CVCA CANADIAN VENTURE CAPITAL & PRIVATE EQUITY ASSOCIATION

25 April 2022

Ms. Vanessa A. Countryman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20548-1090

RE: SEC proposed rules concerning Private Fund Practices and Disclosures

The Canadian Venture Capital and Private Equity Association (CVCA) is the voice of the venture capital and private equity industry in Canada. As the authoritative voice of the industry, the CVCA connects nearly 2200 individual members and close to 300 member organizations. We proudly link venture capital and private equity firms, debt and equity providers, international investors, institutional funds, government entities, angel investors, and family offices. We bring all the pieces together to keep our industry engaged, fluid, and strong.

While the private capital industry in Canada is growing—having deployed CAD $14.7 billion in venture capital in 2021 and CAD $19.2 billion in private equity growth and buyout capital—our industry is a fraction of the size of our US counterpart. Most Canadian venture capital and private equity investors operate on both sides of the border investing in companies across North America. We expect that the increased transparency requirements and other requirements proposed to be carried out upon US private fund advisers (the "Proposed Rules") that has been put forward by the U.S. Securities and Exchange Commission (the "SEC") will have a direct negative impact on Canadian investors.

CVCA, on behalf of our members, wishes to raise the following concerns for your consideration:

I. The most significant concern CVCA members have expressed with the Proposed Rules is the absence of grandfathering for the application of the Proposed Rules to existing funds. Applying all the Proposed Rules to existing agreements between private funds and investors would be in effect re-writing terms that have been agreed upon between parties. We would like to draw your attention to the recent client-focused reforms that were undertaken in Canada. The application of these reforms to Canadian fund managers and advisers and other industry participants took over two years through a gradual process of applying small numbers of the reforms at different times over the period and this was after many years of consultation with investment industry participants. Our experience with the application of these reforms suggests to us that the 12-month transition rule in and of itself would be challenging for our members and applying the Proposed Rules to existing funds, especially for Canadian general partners given the size of their operations, could be a significant cost that might render existing operations uneconomic. That is not a reasonable outcome when the investors in question are content with the status quo and the cost model for the vehicle is already set.

II. Prohibit Activity Rules

a. Proposed rule 211(h)(2)-1(i) *Prohibition on Non-Pro Rata Charged Fees and Expenses*:

The CVCA asks that the SEC consider the use of special purpose vehicles ("SPV") created to co-invest with a main fund, namely that if a transaction is never consummated within the framework of an SPV, there would be no funds available for the SPV to cover its "pro rata" share of expenses.

b. Proposed rule 211(h)(2)-1(ii) *Prohibition on after Tax Clawbacks*:

   i. The application of these proposed changes is very problematic and, in some ways, inconsistent with how most private equity and venture capital funds structure such provisions.

   ii. The SEC should be mindful that these changes may change the way carried interest is realized. It could in fact lead to restructurings to avoid a clawback altogether in ways that would not be helpful to private equity funds or their limited partner investors.

   iii. The creation of carried interest was in large part to ensure the alignment of interest of the general partner over the course of the fund's life. It is essential that this alignment remain well-anchored for the benefit of all parties.

   iv. The CVCA believes that it would be unfair to retroactively require advisers to forfeit a key provision that they relied upon when negotiating with investors and in many cases have done so for much of the last 10 years. This reflects the CVCA's position in point I above.

c. Proposed Rule 211(h)(2)-1(a)(5) *Prohibition on indemnification for simple negligence*:

   i. This rule would prohibit an adviser to a private fund from seeking reimbursement, indemnification, exculpation, or a 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 a private fund.

   ii. The Proposal would improperly prohibit widely accepted contract terms that benefit advisers, private funds and would introduce needless costs and a fear of liability in an extremely entrepreneurial environment. Should fund managers choose to simply impose these costs within management fees, this change could in fact decrease an investor's returns.

d. Proposed Rule 211(h)(2)-3(b) *Preferential Treatment and Side Letters*:

   i. The SEC should be mindful of the complexity of fundraising and the need to address needs of limited partners. The use of side letters is a common tool used to accommodate the needs of limited partners that each have their own, tax, regulatory, and corporate obligations.

   ii. In respect of concerns regarding preferential terms between investors, the SEC should consider that private equity and venture capital funds are closed-ended funds and as such, no investor has the right to negotiate additional preferential treatment for distributions or to redeem their interest in the fund.

Additionally, the CVCA would like to emphasize the difference between retail investors and sophisticated limited partners that invest in private funds.

Sophisticated limited partners that invest in private funds have the resources and financial experience to understand the potential risks associated with investing in private funds. Further, there is a long history of such sophisticated investors successfully negotiating agreements with private funds including reporting obligations to the satisfaction of such investors. The SEC should consider to what extent these added reporting requirements will provide enhanced investor protection compared to the existing negotiated reporting structures currently in place. To this point, we also believe that rather than a set of prescriptive rules, the SEC should allow private fund advisers, with the input of proposed investors, to determine how best to structure their sophisticated investment relationships. This is consistent with the current robust securities law framework that applies in the context of their fund operations and investor profiles just as private fund advisers and investors have been doing for years.

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On behalf of Canadian private investors, we would like to thank you for the opportunity to comment on these proposed rules and we hope that these few points will serve you well as you look to finalize your guidance.

Regards,

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