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| asset management group

June 13, 2022

Submitted electronically via SEC.gov

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

Re: Proposed Rule: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews
File No. S7-03-22

Dear Ms. Countryman:

The Asset Management Group (the "**AMG**") of the Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to provide supplemental comments to the United States Securities and Exchange Commission (the "**Commission**" or "**SEC**") on the Commission's proposed new rules and amendments under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**") intending to enhance the regulation of private fund advisers (the "**Proposed Rule**").[2] SIFMA previously submitted initial comments to the Proposed Rule in a letter dated and submitted on April 25, 2022, the initial deadline for public comments (the "**Initial Comment Letter**").[3] On May 9, 2022, the SEC reopened the comment period for the Proposed Rule for an additional 30 days, with comments due on June 13, 2022.[4]

Unless otherwise noted, capitalized terms in this letter have the same meanings specified in the Initial Comment Letter.

While SIFMA AMG appreciates the Commission's decision to re-open the comment period for the Proposed Rule, we note that this non-contiguous additional time period did not

[1] SIFMA AMG brings the asset management community together to provide views on policy matters and to create industry best practices. SIFMA AMG's members represent U.S. and multinational asset management firms whose combined global assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

[2] Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Advisers Act Release No. 5955 (February 9, 2022), *available at* https://www.sec.gov/rules/proposed/2022/ia-5955.pdf (the "**Release**").

[3] April 25, 2022 Letter to the SEC from Lindsey Weber Keljo, Esq., Head of AMG, SIFMA on the Proposed Rule, *available at* https://www.sec.gov/comments/s7-03-22/s70322-20126748-287461.pdf.

[4] Reopening of Comment Periods for "Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews" and "Amendments Regarding the Definition of 'Exchange' and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities", Advisers Act Release No. 6018 (May 13, 2022), *available at* https://www.sec.gov/rules/proposed/2022/34-94868.pdf.

provide us or our members with a meaningful opportunity to conduct statistical analyses or studies that might have permitted additional quantitative commentary—which we know the Commission values. Nonetheless, we did want to use this opportunity to expand upon some of the issues raised in our Initial Comment Letter, as well as to highlight certain areas of agreement between our Initial Comment Letter and letters submitted by or on behalf of investors (other than those of our members who themselves are both managers and investors in funds sponsored by other managers).

I. SIFMA AMG AND ITS MEMBERS SUPPORT MEANINGFUL DISCLOSURE

As we stated in our Initial Comment Letter, we are generally supportive of aspects of the Proposed Rule that will enhance transparency and provide meaningful disclosure to investors, which we believe would further support and strengthen the critical role of adviser-investor negotiations in the private fund industry. Our comments in the Initial Comment Letter were focused primarily on our belief that the Commission does not need to prohibit or require *commercial outcomes*, but should instead adopt rules that help ensure investors receive adequate disclosure and other information to allow them to meaningfully negotiate with fund sponsors. Indeed, our comments with respect to the portions of the Proposed Rule related to disclosure were intended to assist the Commission by highlighting potential unintended consequences and concerns regarding practicability and implementation; our goal was to make the final rules more helpful to investors and more straightforward to implement for advisers. We believe that many of the concerns raised in our Initial Comment Letter are important for the Commission to consider in striking the right balance between meaningful disclosure that investors can actually use without imposing undue costs and unintended consequences on advisers and investors rather than imposing a one-size fits all requirement on a diverse industry.

II. ADDITIONAL COMMENTARY RELATED TO PROPOSED RULE'S DEFINITION OF "SUBSTANTIALLY SIMILAR POOL OF ASSETS"

As we noted in our Initial Comment Letter, we believe that the Proposed Rule's definition of "substantially similar pool of assets" is overly broad. As proposed, the term "substantially similar pool of assets" refers to any pooled investment vehicle (other than an investment company registered under the Investment Company Act) that has investment objectives, strategies or policies substantially similar to that of the private fund managed by the adviser or its related persons. For the reasons discussed in our Initial Comment Letter, we believe that the proposed definition is overly broad and recommend that the Commission limit the scope of the Proposed Rule to only those parallel pooled investment vehicles that invest *pari passu* with the main private fund with respect to substantially all investments.

This comment letter focuses on the use of the term pooled investment vehicle in the definition of substantially similar pool of assets, which we originally identified in footnote 111 of our Initial Comment Letter. As proposed, the term "pooled investment vehicle" is overly broad because it could capture any other type of pooled investment vehicle regardless of the exclusion or exemption under the Investment Company Act on which such pooled investment vehicle may rely and regardless of the format, terms or structure of the pooled investment vehicle that make it distinguishable as an investment product from a typical private equity or hedge fund. Moreover, the Release fails to take into account how different funds relying on different Investment Company

Act exclusions or exemptions should or should not be subject to the scope of the Proposed Rule's ban on "preferential treatment" relating to redemption and information rights.

In structuring an investment fund, an adviser takes into account various factors, such as the type of proposed investments, the potential investor profile (U.S. vs non-U.S., including tax and regulatory considerations) and the desired liquidity profile for the fund, if any. The investment options ultimately offered to investors will differ based on these attributes.

For example, an adviser could form a closed-ended fund that relies on Section 3(c)(5) of the Investment Company Act alongside an open-ended private fund that relies on Section 3(c)(7) of the Investment Company Act. In part that result could arise because a Section 3(c)(5) vehicle by definition cannot issue redeemable securities, whereas Section 3(c)(7) by its terms does not impose such a restriction. However, in order to provide periodic liquidity, the Section 3(c)(7) fund would need to invest in sufficiently liquid investments of shorter duration resulting in a different portfolio risk profile and portfolio management program. Investors would not view the two funds as being "substantially similar," but the Proposed Rule would have the incongruous result of including the liquid Section 3(c)(7) fund under the Proposed Rule even though the Section 3(c)(5) fund itself does not offer any liquidity, and investors in the market would not view such products as substantially similar, much less as true alternatives to one another. Indeed, under the proposed definition, two entirely different funds with completely different strategies, formats and Investment Company Act exclusions, but with the same investment objective of "absolute return" or "high current income" could be considered substantially similar pools of assets.

The term "pooled investment vehicle" would also include other investment products, such as commodity pools, section 3(c)(11) vehicles and also rule 3a-7 securitization vehicles, even though such products differ substantially and meaningfully with respect to investor profiles, investments and portfolio risk attributes. Section 3(c)(11) of the Investment Company Act is an exclusion on which a privately offered investment vehicle could rely if its investors are solely limited to ERISA plans. This structure can offer investors an opportunity to invest in more liquid and lower cost structures, and advisers choose this exclusion in part because it allows all participating ERISA investors to invest in a vehicle that provides the ERISA fiduciary standard sought by ERISA investors.

For the reasons discussed above, we believe that the Commission's use of the term pooled investment vehicle is unduly broad and recommend that it be defined more narrowly as suggested in our Initial Comment Letter.

III. ADDITIONAL COMMENTARY RELATED TO THE PROPOSED RULE'S PROHIBITION ON THE REDUCTION OF THE ADVISER CLAWBACK BY ACTUAL, POTENTIAL, OR HYPOTHETICAL TAXES

Under the Proposed Rule, advisers would be prohibited from reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related

persons, or their respective owners or interest holders.[5] However, as we noted in our Initial Comment Letter, we believe this aspect of the Proposed Rule ignores the fact that the after-tax clawback limitation is designed to put the general partner and the investors back to the same position they would have been had the clawed-back amount never been distributed to the general partner in the first place. In other words, the after-tax clawback limitation is a true-up mechanism that is designed to prevent the general partner from bearing the tax liabilities associated with the economic benefits realized by the investors, not by the general partner.

We would like to illustrate this point, and the concerns we expressed in the Initial Comment Letter,[6] with the following examples. For purposes of these examples, we have assumed a fund with a single investor and a single general partner where both the investor and the general partner are subject to tax at the 40% effective tax rate. We have further assumed that the general partner is not entitled to claim any tax deduction with respect to the clawback payment.[7]

Example 1. Base Case

The fund realized $100 of income and distributed all the income to the investor pursuant to the distribution waterfall. The investor recognized all of the $100 of income as the general partner was not expected to receive any distribution even if the fund liquidated all of its assets. Under this example, the investor would receive $60 of distributions on an after-tax basis, paying $40 of tax liabilities.

Example 2. Cashless Carry Distributions (*i.e.*, "Phantom Income")

As in Example 1, the fund realized $100 of income. At that time, if the fund were to liquidate all of its assets, the general partner was expected to receive 20% of such income and therefore, the general partner received $20 of phantom income, paying $8 of tax liabilities (*i.e.*, $20 X 40%). The investor received $80 of income allocation, paying $32 of tax liabilities (*i.e.*, $80 X 40%). Pursuant to the waterfall, all the proceeds were still required to be distributed to the investor, except for tax distributions (*i.e.*, the amount necessary for the general partner to pay its tax liabilities). Therefore, the general partner received $8 of tax distributions and the remaining proceeds (*i.e.*, $92) were distributed to the investor.

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[5] Please note that for ease of the Commission's review, as in our Initial Comment Letter, our commentary in this section is generally drafted from the perspective of a private fund organized as a limited partnership where the fund's general partner, an affiliate of the fund's investment adviser, receives performance-based compensation in the form of carried interest. In actuality, it is often the case that individual employees (and former employees) of the adviser will be the ultimate recipients of all or a portion of the carried interest initially received by the general partner, and accordingly the unforeseen complications discussed in this section as applied to the "general partner" would also apply to such individual carry recipients. Our comments will also generally apply to any similar organizational and compensation structures.

[6] We also note, as further described in Section IV below, that the Institutional Limited Partners Association also recognized potential unintended consequences of the Proposed Rule's formulation of the clawback tax reduction prohibition.

[7] In the Initial Comment Letter, we discussed in detail those circumstances in which the carry recipients may not be able to claim the tax deductions for the clawback payment.

Upon liquidation of all of the fund's assets, it was determined that the general partner was not entitled to receive any distribution over the life of the fund and therefore the general partner was subject to the clawback requirement. Absent the after-tax clawback limitation, the general partner would be required to pay $8 to the fund, which would be distributed to the investor. If so and assuming the investor has a sufficient outside tax basis, the investor would have received a total of $68 distributions on an after-tax basis (*i.e.*, $92 - $32 + $8) and the general partner would have paid an $8 tax liability without having received the benefit of the corresponding income.[8]

The after-tax clawback limitation allows the general partner not to return back $8 of tax distributions to the fund. Therefore, the investor would end up receiving a total of $60 distributions on an after-tax basis (*i.e.*, $92 - $32) and the general partner would receive $8 of tax distributions to pay its tax liability.

Example 3. Carry Distributions Subject to Clawback

As in Example 1 and Example 2, the fund realized $100 of income. Under the waterfall, the general partner received $20 of carry distributions and matching income allocations. The investor received $80 of regular distributions and matching income allocations. Later, the general partner was required to pay back the entire carry distributions pursuant to the clawback requirement.

Absent the after-tax clawback limitation, the general partner would be required to pay $20 to the fund, which would be distributed to the investor. Assuming the investor has sufficient outside basis, the investor would be able to collect $20 of clawback distributions on a tax free basis, therefore, receiving a total of $68 distributions on an after-tax basis.

The after-tax clawback limitation would reduce the clawback payment from $20 to $12, preventing the general partner from bearing $8 of tax liabilities associated with the $20 clawback payment. Therefore, with the after-tax clawback limitation, the investor would receive a total of $60 of distributions on an after-tax basis.

The following chart summarizes the after-tax positions of the general partner and the investor described above when the after-tax clawback limitation applies.

	Example 1: Base Case		**Example 2: Cashless Carry Distributions (Phantom Income)**		**Example 3: Carry Distributions Subject to Clawback**	
	Investor	GP	Investor	GP	Investor	GP
Income allocation	100	-	80	20	80	20
Cash	100	-	100	-	80	20

[8] In certain cases, the investor may have to report additional income with respect to the clawback payment, in which case, the same income may be effectively taxed twice due to the deduction limitations applicable to the general partner.

	Example 1: Base Case		**Example 2: Cashless Carry Distributions (Phantom Income)**		**Example 3: Carry Distributions Subject to Clawback**	
	Investor	GP	Investor	GP	Investor	GP
Tax paid	(40)	-	(32)	(8)	(32)	(8)
Net cash after tax distribution	60 (= 100-40)	-	60 (= 100-32-8)	-	48 (=80-32)	12 (=20-8)
Clawback payment	-	-	-	-	-	(12)
After-tax net cash	60	-	60	-	60 (=48+12)	0 (=12-12)

As illustrated above, both cases of making cashless carry distributions (Example 2) and carry distributions subject to clawback (Example 3) result in the same after-tax net cash amount (*i.e.*, $60) for the limited partner as in the base case situation in which there are no carry distributions (Example 1). As the general partner is required to pay taxes on the amount that it returns to the fund (and, thus, to the limited partner) through the clawback, the after-tax clawback limitation ensures that there is no burden shifting between the general partner and the limited partner. Without the after-tax clawback limitation, the general partner may end up bearing the liability that should have been borne by the investors as such liability is associated with the benefits realized by the investors.

Admittedly, the examples discussed are overly simplified and do not reflect the fact that certain investors may not be subject to U.S. federal income tax at all or certain investors may not necessarily have enough outside basis to receive the clawback distributions on a tax free basis. However, these examples illustrate the point that the current use of after-tax clawback limitations in the private fund market are *not* intended to shift general partner tax burdens to investors nor to permit general partners to receive an economic windfall. Therefore, we urge the Commission to remove the prohibition on reducing clawbacks for actual, potential or hypothetical taxes as provided in proposed rule 211(h)(2)-1(a)(4).

IV. AREAS OF AGREEMENT WITH INVESTOR COMMENTERS

A number of prominent private fund investors and related trade organizations have submitted comment letters to the Commission on the Proposed Rule. While those letters express a diversity of viewpoints reflecting the different perspectives of investors, several letters reflect a number of common themes and commentary that we previously highlighted and discussed in our Initial Comment Letter. Given the agreement of investors and sponsors alike on the points summarized below, we believe these issues merit additional attention from the Commission. We note, for example, the following points:

- ***Limitations on an Adviser's Liability***: In the Initial Comment Letter, we raised numerous concerns with the Proposed Rule's prohibition on a private fund adviser

seeking reimbursement, indemnification, exculpation or limitation of its liability from a private fund or its investors for, among other things, negligence in providing services to such fund. We raised significant concerns with this aspect of the Proposed Rule generally, but also with respect to the imposition of a simple negligence standard, particularly on the impact that this change would have on long-standing and widespread industry practice and resulting unintended negative consequences on both advisers and investors. We thus urged the Commission to adopt a *gross* negligence standard rather than a simple negligence standard.[9]

The Institutional Limited Partners Association ("**ILPA**") raised similar concerns regarding the unintended consequences of a simple negligence standard, and also recommended that the Proposed Rule be changed to a conditional gross negligence standard.[10] The National Association of College and University Business Officers ("**NACUBO**") echoed these same concerns; NACUBO highlighted that advisers could potentially be dis-incentivized to take on the investment risk necessary to meet investor demands for returns, and therefore advocated that the Commission apply a gross negligence standard.[11]

- ***Reducing Adviser Clawbacks for Taxes:*** Our Initial Comment Letter raised significant concerns regarding the Proposed Rule's prohibition on the reduction of the adviser clawback by actual, potential, or hypothetical taxes, highlighting potential unintended consequences that may actually be detrimental to investor interests over the longer term.[12]

  ILPA raised similar concerns, including the possibility that waterfall provisions in fund documents may simply be structured to eliminate clawbacks entirely, and also recognizing that smaller managers are less able to bear the potential exposure and uncertainty that would likely result from the Proposed Rule's prohibition.[13]

- ***Preferential Treatment***: Our Initial Comment Letter also raised a number of concerns with the Proposed Rule's general prohibition on the granting of redemption rights or provision of portfolio information where, in either case, the adviser has a reasonable expectation, based on the facts and circumstances, that such preferential treatment would have a "material, negative impact" on other investors in the related private fund (or in a "substantially similar pool of assets").

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[9] Initial Comment Letter at Section V.A.1, at 25-31.

[10] April 25, 2022 Letter from Steve Nelson, CEO, ILPA to the SEC on the Proposed Rule, *available at* https://www.sec.gov/comments/s7-03-22/s70322-20126586-287243.pdf ("**ILPA Letter**"). ILPA noted in its comment letter the possibility that advisers' risk tolerance will be fundamentally impacted and potentially damage the returns produced by private funds under a proposed simple negligence standard and recommended the substitution of "negligence" with "gross negligence," provided that the ordinary negligence standard applies to material breach of the LPA and side letters. ILPA Letter at 2.

[11] April 25, 22 Letter from Elizabeth L. Clark, Vice President, Policy and Research, NACUBO to the SEC on the Proposed Rule, *available at* https://www.sec.gov/comments/s7-03-22/s70322-20126570-287231.pdf.

[12] Initial Comment Letter at Section V.A.2, at 31-34 and accompanying appendices.

[13] ILPA Letter at 16-17.

Among other things, we believed that the above quoted terms were overly broad and would be difficult to apply, implement and monitor.[14]

ILPA and the Ohio Public Employees Retirement System ("**OPERS**") also called for greater clarity and detail on what would be a "material, negative impact" on other investors and that the Proposed Rule may impede investors' ability to negotiate important side letter provisions with respect to their investments in private funds.[15]

In addition, we also raised concerns as to the impact of the Proposed Rule's preferential treatment prohibitions on redemption rights, specifically with respect to Specialized LPs, who negotiate certain redemption rights due to (among other things) legal, regulatory and/or tax considerations.[16] The Comptroller of the State of New York and OPERS raised similar concerns in their comment letters with respect to similarly regulated investors.[17]

- ***Substantially Similar Pool of Assets:*** We also urged the Commission in our Initial Comment Letter to modify the Proposed Rule's definition of "substantially similar pool of assets" to apply only to funds that invest side by side, *pari passu*, with the main fund, with respect to substantially all investment opportunities.[18] ILPA expressed a similar view in its comment letter.[19]

- ***Allocating Co-Investment Costs and Expenses on Non-Pro Rata Basis***: With respect to the Proposed Rule's prohibition on allocating co-investment costs and expenses on a non-*pro rata* basis, we urged the Commission to modify the Proposed Rule and permit advisers to allocate fees and expenses in a fair and equitable manner and as supported by the deal terms (rather than imposing a strict *pro rata* basis requirement).[20] OPERS in its comment letter expressed similar concerns with mandating a *pro rata* allocation under all circumstances and requested that the Commission consider a more nuanced solution than a blanket prohibition, including allowing flexibility in co-invest situations where such non-*pro-rata* allocations may make sense for the fund and its investors.[21]

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[14] Initial Comment Letter at Section V.B, at 42-50.
[15] ILPA Letter at 4-5, Letter from Karen Carraher, Executive Director, OPERS to the SEC on the Proposed Rule, *available at* https://www.sec.gov/comments/s7-03-22/s70322-20126471-287115.pdf ("**OPERS Letter**"), at 8-10.
[16] Initial Comment Letter at 43-44.
[17] April 25, 2022 Letter from Anastasia Titarchuk, Chief Investment Officer and Deputy Comptroller for Pension Investment and Cash Management, Comptroller of the State of New York to the SEC on the Proposed Rule, *available at* https://www.sec.gov/comments/s7-03-22/s70322-20126603-287255.pdf ("**NYS Comptroller Letter**"), at 7-8; OPERS Letter at 9.
[18] Initial Comment Letter at 46. We also provide additional commentary on this issue in Section III below.
[19] ILPA Letter at 20.
[20] Initial Comment Letter at Section V.A.4 at 39-41. A major concern in our Initial Comment was the need for flexibility to allocate expenses on non-*pro rata* basis for legal, tax and regulatory considerations. For example, this issue is especially acute for a non-U.S. direct lending fund to pay for broken deal expenses.
[21] OPERS Letter at 7-8.

- ***Prohibition on Passing Through Certain Costs and Expenses:*** We also urged the Commission to revise the Proposed Rule's provisions related to prohibitions on passing on certain costs and expenses to avoid impacting funds and advisers that use a "pass-through" expense model (in addition to other more general concerns that could impact all fund private fund advisers).[22] Both the Standards Board for Alternative Investments[23] and the CFA Institute[24] agreed with these concerns, advocating for investor choice in conjunction with full and fair disclosure of expense practices.

- ***Grandfathering***: In light of our belief that the Proposed Rule would have a significant retroactive effect, our Initial Comment Letter urged the Commission to take into consideration the potential impacts on existing private funds and their investors, and to provide for a grandfathering of all private fund contracts in existence (including fund governing documents, advisory agreements, and side letters).[25] ILPA in its comment letter also urged grandfathering with respect to certain aspects of the Proposed Rule.[26]

- ***Impact on Emerging Managers***: Finally, our Initial Comment Letter expressed concerns about the Proposed Rule's impact on smaller, start-up and emerging private fund advisers, who may decide to exit or forgo entering into the private fund space, resulting in less investor choice, diversity and competition within the industry.[27] The Comptroller of the State of New York expressed a similar concern in its comment letter with respect to emerging managers.[28]

We urge the Commission to recognize that both advisers and investors have identified common issues related to the scope, workability, and implementation of the Proposed Rule in their current form, and to take these concerns into consideration in connection with any final adoption of the Proposed Rule.

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[22] Initial Comment Letter at Section V.A.3 at 34-39.
[23] April 25, 2022 Letter from Standards Board for Alternative Investments Limited to SEC, *available at* https://www.sec.gov/comments/s7-03-22/s70322-20126524-287173.pdf, at 73.
[24] April 25, 2022 Letter from Kurt N. Schacht, CFA, Senior Advocacy Advisor and Karyn D. Vincent, CFA, CIPM, Senior Head, Global Industry Standards, CFA Institute to SEC, *available at* https://www.sec.gov/comments/s7-03-22/s70322-20126611-287262.pdf, at 14.
[25] Initial Comment Letter at Section II.B at 6-8.
[26] ILPA stated that it believes that the Proposed Rule, with the exception of required quarterly statements and annual fund audits, should be solely applied to new funds formed after the implementation date, to avoid the necessity of renegotiating existing fund agreements, side letters and subscription agreements, the cost and uncertainty of which would be borne by investors. ILPA Comment Letter at 5-6.
[27] Initial Comment Letter at 14.
[28] NYS Comptroller Letter at 9-10, which urged the Commission to take a close look at the Proposed Rule and consider any changes that may mitigate overly onerous or negative effects to emerging managers (noting that emerging managers are an important segment of the market for investors).

SIFMA AMG appreciates the opportunity to provide these supplemental comments, and sincerely appreciates your consideration of our feedback. We would be pleased to further engage on the comments contained in the this letter, the Initial Comment Letter or on the Proposed Rule more generally. If you have any questions or require additional information, please do not hesitate to contact Lindsey Keljo at [redacted] or our outside counsel, Mayer Brown LLP, attention Tram N. Nguyen at [redacted] Andrew J. Olmem at [redacted] or Adam D. Kanter at [redacted]

Sincerely,

Lindsey Weber Keljo, Esq.
Head – Asset Management Group
Securities Industry and Financial Markets Association

cc: Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission
Honorable Caroline A. Crenshaw, Commissioner, U.S. Securities and Exchange Commission
Honorable Allison Herren Lee, Commissioner, U.S. Securities and Exchange Commission
Honorable Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
Dr. William Birdthistle, Director, Division of Investment Management, U.S. Securities and Exchange Commission