HOULIHAN LOKEY

April 25, 2022

Via email: rule-comments@sec.gov

Securities and Exchange Commission
450 Fifth Street NW
Washington, D.C. 20549-0609
Attention: Vanessa A. Countryman, Secretary

Re: File No: S7-03-22; Release No. IA-5955 – Regarding Private Fund Advisers

Ladies and Gentlemen:

This letter is submitted by Houlihan Lokey, Inc. ("Houlihan Lokey") in response to the request for comments by the Securities and Exchange Commission (the "Commission") on File No: S7-03-22; Release No. IA-5955 (the "Release").

Houlihan Lokey is supportive in principle of the Commission's efforts to promote transparency to private fund investors and believes that an investment adviser's retention of a financial advisor can be beneficial, including in connection with adviser-led secondary transactions. However, we have serious concerns regarding aspects of proposed rule 211(h)(2)-2 relating to fairness opinions (the "Proposed Fairness Opinion Rule"), which would prohibit an adviser registered or required to be registered under the Investment Advisers Act of 1940 from completing an adviser-led secondary transaction with respect to any private fund unless the adviser, prior to the closing of the transaction, (a) obtains, and distributes to investors in the private fund, a fairness opinion from an independent opinion provider and (b) prepares and distributes to such investors a summary of any material business relationships the adviser or any of its related persons has, or has had within the last two years, with the independent opinion provider.

Houlihan Lokey very much appreciates the opportunity to comment on the Proposed Fairness Opinion Rule. Established in 1972, Houlihan Lokey is a leading global investment bank with deep experience in mergers and acquisitions, capital markets, financial restructurings, and financial and valuation advisory services. Over the last twenty years (from 2002 through 2021), Houlihan Lokey and its affiliates rendered more fairness opinions than any other fairness opinion provider.[1] We routinely advise financial sponsors, including private equity funds, hedge funds and credit funds, with respect to a broad range of transactions, including adviser-led secondary transactions, and we have been at the forefront of providing fairness opinions, valuation opinions and other financial analyses to advisers in connection with such transactions. As a consequence, Houlihan Lokey is intimately familiar with fairness opinions, valuation opinions and other financial analyses performed in connection with adviser-led secondary and other

[1] Source: Refinitiv.

transactions, and the general principles and practices relating to the preparation and use of such opinions and other financial analyses, and is therefore highly qualified to comment on the Proposed Fairness Opinion Rule.

We have limited our comments in this letter to the Proposed Fairness Opinion Rule and defer to others to comment on other aspects of the Release. With respect to the Proposed Fairness Opinion Rule itself, we are not taking a position on whether or not it is appropriate to *require* that an adviser obtain a fairness opinion, valuation opinion or other financial analyses from a third-party provider under the circumstances outlined therein. Our primary goal in this letter is to explain how many aspects of the Proposed Fairness Opinion Rule, if implemented in its current form, are impractical and/or inconsistent with general fairness opinion principles and practices in the industry and would likely be ineffective and/or have unintended adverse consequences for fund investors. We strongly believe that any requirements of the Proposed Fairness Opinion Rule, if implemented, should, at the very least, be consistent with industry-wide best practices that have developed and become established over the course of thousands of transactions during several decades, including many adviser-led secondary transactions in more recent years.

SELECTED GENERAL FAIRNESS OPINION PRINCIPLES AND PRACTICES

Before addressing some of the specific questions posed by the Commission in the Release relating to the Proposed Fairness Opinion Rule, we believe it is important to respectfully highlight for the Commission that, in general:

1. Fairness opinions have not been and, except as would be required by the Proposed Fairness Opinion Rule, if implemented in its current form, are not required to be obtained under either the U.S. federal securities laws or state corporate laws.[2] For this and other reasons, there is no uniform standard addressing the content, structure or scope of a fairness opinion.

    - The content, structure and scope of a fairness opinion is dependent on the particular facts and circumstances of the transaction (including, without limitation, the structure and form of the transaction, the nature of the consideration being paid, the underlying businesses or assets involved, and the type and quality of available information).

2. A customary fairness opinion does not address the overall fairness of a transaction but rather specifically addresses the fairness "from a financial point of view" to a party paying or receiving consideration in a transaction of such consideration to be paid or received by such party.

[2] *See, e.g.*, Item 1015 or Regulation M-A of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which addresses, among other things, the disclosure requirements on Schedule 14A, Registration Statements on Form S-4 and Schedule 13E-3 relating to fairness opinions received by reporting companies under the Exchange Act in connection with certain mergers and acquisitions. Consistent with its traditional disclosure-based regime, the federal securities laws do not require an issuer to obtain a fairness opinion from an outside party under any circumstances (including, without limitation, in connection with a transaction subject to Rule 13e-3 promulgated under the Exchange Act). *See also Smith v. Van Gorkom*, 488 A. 2d 858, 876 (Del. 1985) ("We do not imply that an outside valuation study is essential to support an informed business judgment; nor do we state that fairness opinions by independent investment bankers are required as a matter of law") and *In re Shoe-Town, Inc. S'holders Litig.*, No. 9483, 1990 Del. Ch. LEXIS 14, at *22 (Del. Ch. Feb. 12, 1990) ("In addition, because a fairness opinion or an outside valuation is not an absolute requirement under Delaware law, it makes little sense to strap those investment banks, who are retained, with the duties of a fiduciary.").

- A fairness opinion does not address the fairness of any other aspect or implication of the transaction or any other agreement, arrangement or understanding entered into in connection with the transaction or otherwise.

- A fairness opinion does not address the underlying decision of a fund, the general partner or other fiduciary of a fund, any security holder or other investor of a fund or any other party to proceed with or effect a proposed transaction or otherwise.

- A fairness opinion does not address the relative merits of a proposed transaction as compared to any alternative business strategies or transactions that might be available for a fund, the general partner or other fiduciary of a fund, any security holder or other investor of a fund or any other party.

3. Financial advisors can be engaged, among other things, to provide fairness opinions, valuation opinions or other financial analyses to the fiduciaries of the clients that retain them, such as the board of directors of a corporation, or to the client itself, when that client is a fiduciary, such as the general partner of a partnership, but are not engaged to advise any of their security holders.

    - The type and form of the deliverable provided, and the scope of the underlying financial analyses performed in connection therewith, are regularly determined in consultation with the firm's client or the client's fiduciaries (which, in the case of an adviser-led secondary transaction, is typically the general partner of the fund).

    - Fairness opinions, valuation opinions and other financial analyses prepared by firms may only be relied upon by the person(s) to whom they are addressed, which is generally the firm's client or the client's fiduciaries.

    - Fairness opinions, valuation opinions and other financial analyses are prepared by firms for their clients or their clients' fiduciaries and are not prepared with a view toward disclosure to, or for use by, security holders or other investors in making an investment decision and do not contain all of the information such holders or investors may want or require in connection with making an investment decision.

    - Financial advisor engagement letters typically prohibit disclosure regarding fairness opinions, valuation opinions or other financial analyses without the firm's prior written consent and/or require that any such disclosure is made on a non-reliance basis, solely for informational purposes, such that the third-party recipient does not acquire rights against the firm by virtue of the disclosure.[3]

4. The purpose of a fairness opinion, valuation opinion or other financial analyses prepared by a firm for a fiduciary is solely to assist the fiduciary in fulfilling its duty of care.

    - Such fairness opinions, valuation opinions and other financial analyses do not constitute advice or a recommendation to a fund, the general partner or other fiduciary of a fund, any security holder or

[3] Such restrictions are not intended to limit the informational nature of disclosure but rather to limit the potential liability of the firm to third parties with whom they are not in contractual privity. As we describe below, it is well-established practice in adviser-led secondary transactions for certain limited partners to be provided access, on an informational basis, to deliverables provided by a firm to the general partner, subject to such limited partner's acknowledgement of customary conditions.

other investor of a fund or any other party as to how such party should vote or act on any matter relating to a proposed transaction or otherwise.

COMMENTS ON CERTAIN QUESTIONS RAISED BY THE COMMISSION

Q. 1 Should the rule give investment advisers the option to obtain either a fairness opinion or a third-party valuation? Why or why not? What are the advantages and disadvantages of a third-party valuation as compared to a fairness opinion, and vice versa?

Investment advisers should be allowed sufficient flexibility to obtain the services, including fairness opinions, valuation opinions or other financial analyses, that are best-suited to the relevant circumstances of the particular adviser-led secondary transaction. As the Commission noted in the Release, adviser-led secondary transactions often are highly bespoke transactions that can take many forms.[4] Under certain circumstances, a fairness opinion may be an appropriate form of deliverable, while in other situations, rendering a fairness opinion may not be appropriate or practicable, given, among other considerations, general fairness opinion principles and practices, the type and quality of available information, the structure and form of the transaction, the underlying assets involved, the stage of the transaction, the costs involved, and any requirements of, or considerations arising from, the fund's governing documents. In such situations, a valuation opinion or other financial analyses may be more appropriate.

The Commission appears to be primarily focused on ensuring that, in connection with an adviser-led secondary transaction, some advice is obtained by the investment adviser with respect to whether "the price being offered is based on an underlying valuation that falls within a range of reasonableness."[5] A fairness opinion is not the only deliverable that can meet this objective. For example, the financial analyses used to support a fairness opinion are often substantially similar to the analyses used to support a valuation opinion, requiring many of the same assumptions and subject to many of the same qualifications and limitations. The analyses underlying both of these deliverables generally yield implied or indicative valuation reference ranges and would therefore ostensibly satisfy the Commission's primary objective. As such, to the extent the Commission determines that some form of mandate is appropriate, we believe its objective would be better served by focusing on ensuring that a third party provider is retained to perform financial analyses addressing valuation issues (which could take the form of a fairness opinion, a valuation opinion or other financial analyses), rather than on requiring a specific type of deliverable.

Our experience is that, under current practices, the cost of obtaining a valuation opinion in connection with an adviser-led secondary transaction is typically *lower* than the cost of a fairness opinion, all other things being equal (e.g., in circumstances where neither form of deliverable is allowed to be disclosed to third parties in a manner that gives rise to potential claims by third parties against the firm). If the Commission does not provide investment advisers with the flexibility to determine which deliverable is appropriate under the circumstances, investment advisers will potentially be precluded from obtaining a less expensive, more appropriate form of deliverable. In addition, mandating fairness opinions in situations where rendering one is not practicable would either prevent investment advisers from being able to pursue transactions that might otherwise be in the best interests of fund investors or significantly increase the risk to opinion providers. This increased risk would in turn increase the cost of fairness opinions and/or could limit the number of qualified firms willing to provide fairness opinions in adviser-led secondary transactions, thereby reducing competition and further increasing costs. Any increased costs associated

[4] *See* Section II C. of the Release, p. 123.

[5] *See* Section II C. of the Release, p. 125.

with obtaining fairness opinions in adviser-led secondary transactions would likely ultimately be borne by fund investors, either directly or indirectly.

Q. 2 Should the scope of the fairness opinion be limited to the price, as proposed? Alternatively, should we require the fairness opinion to cover all, or certain other, terms of the transaction? For example, should we revise the definition of "fairness opinion" to a written opinion stating that the terms of the adviser-led secondary transaction are fair to the private fund? Why or why not?

As an initial matter, we do not believe the Commission should attempt to define what constitutes a fairness opinion for purposes of the Proposed Fairness Opinion Rule or otherwise.[6] Neither Item 1015 of Regulation M-A of the Exchange Act nor FINRA Rule 5150, which are the primary rules regulating matters relating to fairness opinions, define the term or require any particular opinion formulation. Mandating a particular form of opinion would be inconsistent with the fact that, as noted by the Commission, adviser-led secondary transactions are often highly bespoke transactions that can take many forms.

We similarly do not believe it would be practicable or appropriate for the Proposed Fairness Opinion Rule to require fairness opinions to address transaction terms generally, i.e., beyond the consideration to be paid or received in the transaction. Consistent with the core competency of fairness opinion providers in performing valuation analyses, fairness opinions focus on the exchange of value in the transaction and typically only address the fairness, from a financial point of view, to a party paying or receiving consideration in a transaction of the consideration to be paid or received by such party in the transaction. As noted above, under general fairness opinion principles and practices, fairness opinions do not address the fairness of any other aspect or implication of the transaction or any other agreement, arrangement or understanding entered into in connection with the transaction or otherwise.

These principles apply to adviser-led secondary transactions as well. Fairness opinion providers should not be requested to address any term other than the consideration paid in such transactions, because other transaction terms are generally not susceptible to the same types of financial analysis. Including other transaction terms within the scope of the opinion would generally require subjective and other judgments that are beyond an opinion provider's core competence, such as assessments of investment objectives, business strategies and prospects, business and investment risks, and legal or contractual matters.[7]

As noted in the Release, some adviser-led secondary transactions are structured as an existing fund transferring its interests in one or more portfolio companies or other assets to a new fund, in exchange for consideration consisting of cash and/or equity securities of the new fund, with the existing fund's limited partners being offered the option of electing to receive a subsequent distribution by the existing fund in cash or equity securities of the new fund. Accordingly, consistent with general fairness opinion principles and practices, a fairness opinion rendered in connection with an adviser-led secondary transaction so structured would usually address the fairness, from a financial point of view, to the existing fund of the

[6] *See* Section 211(h)(1)-1 of the proposed rule set forth in the Release, which defines a fairness opinion as "a written opinion stating that the price being offered to the private fund for any assets being sold as part of an adviser-led secondary transaction is fair."

[7] In addition, information regarding such other transaction terms from precedent transactions is less likely to be publicly available, and even if such information was publicly available, such terms may not be readily comparable across different transactions due to the unique terms, facts and circumstances of different transactions.

aggregate consideration to be received by the existing fund.[8,9] Fairness opinions typically expressly disclaim any view or opinion regarding any subsequent or other related transactions, such as any subsequent distribution of the consideration received by the existing fund to its investors or those establishing the economic interests of the adviser in respect of the new fund. Amounts ultimately received by limited partners as distributions will depend on the rights and preferences of different classes of securities as well as bespoke management fees, promotes and carried interests, all of which are legal and/or contractual matters and, consequently, not matters that are appropriately addressed by a fairness opinion provider. Furthermore, fairness opinion providers are not legal, accounting or tax advisors and cannot evaluate the legal, accounting or tax aspects of a transaction or provide legal, accounting or tax advice, which evaluation and advice may be necessary in order to assess terms of the transaction beyond the consideration paid or received.

Prescribing a particular scope or formulation for fairness opinions, valuation opinions or other financial analyses obtained in connection with adviser-led secondary transactions will impair the ability of the firm and its client to assess the unique facts and circumstances of a given transaction and agree upon a deliverable and analytical framework they deem appropriate under those facts and circumstances. Such a requirement would also materially increase the uncertainty and risks associated with providing fairness opinions, valuation opinions or other financial analyses and increase the costs to funds of obtaining them. Therefore, consistent with existing regulations addressing fairness opinions such as Item 1015(b) of Regulation M-A and FINRA Rule 5150, we believe the Proposed Fairness Opinion Rule should not attempt to define what constitutes a fairness opinion.

Q. 3 Should the rule require the fairness opinion to state that the private fund and/or its investors may rely on the opinion? Why or why not?

The Proposed Fairness Opinion Rule should not require the fairness opinion to state that the private fund and/or its investors may rely on the opinion. Generally, fairness opinions, valuation opinions and other financial analyses prepared by firms are provided to fiduciaries[10] solely for the purpose of assisting them in fulfilling their duty of care in connection with the fiduciaries' action or recommendation. They are not intended to be for the benefit of the fund (which, unlike its fiduciary, is not itself required to make any

[8] We note that in order to opine on the "price," a fairness opinion rendered in connection with such an adviser-led secondary transaction will typically address the aggregate consideration as if none of the existing fund's limited partners would elect to receive equity securities of the new fund in lieu of cash and, accordingly, as if the existing fund had sol the relevant underlying assets for cash.

[9] There are various permutations of this formulation which could be necessary to address, among other things, circumstances where private fund investors are receiving consideration directly or where tax-driven transaction structures result in consideration being received by a party other than the existing fund. For this, and the various other reasons discussed herein, providing an opinion in this form, or the form set forth in the Proposed Fairness Opinion Rule, will not always be feasible.

[10] In the case of an adviser-led secondary transaction, the firm's client would typically be the general partner of the selling fund. As the fiduciary of the selling fund, the general partner is the party that is typically required to determine whether or not to approve the proposed transaction. The fairness opinion, valuation opinion or other financial analyses are provided to the general partner to assist it in meeting its duty of care in connection with making such a determination.

determination with respect to an adviser-led secondary transaction) or third parties such as the fund's security holders or other investors.[11]

Financial advisor engagement letters expressly state that only the client (which, in the case of an adviser-led secondary transaction, is typically the general partner or other fiduciary of the fund) may rely on the firm's work product (whether that be a fairness opinion, valuation opinion or other financial analyses). Generally, firms are not engaged to assist security holders or other investors in making individual investment decisions, and, under the terms of a firm's engagement letter, such parties are not entitled to rely on the firm's work product.[12]

In order to remain able to provide valuable financial advice to their clients, firms must be allowed to appropriately manage risk by effectively tying reliance to indemnification and limitation on liability. In consideration in part for the ability to rely on a firm's work product, financial advisory engagement letters require clients and/or certain of their affiliates to indemnify and release the firm from and against any losses, claims, damages, expenses and other liabilities related to or arising out of the firm's engagement, subject to certain exceptions.

Fairness opinions, valuation opinions and other financial analyses distinguish between the client, on the one hand, and the security holders or other investors, on the other hand. These deliverables do not state or even implicitly suggest that they can be relied upon by security holders or other investors. Rather, they typically state (or are accompanied by statements) that they are prepared for the board of directors or other fiduciary and do not constitute advice or a recommendation to any security holder or other investor as to how such person should vote or act on any matter relating to a proposed transaction or otherwise.

As noted above, fairness opinions, valuation opinions or other financial analyses are not prepared with a view toward disclosure to, or for use by, security holders or other investors in making an investment decision and do not contain all of the information such holders or investors may want or require in connection with making an investment decision, particularly given the significance of investor-specific factors (e.g., investment objectives (both timing and risk), tax implications, etc.). These deliverables do not address the relative merits of a proposed transaction as compared to any alternative business strategies

---

[11] *See, e.g.,* Frank Aquila & Danyang Zhao, *Fairness Opinions*, Practical Law Practice Note 0-503-5037 (Thomson Reuters 2022) ("A fairness opinion should always: [s]tate it is solely for the information of the company's board of directors or special committee and does not constitute a recommendation to the company's stockholders as to how to vote on the transaction."), Kevin Miller, *The Obligations of Financial Advisors— New Decision Upholds Contractual and Other Limitation*s, Deal Lawyers March-Apr. 2008 ("[T]he express terms of financial advisory engagement letters and the fairness opinions upon which claimants purport to rely typically (and almost universally) contain enforceable limitations on the financial advisor's liabilities and obligations, including qualifications and limitations to the effect that:… A fairness opinion does not constitute advice or a recommendation to any security holder as to how such security holder should vote or act on any matter relating to a proposed transaction or otherwise."), and Andrew L. Bab, *et. al.*, *Faulty Assumptions*, The Daily Deal, Sept. 6, 2004 ("In the first place, fairness opinions are not intended for shareholders. Most opinions explicitly state they are neither addressed to shareholders nor recommendations as to how shareholders should vote on the merger.").

[12] *See* RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 865 n.191 (Del. 2015) (rejecting the proposition that firms are inherently "gatekeepers," explaining that "the role of a financial advisor is primarily contractual in nature" and defined by its engagement letter) and *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 499-500 (5th Cir. 2000) ("The law of New York specifies that only those in privity of contract or who enjoy an intended and immediate third-party beneficiary relationship to a contract may sue thereon and that '[w]here a provision in [a] contract expressly negates enforcement by third-parties, that provision is controlling.'" internal citation omitted and "Morgan Stanley protected itself with explicit language describing the class of beneficiaries of its efforts: the Board, solely. As noted above, such contractual limitations are honored by the law of New York.").

or transactions that might be available for any party, nor do they address the underlying decision of any party to proceed with or effect a proposed transaction or otherwise. Such matters are solely the responsibility of the client's fiduciaries, and a fairness opinion, valuation opinion or other financial analyses are only one of a number of factors that the client's fiduciaries should consider in making any determination in connection therewith.

Furthermore, these deliverables are prepared for a client's fiduciaries, who have far greater familiarity with the business and affairs of a client than its security holders or other investors, or for that matter, the firm preparing the deliverable. In preparing these deliverables, firms rely without independent verification on the accuracy and completeness of the financial and other information with which they are provided, including the assessments of their clients with respect to business, operational, strategic, technological, regulatory or other aspects of a company or portfolio of companies. Given their in-depth knowledge of these matters, the fiduciaries receiving the fairness opinion, valuation opinion or other financial analyses are better positioned to understand the applicable work product and therefore can appropriately rely on such work product. In addition, fairness opinions, valuation opinions and other financial analyses frequently contain assumptions, qualifications or limitations that are mutually agreed-upon by the firm and its client, which will depend on the unique facts and circumstances associated with the underlying transaction. As such, the limitations, qualifications and assumptions associated with fairness opinions, valuation opinions and other financial analyses, and the specific context in which such deliverables are prepared, diminish the utility of these deliverables to individual investors. Therefore, it is not appropriate for investors to rely on a fairness opinion, valuation opinion or other financial analyses that were prepared for a different recipient under different circumstances and for a different purpose.

To avoid claims of detrimental reliance by security holders or other investors, fairness opinion providers generally prohibit the disclosure of their fairness opinions to such parties except to the extent the issuer/registrant is required by the federal securities laws or applicable state law to disclose a summary of the material information relating to the transaction, or as such disclosure is otherwise expressly permitted by a firm's engagement letter. Consistent with this general practice, any other disclosure of a firm's work product to third parties (such as security holders or other investors in a fund that is pursuing an adviser-led secondary transaction) is customarily conditioned on such third party's acknowledgment that, among other things, such work product was provided to, and solely for the benefit of, the applicable fiduciary and no other person or entity and is being made available to such third party solely on an informational basis.

Requiring fairness opinions, valuation opinions or other financial analyses conducted in connection with adviser-led secondary transactions to state that the private fund and/or its investors may rely on them would be inconsistent with general fairness opinion principles and practices and would substantially increase the risk to firms and reduce the number of willing providers, thus increasing the costs to funds of obtaining such financial products and services.

Q. 4 Should we require the fairness opinion to be obtained on behalf of the private fund as proposed? Alternatively, should we require the fairness opinion to be obtained on behalf of the private fund investors? Are there characteristics of certain types of adviser-led transactions, such as tender offers, that would require the fairness opinion to be obtained on behalf of the private fund investors rather than the private fund?

See responses to Q.2 and Q.3 above. The Proposed Fairness Opinion Rule should not require the fairness opinion to be "obtained on behalf of" the private fund investors.

We note that, notwithstanding the fact that fairness opinions rendered in connection with tender offers (including adviser-led secondary transactions structured as tender offers) may address the fairness,

from a financial point of view, to the tendering security holders of the consideration to be received by the tendering security holders pursuant to the tender offer, such fairness opinions are not "obtained on behalf of" the security holders but are typically addressed to the general partner, board of directors or other fiduciary to assist them in fulfilling their duty of care and may only be relied upon by such addressees.

As noted in response to Q.3 above, firms are not engaged to assist security holders or other investors in making individual investment decisions and, under the terms of a firm's engagement letter, such parties are not entitled to rely on the firm's work product.

Requiring fairness opinions, valuation opinions or other financial analyses to be "obtained on behalf of" fund investors would be inconsistent with general fairness opinion principles and practices, increase uncertainty and risks associated with providing such deliverables and increase the costs to funds of obtaining them.

Q. 5 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?

Investment advisers should not be required to distribute the fairness opinions, valuation opinions or other financial analyses they receive from a firm. See response to Q.3 above.

Any rule requiring distribution of a fairness opinion, valuation opinion or other financial analyses should, consistent with current market practice in connection with adviser-led secondary transactions, allow for such disclosure to be conditioned upon the security holders or other investor's acknowledgment that, among other things, the deliverable was provided to, and solely for the benefit of, the applicable fiduciary and no other person or entity and is being made available to the security holder or other investor solely on an informational basis.[13]

Absent such condition, requiring the disclosure of fairness opinions, valuation opinions or other financial analyses to security holders or other investors will significantly increase the risk to firms and reduce the number of willing providers, which will ultimately increase the costs to funds of obtaining such financial products and services in connection with adviser-led secondary transactions.

Q. 6 The proposed rule would require an "independent opinion provider" to provide fairness opinions "in the ordinary course of its business." Do commenters agree with this approach?

We would not object to the part of the Proposed Fairness Opinion Rule, if implemented, that prohibits the opinion provider from being a "related person" to the adviser, but would recommend the

[13] While, in certain circumstances, a summary of a fairness opinion rendered to a reporting company under the Exchange Act may be required to be disclosed under Item 1015(b) of Regulation M-A, most funds are not reporting companies under the Exchange Act, are not subject to the periodic reporting requirements of the Exchange Act and are not required to file merger proxies pursuant to Section 14(a) of the Exchange Act. The same considerations supporting the Commission's decision to refrain from requiring all funds to comply with Rule 13e-3 or file and distribute periodic reports or proxy or information statements pursuant to the Exchange Act (such as the more sophisticated and institutional investor base, the more contractual organizational structure of funds, the fact that interests in funds are not publicly traded, and the increased costs associated with making such disclosures) apply with equal force to disclosures regarding fairness opinions, valuation opinions and other financial analyses. Moreover, the disclosures relating to fairness opinions called for in Schedule 14A, Form S-4 and Schedule 13E-3 are made alongside substantial other disclosures in response to the robust disclosure requirements of such forms. Disclosure of the opinion without all of the additional disclosures would provide an incomplete backdrop in which to consider the opinion.

replacement of the word "independent" with "third-party" or "outside" (consistent with "outside party" referred to in Item 1015(b) of Regulation M-A) as it would more accurately convey the nature of the restriction applicable to opinion providers in the proposed rule. The word "independent" could be construed to suggest the total absence of any relationships or interests.

We would not object to the part of the Proposed Fairness Opinion Rule, if implemented, that requires firms to have provided the applicable deliverable "in the ordinary course of its business."

Q. 7 Should we require the independent opinion provider to have any specific qualifications, licenses, or registrations?

While we would not object to the Proposed Fairness Opinion Rule, if implemented, that requires firms to have provided the applicable deliverable "in the ordinary course of its business," we do not believe any further specific regulatory qualifications, licenses or registrations should be required by the Proposed Fairness Opinion Rule. The Proposed Fairness Opinion Rule, if implemented, should allow fund advisers to select the firm that they believe is best-suited to advise them with respect to a given transaction after taking into account all relevant criteria, including, among other things, the firm's experience and reputation; the unique facts and circumstances of a given transaction; the analytical framework most appropriate to those facts and circumstances; and the firm's relationships with the adviser and its related persons. Requiring any specific regulatory qualifications, licenses, or registrations would be inconsistent with current practice and unnecessarily narrow the number of qualified firms, leading to higher costs to funds.

Q. 8 Instead of requiring disclosure of any material business relationships between the adviser (or its related persons) and the independent opinion provider, should the rule prohibit firms with certain business relationships with the adviser, its related persons, or the private fund from providing the fairness opinion? For example, if a firm has provided consulting, prime broker, audit, capital raising, or investment banking services to the private fund or the adviser or its related persons within a certain time period – such as two or three years – should the rule prohibit the firm from providing the opinion? If so, should the rule include a threshold of materiality, regularity, or frequency for some or all of such services to trigger such a prohibition?

The Proposed Fairness Opinion Rule, if implemented, should not prohibit firms with certain business relationships with the adviser or its related persons from providing the fairness opinion, valuation opinion or other financial analyses. Rather, any rule should allow fund advisers to select the firm that they believe is best-suited to advise them with respect to a given transaction after taking into account all relevant criteria, including, among other things, the firm's experience and reputation; the unique facts and circumstances of a given transaction; the analytical framework most appropriate to those facts and circumstances; and the firm's relationships with the adviser and its related persons. Prohibiting firms with certain business relationships with the adviser or its related persons from providing the fairness opinion, valuation opinion or other financial analyses to the adviser would represent a major departure from current rules,[14] would be inconsistent with current market practice, and would likely disqualify the firms deemed most qualified, experienced or otherwise appropriate by the adviser. Decreasing the number of potential firms would increase the costs to funds of obtaining such products and services.[15] We further note that in the Commission's Release No. 34-53598 relating to FINRA's (then NASD's) proposed rule relating to fairness opinions, the Commission indicated that FINRA considered whether to require that all fairness

[14] *See* Item 1015(b)(4) of Regulation M-A and FINRA Rule 5150(3).

[15] We note that, even in the absence of a rule, advisers are able to evaluate relationships and deal terms to address potential conflicts.

opinions be obtained from "independent" firms, but concluded that a disclosure-based rule was the appropriate course to pursue.

Q. 9 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? For example, should we require advisers to disclose the total amount paid to the independent opinion provider by the adviser or its related persons, if applicable? Why or why not? Is two years the appropriate look-back period? Are there any other conflict disclosures we should require in the fairness opinion or otherwise require to be made available to investors?

Any material business relationships summary should only be made available by the fund to fund investors receiving access to the fairness opinion, valuation opinion or other financial analyses, and only under the same conditions that they would have to satisfy in order to access the fairness opinion, valuation opinion or other financial analyses (see responses to Q.3 and Q.5 above).

In terms of the scope of the required disclosure, we suggest that the Commission consider adopting the current level of disclosure generally required by the Staff of the Commission under Item 1015(b)(4) of Regulation M-A, which has a two-year lookback period, but does not (a) require the disclosure of the total amount paid to the firm, (b) define material relationships, or (c) include a threshold of regularity or frequency in order to qualify as a disclosable relationship.

We believe that the Commission should further clarify the Proposed Fairness Opinion Rule to avoid any implication that the rule requires advisers or any other party to breach obligations of confidentiality or to disclose material nonpublic information.

Q. 10 Should we define "material business relationship" for purposes of the proposed rule? Should the rule include a threshold of regularity or frequency (in addition to or in lieu of the materiality threshold) for some or all of such relationships or services to trigger a disclosure requirement?

See response to Q.9 above.

Q. 11 We recognize that, for certain adviser-led transactions, the closing of the underlying deal may not occur simultaneously with the closing of the new vehicle managed by the adviser. How should the rule take this into account, if at all? For example, should we clarify that, for purposes of the rule, an adviser would not be deemed to have completed an adviser-led secondary transaction until the underlying deal has closed (if applicable)? Alternatively, should we prohibit an adviser from calling investor capital prior to obtaining and distributing the fairness opinion?

The scenario described in the above question, as well as the other scenarios described in the Release[16], illustrate the bespoke nature of adviser-led secondary transactions, the unique and varying facts and circumstances that frequently accompany such transactions, and accordingly, the need for firms and their clients to have sufficient latitude and flexibility to mutually agree upon the appropriate scope, form and timing, including the assumptions, qualifications and limitations, of any fairness opinion, valuation opinion or other financial analyses to be provided.

[16] *See, e.g.,* the questions and scenarios posed by the Commission on pages 123-124, 127-131 and 278 of the Release.

Q. 12 Has the Commission accurately characterized the costs and benefits of the proposed rule?

For purposes of the Paperwork Reduction Act of 1995, the Commission estimates the annual external cost burden for the preparation/procurement of a fairness opinion and the material business relationships summary is $40,849 (implying that the cost of the fairness opinion itself would be less than this amount). We believe this suggested cost substantially underestimates the actual current costs of obtaining a fairness opinion. Financial analyses with respect to adviser-led secondary transactions are often as or more complicated than those with respect to M&A transactions involving public companies due to, among other things, complex and bespoke transaction structures and the frequent need to evaluate multiple portfolio companies and illiquid and bespoke securities being sold in such a transaction. In addition, as noted above in the last paragraph of our response to Q.1, under current practices, the cost of obtaining a valuation opinion in connection with an adviser-led secondary transaction is typically lower than the cost of a fairness opinion. As such, any rule should provide investment advisers with the flexibility to determine which form of deliverable is cost-effective and appropriate under the circumstances, whether that be a fairness opinion, valuation opinion or other financial analyses.

As described above in our answers, various aspects of the Proposed Fairness Opinion Rule would likely significantly increase the fees currently charged for fairness opinions, valuation opinions and other financial analyses rendered in connection with adviser-led secondary transactions, and some of the suggested modifications to the rule (expressed in the questions listed above) would drive these fees even higher due to, among other things, the increase in risk to the firm and likely reduction in the number of qualified firms willing to provide such products and services. Since these costs are frequently ultimately borne by the fund investors, we believe that much of the current version of the Proposed Fairness Opinion Rule runs counter to the Commission's objectives (as well as longstanding industry and market practice).

* * * * * *

We hope the Commission finds these views and suggestions helpful. We would be happy to discuss any questions the Staff or the Commission may have with respect to this letter. Please do not hesitate to contact us at [redacted] with any questions regarding the foregoing.

Respectfully submitted,

Houlihan Lokey, Inc.