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Via Electronic Filing

Re: Proposed Commission Amendments to Form PF; Request for Comment on Enhancing Current Reporting and Amending Reporting Requirements for Private Equity Advisers; Rel. No. IA- 5950; File No. S7-01-22

To whom it may concern:

Ropes & Gray LLP appreciates the opportunity to provide these comments to the Commission on the above-referenced matters.

Our firm represents the interests of many asset management firms that are registered with the Commission as investment advisers, including a wide range and significant number of private equity, hedge, real estate, credit and other private fund advisers. The proposed amendments to Form PF relate to, among other things, increased reporting obligations upon the occurrence of certain events for private equity advisers and hedge fund advisers (each as defined in Form PF) and thus would directly apply to many of our private fund adviser clients. Given this fact, we are writing to provide our views on aspects of the proposed amendments to Form PF. The comments expressed herein reflect the views of the undersigned as practitioners with many years of experience in providing legal counsel to a wide variety of asset management firms. These comments and opinions are not intended to represent the views of our clients.

1. The Commission Should Make Certain Revisions and Clarifications to the Types of Events Requiring Reporting in Form PF.

The proposed Form PF amendments introduce a new Section 6 that requires advisers to private equity funds (irrespective of a fund's size) to file a report with the Commission within one business day upon the occurrence of certain reporting events.[1] The Commission has stated that certain significant events that occur with respect to a private equity fund or a private equity fund adviser may signal to the Commission or FSOC a heightened risk of investor harm as well as potential risks to the broader financial markets. In the Form PF proposed amendments proposing release, the Commission states that the requirement of private equity advisers to report on Form PF only on an annual basis can lead to meaningful delays in reporting significant events to the Commission and certain events could have negative consequences for a fund's investors and other financial market participants.[2]

[1] *See* Proposed Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Advisers, 84 Fed. Reg. 9106, 9108 (proposed Jan 26, 2022) ("Proposed Form PF Amendments") (to be codified at 17 C.F.R. Pts. 275, 279).
[2] *See Id*. at 9131.

However, we would respectfully suggest that the proposed amendments to Form PF could be improved by removing or clarifying certain of the reporting events that occur in the ordinary course of a private equity adviser's business and do not suggest or give rise to concerns of market stress or risk to investors. We have highlighted two of these instances below.

a. GP-Led Secondary Transactions Should Not Be Reporting Events on Section 6 of Form PF.

The Proposed Form PF Amendments require an adviser to private equity funds to file a report with the Commission within one business day upon the execution of an "adviser-led secondary transaction" with respect to a fund they manage.[3] An "adviser-led secondary transaction" is defined as any transaction initiated by the adviser or any of its related persons that offers private fund investors the choice to (1) sell all or a portion of their interests in the private fund; or (2) convert or exchange all or a portion of their interest in the private fund for interests in another vehicle advised by the adviser or any of its related persons.[4]

Adviser-led secondary transactions are commonly done in the ordinary course of a private equity fund adviser's business, and such transactions are not generally indicative of broader market risks. In fact, adviser-led secondary transactions are becoming an increasingly common way for a private equity sponsor to provide a liquidity option for its investors, particularly with respect to successful investments held by a private equity fund that is nearing the end of its term. Such transactions are not, as the Commission suggests, an indication of a private fund adviser's inability to sell a company.[5] It is our experience that private equity sponsors typically engage in adviser-led secondary transactions with respect to investments the adviser believes have the potential for future growth, versus an investment with poorer prospects. In this way, investors are provided with the choice of (i) obtaining liquidity with respect to their investment, and (ii) continuing to stay invested to enjoy any further growth.

Adviser-led secondary transactions rely on obtaining third party capital, which is effectively used to "cash out" investors that choose to obtain liquidity rather than rolling into a continuation vehicle. Those third parties would not invest indirectly in private companies or other investment assets that were failing or otherwise expected to have poor returns.

While the Commission accurately notes that an adviser-led secondary transaction presents fund-level conflicts of interest, such as those that arise because the adviser (or its affiliates) are on both sides of the transaction and may have differing economic incentives from the investors, the presence of such conflicts do not, on their own, suggest deteriorating market

[3] *See Id*. at 9117.
[4] *See* Form PF Glossary (proposed definition of "adviser-led secondary transaction").
[5] *See* Proposed Form PF Amendments at 9117.

conditions or give rise to the systemic risk Form PF is seeking to identify and address.[6] While the Commission notes that reporting on an adviser-led secondary transaction could alert the Commission to specific investor protection issues at the fund, such issues are not "urgent" as the transaction would have already occurred and can be (and have been) identified through the Commission's power of examination, which is the more appropriate method of investor protection. To the extent the Commission wishes to receive periodic reporting of adviser-led secondary transactions, it could require such reporting to be included as part of the regular annual reporting of large private equity advisers on Form PF.

Therefore, we would respectfully recommend that the Commission remove the requirement that private equity advisers report on Section 6 of Form PF with respect to adviser-led secondary transactions.

b. The Definition of a "Limited Partner Clawback" Should be Clarified to Exclude Amounts Recalled or Recycled to Make New or Follow-On Investments Consistent with a Fund's Governing Documents.

The Proposed Form PF Amendments would also require private equity fund advisers to report on Form PF upon the implementation of a limited partner clawback in excess of an aggregate amount equal to 10% of a fund's aggregate capital commitments.[7] The Proposed Form PF Amendments defines a "limited partner clawback" as "an obligation of a fund's investors to return all or any portion of a distribution made by the fund to satisfy a liability, obligation or expense of the fund pursuant to the fund's governing agreements."[8]

Private equity sponsors routinely negotiate for the right to, and in fact do, call from investors amounts that have been previously distributed, in order for the applicable private equity fund to make a new investment or a follow-on investment to a currently held investment (such practice is known as "recycling"). Absent clarification from the Commission, the practice of recycling could under certain circumstances require reporting on Form PF. For instance, in the event a fund enters into a commitment or contract to make an investment prior to calling the capital from an investor, any amounts recalled by the fund from investors would technically be for the purpose of satisfying an obligation of the fund and would thus be covered under the definition of "limited partner clawback" and would be reportable on Form PF.

We would respectfully note that this practice of recycling is extremely common in the private equity industry. Private equity fund sponsors and investors routinely negotiate the caps and limitations with respect to recycling capital. This practice does not implicate the same

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[6] *See* Form PF Proposed Amendments at 9117.
[7] *Id*. at 9118.
[8] *See* Form PF Glossary (proposed definition of "limited partner clawback").

concerns as other scenarios in which a limited partner clawback would be implemented. A fund recycling capital to make new investments would not indicate that the fund is planning for a material event (e.g., substantial litigation or legal judgment) or is under stress. Furthermore, this practice does not have any significant negative impact on investors in the fund (who would be well-informed of the recycling ability and related limitations at the time they commit capital to the fund).

Therefore, we would respectfully suggest that Commission clarify that the calling of capital for the purposes of making a new investment or follow-on investment in a manner consistent with any limitations set forth in a fund's governing document be excluded from the definition of "limited partner clawback," and that therefore any such capital calls would not be reportable events in Section 6 of Form PF.

2. The Commission Should Make Certain Exemptions from Section 5 Reporting for Hedge Fund Advisers that Do Not Calculate their Funds' Net Asset Value on a Daily Basis.

Newly proposed Section 5 of Form PF requires large hedge fund advisers to file current reports within one business day of certain events occurring. However, these reporting requirements will be nearly impossible for certain large hedge fund advisers to fulfill – namely, advisers to private funds that share few of the characteristics of funds commonly referred to as "hedge funds", but which are nevertheless classified as hedge funds solely due to the definition of "hedge fund" in Form PF. For example, certain private equity funds may be permitted to engage in derivatives or borrowing in excess of the limits in the hedge fund definition of Form PF. Whether or not they actually engage in such activities, such funds are classified as "hedge funds" under the Form. Similarly, some private funds might allow redemptions, but such redemptions are permitted once per year (or even less frequently) – for example, permanent capital private equity funds. Because they allow redemptions at all, they are classified as hedge funds for purposes of Form PF. However, these funds do not engage in most (if not all) of the activities contemplated by Section 5, and, in particular, typically calculate their net asset value ("NAV") once each quarter (or even less frequently). As a result, they will have no way of knowing whether they have triggered the requirements of Section 5. The potential disconnect between the definition of "hedge fund" in Form PF and the reporting requirements contemplated by Section 5 may impact a variety of private funds investing in illiquid assets, including, among others, private equity funds, open-end real estate funds and certain credit funds. Consequently, we recommend that the SEC exempt hedge funds that do not calculate their NAV on a daily basis in the ordinary course of their business from the requirements of Section 5.[9]

[9] As an aside, we would add that these issues do not arise from the proposed changes to Form PF, but rather arise from a definition of "hedge fund" that is not well tailored to the operations of many funds. To date, many private funds that are categorized as "hedge funds" have responded to Section 2 questions as best they can (with many creative interpretations, N/A responses and Item 4 explanations), while not responding to the items in Form PF that would provide the SEC with much more relevant information (e.g., Section 4). We would urge the SEC to take this opportunity to reconsider the definition of hedge fund in Form PF (and the corresponding definition in Form ADV), and allow investment advisers to

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Again, we thank you for the opportunity to provide these comments. We stand ready to provide additional comments or to answer any questions you may have.

Very truly yours,

Jason Brown

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determine the type of fund for purposes of Form ADV and Form PF (subject to a “holding out” requirement, similar to that in Rule 203(l)-1(a)(1) for venture capital funds).