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Vanessa A. Countryman
Secretary, Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
(duplicate via e-mail to:
rule-comments@sec.gov)

Re: File Number S7-03-22
Private Fund Advisers: Documentation of Registered Investment Adviser Compliance Reviews

Dear Madame Secretary:

Professor Joseph A. Grundfest[1] submits this comment letter in response to the above-referenced release (the "Proposing Release") regarding proposed rules (the "Proposed Rules") under the Investment Advisers Act of 1940 (the "Advisers Act").

The Scope of this Comment Letter. The Proposed Rules are of three categories: Disclosure Rules,[2] Audit Rules,[3] and Prohibited Activity Rules.[4] These comments relate solely to the Prohibited Activity Rules that would forbid the following terms and conditions in investor advisory agreements:[5]

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[1] Professor Grundfest is the William A. Franke Professor of Law and Business at Stanford Law School and served as a Commissioner of the United States Securities and Exchange Commission (1985-1990). Professor Grundfest also chairs the audit committee of the board of directors of KKR, Inc., and serves on the advisory board of Millennium Management LLP. The views expressed in this letter are Professor Grundfest's and do not necessarily reflect the views of Stanford University, KKR, Millennium, or of any other organization with which Professor Grundfest is affiliated. This comment is an early version of a law review article currently in preparation and tentatively titled "The Most Curious Rule Proposal in SEC History."

[2] Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 5955 (Feb. 9, 2022), 87 Fed. Reg. 16886, 16890-911 (Mar. 24, 2022) ("Proposing Release") (describing proposed rules requiring private fund advisers to provide quarterly statements including detailed disclosures); *id.* at 16976-77 (proposing Rule 211(h)(1)-2).

[3] *Id.* at 16911-17 (describing proposed rules requiring mandatory private fund adviser audits); *id.* at 16974-75 (proposing Rule 206(4)-10).

[4] *Id.* at 16920-28 (describing proposed rules prohibiting private fund advisers from engaging in certain activities); *id.* at 16977 (proposing Rule 211(h)(2)-1).

[5] Silence regarding the Disclosure Rules and the Audit Rules should not be construed as non-objection. For ease of exposition, and given the time pressure created by the short comment period (as to which, see infra, Section VIII), as well the nature of the challenges presented by the Prohibited Activity Rules, this comment letter focuses primarily on the proposed prohibition of indemnification (proposed Rule211(h)(2)-1). The proposed Preferential Treatment Rule (proposed Rule 211(h)(2)-3) is analytically indistinguishable from the Prohibited Activity Rules because it too is an absolute prohibition that cannot be resolved through disclosure. Further, the distinction between the Prohibited

1. "Charging certain fees and expenses to a private fund or portfolio investment, including accelerated monitoring fees; fees or expenses associated with an examination or investigation of the adviser or its related persons by governmental or regulatory authorities; regulatory or compliance expenses or fees of the adviser or its related persons; or fees and expenses related to a portfolio investment on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons have invested (or propose to invest) in the same portfolio investment";[6]

2. "Reducing the amount of any adviser clawback by the amount of certain taxes";[7]

3. "Seeking reimbursement, indemnification, exculpation, or limitation of its liability by the private fund or its investors for a breach of fiduciary duty, willful misfeasance, bad faith, negligence, or recklessness in providing services to the private fund";[8] and

4. "Borrowing money, securities, or other fund assets, or receiving an extension of credit, from a private fund client."[9]

Summary. These comments address foundational concerns central to the operation of the federal securities laws and abstract away from detailed critiques of the Proposed Rules' specific provisions.

The Prohibited Activity Rules arise absent evidence of market failure suggesting that disclosure is an inadequate remedy.

Participants in the market for venture capital, hedge fund, and private equity fund investments are among the largest, most sophisticated, and best-advised clients in the world.[10]

Activity Rules and the Disclosure Rules and Audit Rules can be framed as semantic. Each Disclosure Rule and Audit Rule can be rewritten as a Prohibited Activity Rule that precludes forms of disclosure or audit that do not comport with the Proposed Rules. The concerns regarding the Prohibited Activity Rules thus naturally extend to certain Disclosure Rules and Audit Rules.

[6] Proposing Release at 16920.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Access to private funds is limited to an elite class of sophisticated investors—namely, "qualified purchasers," including state and corporate pension funds, financial institutions, university endowments, and high net worth individuals. Commentators have observed that these sophisticated investors "engage in active due diligence before investing, routinely retain advisory firms to evaluate options for them, and negotiate for more disclosure" before investing with a particular manager. Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975, 992 (2006). The SEC likewise has observed that institutional investors can and do engage in extensive due diligence before investing in private funds. *See, e.g.*, U.S. Sec. & Exch. Comm'n., *Implications of the Growth of Hedge Funds: Staff Report to the United States Securities and Exchange Commission* 13 (2003) ("Most hedge fund investors perform extensive due diligence prior to making initial and subsequent investments. According to a survey of institutional investors, 60 percent of institutional investors take between two to six months to complete due diligence on a hedge fund."); U.S. Sec. & Exch. Comm'n., Office of Compliance Inspections & Examinations, *National Exam Program Risk Alert*, *Investment Adviser Due Diligence Processes For Selecting Alternative Investments And Their Respective Managers*, (Jan. 28,

Every investor subject to the proposed restrictions is fully informed.[11] These investors can select from among thousands of alternative vehicles that typically charge far lower fees, have greater liquidity, and impose none of the restrictions to which the Commission now objects.[12] They are fully capable of negotiating investment terms and making their own investment decisions. No investor is forced to accept terms as to which the Commission now objects.[13] Every investor who accepts those terms does so because they prefer the proposed arrangement to other available alternatives, even if the Commission might not.

The Prohibited Activity Rules, however, forswear all forms of disclosure-based remedies. They transform the Commission into a merit regulator. This transition is fraught with institutional and political peril. As a merit regulator, particularly in the context now proposed, the Commission will be hard pressed to decline the entreaties of special interest constituencies petitioning for merit-based regulations calculated to advance their parochial interests. The agency's identity and mission will be forever changed if it adopts these rules.

The Prohibited Activity Rules also generate multiple, profound, and conspicuous internal contradictions within the federal securities laws. They provide greater "investor protection" to the most sophisticated of all investors in venture capital, hedge fund, and private equity transactions than to the least sophisticated investors in public offerings and private placements. The Proposing Release provides no rational explanation for this inversion of traditional principles of investor protection. The Prohibited Activity Rules also cannot be reconciled with positions previously taken by Congress and the Commission affirming that sufficiently sophisticated investors do not require the protection of the federal securities laws precisely because they are able to fend for themselves.

These contradictions within the federal securities laws are compounded by additionally conspicuous contradictions with state, federal, and foreign law, and with a large body of academic literature. Every state expressly permits indemnification.[14] Federal and foreign law are

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2014) (noting the increasingly robust due diligence practices undertaken by institutional investors prior to investing in private funds).

[11] *See* Paredes, *supra* n.10, at 994 ("So long as investors know what they know, and are in a position to know what they do not know, investors can fend for themselves.").

[12] A vast array of alternate investment vehicles are available to the sophisticated investors subject to the Proposed Rules. As of year-end 2020, there are 16,127 U.S.-registered investment companies, comprised of 9,027 mutual funds, 2,296 exchange-traded funds, 494 closed-end funds, and 4,310 unit investment trusts. *See* Investment Company Institute, 2021 Investment Company Fact Book, https://www.icifactbook.org/. There are an estimated 4,000 public companies listed in the United States. *See* McKinsey & Co., *Reports of corporates' demise have been greatly exaggerated* (Oct. 21, 2021), https://www mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/reports-of-corporates-demise-have-been-greatly-exaggerated.

[13] The Commission has long recognized that qualified purchasers can simply refuse to invest in private funds. *See, e.g.*, *Protecting Investors: A Half Century of Investment Company Regulation, Division of Investment Management*, U.S. Sec. & Exch. Comm'n., 114 (May 1992) (noting that a qualified purchaser eligible to invest in a private fund "nevertheless may choose to invest instead in registered investment companies, relying on the protections afforded by the existing regulatory structure").

[14] *See, e.g.*, 13 FLETCHER CYC. CORP. § 6045.10 ("All jurisdictions now have statutes authorizing some form of indemnification of directors, officers, agents or other employees."); John K. Villa, BANK DIRECTORS', OFFICERS', AND LAWYERS' CIVIL LIABILITIES, Appendix 6-1 (listing the state indemnity statutes). It is common for private fund

consistent. A large literature supports the rationality of indemnification.[15] The Commission nonetheless asserts that all these legislatures and scholars must be in error and that indemnification must be prohibited even among the most sophisticated of counterparties.

The Proposing Release, however, fails even to mention the remarkable extent to which the Commission's position diverges from the supermajority position in the law. Nor does the Proposing Release explain why so many legislatures, jurists, and scholars are incorrect to permit indemnification. More broadly, state and federal law permit sophisticated parties to engage in transactions that are prohibited to less sophisticated actors. The Prohibited Activity Rules, however, also invert this principle, thereby creating a further unexamined conflict with state and federal law, in addition to the conflicts created within federal securities law.

The Commission's reliance on the incidence of enforcement actions as a rationale in support of the Prohibited Activity Rules is also profoundly misplaced. Those enforcement actions, when viewed in context, are actually quite rare. Indeed, if anything, the rare nature of these proceedings proves the opposite of the proposition for which they are cited by the Commission.

Further, the Commission's claim that it must proceed on a qualitative rather than a quantitative basis - - *i.e.,* it must proceed on the basis of opinion rather than empirical fact - - is a self-inflicted wound. The Commission has the authority and ability to gather objective data that could inform its rulemaking. Instead, it has decided to rush ahead with these proposals rather than to gather facts that might form a more solid foundation for administrative action, assuming that any is warranted.

If adopted as proposed, and if followed to its logical conclusion, the Prohibited Activity Rules establish a foundation for far more intrusive Commission regulation of a much broader range of contractual arrangements than is addressed in the Proposing Release. It follows, *a fortiori*, that every contractual provision that violates the Prohibited Activity Rule involving sophisticated investors should also be precluded, to the extent possible, from every transaction - - including those involving publicly traded securities and private placements - - involving unsophisticated investors. If the Commission's intends to extend the Prohibited Activity Rules to their logical conclusion, then the public would benefit from fair notice that the proposal on the table is but a precursor to a far more dramatic, merits-based intrusion by the Commission into a

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investors to agree to limit an adviser's liability in the case of ordinary negligence. In addition to ordinary negligence, the Prohibited Activity Rules would further prohibit reimbursement, indemnification, exculpation or limitation of liability for a breach of fiduciary duty, willful misfeasance, bad faith or recklessness. Private fund agreements generally do not provide for indemnification in these circumstances; such limitations may not be enforceable under state law.

[15] As one commenter has noted, "the invariant policy of [indemnification is] to 'promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated.' Beyond that, the larger purpose . . . is to encourage capable persons 'to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve.'" E. Folk, R. Ward & E. Welch, FOLK ON THE DELAWARE GENERAL CORPORATION LAW, § 145 (7th ed. 2022) (citations omitted).

much broader set of contractual arrangements. And, if the Commission does not intend to follow its proposals to their logical conclusion, the public would benefit from a rational explanation of why it is sensible to demand certain "protections" for sophisticated but not for unsophisticated investors, thereby inverting longstanding principles of logic and law.

I. There Is No Evidence of Market Failure.

The market for investment advice is among the most competitive in the world. Every investor in every venture capital fund, hedge fund, or private equity fund can choose from among thousands of alternatives.[16] They can purchase index funds that charge extremely low fees and provide liquidity far superior to that available in venture capital, hedge, or private equity funds. They can retain active managers, or have their own staffs build bespoke portfolios using publicly traded equities, ETFs and myriad other investment instrument. It is trivially easy for every investor who participates in an arrangement containing provisions to be precluded by the Prohibited Activity Rules to find investments that are not subject to provisions the Commission now deems objectionable.

Many of the worlds best-informed, highly-capitalized, and expertly-advised investors nonetheless regularly prefer to pay the higher fees and accept the lower liquidity that is inherent in venture capital, hedge, and private equity fund investing. They also willingly agree to provisions the Commission now seeks to prohibit. They do so with full knowledge of the risks emphasized in the Commission's release.

The Commission presents no evidence of market failure that could support the proposed forms of regulatory intervention. There is no evidence of any lack of competition. Nor has the Commission presented any evidence of asymmetric information that would justify abandoning its traditional regulatory boundaries. The market is not susceptible of public goods problems, and does not generate externalities that could support intrusion of the nature proposed.[17]

The Commission's failure to support the Prohibited Activity Rules with a claim of asymmetric information is particularly relevant because, absent such a foundation, the Proposed Rules clearly take the Commission out of its traditional lane of acting as a disclosure regulator and transform the agency into a merit regulator. This transformation has serious adverse consequences for the agency and for its mission.

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[16] *See supra* n.12 (describing the vast array of investment vehicles available to sophisticated investors).

[17] *See, e.g.*, Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1602 (2014) ("In the neoclassical theory of regulation, the concept of market failure is central."); Gina-Gail S. Fletcher, *Benchmark Regulation*, 102 IOWA L. REV. 1929, 1937 (2017) ("Modern law and economics theory posits that the sole legitimate reason for government regulation is to respond to market failure."); Steven L. Schwarcz, *Systematic Regulation of Systemic Risk*, 2019 WIS. L. REV. 1, 25 (2019) ("[A] systematic framework should start by engaging the normative justification for financial regulation: to correct market failures."); Steven L. Schwarcz, *Changing Law to Address Changing Markets: A Consequence-Based Inquiry*, 80 Law & Contemp. Probs., 163, 166 (2017) ("In the financial context, the principal normative justification for lawmaking is to correct market failures.").

II. The Prohibited Activity Rules Transform the Agency into a Merit Regulator.

The Chair of the Commission recently explained that the SEC is "not a merit-based regulator, we're primarily a disclosure-based regulator."[18]

> "There was a 'basic bargain' hashed out, originally under President Franklin Delano Roosevelt, that the SEC's 'backbone' be based on 'disclosure and anti-fraud, meaning you can't lie to the public,' Gensler noted. But at that point, 'the public gets to decide what risks they want to take.'"[19]

The Prohibited Activity Rules are inconsistent with this articulation of the agency's core mission and historic philosophy. The Rules expressly prohibit "the public" - - here, some of the world's largest, most sophisticated, and well represented investors - - from being able to "decide what risks they want to take," even with full disclosure and absent fraud.

This is merit regulation applied to a market that least calls for merit regulation.

The Prohibited Activity Rules thus constitute a radical departure from the agency's core philosophy as articulated by the sitting Chair. If the Prohibited Activity Rules are adopted as proposed, then no Chair, no Commissioner, and no agency employee will ever again be able to testify before Congress, claim at an open Commission meeting, or deliver a speech to the bar, to law students, or to anyone else, claiming the agency is not a merit regulator. Those days will be done.

The burden will then shift to the Commission and Staff to explain precisely why the Commission has abandoned its traditional disclosure-based philosophy in situations that least require merit regulation. The Commission, in its new merit-based incarnation, will then be inviting petitions from a wide range of special interest groups to adopt additional merit-based restrictions intended to further the parochial interests of the petitioning constituencies.

None of this should come as a surprise. This is how Washington works. Once the Commission signals it is in the merit regulation business, it should be ready to entertain a flood

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[18] Al Barbarino, *Gensler Says Climate Rule Part of SEC's Disclosure Mandate*, LAW360 (Mar. 31, 2022), https://www.law360.com/securities/articles/1478271/gensler-says-climate-rule-part-of-sec-s-disclosure-mandate. *See also infra* n.19 (collecting statements by commissioners regarding the fact that the agency is not a merit regulator).

[19] *Id.* Chair Gensler has emphasized that "[disclosure] is what the SEC's remit is. We're not a merit regulator." Ben Geman, *Why the climate disclosure fight is so intense*, AXIOS (Mar. 24, 2022), https://www.axios.com/why-the-climate-disclosure-fight-is-so-intense-c8326a32-6c05-4b3f-a183-c4963eb779ac.html. *See also* Elad L. Roisman, Commissioner, U.S. Sec. & Exch. Comm'n., *Statement on Proposed Changes to Asset Managers' Proxy Voting Disclosures* (Sept. 29, 2021) (noting that "the SEC is purposefully not a merit regulator"); Hester M. Peirce, Commissioner, U.S. Sec. & Exch. Comm'n., *Paper, Plastic, Peer-to-Peer* (Mar. 15, 2021) (emphasizing the Commission's "limited role as a disclosure regulator, rather than a more interventionist merit regulator").

of requests for more merit regulation, together with the partisan political favor-seeking that inevitably accompanies such an enterprise.

The Commission will then be tasked with picking winners and losers. It will have to explain why it adopts some forms of merit regulation but rejects others. Abandoning the agency's traditional disclosure-oriented philosophy thus comes with great potential institutional and political peril, and substantial opportunity for mischief. Indeed, once the Commission crosses the "disclosure-line" and adopts merit regulation of the sort contemplated by the Prohibited Activity Rules, the Commission is *de facto* inviting a wide range of special interest groups to petition for merit regulation in their favor. The Commission should be ready to embrace its new role as a merits regulator if it adopts the Prohibited Activity Rules.

III. The Prohibited Activity Rules Generate Multiple, Profound, and Conspicuous Contradictions Within Federal Securities Law.

The proposed Prohibited Activity Rules generate multiple, profound internal contradictions within federal securities law. None of these contradictions are addressed by the Proposing Release. All are, however, obvious on the face of the document. All raise significant challenges to the rationality of the proposed Prohibited Activity Rules. The Release's silence as to these obvious contradictions speaks volumes. The silence exists, perhaps, because there is no rational response. As the Supreme Court recently explained, administrative rules can be vacated when they fail to address "conspicuous issues."[20] These issues are conspicuous and unaddressed.

A. Inconsistencies With Markets for Publicly Traded Instruments.

The Commission permits the world's least sophisticated investors to purchase shares of publicly traded corporations that promise to indemnify officers and directors "for a breach of fiduciary duty, willful misfeasance, bad faith, negligence, or recklessness . . . ." Indemnification is pervasive in publicly traded corporations.[21] Item 512(h) of Regulation S-K expressly permits such indemnification.[22] The Commission reasons that disclosures provided through the registration process provides sufficient investor protection. It therefore does not prohibit indemnification of officers and directors of publicly traded corporations that are registered with the Commission, even though those securities are regularly purchased by the market's least sophisticated investors.

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[20] *Dep't. of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1916 (2020).

[21] *See, e.g.*, 13 FLETCHER CYC. CORP. § 6045.10 ("All jurisdictions now have statutes authorizing some form of indemnification of directors, officers, agents or other employees.").

[22] 17 C.F.R. § 229.512(h). In the event that a claim for such indemnification is made, Regulation S-K requires that the registrant submit the claim to a court of appropriate jurisdiction to determine if the claim is against public policy as expressed in the Securities Act in 1933. 17 C.F.R. § 229.512(h)(3). In addition, Regulation FD allows publicly traded entities to share material nonpublic information with investors subject to non-disclosure agreements. 17 C.F.R § 243.100(b)(2)(ii). The proposed Prohibited Activity Rules would, however, prohibit identical sharing with investors in a venture capital, hedge, or private equity fund even if a binding non-disclosure agreement is in place. This is an additional inconsistency in federal securities law introduced by the Prohibited Activity Rules.

The Prohibited Activity Rules would, however, make it illegal for the world's most sophisticated investors to enter into identical agreements. The prohibition would apply even if the disclosures are at least as complete, and even though the investors are far better able to understand the implications of the indemnification arrangements, and far better able to negotiate amendments to those indemnification provisions.

The Proposing Release nowhere addresses this conspicuous contradiction and nowhere presents a rational basis for such a regulatory regime. Nor does the Commission explain why disclosures to the least sophisticated investors are adequate for investor protection but identical disclosures to the most sophisticated do not suffice. These inconsistencies raise obvious questions as to the existence of a rational basis for the Prohibited Activity Rules, whether those rules are arbitrary and capricious, and whether the Commission has marshalled evidence sufficient to support the inconsistent form of merit regulation it now advocates.

B. Inconsistencies With the Private Placement Market.

Similar inconsistencies arise in the private placement market. A financially unsophisticated heir to $1 million qualifies as an accredited investor,[23] and is permitted to enter into a real estate limited partnership agreement pursuant to which the general partner owes fiduciary duties. That agreement could allow the general partner to seek reimbursement, indemnification, exculpation, or limitation of its liability by the limited partnership or its investors for a breach of fiduciary duty, negligence, recklessness or for any other claims in providing services to the limited partnership.[24]

The proposed Prohibited Activity Rules would, however, again prevent world's most sophisticated investors from entering into identical arrangements. The Commission has the authority to subject this unsophisticated person to the Prohibited Activity Rules as a condition of qualification for a private placement exemption, but it has not done so, does not propose to do so, and does not explain why it proposes not to do so. The Proposing Release nowhere recognizes this fundamental contradiction in the Commission's approach to "investor protection." Again, it nowhere addresses the rationality of a regime that permits the least sophisticated to engage in transactions prohibited to the most sophisticated investors.

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[23] A natural person is an "accredited investor" under Rule 501 if their total net worth (or joint net worth with their spouse) exceeds $1 million, exclusive of primary residence. 17 C.F.R. § 230.501(a).

[24] Section 17-108 of the Delaware Revised Uniform Limited Partnership Act provides that provides that, "subject to such standards and restrictions set forth in a partnership agreement, a limited partnership may indemnify and hold harmless any partner or other person from and against any and all claims or demands." 6 Del. C. § 17-108. *See generally* Limited Partnership Agreement (Initial Form DE), Practical Law Standard Document 7-569-0305 ("Most limited partnership agreements include provisions requiring the partnership to indemnify the general partner and its affiliates for losses in connection with such claims and demands. . . . Limited partnership agreements typically do not afford indemnification for losses arising from bad faith, wilful misconduct or gross negligence of the indemnified person.").

C. Inconsistencies With Prior Commission Positions.

The Commission has frequently explained that sufficiently large and sophisticated investors should not be subject to restrictions of the sort it now seeks to impose through the Prohibited Activity Rules. This principle is decades old.

In 1992, the SEC's Division of Investment Management issued a comprehensive report on investment company regulation recommended the removal of regulations preventing investment advisers "from offering flexible, efficient, and competitive vehicles for investing in the financial markets."[25] The Staff recommended an exemption for funds that sell to "qualified purchasers," concluding that "for funds that sell exclusively to sophisticated investors … the 100 investor limit is an unnecessary constraint not supported by sufficient public policy concerns."[26] This "the new exception would be premised on the theory that 'qualified purchasers' do not need the [Investment Company Act's] protections because they are able to monitor for themselves such matters as management fees, transactions with affiliates, corporate governance, and leverage."[27] The study concluded that "no sufficiently useful governmental purpose is served by continuing to regulate funds owned exclusively by sophisticated investors."[28]

Consistent with the Staff's recommendation, Congress in 1996 passed the National Securities Markets Improvement Act ("NSMIA"),[29] adding a new Section 3(c)(7) to the Investment Company Act that excludes from the definition of "investment company" issuers whose outstanding securities are owned by persons who, at the time of acquisition, are qualified purchasers, and where the issuer is neither making nor proposing to make a public offering of its securities. Generally, a "qualified purchaser" is an individual with $5 million in invested assets or an institution with $25 million in invested assets.[30]

Section 3(c)(7) embodies a Congressional recognition that financially sophisticated investors can apprehend the risks associated with investment alternatives. They do not need the protections of the Investment Company Act, including protections relating to "corporate governance."[31] Further, when adopting rules defining qualified purchasers, the SEC acknowledged that Congress intended the exclusion for persons with "investment experience and sophistication necessary to evaluate the risks of investing in regulated investment pools."[32]

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[25] U.S. Sec. & Exch. Comm'n., *Protecting Investors: A Half Century of Investment Company Regulation, Division of Investment Management*, v (May 1992).
[26] *Id.* at xxiii.
[27] *Id.* at 104-05.
[28] *Id.* at 114-15.
[29] Pub. L. No. 104-290, 110 Stat. 3416 (Oct. 11, 1996).
[30] *See* 15 U.S.C § 80a-2(a)(51).
[31] S. Rep. No. 293, 104th Cong., 2d. Sess. 10 (1996) ("Generally, these investors can evaluate on their own behalf matters such as the level of a fund's management fees, governance provisions, transactions with affiliates, investment risk, leverage, and redemption rights.").
[32] *Privately Offered Investment Companies*, Inv. Co. Act Rel. No. 22597 (Apr. 3, 1997). *See also* U.S. Sec. & Exch. Comm'n., *Implications of the Growth of Hedge Funds: Staff Report to the United States Securities and Exchange Commission*, 13 (2003) ("This exclusion reflects Congress's view that certain highly sophisticated investors do not

The presumption that these investors can adequately "fend for themselves" is hardly unique to the Investment Company Act. Identical presumptions underlie the definition of Qualified Institutional Buyers and the operation of the entire Rule 144A market.[33] The same presumption is foundational to the entire private placement market, as explained by the Supreme Court in *Ralston Purina*.[34]

The Prohibited Activity Rules thus cannot be reconciled with the Commission's historic position that "no sufficiently useful governmental purpose is served by continuing to regulate funds owned exclusively by sophisticated investors."[35] The Prohibited Activity Rules instead represent a sharp departure – a rupture – from this historic position.

The Supreme Court has explained that "[a]gencies are free to change their existing policies, but in explaining its changed position, an agency must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.' An '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'"[36] But the Proposing Release presents no such explanation, and nowhere attempts to reconcile the agency's historic position, endorsed by Congress, with its new approach, that has no Congressional endorsement, and that would "protect" sophisticated investors far more aggressively than the unsophisticated. The obligation is on the Commission to explain why its historic position is suddenly incorrect and why sophisticated investors now demand "protections" not afforded unsophisticated investors.

D. <u>The Inconsistencies are Pervasive.</u>

Although the preceding discussion emphasizes the indemnification prohibition, identical challenges arise in connection with the operation of every other contractual provision proposed to be subject to the Prohibited Activity Rules. In each instance, the Commission would "protect"

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need the protections of the Investment Company Act because those investors are in a position to appreciate the risks associated with pooled investment vehicles.").

[33] "The Commission decided on the $100 million in securities threshold [in Rule 144A] as a presumptive mechanism—a presumption that the investor has enough experience to be able to fend for itself in the private resale market for restricted securities." J. William Hicks, RESALES OF RESTRICTED SECURITIES § 7:21. In the proposing release for Rule 144A, the Commission explained: "In defining a 'qualified institutional buyer,' the Commission has attempted to establish a level at which it can be confident that participating investors have extensive experience in the private resale market for restricted securities. In addition, the Commission is seeking to identify a class of investors that can be conclusively assumed to be sophisticated and in little need of the protection afforded by the Securities Act's registration provisions." Securities Act Release No. 6806 (Oct. 25, 1988), 53 Fed. Reg. 44016, 44028 (Nov. 1, 1988).

[34] *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953) ("[T]he applicability of [Section 4(2) of the Securities Act] should turn on whether the particular class of persons affected need the protection of the [Securities] Act. An offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.'").

[35] U.S. Sec. & Exch. Comm'n., *Protecting Investors: A Half Century of Investment Company Regulation, Division of Investment Management*, 114-15 (May 1992).

[36] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (internal citations omitted). *See also F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (explaining that an agency must "display awareness that it is changing position" and may not "depart from a prior policy *sub silentio*").

sophisticated investors from transactions permitted for unsophisticated investors in a manner that creates contradiction within the federal securities laws. The Commission nowhere addresses any of these additional contradictions.

IV. The Prohibited Activity Rules Create Conspicuous, Significant, and Unexamined Inconsistencies With State and Federal Law.

The proposed prohibition on indemnification is an extreme outlier. Every state corporation code permits indemnification.[37] Federally chartered corporations permit indemnification.[38] Foreign jurisdictions permit indemnification.[39] A large literature explains the rationality of indemnification.[40]

The law also commonly provides greater contractual latitude to sophisticated parties. For example, Delaware law enforces non-reliance provisions[41] and allows waivers of appraisal rights,[42] but only for sufficiently sophisticated parties. The Prohibited Activity Rules, however, stand this principle on its head. They provide greater "protection" to sophisticated than unsophisticated persons, and the Proposing Release offers no support for this inversion as applied to indemnification provisions or to any other principle of law.

The Commission thereby asserts the strong and controversial claim that it is right and that every state legislature, the United States Congress, and a large number of foreign jurisdictions are wrong to permit indemnification in contracts involving sophisticated investors. The Commission's novel exceptionalism is nowhere analyzed or defended in the Proposing Release. The Commission should, at a minimum, explain why so many other authorities are in error, and why its approach is preferable.

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[37] 13 FLETCHER CYC. CORP. § 6045.10 ("All jurisdictions now have statutes authorizing some form of indemnification of directors, officers, agents or other employees.").
[38] 12 C.F.R. § 7.2014(b)(1).
[39] *See, e.g.*, Brian R. Cheffins & Bernard S. Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385 (2006) (summarizing the approach to indemnification in the United Kingdom, Germany, Australia, Canada, France and Japan).
[40] *See* Folk, *supra* n.15.
[41] "The Court of Chancery has consistently held that sophisticated parties to negotiated commercial contracts may not reasonably rely on information that they contractually agreed did not form a part of the basis for their decision to contract." *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 142 n.18 (Del. Ch. 2003).
[42] *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199 (Del. 2021) (enforcing a waiver of appraisal rights included in a stockholders agreement executed by "sophisticated parties"). *See also NAF Hldgs., LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 n.14 (Del. 2015) ("Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties.") (*quoting NACCO Indus. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009)).

V. The Commission's Reliance on Enforcement Data is Misplaced.

The Commission cites twenty-four enforcement actions filed over a seventeen-year span as partial support for the Proposed Rules. These actions are enumerated in Appendix A.[43] The Commission's reliance on this datum is problematic for at least three distinct reasons.

First, the statistic is inflated. At least two of the cited actions could not have been prevented even with perfect adherence to the Proposed Rules, and bear no rational relationship to the Commission's proposals. How, for example, would a Foreign Corrupt Practices Act violation have been prevented by any of the Prohibited Activity Rules? These actions are excluded from the analysis, leaving a sample of twenty-two proceedings.[44]

Twenty of these proceedings were, moreover, settled simultaneously with the filing of a complaint on a neither admit-nor-deny basis.[45] The Proposing Release assumes, without discussion, that settled matters establish wrongdoing. They do not. Settling respondents do not concede any violations. For ease of exposition, and giving the Commission a benefit not supported by the record, this analysis accepts, but does not agree with, the assumption that "neither admit-nor-deny" settlements can be treated as concessions of wrongdoing.[46]

Second, the statistic is a numerator in desperate search of a denominator. Case counts require context. Simply observing twenty-two COVID cases is meaningless from a public health perspective without appropriately contextualizing that information. Are these twenty-two cases per hundred or per million? A simple count can be potentially misleading, if not properly contextualized.

Contextualizing these twenty-two cases establishes that they are a trivial statistic. The twenty-two cited proceedings span a period of seventeen years (2005 to 2021 inclusive) during which the Commission filed 12,860 enforcement actions.[47] This represents a litigation rate of 1.29 cases per year (22/17) and constitutes a mere 0.17 percent (22/12,860) of the total number of actions brought during the relevant period.

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[43] *See, e.g.*, Proposing Release at 16888, 16892, 16927, 16937, 16945 (noting that the Commission has pursued enforcement actions against private fund advisers in various contexts). Appendix A lists these cases together with data describing payments in connection with the resolution of these proceedings.

[44] The matter with the largest recovery alleges violations of the Foreign Corrupt Practices Act. *In the Matter of Och-Ziff Capital Management Group, LLC,* Investment Advisers Act Release No. 4540 (Sept. 29, 2016). The matter with the second largest recovery alleges a fraud in which fund managers transferred high performing traders to a proprietary fund, thereby depriving the clients' fund of those traders' returns and creating a conflict of interest that was inadequately disclosed in violation of general antifraud provisions. *In the Matter of Bluecrest Capital Management Limited,* Investment Advisers Act Release No. 5642 (Dec. 8, 2020). Neither of these violations would have been prevented by any aspect of the Proposed Rules. Thus, neither serve as rational support for an argument that enforcement history justifies adoption of any of the proposed rules.

[45] *See* Appendix A.

[46] This entire exercise overlooks the fact that, of these twenty-four proceedings, twenty-two are settled matters in which respondents neither admit nor deny the complaints' allegations.

[47] This data is compiled from historical annual reports published by the Commission and available at https://www.sec.gov/reports.

These twenty-two cases are also trivial if measured in terms of financial recovery. They generated total payments of $96.085 million during the same period that the Commission collected approximately $59.3 billion in recoveries from all its enforcement actions.[48] The twenty-two cited cases thus constitute only 0.16 percent of corresponding dollar recoveries.

Intriguingly, the Proposing Release never describes the cited cases as percentage of the Commission's overall enforcement docket. This simple and obvious statistic is clearly within the Commission's knowledge. The Proposing Release thus fails to contextualize its own data even in the most minimally rational and obvious manner.

To be sure, the observation of twenty-two potentially relevant proceedings can be contextualized from many different perspectives. But doing so simply reinforces the conclusion that the Commission is relying on trivial incidence rates to support significant regulatory interventions.

Consider, for example, the Commission's observed litigation count and financial recoveries in comparison to the size of the industry. "There are currently 5,037 registered private fund advisers with over $18 trillion in private fund assets under management."[49] Expressed as a percentage of advisers currently in business, these twenty-two enforcement actions represent 0.00437 (22/5,037) of the population.

But even this small percentage significantly exaggerates the incidence of litigation because it aggregates seventeen years of enforcement activity and compares that statistic with the current population of registered advisers rather than with a comparable seventeen-year population. To be sure, the number of advisers has increased dramatically in recent years.[50] To adjust for this growth, assume that the average number of registered advisers over the last seventeen years is only half the currently active population, or 2,519.5. Over a seventeen-year period, that average population would have generated 42,831.5 "adviser-years," of activity, *i.e.,* years in which these advisers have been registered with the Commission (2,519.5x17). Twenty-two enforcement actions over 42,831.5 adviser-years represents 0.000514 of the population (22/42,831.5) - - that's about five hundredths of one percent - - a clearly imprecise but directionally more accurate representation of the incidence of alleged but unproven violations involving investment advisers.

Viewed from a financial perspective, the $96.085 million in recoveries generated by the twenty-two cited proceedings represent 5.33 millionths of the industry's current $18 trillion in assets under management ($96.085 million/$18 trillion). (To help make this math a bit more intuitive, it is useful to recognize that a trillion is equivalent to a million million. Thus, $1

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[48] *Id.*
[49] Proposing Release at 16887.
[50] The Proposing Release reports that there are currently 5,037 registered private fund advisers. *Id.* This represents an increase of 24% over the 4,061 registered private fund advisers in 2012. *See* Press Release, *More Than 1,500 Private Fund Advisers Registered With the SEC Since Passage of the Financial Reform Law* (Oct. 19, 2012), https://www.sec.gov/news/press-release/2012-2012-214htm.

million is a millionth of $1 trillion.) If adjusted to reflect industry-level assets under management over a seventeen-year period, the percentage would shrink to even more sub-microscopic levels.

These are certainly apples to oranges comparisons and are susceptible of a long list of legitimate critiques. But these comparisons are not offered with the suggestion that they are precise. They are not. They are, instead, presented to illustrate orders of magnitude and to provide contextual data that are not addressed in the Proposing Release.

Third, and most fundamentally, once viewed in context, the Commission's statistic supports a proposition precisely contrary to that for which it is cited. The cases the Commission relies upon represent a trivial litigation burden in the aggregate. There is no looming aggregate litigation crisis affecting the investment advisory industry that can justify massive regulatory intrusion. The Commission nowhere explains why litigation representing no more than 17 one-hundredths of one percent of its docket is a sufficient basis upon which to support rulemaking of any sort, much less blanket prohibitions that substitute merit regulation for disclosure remedies. If anything, litigation occurring at such a low rate would seem to argue against intrusive rulemaking of the form proposed.

The fact that the cited cases appear to generate losses significantly less than 5.33 millionths of the industry's assets under management raises an even starker question. What is the rational amount investors would spend to deter practices that appear to cost significantly less than 5.33 millionths of capital at risk? Reasonable, profit maximizing investors would not spend a great deal of money or time to avoid a risk of such low magnitude. Yet, the Commission makes this level of risk reduction central to its argument in support of the Proposed Rules.

Indeed, if litigation at the rate of seventeen hundredths of a percent of the agency's docket, that puts at risk far less than 5.33 millionths of an industry's assets, can support muscular intrusion into freely negotiated contractual arrangements, then the Commission has established a foundation for far more intrusive intervention in many contractual arrangements governed by the federal securities laws, and not just investment advisory agreements. It is unclear then where a line might be drawn that would prevent the Commission from arguing that even miniscule litigation rates can support massive, intrusive regulation.

VI. The Commission's Inability to Quantify "Many of the Economic Effects of the Proposed Amendments" is a Self-Inflicted Wound

The Proposing Release states:

> "[S]everal factors make the quantification of many of [the] economic effects of the proposed amendments and rules difficult. For example, there is a lack of data on the extent to which advisers engage in certain of the activities that would be prohibited under the proposed rules, as well as their significance to the businesses of such advisers. It is, therefore, difficult to quantify how costly it would be to comply with the prohibitions. Similarly, it is difficult to quantify

> the benefits of these prohibitions, because there is a lack of data regarding how and to what extent the changed business practices of advisers would affect investors, and how advisers may change their behavior in response to these prohibitions. . . .
>
> Further, there is a lack of data on the frequency with which advisers grant certain investors the preferential treatment that would be prohibited under the proposed rules, as well as the frequency with which preferential terms are currently disclosed to other investors, as well as how and to what extent these disclosures affect investor behavior. As a result, parts of the discussion below are qualitative in nature."[51]

This is a self-inflicted wound.

The Commission has authority to conduct examinations of entities subject to the Proposed Rules.[52] The Commission has, in the past, engaged in constructive, detailed information gathering exercises to inform its regulatory agenda.[53] Here, however, and for whatever reason, the Commission prefers to regulate in the dark. The Commission could have gathered empirical data to inform its rulemaking agenda. Instead, it rushes ahead with proposals that create fundamental conflicts within the securities laws and with other bodies of law, and advocates for those conflicts based on "qualitative" assessments, *i.e.,* matters of opinion, rather than knowable fact.

This is suboptimal policy making. The implications of the Commission's failure to rely on accessible data are also more profound than the Commission suggests, and reach well beyond the basic cost-benefit considerations mentioned in the Proposing Release. Indeed, the failure to engage in basic fact-finding as a predicate to this rulemaking supports skepticism as to the agency's understanding of certain fundamental market practices. In particular, recent research

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[51] Proposing Release at 16948.

[52] *Id.* at 16887 ("During our decade overseeing most private fund advisers, our staff has examined private fund advisers to assess both the issues and risks presented by their business models and the firms' compliance with their existing legal obligations.").

[53] For example, before proposing Regulation Best Interest, the Commission and the staff conducted extensive industry and investor outreach and carefully considered and evaluated data and information solicited over several years of study. In 2011, the Commission staff issued a study in which they made recommendations relating to a uniform fiduciary standard of conduct. In 2013, the Commission issued a request for information seeking additional information from the public to assist the Commission in evaluating whether and how to address certain standards of conduct for, and regulatory obligations of, broker-dealers and investment advisers, generating more than 250 comment letters. In 2017, Chair Jay Clayton solicited further information from the public regarding standards of conduct for broker-dealers and investment advisers, generating more than 250 additional comment letters. Chair Clayton and his staff further engaged in meetings with retail investors, investor advocacy groups, and industry participants, to better understand these issues. Finally, when the Commission proposed Regulation Best Interest in 2018, it provided for a 90-day comment period, allowing sufficient time for the public to provide meaningful comments on the proposed rule itself. *See* Regulation Best Interest, Proposing Release, Exchange Act Release No. 83062 (Apr. 18, 2018).

suggests that portions of the Prohibited Activity Rules may be based on fundamental misapprehensions regarding the operation of the market for investment advice.[54]

A survey of private equity fund side letters finds that these "side letters very rarely grant fee discounts to investors or otherwise reallocate the fund economics among investors. Instead, side letters are mostly designed to accommodate a fund investor's regulatory and tax concerns. The view shared by both critics and proponents—that side letters are primarily used to treat investors differentially—is largely mistaken."[55]

The authors document inefficiencies in the side letter negotiation process, but these inefficiencies nowhere suggest that side letters are systematically used to disadvantage fund investors. Instead, the most appropriate remedy for the transactions costs generated by side letter practice could entail development of a standardized set of side letter terms and conditions, perhaps along the lines of the model term sheets and deal documentation developed by the National Venture Capital Association (NVCA) for venture capital investing,[56] standardized documentation provided by the International Swaps and Derivatives Association (ISDA) in connection with complex swap and derivative transactions,[57] or myriad other forms of standardized agreements.[58] The remedy for the side letter situation identified in this recent empirical research is most certainly not found in the Prohibited Activity Rules as proposed.

VII. Is the Commission Building a Foundation for Extensive, Substantive, Regulation of a Much Larger Universe of Contractual Arrangements?

If the Commission is correct that its logic supports the Prohibited Activity Rules in transactions involving the most sophisticated of investors, then it follows *a fortiori* that the agency can and should adopt the Prohibited Activity Rules in situations involving far less sophisticated investors. Dramatic revisions to the rules governing private placements, the operation of Rule 144A markets, and permissible governance provisions of publicly traded corporations should then be viewed as inevitable.

If the Commission intends to follow the implications of the Prohibited Activity Rules to their logical conclusion, then the market would benefit from fair notice that the Proposing Release is but a precursor to a potentially far more dramatic and intrusive revisions of a large body of federal securities law. Such notice would allow commenters to react to the pending proposal from a broader and more accurate perspective. But if the Commission's intent is not to extend the Prohibited Activity Rules to transactions involving less sophisticated investors, the

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[54] Elisabeth de Fontenay and Yaron Nili, *Side Letter Governance*, WASH. U. L. REV. (Forthcoming) (Mar. 28, 2022), https://ssrn.com/abstract=4067905.
[55] *Id.* at abstract.
[56] *Id.* at 57. *See also* NVCA, *Model Legal Documents*, https://nvca.org/model-legal-documents/.
[57] *Id.* at 56-57.
[58] *See, e.g.*, Institutional Limited Partners Association, *Model Subscription Agreement* (2017), https://ilpa.org/model-sub-agreement/.

Commission should provide the rationale whereby it imposes restrictions on the most sophisticated market participants, and not on the least.

VIII. The Comment Period is Too Short.

As is apparent from these observations, the Proposed Rules raise a host of fundamental economic, public policy, and legal challenges. These matters cut to the core of the agency's mission. They are not trivial. They call for a thoughtful analysis that extends far beyond the discussion presented in the Proposing Release.

A comment letter submitted by twenty-five trade associations on April 5, 2022, titled "Importance of Appropriate Length of Comment Periods,"[59] offers several cogent observations suggesting that the time afforded for public comment on these proposals is too short. That comment letter also observes that "unnecessarily short comment periods run the risk of giving the impression that the Commission has already made up its mind on a particular issue."[60] A comment letter signed by forty-seven Members of Congress on April 13, 2022, also urges the Commission "to allow the public sufficient time to conduct the analysis required for meaningful input on complex or highly significant proposed rules," and notes that a "30-day comment period is the lawful bare minimum."[61] The legislative history of the APA also suggests that "[matters] of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures."[62]

IX. Conclusion.

For all these reasons, this comment respectfully suggests that the Commission withdraw the Proposed Rules and reconsider whether they should be reproposed at all. If the Commission determines to proceed with rules that are even remotely similar to the current Prohibited Activity Rule proposals, a more detailed and substantive economic and legal analysis addressing concerns raised in this letter is warranted.

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[59] Letter from the Alternative Credit Council (ACC) *et al.* to Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n.(Apr. 5, 2012), https://www.ipa.com/wp-content/uploads/2022/04/FINAL_as-Sent-to-SEC_Joint-Trades_Comment-Period-Letter_4-5-2022.pdf.

[60] *Id.* at 14.

[61] Letter from Members of Congress to Gary Gensler, Chair, U.S. Sec. & Exch. Comm'n.(Apr. 13, 2012), https://www.lsta.org/app/uploads/2022/04/Gary-Gensler-Private-Fund-Adviser-Letter_April-13-2022.pdf.

[62] Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 259 (1946). Clearly, this is a matter of great importance. In announcing the Proposed Rules, the Commission noted that private funds currently have approximately $18 trillion in gross assets, and the Chair emphasized, "Private fund advisers, through the funds they manage, touch so much of our economy." U.S. Sec. & Exch. Comm'n., Press Release, *SEC Proposes to Enhance Private Fund Investor Protection* (Feb. 9, 2022), https://www.sec.gov/news/press-release/2022-19.

Respectfully submitted,

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Appendix A

Enforcement Matters Cited in the Proposing Release

No.	Caption	Year	Settled or Litigated	Footnote Citation	Payments (In Millions)
1	*SEC v. Joseph W. Daniel,* Litigation Release No. 19427 (Oct. 13, 2005) and *In re Joseph W. Daniel* Act Release No. 2450 (Nov. 29, 2005).	2005	Settled	14	0.097*
2	*In the Matter of Swapnil Rege,* Investment Advisers Act Release No. 5303 (July 18, 2019).	2005	Settled	14, 111	0.749
3	*SEC v. Southridge Capital Mgmt., LLC,* Lit. Rel. No. 21709 (Oct. 25, 2010).	2010	Consent	111	12.864
4	*Securities and Exchange Commission v. Philip A. Falcone, Harbinger Capital Partners Offshore Manager, L.L.C. and Harbinger Capital Partners Special Situations GP, L.L.C., Civil Action No. 12 Civ. 5027 (PAC) (S.D.N.Y.) and Securities and Exchange Commission v. and (sic) Harbinger Capital Partners LLC, Philip A. Falcone and Peter A. Jenson, Civil Action No. 12 Civ. 5028 (PAC) (S.D.N.Y.), Civil Action No. 12 Civ. 5027 (PAC) (S.D.N.Y.), U.S. Securities and Exchange Commission Litigation Release No. 22831A (Oct. 2, 2013).*	2013	Consent	12, 182	18.020
5	*In the Matter of Clean Energy Capital LLC,* Investment Advisers Act Release No. 3955 (Oct. 17, 2014).	2014	Settled	184	2.021
6	*In the Matter of Lincolnshire Management, Inc.,* Investment Advisers Act Release No. 3927 (Sept. 22, 2014).	2014	Settled	27	2.308
7	*In re Blackstone Management Partners L.L.C., et al.,* Investment Advisers Act Release No. 4219 (Oct. 7, 2015).	2015	Settled	10, 25	28.911
8	*In the Matter of Cherokee Investment Partners, LLC and Cherokee Advisers, LLC,* Investment Advisers Act Release No. 4258 (Nov. 5, 2015).	2015	Settled	26	0.100
9	*In re du Pasquier & Co., Inc.,* Investment Advisers Act Release No. 4004 (Jan. 21, 2015).	2015	Settled	209	0.050
10	*In re Kohlberg Kravis Roberts & Co. L.P.*, Investment Advisers Act Release No. 4131 (June 29, 2015).	2015	Settled	10	18.677
11	*In re Pekin Singer Strauss Asset Management Inc., et al.,* Investment Advisers Act Release No. 4126 (June 23, 2015).	2015	Settled	209	0.285

* Disgorgement of $97,152 was ordered but waived because of inability to pay.

12	*In the Matter of Och-Ziff Capital Management Group, LLC,* Investment Advisers Act Release No. 4540 (Sept. 29, 2016).	2016	Settled	183	N/A**
13	*Resilience Management, LLC,* Investment Advisers Act Release No. 4721 (June 29, 2017).	2017	Settled	182	0.750
14	*In the Matter of Hudson Hous. Capital, LLC,* Investment Advisers Act Release No. 5047 (Sept. 25, 2018).	2018	Settled	209	0.065
15	*In re NB Alternatives Advisers LLC,* Investment Advisers Act Release No. 5079 (Dec. 17, 2018).	2018	Settled	10	2.368
16	*In the Matter of ED Capital Management, LLC,* Investment Advisers Act Release No. 5344 (Sept. 13, 2019).	2019	Settled	209	0.100
17	*In the Matter of Mitchell J. Friedman,* Investment Advisers Act Release No. 5338 (Sept. 4, 2019)	2019	Settled	11	0.171
18	*In the Matter of Bluecrest Capital Management Limited,* Investment Advisers Act Release No. 5642 (Dec. 8, 2020).	2020	Settled	13	N/A***
19	*In the Matter of EDG Management Company, LLC,* Investment Advisers Act Release No. 5617 (Oct. 22, 2020)	2020	Settled	11	1.512
20	*In the Matter of Monomoy Capital Management, L.P.,* Investment Advisers Act Release No. 5485 (Apr. 22, 2020).	2020	Settled	13	1.927
21	*In the Matter of Monsoon Capital, LLC,* Investment Advisers Act Release No. 5490 (Apr. 30, 2020).	2020	Settled	182	0.100
22	*In the Matter of Rialto Capital Management, LLC,* Investment Advisers Act Release No. 5558 (Aug. 7, 2020).	2020	Settled	175	0.350
23	*In the Matter of Diastole Wealth Management, Inc.,* Investment Advisers Act Release No. 5855 (Sept. 10, 2021).	2021	Settled	11	0.160
24	*In re Global Infrastructure Management, LLC,* Investment Advisers Act Release No. 5930 (Dec. 20, 2021).	2021	Settled	11	4.500
	Total				**$96.085 million**

** The action against Och-Ziff, is unrelated to any proposed rule and is therefore excluded from the analysis. The claim alleged violations of the Foreign Corrupt Practices Act relating to bribes paid in the Democratic Republic of the Congo and Libya resulting in payments of $213 million to settle criminal allegations filed by the Department of Justice and $199.045 million to settle related SEC allegations. Aggregate payments thus amounted to approximately $412 million. *See* text accompanying note 44.

*** Bluecrest is omitted from the analysis because the allegations involve conduct that would not have been deterred by the Proposed Rules. The conduct at issue instead violates established disclosure and antifraud principles that are not changed by the Proposed Rules. Respondents were ordered to pay $170 million to resolve the matter. *See* text accompanying note 44.