



April 25, 2022

Via Electronic Mail: rule-comments@sec.gov

Vanessa A. Countryman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Private Fund Adviser Proposal; File No. S7-03-22

Dear Ms. Countryman,

The California Alternative Investments Association, Connecticut Hedge Fund Association, New York Alternative Investment Roundtable Inc., Palm Beach Hedge Fund Association, and Southeastern Alternative Funds Association (together, the “**Associations**”)¹ welcome the opportunity to comment on the Securities and Exchange Commission’s (“**Commission**” or “**SEC**”) proposed rules regarding the regulation of private fund advisers (“**Proposed Rules**”).² We represent national, regional and state alternative investment industry participants whose members include alternative asset managers, investors and service providers. We support thoughtful regulatory oversight of private fund advisers and recognize the importance of well-crafted rules that help govern the relationships among private fund advisers, their fund clients, and fund investors.

While we appreciate the efforts of the Commission to improve regulation of advisers to private funds, we believe the Proposed Rules (i) have a number of fundamental flaws from a policy perspective and from the perspective of the Administrative Procedures Act (“**APA**”), (ii) will harm rather than protect investors in numerous ways, (iii) will needlessly upset the carefully constructed commercial relationships that private fund advisers and their sophisticated investors have negotiated over many years, (iv) will create significant barriers to entry for smaller and newly-formed advisers, thereby reducing the investment choices available to investors, and (v) plainly exceed the Commission’s authority under the Investment Advisers Act of 1940 (“**Advisers Act**”) and other applicable law.

¹ [Describe organization(s)]

² Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 87 Fed. Reg. 16886 (Mar. 24, 2022) (“**Proposing Release**”), available at: <https://www.govinfo.gov/content/pkg/FR-2022-03-24/pdf/2022-03212.pdf>.

We encourage the Commission to carefully consider the comments from the Managed Funds Association (“MFA”)³ on the Proposed Rules (“MFA Comment Letter”), which we fully support. Specifically, as described further in the MFA Comment Letter, we believe the Proposed Rules will have numerous and significant adverse consequences on investors, with only very limited offsetting benefits. Among other things, such consequences will include:

- fundamental changes to, and/or the elimination of, fund structures and terms that benefit investors, including redemption provisions designed to meet investor needs;
- reduced transparency and ability of investors to understand and manage their portfolios as investor reporting is homogenized to provide less useful and/or misleading information;
- proliferation of opportunistic and frivolous lawsuits under state or foreign law;
- reduction or elimination of side letters as well as other beneficial accommodations provided by advisers to their investors, including routine information sharing and communication;
- disclosure of potentially sensitive commercial information in mandated reports;
- potential conflicts between the prescriptive performance information required to be provided to investors by the Proposed Rules and other performance information frequently requested by investors, including to comply with investors’ internal requirements (*e.g.*, Global Investment Performance Standards (“GIPS”) promulgated by the CFA Institute) or to facilitate comparisons across advisers with which an organization is invested;
- discouraging arms-length economic activity among the companies in which private funds invest and/or among such companies and diversifying non-advisory businesses operated by fund advisers; and
- reduced alignment of interest among advisers and their clients (*e.g.*, through the prohibitions related to clawbacks and certain advances by private funds as well as the disincentives for advisers to incur compliance-related costs).

In particular, we are concerned that the proposed prohibitions are likely to create significant barriers to entry for smaller and newly formed investment advisers, which may have less ability to increase their management or similar fees, are likely to be unable to bear the additional costs that the prohibitions would impose and require significant flexibility regarding the terms that they negotiate with seed, anchor, and other investors. These barriers to entry are anti-competitive, stifle innovation, act to limit investor choice, and potentially impede other efforts by the Commission and President Biden’s administration to promote greater diversity within the asset management industry. The alternative investment industry thrives on new entrants, entrepreneurship, and competition. Imposing significant costs and eliminating long-

³ See Letter from Jennifer W. Han, Chief Counsel and Head of Regulatory Affairs, MFA, to Vanessa Countryman, Secretary, SEC, on April 25, 2022.

standing industry practices that enable smaller and newer firms to incent early investors and tailor fund terms appropriately will make it harder to launch new firms and harder for new managers to succeed. The Proposed Rules, however, do not address these costs.

A robust evidentiary record, including a cost-benefit analysis, is an integral part of the rulemaking process. As the Commission is aware, courts have held that rulemaking that is “unsupported by substantial evidence” constitutes unlawful agency action.⁴ Further, Section 202(c) of the Advisers Act provides:

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.⁵

As described more fully in the MFA Comment Letter, we believe the Proposed Rules fail to meet these standards, particularly with respect to the proposed prohibitions. It is clear that the Commission has not conducted a robust cost-benefit analysis that demonstrates (i) the need for the proposed rules, (ii) that the benefits of the Proposed Rules outweigh the costs on investors and capital formation, and (iii) that less costly alternatives are unavailable.⁶

Given these significant flaws, the Proposed Rules, in particular those rules that would impose prohibitions on private fund advisers, fail to meet the requirements of Section 202(c) and the requirements of the APA. Accordingly, we believe the Commission should withdraw these Proposed Rules.

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⁴ See *Susquehanna Int’l Grp., LLP v. SEC*, 866 F. 3d 442 (D.C. Cir. 2017), citing 5 U.S.C. §706(2)(A). See also *Goldstein v. SEC*, 451 F. 3d 873 (D.C. Cir. 2006).

⁵ See also *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (finding that the SEC’s adoption of Rule 14a-11 under the Securities Exchange Act of 1934 violated the APA because the “Commission acted arbitrarily and capriciously here because it neglected its statutory responsibility to determine the likely economic consequences of Rule 14a-11 and to connect those consequences to efficiency, competition, and capital formation,” requirements similar to those set out in Section 202(c) of the Advisers Act.).

⁶ In this regard, we encourage the Commission to consider the study of the economic consequences of the Proposed Rules prepared by Craig M. Lewis, Ph.D., former Chief Economist of the SEC, which is included as an appendix to the MFA Comment Letter.

We appreciate the opportunity to provide comments to the Commission on the Proposed Rules. Please do not hesitate to contact the undersigned at 212-210-9494 with any questions that you, your respective staffs, or the Commission staff might have regarding this letter.

Very truly yours,

/s/ Robin Fink, President, California Alternative Investments Association

/s/ Bruce McGuire, President, Connecticut Hedge Fund Association

/s/ Tim Selby, Chairman, New York Alternative Investment Roundtable

/s/ Dave Goodboy, Managing Director and Founder, Palm Beach Hedge Fund Association

/s/ Gilbert Davis, President, Southeastern Alternative Funds Association

cc: The Hon. Gary Gensler, SEC Chairman
The Hon. Hester M. Peirce, SEC Commissioner
The Hon. Allison Herren Lee, SEC Commissioner
The Hon. Caroline A. Crenshaw, SEC Commissioner
Mr. William Birdthistle, Director, Division of Investment Management