Federated Hermes, Inc.
1001 Liberty Avenue
Pittsburgh, PA 15222-3779

May 10, 2022

VIA E-MAIL TO RULE-COMMENTS@SEC.GOV

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Comment Letter of Federated Hermes, Inc. on the Securities and Exchange Commission's Proposed Rules Relating to Private Fund Advisers (File Number S7-03-22)

Dear Ms. Countryman:

Federated Hermes, Inc. and its subsidiaries ("**Federated Hermes**")[1] submit this comment letter to the U.S. Securities and Exchange Commission (the "**Commission**") with respect to the Commission's request for comment on its proposed new rules and amendments under the Investment Advisers Act of 1940, as amended, (the "Advisers Act") on private fund advisers (the "**Proposal**").[2]

The Proposal requires private fund advisers to, among other things:

- provide quarterly statements to investors that include standardized disclosures on fees and expenses and investment performance;
- obtain annual audited financial statements and deliver such statements to investors;
- obtain a fairness opinion for all "adviser-led secondary transactions" and deliver copies of such opinion to investors participating in the transaction;
- prepare a report on the adviser's annual compliance program review; and
- disclose to all prospective investors, prior to investing, the details of any preferential rights granted to the fund's investors.

The Proposal also prohibits certain practices by private fund advisers, including:

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

[1] Federated Hermes, Inc. (NYSE: FHI) is a global leader in active, responsible investment management, with $631.1 billion in assets under management as of March 31, 2022. We deliver investment solutions that help investors target a broad range of outcomes and provide equity, fixed-income, alternative/private markets, multi-asset and liquidity management strategies to more than 11,000 institutions and intermediaries worldwide. Our clients include corporations, government entities, insurance companies, foundations and endowments, banks and broker-dealers.
[2] *See* Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Release No. IA-5955 (February 9, 2022), available at https://www.sec.gov/rules/proposed/2022/ia-5955.pdf (the "Proposal").

- Reducing the amount of any adviser clawback by the amount of certain taxes;
- Seeking reimbursement, indemnification, exculpation, or limitation of its liability by the private fund or its investors for a breach of fiduciary duty, willful misfeasance, bad faith, *negligence*, or recklessness in providing services to the private fund. Most private equity funds presently contain a "gross negligence" standard; and
- Borrowing money, securities, or other fund assets, or receiving an extension of credit, from a private fund client.

Federated Hermes supports the comment letter submitted by the Securities Industry and Financial Markets Association ("**SIFMA**") regarding the Proposal ("**SIFMA Letter**"). In particular, Federated Hermes similarly questions the Commission's asserted authority, pursuant to certain sections of the Advisers Acts, including Sections 206(4) and 211(h), to enact most aspects of the Proposal, and notes that the Commission did not provide analysis on such authority.[3] Federated Hermes requests that the Commission's provide analysis on its authority to enact the Proposal as we do not believe that Sections 206(4) or 211(h) of the Advisers Act provide the Commission with requisite authority.

Further, we endorse SIFMA's recommendation that the Commission modify the Proposal, which would prohibit a private fund adviser from obtaining reimbursement, indemnification, exculpation or limitation of its liability for mere "negligence." It is well established that "gross negligence" is the industry standard for managing non-ERISA investment pools, and a departure from this standard creates additional, unnecessary potential liability and litigation risk for private fund advisers, who regularly provide investment advisory services for sophisticated, qualified investors who are presumptively able to understand the risks of their investments. Moreover, as the Commission is well aware, the established standard of care for registered investment companies under the Investment Company Act of 1940, as amended ("1940 Act") is gross negligence. Section 17(h) of the 1940 Act provides, in relevant part, that:

> neither the charter, certificate of incorporation, articles of association, indenture of trust, nor the by-laws of any registered investment company, nor any other instrument pursuant to which such a company is organized or administered, shall contain any provision which protects or purports to protect any director or officer of such company against any liability to the company or to its security holders to which he would otherwise be subject by reason of willful misfeasance, bad faith, *gross negligence* or reckless disregard of the duties involved in the conduct of his office. (emphasis added)

An adviser to a private fund should not be held to a higher standard of care. Simply put, a negligence standard is an invitation to litigate over investment decisions and judgment calls made by investment professionals in the course of the daily business. As such, it is an inappropriate standard to require by regulation, particularly for their most sophisticated clients.

Finally, consistent with the definition of "private funds" under Section 202(a)(29) of the Advisers Act, Federated Hermes believes that the Proposal should be limited to "private funds" under Sections 3(c)(1) or 3(c)(7) of the Advisers Act only, and not expanded to cover any other "substantially similar pool of

[3] *See* Proposal at 311 and 325-326

assets", an overly broad and fatally vague term. Pooled investment vehicles outside of Sections 3(c)(1) and 3(c)(7) of the Advisers Act generally are more specialized vehicles that are tailored to specific investors. Unlike a private fund that is structured by its sponsor or adviser and offered to investors, investors in other types of vehicles negotiate rights to specific reports, audits and other information. Federated Hermes believes that investors in these other vehicles do not require the protections afforded by the Proposal. Moreover, Federated Hermes questions the authority of the U.S. Congress, and the Commission, under the Advisers Act to regulate or impose requirements regarding certain types of other pooled investment vehicles under the Commerce Clause of the Constitution of the United States, such as local government investment pools, which involve the sovereign wealth of a state government, and are organized under state laws and distributed only intra-state to state agencies and local governments.

Federated Hermes appreciates the opportunity to comment on the Proposal. We are available to discuss any questions that the Commission may have relating to these comments.

Sincerely,

Peter J. Germain
Chief Legal Officer

Cc: The Honorable Gary Gensler
The Honorable Allison Herren Lee
The Honorable Caroline A. Crenshaw
The Honorable Hester M Peirce
William Birdthistle, Director, Division of Investment Management