Standards Board for Alternative Investments

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25 April 2022

Ms. Vanessa Countryman
Secretary U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-100

Dear Ms. Countryman,

Re: Feb 9, 2022, Request for Public Input on Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (IA-5955) (File No. S7-03-22)

At the Standards Board for Alternative Investments (SBAI), we welcome the opportunity to respond to the U.S. Securities and Exchange Commission's (SEC) request for public input on Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews[1].

At the SBAI, we are an active alliance of over 150 asset managers and over 90 institutional investors dedicated to advancing responsible practices, partnership and knowledge. Our community includes asset managers with over $2 trillion in AUM and institutional investors responsible for over $4 trillion in assets. We aim to improve industry outcomes through our Alternative Investment Standards[2], practical industry guidance[3] and engagement with the global regulatory community[4]. Our mission is to bring asset managers and investors together to achieve new best practices and improve industry outcomes.

We support efforts to facilitate fair and efficient markets, reduce systemic risk and enable investors to make well-informed investment decisions. We believe appropriate disclosure and transparency for investors is important in achieving these goals. As a neutral platform with a community of asset managers and institutional investors, we also believe that any disclosure requirements or other proposed rules need to be practical for asset managers, offer protection to investors, be cost effective and of genuine value to both sides of the alternative investment industry.

In our response to your request for input we address many, but not all, of the specific questions asked by the SEC. **Where we have chosen not to answer a question this should not be considered an endorsement of any or all the suggestions contained in that question but rather a function of the volume of questions asked and the time given to respond.** In addition, we have noted some key points from this proposal that we wish to highlight.

We would be delighted to discuss any of the points raised in our response with the SEC.

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[1] https://www.sec.gov/rules/proposed/2022/ia-5955.pdf
[2] https://www.sbai.org/standards.html
[3] https://www.sbai.org/toolbox.html
[4] https://www.sbai.org/regulatory-engagement.htmlI

Key Points from Response:

At the SBAI we are an alliance of over 150 asset managers, of which a significant portion are based in the US and invest in tradeable securities, and over 90 institutional investors the majority of which represent pension beneficiaries. Our community works together to resolve issues in the industry and provide practical solutions to produce better outcomes for the end beneficiaries. We believe that in the years since the global financial crisis this coming together of asset manager and investors through organisations such as the SBAI or through negotiations and due diligence meetings, has achieved significant improvements in the alternative investment industry relating to fund documentation, fund terms, adviser operations and more. Our transparency tools including the widely adopted Administrator Transparency Report, Standard Total Expense Ratio and Open Protocol Risk Reporting were developed through collaboration between these two parties. For this reason, we believe investors and advisers should retain as much freedom to negotiate contractual and other terms to continue to achieve new best practices and better outcomes in the industry.

Through discussions within our community of asset managers and institutional investors there are two main themes that have arisen which inform our response to this consultation:

1. It is not clear what problem the proposed rules are trying to solve. There are rules proposed where investors do not feel there is a problem that needs to be solved, and
2. The SEC examination deficiencies cited and the rationale for some of these rules are very Private Equity focused; however, the rules will cover all private funds. Given the diversity of private funds in the alternative investment industry trying to create a one-size fits all approach will have unintended consequences that could be detrimental to both advisers and investors.

It is also important to note that *fair* treatment of all investors does not necessarily mean *identical* treatment of all investors. Efforts to treat all investors the same may in fact end up being unfair to some investors, may limit investor choice and/or investment opportunities for investors and could cause some investors to not be able to fulfil their own fiduciary, legal or regulatory obligations which are currently satisfied through negotiated contractual arrangements with advisers.

Grandfathering of Existing Agreements:

Many of the proposed rules are wide ranging and cover contractual terms that have been negotiated between investors and advisers over the years. Retrospectively applying these rules to existing agreements will have far reaching consequences for both investors and advisers.

Side letters negotiating items such as fees, transparency and other matters are common practice in the industry, are beneficial to investors, and have often been negotiated on a confidentiality basis.

If the SEC requires all historic agreements to be disclosed, this will mean many if not all existing side letters would need to be renegotiated or repapered to align with the rules. This would be a significant effort on behalf of both advisers and investors. It would also increase costs to both sides as these are legal agreements that may require the involvement of law firms. It will also significantly increase the implementation time required as all private funds and investors in private funds will be trying to repaper these agreements at the same time leading to a potential shortage of legal resources and increased costs.

Applying any new rules to new agreements only is essential because prior agreements are the result of negotiations with series of compromises and trade-offs for both investors and advisers. Applying rules which

address parts of those existing agreements in a piecemeal manner are unfair to both parties. If grandfathering is not adopted, then the only logical alternative would be for the parties to be afforded termination rights and that could be extremely disruptive for individual investors, advisers and markets.

We strongly recommend any disclosure rule that the SEC enacts must have a grand-fathering clause where the rule applies to new agreements from its effective date and not to all historic agreements.

Principles vs Rules

At the SBAI, we are supportive of disclosure by advisers to investors to support well informed investment choices. In many cases the proposed rules are overly prescriptive which may result in unintended consequences for the industry. Our Alternative Investment Standards provide a framework that is principles-based, adopted via a comply or explain mechanism to allow flexibility and focused on disclosure rather than prohibition.

We believe principles-based frameworks are more appropriate to an industry that is diverse in terms of its operations, strategies, asset classes and more. Throughout this response where we feel a rule has become too prescriptive, and potentially detrimental to the industry, we have suggested an alternative principles-based rule for the SEC to consider.

We would strongly recommend that the SEC incorporate some flexibility in the proposed rules to avoid unintended consequences (examples of which we provide throughout our response).

Disclosure rather than Prohibition

In general, we believe that the terms of investment are a negotiation between advisers and institutional investors. We support the SEC's view that increased transparency will help institutional investors in this negotiation, but we do not believe that the SEC should prohibit or limit elements of this negotiation. Prohibition can be a blunt tool and may result in valid processes agreed between investors and advisers no longer being allowed. We expand further on this point in our responses to the specific proposed rules.

Consistent with many other SEC regulations, we would recommend that the SEC focus on ensuring that there is disclosure of certain activities rather than prohibiting them outright.

Governance of Private Funds

We note that throughout the proposed rules the SEC indicates that these rules are required as "private funds typically lack governance mechanisms that would help check overreaching by private fund advisers". Through these rules the SEC aims to function as the governance mechanism for private funds. **We would ask whether instead of imposing many detailed rules to provide a check on overreach of private fund advisers, did the SEC consider a rule promoting improvements in governance of private funds as an alternative?** This would allow more freedom of operations for both advisers and institutional investors, whilst maintaining the correct checks and balances.

Retail vs Institutional Investors and interference in contractual relationships

The rationale for the proposed rules at times appears to suggest that investors are being taken advantage of and to equate institutional investors with their underlying beneficiaries. Global regulations almost always

distinguish between rules applicable to institutional and retail investors as institutional investors are, correctly, considered to be more sophisticated and capable of protecting themselves. Institutional investors have differing needs and spend significant time and resources negotiating contractual elements with advisers including commercial terms and transparency based on their own differing preferences. These rules, if enacted as written, would restrict the type of arrangements, and in some cases commercial terms, that institutional investors can negotiate. This is unlikely to achieve the outcome that is implied within the rules of greater transparency or lower fees for all investors and could in fact have the unintended consequence of lower overall transparency and higher fees and expenses. In some cases, such as the proposed rule on indemnification wording, if the rule was to be implemented as described this would result in institutional investors having more protection than retail investors in mutual funds. We believe that institutional investors are more sophisticated and complete more thorough due diligence on advisers than retail investors and as such do not require the same level of mandated terms.

We would recommend that the SEC allow investors to retain the freedom to negotiate their required contractual arrangements supported by appropriate disclosure to allow for well-informed investment decisions.

High-Level Unintended Consequences:

The proposed rules will increase the cost of compliance for advisers, and this may have the following detrimental effects:

- Increasing the barrier for new entrants into the industry. Where costs cannot be charged to the fund this will add to an already increasing cost of entry into the market. This will favour established advisers and potentially reduce choice for institutional investors.
- Increasing costs for Institutional Investors. Some of the costs for the changes required by the rules will be passed onto the investors by being charged to the fund. This will be in addition to a potential consequence of the preferential fee disclosure rule (discussed later in our response) where advisers may no longer offer differing fee arrangements (without additional disclosure to all investors) to large institutional investors further increasing costs.

As many aspects of the proposed rules will apply to Exempt Reporting Advisers (ERAs) as well as Registered Investment Advisers (RIAs) this may mean an increased number of foreign private fund advisers choose not to becomes ERAs therefore reducing choice for US based investors.

Separately Managed Accounts (SMAs) are exempt from many of these rules (which we are supportive of). If large investors cannot obtain the bespoke transparency, fees or other contractual terms they require through pooled vehicles this may increase the use of SMAs. This could result in smaller investors, who are unable to invest in sizes large enough to justify an SMA relationship, being left in smaller pooled vehicles with a potentially higher fee drag.

For this reason, we believe it is important that any enacted rule should have a clear benefit to investors to justify the increase in costs and resources that might be required to adopt it.

Time for Response to Request for Input

The SEC's proposed rules are extensive. Whilst certain advisers may already operate in the way proposed by the rules, there are also some large-scale changes to the way the asset management industry works. At the SBAI, we aim for our responses to be thoughtful and promote effective regulation for the entire alternatives

eco-system and we do this by discussing the responses with our community of both asset managers and investors.

The SEC has been active in proposing new rules in Q1 2022 and as such this has provided limited time to properly assess the implications and craft a detailed response to the questions posed that includes the impact, any relevant data, and suggested alternatives where appropriate.

We would ask the SEC to consider providing more time for responses to consultations of this nature to aid with arriving at effective rules for the industry that support public policy.

Discussion of the Proposed Rules

SEC Question 1:
Are there certain activities that this package of proposed reforms would address in the private fund context that we should also address in other contexts (e.g., separately managed accounts)? Why or why not?

SBAI Response:

We agree with the SEC's proposal that Managed Accounts, Separately Managed Accounts and the equivalent should <u>not</u> be covered by this rule.

These accounts are bespoke agreements between individual institutional investors and advisers and typically full transparency is provided. This negates the conflicts of interest and investor protection concerns cited in the proposal. We indicate throughout our response areas where we believe the SEC should specifically state this within the proposed rules.

We also believe that Fund of Ones (a fund structure limited to one underlying investor plus the adviser), which are also bespoke agreements negotiated between sophisticated parties, should also be exempt from these rules.

SEC Question 2:
Are there certain activities in the private fund context that this package of proposed reforms is not addressing but we should address?

SBAI Response:

As noted in our key points above, the rules are being proposed as the SEC does not believe that private funds have optimal governance arrangements, but the SEC has not addressed governance of these funds within the rules.

We believe the SEC should consider whether one principles-based rule on governance of private funds would be more appropriate than a long list of prescriptive rules on the operations of the private fund and the private fund adviser.

Quarterly Statements

SEC Question 3:
Should we, as proposed, require advisers to private funds to prepare a quarterly statement providing standardised disclosures regarding the cost of investing in the private fund and the private fund's performance and distribute quarterly statements to the fund's investors?

SBAI Response:

In general, we are supportive of increased and, where appropriate, standardised disclosure from advisers to institutional investors to aid investors with making well-informed investment decisions.

Performance Reporting

The rules as proposed may not be beneficial to investors, particularly in areas such as providing fund-level performance or consolidated performance across substantially similar vehicles (we discuss this further in response to other questions). Reporting in this way could be at best misleading to investors and at worst provide no useful information to assess or compare investments in private funds. Mandating personalised performance statements may solve this issue but will be burdensome to implement for many asset managers. For these reasons we believe flexibility to report performance in a way that is appropriate to the private fund and its investors would be a more efficient solution.

Many investors will choose to calculate their own performance from the details they receive or may request performance reported using a specific methodology or in a specific format. The prescriptive nature of this rule, combined with the proposed prohibition on preferential transparency, may result in investors only being able to receive one specific type of performance reporting and therefore reducing investor choice.

We believe disclosure of the methodology used to calculate performance, including any material assumptions, fee rates used and the use of subscription lines, would be more beneficial to investors than prescribing the methodology that should be used.

Fee Disclosure

We are supportive of disclosure of fees to investors. Our Alternative Investment Standard 2.5 requires:

"The fees and expenses (including but not limited to management and performance fees) charged to the fund should be disclosed in the fund's audited financial statements. This includes explanations in the annual report which allow investors to compare, readily, the fees and expenses charged with the description of such fees and expenses set out in the fund's offering documents where this is not obvious from the disclosure in the financial statements."

In addition, we provide a Total Expense Ratio template for liquid funds on our website that advisers may use on a voluntary basis.

Many fees charged to private funds are charged annually. Reporting expenses on a quarterly basis may therefore not allow for easy comparison for investors. Annual reporting would be more appropriate and is in line with other global regulations such as the annual costs and charges disclosures under MiFID II[5] in the EU.

If the SEC enacts this rule, we recommend it does not mandate a specific template or otherwise supplant the use of existing industry templates and standards for fee disclosure such as the SBAI Total Expense Ratio, the Institutional Limited Partner Association's (ILPA) private equity fee template or formats commonly used in audited financial statements (or other formats agreed between investors and advisers).

Proposed Alternative Rule:

Performance Reporting

Private fund advisers should report performance to all investors at a frequency suitable for the private fund's strategy and agreed with investors. Performance reporting should include disclosure of the methodology used to calculate performance including any material assumptions made, the fee rate applied and whether subscription lines have been used.

Fees and Expenses

Private fund advisers should disclose to investors on at least an annual basis all fees and expenses charged to the private fund including but not limited to compensation (e.g., management and performance fees), operating expenses, and fees paid to the adviser (whether offset against other compensation or not) by underlying portfolio companies controlled by the adviser. This should include explanations that allow investors to compare the fees and expenses charged with those allowed in the private fund's offering documents where this is not obvious from the disclosure.

SEC Question 4:

Should we instead require advisers to provide investors with personalised information that takes into account the investor's individual ownership stake in the fund in addition to, or in lieu of, a statement covering the private fund?

- *If so, what information should be included in the personalised disclosure? For example, should the statement reflect specific fee arrangements, including any offsets or waivers applicable only to investors receiving the statement?*
- *Do advisers currently provide personalised fee, expense, and performance disclosures? If so, what other types of information do advisers or funds typically include? Do they automate such disclosures?*
- *How expensive and complex would it be for advisers to create and deliver personalised disclosures?*
- *How useful would it be for investors to receive personalised disclosures?*

SBAI Response:

As per our response to the previous question, we believe that different investors will have different requirements in terms of performance reporting. Any rule enacted should be flexible enough to allow the private fund advisor and the investors to agree the most appropriate type of performance reporting given the specific asset classes involved, type of fund vehicle and the preferences of the investors in the specific fund. These all vary widely across the private fund industry.

[5] Markets in Financial Instruments Directive II

SEC Question 5:
Would investors find data regarding the private fund's fees, expenses, and performance useful given that certain investors may have different economic arrangements with the adviser, such as fee breaks or expense caps? Should we require advisers to disclose in the quarterly statement whether investors are subject to different economic arrangements, whether documented in side letters or other written agreements or, to the extent applicable, as a result of different class terms? If so, should we require advisers to list the rates or otherwise show a range?

SBAI Response:
We do not believe that the quarterly statements should include the details of any economic arrangements the manager has made with different institutional investors. These are contractual terms agreed between two parties and it is not common in this industry or others to disclose contractual terms to an unrelated third party.

If the aim of this rule is to provide the investor with specific details of their own performance and fees, then we believe that different investors will have different requirements in terms of performance reporting. Any rule enacted should be flexible enough to allow the private fund advisor and the investors to agree the most appropriate type of performance reporting given the specific asset classes involved, type of fund vehicle and the preferences of the investors in the specific fund. These all vary widely across the private fund industry.

If the aim of this rule is to provide all investors with insight into other investors' commercial arrangements, then we do not believe this is appropriate. We would be supportive of advisers having to disclose to all investors (on request) that some investors have better commercial arrangements, but we do not support full transparency to all investors of the specifics of these terms. In all markets, clients may have different commercial arrangements due to factors such as risk taken, size of investment or others and this is part of the price formation mechanism for this market. We do not believe that price formation should be regulated in this way and support investors retaining the ability to confidentially negotiate their commercial arrangements based on their individual circumstances.

We note in response to other proposed rules further down in this document that the SEC has expressed concerns that smaller institutional investors cannot negotiate the same types of deals as larger ones. Whilst this may sometimes be true, disclosure or prohibition of these types of preferential treatment are unlikely to result in the smaller institutional investors receiving fee discounts and more likely to mean the larger institutional investors (typically pension funds) will find they no longer have access to their current lower fees for new investments which is overall detrimental to the underlying beneficiaries.

Should the SEC enact the fee disclosure section of this proposed rule as written, **we strongly recommend that a grandfathering clause** is included so this disclosure applies to new agreements between investors and advisers and not all historic ones. Applying the disclosure to historic agreements will require repapering and renegotiation of these agreements (which are typically agreed with confidentiality clauses). This will mean both investors and advisers will have to dedicate significant time, resources and costs to this process.

SEC Question 6:
Should the quarterly statement rule apply to registered advisers to private funds as proposed or should it apply to all advisers of private funds? Should it apply to exempt reporting advisers? Should the rule include any exceptions for categories of advisers? If so, what conditions should apply to such an exception?

SBAI Response:
This rule if enacted should apply to registered advisers only.

SEC Question 7:
Should the rule require advisers to prepare and distribute the quarterly statements only to private fund investors, as proposed? Alternatively, should the rule require advisers to provide quarterly statements to investors in other types of pooled investment vehicles, such as a vehicle that relies on an exclusion from the definition of "investment company" in section 3 of the Investment Company Act other than section 3(c)(1) or 3(c)(7) of that Act? For example, should we require advisers to provide quarterly statements to investors in pooled investment vehicles that rely on the exclusion from the definition of "investment company" in section 3(c)(5)(C) of that Act?

SBAI Response:
We believe this rule, if enacted, should apply only to private fund investors i.e., those in funds that rely on 3(c)1 or 3(c)(7).

SEC Question 8:
The proposed rule would require an adviser to distribute the quarterly statement to the private fund's investors within 45 days after each calendar quarter end, unless such a quarterly statement is prepared and distributed by another person. Would this provision eliminate burdens where there are multiple advisers to the same fund, while still providing the fund's investors with the benefits of the quarterly statement? Would the fund's primary adviser typically prepare and distribute the quarterly statement in these circumstances? How would advisers that do not prepare and distribute a quarterly statement in reliance on another adviser demonstrate compliance with this requirement?

SBAI Response:
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 9:
The proposed rule would require advisers to prepare and distribute a quarterly statement disclosing certain information regarding a private fund's fees, expenses, and performance. Are there alternative approaches we should require to improve investor protection and bring greater efficiencies to the market? For example, should we establish maximum fees that advisers may charge at the fund level? Should we prohibit certain compensation arrangements, such as the "2 and 20" model? Should we prohibit advisers from receiving compensation from portfolio investments to the extent they also receive management fees from the fund? Should we require advisers to disclose their anticipated management fee revenue and operating budget to private fund investors or an LPAC or other similar body (despite the limitations of private fund governance mechanisms, as discussed above) on an annual or more frequent basis? Should we impose limitations on management fees (which are typically paid regardless of whether the fund generates a profit), but not impose limitations on performance-based compensation (which is typically tied to the success of

the fund)? Should we prohibit management fees from being charged as a percentage of committed capital and instead only permit management fees to be based on invested capital, net asset value, and other similar types of fee bases? Should we prohibit certain expense practices or arrangements, such as expense caps provided to certain, but not all, investors?

SBAI Response:
We do not believe that the SEC should set the terms for market pricing of private funds and are supportive of disclosure over prohibition.

Commercial terms are contractual agreements negotiated between investors and private fund advisers. The proposed rule would restrict the terms that investors can negotiate and reduce investor choice. In principle we do not believe the SEC should be involved in setting limits on negotiated contractual arrangements between two sophisticated parties.

In all markets clients may have different commercial arrangements due to factors such as risk taken, size of investment or others and this is part of the price formation mechanism of this market. We do not believe that price formation should be regulated in this way and support investors retaining the ability to confidentially negotiate commercial arrangements based on their individual circumstances.

For clarity we would not support the introduction of maximum fees, prohibition of certain compensation arrangements such as the "2 and 20" model, prohibition of private fund advisers receiving compensation from portfolio investments or any other limitations of the type of compensation structures used by advisers. We do support disclosure of this compensation to investors in an appropriate way.

SEC Question 10:
Similarly, should we prohibit certain types of private fund performance information in the quarterly statement? For example, should we prohibit advisers from presenting performance with the impact of fund-level subscription facilities? Should we prohibit advisers from presenting combined performance for multiple funds, such as a main fund and a co-investment fund that pays lower or no fees?

SBAI Response:
If the proposed rule on quarterly statements is enacted as described, it will mandate a specific type of performance reporting that will be uniform. In this case, we do not believe that advisers should be prohibited from providing additional performance calculations provided the methodology is disclosed so that it is clear why the performance is different.

SEC Question 11:
Do private fund advisers or their related persons receive other economic benefits that the rule should require advisers to disclose in the quarterly statement? For example, should the quarterly statement also require disclosure and quantification of the kinds of economic benefits commonly received by advisers or their related persons from broker-dealers or other service providers to private funds, such as hedge funds? Why or why not?

SBAI Response:
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Fee and Expense Disclosure

Fund-Level Disclosure:

SEC Question 12:
Should we require advisers to disclose all compensation and fund expenses as proposed? Do commenters agree with the scope of the proposal? Why or why not?

SBAI Response

We are supportive of disclosure of fees. Our Alternative Investment Standard 2.5 requires:

"The fees and expenses (including but not limited to management and performance fees) charged to the fund should be disclosed in the fund's audited financial statements. This includes explanations in the annual report which allow investors to compare, readily, the fees and expenses charged with the description of such fees and expenses set out in the fund's offering documents where this is not obvious from the disclosure in the financial statements."

In addition to this we provide a Total Expense Ratio template for liquid funds on our website which advisers can use on a voluntary basis.

Many fees charged to private funds are charged annually. Reporting expenses on a quarterly basis would therefore not allow for easy comparison for investors. Annual reporting may be more appropriate and is in line with other global regulations such as the annual costs and charges disclosures under MiFID II[6] in the EU.

If the SEC enacts this rule, we recommend it does not prescribe a specific template or otherwise supplant the use of existing industry templates and standards for fee disclosure such as the SBAI Total Expense Ratio, the Institutional Limited Partner Association's (ILPA) private equity fee template or formats commonly used in audited financial statements (or other formats agreed between investors and advisers).

Proposed Alternative Rule:

Private fund advisers should disclose to investors on at least an annual basis all fees and expenses charged to the private fund including but not limited to compensation (e.g., management and performance fees), operating expenses, and fees paid to the adviser (whether offset against other compensation or not) by underlying portfolio companies controlled by the adviser. This should include explanations that allow investors to compare the fees and expenses charged with those allowed in the private fund's offering documents where this is not obvious from the disclosure.

[6] Markets in Financial Instruments Directive II

SEC Question 13:
Would the proposed content result in fund-level fee and expense disclosure that is meaningful to investors? Are there other items that advisers should be required to disclose in the fund table? Are there any proposed items that we should eliminate? Would more or less information about the fees and expenses charged to the fund be helpful for investors? Are there any revisions to the descriptions of fees that would make the proposed disclosure more useful to investors?

SBAI Response

As discussed above, we believe the SEC should not prescribe a specific template or otherwise supplant the use of existing industry templates and standards for fee disclosure such as the SBAI Total Expense Ratio, the Institutional Limited Partner Association's (ILPA) private equity fee template or formats commonly used in audited financial statements (or other formats agreed between investors and advisers).

SEC Question 14:
Instead of the proposed approach, should we prescribe a template for the fund table? Would the increased comparability of a template be useful to investors? Would a template be flexible enough to accommodate changes in the types of fees and expenses as well as the types of offsets, rebates, or waivers used by private fund advisers? Would a template necessitate repeated updating as the industry evolves?

SBAI Response

As discussed above, we believe the SEC should not prescribe a specific template or otherwise supplant the use of existing industry templates and standards for fee disclosure such as the SBAI Total Expense Ratio, the Institutional Limited Partner Association's (ILPA) private equity fee template or formats commonly used in audited financial statements (or other formats agreed between investors and advisers).

SEC Question 15:
Should we include any additional definitions of terms or phrases for the fund table? Should we omit any definitions we have proposed for the fund table?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 16:
The proposed rule would require an adviser to include the compensation paid to a related person sub-adviser in its quarterly statement. For private funds that have sub-advisers that are not related persons, should we require a single quarterly statement showing all adviser compensation (at both the adviser and sub-adviser levels)? In cases where a nonrelated person sub-adviser does not prepare a quarterly account statement in reliance on the adviser's preparation and distribution of the quarterly statement to the fund's investors, how would advisers reflect the compensation paid to the sub-adviser and its related persons? Do commenters agree that such compensation would be captured as a fund expense? Should we require a separate table covering these fees and expenses,

as well as a separate table showing portfolio investment compensation paid to the subadvisor or its related person? How would advisers operationalize this requirement in these circumstances?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 17:

Should we adopt the proposed definitions of "related persons" and "control" as proposed? Are they too broad? Are the proposed definitions broad enough? Should we add former personnel of the adviser or its related persons to the proposed definition? If so, for how long after a departure from the adviser or its related persons should such personnel fall into the definition? Should the definition of related person include family members of adviser personnel or persons who share the same household with adviser personnel? Should the definition capture any person directly or indirectly controlled by the adviser's officers, partners, or directors (including any consulting firms controlled by such persons)? Should it capture operational partners, senior advisors, or other similar consultants of the adviser, the private fund, or its portfolio investments? Should we add any entity more than five percent of the ownership of which is held, directly or indirectly, by the adviser or its personnel? Should the definition include any person that receives, directly or indirectly, management fees or performance-based compensation from, or in respect of, the fund; or any person that has an interest in the investment adviser or general partner (or similar control person) of the fund? If we adopt a different definition of "related person" than what is being proposed, should we use a different defined term (such as "related party") to avoid confusion given that the term "related person" is defined in Form ADV?

SBAI Response

We would recommend that definitions be consistent across different reporting requirements.

SEC Question 18:

For purposes of the definition of "control," are the control presumptions appropriate in this context? Should we eliminate or modify any of the presumptions? For example, should we eliminate aspects of the definition that may capture passive investors who do not have the power to direct the management or policies of the relevant entity? Why or why not? Should we add any additional control presumptions? For example, should an entity be presumed to be controlled by an adviser to the extent the adviser has authority over the entity's budget or whether to hire personnel or terminate their employment?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 19:
The proposed rule includes a non-exhaustive list of certain types of adviser compensation and fund expenses. Would this information assist advisers in complying with the rule? Should we add any additional types? If so, which ones and why?

SBAI Response
As discussed above, we recommend allowing the use of existing industry templates and other formats agreed between investors and advisers.

SEC Question 20:
Do private fund advisers or their related persons receive other economic benefits that the rule should require advisers to disclose in the quarterly statement? For example, should we require hedge fund advisers to disclose the dollar amount of any soft dollar or similar benefits provided by broker-dealers that execute trades for the funds, or any benefits provided by hedge fund prime brokers?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 21:
Do commenters agree with the scope of the proposed definition of "performance-based compensation"? Should we specify the types of compensation that should be included in the definition? For example, should the definition specify that the term includes carried interest, incentive fees, incentive allocations, performance fees, or profit allocations?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 22:
Should we only require the table to disclose adviser compensation and fund expenses after the application of any offsets, rebates, or waivers, rather than before and after, as proposed? If so, why?

SBAI Response
As discussed above, we recommend making use of existing industry templates (or other formats agreed between investors and advisers).

SEC Question 23:
Should we define offsets, rebates, and waivers? If so, what definitions should we use and why? Are there any types of offsets, rebates, and waivers that we should not require advisers to reflect in the fund table? If so, which ones and why? To the extent that offsets, rebates, or waivers are available to certain, but not all, investors, are there any operational concerns with reflecting and describing those offsets, rebates, or waivers in the fund-wide numbers presented in the quarterly statement? Are there alternatives we should use?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 24:
Should we require advisers to disclose the amount of any offsets or rebates carried forward during the reporting period to subsequent periods to reduce future adviser compensation as proposed? Would this information be helpful for investors? Do advisers already provide this information in the fund's financial statements or otherwise?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 25:
Should we require advisers to provide any additional disclosures regarding fees and expenses in the quarterly statement? In particular, should we require any disclosures from an investment adviser's Form ADV Part 2A narrative brochure (if applicable) to be included in the quarterly statement, such as more details about an investment adviser's fees?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 26:
Should we tailor the disclosure requirements based on fund type? For example, should the requirements or format for hedge funds differ from the requirements and format for private equity funds? Are there unique fees or expenses for types of funds that advisers should be required to disclose or otherwise list as a separate line item? If so, how should we define these types of funds for these purposes? For example, should we use the definitions of such terms used on Form ADV?

SBAI Response

If the rule is enacted as proposed, we would recommend that there is flexibility for different types of reporting for different funds. Fees and expenses commonly paid within a hedge fund will look different to those in, for example, private equity or real estate funds. Similarly, fees and expenses paid in one type of hedge fund could differ considerably from those relevant to other hedge funds. In our alternate rule proposal, we feel it would be more appropriate to not define exactly how this should be presented but allow the use of existing industry templates (or other formats agreed between investors and advisers) and allow flexibility in the format of reporting.

SEC Question 27:
Do any of the proposed requirements impose unnecessary costs or compliance challenges? Please provide specific data. Are there any modifications to the proposal that we could make that would lower those costs or mitigate those challenges? Please provide examples.

SBAI Response

Many private fund advisers will already provide details of fees and expenses through financial statements, use of existing industry templates or otherwise. Processes and systems will already have been set up to achieve this. Changing the reporting format will introduce compliance costs, which in many cases will be passed through to the funds either directly or in the form of higher fees or lower fee discounts.

We recommend modifying this rule to the alternative suggestion below to allow flexibility to provide this transparency in the most cost-effective way.

Proposed Alternative Rule:

Private fund advisers should disclose to investors on at least an annual basis all fees and expenses charged to the private fund including but not limited to compensation (e.g., management and performance fees), operating expenses, and fees paid to the adviser (whether offset against other compensation or not) by underlying portfolio companies controlled by the adviser. This should include explanations that allow investors to compare the fees and expenses charged with those allowed in the private fund's offering documents where this is not obvious from the disclosure.

SEC Question 28:
The proposed quarterly statement prescribes minimum fee and expense information that must be included. What are the benefits and drawbacks of prescribing the minimum disclosure to be included in the quarterly statement and otherwise permitting advisers to include additional information? Do commenters agree that we should allow advisers to include additional information? Would the inclusion of additional information affect whether investors review the quarterly statement?

SBAI Response

If the rule is enacted, it should allow the flexibility for a private fund adviser to include additional information.

SEC Question 29:
Certain advisers use management fee waivers where the amount of management fees paid by the fund to the adviser is reduced in exchange for an increased interest in fund profits. Because fund

agreements often document such waivers with complex and highly technical tax provisions, should we provide guidance to assist advisers in complying with the proposed requirement to describe the manner in which they are calculated or specify a methodology for such calculations?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 30:

Should we permit advisers to exclude expenses from the quarterly statement if they are below a certain threshold? Alternatively, should we permit advisers to group expenses into broad categories and disclose them under single line item – such as "Miscellaneous Expenses" or "Other Expenses" – if the aggregate amount is de minimis relative to the fund's size? Why or why not?

SBAI Response

As discussed above, we would recommend allowing the use of existing industry templates (or other formats agreed between investors and advisers).

SEC Question 31:

The proposed rule would require the initial quarterly statement for newly formed funds to include start-up and organizational fees of the fund if they were paid during the reporting period. Instead, should the proposed rule exclude those fees and expenses?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 32:

Should the table provide fee and expense information for any other periods? For example, should we require advisers to disclose all adviser compensation and fund expenses since inception (in addition to adviser compensation and fund expenses allocated or paid during the applicable reporting period)? If so, should we require since inception information only for certain types of funds, such as closed-end private funds, and not for other types of funds, such as open-end private funds?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 33:
We recognize that certain private fund advisers may already provide quarterly account or similar statements to investors, such as advisers that rely on an exemption from certain disclosure and recordkeeping requirements provided by U.S. Commodity Futures Trading Commission Regulation 4.7. How often are private fund advisers separately required to provide such quarterly statements, and how often do they do so even when not required? Would there be any overlap between the proposed quarterly statement and the existing quarterly account or similar statements currently prepared by advisers?

SBAI Response
We believe there would be some overlap with existing monthly or quarterly NAV reports (often provided to investors pursuant to CFTC rule 4.7) as well as monthly reports and/or investor letters that many advisers, particularly those managing liquid private funds, currently provide to their investors.

Portfolio Investment-Level Disclosure:

SEC Question 34:
Would the proposed rule provide portfolio investment compensation disclosure that is meaningful to investors? Should the rule require advisers to disclose additional or different information in the portfolio-investment table? Would more information about the fees and expenses charged to portfolio investments be helpful for investors?

SBAI Response
If the SEC enacts this rule, we recommend it makes use of existing industry templates (or other formats agreed between investors and advisers). The rule should also contain flexibility for advisers and investors to agree reporting formats that make sense for the strategy and the investors' needs.

Proposed Alternative Rule:

Private Fund Advisers should disclose to investors on at least an annual basis all fees and expenses charged to the private fund including but not limited to compensation (e.g., management and performance fees), operating expenses, and fees paid to the adviser (whether offset against other compensation or not) by underlying portfolio companies controlled by the adviser. This should include explanations that allow investors to compare the fees and expenses charged with those allowed in the private fund's offering documents where this is not obvious from the disclosure.

SEC Question 35:
Should we include any additional definitions of terms or phrases for the portfolio investment table? Should we omit any definitions we have proposed for the portfolio investment table?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 36:
Is the proposed definition of "portfolio investment" clear? Should we modify or revise the proposed definition? For example, should we define "portfolio investment" as any person whose securities are beneficially owned by the private fund or any person in which the private fund owns an equity or debt interest? Alternatively, should we define "portfolio investment" as any underlying company, business, platform, issuer, or other person in which the private fund has made, directly or indirectly, an investment? Should we permit advisers to determine, in good faith, which entity or entities constitute the portfolio investment for purposes of the quarterly statement rule? For example, a fund of funds may indirectly invest in hundreds of issuers or entities. Depending on the underlying structure, control relationship, and reporting, the fund of funds' adviser may have limited knowledge regarding such underlying entities or issuers. Should we exclude such entities or issuers from the definition of portfolio investment for such advisers? Is there a different standard or test we should use? Should we require such adviser to conduct a reasonable amount of diligence consistent with past practice and/or industry standards? Why or why not?

SBAI Response

"Portfolio investment" is currently defined too broadly. A portfolio investment is generally understood to be a private equity concept referring to an investment in a company controlled by the adviser. Reporting requirements for portfolio investments should be limited to private funds that trade private assets and limited to investments in companies controlled by the adviser.

Any final rule should define "covered portfolio investment" to exclude portfolio investments which the adviser does not control. When an adviser is not involved in, or has no influence over, a portfolio company's operations, the conflict of interest the SEC is trying to address is not present. We recommend the SEC narrows the definition of covered portfolio investment to include only portfolio companies controlled by the adviser.

SEC Question 37:
As discussed above, to the extent a private fund enters into a negotiated instrument, such as a derivative, with a counterparty, we would not consider the private fund to have made an investment in the counterparty. Do commenters agree with this approach? Why or why not? Should we adopt a different approach for derivatives or other similar instruments generally? For purposes of determining whether the fund has made an investment in an issuer or entity, should we only include equity investments? Should we exclude derivatives? Why or why not? How should exchange-traded (i.e., not negotiated) derivatives, including swaps and options, be treated for purposes of the rule?

SBAI Response

We agree that trading a derivative should **not** be viewed as having an investment in the counterparty.

This rule should extend to fees received from private companies controlled by the adviser, all other instruments including but not limited to investment in public equities, derivatives, swaps, options, bonds, loans, commodities, real estate etc. should be exempt from this rule.

SEC Question 38:
The proposed definition of portfolio investment would not distinguish among different types of private funds. Is our approach in this respect appropriate or should we treat certain funds differently depending on their strategy or fund type? If so, how should we reflect that treatment? For example, should we modify the definition with respect to a real estate fund to reflect that such a fund generally invests in real estate assets, rather than operating companies? Because a secondaries fund may indirectly invest in a significant number of underlying operating companies or other assets, should we limit the "indirect" component of the definition for such funds (or any other funds that may have indirect exposure to a significant number of companies or assets)? Why or why not? Would additional definitions be appropriate or useful? Should the proposed rule define the term "entity" and/or "issuer"? If so, how? Should the proposed rule treat hedge funds, liquidity funds, and other open-end private funds differently than private equity funds and other closed-end private funds?

SBAI Response
"Portfolio investment" is currently defined too broadly. A portfolio investment is generally understood to be a private equity concept referring to an investment in a company controlled by the adviser. Reporting requirements for portfolio investments should be limited to private funds that trade private assets and limited to investments in companies controlled by the adviser.

Any final rule should define "covered portfolio investment" to exclude portfolio investments which the adviser does not control. When an adviser is not involved in, or has no influence over, a portfolio company's operations, the conflict of interest the SEC is trying to address is not present. We recommend the SEC narrows the definition of covered portfolio investment to include only portfolio companies controlled by the adviser.

SEC Question 39:
Should we adopt the approach with respect to portfolio-investment compensation as proposed? Do commenters agree with the scope of the proposal? Why or why not?

SBAI Response
We would recommend enacting a more principles-based rule with flexibility as suggested in our alternative proposal.

Proposed Alternative Rule:

Private fund advisers should disclose to investors on at least an annual basis all fees and expenses charged to the private fund including but not limited to compensation (e.g., management and performance fees), operating expenses, and fees paid to the adviser (whether offset against other compensation or not) by underlying portfolio companies controlled by the adviser. This should include explanations that allow investors to compare the fees and expenses charged with those allowed in the private fund's offering documents where this is not obvious from the disclosure.

SEC Question 40:
The proposed rule includes non-exhaustive lists of certain types of fees. Would this information assist advisers in complying with the rule? Should we add any additional types? If so, which ones and why?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 41:
Should we require advisers to list each type of portfolio-investment compensation as a separate line item as proposed? Would this level of detail be helpful for investors with respect to portfolio-investment reporting? Given that many funds require a management fee offset of all portfolio-investment compensation, is this level of detail necessary or useful to investors? Should we instead require advisers to provide aggregate information for each covered portfolio investment?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 42:
Should the rule permit advisers to use project or deal names or other codes, and if so, what additional disclosures are necessary for an investor to understand the nature of the conflicts?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 43:
We considered only requiring advisers to disclose the amount of portfolio investment compensation after the application of any offsets, rebates, or waivers, rather than before and after. We believe the proposed approach would be more helpful for investors because investors would have greater insight into the compensation advisers initially charge and the amount they ultimately retain at the expense of the private fund and its investors. Do commenters agree? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 44:
Would information about a firm's services to portfolio investments be helpful for investors? Are there any elements of the proposed requirements that firms should or should not include? If so, which ones and why?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 45:
We considered requiring advisers to disclose the total portfolio-investment compensation for the reporting period as an aggregate number, rather than providing the amount of compensation allocated or paid by each covered portfolio investment as proposed. However, we believe that investment-by-investment information would provide investors with greater transparency into advisers' fee and expense practices and thus be more helpful for investors. Do commenters agree? Should we require advisers to report a consolidated "top-line" number that covers all covered portfolio investments?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 46:
Should we define the term "ownership interest"? If so, how should we define it? For purposes of the rule, should a private fund be deemed to hold an "ownership interest" in a covered portfolio investment only to the extent the fund has made an equity investment in the covered portfolio investment? Why or why not? What types of funds may not hold an "ownership interest" in a covered portfolio investment?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 47:
The proposed rule would require advisers to list the fund's ownership percentage of each covered portfolio investment. Because the definition of "portfolio investment" could capture more than one entity, will advisers be able to calculate the fund's ownership percentage? Are there any changes to the proposed rule text that could mitigate this challenge? If a portfolio investment captures multiple

entities, should we require advisers to list the fund's overall ownership of such entities? If so, what criteria should advisers use to determine a fund's overall ownership?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 48:

Should we require advisers to disclose how they allocate or apportion portfolio investment compensation among multiple private funds invested in the same covered portfolio investment? If so, how should the portfolio investment table reflect this information?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 49:

Certain advisers have discretion or substantial influence over whether to cause a fund's portfolio investment to compensate the adviser or its related persons. Should the requirement to disclose portfolio-investment compensation apply only to advisers that have such discretion or authority? Should such requirement apply if the adviser is entitled to appoint one or more directors to the portfolio investment's board of directors or similar governing body (if applicable)? Is there another standard we should require?

SBAI Response

Yes – any requirement to report on portfolio investment compensation should be limited to investments in private companies controlled by the adviser.

SEC Question 50:

We recognize that certain private funds, such as quantitative and algorithmic funds and other similar funds, may have thousands of holdings and/or transactions during a quarter and that those funds typically do not receive portfolio investment compensation. While the proposed rule would not require an adviser to include any portfolio investment that did not pay or allocate portfolio-investment compensation to the adviser or its related persons during the reporting period in its quarterly statement, these advisers would need to consider how to identify such portfolio investment's payments and allocations for purposes of complying with this disclosure requirement. Should the rule provide any full or partial exceptions for such funds? Should we require investment-level disclosure for quantitative, algorithmic, and other similar funds only where they own above a specified threshold percentage of the portfolio investment? For example, should such funds only be required to provide investment-level disclosure where they own 25% or more ownership of any class of voting shares? Alternatively, should we use a lower ownership threshold, such as 20%, 10%, or

5%? Should we adopt a similar approach for all private funds, rather than just quantitative, algorithmic, and other similar funds? If so, what threshold should we apply? For instance, should it be 5%? Or 10%? A higher percentage?

SBAI Response

As discussed above, we believe this rule should exempt all other instruments other than those associated with private companies controlled by the adviser. Large systematic or quantitative portfolios do not typically hold investments in these types of securities and would therefore be exempt if the rule was modified in this way.

SEC Question 51:

Should we exclude certain types of private funds from these disclosures? If so, which funds and how should we define them? For example, should we exclude private funds that only hold (or primarily hold) publicly traded securities, such as hedge funds?

SBAI Response

As discussed above, we believe this rule should exempt all other instruments other than those associated with private companies controlled by the adviser. This would be a more effective way of exempting funds where this is not relevant rather than exemptions by fund type.

SEC Question 52:

Should we require layered disclosure for the portfolio-investment table (i.e., short summaries of certain information with references and links to other disclosures where interested investors can find more information)? Would this approach encourage investors to ask questions and seek more information about the adviser's practices? Are there modifications or alternatives we should impose to improve the utility of the information for private fund investors, such as requiring the quarterly statement to present information in a tabular format?

SBAI Response

As discussed above, we recommend allowing the use of existing industry templates (or other formats agreed between investors and advisers).

SEC Question 53:

Are there particular funds that may require longer quarterly statements than other funds? Please provide data regarding the number of funds that have covered portfolio investments and, with respect to those funds, the number of covered portfolio investments per private fund. Should the Commission take into account the fact that certain funds will have more covered portfolio investments than other funds? For example, should we require funds that have more than a specific number of covered portfolio investments, such as 50 or more covered portfolio investments, to provide only portfolio-investment level reporting for a subset of their covered portfolio investments, such as a specific number of their largest holdings during the reporting period (e.g., their largest ten, fifteen, or twenty holdings)?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 54:
The proposed rule would require advisers to list zero percent as the ownership percentage if the fund has completely sold or completely written off its ownership interest in the covered portfolio investment during the reporting period. Instead, should we require or permit advisers to exclude any such portfolio investments from the table? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 55:
The proposed rule would require the adviser to disclose the amount of portfolio investment compensation attributable to the private fund's interest in the covered portfolio investment that is paid or allocated to the adviser and its related persons. Should we require disclosure of portfolio compensation paid to other persons (such as co-investors, joint venture partners, and other third parties) to the extent such compensation reduces the value of the private fund's interest in the portfolio investment?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Calculations and Cross References to Organizational and Offering Document:

SEC Question 56:
Should we allow flexibility in the words advisers use, as proposed, or should we require advisers to include prescribed wording in disclosing calculation methodology? If the latter, what prescribed wording would be helpful for investors? Does the narrative style work or are there other presentation formats that we should require?

SBAI Response
Flexibility would be preferred over prescribed wording.

SEC Question 57:
Should we provide additional guidance or specify additional requirements regarding what type of disclosure generally should or must be included to describe the manner in which expenses, payments, allocations, rebates, waivers, and offsets are calculated? For example, should we provide sample disclosures describing various calculations? Should the rule require advisers to restate

disclosures from offering memoranda (if applicable) regarding the manner in which expenses, payments, allocations, rebates, waivers, and offsets are calculated in the quarterly statement? Do commenters believe that advisers would prefer to restate offering memoranda disclosures rather than drafting new disclosures to avoid conflicting interpretations of potentially complex fund terms? Should the rule only require advisers to provide a cross reference to the language in the fund's governing documents regarding this information (e.g., identifying the relevant document and page or section numbers)?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 58:
Would providing cross references, as proposed, to the relevant sections of the private fund's organizational and offering documents be helpful for investors? Would it permit investors to "cross check" or evaluate the adviser's calculations? Are there other alternatives that would achieve our objectives?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Performance Disclosure

SEC Question 59:
Should the proposed rule require advisers to include performance information in investor quarterly statements? Why or why not?

SBAI Response

In general, we are supportive of increased and, where appropriate, standardised disclosure from advisers to institutional investors to aid investors with making well-informed investment decisions.

The rules as proposed may not be beneficial to investors particularly in areas such as providing fund-level performance or consolidated performance across substantially similar vehicles (we discuss this further in response to other questions). Reporting in this way could be at best misleading to investors and at worst provide no useful information to assess or compare investments in private funds.

Many investors will choose to calculate their own performance from the details they receive or may request performance reported using a specific methodology or in a specific format. The prescriptive nature of this rule, combined with the proposed prohibition on preferential transparency, may result in investors only being able to receive one specific type of performance reporting and therefore reducing investor choice.

We believe disclosure of the methodology used to calculate performance, including any material assumptions and the use of subscription lines, would be more beneficial to investors than prescribing the methodology that should be used.

Proposed Alternative Rule:

Private fund advisers should report performance to all investors at a frequency suitable for the private fund's strategy and agreed with investors. Performance reporting should include disclosure of the methodology used to calculate performance including any material assumptions made, the fee rate applied and whether subscription lines have been used.

SEC Question 60:
Should the proposed rule require advisers to determine whether a private fund is a liquid or illiquid fund and provide performance metrics based on that determination? Alternatively, should the rule eliminate the definitions and give advisers discretion to provide the proposed performance metrics that they believe most accurately portray the fund's returns?

SBAI Response

The rule should eliminate the definitions and give advisers and investors discretion to provide or receive the proposed performance metrics that they believe most accurately portray the fund's returns.

SEC Question 61:
Should we define "illiquid fund" and "liquid fund" as proposed or are there alternative definitions we should use? Are there other terms we should use for these purposes? For example, should we refer to the types of funds that would provide annual net total returns under the rule as "annual return funds" and those that would provide internal rates of return and a multiple of invested cash under the rule as "IRR/MOIC funds"?

SBAI Response

As previously discussed, we do not believe the SEC should determine which types of fund report which performance metrics. The rule should eliminate definitions and give advisers and investors discretion to provide or receive the proposed performance metrics that they believe most accurately portray the fund's returns.

SEC Question 62:
Are the six factors used in the definition of "illiquid fund" sufficient to capture most funds for which an annual net total return is not an appropriate measure of performance? Are there any factors we should add? For example, should we add a factor regarding whether the fund produces irregular cash flows or whether the fund takes into account unrealized gains when calculating performance-based compensation? Should we add as a factor whether the private fund pays carried interest? Are there factors we should eliminate?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 63:
Should we define additional terms or phrases used within the definition of "illiquid fund," such as "has as a predominant operating strategy the return of the proceeds from disposition of investments to investors"? Would this characteristic carve out certain funds, such as real estate funds and credit funds, for which we generally believe internal rates of return and a multiple of invested capital are the appropriate performance measures? If so, why? Should we eliminate or modify this characteristic in the definition of "illiquid fund"?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 64:
Should the proposed rule define a "liquid fund" based on certain characteristics? If so, what characteristics? For example, should we define it as a private fund that requires investors to contribute all, or substantially all, of their capital at the time of investment, and invests no more than a de minimis amount of assets in illiquid investments? If so, how should we define "illiquid investments"? Are there other characteristics relating to redemptions, cash flows, or tax treatment that we should use to define the types of funds that should provide annual net total return metrics?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 65:
Will advisers be able to determine whether a private fund it manages is a liquid or illiquid fund? For example, how would an adviser classify certain types of hybrid funds under the proposed rule? Should the rule include a third category of funds for hybrid or other funds? If so, what definition should we use? Should we amend the proposed definitions if we adopt a third category of funds (e.g., should we revise the definition of "liquid fund" given that the proposal defines "liquid fund" as any private fund that is not an illiquid fund)? If a fund falls within the third category, should the rule require or permit the private fund to provide performance metrics that most accurately portray the fund's returns?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 66:
Are there scenarios in which an adviser might initially classify a fund as illiquid, but the fund later transitions to a liquid fund (or vice versa)? Should we provide additional flexibility in these circumstances? Should the proposed rule require advisers to revisit periodically their determination of a fund's liquidity status? For example, should the proposed rule require advisers to revisit the liquid/illiquid determination annually, semi-annually, or quarterly?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 67:
How would an adviser to a private fund with an illiquid side pocket classify the private fund under the proposed rule's definitions for liquid and illiquid funds? For example, would the adviser treat the entire private fund as illiquid because of the side pocket? Why or why not? Should we permit or require the adviser to classify the side pocket as an illiquid fund, with the remaining portion of the private fund classified as a liquid fund?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 68:
Instead of requiring advisers to show performance with equal prominence, should the proposed rule instead allow advisers to feature certain performance with greater prominence than other performance as long as all of the information is included in the quarterly statement? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Liquid Funds:

SEC Question 69:
Should we require advisers to provide annual net total returns for liquid funds, as proposed? Would showing annual net total returns for each calendar year since a private fund's inception be overly burdensome for older funds? Would performance information that is more than 10 years old be useful to investors? Why or why not?

SBAI Response
Most liquid funds report performance information to investors, which may include annual net returns since inception, typically more frequently than quarterly.

Through our conversations with our allocator community, we do not believe allocators have problems receiving performance in liquid funds (and therefore see no market failure that would require this information to be mandated through quarterly statements).

We would recommend the SEC is not prescriptive in how the performance is shown and what periods it should be shown for. This will enable private fund advisers and investors to continue to distribute and receive performance in a manner that is appropriate for both the private fund and its investors.

SEC Question 70:
Should the proposed rule define "annual net total return" or specify the format in which advisers must present the annual net total returns? Should the proposed rule specify how advisers should calculate the annual net total return, similar to Form N-1A?

SBAI Response
We do not believe the rule should be this prescriptive.

SEC Question 71:
The proposed rule would require advisers to provide performance information for each calendar year since inception and over prescribed time periods (one-, five-, and ten-year periods). Should the proposed rule instead only require an adviser to satisfy one of these requirements (i.e., provide performance each calendar year since inception or provide performance over the prescribed time periods)? For funds that have not been in existence for one of the prescribed time periods, should the proposed rule require the adviser to show the average annual net total return since inception, instead of the prescribed time period?

SBAI Response
We do not believe the rule should be this prescriptive.

SEC Question 72:
The proposed rule would require advisers to provide average annual net total returns for the private fund over the one-, five-, and ten- calendar year periods. However, the proposal would not prohibit advisers from providing additional information. Should we allow advisers to provide performance information for annual periods other than calendar years?

SBAI Response
Any enacted rule should contain the flexibility for performance to be provided in the most appropriate way for that private fund and its investors.

SEC Question 73:
Should the proposed rule define "average annual net total return" or specify the format in which advisers must present the average annual net total returns?

SBAI Response
We do not believe the rule should be this prescriptive.

SEC Question 74:
The proposed rule would require an adviser to provide "the cumulative net total return for the current calendar year." Instead of using the word "cumulative" net total return, should the rule use the phrase "year to date" net total return?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 75:
To the extent certain liquid funds quote yields rather than returns, should such funds be required or permitted to quote yields in addition to or instead of returns?

SBAI Response
Any enacted rule should contain the flexibility for performance to be provided in the most appropriate way for that private fund and its investors.

Illiquid Funds:

SEC Question 76:
Are the proposed performance metrics appropriate? Why or why not? We recognize that advisers often utilize different performance metrics for different funds. Should we add any other metrics to the proposed rule? For example, should we require a public market equivalent or variations of internal rate of return, such as a modified internal rate of return that assumes cash flows are reinvested at modest rates of return or otherwise incorporates a cost of capital concept for funds that do not draw down all, or substantially all, of investor capital at the time of investment? If so, should we prescribe a benchmark for the cost of capital and reinvestment rates?

SBAI Response

We do not believe the SEC should prescribe the metrics to be used or the methodology for calculating these metrics. There should be flexibility for the adviser to report performance in the most meaningful way for the private fund and its investors.

We would be supportive of disclosures requiring an explanation of the performance calculation methodology including any material assumptions made, fee rates used and whether subscriptions lines have been used.

Private fund advisers should retain the right to send additional or different performance metrics to investors that request them.

SEC Question 77:
The proposed rule would not distinguish among different types of illiquid funds. Is our approach in this respect appropriate or should we treat certain illiquid funds differently? If so, how should we reflect that treatment?

SBAI Response

Different types of illiquid funds may be better served with different performance metrics. For example, private equity vs private credit or liquid funds with illiquid assets or side pockets.

Removing the prescribed metrics from the rule and allowing the flexibility to report the most appropriate performance metrics for the private fund and its investors (with disclosure of methodologies) would address this issue.

SEC Question 78:
Are there additional guardrails we should add to the proposed rule to achieve the policy goal of providing investors with comparable performance information? If so, please explain. Are there practices that advisers use or assumptions that advisers make, when calculating performance that we should require, curtail, or otherwise require advisers to disclose?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 79:
Although some investors receive certain annual performance information about a private fund if that fund is audited and distributes financial statements prepared in accordance with U.S. GAAP, we believe that the proposed rule's performance information would be helpful for private fund investors because it would require performance information to be reported at more frequent intervals in a standardized manner. Do commenters agree? To the extent there are differences (e.g., the requirement that performance be computed without the impact of any fund-level subscription facilities), would investors find this confusing? Would disclosure regarding these differences help to alleviate investor confusion?

SBAI Response

The nature of illiquid assets means they do not always have a current fair value. Many illiquid funds use independent valuation agents to help price these assets periodically, but these come at a cost to the fund and therefore the underlying investors.

It should be noted that even if performance reporting is more frequent for illiquid funds there will be stale prices included in that performance meaning it could be misleading.

SEC Question 80:
Would investor confusion or other concerns arise from requiring performance information in the quarterly statement as proposed?

SBAI Response

The nature of illiquid assets means they do not always have a current fair value. Many illiquid funds use independent valuation agents to help price these assets periodically, but these come at a cost to the fund and therefore the underlying investors.

It should be noted that even if performance reporting is more frequent for illiquid funds there will be stale prices included in that performance meaning it could be misleading.

SEC Question 81:
What, if any, burdens would be associated with this aspect of the proposed rule? How can we minimize any associated burdens while still achieving our goals?

SBAI Response

Requiring prescriptive metrics with a specified calculation methodology may result in investors not receiving the performance metrics they require. As per the proposed preferential treatment rules (discussed further later) providing additional information to certain investors that require it may not be permitted.

The rule should be modified to allow flexibility for the private fund adviser and investors to report or receive performance in the most appropriate way for both the private fund and its investors rather than prescribing metrics and methodologies.

SEC Question 82:
Are the proposed definitions appropriate and clear? If not, how should we clarify the definitions? Should we modify or eliminate any? Would additional definitions be appropriate or useful? For example, should we define any of the terms used in the definition of internal rate of return, such as "net present value" or "discount rate"? If so, what definitions should we use?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 83:
Are the definitions of gross IRR, gross MOIC, net IRR, and net MOIC appropriate? Should we provide further guidance or specify requirements in the proposed rule on how to calculate gross performance or net performance? If so, what guidance or requirements? Should we require advisers to adopt policies and procedures prescribing specific methodologies for calculating gross performance and net performance? Why or why not? When calculating net performance, are there additional fees and expenses that advisers should include? Alternatively, should we expressly permit advisers to exclude certain fees and expenses when calculating net performance figures, such as taxes incurred to accommodate certain, but not all, investor preferences? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 84:
Similarly, are the definitions of gross IRR and gross MOIC appropriate for purposes of calculating the performance metrics of the realized and unrealized portions of the illiquid fund's portfolio? Should we modify such definitions to reference specifically the realized and unrealized portions of the portfolio, rather than only referencing the illiquid fund? For example, should the definition of MOIC be revised to mean, as of the end of the applicable calendar quarter: (i) the sum of (A) the unrealized value of applicable portion of the illiquid fund's portfolio, and (b) the value of all distributions made by the illiquid fund attributable to the applicable portion of the illiquid fund's portfolio; (ii) divided by the total capital contributed to the illiquid fund by its investors attributable to the applicable portion of the illiquid fund's portfolio? Are there other variations we should impose? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 85:
The Global Investment Performance Standards ("GIPS") are a set of voluntary standards for calculating and presenting investment performance. For purposes of calculating an illiquid fund's performance under the proposed rule, are there any elements found in the GIPS standards that we should require? For example, should we require advisers to disclose composite cumulative committed capital, or should we require advisers to disclose performance with and without the impact of subscription facilities? Are there any definitions we should revise or propose to be consistent with the definitions used in the GIPS standards? For example, the GIPS standards define "internal rate of return" as the return for a period that reflects the change in value and the timing and size of external cash flows and "multiple of invested capital" as the total value divided by since inception paid-in capital. If we were to adopt such definitions, do commenters believe that such definitions would result in different performance numbers for illiquid funds, as compared to the

performance numbers that advisers would disclose under the proposed definitions? Why or why not? Please provide examples

SBAI Response

We do not believe the rule should be this prescriptive.

SEC Question 86:

We recognize that advisers and their related persons typically invest in private funds on a "fee-free, carry-free" basis (i.e., they are not required to pay management fees or performance-based compensation). When calculating a fund's performance, how should such interests be taken into account? Should we require advisers to exclude such interests from the calculations, especially the net performance figures?

SBAI Response

Disclosure of the calculation methodology would be more appropriate than a detailed prescriptive methodology in the rule.

SEC Question 87:

The proposed rule would require advisers to calculate the various performance measures without the impact of any fund-level subscription facilities. Do commenters agree with this approach? Should the proposed rule require advisers to provide the same performance measures with the impact of fund-level subscription facilities? Why or why not? The proposed rule does not prohibit advisers from providing the same performance measures with the impact of fund-level subscription facilities. Should we prohibit advisers from doing so?

SBAI Response

Disclosure of the calculation methodology would be more appropriate than a detailed prescriptive methodology in the rule.

Note that requiring an adviser to assume no use of subscription lines in calculating performance could provide misleading results to investors that fail to reflect their actual investor experience. Disclosure of the use of subscription lines within the performance calculation would be more appropriate and investors should retain the right for to ask for different performance measurements if required.

Advisers should not be prevented from providing additional information or performance measures that may be useful to or requested by investors.

SEC Question 88:

Should we define the term "computed without the impact of any fund-level subscription facilities"? Should we provide additional guidance or requirements regarding how advisers generally should or must calculate such performance measures? If so, what guidance or requirements should we provide?

SBAI Response
Disclosure of the calculation methodology would be more appropriate than a detailed prescriptive methodology in the rule.

SEC Question 89:
We recognize that a fund-level subscription facility has the potential to have a greater impact on a fund's internal rate of return as compared to its multiple of invested capital. Should advisers only be required to provide "unlevered" internal rates of return and not "unlevered" multiples of invested capital? If the fund realizes an investment prior to calling any capital from investors in respect of such investment, how would an adviser calculate a multiple for such investment?

SBAI Response
Disclosure of the calculation methodology would be more appropriate than a detailed prescriptive methodology in the rule. Private funds use many sources of leverage beyond subscription facilities, so the calculation of an "unlevered" return could be burdensome to produce, misleading and may be of limited use to the investor.

SEC Question 90:
The proposed rule would require advisers to prepare the statement of contributions and distributions without the impact of any fund-level subscription facilities. Would this information be helpful for investors? Would advisers be able to prepare such a statement without making arbitrary assumptions? Why or why not? For example, would advisers need to make assumptions in calculating the preferred return (if applicable)?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 91:
The proposed rule would require only gross performance measures for the realized and unrealized portion of the illiquid fund's portfolio. Should the proposed rule require net performance information as well? Would net performance measures be beneficial for investors despite the drawbacks discussed above? What assumptions should we require in calculating net information? What limitations, if any, would advisers face in providing net performance measures?

SBAI Response
Disclosure of the calculation methodology would be more appropriate than a detailed prescriptive methodology in the rule. Disaggregating realised and unrealised gains for certain types of portfolios, even in illiquid funds, could be very challenging, subjective and may be of limited use for investors.

SEC Question 92:
Should we define the phrases "unrealized portion of the illiquid fund's portfolio" and "realized portion of the illiquid fund's portfolio"? For example, should we define the realized portion to include

not only completely realized investments but also substantially realized investments to the extent the fund's remaining interest is de minimis? Why or why not?

SBAI Response

Disclosure of the calculation methodology would be more appropriate than a detailed prescriptive methodology in the rule.

SEC Question 93:

Should we require advisers to disclose the dollar amounts of the realized and unrealized portions of the portfolio? Should we also require advisers to disclose such amounts as percentages? For example, if the value of the realized portion of the portfolio is $250 million and the value of the unrealized portion is $750 million, should we require advisers to disclose those amounts, both as dollar values and percentages (i.e., 25% ($250 million) of the illiquid fund's portfolio is realized, and 75% ($750 million) remains unrealized)?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 94:

The proposed rule would require advisers to provide cumulative performance reporting since inception of the illiquid fund each quarter. Is this the right approach? Should the proposed rule require performance since inception for each quarter or on an annual basis? Should the proposed rule remove the "since inception" requirement for quarterly reports and instead require performance for each quarter of the current year, and cumulative performance for the current year? If so, why or why not?

SBAI Response

Any enacted rule should include the flexibility for a private fund adviser to report performance in the most appropriate way for the private fund and its investors.

SEC Question 95:

Should we prescribe specific periods for illiquid fund performance reporting? For example, should we prescribe one-, five-, and/or ten-year time periods? Instead, should we require that advisers always present performance since inception as proposed? Are there other periods for which we should require the presentation of performance results? Are there any specific compliance issues that an adviser would face in generating and presenting performance results for the required period? For example, would advisers have the requisite information to generate or support performance figures for older funds from the proposed recordkeeping requirements and/or performance presentation requirements? If not, should we provide an exemption for advisers that lack such information?

SBAI Response
Any enacted rule should include the flexibility for a private fund adviser to report performance in the most appropriate way for the private fund and its investors.

SEC Question 96:
Liquid funds often have longer terms than illiquid funds. To the extent an illiquid fund has been in existence for an extended period of time, such as more than ten years, should the rule prescribe specific periods for performance reporting for such funds (e.g., one-, five-, and/or ten-year time periods)?

SBAI Response
This is not necessarily an accurate statement – term length can vary in both liquid and illiquid funds. For example, illiquid funds that invest in real estate or infrastructure may have terms of 20 years or more.

We do not believe the rule should be this prescriptive.

SEC Question 97:
Should we require that advisers provide performance results current through the end of the quarter covered by the quarterly statement as proposed? In circumstances where quarter-end numbers are not available at the time of distribution of the quarterly statement, should we require an adviser to include performance measures through the most recent practicable date as proposed? Should we define, or provide additional guidance about, the term "most recent practicable date"? If so, what definition or additional guidance should we provide?

SBAI Response
We do not believe the rule should be this prescriptive.

SEC Question 98:
Should the proposed rule require advisers to make certain, standard disclosures tailored to each of the performance metrics mandated in the proposed rule? For example, should we require advisers to illiquid funds that are required to display internal rate of return to disclose prominently that the returns do not represent returns on the investor's capital commitment and instead only reflect returns on the investor's contributed capital? Should we require advisers to disclose that an investor's actual return on its capital commitment will depend on how the investor invests its uncalled commitments?

SBAI Response
We do not believe the rule should be this prescriptive.

SEC Question 99:
As noted above, we would generally interpret the phrase computed without the impact of fund-level subscription facilities to require advisers to exclude fees and expenses associated with the subscription facility, such as the interest expense, when calculating net performance figures and preparing the statement of contributions and distributions. Do commenters agree with this approach? Should we require advisers to include such amounts instead? Are there other

assumptions advisers would need to make in calculating performance information that the rule should address?

SBAI Response

We do not believe the rule should be this prescriptive.

SEC Question 100:

The proposed rule would require the statement of contributions and distributions to reflect the private fund's net asset value as of the end of the applicable quarter. Should we require advisers to provide additional detail regarding the unrealized value of the private fund? For example, should we require advisers to reflect the portion of such net asset value that would be required to be paid to the adviser as performance-based compensation assuming a hypothetical liquidation of the fund?

SBAI Response

We do not believe the rule should be this prescriptive.

SEC Question 101:

The statement of contributions and distributions generally reflects aggregate, fund-level numbers. Should we also require a statement of contributions and distributions for each underlying investment? Would a statement of each investment's cash flows be useful to investors? Why or why not? Would such a requirement be too burdensome for certain advisers, especially advisers to private funds that have a significant number of investments? Should this requirement only apply to certain types of funds, such as private equity, venture capital, or other similar funds that may invest in operating companies?

SBAI Response

We do not believe the rule should be this prescriptive.

SEC Question 102:

Should we provide further guidance or specify requirements on how advisers generally should or must present performance? For example, should we require advisers to present the various performance metrics with equal prominence as proposed? Should we require advisers to present performance information in a format designed to facilitate comparison? Should we provide additional guidance or requirements regarding how an adviser should or must calculate the proposed performance metrics? Is there additional information that we should require advisers to disclose when presenting performance?

SBAI Response

We do not believe the rule should be this prescriptive.

SEC Question 103:

Should we provide further guidance or specify requirements in the rule on how advisers generally should or must treat taxes for purposes of calculating performance? For example, should the rule

state that advisers may exclude taxes paid or withheld with respect to a particular investor or by a blocker corporation (but not the illiquid fund as a whole)?

SBAI Response

We do not believe the rule should be this prescriptive.

Prominent Disclosure of Performance Calculation Information

SEC Question 104:
Should we require advisers to disclose the criteria used and assumptions made in calculating the performance as part of the quarterly statement as proposed? Is this approach too flexible? Should we instead prescribe required disclosures?

SBAI Response

We are supportive of disclosure of the criteria used and material assumptions made in performance calculations. We believe there should be flexibility for private fund advisers to make the most relevant and appropriate disclosures and that the rule should not prescribe these disclosures.

SEC Question 105:
Should we require advisers to provide these disclosures prominently as proposed? Is there another disclosure standard we should use for these purposes?

SBAI Response

We have not answered this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 106:
Because we propose to require an adviser to provide these disclosures as part of each quarterly statement, investors would receive these disclosures quarterly. Would providing these disclosures every quarter reduce their salience? Should we require these disclosures only as part of the first quarterly statement that an adviser sends to an investor with amendments if the criteria used or assumptions made in calculating performance change? Should we permit hyperlinking to these disclosures after the initial quarterly statement?

SBAI Response

We have not answered this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Preparation and Distribution of Quarterly Statements

SEC Question 107:
Should we require advisers to prepare and distribute statements to clients at least quarterly, or should we prescribe a different frequency? For example, should we require monthly, semi-annual, or annual statements? Should we mandate the same delivery frequency for all proposed statements under the rule? How would each of these approaches affect comparability and effectiveness of the information in those statements? Would a quarterly reporting obligation require advisers to value the fund's investments more frequently than advisers currently do?

SBAI Response

We do not believe that the SEC should mandate for these statements to be distributed more frequently than quarterly, but the rule should allow flexibility for private fund advisers to distribute them more frequently if they choose to or their investors request it.

It is customary and accepted practice for certain types of funds to distribute this information monthly, while others typically distribute this information quarterly. In addition, disclosure requirements for Registered Investment Companies (RICs) are semi-annual therefore if the rule is enacted as proposed, disclosure to institutional investors would be mandated more frequently than to retail investors.

The nature of illiquid assets means they do not always have a current fair value. Many illiquid funds use independent valuation agents to help price these assets periodically, but these come at a cost to the fund and therefore the underlying investors. Requiring the assets to be valued for each quarterly statement would increase the cost to the fund, and therefore investors, for limited benefit as the value of these assets is typically only determined on their disposal.

It should be noted that even if performance reporting is more frequent for illiquid funds there will be stale prices included in that performance meaning it could be misleading.

SEC Question 108:
We understand that advisers may use a fund administrator or another person to distribute the quarterly statement. Is the proposed definition of "distribute" broad enough to capture a fund administrator or another person acting under the direction and control of the adviser sending the quarterly statement on the adviser's behalf? If not, should we broaden the definition? Instead of changing the definition of "distribute," should we require the adviser to distribute the quarterly statement, unless it has reason to believe that another person has distributed a required statement (and has a copy of each such statement distributed by such other person)?

SBAI Response

The rule should explicitly state that these statements can be distributed by a third party on behalf of the adviser.

SEC Question 109:
The proposed rule would require advisers to distribute the quarterly statement within 45 days of a calendar quarter end. Is this period too long or too short for an adviser to prepare the quarterly statement while also ensuring timely delivery to investors? Should we instead adopt a flexible

delivery standard, such as a requirement that the adviser distribute the quarterly statement "promptly"? Why or why not? If we were to adopt a prompt delivery standard, should we define "promptly"? If so, how? If we should not define "promptly," should we instead interpret that term to mean as soon as reasonably practicable?

SBAI Response

A flexible delivery standard would be preferred. The length of time required to produce these reports will vary depending on the types of assets, number of positions and structure of the fund (e.g., fund of funds). Requiring the statements to be distributed as soon as reasonably practicable would be preferred over a set time limit.

If the final rule contains a specified time period, we believe that 60 days would be more appropriate.

SEC Question 110:

We understand that preparing quarterly statements may require coordination with, and reliance on, third parties. This may be the case, for example, when a private fund itself invests in other private funds or portfolio companies. Should the rule allow different distribution timelines for different types of private funds (e.g., fund of funds, master feeder funds)? If so, why (e.g., do certain types of funds value assets more frequently than other types)? Should the proposed rule allow different distribution deadlines for underlying funds, depending on whether or not the underlying funds have the same adviser or an adviser that is a related person of the adviser distributing the quarterly statements?

SBAI Response

Adopting a flexible "as soon as reasonably practicable" standard would solve this issue more efficiently.

SEC Question 113:

Should the proposed rule bifurcate the timing of when certain information in the quarterly statement is required? For example, should the proposed rule require fee and expense information starting at the fund's inception and then require performance information beginning later? If so, when should we require an adviser to start showing performance?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 114:

Should the proposed rule treat liquid and illiquid funds differently with regard to fee and expense versus performance reporting? For example, should the proposed rule require liquid funds to start distributing quarterly statements with performance reporting sooner than illiquid funds? If so, why and how much sooner?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 115:
As proposed, the rule would use "operating results" as the trigger for quarterly statement distribution. Should we instead rely on another trigger to indicate when an adviser must start distributing quarterly statements to investors? For example, should the proposed rule instead require an adviser to start distributing quarterly statements when the private fund has financial statements that report operating results? If so, why? Should we define "operating results" or clarify what it means?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 114:
Should the proposed rule require an adviser to prepare and distribute an initial quarterly statement sooner than after the first two full calendar quarters of operating results? For example, should we require an adviser to prepare and distribute a quarterly statement after the first calendar quarter of the fund's operations? Why or why not? If we required an adviser to prepare and distribute a quarterly statement earlier in the fund's life, would this information be useful to investors?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 115:
The proposed rule would require advisers to prepare and distribute a quarterly statement after the private fund has two full calendar quarters of operating results and continuously each calendar quarter thereafter. An adviser would be required to provide information for any stub periods that precede its first two full calendar quarters of operating results (i.e., from the date of the fund's inception to the beginning of the first calendar quarter during which the fund begins to produce operating results). Should the proposed rule explicitly address how advisers should handle stub periods? If so, how?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 116:
The proposed rule would require fee and expense reporting based on a fund's calendar quarter and performance reporting based on a liquid fund's calendar year. Should we instead use "fiscal quarter" and "fiscal year"? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 117:
Are there certain types of advisers or funds that should be exempt from distributing the quarterly statement to investors? If so, which ones and why? Are there certain types of advisers or funds that should be required to distribute quarterly statements to investors? If so, which ones and why?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 118:
Instead of requiring advisers to distribute the quarterly statement to investors, should we require advisers to only distribute or make the quarterly statement available to investors upon request? Despite the limitations of private fund governance mechanisms, as discussed above, should we require advisers to distribute the quarterly statement to independent members of the fund's LPAC, board, or other similar governance body?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 119:
Rule 206(4)-2 under the Advisers Act (the "custody rule") allows a client to designate an independent representative to receive on its behalf account statements and notices that are required by that rule. Under the custody rule, an "independent representative" is defined as someone who does not control, is not controlled by, and is not under common control with the adviser, among other requirements. Should we adopt a similar provision in the quarterly statement rule? Are there specific types of investors that need, or at present commonly designate, independent representatives to receive quarterly statements on their behalf?

SBAI Response
There should be flexibility for investors to request their report to be sent to an independent representative if they choose to.

SEC Question 120:
Should we revise the definition of "distribute" expressly to include distribution by granting investors access to a virtual data room containing the quarterly statement? Why or why not?

SBAI Response
The rule should not be prescriptive on how this is distributed, different investors may choose to receive statements in different ways. The rule should be flexible enough to allow for distribution in many ways.

SEC Question 121:
We considered requiring the proposed quarterly statement disclosures to be submitted using a structured, machine-readable data language. Such format may facilitate comparisons of quarterly statement disclosures across advisers and periods. Should we require advisers to provide quarterly statements in a machine-readable data language, such as Inline eXtensible Business Reporting Language ("Inline XBRL")? Why or why not? Would such a requirement make the quarterly statements, and the information included therein, easier for investors to analyze? For example, would it be useful for investors to download quarterly statement information directly into spreadsheets, particularly for institutional investors that may have a significant number of private fund investments? Would a machine-readable data language impose undue additional costs and burdens on advisers? Please provide support for your response, including, where available, cost data

SBAI Response
The rule should not be prescriptive on how this is distributed, different investors may choose to receive statements in different ways. The rule should be flexible enough to allow for distribution in many ways.

SEC Question 122:
If we adopt rules requiring a machine-readable data language, is the Inline XBRL standard the one that we should use? Are any other standards becoming more widely used or otherwise superior to Inline XBRL? What would the advantages of any such other standards be over Inline XBRL?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Consolidate Reporting for Certain Fund Structures

SEC Question 123:
Do commenters agree that the proposed rule should require advisers to consolidate reporting to cover related funds to the extent doing so would provide more meaningful information to investors and would not be misleading? Alternatively, should we prohibit advisers from consolidating

information for multiple funds? Why or why not? Should the rule permit, rather than require, consolidated reporting?

SBAI Response

Consolidating reporting from different private funds, even when running substantially similar strategies, would provide misleading performance and mean that none of the investors in different private funds receive accurate data on the specific fund they are invested in.

The only place this might be beneficial would be for a feeder fund that is wholly invested in a master fund to be consolidated with the master fund to get a full picture of expenses – but it should not be consolidated with other feeder funds which might have different costs.

SEC Question 124:
Should we require advisers to provide a consolidated quarterly statement for funds that are part of the same strategy, such as parallel funds, feeder funds, and master funds? Alternatively, should these types of funds have separate reporting? For example, should feeder fund investors receive a quarterly statement covering the feeder fund and a separate quarterly statement covering the main fund or master fund? How should the rule address the fact that certain funds may have different expenses (e.g., an offshore fund may have director expenses while an onshore fund may not)? Should we require advisers to provide investors with a summary of any fund-specific expenses and the corresponding dollar amount(s)? Should such a requirement be triggered only if the fund-specific expense exceeds a certain threshold, such as a percentage of the fund size (e.g., .01%, .05%, or .10% of the fund's size) or a specific dollar amount (e.g., $15,000, $30,000, or $50,000)?

SBAI Response

Consolidating reporting from different private funds, even when running substantially similar strategies, would provide misleading performance and mean that none of the investors in different private funds receive accurate data on the specific fund they are invested in.

The only place this might be beneficial would be for a feeder fund that is wholly invested in a master fund to be consolidated with the master fund to get a full picture of expenses – but it should not be consolidated with other feeder funds which might have different costs.

SEC Question 125:
As noted above, the proposal would require advisers to provide feeder fund investors with a consolidated quarterly statement covering the applicable feeder fund and the feeder fund's proportionate interest in the master fund, to the extent doing so would provide more meaningful information to investors and would not be misleading. Do commenters agree with this approach? Alternatively, should we require advisers to provide consolidated reporting covering all feeder funds (and not just the applicable feeder fund) and the master fund? Why or why not?

SBAI Response

The only place this might be beneficial would be for a feeder fund that is wholly invested in a master fund to be consolidated with the master fund to get a full picture of expenses – but it should not be consolidated with other feeder funds which might have different costs.

SEC Question 126:
We also recognize that certain private funds have multiple classes (or other groupings such as series or tranches) of interests or shares. The proposed rule would require the quarterly statement to present fund-wide information. Would advisers face challenges in calculating fee, expense, and performance information if there are differences in fees, allocations, and/or expenses between or among classes, series, or tranches? Should we require disclosure of class-specific fees and expenses, or of the differences among classes? Why or why not? Should we instead permit or require quarterly statements for multi-class private funds to present the proposed fee and expense and performance information on a class-by-class basis, particularly if each class (or series or tranche) is considered a distinct private fund or separate legal entity (with segregated assets and liabilities) under applicable law? Would such an approach provide more meaningful information for investors in each of those classes, given the potential for different fee, allocation, and expense structures? Should we require quarterly statements for multiclass (or multi-series or multi-tranche) private funds to present class-by-class (or series-by-series or tranche-by-tranche) information to the extent each class (or series or tranche) holds different investments?

SBAI Response
Many share classes (or equivalent) of private funds will have different fee structures and class specific fees. The rule should allow for, but not require, class specific statements to be produced.

SEC Question 127:
Should advisers only be required to distribute a class's quarterly statement to interest holders of such class, or should all fund investors be entitled to receive such statement regardless of whether they are interest holders of the relevant class if the rule permits or requires class-specific quarterly statements for multi-class private funds?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 128:
Certain advisers provide combined financial statements covering multiple funds. Should we require or permit advisers to provide consolidated quarterly statements for funds that have combined financial statements? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Format and Content Requirements

SEC Question 129:
Should the proposed quarterly statement rule include a provision on formatting and content? Why or why not?

SBAI Response

The rule should not be prescriptive on the format and content of the reporting. The rule should contain enough flexibility that a private fund adviser can accurately reflect relevant information in a format that is appropriate for investors.

SEC Question 130:
Do commenters agree with the flexibility of the proposed format and content requirements, or should we prescribe wording? For example, should we require a cover page with prescribed wording? If so, what prescribed wording should we require?

SBAI Response

The rule should not be prescriptive on the format and content of the reporting. The rule should contain enough flexibility that a private fund adviser can accurately reflect relevant information in a format that is appropriate for investors.

SEC Question 131:
To meet the rule's formatting requirements, any information that an adviser chooses to include in a quarterly statement, but that is not required by the rule, would be required to be presented in a manner that is no more prominent than the required information. Should the rule, instead, require that advisers more prominently present information that is required by the proposed quarterly statement rule (as opposed to supplemental information that is merely permitted)? If an adviser chooses to include supplemental information, should we require that adviser to disclose what information in the quarterly statement is required versus that which is voluntary?

SBAI Response

The rule should not be this prescriptive.

Recordkeeping for Quarterly Statements

SEC Question 132:
Should we require advisers to maintain the proposed records, or would these requirements be overly burdensome for advisers? Are there alternative or additional recordkeeping requirements we should impose?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 133:
Should we require advisers to retain a record of each addressee, the date(s) the statement was sent, address(es), and delivery method(s) for each quarterly statement, as proposed? Should we instead eliminate this requirement because of the potential burdens?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 134:
Should we provide more specific requirements regarding the records an adviser must maintain to substantiate its determination that a private fund is a liquid fund or an illiquid fund? Alternatively, should we leave the proposed rule as is and allow advisers flexibility in how they document this determination?

SBAI Response
Any final rule should retain the flexibility for advisers to choose how they document this determination.

Mandatory Private Fund Adviser Audits

SEC Question 135:
Would the proposed audit rule provide appropriate protection for investors? If not, please describe what, if any, modifications would improve investor protection.

SBAI Response
It is already very common for private funds to produce annual audited financial statements and is requested by many institutional investors. Whilst we are supportive of the audit requirement in principle, we believe that some of the prescriptive elements of this rule may be detrimental to investors; mainly by increasing costs to the private fund without necessarily increasing benefits to or protection of investors. Namely the requirement for annual audits for both new funds (launched shortly before the fund's financial year end) and liquidating funds as discussed further in responses to later questions.

The rule requires auditors to report anything other than a "clean" audit opinion to the SEC. There are some elements of the operation of a private fund which can result in "qualified" opinions despite being of benefit to private fund investors. An example of this is the common practice of amortising the organisational or set up costs of a private fund over a period of three or five years. This is done to ensure fair treatment of investors by making sure that the full cost of setting up the fund is not solely borne by the day one investors in a fund.

Proposed Alternative Rule:

Auditors could be required to only report ***material*** qualified opinions to the SEC to ensure the reports are reflective of genuine issues and to avoid unnecessary noise.

The rule requires foreign private funds to use a PCAOB auditor and complete a reconciliation to US GAAP.

Foreign private funds will be subject to audit requirements in their local jurisdiction and the impact of this rule could be twofold:

1. The choice of auditors may become extremely limited in some jurisdictions. This reduces competition and may also prevent private funds from rotating auditors periodically which is recommended as good practice, or even required, in some jurisdictions, and
2. US GAAP reconciliations will be an additional cost on top of existing audit fees to these funds. As audit fees are typically paid by the fund this will increase the cost to private fund advisers.

We would propose that private funds organized under non-U.S. law (regardless of the presence of investors who are U.S. persons) have the option of having the annual audit undertaken in accordance with internationally recognized Standards on Auditing (ISAs) rather than having to perform the audit in accordance with U.S. GAAS. In many non-U.S. jurisdictions, most notably the European Union, private funds are required to conduct an annual audit in accordance with ISAs which are broadly comparable to U.S. GAAS, but with different audit independence considerations. Because certain European Union-domiciled funds also need to rotate auditors every 10 years, we believe it will become very challenging to identify auditors that can issue audit opinions under both ISAs and US auditing standards, which we believe will be detrimental to investors from an auditor quality, selection and costs perspective.

Proposed Alternative Rule:

Foreign private funds could be required to complete an audit using a recognised international accounting standard, such as IFRS or GAAP in other jurisdictions, by an independent auditor.

The rule requires that an audit must be completed at least annually. There are two instances in normal practice where this may not currently be the case:

1. For a new fund that launched less than six months from the end of the private fund's financial year, and
2. For liquidating funds with small or stub positions.

For new funds it is common practice and accepted by institutional investors, for a private fund to have a long first financial year if it launches less than six months from the end of the financial year. The cost of an audit is typically similar regardless of whether it is for a period of one year or less. A long first financial year means that the investors do not bear this additional cost at a period when the assets of the fund may be small, and the fee drag will be higher.

For liquidating funds where there are only small or stub positions remaining it is common for investors to agree to audits less frequently than annual. This is to avoid the cost of an annual audit eroding the remaining value in the fund.

Proposed Alternative Rule:

The rule should allow for newly formed private funds to have a long first financial year where the fund has launched less than a certain period (for example three or six months) before the end of the private fund's financial year.

The rule should be flexible enough for investors to agree with private fund advisers that an audit can be completed less frequently than annual for a liquidating fund when only small or stub positions remain.

SEC Question 136:
The proposed audit rule bears many similarities to provisions of the custody rule; however, one notable difference is that there would be no option to, instead, undergo a surprise examination and rely on a qualified custodian to deliver quarterly statements. What would be the impact on advisers to private funds that are not relying on the custody rule's audit provision? Are private funds undergoing similar audits of their financial statements for other reasons, or would this represent a new requirement for them? There also are no exceptions from the proposed rule, as there are in the custody rule, such as the exception from the surprise examination requirement for advisers whose sole basis for being subject to the rule is because they have authority to deduct their advisory fees. What would be the impact on advisers to private funds that are relying on this and other exceptions? Do many private fund advisers rely on the exception for fee-deduction?

SBAI Response

We have not responded to this question but note that it is already common practice for private funds to provide audited financial statements to investors.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 137:
Do commenters agree that the similarities of the audit requirements for the custody rule and for the proposed rule would ease the compliance burdens of advisers that would be required to comply with both? Should the rule provide that compliance with one rule would satisfy the requirements of the other, given the similarities of the two rules? Why or why not?

SBAI Response

Consistency between similar rules would be our preferred approach.

SEC Question 138:
The application of the proposed rule to registered advisers to private funds seeks to balance our policy goal with the anticipated costs of the proposed measures. Do commenters agree with this approach? If not, what would be a more effective way of achieving our goals?

SBAI Response

We agree the proposed rule should only apply to registered advisers of private funds but note our specific concerns on the prescriptiveness of the proposed rule (including reference to additional costs with limited investor benefit) namely:

- Requiring foreign private fund advisers to complete a US GAAP reconciliation and use a PCAOB audit will increase costs and limit the choice of available auditors,
- New fund audit costs will increase if it cannot have a long first financial year when launching less than six months before the end of the fund's financial year, and
- Liquidating fund audit costs will increase if investors cannot agree with advisers to complete audits less than annually where there are only small or stub positions remaining.

SEC Question 139:
Should the rule apply to all advisers to private funds, rather than to just advisers to private funds that are registered or are required to be registered? Should it apply to exempt reporting advisers? Why or why not?

SBAI Response

This rule should only apply to registered advisers of private funds and not include exempt reporting advisers.

If the rule is enacted as described, it will increase the cost of audits at the beginning and end of a fund's life. ERAs tend to be either small funds or foreign private funds. For small funds the increased costs will have a higher fee drag for investors and for ERAs running foreign private funds this may result in the private fund adviser choosing not to be an ERA and therefore reducing choice for US investors.

SEC Question 140:
Similarly, should it apply in the context of all pooled investment vehicle clients (e.g., funds that rely on section 3(c)(5) of the Investment Company Act), rather than just in the context of those that meet the Advisers Act definition of private fund? Should it apply more broadly to any advisory account with financial statements that can be audited? Why or why not?

SBAI Response

This rule should only apply to registered advisers of private funds.

SEC Question 141:
Should the rule provide any full or partial exceptions, such as when an adviser plays no role in valuing the fund's assets, receives little or no compensation for its services, or receives no compensation based on the value of the fund's assets? Should the rule provide exceptions for private funds below a certain asset threshold (e.g., less than $5 million)? A higher or lower amount? Should the rule provide exemptions for private funds that have only related person investors, or that have a limited number of investors, such as 5 or fewer investors? If yes, please identify which advisers or funds we should except, from which aspects of the proposed audit rule, and why

SBAI Response

The rule should provide full or partial exceptions in two cases:

1. When a fund launches less than a specified period before the end of the fund's financial year to allow for a long first financial year, and
2. For investors to be able to agree a less frequent than annual audit for liquidating funds with small or stub positions.

For new funds it is common practice and accepted by institutional investors, for a private fund to have a long first financial year if it launches less than six months from the end of the financial year. The cost of an audit is typically similar regardless of whether it is for a period of one year or less. A long first financial means that the investors do not bear this additional cost at a period when the assets of the fund may be small, and the fee drag will be higher.

For liquidating funds where there are only small or stub positions remaining, it is common for investors to agree to audits less frequently than annual. This is to avoid the cost of an annual audit eroding the remaining value in the fund.

Proposed Alternative Rule:

The rule should allow for newly formed private funds to have a long first financial year where the fund has launched less than a certain period (for example three or six months) before the end of the private fund's financial year.

The rule should be flexible enough for investors to agree with private fund advisers that an audit can be completed less frequently than annual for a liquidating fund when only small or stub positions remain.

SEC Question 142:
Should the rule apply to a sub-adviser to a private fund? In situations where a fund has multiple advisers, is it clear that a single audit of the fund's financial statements may satisfy the proposed audit rule for all of the advisers subject to the rule?

SBAI Response

The rule should be written in a way that clearly requires only one single audit of the fund's financial statements. Requiring more than this would increase the cost to the private fund without increasing the benefit to investors.

SEC Question 143:
Should the alternative of "taking all reasonable steps" to cause a private fund client to be audited apply in any situation, rather than just in situations where the adviser is not in a control relationship with its fund client? Why or why not? Is it sufficiently clear how an investment adviser can establish that it has "taken all reasonable steps" to cause a private fund client to obtain an audit?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 144:
Should the rule require accountants performing the independent public audits to be registered with the PCAOB, as proposed? Should the rule limit the pool of accountants to those who are subject to inspection by the PCAOB, as proposed? If the rule does not include these requirements, should the rule impose any alternative or additional requirements on such accountants? If so, describe these additional requirements and explain why they are necessary or appropriate.

SBAI Response
The rule requires foreign private funds to use a PCAOB auditor and complete a reconciliation to US GAAP.

Foreign private funds will be subject to audit requirements in their local jurisdiction and the impact of this rule could be twofold:

1. The choice of auditors may become extremely limited in some jurisdictions. This reduces competition and may also prevent private funds from rotating auditors periodically which is recommend as good practice, or even required, in some jurisdictions, and
2. US GAAP reconciliations will be an additional cost on top of existing audit fees to these funds. As audit fees are typically paid by the fund this will increase the costs to private fund investors.

Proposed Alternative Rule:

Foreign private funds could be required to complete an audit using a recognised international accounting standard, such as IFRS or GAAP in other jurisdictions, by an independent auditor.

SEC Question 145:
Do commenters agree that the availability of accountants to perform services for purposes of the proposed audit rule is sufficient and that even advisers in foreign jurisdictions (or with private fund clients in foreign jurisdictions) would not have significant difficulty in finding a local accountant that is eligible to perform an audit under the proposed rule? Do advisers have reasonable access to independent public accountants that are registered with, and subject to inspection by, the PCAOB in the foreign jurisdictions in which they operate? If not, how should the rule address this issue?

SBAI Response
The rule requires foreign private funds to use a PCAOB auditor and complete a reconciliation to US GAAP.

Foreign private funds will be subject to audit requirements in their local jurisdiction and the impact of this rule could be twofold:

1. The choice of auditors may become extremely limited in some jurisdictions. This reduces competition and may also prevent private funds from rotating auditors periodically which is recommend as good practice, or even required, in some jurisdictions, and
2. US GAAP reconciliations will be an additional cost on top of existing audit fees to these funds. As audit fees are typically paid by the fund this will increase the costs to private fund investors.

Proposed Alternative Rule:

Foreign private funds could be required to complete an audit using a recognised international accounting standard, such as IFRS or GAAP in other jurisdictions, by an independent auditor.

SEC Question 146:
Should the rule require advisers to obtain audits performed under rule 1-02(d) of Regulation S-X, as proposed? If not, what other auditing standards should the rule allow? Are there certain non-U.S. auditing standards that the proposed rule should explicitly include?

SBAI Response
We would propose the following particularly in the context of foreign fund managers:

Proposed Alternative Rule:

Foreign private funds could be required to complete an audit using a recognised international accounting standard, such as IFRS or GAAP in other jurisdictions, by an independent auditor.

SEC Question 147:
Should the rule require private funds to prepare audited financial statements in accordance with generally accepted accounting principles, as proposed? Should the rule include any additional requirements regarding the preparation of financial statements? If so, what requirements, and why?

SBAI Response
We would propose the following particularly in the context of foreign fund managers:

Proposed Alternative Rule:

Foreign private funds could be required to complete an audit using a recognised international accounting standard, such as IFRS or GAAP in other jurisdictions, by an independent auditor.

SEC Question 148:
As proposed, should financial statements prepared in accordance with accounting standards other than U.S. GAAP for foreign private funds meet the requirements of the rule provided they contain information substantially similar to statements prepared in accordance with U.S. GAAP, material differences with U.S. GAAP are reconciled, and the reconciliation is distributed to investors along with the financial statements? If so, should we specify what "substantially similar" means?

SBAI Response
US GAAP reconciliations will be an additional cost on top of existing audit fees to these funds. As audit fees are typically paid by the fund this will increase the costs to private fund investors.

Proposed Alternative Rule:

Foreign private funds could be required to complete an audit using a recognised international accounting standard, such as IFRS or GAAP in other jurisdictions, by an independent auditor.

SEC Question 149:
Would there be unique challenges to complying with the rule for auditors and advisers to private funds in foreign jurisdictions? For example, might certain advisers or auditors face challenges in complying with the proposed rule's Commission notification requirement, including because of applicable privacy and other local laws? If so, what would alleviate these challenges and still achieve the policy goals of the proposed audit rule?

SBAI Response

The choice of auditors may become extremely limited in some jurisdictions. This reduces competition and may also prevent private funds from rotating auditors periodically which is recommend as good practice, or even required, in some jurisdictions.

Proposed Alternative Rule:

Foreign private funds could be required to complete an audit using a recognised international accounting standard, such as IFRS or GAAP in other jurisdictions, by an independent auditor.

SEC Question 150:
Do commenters agree that the proposed rule's requirement to distribute the audited financial statements promptly would provide appropriate flexibility regarding the timing of the distribution of audited financial statements? Should there nevertheless be an outer limit on the number of days an investment adviser has from its fiscal year end for the distribution of audited financial statements? If so, what should that limit be? Would it be more appropriate for distribution to be required within 120 days of the end of the fund's fiscal year, as under the custody rule? Alternatively, would a longer or shorter period be appropriate in most circumstances? Should the timeline for distributing audited financial statements align with the timeline for distributing quarterly statements under the proposed quarterly statement rule? Why or why not? We understand that funds of funds or certain funds in master-feeder structures (including those advised by related persons) have difficulty satisfying the 120-day requirement and that our staff has indicated they would not recommend enforcement if certain of these funds satisfy the distribution requirement within 180 or 260 days of the fund's fiscal year end, depending on a variety of circumstances. If the rule contained a specific distribution deadline, would these types of funds need a separate deadline or other special treatment?

SBAI Response

Private fund advisers may already be subject to deadlines for delivery of audited financial statements via the custody rule as referenced in the proposal, but also through agreements with the private fund's counterparties or other arrangements.

We believe that requiring audited financials to be delivered promptly provides the right level of flexibility and would mean that a separate rule or exemption would not need to be written for fund of funds or other similar vehicles.

SEC Question 151:
Instead of requiring prompt distribution of the audited financial statement to investors, should we require the statement to be distributed or made available to investors upon request?

SBAI Response
Requiring distribution as proposed would be correct and is in line with common practice in the alternative investment industry. The rule should allow flexibility for the statements to be distributed by third parties such as fund administrators.

SEC Question 152:
Should the rule provide additional flexibility, such as for situations in which the adviser can demonstrate that it reasonably believed that it would be able to comply with the rule but failed due to certain unforeseeable circumstances?

SBAI Response
Yes, this flexibility should be included. The covid-19 pandemic was an example of an exceptional situation where audits may have taken longer than anticipated due to lack of staff and the inability of auditors to go onsite.

SEC Question 153:
Should the rule require annual audits, as proposed? Should the rule require an audit upon a private fund's liquidation, as proposed? Should we modify either or both of these requirements? If so, how should we modify these requirements, and why?

SBAI Response
For liquidating funds where there are only small or stub positions remaining it is common for investors to agree to audits less frequently than annual. This is to avoid the cost of an annual audit eroding the remaining value in the fund.

Proposed Alternative Rule:

The rule should be flexible enough for investors to agree with private fund advisers that an audit can be completed less frequently than annual when only small or stub positions remain.

SEC Question 154:
Advisers would be required to comply with the proposed audit rule beginning with their first fiscal year after the compliance date and any liquidation that occurs after the compliance date. Advisers would also be required to obtain an audit annually. We understand that newly formed and liquidating funds may face unique challenges. For instance, the value provided by an audit of a very short period of time, such as a period of less than three-months (a "stub period"), may be diminished

because there is a lack of comparability in the information provided. In addition, we understand that the cost of obtaining an audit covering a few months can be similar to the cost of an audit covering an entire fiscal year. We further understand that when newly formed entities have few financial transactions and/or investments, obtaining an audit, relative to the investor protections ultimately offered by obtaining the audit, may be burdensome. Should the rule allow newly formed or liquidating entities to obtain an audit less frequently than annually to avoid stub period audits? Should the rule permit advisers to satisfy the audit requirement by relying on an audit on an interval other than annually when a fund is liquidating? For example, should we allow advisers to rely on an audit of a fund every two years during the liquidation process?

SBAI Response

The rule requires that an audit must be completed at least annually. There are two instances in normal practice where this may not currently be the case:

1. For a new fund that launched less than six months from the end of the fund's financial year, and
2. For liquidating funds with small or stub positions.

For new funds it is common practice and accepted by institutional investors, for a private fund to have a long first financial year if it launches less than six months from the end of the fund's financial year. The cost of an audit is typically similar regardless of whether it is for a period of one year or less. A long first financial year means that the investors do not bear this additional cost at a period when the assets of the fund may be small, and the fee drag will be higher.

For liquidating funds where there are only small or stub positions remaining it is common for investors to agree to audits less frequently than annual. This is to avoid the cost of an annual audit eroding the remaining value in the fund.

Proposed Alternative Rule:

The rule should allow for newly formed private funds to have a long first financial year where the fund has launched less than a certain period (for example three or six months) before the end of the fund's financial year.

The rule should be flexible enough for investors to agree with private fund advisers that an audit can be completed less frequently than annual when only small or stub positions remain.

SEC Question 155:

If the rule were to permit audits less frequently than on an annual basis, should it also include additional restrictions or requirements? If so, what restrictions or requirements, and why? For instance, should it require investment advisers to create and distribute alternative financial reporting for the fund to investors (e.g., cash-flow audit or asset verification)? Alternatively, or in addition to alternative financial reporting, should the rule require advisers to obtain a third-party examination? If so, what should the examination consist of, and why? For example, would allowing advisers to obtain an audit less frequently than annually during a liquidation raise investor protection concerns that additional requirements could address given the potential for a liquidation to last for an extended period? If so, what additional requirements, and why? For example, should

advisers be required to provide notice to investors of their intent to liquidate an entity in these circumstances? Should advisers be required to obtain investor consent prior to satisfying the audit requirement by relying on audits on a less than annual basis? Should we set an outer limit for the period such an audit could cover (e.g., 15 months)?

SBAI Response

We do not believe that additional requirements would be necessary if the flexibility is allowed when investors consent to a less frequent audit.

SEC Question 156:

Should the rule define "liquidation" for purposes of the liquidation audit requirement? If so, how? For example, should we base such a definition on a certain percentage of assets under management of the entity from or over previous fiscal period(s) or a stated threshold based on an absolute dollar amount of the entity's assets under management? Should we base the definition on a calculation of the ratio of the management fees assessed on assets under management of the entity or some other basis, for example, to detect whether an adviser is charging management fees on a very small amount of assets?

SBAI Response

We do not believe the rule should be this prescriptive.

SEC Question 157:

Are there risks posed to investors when an entity is liquidating that the proposed rule does not address? If so, please describe those risks. How should we modify the rule to address such risks?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 158:

Are there some types of investments that pose a greater risk of misappropriation or loss to investors during a liquidation that the rule should specifically address to provide greater investor protection? If so, please describe the investment type; the particular risk the investment type poses to investors during liquidation; and how to modify the proposed rule to address such investor risk.

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 159:
We are not proposing the filing of a copy of the audit report or a copy of the audited financial statements with the Commission; should the rule contain such a requirement? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 160:
Would the requirement for an accountant to comply with the notification requirement change the approach that an accountant would take with respect to audits that normally are performed for purposes of satisfying the custody rule? If so, how?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 161:
Should we, as proposed, require advisers to enter into, or cause a private fund to enter into, a written agreement with the independent public accountant completing the audit to notify the Commission in connection with a modified opinion or termination?

SBAI Response
The rule requires auditors to report anything other than a "clean" audit opinion to the SEC. There are some elements of the operation of a private fund which can result in "qualified" opinions despite being of benefit to private fund investors. An example of this is the common practice of amortising the organisational or set up costs of a private fund over a period of three or five years. This is done to ensure fair treatment of investors by making sure that the full cost of setting up the fund is not solely borne by the day one investors in a fund.

Proposed Alternative Rule:

Auditors could be required to only report ***material*** qualified opinions to the SEC to ensure the reports are reflective of genuine issues and to avoid unnecessary noise.

SEC Question 162:
Do commenters agree that the professional engagement period of an audit performed under the rule should begin and end as indicated in Regulation S-X rule 2-01(f)(5), as proposed? If not, why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 163:
As noted above, the proposed Commission notification provision bears some similarities to, and is drawn from our experience with, a similar custody rule requirement in the surprise examination context with which we believe advisers may likely already have some familiarity. Rule 17a-5 requires a broker or dealer's self-report to the Commission within one business day and to provide a copy to the accountant. The accountant must report to the Commission about any aspects of the broker or dealer's report with which the accountant does not agree. If the broker or dealer fails to self-report, the accountant must report to the Commission to describe any material weaknesses or any instances of non-compliance that triggered the notification requirement. Should the audit rule contain similar requirements? Why or why not? Are private fund advisers and the accountants that perform private fund financial statement audits more familiar with Rule 17a-5's notification requirement than the custody rule's notification requirement?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 164:
Do commenters agree that the related proposed amendments to the books and records rule would facilitate compliance with the proposed audit rule? What additional or alternative amendments should the rule include, if any?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Adviser-Led Secondaries

SEC Question 165:
Do commenters agree that adviser-led secondary transactions can be of some benefit to a private fund and its investors?

SBAI Response

Yes, secondary transactions can be an important source of liquidity in otherwise illiquid funds for investors who may need to realise their investment earlier than intended for reasons such as being overweight a particular asset class, needing to meet liabilities or other reasons.

We would also note that it is not always clear cut to identify the initiator of the transaction. These transactions may be the result of conversations between investors and asset managers.

SEC Question 166:
Do commenters agree with the scope of the proposed rule? Should the rule apply to all investment advisers? Why or why not? What are the factors that weigh in favor of expanding the scope of the proposed rule to apply to a broader scope of advisers than proposed? Are there particular types of advisers that should or should not be subject to the rule? Should the rule only apply when the adviser or its related person is general partner (or equivalent) of a fund that is party to the transaction?

SBAI Response

The rule should apply to registered fund advisers only and not be extended more broadly.

SEC Question 167:
Should certain adviser-led transactions be exempt from the proposed rule? For example, if the adviser conducts a competitive sale process for the assets being sold, which ultimately leads to the price, should advisers still be required to obtain a fairness opinion? Do competitive bids typically represent net asset value? Do prospective purchasers typically bid at a discount to net asset value? Does net asset value always correspond to the current value of the assets being sold? Why or why not? Are there other price discovery processes that we should require to protect investors?

SBAI Response

We would note that it is not always clear cut to identify the initiator of the transaction. These transactions may be the result of conversations between investors and asset managers.

Secondary transactions in liquid securities and season and sell loan transactions should be exempt from this rule. These assets have observable market prices to support the transaction and as such a fairness opinion would add additional cost to the transaction with no benefit to investors. Secondary transactions in liquid securities are completed to reduce transaction costs for the two parties – the addition of a fairness opinion would negate the cost saving for investors.

Independent third-party valuations and other market transactions would be more indicative of the correct value being paid for an asset. Independent third-party valuations for illiquid assets are common periodically through the life of the private fund. The rule should provide flexibility so support for the transaction price can include forms other than a fairness opinion.

Proposed Alternative Rule:

Participants in secondary sales that are not of liquid assets or season and sell transactions should be provided with independent support for the pricing of the transaction. This may include independent third-

party valuations, recent market transactions, results of competitive tender processes or other similar independent support of the price of the transaction.

SEC Question 168:
Should certain adviser-led transactions be exempt from the rule, such as adviser-led transactions involving liquid funds? For example, if the underlying assets being sold in the transaction are predominantly publicly traded securities, should advisers still be required to obtain a fairness opinion? Do such transactions present the same concerns as adviser-led secondary transactions involving illiquid funds where the underlying assets are typically illiquid and not listed or quoted on a securities exchange? Are there other hedge fund transactions that we should exempt from the rule, such as hedge fund restructurings where an adviser may be merging the portfolios of two different hedge funds and gives all affected investors the option to redeem or convert/exchange their interests into the new fund? Should the exemption depend on whether the price of the transaction is based on net asset value? Why or why not?

SBAI Response
Secondary transactions in liquid securities and season and sell loan transactions should be exempt from this rule. These assets have observable market prices to support the transaction and as such a fairness opinion would add additional cost to the transaction with no benefit to investors. Secondary transactions in liquid securities are completed to reduce transaction costs for the two parties – the addition of a fairness opinion would negate the cost saving for investors.

Proposed Alternative Rule:

Participants in secondary sales that are not of liquid assets or season and sell transactions should be provided with independent support for the pricing of the transaction. This may include independent third-party valuations, recent market transactions, results of competitive tender processes or other similar independent support of the price of the transaction.

SEC Question 169:
Are there other transactions for which we should require private fund advisers to obtain a fairness opinion? For example, should we require advisers to obtain a fairness opinion before certain cross transactions between private funds it manages? If so, which transactions? Should we provide certain cross transaction exemptions, such as exemptions for bridge financings or syndications where the selling fund transfers the investments within a short period at a price equal to cost plus interest?

SBAI Response
We have not responded to this question directly but note our recommendation above that forms of price verification other than fairness opinions should be permitted.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 170:
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?

SBAI Response
We have not responded to this question directly but note our recommendation above that forms of price verification other than fairness opinions should be permitted.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 171:
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?

SBAI Response
Independent third-party valuations and other market transactions would be more indicative of the correct value being paid for an asset. Independent third-party valuations for illiquid assets are common periodically through the life of the private fund. The rule should provide flexibility that support for the transaction price can include forms other than a fairness opinion.

Proposed Alternative Rule:

Participants in secondary sales that are not of liquid assets or season and sell transactions should be provided with independent support for the pricing of the transaction. This may include independent third-party valuations, recent market transactions, results of competitive tender processes or other similar independent support of the price of the transaction.

SEC Question 172:
We request comment on the proposed use of "related person." Do commenters agree that the fairness opinion should be issued by a person that is not a related person of the adviser? Should we adopt a different definition of "related person" than the one proposed?

SBAI Response
We have not responded specifically to this question but note that through our conversations with our asset manager and investor community the real concern of investors is not the relationship between the private fund adviser and a fairness opinion provider (although independence should always be sought) but the relationship between the private fund adviser and the investor on the other side of the transaction. For example, when the buyer in a secondary transaction also maintains other relationships with the adviser or is contemplating other transactions such as an investment in another fund sponsored by the adviser. In this case potential conflicts may exist which are contrary to the interests of the other private fund investors. The SEC has not addressed this conflict in its proposed rules.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 173:
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?

SBAI Response
We have not responded to this question directly but note our recommendation above that forms of price verification other than fairness opinions should be permitted.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 174:
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?

SBAI Response
We do not believe the rule should be this prescriptive. Disclosure should be used over prohibition to allow flexibility to avoid unintended consequences.

SEC Question 175:
Should we require the independent opinion provider to have any specific qualifications, licenses, or registrations?

SBAI Response
We do not believe the rule should be this prescriptive.

SEC Question 176:
Should we define the term "transaction" in the definition of "adviser-led secondary transaction"? If so, how should the rule define "transaction"? Should we reference the various types of adviser-led secondary transactions in the definition? For example, should "transaction" include only single asset transactions, strip sale transactions, and other similar secondary transactions? Should we include in the definition of "adviser-led secondary transaction" transactions initiated by the adviser's related persons?

SBAI Response
We do not believe the rule should be this prescriptive.

SEC Question 177:
Should we define, or provide additional guidance regarding, the phrase "initiated by the investment adviser or any of its related persons"? Should we define, or provide additional guidance regarding, the role the adviser would have to play in a secondary transaction for it to be considered an adviser-led transaction subject to the proposed rule?

SBAI Response
We do not believe the rule should be this prescriptive and as noted above it will not always be obvious who has initiated a transaction.

SEC Question 178:
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?

SBAI Response
We note our previous recommendation that other forms of pricing support for the transaction should be permitted by this rule.

Requiring the fairness opinion provider to adding language as described here would increase the liability to fairness opinion providers (or providers of other similar pricing support). This could result in fewer providers being willing to provide these fairness opinions.

SEC Question 179:
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?

SBAI Response
We have not responded to this specific question but note our previous recommendation that other forms of pricing support for the transaction should be permitted by this rule.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 180:
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?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 181:
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?

SBAI Response

We do not believe the rule should be this prescriptive.

SEC Question 182:
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?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 183:
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?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 184:
We recognize that certain adviser-led transactions may not involve investors rolling their interests into a new vehicle managed by the adviser. For example, an adviser may arrange for a new investor to offer to purchase fund interests directly from existing investors, such as a tender offer. Do

commenters agree that the first prong of the definition would cover such transactions? Should the rule treat such transactions differently?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 185:
Should the rule apply to adviser-led transactions initiated by the adviser or its related persons as proposed? Is the definition of "related person" too broad in this context such that it would capture secondary transactions initiated by third parties unrelated to the adviser? Should we revise the definition of "related person" to include an investment discretion requirement? Similarly, is the definition of "control" too broad in this context?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 186:
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?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Recordkeeping for Adviser-Led Secondaries

SEC Question 187:
Should we require advisers to maintain the proposed records or would these requirements be overly burdensome for advisers? Are there alternative or additional recordkeeping requirements we should impose?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 188:
Should we require advisers to retain a record of each addressee, the date(s) the statement was sent, address(es), and delivery method(s) as proposed? Why or why not?

SBAI Response
We have not responded to this question

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Prohibited Activities

SEC Question 189:
Should the rule apply to all advisers as proposed? Alternatively, should the rule apply only to SEC-registered advisers? If so, why?

SBAI Response
This rule should only apply to SEC-registered advisers. There are many aspects of this rule that we believe will be detrimental to investors in the form of unintended consequences that may result in lower average transparency and higher fees and expenses for investors.

Applying these rules to ERAs as well as RIAs may discourage advisers of foreign private funds from becoming ERAs and therefore limit choice for US investors.

SEC Question 190:
Should the rule only prohibit these activities with respect to an adviser's private fund clients and the investors in those private funds? Should the rule apply more broadly or more narrowly? For example, should the rule apply to such activities with respect to all clients of an adviser? Should the rule apply to such activities with respect to persons to which the adviser offers co-investment opportunities even if the adviser does not classify them as its clients?

SBAI Response
To note we do not believe that the rule should prohibit any activities but should apply a more principles-based approach that allows for flexibility to avoid unintended consequences that may lower average transparency and increase fees and expenses for investors.

We are supportive of disclosure over prohibition.

If the rule is enacted as proposed, it should only apply to private fund investors. Other arrangements such as SMAs, Funds or One, or co-investment opportunties are bespoke agreements negotiated between

sophisticated counterparties who should be allowed freedom to determine their own contractual arrangements.

SEC Question 191:
We have historically taken the position that most of the substantive provisions of the Advisers Act do not apply with respect to the non-U.S. clients (including funds) of a registered offshore adviser. In taking this approach, the Commission noted that U.S. investors in an offshore fund generally would not expect the full protection of the U.S securities laws and that U.S. investors may be precluded from an opportunity to invest in an offshore fund if their participation would result in full application of the Advisers Act and rules thereunder. Similarly, the proposed prohibited activities rule would not apply to a registered offshore adviser's private funds organized outside of the United States, regardless of whether the private funds have U.S. investors. Do commenters agree that registered offshore advisers should not be subject to this rule with respect to their offshore private fund clients or offshore investors? Should other rules in this rulemaking package take the same approach, or a different approach, with respect to a registered offshore adviser's offshore private fund clients? Please explain

SBAI Response
We agree that the rule should not be applicable to non-U.S. investors, however, would ask the SEC to clarify within the final rule that differences between an onshore and offshore feeder that result from this exemption would not be classified as preferential treatment and therefore subject to the proposed rule on preferential treatment.

SEC Question 192:
Instead of prohibiting these activities, should the rule prohibit these activities unless the adviser satisfies certain governance and other conditions (e.g., disclosure to investors in all relevant funds/vehicles, approval by the limited partner advisory committee (or other similar body) or directors)? Should the rule prohibit these activities unless the adviser obtains approval for them by a majority (by number and/or in interest) of investors? Should the rule permit non-pro-rata fee and expense allocations if such practice is disclosed to, and consented by, co-investors?

SBAI Response
We would be supportive of a rule that required disclosure rather than prohibition.

Throughout our responses on specific sections of this rule below we highlight several instances where the potentially prohibited activities would be valid or beneficial for the investor. Prohibition of the entire activity will have unintended consequences that could be detrimental to the investor including lowering average transparency and higher fees and expenses.

SEC Question 193:
Should we amend the books and records rule to require advisers to retain specific documentation evidencing compliance with the prohibited activities rule? For example, records showing how fees and expenses associated with an examination or investigation of the adviser or its related persons by governmental or regulatory authorities were paid or showing the allocations of fees and expenses related to a portfolio investment on an investment-by-investment basis? Would advisers be able to

obtain or generate sufficient records to demonstrate compliance with all aspects of the proposed rule? Should we amend the books and records rule to require advisers to prepare a memorandum on an annual basis attesting to their compliance with each aspect of the proposed rule?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Fees for Unperformed Services

SEC Question 194:
Are there any scenarios in which we should permit an adviser to charge a fund's portfolio investment for unperformed services? If so, please explain.

SBAI Response

Many commercial arrangements may require payment in advance to, for example, fund the resources needed to perform the service. Advance payments; however, can also be seen as a form of credit risk borne by the fund. We would ask the SEC clearly exempts the payment of management and performance fees or similar on unrealised gains from this rule.

SEC Question 195:
Should we prohibit an adviser from being paid in advance for services it reasonably expects to provide in the future? Why or why not?

SBAI Response

We do not believe this should be prohibited. Many commercial arrangements may require payment in advance to, for example, fund the resources needed to perform the service.

SEC Question 196:
As noted above, if an adviser is paid in advance, and reasonably expects to perform services, but ultimately does not provide the contracted for services, the proposed rule would require the adviser to refund the prepaid amount attributable to the unperformed services. Do commenters agree with this approach? Why or why not?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 197:
The proposed rule specifically references "monitoring, servicing, consulting, or other fees." Do commenters agree with this list? Should we eliminate any? Are there additional or alternative types of remuneration that the rule should reference?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 198:
Do commenters agree that if an adviser shifts 100% of the economic benefit of any portfolio investment fee to the private fund investors, whether through an offset, rebate, or otherwise, the adviser would not violate the proposed rule? Why or why not? We recognize that certain tax-sensitive investors often waive the right to receive their share of any rebates of portfolio investment fees. How should the rule take into account such waivers, if it all? For example, to the extent one investor does not accept its share, should the rule require the adviser to distribute such amount to the other investors in the fund? Why or why not?

SBAI Response
If the adviser is not receiving or retaining this compensation, then the conflict the SEC is seeking to resolve is not present and the rule should not apply in this instance.

SEC Question 199:
Should the rule instead permit an adviser to engage in this activity if the adviser satisfies certain disclosure, governance, and/or other conditions (e.g., disclosure to investors in all relevant funds/vehicles, approval by the LPAC (or other similar body) or directors)?

SBAI Response
Yes, we believe the rule should focus on disclosure rather than prohibition.

SEC Question 200:
The proposed rule would prohibit compensation schemes where an adviser charges for services that it does not reasonably expect to provide. Is "reasonably expect" the appropriate standard? Should we provide examples or guidance to assist advisers in complying with this standard? Does this standard have the potential to reduce the effectiveness of the rule? Are there other standards we should adopt?

SBAI Response
As noted, we believe that the rule should encourage disclosure rather than prohibit certain activities. If the rule is enacted as described, then the standard should remain "reasonably expect".

Certain Fees and Expenses

SEC Question 201:
Are there circumstances in which it would be appropriate in the public interest or for the protection of investors for a private fund to bear (i) regulatory or compliance expenses of the adviser or its related persons or (ii) expenses related to an examination or investigation of the adviser or its related persons? If so, please explain. Should we permit private funds to bear these fees and expenses if fully disclosed and consented to by the private fund investors and/or an LPAC (despite the limitations of private fund governance mechanisms, as discussed above)? Should we place any conditions on charging these fees and expenses, such as caps, management fee offsets, or detailed reporting requirements in the proposed quarterly statement?

SBAI Response

The term "regulatory and compliance expenses" is very broad and could cover several different types of expenses for example (but not limited to):

- The cost of regulatory filings,
- The cost of compliance with these proposed rules (for example if audits are now required under this proposed rule would they no longer be able to be charged to the fund?),
- Registration costs, or
- The regulatory costs for investment activity (see additional note on this below).

We don't believe that it is current practice for private fund advisers to charge the cost of SEC examinations of the adviser to private funds except for private funds that operate a pass-through model. For pass-through models, we believe the investor should determine what they are happy to pay for when choosing to invest in a private fund that operates this expense model.

There are strategies where litigation, subpoenas and other regulatory costs are a legitimate part of the investment strategy. It is common for private fund advisers to charge these costs to the fund and investors are aware that these costs are associated with the strategy. We believe it is legitimate for the fund to pay these costs as they also retain the upside of these investments and would ask that to the extent the proposed rule is adopted, it clarifies that these would be able to be charged to the fund.

The SEC acknowledges that private fund advisers may restructure their expense model to cover these expenses as part of the management fee. This would result in a similar cost to the investor but a lack of transparency to investor on these fees. In other words, the proposed rules acknowledge that fees and expenses associated with an adviser's regulatory obligations may be passed onto the investors but does not provide a rationale for why one expense model is preferable to another or why one of these models would need to be prohibited.

Note also that if management fees are not raised and the cost of compliance is increased for advisers, this could have an adverse impact on being able to properly resource compliance departments and would increase the barriers to entry for smaller and newer market entrants (larger more established firms may be able to absorb the costs of this directly without increasing management fees, if costs do not increase significantly, but this may not be an option for smaller or newer advisers).

Proposed Alternative Rule:

Any regulatory or compliance expenses of the adviser and any expense related to examination or investigation of the adviser and its related persons paid by the private fund should be fully disclosed to investors as separate line items.

SEC Question 202:
The proposed rule would likely increase operating costs for advisers that have historically charged private funds for the types of fees and expenses covered by the proposed rules. Do commenters believe that advisers would increase management fees to offset such increase in operating costs?

SBAI Response

The SEC acknowledges that private fund advisers may restructure their expense model to cover these expenses as part of the management fee. This would result in a similar cost to the investor but a lack of transparency to investors on these fees. In other words, the proposed rules acknowledge that fees and expenses associated with an adviser's regulatory obligations may be passed onto the investors but does not provide a rationale for why one expense model is preferable to another or why one of these models would need to be prohibited.

Note also that if management fees are not raised and the cost of compliance is increased for advisers this could have an adverse impact on being able to properly resource compliance departments and would increase the barriers to entry for smaller and newer market entrants (larger more established firms may be able to absorb the costs of this directly without increasing management fees, if costs do not increase significantly, but this may not be an option for smaller or newer advisers).

SEC Question 203:
Are there any additional types of fees or expenses that we should prohibit an adviser from charging to a private fund? Alternatively, are there fees and expenses that the rule should not prohibit?

SBAI Response

We do not believe the SEC should prohibit the charging of any fees or expenses but should focus on disclosure of fees and expenses paid by the private fund to investors.

Fees and expenses are commercial terms and there are many fee models in place within the alternative investment industry. Some funds may charge a lower management fee but charge more expenses to the fund or vice versa and these arrangements need to be reviewed accounting for all fees and expenses as opposed to focusing on certain individual fees.

SEC Question 204:
Should we provide exceptions to the proposed rules for certain types of private funds and/or certain types of advisers? For example, should we permit a first-time fund adviser to charge regulatory and compliance expenses to the fund? If so, why?

SBAI Response

There is an argument that small and emerging advisers should be exempt from this rule to avoid increasing the barriers to entry for new market entrants.

We believe a simpler way to avoid these unintended consequences would be to require disclosure of these fees as opposed to prohibit charging them to the fund.

SEC Question 205:
Do commenters agree that many advisers do not currently charge private funds for the types of fees and expenses covered by the proposed rules and, as a result, the proposed rules would not cause a dramatic change in industry practice? Why or why not? To the extent commenters disagree, please provide supporting data.

SBAI Response
We do not believe it is common for private fund advisers to charge the costs of SEC examinations or equivalent to private funds except for private funds that operate a pass-through model.

"Compliance or regulatory" expenses are a broad category and there may be costs charged to the fund that could be seen to fall under this definition. Rather than trying to expand this definition to a prescriptive or exhaustive list we would prefer any enacted rule focuses on disclosure rather than prohibition.

SEC Question 206:
Will advisers have difficulty in determining whether fees and expenses relate to the adviser's activities versus the fund's activities? Should we provide guidance to assist advisers in making such a determination? If so, what guidance should we provide? Should the rule list certain types of fees and expenses that relate to the adviser's activities versus the fund's activities?

SBAI Response
We have not responded to this question in full but believe there may be some difficulty in determining whether fees or expenses relate to activities of the adviser or the firm.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 207:
As discussed above, we recognize that certain private fund advisers utilize a pass-through expense model. Should the rule provide any full or partial exceptions for advisers utilizing such models, particularly where the adviser does not charge any management, advisory, or similar fees to the private fund?

SBAI Response
If the rule is enacted as written, it should provide an exemption for pass-through expense models which investors have agreed to at the time of investment.

The SEC should consider why it would be appropriate to charge a higher management fee and not pass-through expenses versus a lower management fee and pass through some expenses even where a pass-through model is not used. The proposal acknowledges that management fees may increase to compensate for these expenses but does not provide a rationale for why this expense model, which would be less transparent to investors, is preferable or why alternative expense models should be prohibited.

We believe these are all different expense models that provide investors with choice and therefore disclosure would be preferred over prohibition.

Reducing Adviser Clawbacks for Taxes

SEC Question 208:
Would this aspect of the proposed prohibited activities rule have our intended effect of ensuring that investors receive their full share of profits generated by the fund? Is there an alternative approach that would better produce this intended effect? For example, should we require advisers to return the entire amount of any adviser clawback, rather than only prohibiting advisers from reducing the clawback amount by actual, potential, or hypothetical taxes? Would this approach ensure that investors receive their full share of fund profits?

SBAI Response

The SEC's stated objective is to ensure that investors receive their full share of the profits generated by the fund. We believe that the objective should be alignment of interests between private fund advisers and private fund investors and to ensure that the private fund adviser does not unfairly retain profits that should belong to the investors.

Alignment of interests means that it is in both the private fund advisers' and the investors' interest for the private fund to perform well and be properly managed. To achieve this, private fund advisers need to be compensated properly and investors need to receive their fair share of the profits.

Advance payment of carry, performance fee or incentive fee is typically used in closed-ended funds which can often have a long life (for example a real estate fund might have a lifetime of 20+ years). It is used to compensate the investment team to ensure the private fund adviser can attract and retain the right talent to properly manage the portfolio. This is even more important for newer and smaller managers who would not be able to rely on carry from previous vintages to compensate their staff. Moving entirely to the use of an escrow account or prohibition of the "American waterfall" calculation could be disadvantageous for newer entrants to the market.

Where taxes have been paid these are not profits that have been retained by the private fund adviser or its staff and returning these amounts would therefore be a cost to the private fund adviser.

If the SEC chooses to enact this rule, we recommend it be adapted to the below:

Proposed Alternative Rule:

Advisers may only reduce clawback amounts by the value of actual taxes paid on this amount and should not use hypothetical or estimated tax rates to calculate the withheld amounts.

SEC Question 209:
Would the proposed clawback provision result in more whole-fund waterfalls (commonly referred to as European waterfalls in the private funds industry), which generally delay payments of

performance-based compensation until investors receive a return of all capital contributions? What other effects would this aspect of the proposed rule have on the industry, including with respect to adviser's ability to attract, retain, and develop investment professionals?

SBAI Response

Advance payment of carry, performance fee or incentive fee is typically used in closed-ended funds which often have a long life (for example a real estate fund might have a lifetime of 20+ years). It is used to compensate the investment team to ensure the private fund adviser can attract and retain the right talent to properly manage the portfolio. This is even more important for newer and smaller managers who would not be able to rely on carry from previous vintages to compensate their staff. Moving entirely to the use of an escrow account or prohibition of the "American waterfall" calculation could be disadvantageous for newer entrants to the market.

SEC Question 210:
Instead of the proposed clawback provision, should we prohibit deal-by-deal waterfall arrangements (commonly referred to as American waterfalls)?

SBAI Response

Fees paid to the adviser are commercial terms that investors sign up to when investing in a fund. There are a range of models within the industry and investors can choose which they prefer to invest in.

<u>We do not believe the SEC should regulate which type of commercial arrangements private fund advisers and investors can enter in to.</u>

SEC Question 211:
We recognize that clawback mechanisms are more common for closed-end funds and less common for open-end funds. Should the rule separately address performance-based compensation for open-end private funds? If so, how should we address those funds?

SBAI Response

Closed-ended and open-ended funds have very different operating models. In exchange for the liquidity of an open-ended fund investors accept that they will be charged fees on unrealised gains and an investor may not be in the fund from the beginning to the end of its life.

Whilst it is true that it is less common for open-ended funds to have clawbacks within the fund structure, many private fund advisers operate these clawback schemes within the staff compensation structure to ensure alignment of interest with investors.

For these reasons we do not believe this rule should address open-ended funds when performance fee is crystallised on an annual basis. If performance fee is crystalised over longer periods (for example two or three years) and advance payments are made to the adviser and its staff, then the same conflicts may exist, and this should be covered by the rule (subject to our suggested amendments).

SEC Question 212:
Is the proposed definition of "adviser clawback" clear? Are there ways in which the proposed definition is over- or under-inclusive? For example, should the definition include "all-partner" givebacks or clawbacks (i.e., should advisers be prohibited from reducing the portion of an all-

partner giveback attributable to their performance-based compensation by taxes paid or deemed paid)?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 213:
Is the proposed definition of "performance-based compensation" clear? Is it too narrow or too broad?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 214:
What issues may advisers face in complying with this aspect of the proposed prohibited activities rule? In particular, what issues may result with respect to amending tax returns from prior years?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 215:
We recognize that this aspect of the proposed rule might result in delayed payments of performance-based compensation. For example, during the early stages of the fund, the adviser may be less inclined to distribute performance-based compensation to investment professionals that source or manage successful investments. How would this aspect of the proposed prohibited activities rule affect the intended incentive effects of performance-based compensation?

SBAI Response

Advance payment of carry, performance fee or incentive fee is typically used in closed-ended funds which often have a long life (for example a real estate fund might have a lifetime of 20+ years). It is used to compensate the investment team to ensure the private fund adviser can attract and retain the right talent to properly manage the portfolio. This is even more important for newer and smaller managers who would not be able to rely on carry from previous vintages to compensate their staff. Moving entirely to the use of an escrow account or prohibition of the "American waterfall" calculation could be disadvantageous for newer entrants to the market.

SEC Question 216:
We recognize that many fund agreements clawback performance-based compensation on a post-tax basis. We considered, but are not proposing, a rule that would generally allow this practice to continue but would prohibit advisers from using a hypothetical marginal tax rate to determine the tax reduction amount. We considered requiring advisers to use the actual marginal tax rates applicable to the adviser or its owners, rather than a hypothetical marginal tax rate. Our view is that this approach could be too burdensome for advisers. Do commenters agree? If we were to adopt this approach, how should we factor tax benefits realized by the adviser or its owners into the tax reduction amount? What operational challenges would advisers face under this alternative approach? For example, would the amount of time it may take to determine the actual tax amount, which may not be determined until a significant amount of time has passed not justify the benefits? Do commenters believe that the use of a hypothetical marginal tax rate is a reasonable and cost-effective method for determining the tax reduction amount, or do commenters believe that the hypothetical marginal tax rate is too high? Why or why not? Please provide data

SBAI Response
We have not responded to the specifics of this question – the time given for response to this consultation does not allow for us to complete a proper analysis on US tax arrangements and the implication of this rule. We do believe that if this rule is enacted it would be fairer to the private fund adviser to allow the clawback to be reduced by actual taxes paid and maintain alignment between private fund advisers and private fund investors.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Limiting or Eliminating Liability for Adviser Misconduct

SEC Question 217:
We have observed these types of contractual provisions among private fund advisers and their related persons; do advisers to clients other than private funds typically include these types of contractual provisions?

SBAI Response
Yes, indemnification wording or similar would be common in many service contracts between different parties. They are also common in contractual arrangements between private funds and service providers such as fund administrators, custodians or prime brokers.

SEC Question 218:
Are there other types of contractual provisions we should prohibit as contrary to the public interest and the protection of investors?

SBAI Response
We do not believe that the SEC should prohibit any contractual provisions in a contract negotiated between a private fund adviser and institutional investors – both of which are sophisticated parties.

In all other instances where a standard of liability is set under the regulatory framework it has been explicitly set forth in a statue (e.g., ERISA or RICs) which is not the case here. If this rule is enacted as written, it would provide a higher liability standard for institutional investors than is provided for retail investors in mutual funds.

There is a wide range of indemnification wording (we discuss many of them in our Toolbox Memo on Indemnification Wording in Fund Governing Documents here) but there are also many levels of litigation risks that managers are willing to accept, for example if they choose to accept ERISA money or not.

We believe that private fund advisers and investors should have freedom of contract to negotiate these terms. We also note that there has been no market failure identified from this freedom of contract.

Unintended consequences from this rule, all of which may reduce overall investor returns and create new barriers to entry, could include:

- An increase in the cost of insurance for the fund. This is typically at least partially paid by the private fund and therefore the investors.
- A change in the financial landscape for private fund advisers but also operations - it is not clear how things like trade errors would be treated if this rule was enacted.
- Potential reduction in the offering of more complex investment strategies or investments

We do not believe that this rule should be adopted.

SEC Question 219:
Should this aspect of the final prohibited activities rule prohibit limiting liability for "gross negligence," or would prohibiting limitations of liability for ordinary negligence, as proposed, be more appropriate? Why?

SBAI Response
We do not believe the rule should prohibit any of these contractual provisions.

SEC Question 220:
Should the proposed rule prohibit contractual provisions that limit or purport to waive fiduciary duties and other liabilities in situations where state law permits such waivers?

SBAI Response
We do not believe the rule should prohibit any of these contractual provisions.

SEC Question 221:
Do commenters believe that the proposed rule would increase operating expenses for advisers? For example, would the proposed prohibition on receiving indemnification/exculpation for negligence cause an adviser's insurance premium to increase?

SBAI Response

We believe that the proposed rule would cause insurance premiums to increase. This would not only be an increase to the operating expenses for advisers but, as the private fund typically pays its own insurance expenses, could also be an increased cost for the private fund investors.

Certain Non-Pro Rata Fee and Expense Allocation

SEC Question 222:
Should we prohibit non-pro rata fee and expense allocations as proposed? If not, under what circumstances would non-pro rata allocations be appropriate? For example, we recognize that advisers often have policies and procedures in place that permit the adviser to allocate fees and expenses in a fair and equitable manner (or similar standard), rather than on a pro rata basis; would this better achieve our policy goals? Why or why not? What specific protections are included in such policies and procedures? Should such protections be included in the rule? Why or why not? Should there be an exception to the prohibition where an adviser determines that it is in a private fund's best interest to bear more expenses than another managed vehicle and the private fund's investors agree?

SBAI Response

We believe that all investors should be treated fairly but that does not mean they should all be treated identically. For this reason, we do not believe that the SEC should prohibit non-pro rata fee expense allocations. Any standard for fee and expense allocation should be based on what is fair and equitable. A one size fits all pro rata approach may lead to non-equitable results.

There are many genuine reasons that costs might not be split pro-rata including but not limited to:

- Investors that are not eligible to invest in new-issues should not bear the costs of these investments they should be charged to new-issues eligible investors only,
- Investors can opt out of certain investments for ESG or regulatory reasons and should not bear the cost of these investments,
- Certain costs may be incurred to satisfy the regulatory requirements of some but not all investors and it would be unfair for all investors to pick up these costs, or
- Onshore and offshore feeders may incur different costs related specifically to these investors and it would be unfair to charge all investors for these costs.

In addition, how "pro-rata" is calculated may vary depending on the expense in question. For investment related expenses it may be fairer to investors to charge pro-rata based on P&L and in other cases it may be more appropriate to charge pro-rata based on NAV.

We believe that the rule should contain enough flexibility to allow the adviser to absorb the cost for a particular client if it has agreed this client will not pay certain fees.

The drafting of the final rule should also clearly state that it refers to fixed fees and expenses and does not include management and performance fees.

The proposal refers specifically to broken deal fees for co-investment vehicles. In many private fund structures all LPs may have the right but not the obligation to co-invest alongside the private fund. Typically, there will be

no binding agreement for the co-investment to be made until more is known about the deal. If the rule required that co-investors take a pro-rata share of all broken deal fees this could cause significant issues (and increased costs) for investors:

- For the co-investor to be charged this cost it would require a binding agreement to invest before the details of the deal are known or require potential co-investors to commit to paying fees on investments they never intended to make.
- Where all investors have the right to co-invest this would mean they would all pay an additional share of the fees as potential co-investors or must opt out of co-investment before knowing the details of the deal.
- Co-investors do not typically commit to an investment size in advance of knowing the details of the deal and as such it would be difficult to determine a pro-rata amount for a broken deal.
- The offering of co-investments to investors is often driven by a desire of the adviser to manage a larger stake in an underlying investment that would not be appropriate for the fund due to concentration limits and/or diversification. This additional ownership stake benefits all fund investors, whether they are co-investors or not. The larger stake provides the adviser greater governance rights over the underlying investment than it would otherwise possess without the co-investment.

Unless the co-investment is through a dedicated co-investment vehicle that has a mandate to regularly invest alongside the fund, we believe that broken deal fees should be exempt from any requirement to split fees on a pro rata basis between co-investors, SMAs, funds of one and private funds.

Given the valid reasons why fees may be split on a non-pro rata basis and the complexities with broken deal fees mentioned above, we believe that the rule should be amended as follows:

Proposed Alternative Rule:

Where fees and expenses are not split on a pro-rata basis the circumstances where this will be the case should be disclosed to investors.

SEC Question 223:
Should the proposed rule apply to unconsummated – or potential – portfolio investments, as proposed? Do commenters agree that non-pro rata allocations of fees and expenses attributable to such investments present the same concerns as the ones discussed above with respect to consummated investments? Why or why not?

SBAI Response

The proposal refers specifically to broken deal fees for co-investment vehicles. In many private fund structures all LPs may have the right but not the obligation to co-invest alongside the private fund. Typically, there will be no binding agreement for the co-investment to be made until more is known about the deal. If the rule required that co-investors take a pro-rata share of all broken deal fees this could cause significant issues (and increased costs) for investors:

- For the co-investor to be charged this cost it would require a binding agreement to invest before the details of the deal are known or require potential co-investors to commit to paying fees on investments they never intended to make.

- Where all investors have the right to co-invest this would mean they would all pay an additional share of the fees as potential co-investors or must opt out of co-investments before knowing the details of the deal.
- Co-investors do not typically commit to an investment size in advance of knowing the details of the deal and as such it would be difficult to determine a pro-rata amount for a broken deal.
- The offering of co-investments to investors is often driven by a desire of the adviser to manage a larger stake in an underlying investment that would not be appropriate for the fund due to concentration limits and/or diversification. This additional ownership stake benefits all fund investors, whether they are also co-investors or not. The larger stake provides the adviser greater governance rights over the underlying investment than it would otherwise possess without the co-investment.

Unless the co-investment is through a dedicated co-investment vehicle that has a mandate to regularly invest alongside the fund, we believe that broken deal fees should be exempt from any requirement to split fees on a pro rata basis between co-investors, SMAs, funds of one and private funds.

Any standard for fee and expense allocation should be based on what is fair and equitable. A one size fits all pro rata approach may lead to non-equitable results.

SEC Question 224:
We recognize that many co-investors do not agree to bear their pro rata share of broken or dead deal expenses. Would the proposed rule make it difficult for funds to consummate larger investments where co-investment capital is needed? Would the proposed rule cause funds to syndicate more deals post-closing once the adviser is confident that the deal will not fall through?

SBAI Response
If the rule is enacted as proposed, it would imply that co-investors must agree to take on fees related to an investment before they have committed to investing (since the details of the deal are not yet known). This could discourage co-investments from certain investors.

Co-investments are beneficial to the private fund investors, they can allow the private fund adviser to have greater control over an investment, allow for larger deals to be struck, or allow full control of an issuer. If investors are discouraged from co-investments this could be detrimental to the private fund.

Note that in some cases it would not be possible for a fund to syndicate a deal post-closing for example in the purchase of a private issuer.

SEC Question 225:
Should we include an exception for co-investment vehicles (or certain other vehicles) that invest alongside another fund managed by the adviser? If so, how should we define "co-investment vehicle"? Should the rule treat single-deal co-investment vehicles differently than multi-deal co-investment vehicles? Why or why not?

SBAI Response
We do believe that there should be separate considerations for co-investments; however, we believe that disclosure of non-pro rata expenses rather than prohibition would be a better solution to this.

Any standard for fee and expense allocation should be based on what is fair and equitable. A one size fits all pro rata approach may lead to non-equitable results.

SEC Question 226:
Should we define "pro rata"? Should "pro rata" be determined based on each client's ownership (or anticipated ownership) of the portfolio investment? Will advisers interpret "pro rata" differently?

SBAI Response
How "pro-rata" is calculated may vary depending on the expense in question. For investment related expenses it may be fairer to investors to charge pro-rata based on P&L and in other cases it may be more appropriate to charge pro-rata based on NAV.

For this reason, we do not believe the SEC should be prescriptive on the definition of "pro-rata"

SEC Question 227:
Where multiple funds invest in the same portfolio investment at different times, the first fund to invest may initially bear a higher level of fees and expenses than later funds. Should the proposed rule address fees and expense allocations among funds that invest at different times, and if so, how? If a significant amount of time has passed between the first fund's investment and the later fund's investment, should the later fund pay interest on its portion of fees and expenses? Should interest payments always apply when portfolio investments are made at different times? If not, how much time should lapse before interest applies?

SBAI Response
We believe this would be very complex to regulate for and while it may make sense for investments that follow in a short space of time (i.e., weeks) it would not necessarily make sense for investments made at a later point.

Different funds may invest in the same investment at different times due to their investment strategy, mandate or restrictions. For example, one fund may invest in early stage companies with a mandate to bear the associated costs and risks in expectation of a larger return, a second fund may invest in the same investment at a later point as it can only invest in established companies (perhaps after they have gone public) – in this situation it would not be fair for investors in the second fund to pick up their share of the day one costs as they are not necessarily being compensated in the same way and would not have to pay these costs on this type of investment if the other fund had not invested.

The complexity and nuances of these types of investment mean that disclosure over prohibition would be a better regulatory solution.

SEC Question 228:
The proposed rule would prohibit advisers from charging or allocating fees and expenses related to a portfolio investment (or potential 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. Is the scope of the phrase "other clients advised by the adviser or its related persons" broad enough? Should we revise the proposed rule to cover any

other clients, vehicles, or other persons advised by the adviser or its related persons? Alternatively, should we revise the rule to cover all co-investment structures and arrangements?

SBAI Response

We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 229:

We recognize that a transaction counterparty may request to only contract with one fund entity, which can result in one fund being liable for its own share as well as another fund's share of any transaction obligations, including fees and expenses. If one fund would be responsible for the liability of another fund, those funds, in certain cases, contractually agree to bear their pro rata share, often times through a contribution or reimbursement agreement. Should we prohibit this practice and thus require each fund entity to contract directly with the counterparty? Alternatively, should we require certain governance and other protections, such as contribution or reimbursement agreements, if only one fund contracts directly with the counterparty? Why or why not?

SBAI Response

We do not see any market failure that would support prohibition of this type of arrangement. If counterparties require one counterparty to a contract and this is prohibited, this could limit investment choices unnecessarily.

SEC Question 230:

As noted above, the proposed rule would not prohibit an adviser from charging different fund-level compensation, such as advisory fees, to vehicles that invest alongside each other in the same underlying portfolio investment. For example, a co-investment vehicle may pay lower management fees than the main fund. Is it sufficiently clear that such arrangements would not be prohibited under the proposed rule?

SBAI Response

This should be explicitly stated in any enacted rule.

Borrowing

SEC Question 231:

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

SBAI Response

We do not believe the scope of this rule should be widened. Other accounts are typically the result of bespoke negotiations between a sophisticated investor and the private fund adviser.

SEC Question 232:
Should we broaden the proposed prohibition to apply when an adviser lends to the fund?

SBAI Response
We do not believe there is any identified market failure that would require the prohibition of an adviser lending to a fund.

There are many instances where this would occur in the normal course of business that are beneficial for investors. For example, often advisers will advance fee payments and be reimbursed by the funds. This can be beneficial particularly in the early stages of a fund's life where it may not have readily available operating capital.

SEC Question 233:
Should the proposed rule exclude certain activity from the prohibition (e.g., scenarios where a private fund makes tax advances or tax distributions to its general partner (or similar control person) to ensure that the general partner and its investment professionals are able to pay their personal taxes derived from the general partner's interest in the fund)? If so, what activity should we exclude and why?

SBAI Response
We believe that tax advances should be exempt from any prohibition. Only the largest advisers will be able to fund these tax payments without advances as the amount owed is based on unrealised income. Prohibiting these tax advances would be detrimental to smaller advisers and raise barriers to entry for the industry.

The SEC should also specifically exempt loans negotiated between an investor and the adviser outside of the fund structure for example an investor may advance working capital for a new private fund adviser. These are bespoke negotiated agreements that do not present the same conflicts or impact on the private fund and its investors.

SEC Question 234:
Are there situations in which a fund would agree to lend a start-up adviser money for initial costs and employee salaries? Are there situations in which a private fund client should be able to make a loan to a private fund adviser because the economic terms would be favourable to the private fund? How would we determine that the terms are favourable to the private fund?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 235:
Should the proposed rule be expanded to prohibit an adviser from borrowing against a private fund client's bank account or other assets, where the lender may be a third party (rather than the private fund)? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 236:
Should we amend Form ADV and/or Form PF to require advisers to report information about an adviser or its related person lending to, or borrowing from, private funds or other clients? Why or why not? For example, should we require advisers to report whether they engage in this practice and to provide an aggregate amount or range of such loans or borrowings?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 237:
Recognizing the limitations of private fund governance mechanisms, as discussed above, should we permit borrowing if it is subject to specific governance and other protections (e.g., advance disclosure to all investors, advance disclosure to an LPAC or similar body, consent of a governing body such as an LPAC, and/or consent of a majority or supermajority of investors)? Should we require private fund advisers to make ongoing disclosures to investors and/or governing bodies of the status of such borrowings? Why or why not?

SBAI Response
We have not responded to the specific points in this question but reiterate a key point we make at the beginning of this response. We note that the SEC is concerned about governance of private funds and would ask whether addressing this would be a better option than taking on the governance role for private funds through prescriptive rules.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 238:
Should the rule include any full or partial exclusions for certain transactions that may not involve conflicts of interest or that may involve certain third parties that ameliorate the conflicts of interest? For example, should we provide an exclusion if the terms of the borrowing are set by an independent third party and such third party has the authority to act on behalf of the fund in the event of a default by the adviser? Why or why not?

SBAI Response
We have not responded to the specific points in this question but reiterate that disclosure would be a preferred option to prohibition.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 239:
Do commenters envision unintended consequences of this proposed prohibition, such as in circumstances where an adviser's related person has its own commercial relationship with the fund?

SBAI Response
Where a rule is based on prohibition rather than disclosure and includes broad terms there will always be unintended consequences such as those we describe in responses above like advancement of fee payments or tax advances.

SEC Question 240:
Should the rule prohibit (or otherwise restrict) advisers from lending to private funds they manage on terms that include excessive interest rates or other abusive practices? To what extent and under what circumstances does this practice occur? Does it raise similar concerns to borrowing?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Preferential Treatment

SEC Question 241:
Should the proposed rule apply only to SEC-registered advisers and advisers that are required to be registered with the SEC instead of all advisers, as proposed?

SBAI Response
Yes, the rule should apply to SEC-registered advisers only. This rule should also not apply to SMAs or Funds of One which are bespoke negotiated agreements between two sophisticated parties.

SEC Question 242:
Should we prohibit all preferential treatment instead of the proposed approach, which is to prohibit certain types of preferential treatment (i.e., liquidity and transparency terms that an adviser reasonably expects to have a material, negative effect) and prohibit all other types of preferential treatment unless disclosed? Why or why not?

SBAI Response
No, we do not believe the SEC should prohibit <u>any</u> of these treatments and disclosure-based rules should be the basis of any regulation.

Many of the items listed in this proposal are beneficial to investors in certain circumstances and prohibition means that investors would lose these benefits. In addition, defining what is deemed as "preferential" may prove challenging and may result in advisers choosing not to provide different choices to investors out of fear those choices would later be deemed to be preferential. This would have a significant impact on the ordinary course of business between advisers and investors for example:

- During ongoing monitoring meetings between investors and advisers, investors may ask different questions depending on their own interests and concerns. If preferential transparency is prohibited, then advisers may feel they cannot answer questions that other investors have not asked.
- Many investors provide their own bespoke due diligence questionnaires to be completed by advisers. If preferential transparency was prohibited advisers may choose not to complete these in case information provided was later deemed to be preferential. This would result in reduced transparency to investors.
- Many private funds offer different structures to suit the needs of different investors. For example, an adviser may run a closed-ended and open-ended fund in a similar strategy or different share classes could be offered where one has a lower fee but less liquidity and the other has a higher fee but more liquidity. It would be difficult to determine which of these would be deemed "preferential" and as such different options may not be offered reducing investor choice.

The unintended consequence of the dynamics described above would be that advisers reduce the number of investment options and opportunities available to investors, leaving investors with a single investment offering which does not consider their particular needs or circumstances. This would disadvantage smaller investors disproportionately because advisers would be most likely to make available offerings designed to attract the largest clients.

To the extent this rule is adopted, we request the SEC confirm that liquidity terms set out in a private fund's governing documents (for example, multiple share classes that offer different redemption terms) would not be considered "preferential" terms for purposes of the proposed rule. Uncertainty regarding the scope of the proposed rule may result in private fund advisers not permitting investors to choose between share classes with different redemption terms, such as a class-level gate and an investor-level gate, thus reducing investors' ability to tailor their investment to their liquidity needs.

In addition, to the extent this rule is adopted, we request the SEC clarify the definition of "substantially similar pool of assets" does not include funds that have different liquidity terms and pursue different (i.e., not pari passu), but in some cases overlapping, strategies.

SEC Question 243:
Should the proposed prohibitions apply only to terms that the adviser reasonably expects to have a material, negative effect, as proposed? Alternatively, should the proposed prohibitions apply more broadly to terms that the adviser reasonably expects could have a material, negative effect? Why or why not?

SBAI Response

Noting that we do not agree with outright prohibitions of these types of "preferential treatment" if the rule is enacted as written they should not apply more broadly.

The proposed standard as written is vague and may lead to uncertainty for advisers and result in reducing offering of terms to investors and reduced investor choice. A standard where the adviser reasonably expects the terms **will** have a material negative effect would be more appropriate.

SEC Question 244:
Should we prohibit all preferential liquidity terms, rather than just those that the adviser reasonably expects to have a material, negative effect on other investors in that fund or in a substantially similar pool of assets? Why or why not?

SBAI Response

No, we do not believe the SEC should prohibit all preferential liquidity terms. We also do not believe the proposed rule should be based on prohibition. Disclosure would be a better solution.

It is difficult to determine what is "preferential" – if an investor receives a lower fee but locks their money up for a longer period due to its own circumstances is that preferential over an investor paying a higher fee that can redeem their capital more frequently?

The proposed rule is broadly written and could include many things that happen in the ordinary course of business, for example:

- Waiving minimum subscription amounts for investors,
- Accepting a subscription document after the deadline (but in advance of the NAV being finalised),
- Allowing an investor to redeem for legal or regulatory reasons, or
- Offering different combinations of liquidity and fee rates to suit an investor's particular needs and circumstances.

With blanket prohibition and broad definitions advisers will likely be cautious about what the SEC may consider as "preferential" at a future point in time. This may result in moving all investors on to the same terms despite differences in their circumstances and requirements which would be detrimental for some investors. This could remove choice for investors making it difficult for them to fulfil their fiduciary duty to get the best terms for their underlying investors (which will be different from investor to investor).

This may also result in larger investors leaving commingled funds and moving into SMAs to be able to get the terms they require to fulfil their fiduciary duty to their underlying investors. This would be detrimental to the remaining investors in the private funds resulting in a smaller pool of capital with more limited investment choices and a potentially higher fee drag (fixed fees would not necessarily decrease but assets would).

We would propose the following:

Proposed Alternative Rule:

Where certain investors have liquidity that the adviser believes may be preferential and it reasonably expects it to have a material adverse effect, the adviser should disclose this to investors either through share class (or equivalent) terms detailed in the private fund's governing documents or directly to investors.

SEC Question 245:
Are there certain investors who require different liquidity terms (e.g., ERISA plans, government plans)? If so, which types of investors and what liquidity terms do they require? How do advisers currently accommodate such investors without disadvantaging other investors in the private fund? Should the proposed rule permit different liquidity terms for these investor types? If so, should the proposed rule impose restrictions in order to protect other private fund investors? If so, which types of restrictions?

SBAI Response

All types of investors will have different liquidity requirements. Pension funds may require a mixture of longer liquidity terms and liquid investments, fund of funds will require the liquidity of their investments to align with the liquidity offered to their underlying investors or endowments and foundations may be comfortable locking up their capital for a longer period. Some investors may feel more comfortable with less liquidity in longer-term relationships, established advisers or particular investment strategies, but may prefer greater liquidity for less established relationships or opportunistic/cyclical strategies.

Advisers often accommodate these investors via specific fee and liquidity packages that align these interests. For example, an investor willing to commit their capital to the private fund for a longer period may be offered a lower fee or an investor who requires more frequent liquidity may pay a higher fee for this right. In this case liquidity cannot be the sole basis for determining what is preferential as there are trade-offs for both and the investor can choose which is the right structure for them. Prohibiting preferential liquidity would remove this choice from investors.

The proposed rule should be based on disclosure not prohibition to allow flexibility for investors and advisers to negotiate these types of arrangements.

SEC Question 246:
Are there practices related to liquidity and redemption rights that the proposed rule should explicitly address (e.g., in-kind distribution of securities in connection with a redemption, side-pocketing of illiquid investments, discounting or eliminating the management fee while a fund suspends liquidity)? For example, should the proposed rule prohibit in-kind distribution of securities in connection with a redemption, side-pocketing illiquid investments, or discounting or eliminating the management fee while a fund suspends liquidity? Alternatively, should the proposed rule include an exception for these activities?

SBAI Response

We do not believe that the SEC should prohibit any of these activities.

In-kind redemptions can be a useful form of liquidity if a fund is closing or liquidating. Investors would typically agree to this process, and we do not believe the SEC should limit investor choice.

Side-pocketing of illiquid assets is beneficial to investors. It protects both redeeming investors and those that remain in the fund. It also allows investors who subscribe after an asset has become illiquid to not have exposure to that asset. Redeeming investors are protected by not being paid out on the estimated value of these illiquid assets which may be lower than the final realised value. Investors that remain in the fund are protected from the private fund having to sell liquid assets to raise funds for redeeming investors which would

leave them with an unfair exposure to the illiquid assets. Prohibiting side pockets would be detrimental to all investors.

The discounting or eliminating of management fees if a fund suspends liquidity is usually done as a gesture of good will by the private fund adviser as the investor at this point cannot redeem their holding. This is to the advantage of the investor rather than the private fund adviser. There are often genuine reasons to suspend liquidity of the fund to protect all investors, for example a fund with significant Russian exposure may not currently be able to accurately value or dispose of assets and may suspend liquidity until redemptions can be valued fairly. Prohibiting reduced management fees in these circumstances would mean investors have to continue to pay higher fees for the period the liquidity remains suspended.

It is not clear how any of these practices would constitute preferential liquidity or the conflicts the SEC is trying to address so we do not believe the rule needs to address these practices.

SEC Question 247:
Should we prohibit all preferential transparency regarding holdings or exposures of the fund or pool, rather than just prohibiting preferential transparency regarding holdings or exposures that the adviser reasonably expects to have a material, negative effect on other investors in that fund or in a substantially similar pool of assets? Why or why not?

SBAI Response

We do not believe that the SEC should prohibit preferential transparency in general. Determining what is "preferential" will be complex as investors have different preferences for transparency. Prohibiting this could result in private fund advisers deciding to not provide different information to any investors in case it ends up being determined as preferential later and this would result in overall reduced transparency.

Investors have different needs and require different information in different formats. It is beneficial to investors to be able to get the type of information they require. This may also increase the amount of larger investors that move into SMAs (where they would typically own the account and have full transparency) which would be detrimental to the smaller investors that remain in the private fund as lower AUM would mean less investment opportunities and a higher fee drag from fixed fees and expenses.

There are two potential issues that the SEC might be trying to address with this rule:

1. That one investor may receive information that leads to a decision to redeem the holding in the private fund that another investor has not received – i.e., front-running other investors, or
2. That an investor would use the information to trade on their own account – i.e., front-running the fund.

For the first point, typically holding or exposure information is provided on a lagged basis after the NAV for the fund has been completed. This means that investors do not have the ability to redeem ahead of the price being finalised. For liquid funds this information is typically sent to all investors as part of a monthly risk or performance report, but there will be some investors that will request additional information or more granular information due to their own needs - again likely on a lagged basis.

Investors often have a fiduciary duty to monitor their investments, and this means they need to be able to discuss things like positions, trades, exposure and risk with the private fund adviser to ensure that the investment still makes sense for their portfolio and is performing the way they expect it to. Prohibiting

preferential transparency would reduce the efficiency of these conversations as advisers would need to carefully review what might be seen as preferential and this would be detrimental to investors. The same would be true of reporting such as bespoke DDQs, risk reporting in a specified format and other similar information that investors may feel they no longer have access to.

For closed-ended funds it is not clear there is a conflict or a risk here. These funds have a fixed term and investors typically cannot redeem their capital and must wait for it to be distributed at the end of the fund's life. Preventing preferential transparency here would be detrimental to investors with no risk mitigation.

For "substantially-similar" funds – this definition should not include SMAs or Funds of One. These are bespoke accounts and are typically structured where the investor is the owner of the account, and the adviser is contracted to invest on behalf of the account. Restricting transparency here would not be practical or appropriate.

With regards to front-running the fund if the information is material and non-public this would be covered by existing laws on MNPI and insider trading. Therefore, there is no requirement for an additional rule from the SEC.

Proposed Alternative Rule:

Advisers should disclose if any investors receive preferential transparency with details of holdings or exposure, and this should be made available to other investors on request.

SEC Question 248:
Should we define, or provide guidance on, when preferential redemption terms or preferential information rights would have a material, negative effect on other investors? If so, what should be some determining factors? Would it be relevant that the redemption terms would cause another investor to reconsider its investment decision? Please explain your answer. Should we clarify whether an adviser could disclose information about holdings or exposures of the fund or a substantially similar pool of assets on a delayed basis without violating the proposed prohibition? Should the proposed rule expressly require disclosure to investors after a specified period? If so, what period?

SBAI Response

The definition of what is preferential and what has a material adverse effect will not be the same across the industry. It will differ depending on whether the fund is open ended or closed ended, the types of instruments traded by the private fund, the holding period for the fund and many other factors.

Equally, what constitutes a delayed basis will differ for the same reasons, for example a fund that turns over its entire portfolio daily could report holdings as soon as COB of the trading day or a fund that holds complex assets that take time to value might require a longer delay.

We do not believe that the SEC can or should be prescriptive about what information can be sent and when. Amending this rule to require disclosure of this type of transparency would resolve many of these issues in a more efficient way without reducing the benefits to investors.

SEC Question 249:
Are transparency concerns, especially with regard to information that could have an impact on an investor's decision to redeem, more prominent with certain fund types (e.g., hedge funds, private equity funds)? If so, which types and why?

SBAI Response
From conversations with our community of asset managers and investors we do not believe that there are wide-spread industry concerns about too much or differential transparency to investors. There are however great concerns that implementing this prohibition rule would significantly reduce transparency to investors, which would be contrary to the SEC's stated goal of investor protection. In addition, there has been no market failure identified that would require this intervention.

SEC Question 250:
Should we exempt certain types of private funds from the written notice requirements of the proposed preferential treatment rule? If so, which types of funds and why?

SBAI Response
Any written notice or disclosure requirements should be flexible enough for the adviser and investors to agree the best methods and format of this disclosure. For example, some advisers may choose to present the disclosures proposed by these rules in a stand-alone document or others may choose to include the information in DDQs or other marketing materials.

Any disclosure rule that the SEC enacts must have a grand-fathering clause where the rule applies to new agreements from its effective date and not to all historic agreements. Side letters negotiating items such as fees, transparency and other matters are common practice in the industry, are beneficial to investors, and have often been negotiated on a confidentiality basis.

If the SEC requires all historic agreements to be disclosed, this will mean many if not all existing side letters would need to be renegotiated or repapered to align with the rules. This would be a significant effort on behalf of both advisers and investors. It would also increase costs to both sides as these are legal agreements that may require the involvement of law firms.

SEC Question 251:
Should we restrict the use of side letters and side arrangements so that they can only be used to address certain matters such as, for example, legal, regulatory, or tax issues that are specific to an investor?

SBAI Response
Side letters between advisers and institutional investors are contractual arrangements that are negotiated between sophisticated parties. We do not believe the SEC should restrict freedom of contract for side letters.

As noted throughout our response on the prohibited activities and preferential treatment section of these rules; we believe disclosure is more effective than prohibition as it avoids unintended consequences that could make investing in alternatives less efficient and transparent for investors.

SEC Question 252:
Should the rule's prohibitions on preferential terms extend to a substantially similar pool of assets or apply only to each private fund separately?

SBAI Response
As previously noted, we do not believe there should be a prohibition of these terms generally but if the rule is enacted as proposed it should extend only to each private fund separately.

Different vehicles following a similar strategy are set up to meet specific investor needs. Limiting an adviser's choice to provide these different terms to meet these needs will reduce investor choice in the industry.

SEC Question 253:
The proposed definition of "substantially similar pool of assets" would not include co-investments by a separately managed account managed by the adviser or its related persons. Is this definition too narrow? Why or why not? Would the proposed definition appropriately capture similar funds? Should it, for example, include circumstances where a private fund invests alongside a separately managed account? Why or why not? Should the definition include a co-investment vehicle that is structured as a pool of assets that invests in a single entity and where the private fund invests in the same entity?

SBAI Response
As previously noted, we do not believe there should be a prohibition of these terms generally but if the rule is enacted as proposed the definition of "substantially similar pool of assets" should not include SMAs, Funds of One or Co-Investment vehicles.

SMAs are bespoke agreements negotiated between sophisticated parties. These are often structured where the investor owns the account and contracts the adviser to make investments. Preventing freedom of contract to negotiate terms for these accounts or the transparency available to an investor that owns the account is not practical or appropriate.

Co-investments may invest in a selection of assets that the private fund has invested in, but they do not run the same strategy. Often the investor has discretion over which co-investment they will invest in which is not the case in a private fund. These investments may also be sized differently in a co-investment and in some cases the investor will have the choice to hold onto the investment when the fund decides to sell. Co-investments should not be treated as substantially similar and there should be freedom of contract to determine the most appropriate terms for these vehicles.

In addition, to the extent this rule is adopted, we request the SEC clarify that the definition of "substantially similar pool of assets" does not include funds that have different liquidity terms and pursue different (i.e., not pari passu), but in some cases overlapping, strategies.

SEC Question 254:
Should we limit "substantially similar pool of assets" to pools the adviser or its related persons manage, as proposed? Is the proposed definition too broad or too narrow? The proposed definition would require the pool of assets to have substantially similar (i) investment policies, (ii) objectives, or (iii) strategies to those of the private fund. Should we change "or" to "and" and instead require that

the pool satisfy all three requirements (i.e., have substantially similar investment policies, objectives, and strategies)? Should we instead require that the pool satisfy only two of the three criteria? For example, should the definition only require the pool of assets to have substantially similar objectives and strategies (and not policies) to those of the private fund? Are there other unique characteristics or factors, such as the target rate of return, the proposed definition should address? Should the definition exclude multi-share class private funds? If so, why?

SBAI Response

We have not responded to all sections of this question, but multi-share class private funds should be excluded from the definition.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 255:
Should we narrow the scope of the term "substantially similar pool of assets" to only include pooled vehicles that invest or generally invest pari passu with the private fund? Why or why not?

SBAI Response

We do not agree that different vehicles should be defined as having preferential terms over other vehicles as different vehicles following similar strategies are often set up to meet different investor needs. If the rule is enacted as written the definition of "substantially similar pool of assets" should be narrowed to include only pooled vehicles that invest or generally invest pari passu with the private fund. In addition, this definition should exclude open-ended and closed-ended funds that run similar (but in some cases overlapping) strategies as the risks and conflicts will be different here.

SEC Question 256:
Do commenters agree that we should prohibit other preferential terms unless the adviser provides specific information regarding those terms to prospective and current private fund investors? Would these disclosures benefit these investors? Should we require advisers to provide additional information in the written notices? If so, what information? Should the rule specify what information is required to be included in the notice?

SBAI Response

We are supportive of disclosure requirements rather than prohibition of commercial terms; however, we note that the disclosure requirements as currently written are overly prescriptive and detailed.

It is common in many commercial arrangements for people to be compensated for taking more risk (e.g., early-stage investors), buying in bulk (e.g., large investments) or to otherwise negotiate commercial terms as part of a contractual arrangement. It is not common in other industries for terms negotiated in a contract between two parties to be disclosed to a third party unrelated to the contract.

The SEC notes in its proposal that the disclosure would help investors identify other similar investors which have different terms. The disclosures prescribed would not achieve this as the SEC, rightly, protects identifying information about investors. The disclosure would therefore not allow investors to compare the terms of other similar investors.

There is an underlying assumption in this rule that this disclosure would result in better fees for all investors. It is more likely that advisers will choose not to offer preferential fees rather than offer all investors better fees and as such average fees for investors could increase.

We do not believe that advisers should disclose the exact fees that have been negotiated as these are contractual terms between two parties. We believe that disclosure that some investors have preferential fees, which is currently common practice, is sufficient and investors can choose to ask further questions in due diligence meetings. This is similar to the current requirement under AIFMD[7] in Europe and therefore in line with international practice.

The SEC also references terms such as excuse rights for investors for ESG reasons or others. These are terms negotiated specifically to suit an individual investor's needs and as such should not be considered transferable to another investor that may have different requirements. These agreements are made to meet investor demand and increase investor choice – discouraging them would be detrimental to investors.

We do not believe the SEC should be prescriptive about the content of format of these disclosures. Depending on the terms agreed, investor preferences, and disclosures already in place a one size fits all approach is not appropriate in this instance. For example:

- For multi-share class funds the terms of each share class will be disclosed in the fund's offering documents and apart from founder share classes that may be closed are typically available to all eligible investors.
- Advisers may choose to provide stand-alone disclosures to comply with these rules or may already be disclosing this information in DDQs or other marketing materials

Should the SEC enact the disclosure sections of this proposed rule as written, **we strongly recommend that a grandfathering clause is enacted so this disclosure applies to new agreements between investors and advisers and not all historic ones**. Applying the disclosure to historic agreements will require repapering and renegotiation of these agreements (which are typically agreed with confidentiality clauses). This will mean both investors and advisers will have to dedicate significant time, resources and costs to this process.

SEC Question 257:
Instead of requiring advisers to provide or distribute the written notice, should we require advisers to only provide or distribute the written notice upon request?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 258:
With regard to current investors, the proposed rule would require advisers to disclose preferential treatment provided by the adviser or its related persons. Instead or in addition, should we require advisers to disclose preferential treatment that it has offered to other investors in the same fund?

[7] Alternative Investment Fund Managers Directive

SBAI Response
Disclosures should be restricted to investors in the same fund. Other funds may be set up to meet different investor demands and terms may therefore not be comparable.

SEC Question 259:
Should we require advisers to provide advance written notice to prospective investors, as proposed? Should we define "prospective investor" in the proposed rule? If so, how should we define this term and why? For example, should we define "prospective investor" as any person or entity that has expressed an interest in a private fund advised by the adviser? If not, should we provide guidance regarding how advisers can identify prospective investors? Should we clarify how advisers that use intermediaries, investment consultants, or other third parties to introduce prospective investors would comply with the proposed rule? For example, should we state that advisers must treat the intermediaries, investment consultants, or other third parties as the prospective investor in these circumstances? Should the definition include prospective transferees? Why or why not?

SBAI Response
There is a well-established due diligence process in place between advisers and institutional investors (whether the investors use investment consultants or not). This process will have many stages. Typically, the manager selection process for a new investment will involve initial high-level discussions with many managers to assess a peer group, there will then be more detailed discussions with fewer managers, and finally operational due diligence completed on chosen managers.

We do not believe the SEC needs to define the term "prospective investor", but the rule should state that an investor does not need to be treated as a prospective investor for disclosure purposes at the start of the interactions between the adviser and the investor. The point of operational due diligence or equivalent is likely the place that these disclosures would be most beneficial and as such an investor should be treated as a prospective investor from the point they signal an intention to invest (subject to remaining due diligence) and not from the point they express interest in a fund.

Advisers should not be required to treat intermediaries, investment consultants or other third parties as prospective investors for the purposes of this rule.

SEC Question 260:
The proposed rule would require the adviser to provide the written notice "prior to the investor's investment in the private fund." Should we prescribe how far in advance of the investment an adviser must provide such notice? For example, should we require an adviser to provide the written notice at least two business days prior to the date of investment? Should such period be longer or shorter? If so, why? Should the proposed rule require advisers to provide notice to prospective investors within a certain number of days before the investor submits its complete subscription agreement (or equivalent)? Alternatively, should the proposed rule require the adviser to provide the notice at the time an investor receives the private fund's offering and organizational documents (e.g., limited partnership agreement, private placement memorandum)? Should we instead require that notice be sent prior to some other action or event? If so, what action or event and why? Should the proposed rule require advisers to update disclosure they previously provided, for example, to

include preferential treatment that an adviser granted after some investors decided to invest, but before closing?

SBAI Response
We do not believe the rule should be more prescriptive than requiring disclosure "prior to the investor's investment in the private fund". The exact point this information is useful to the investor will differ depending on the investor's internal processes and needs. Being prescriptive about a timeframe for this to be delivered may be detrimental to investors who need to receive this at an earlier point.

SEC Question 261:
What impact would the advance written notice requirement have on "most favoured nation" clauses ("MFN clauses") granted to other fund investors?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 262:
Should the rule require disclosure of all preferential treatment, as proposed, or should the rule have a narrower or broader scope?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 263:
Should the proposed rule require the adviser to disclose how it memorialized the preferential treatment (e.g., formal written side letter, email)?

SBAI Response
We do not see any benefit to investors from this disclosure and therefore see no requirement for it.

SEC Question 264:
The proposed rule would require the adviser to provide written notice. Should the proposed rule instead allow advisers to disclose this information orally and keep a record evidencing such oral disclosure? Why or why not?

SBAI Response
Yes, we believe this flexibility should be in the rules.

SEC Question 265:
The proposed rule would require the adviser to provide notice on an annual basis to current investors, if the adviser or its related persons provided any preferential treatment to other investors in the same private fund since the last written notice. The proposed rule does not specify whether the adviser must provide this on a calendar year basis, the adviser's fiscal year, or on a rolling annual basis. Should the rule specify precisely when the annual period begins and ends? Why or why not? If so, what should the beginning and ending dates be? Instead of an annual notice, should we require an adviser to provide the notice within 30 days of providing any new preferential treatment to an investor in the fund?

SBAI Response
We do not believe the SEC should prescribe the timing of this annual notice. Many investors complete annual operational due diligence (as well as other more frequent interactions) of their advisers and may prefer this information to be received in line with their due diligence cycle. We believe that the rule should be flexible on when this is delivered to investors so long as it is delivered annually (as stated in the proposed rules as written).

The rule should not be amended to require notification 30 days after provision of preferential treatment.

SEC Question 266:
Should we require an adviser to document the years during which it has not provided any preferential treatment and therefore need not distribute or provide a written notice to current investors or prospects, respectively? Why or why not? If an adviser has not provided preferential treatment to any investors, or has not done so during the applicable time period, should we require an adviser to send current investors and prospects a written notice confirming that it does not have any preferential treatment to disclose? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 267:
The proposed rule would require advisers to provide or distribute a written notice that provides "specific" information about preferential treatment. Should the proposed rule define "specific" or use another term to describe the required level of detail?

SBAI Response
We do not believe the rule should be prescriptive about the information that should be included in this disclosure.

Recordkeeping for Preferential Treatment

SEC Question 268:
Would the proposed recordkeeping requirement be overly burdensome for advisers? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 269:
Would advisers face more difficulty retaining records regarding prospective investors as compared to retaining records for current investors? Would it be more difficult for advisers to keep track of prospective investors? For example, prospective investors may express interest in a private fund, but may not actually invest. Should we only require advisers to retain records regarding prospective investors that invest in the private fund?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 270:
The books and records rule under the Advisers Act applies to SEC-registered advisers. Should we adopt a recordkeeping obligation that would require other advisers (such as exempt reporting advisers) to retain the written notices that proposed rule 211(h)(2)-3 would require? Why or why not?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Discussion of Proposed Written Documentation of all Advisers' Annual Reviews of Compliance Programmes.

SEC Question 271:
Should we expressly require advisers to document the annual review of their compliance policies and procedures in writing, as proposed? If not, why?

SBAI Response
We believe this is already common practice in the industry and would not have a large impact. The SEC should not be prescriptive about what should be included in this documentation as the compliance risks differ for firms based on their jurisdictions, investor base, strategy, asset classes traded and other factors.

Being prescriptive about what should be included in this written response would mean that compliance reviews are documented to fulfil regulatory requirements (a tick-box exercise) rather than being tailored to ensure they address the actual compliance risks of the adviser and the private fund.

SEC Question 272:
Should we specify certain elements that must be included in the written documentation of the annual review? For example, should we require the written documentation to address matters similar to those that are required in the CCO's written report to a registered fund's board of directors pursuant to rule 38a-1 under the Investment Company Act? Despite the limitations of private fund governance mechanisms, as discussed above, should we require the new documentation to be provided to LPACs, directors, or other governing bodies of private funds? Why or why not?

SBAI Response
The SEC should not be prescriptive about what should be included in this documentation as the compliance risks differ for firms based on their jurisdictions, investor base, strategy, asset classes traded and other factors.

Being prescriptive about what should be included in this written response would mean that compliance reviews are documented to fulfil regulatory requirements (a tick-box exercise) rather than being tailored to ensure they address the actual compliance risks of the adviser and the private fund.

SEC Question 273:
Are there alternate means to document an adviser's annual review of its compliance program?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 274:
Are there exceptions to the written documentation requirement that we should adopt?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

Transition Period and Compliance Date

SEC Question 275:
Do commenters agree that a one-year transition period following each rule's effective date if adopted is appropriate? Should the period be shorter or longer? For example, would six months be an appropriate amount of time? Alternatively, would eighteen months be necessary?

SBAI Response
The rule as it is currently written would involve a substantial amount of work for both advisers and investors to be ready for an effective date.

Assuming the rule is enacted as it is currently written it would involve:

- Renegotiation or repapering of all existing side letters or similar agreements to ensure they are compliant with the rules and allow any required disclosure of terms – this will be the most significant aspect in terms of time and cost of implementation.
- Reporting templates will need to be created and where information is not currently provided it may need to be sourced.
- Processes will need to be put in place to meet the new record keeping requirements.
- Third parties may need to be sourced, have due diligence completed on and engaged for requirements such as the fairness opinion.
- Auditors may need to be changed (particularly for foreign private fund advisers) and engagement letters or contracts amended for those private funds that now require US GAAP reconciliation.
- Fund documentation and expense processes will need to be amended to account for the new expense related rules. Other client agreements such as those for SMAs and Co-Investments would also need to be revisited for this purpose.
- Fund documentation would need to be amended to ensure indemnification clauses are compliant with the new rule.
- Internal processes, policies and procedures will need to be updated to ensure compliance with the new rules.

All of this will take time and there will be costs to both advisers and investors for this. Further delays may be caused by the fact the entire private funds industry will be required to do this at the same time putting a pressure on legal resources (and potentially increasing costs). Many investors do not have large internal legal teams or resources and may need to rely on external counsel due to the volume of side letters meaning they incur additional costs.

Accounting for all these factors we do not believe a one-year transition period is an adequate amount of time. We have made several proposals for alternative rules throughout our response including:

- Grandfathering historic agreements and only applying the rules to new ones. This is essential because prior agreements are the result of negotiations with series of compromises and trade-offs for both investors and advisers. Applying rules which address parts of those existing agreements in a piecemeal manner are unfair to both parties. If grandfathering is not adopted, then the only logical alternative would be for the parties to be afforded termination rights and that could be extremely disruptive for individual investors, advisers and markets.
- Relying on disclosure rather than prohibition including flexibility on where and how the information is disclosed, and

- Removing the rule relating to Limiting or Eliminating Liability for Adviser Misconduct.

Adopting these alternative proposed rules would significantly reduce both the time and cost to advisers and investors in implementing these rules.

Proposed Alternative Rule:

The transition period should be 24 months to allow for this work to be completed.

SEC Question 276:
Should the transition period be the same for all of the proposed new and amended rules if adopted? Should we have different compliances dates for each proposed rule? Why or why not, and for which rules?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 277:
Should the transition period be the same for all advisers subject to the proposed rules, if adopted? Alternatively, should we adopt a tiered transition period for smaller or larger entities? For example, should we provide an additional six months in the transition period for smaller entities (or some other shorter or longer period)? How should we define smaller entities for this purpose?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 278:
Should advisers to certain fund types have a longer (or shorter) transition period? Would compliance with some or all of the proposed rules be more complex for advisers to certain fund types, such as private equity, venture capital, real estate or other similar closed-end private funds, than for advisers to other fund types, such as hedge funds or other similar open-end private funds?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.

SEC Question 279:
The proposed quarterly statement rule would require advisers to report performance since the fund's inception. Should we allow funds that existed before the compliance date of the proposed rule to include performance information only for periods beginning on or after the proposed rule's compliance date? Should the proposed rule include a maximum period of time that funds that are in existence as of the compliance date must look back in order to report performance, fees, and expenses? Is it common practice for older funds (e.g., hedge fund incepted 30 years ago) to retain records to support that performance? Would it be burdensome for advisers to provide since-inception performance information?

SBAI Response
We have not responded to this question.

Our choice not to respond to this question should not be taken as an endorsement of any of the details contained in the question. It reflects the limited time available to appropriately respond to all questions.