do not engage in significant asset-based leverage or portfolio gearing. Private equity sponsors and their funds do not guarantee or pledge assets to secure each other's obligations, and portfolio companies owned by a private equity fund typically do not guarantee or pledge assets to secure each other's obligations.[10] If a portfolio company is in financial distress or fails, its distress or failure does not meaningfully impact the private equity fund, its sponsor or any of the other portfolio companies. Moreover, investors in private equity funds have limited or no redemption rights during the life of the fund, which is often a period of 10 years or more, making a sudden "run" on the fund highly unlikely. Private credit funds similarly provide investors with limited redemption rights, and use much less leverage compared to the high leverage of banking institutions. These structures allow private credit funds to minimize maturity mismatches and limit the impact of a liquidity squeeze or asset "fire sale."

The Proposed Amendments impose reporting requirements for commercial events that have no reasonable relation to systemic risk activities and are not indicative of systemic risk. The Proposing Release does not offer any evidence demonstrating how any of the proposed reporting events would reasonably indicate systemic risk, and does not explain or justify how the specific information requested in current reports would be meaningful to further the FSOC's systemic risk monitoring goals. These events, in fact, are not indicative or predictive of systemic risk and are not correlated to systemic risk, and are merely transactions that occur for any

[8] *See*, Form PF Adopting Release ("The SEC is adopting Advisers Act rule 204(b)-1 and Form PF to enable FSOC to obtain data that will facilitate monitoring of systemic risk in U.S. financial markets…The design of Form PF is not intended to reflect a determination as to where systemic risk exists but rather to provide empirical data to FSOC with which it may make a determination about the extent to which the activities of private funds or their advisers pose such risk.").

[9] *See, e.g.*, Comment Letter of The Private Equity Growth Capital Council in connection with Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Release No. IA-3145, File No. S7-05-11 (April 12, 2011); *See also* Letter of The American Investment Council to Chairman Clayton Re: Regulatory Reform for Private Equity (January 31, 2018).

[10] Some private equity funds may enter into a NAV financing facility where they effectively pledge to the lender the right to receive portfolio company distributions, or pledge the common stock of an entity owned by the fund that in turn holds the fund's portfolio companies.

number of reasons unrelated to systemic events. Exactly how the reporting of these specific events and transactions to the SEC and FSOC would further the SEC's mission to protect investors is unclear because each event, and its consequences, will be governed by a particular deal term or contract provision that will have been negotiated by and ultimately agreed to by a private equity adviser's fund investors in advance, thus satisfying the adviser's obligation to disclose and mitigate conflicts of interest. Further, the Proposing Release offers no evidence on what the SEC or the FSOC would do with the information (whether reported on Form PF or another Form) or how the SEC would apply it to advance its mission to protect investors or the FSOC would apply it to advance its purpose to monitor systemic risk. We discuss the specific reporting events below.

A. Adviser-Led Secondary Transactions

Adviser-led secondary transactions have no relation whatsoever to systemic risk and in fact can be a sign of market strength supporting continuing growth potential in a portfolio or specific assets. Moreover, such transactions are commonly welcomed by fund investors, given the liquidity and other potential economic benefits they offer, including the ability to participate in future asset value growth beyond the contracted life of a fund. In short, strategic and business judgments unrelated to systemic risk will drive the decision by fund advisers and fund investors to engage in an adviser-led secondary transaction. The Proposing Release also ignores the conflict mitigation steps that private equity advisers take when considering such transactions, including making thoughtful disclosure and seeking relevant investor consent and/or elections, to demonstrate compliance with their fiduciary obligations (and in keeping with long-standing practices under the Advisers Act), which typically cannot be unilaterally implemented by a private equity adviser without investor action.[11] As a result, the SEC should eliminate the requirement to report adviser-led secondaries on Form PF.

We note that the SEC has also recently proposed Rule 211(h)(2)-2 under the Advisers Act that would require investment advisers to obtain fairness opinions as part of any adviser-led secondary transaction, as well as provide disclosure to fund investors regarding the opinion provider, as a means to protect investors.[12] The Proposed Amendments and proposed Rule 211(h)(2)-2 share the definition of "adviser-led secondary transaction." We fail to see how requiring a private equity adviser to file with the SEC information about an adviser-led secondary transaction within one day of such transaction is necessary to protect investors when that same adviser would be required, as a matter of law, to obtain a fairness opinion and provide conflicts disclosure to investors

[11] These procedures are consistent with, and in some cases are designed to incorporate, guidance issued by the Institutional Limited Partners Association in connection with adviser-led secondary transactions. *See* https://ilpa.org/gp-led-restructurings/.

[12] *See*, Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, SEC Release No. IA-5955; File No. S7-03-22 (Feb. 9, 2022) ("While adviser-led transactions can provide liquidity for investors and secure additional time and capital to maximize the value of fund assets, they also raise certain conflicts of interest…This process would provide an important market check for private fund investors by providing some assurance that the price being offered is based on an underlying valuation that falls within a range of reasonableness").

about the very same transaction. Nevertheless, to the extent the SEC adopts the Proposed Amendments and proposed Rule 211(h)(2)-2, the SEC should ensure that any changes to the definition of "adviser-led secondary transaction" in the final version of Rule 211(h)(2)-2 are reflected in that definition for purposes of Form PF.

B. General Partner and Limited Partner Clawbacks

General partner and limited partner clawbacks are closely linked to other actively negotiated commercial features of a fund such as the ability of the fund to draw down capital when needed (particularly in the later stages of a fund), take reserves, recycle investment proceeds, or otherwise withhold distributions for anticipated liabilities. The exercise of a general partner or limited partner clawback does not necessarily stem from broader market conditions or have any relation to, or be predictive of, systemic risks. As a result, the SEC should eliminate the requirement to report general partner and limited partner clawbacks.

C. General Partner Removal, Investment Period Termination, and Fund Termination

Requiring current reporting upon receipt of notification of a general partner removal, investment period termination or fund termination by fund investors does not take into account the varying commercial reasons wholly unrelated to market circumstances that can trigger these types of investor actions. The Proposing Release also does not acknowledge that rights of investors to take these types of actions can vary significantly across funds in addition to the specific procedures associated with their implementation, making identification of the specific "trigger" point for this reporting obligation unclear and the likelihood of a similar set of circumstances giving rise to this type of event across different funds highly variable, calling into question any indicative value of this information. The SEC has failed to show any connection between these events and systemic risk. As a result, these events should be eliminated from the reporting requirement.

The Proposing Release does not demonstrate specifically how the newly requested information would aid in systemic risk monitoring; rather, it only asserts generally that more information can potentially be a useful tool for identifying systemic risk trends, and thus is inconsistent with Congressional intent in adopting Form PF. The Proposing Release does not indicate how the current Form PF reporting regime has been systematically deficient or insufficient (or helpful or effective) for FSOC to carry out its statutory purpose, and the SEC made no attempt to revisit or improve Form PF's current requirements. Additional information that is merely potentially useful to the SEC as a compliance monitoring tool in administering its examination and enforcement programs is not an appropriate justification for significantly expanding reporting on Form PF and is inconsistent with the primary purpose of Form PF and the intent of Congress and the SEC under the Dodd-Frank Act.[13]

[13] *See*, Senate Committee Report, *supra* note 5; *see also,* Commissioner Hester M. Peirce, Statement on Proposed Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers (Jan. 26, 2022), https://www.sec.gov/news/statement/peirce-form-pf-20220122.

The Proposing Release also does not demonstrate why the newly requested information is needed immediately in order to monitor systemic risk. Certain information would not even be indicative of current systemic risk, if at all. For example, a general partner clawback, which is most commonly done at the end of the life of a fund on a cumulative retrospective basis, could be due to losses suffered many years before the clawback occurs. General partner clawbacks occur for any number of reasons which are not related to market conditions. Some of this information is already subject to monitoring. For example, registered investment advisers are regularly subject to examination and are thus already subject to checks regarding general partner clawbacks.

III. A One-Day Reporting Requirement Imposed on Private Equity Advisers for Any Reason Is Unprecedented, and Reporting of the Specific Transactions and Events Deemed by the SEC to Be Systemically Important Is Wholly Unsupported.

None of the federal securities laws applicable to private equity advisers require reporting of any kind on a one-day basis, and the SEC has not provided adequate support for such a requirement and has not demonstrated how reporting on individual fund events is an effective way to monitor systemic risk or provide additional protections to investors. Even material changes to a private equity adviser's Form ADV are not required with such immediacy.[14]

Even if the SEC concludes that private equity advisers should be required to file additional reporting items in Form PF pursuant to the Proposed Amendments, the AIC respectfully requests that private equity advisers be permitted to file Form PF current reports on an annual basis consistent with the current Form PF filing requirements so as to take into account the significant burdens on private fund sponsors in light of the lack of a reasonable connection to systemic risk monitoring or investor protection.

IV. The Proposed Amendments to Section 4 of Form PF Impose Onerous New Reporting Requirements That Force "Large Private Fund Advisers" to Report Sensitive Information That Is Unrelated to Monitoring for Systemic Risk and Will Be Burdensome for Regulators to Review.

We discuss below the limitations of requiring reporting such information to the SEC and FSOC, as such information bears little resemblance to monitoring systemic risk, and the information is largely already reported (or at least available) through contractual arrangements negotiated by sophisticated and well-represented fund investors for fund investors to review and assess.

- *New Question 68 – Strategies, New Question 70 – Portfolio Company Restructuring, and New Question 71 – Investments in Multiple Tiers of Capital Structure*

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[14] Compare this to money market funds registered under the Investment Company Act of 1940, as amended (the "1940 Act"), which are required to report on Form N-CR certain events within one business day of their occurrence. The reportable events include portfolio company defaults and insolvency, fund net asset value declines of more than one quarter of one percent from its intended stable price of $1.00, and a fund's receipt of financial support from its sponsor or an affiliate. Money market funds, unlike private equity funds, are required by the 1940 Act to offer daily redeemability, maintain a stable net asset value, and invest generally in highly liquid securities, and are generally recognized as being more susceptible to significant redemptions that could have a systemic effect.

The Proposed Amendments require private equity advisers to specify the percentage of their reporting funds deployed capital to specified investment strategy categories. The SEC has provided no evidence for why this information is relevant to systemic risk and has not provided any cost-benefit analysis to support this requirement.

Forcing private equity advisers to report on how they allocate complicated portfolios among overly broad categories will be unduly burdensome, particularly given the tenuous relationship between the information and systemic risk. The Proposed Amendments' requirement to report restructurings or recapitalizations of portfolio companies is misplaced as a systemic risk monitoring tool. Such transactions routinely occur in all economic environments, and many fund agreements are drafted to specifically contemplate such transactions.

Finally, information about investing in multiple tiers of a company's capital structure, while having a bearing on potential conflicts of interest, has no relation to systemic risk concerns. If this question is included in any final amendments, it should be clarified to avoid inadvertently bringing in scope a variety of ordinary course investment structures that are likely not meant to be captured. In particular, it is very common for private equity funds to invest in portfolio companies indirectly through one or more special purpose vehicles, aggregators, blocker vehicles or other holding entities for tax, regulatory, administrative or other reasons. Read broadly, this question could require disclosure of investments in the same exact class of underlying securities through separate investment entities. This would seem to distort the data and entirely miss the spirit of this requirement if these types of common structural elements were inadvertently included in the scope of this question.

- *New Questions 67 and 82 – Controlled Portfolio Companies*

  These new questions require private equity advisers to specify the number of controlled portfolio companies that a reporting private equity fund owns as well as the percentage of the controlled portfolio company aggregate borrowings which are at a floating rate of increase. The SEC has provided no evidence for why this information is relevant to systemic risk, and has not provided any cost-benefit analysis to support this requirement.

These new requirements will generate substantially more information for regulators to analyze (that is unrelated to systemic risk) and may obscure information on Form PF which may actually be relevant to systemic risk. Moreover, SEC resources would need to be expended on this exercise instead of more meaningful investor protection initiatives, including those focusing on retail investors.

V. The Significant Added Cost and Timing Burdens of the Proposed Amendments Are Unreasonable and Do Not Provide Investors with Commensurate Benefits or Protections or Enhance Systemic Risk Monitoring.

The SEC has provided no adequate cost-benefit analysis as to how the new information required by the Proposed Amendments benefits investors commensurately. Private equity advisers' compliance and operational costs will increase as they attempt to operationalize these new reporting requirements, and investors are likely to bear these added costs, a point that is particularly unjust given that Form PF is not intended as an investor protection form (investors do not receive Form PF).

VI. The Reduced Threshold for Reporting Private Equity Advisers Is Arbitrary.

The SEC's reason for choosing 75% of committed capital as a meaningful threshold for purposes of FSOC's systemic risk-monitoring function is unclear. Moreover, the Proposing Release does not make it clear why (or whether) the significant proportion of private equity advisers that are reporting under the current $2 billion threshold has become insufficient to monitor systemic risk. The initial $2 billion threshold was established so as to include a relatively small number of private equity advisers while representing a substantial portion of assets under management.[15]

The SEC currently collects information on 67% of the private equity market using the $2 billion threshold, yet has not provided adequate support for why a 75% threshold is appropriate or why information on 67% of the private equity fund industry is inadequate, particularly in the absence of any evidence that private equity funds pose systemic risk. Indeed, the threshold should be increased, not decreased, in recognition of the very low systemic risk concerns that private funds and private fund sponsors present, as the AIC has indicated to the SEC on numerous, previous occasions.

The AIC appreciates the SEC's wish to continue enhancing the monitoring of systemic risk. However, the addition of new reporting requirements, including the one-business-day timeframe set forth in the Proposed Amendments, presents significant compliance and operational challenges for private fund sponsors, with no added benefit to investors and no relation to the intent of Form PF in monitoring systemic risk. As a result, the Proposed Amendments are not required and should not be adopted. At the very least, the SEC must provide adequate evidence that the Proposed Amendments bear some reasonable resemblance to systemic risk and provide meaningful cost-benefit analyses to support the increased burdens inherent in adopting the compliance infrastructure necessary for such reporting.

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[15] *See*, "Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF," Release No. IA-3308; File No. S7-05-11 (November 16, 2011).

The AIC appreciates the opportunity to comment on the Proposed Amendments and would be pleased to answer any questions that you might have concerning our comments.

Respectfully submitted,

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American Investment Council