NYPPEX Holdings, LLC
500 West Putnam Avenue
Suite 400
Greenwich, CT 06830
[redacted]
www.nyppex.com

NYPPEX PRIVATE MARKETS

Laurence G. Allen
Managing Member

[redacted]

February 25, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. S7-03-22
Comments on Proposed New Rules for Private Funds

Dear Ms. Countryman:

We appreciate the opportunity to submit comments on the proposed new rules for private funds under the Investment Advisors Act of 1940, as amended (the "Advisors Act"). We applaud the efforts of the Commission and its Staff to update the rules to reflect changes in the private funds industry since the adoption of the original rules.

Based on our recent survey to approximately 2,300 limited partners in private equity funds and private fund attorneys in connection with the proposed new rules, below are our comments to certain proposals that we believe are in the best interests of investors and advisors to private funds.

1. **Advisor-Led Secondaries: Fairness Opinions**

Proposed Rule 211(h)(2)-2

a) Exemption for Funds under $250 million with Private Wealth LPs.

We recommend that a fairness opinion <u>only be required</u> for advisor-led secondary transactions (also referred to as GP-led secondary transactions) <u>above $250 million</u> in gross cash proceeds, as the cost for such opinions would be prohibitive for smaller feeder funds with private wealth limited partners ("LPs").

Therefore, an exemption should be provided for smaller private funds whose limited partners are primarily private wealth clients.

b) Fairness Opinions to include Terms as well as Price

We recommend that fairness opinions include the "terms" as well as the "price" of proposed advisor-led secondary transactions, as these deals are generally more complex and difficult for sophisticated investors to understand.

Typically, terms are included in fairness opinions. However, we recommend that terms be stated explicitly.

c) Exemption for Competitive Bidding Processes

We recommend that a fairness opinion not be required if the secondary buyers have been selected through a competitive bidding process with 3 or more bidders.

Therefore, an exemption should be provided for a competitive sale process among prospective secondary buyers.

2. Advisors Should Not be Bound by State Securities Regulations that Conflict with Federal Securities Regulations

Proposed Rule on Fiduciary and Conflicts Responsibilities

a) In general, we agree with the proposed new rule that advisors to private funds ("General Partners" or "Advisors") have a fiduciary and conflict of interest duty to follow both state securities regulations and federal securities regulations, provided however that a state's securities regulation does not conflict with the federal securities regulation.

For example, we believe that the Office of the New York Attorney General is under the mistaken view that private fund investments in affiliates are "self-dealing" and "fraudulent" under the New York State Martin Act (which has an extraordinarily low threshold because it does not require *scienter* – a showing of knowledge and specific intent to deceive – as is required to establish fraud under common law, and

more specifically, to support a Rule 10b-5 securities fraud claim under federal law). Moreover, pursuant to federal securities regulations, private funds have been permitted to make investments in affiliates for over18 years.

For reference, in 2003, the SEC revised certain affiliate investment rules for advisors, namely SEC Rules 17a-6 and 17d-1, as stated in "Transactions of Investment Companies with Portfolio and Sub-Advisor Affiliates," finalized on February 24, 2003. The purpose of these revisions was to expand the current exemptions for investment companies or funds to engage in transactions with "portfolio affiliates," companies that are affiliated with the fund solely as a result of the fund (or an affiliated fund) controlling them or owning more than five percent of their voting securities.

Since 2003, leading advisors to private funds such as Goldman Sachs, Credit Suisse and Fortress Group have made investments in affiliates in certain of their private equity funds. Further, leading law firms such as Simpson Thacher & Bartlett, draft provisions in private funds' limited partnership agreements for their advisors to make investments in affiliates.

Accordingly, we recommend an exemption be provided that if state and federal securities regulations are in conflict, that the federal securities regulations are to be followed by private funds.

3. Consideration of Impact on the U.S. Economy

a) SEC's New Rules Estimated to Reduce Secondary Liquidity and Capital Formation by 10-12% Annually

We estimate that the SEC's new rules for private funds will result in a 10-12% reduction of annual secondary transaction volume and capital investment in private companies in the United States. This will create a drag on economic growth in the United States.

Our view is based on the following unintended consequences from the new rules:

1. Higher Professional Fees to be Passed-Thru to Limited Partners

Advisors to private funds will be forced to pay higher "professional fees" for legal advice and regulatory compliance to ensure compliance with the new rules. The fund's higher professional fees will be charged to their investors, which will be in addition to the advisor's fees and carried interest.

This will occur at a time when investors seek lower fees and expenses from their investments in private funds due to expectations for lower investment returns.

2. Fewer Investors for Private Funds

We estimate that approximately 15% of prospective investors would no longer make allocations to private funds due to (i) increased regulatory involvement and therefore investment risk, (ii) higher professional fees as stated in (1) above and (iii) greater holding period uncertainty due to contracting valuations and reduced liquidity as stated in (3) below.

3. Greater Holding Period Risk for Investors in Private Funds

In general, we believe valuation multiples for companies are in the process of contracting due to investors' expectations for higher inflation, taxes and interest rates in the United States. Historically, valuation multiples for U.S. stock markets expand and contract over economic cycles depending on expectations for the direction of these macro indicators.

We believe the confluence of the trends in 1, 2 and 3 will result in (i) greater exit risk for private fund investments, and therefore a more cautious approach to capital investment by private funds, (ii) term extension risk for private funds, typically from 10 to 15 years or more and (iii) greater holding period risk for investors in private funds.

Recommendation: Encourage Investor Access to Secondary Market Liquidity

We recommend that the SEC offset these adverse effects by encouraging private funds to (i) appoint independent transfer administrators such as NYPPEX and (ii) create secondary transfer policies, to enable investors in private funds to more easily access liquidity through transfers of their interests in the secondary markets. Enabling

investors to access secondary market liquidity does not interfere with the activities of advisors to private funds.

We appreciate the opportunity to comment on the proposed new rules for private funds under the Advisors Act. If the Commission or its Staff have any questions or wish to discuss the matters mentioned in this letter, please contact Jeremy Kim, General Counsel at [redacted] or [redacted] or myself direct at [redacted] or [redacted].

Respectfully submitted,

Laurence G. Allen
Managing Member

Cc: Jeremy Kim, General Counsel

About NYPPEX Holdings

NYPPEX operates a global private marketplace that provides secondary market liquidity and data to qualified investors in alternative funds such as buyout, venture, real estate, infrastructure and natural resources and also in private companies. We believe our specialized services are important as we provide the opportunity for investors to manage risk in alternative assets as well as help facilitate private capital formation and jobs in the United States.

Since 1999, NYPPEX has helped pioneer the development of a secondary private equity market worldwide for both qualified private clients and institutional investors in alternative funds and private companies. Currently, we provide liquidity to investors in 19 alternative fund strategies (i.e. buyout, venture, real estate, infrastructure, private debt and natural resources), which we believe substantially contributes to economic growth and employment in the United States. To date, NYPPEX has executed and settled over 1,625 private equity transactions which have provided liquidity or capital to qualified investors, private companies and alternative funds. We

believe our number of private equity transactions are the largest of any secondary private equity intermediary worldwide.

Prior to NYPPEX, qualified private clients were typically unable to access liquidity for their investments in alternative funds due to a lack of standardization, as well as excessive legal and related costs.

Since 2004, the NYPPEX QMS™ has been formerly recognized by the U.S. Internal Revenue Service as a Qualified Matching Service for private partnerships though a private letter ruling under Internal Revenue Code §1.7704.

In 2014, the NYPPEX (Shanghai) Investment Consulting Co. Ltd. was among the first foreign financial firms approved as members into the Shanghai Free Trade Zone (FTZ), along with Oaktree Capital, Citadel and Man Group. Among its features, the Shanghai FTZ permits yuan convertibility and foreign currency exchange, and a tax-free period of 10 years for the businesses in the area.

Its private securities are privately offered to qualified investors through NYPPEX, LLC and only in jurisdictions were permitted. NYPPEX is regulated in the U.S. by the SEC and FINRA. Member FINRA, SPIC.

.