Albourne Group response to SEC Private Fund Proposals

April 2022

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25 April 2022

For the Attention of: Ms. Vanessa A. Countryman
Secretary

U.S. Securities and Exchange Commission
100 F. Street NE
Washington, DC 20549-1090

Submitted via email to rule-comments@sec.gov
In relation to: File Number S7-03-22,

RE: Albourne Group comments on SEC Private Fund Adviser Rule Proposals; file number S7-03-22

Dear Ms. Countryman,

As a brief introduction, the Albourne Group ("Albourne") is one of the largest alternatives advisory firms, with 550+ employees, including 370+ analysts, in 11 offices around the world. The firm was established in London in March 1994 as an independently-owned advisor to institutional investors of alternative assets such as private funds.

Albourne's mission is to empower our clients to be the best investors that they can be, by providing advisory, research, implementation, and fintech services. With over 300 clients including leading public and corporate pension plans, endowments, foundations, family offices, sovereign wealth funds and financial intermediaries, Albourne believes we can provide some insight and perspective on the proposed rules for private fund given our role advising clients who have over $650bn invested in alternative assets.

The private funds proposal includes sweeping changes that could materially impact the private funds industry. Given our role within the industry, Albourne understands the concerns faced by investors as well as the challenges fund advisers will face in the implementation of the proposals. The spirit of the proposals seeks to address many activities that have negatively impacted investors in the past. We note that this could be due to inherent conflicts of the GP, a lack of transparency to investors, or other factors.

Albourne is generally supportive of the proposals overall and believes that they will help achieve greater transparency in the industry but also notes that certain proposals and options outlined by the SEC could have unintended consequences.

This document responds to specific questions in five key areas where Albourne wishes to express its views:

1. Quarterly Statements
2. Mandatory Private Fund Adviser Audits
3. Adviser-Led Secondaries
4. Prohibited Activities
5. Preferential Treatment

Sincerely,

John Claisse, CEO of Albourne Group

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1. Quarterly Statements

Should we, as proposed, require advisers to private funds to prepare a quarterly statement providing standardized disclosures regarding the cost of investing in the private fund and the private fund's performance and distribute the quarterly statement to the fund's investors? Should we instead require advisers to provide investors with personalized information that takes into account the investors' individual ownership stake in the fund in addition to, or in lieu of, a statement covering the private fund? If so, what information should be included in the personalized disclosure? For example, should the statement reflect specific fee arrangements, including any offsets or waivers applicable only to the investors receiving the statement? Do advisers currently provide personalized fee, expense, and performance disclosures? If so, what other types of information do advisers or funds typically include? Do they automate such disclosures? How expensive and complex would it be for advisers to create and deliver personalized disclosures? How useful would it be for investors to receive personalized disclosures?

Our view is that advisers to private funds should prepare a quarterly statement disclosing all fees, expenses, offsets and performance at the underlying client level and not just at the fund level. This personalized statement could go a long way in achieving the SEC's aims of improving fee and expense transparency for investors.

We would encourage the SEC to work with the Institutional Limited Partners Association ("ILPA") and embrace their reporting template as the standard framework that private funds should complete in order to provide the various desired data points to investors. By standardizing the reporting template, this will bring down the costs of producing reporting of this nature in the long run and provide investors with consistent data which can be scrutinized and compared on an "apples to apples" basis. The ILPA template is established within the industry with a fair number of funds and administrators producing the template and would eliminate the need to produce a completely new template.

In addition, Albourne would encourage the SEC to consider using the Standard Total Expense Ratio ("STER") developed by the Standards Board for Alternative Investments ("SBAI") as a means to not only provide investors with the underlying breakdown of each data point (i.e., Management Fee and Expenses incurred by investors that are not included in the Management Fee) required to perform the ratio, but to give investors a consistent and accurate methodology to be able to compare this ratio across all their investments.

Would investors find data regarding the private fund's fees, expenses, and performance useful given that certain investors may have different economic arrangements with the adviser, such as fee breaks or expense caps? Should we require advisers to disclose in the quarterly statement whether investors are subject to different economic arrangements, whether documented in side letters or other written agreements or, to the extent applicable, as a result of different class terms? If so, should we require advisers to list the rates or otherwise show a range?

We are supportive of the idea that investors should have greater transparency in the different rates and expense caps of a private fund they are invested in as this could give investors a better understanding of how other LPs in a specific fund are being treated. This transparency is important to help investors understand the economics of not only the value of their investment (i.e., how much they pay for their commitment in comparison to their peers) but also gives a clear idea to all investors about how the fee load is being shared. This knowledge will in turn allow for greater scrutiny and discussion on the appropriateness of an investors share of the running costs of a fund in comparison to their actual commitment.

Should the quarterly statement rule apply to registered advisers to private funds as proposed or should it apply to all advisers to private funds? Should it apply to exempt reporting advisers? Should

the rule include any exceptions for categories of advisers? If so, what conditions should apply to such an exception?

We believe the rule should apply to registered advisers as suggested. Some Investors take comfort when investing in a fund where its advisor is registered with the SEC; that comfort should come with an additional standard of reporting and transparency.

Should we require advisers to disclose all compensation and fund expenses as proposed? Do commenters agree with the scope of the proposal? Why or why not?

Albourne agrees with the proposal to disclose all compensation and fund expenses. We have observed investors from all over the world coming under increasing pressure to know and disclose their fees and expenses; this proposal could help investors fulfil their obligations to disclose the fees and expenses paid on their private fund investments.

Instead of the proposed approach, should we prescribe a template for the fund table? Would the increased comparability of a template be useful to investors? Would a template be flexible enough to accommodate changes in the types of fees and expenses as well as the types of offsets, rebates, or waivers used by private fund advisers? Would a template necessitate repeated updating as the industry evolves?

As previously mentioned, Albourne encourages the SEC to have private funds use the ILPA reporting template to meet the proposed rules' disclosure requirement. This is the case because, from Albourne's work to collect and gather sufficient information from private funds to provide reporting to investors, Albourne believes that a significant number of private fund advisers are already familiar with the template and may have already factored in the costs involved in preparing the IPLA template for their investors. This is advantageous not only from a standardization of reporting point of view but could minimize costs for private fund advisors to comply with the proposed disclosure obligations.

We believe the template – and updates to the template – can be handled and maintained by ILPA in consultation with the industry.

Do commenters agree with the scope of the proposed definition of "performance-based compensation"? Should we specify the types of compensation that should be included in the definition? For example, should the definition specify that the term includes carried interest, incentive fees, incentive allocations, performance fees, or profit allocations?

Albourne supports specifying that the definition of "performance-based compensation" includes carried interest, incentive fees, incentive allocations, performance fees, or profit allocations. This approach may help to prevent loopholes in the reporting requirements.

Should we tailor the disclosure requirements based on fund type? For example, should the requirements or format for hedge funds differ from the requirements and format for private equity funds? Are there unique fees or expenses for types of funds that advisers should be required to disclose or otherwise list as a separate line item? If so, how should we define these types of funds for these purposes? For example, should we use the definitions of such terms used on Form ADV?

In Albourne's view, bifurcating the disclosure requirements between liquid and illiquid funds makes sense. Reporting for illiquid structures requires data points such as gross management fees before any rebates/offsets are applied; these same data points are not required to report fees and expenses for liquid investment vehicles.

Would providing cross references, as proposed, to the relevant sections of the private fund's organizational and offering documents be helpful for investors? Would it permit investors to "cross check" or evaluate the adviser's calculations? Are there other alternatives that would achieve our objectives?

We believe including cross-references to fund documents would add considerable value to the review of fee disclosure statements. Whilst it may not necessarily help in a quantitative check on the accuracy of any fees, the proposed cross-references may provide a qualitative check that the correct rates have been used to calculate fees and expenses as well as provide high level comfort to investors.

Should the proposed rule require advisers to include performance information in investor quarterly statements? Why or why not?

Yes. We believe that, in order to understand the effect of fees and expenses on an investment, the performance of a fund should be taken into account and therefore included in the quarterly statement.

This will allow investors to scrutinize how much they have paid in relation to a fund's gain or losses and in turn determine if the cost of investing in that particular fund is acceptable to their own individual investment policy: for example, if an investor is not satisfied by the returns of their investment in comparison to the fees they have paid, they will have the knowledge to decide as to whether or not to reinvest with the adviser in future or redeem their investment if possible.

Should the proposed rule require advisers to determine whether a private fund is a liquid or illiquid fund and provide performance metrics based on that determination? Alternatively, should the rule eliminate the definitions and give advisers discretion to provide the proposed performance metrics that they believe most accurately portray the fund's returns?

We would support the determination of whether or not a fund is liquid or illiquid and subsequent performance metrics being available on that basis. We feel this is important as it would give greater clarity to investors as in certain hybrid structures, the fund structure is not always clear.

Furthermore, we would like to see the adoption of standardized performance metrics to facilitate consistency in how funds report these metrics.

Should we require advisers to prepare and distribute statements to clients at least quarterly, or should we prescribe a different frequency? For example, should we require monthly, semi-annual, or annual statements? Should we mandate the same delivery frequency for all proposed statements under the rule? How would each of these approaches affect comparability and effectiveness of the information in those statements? Would a quarterly reporting obligation require advisers to value the fund's investments more frequently than advisers currently do?

Albourne believes that the frequency of statements should be bifurcated depending on if a fund is liquid or illiquid.

For liquid funds, Albourne believes reporting should be prepared on a monthly basis, which we feel is reasonable, and, based on our observations, generally conforms to the current practice of most liquid private funds. Albourne also believes that the disclosure statements should be available to investors 45 days after the month end.

For illiquid funds, Albourne believes that quarterly reporting is appropriate with statements being made available 45 days after quarter end, except during the period following an annual audit. In this event, Albourne believes the time for delivery of statements should be extended to 90-120 days after the quarter end depending

on the complexity of the fund; i.e., fund of funds or secondaries should be granted additional time to provide statements after the audit period as the sheer amount of time to audit their underlying investments and the costs involved in doing so within a 45 day period do not justify receiving the statement in a more timely manner.

We considered requiring the proposed quarterly statement disclosures to be submitted using a structured, machine-readable data language. Such format may facilitate comparisons of quarterly statement disclosures across advisers and periods. Should we require advisers to provide quarterly statements in a machine-readable data language, such as Inline eXtensible Business Reporting Language ("Inline XBRL")? Why or why not? Would such a requirement make the quarterly statements, and the information included therein, easier for investors to analyze? For example, would it be useful for investors to download quarterly statement information directly into spreadsheets, particularly for institutional investors that may have a significant number of private fund investments? Would a machine-readable data language impose undue additional costs and burdens on advisers? Please provide support for your response, including, where available, cost data.

We would be supportive of statements being provided in a machine-readable format, but we have no preference on the specific language which could be used.

Whilst we recognize this would add an additional cost burden to all stakeholders, as technology improves, so should efficiencies in how data is delivered to investors and how they are in turn able to process their data.

2. Mandatory Private Fund Adviser Audits

Would the proposed audit rule provide appropriate protection for investors? If not, please describe what, if any, modifications would improve investor protection.

It is Albourne's view that overall, the proposed audit rule could provide appropriate protection for investors. With respect to the proposal requiring an annual audit of private funds, investors may be able to gain additional comfort on the objectivity of the adviser's valuation and whether fees charged are appropriate. There may be an inherent conflict of interest when valuing a private market's portfolio due to the subjectivity and illiquidity of fund assets. Thus, there may be a significant incentive for private fund advisers to boost the value of these assets and collect higher fees from investors, who are unable to properly track the objectivity of valuations on a year-to-year basis. Having an independent third party evaluate whether fair value estimates and related disclosures are reasonable and in accordance with the financial reporting framework on an annual basis should increase investor protection, in Albourne's view. When contrasting the proposed rule to the custody rule, Albourne notes that the surprise examination element in the custody rule appears quite limited in scope, where the focus is primarily on whether the Adviser maintains cash and securities positions with a qualified custodian and maintains records of these positions. The surprise examination element appears to ignore valuation, which could be of material value to investors depending on fee structure or other factors.

Do commenters agree that the similarities of the audit requirements for the custody rule and for the proposed rule would ease the compliance burdens of advisers that would be required to comply with both? Should the rule provide that compliance with one rule would satisfy the requirements of the other, given the similarities of the two rules? Why or why not?

Although Albourne believes that the audit requirements for the custody rule and the proposed rule are similar, we do not believe these similarities would necessarily ease the compliance burden of complying with both for Advisers.

For Advisers that must continue to follow the custody rule in addition to the proposed rule because they have custody of non-private fund client funds and securities, this may result in additional costs. The cost of an annual audit tends to be more expensive than a surprise examination given the increase in scope. Therefore, even for Advisers that no longer have to conduct a surprise examination, there would likely be only partial cost offset given the cost difference between surprise examinations and annual audits. This is further exacerbated by the fact that the cost of the required audit would likely be greater for a PCAOB-registered and inspected auditor. An Adviser who satisfies the audit requirement of the custody rule with a non-registered and inspected PCAOB auditor may incur additional costs if they need to also comply with the proposed rule.

Further, the proposed rules do not provide an exception from the audit requirement for advisory fee reduction or where the adviser has custody solely because a related entity has custody of a client's funds or investments. Additionally, even if registered Advisers do not control or are not under common control with a private fund that they advise, they still need to take reasonable steps for the private fund to undergo an annual audit. These provisions do not exist in the custody rule and may result in additional fees for the Adviser as applicable.

Albourne does not believe that compliance with one rule would satisfy the requirements of the other. Although they are both similar, abiding by the custody rule and forgoing the annual audit in exchange for a surprise examination may not fulfill the requirements of the proposed rule. Solely complying with the custody rule may increase the risk that fund assets are misstated or inflated, as the surprise examination is relatively limited in scope. Given that one of the driving forces behind the proposed rule is to provide investors with transparency and comfort with respect to a private fund's valuation, compliance with the custody rule may not satisfy the requirements of the proposed rule. Finally, with respect to the distribution of audited financial statements, an

Adviser complying with both rules would need to comply with the 120 days deadline as mentioned in the custody rule, rather than "promptly" as mentioned in the proposed rule.

Should the rule require private funds to prepare audited financial statements in accordance with generally accepted accounting principles, as proposed? Should the rule include any additional requirements regarding the preparation of financial statements? If so, what requirements, and why?

In Albourne's view, the rule should require all registered private funds to prepare audited financial statements in accordance with US GAAP, as proposed. Not only could this approach help facilitate reporting consistency among private funds, but it may also increase transparency and help elicit certain disclosures so that they are not omitted. For example, International Financial Reporting Standards ("IFRS") does not provide specific guidance for registered investment companies or private funds, whereas US GAAP does provide specific guidance through the FASB's Accounting Standards Codification (ASC) 946 Financial Services-Investment Companies (Topic 946). Further, IFRS does not require a Schedule of Investments to be disclosed, nor financial highlights such as total return or IRR. This makes it harder for investors to determine investment holdings, investment concentration, investments in Foreign Corrupt Practices Act ("FCPA")-sensitive regions, and key return information. Albourne does not believe that the rule should require unregistered private funds to conform to US GAAP due to an increased administrative burden and cost on smaller funds who are located outside the US. Although conforming to or reconciling to US GAAP may lead to increased consistency among funds, for unregistered funds with limited resources, the costs of reconciling to US GAAP may be greater than the benefits. Further, certain private funds that use IFRS accounting standards may provide a better depiction of the business's operations than US GAAP. In this case, providing a reconciliation to US GAAP may not provide many tangible benefits to investors. Regardless, investors should be able to agree to a separate form of generally accepted accounting principles if they so choose.

Albourne does not believe that the rule should include any additional requirements regarding the preparation of audited financial statements.

Do commenters agree that the availability of accountants to perform services for purposes of the proposed audit rule is sufficient and that even advisers in foreign jurisdictions (or with private fund clients in foreign jurisdictions) would not have significant difficulty in finding a local accountant that is eligible to perform an audit under the proposed rule? Do advisers have reasonable access to independent public accountants that are registered with, and subject to inspection by, the PCAOB in the foreign jurisdictions in which they operate? If not, how should the rule address this issue?

Given that approximately 90% of private funds are currently audited according to the SEC, Albourne does not believe that there would be a significant spike in demand for audit services. However, given that some Advisers engage the services of smaller, regional auditors who may not be currently registered by the PCAOB, those Advisers would need to switch to auditors who do to abide by the rule. This could lead to higher fees given that a PCAOB-registered and inspected auditor may cost more. Further, PCAOB-registered auditors may charge higher fees due to an increase in demand for their services.

Given that the audit firm would need to be headquartered or have a foreign office in a jurisdiction where the PCAOB is entitled to inspect, there are concerns regarding whether there would be enough PCAOB registered auditors in foreign jurisdictions. As of 2021, the PCAOB has conducted inspections of 54 non-US jurisdictions[1]. There is therefore a concern that advisers in foreign jurisdictions that are outside these 54 countries would have difficulty finding a local accountant that is able to perform an audit under the proposed rule. Further,

[1] PCAOB. *Where the PCAOB has Conducted Oversight Outside the U.S. (current as of 31 December 2021).* Link (31 December 2021).

because of the position taken by the local authorities, the PCAOB is currently prevented from inspecting the US-related audit work of PCAOB-registered firms in Hong Kong to the extent their audit clients have operations in Mainland China.

The biggest current concern relates to smaller, regional auditors who may not be in a jurisdiction where the PCAOB is entitled to inspect.

Should the rule apply to all advisers to private funds, rather than to just advisers to private funds that are registered or are required to be registered? Should it apply to exempt reporting advisers? Why or why not?

In Albourne's view, and for the reasons discussed below, the rule should apply to all advisers of private funds, irrespective of the fact that they are registered or unregistered. Further, the rule should also apply to exempt reporting advisers.

According to the SEC, approximately 90% of funds are currently audited in connection with the fund adviser's alternative compliance under the custody rule. Further, many unregistered funds already conduct an annual audit due to market best practice and the current state of the industry. As a result, Albourne believes that requiring 100% of private funds to be audited annually is a reasonable rule that would help hold funds accountable. Annual audits can provide a number of benefits to investors, such as increased transparency into a fund's operations, protection for the fund and its investors from the misappropriation of fund assets, and a check on valuation of private fund assets. Although an annual audit can cost approximately $60,000, Albourne believes that the benefit of obtaining an annual audit would be higher than the costs for the vast majority of funds.

Albourne recognizes that some smaller Advisers could be deterred from launching a private fund due to the fact that the cost of an annual audit may be too high to justify the increased transparency benefit from doing so. This further extends to smaller funds managed by Advisers who have relatively few private assets, making the cost of an annual audit unjustifiable to them. While Albourne does recognize this could potentially lead to consolidation in the industry, we believe that such consolidation would be justified given the ultimate goal of investor protection. Certain funds may attempt to increase management fees, negatively impacting returns. However, Albourne believes that given the high level of concentration in the industry, many investors may go to competitor funds with lower management fees, all else equal. As a result, Advisers could potentially be under pressure once again to reduce management fees.

Instead of requiring prompt distribution of the audited financial statement to investors, should we require the statement to be distributed or made available to investors upon request?

Albourne does not believe that statements should only be distributed or made available to investors upon request. Requiring the distribution of financial statements from the Adviser could enable all investors receive up to date information regarding the private fund's operations and receive the same information at the same time. This may prevent Advisers from abusing this rule by potentially not informing investors of material events, such as a very large redemption, bankruptcy proceedings, conflicts of interests, and potential liquidations. Further, the receipt of timely financial statements can help investors to properly track fees that are charged to the fund and provide information to assess whether the Adviser is charging abnormal fees or passing through certain non-operating expenses to investors. Timely receipt of statements can also help allow investors to track operating expenses, management fees, performance fees, AUM stability, and many more factors that could have the potential to materially affect their portfolio allocation decisions.

3. Adviser-Led Secondaries

Should certain adviser-led transactions be exempt from the proposed rule? For example, if the adviser conducts a competitive sale process for the assets being sold, which ultimately leads to the price, should advisers still be required to obtain a fairness opinion?

Albourne believes that a competitively obtained price (e.g. an auction), supported by a market transaction, should be considered a better quality price gauge than a fairness opinion. The transaction governance mechanism might involve engaging an investment bank to solicit competitive bids and/or a sale of over 50% of the existing portfolio investment to a third party.

Should certain adviser-led transactions be exempt from the rule, such as adviser-led transactions involving liquid funds? For example, if the underlying assets being sold in the transaction are predominantly publicly traded securities, should advisers still be required to obtain a fairness opinion?

Albourne believes liquid positions that have easily observable prices and which can be independently priced by third parties via exchange feeds or models with easily observable inputs (ASC 820 Level 1 and 2 equivalent) should be excluded from the fairness opinion proposal because a fairness opinion should not arrive at a materially different result than that of independent observable prices.

Should the adviser be required to distribute a summary of any material business relationships the adviser or its related persons has, or has had within the past two years, with the independent opinion provider as proposed? Should we provide guidance or impose requirements regarding the level of detail advisers should include in the summary?

Albourne believes that there should be a disclosure of material business relationships between an adviser and the provider of the fairness opinion. We believe the SEC should provide guidance on the details that should be included and opine on what "material" means in this context.

Should we require advisers to distribute the fairness opinion to investors as proposed? Alternatively, should we require advisers to only distribute or make the fairness opinion available to investors upon request?

Albourne believes that a fairness opinion is a material data point and therefore it should be distributed to all investors at the same time. To provide the most value to the LPs, a fairness opinion should be distributed to the LPs prior to any transaction election deadline.

4. Prohibited Activities

Should we prohibit an adviser from being paid in advance for services it reasonably expects to provide in the future?

No, as with many services, not just those typical to private funds, fees may be paid in advance as part of standard terms, as agreed between the parties or as requested by the payor. Prohibiting fees to be paid in advance outright could create unintended consequences in the regular operations of paying vendors without a reasonable benefit to investors.

If an adviser is paid in advance, and reasonably expects to perform services, but ultimately does not provide the contracted for services, the proposed rule would require the adviser to refund the prepaid amount attributable to the unperformed services. Do commenters agree with this approach?

Albourne agrees with this approach.

The proposed rule would prohibit compensation schemes where an adviser charges for services that it does not reasonably expect to provide. Is "reasonably expect" the appropriate standard? Should we provide examples or guidance to assist advisers in complying with this standard? Does this standard have the potential to reduce the effectiveness of the rule? Are there other standards we should adopt?

As noted above, this is an area of ambiguity that may require objective criteria and examples to better guide advisers. Note that if amounts for services not rendered are returned to investors, then the overall risk surrounding the "reasonably expects" guideline may be lower.

The proposed rule would likely increase operating costs for advisers that have historically charged private funds for the types of fees and expenses covered by the proposed rules. Do commenters believe that advisers would increase management fees to offset such increase in operating costs?

This may be a side effect that could disproportionately impact smaller investors, thereby increasing the barriers to entry for new managers. This could necessitate an increase in management fees to meet their operating costs.

We recognize that certain private fund advisers utilize a pass-through expense model. Should the rule provide any full or partial exceptions for advisers utilizing such models, particularly where the adviser does not charge any management, advisory, or similar fees to the private fund?

Where no management fees are charged, then disclosure and approval by the governing body for that vehicle may be a more appropriate avenue in ensuring the expensed passed on are appropriate.

We recognize that clawback mechanisms are more common for closed-end funds and less common for open-end funds. Should the rule separately address performance-based compensation for open-end private funds? If so, how should we address those funds?

Open-ended funds face unique challenges due to current legislation that have necessitated innovative approaches such as 1-or-30. Given current legislation, open-ended funds would be best dealt with separately. A solution for those structures could include an amendment to § 457A's exception surrounding substantial risk of forfeiture to address the key blocker in why GPs will generally avoid such structures. The inclusion of open-ended funds requires a separate discussion and will not be explored further here.

Instead of the proposed clawback provision, should we prohibit deal-by-deal waterfall arrangements (commonly referred to as American waterfalls)?

Acknowledging that a whole-fund waterfall is the best way to reduce the risk of clawback, prohibiting deal-by-deal models could reduce the competitive nature of the industry, particularly for smaller and emerging managers who may find it difficult to attract talent as compensation would be delayed by many years compared to larger peers who may have sufficient capital to better compensate employees in earlier years. Similarly, managers may look to pursue more open-ended structures to avoid such provisions. Albourne believes further LP protections, such as a stronger guaranty and clawback terms are more appropriate.

Should this aspect of the final prohibited activities rule prohibit limiting liability for "gross negligence," or would prohibiting limitations of liability for ordinary negligence, as proposed, be more appropriate?

It could potentially be difficult for the industry to move towards simple negligence as a standard since gross negligence is so well established. Acknowledging that the negligence standard could provide much better protections to LPs, Albourne is wary of unintended consequences and feel the matter should be explored more fully prior to a change. It could lead to significantly more litigation given the lower standard until precedent at the negligence stage is reset.

We recognize that many co-investors do not agree to bear their pro rata share of broken or dead deal expenses. Would the proposed rule make it difficult for funds to consummate larger investments where co-investment capital is needed? Would the proposed rule cause funds to syndicate more deals post-closing once the adviser is confident that the deal will not fall through?

This is a potential consequence in having investors sign-on to co-investment until the deal is consummated. It would be very difficult to enforce the pro rata allocation for single co-investment deals and not a significant amount would change from the current process. The proposal could include a requirement for single deal co-investors to bear an outsized portion of the deal costs (i.e. two to three times that which would normally be allocated) to account for those deals which couldn't be allocated. However, trying to implement this across the industry in a fair manner may not be appropriate as the costs borne should be commensurate to the broken deal costs which will vary by GP and strategy.

Should we include an exception for co-investment vehicles (or certain other vehicles) that invest alongside another fund managed by the adviser? If so, how should we define "co-investment vehicle"? Should the rule treat single-deal co-investment vehicles differently than multi-deal co-investment vehicles? Why or why not?

Albourne believes vehicles that are expected to invest alongside the fund should be included, including co-investment vehicles. As noted above, single-deal co-investments are unlikely to be included unless the co-investors are identified. The proposal should include criteria for when it is determined that the co-investors have signed on.

Recognizing the limitations of private fund governance mechanisms, as discussed above, should we permit borrowing if it is subject to specific governance and other protections (e.g., advance disclosure to all investors, advance disclosure to an LPAC or similar body, consent of a governing body such as an LPAC, and/or consent of a majority or supermajority of investors)? Should we require private fund advisers to make ongoing disclosures to investors and/or governing bodies of the status of such borrowings? Why or why not?

Albourne believes ongoing disclosures of any lending relationships with investors should be made, but in certain situations it may be possible for LPACs or investors to approve these. As noted above, we believe a clear distinction between what actions may fall into this category should be made.

Should we broaden the scope of the prohibition on borrowings to prevent a private fund adviser from borrowing from co-investment vehicles or other accounts that are not private funds?

Co-investment vehicles are likely to have sufficient investor involvement to mitigate the potential conflicts presented. That being said, some co-investment structures operate like commingled vehicles and likely should be subject to the same types of prohibitions. Clarification on the types of co-investment vehicles should be considered.

5. Preferential Treatment

Should we prohibit all preferential treatment instead of the proposed approach, which is to prohibit certain types of preferential treatment (i.e., liquidity and transparency terms that an adviser reasonably expects to have a material, negative effect) and prohibit all other types of preferential treatment unless disclosed?

Prohibiting all preferential treatment may limit those investors who require tax, regulatory and legal matters addressed through side letters. Albourne feels that the noted approach is measured and should not extend to prohibiting all preferential treatment.

The proposed definition of "substantially similar pool of assets" would not include co-investments by a separately managed account managed by the adviser or its related persons. Is this definition too narrow?

Excluding co-investments and managed accounts appears appropriate. As noted above though, if managed accounts or co-investments having preferential liquidity could have a negative impact on a fund, this should be addressed as part of the proposal. This could include specifics around managed accounts and commingled vehicles entering and exiting positions at substantially the same time and terms for assets.