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June 13, 2022

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

Re: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (File Number S7-03-22)

Dear Ms. Countryman:

Thank you for the opportunity to comment on the Securities and Exchange Commission (SEC) private funds proposal. Top Tier Capital Partners is an investment adviser based in San Francisco, CA, that is registered under the Investment Advisers Act of 1940 ("Advisers Act"). Our primary business is advising funds that invest in other venture capital funds (*i.e.*, venture capital "funds of funds"), as well as making secondary purchases and co-investments.

Our experience as an investor in venture capital funds gives us a unique vantage point in assessing the operation and structure of such funds. As a limited partner in venture capital funds, we are among the class of investors that the SEC proposal intends to help. Our perspective on the asset class give us significant concerns about the consequences of several of the proposals, which we believe will hurt both fund investors and advisers, and the venture capital asset class as a whole.

Liability limitation ban

As we understand the law there are no private liabilities for negligence or other conduct under the Investment Advisers Act. Thus, the purpose of the proposed rule appears to be to circumscribe state law under which each private fund is organized with which the Commission disagrees. Some state laws permit participants in a business organization (such as a limited partnership) to structure their liability provisions in whatever manner as the participants agree. Such an arrangement permits partnerships to attract persons to serve as a general partner who would be unwilling to do so (or who would be unwilling to do so without substantially greater compensation) if otherwise faced with liabilities that could be ruinous.

Venture capital funds are just the type of business organization for which these state law provisions were designed. Venture capital investing involves substantial risks where it is common to see multiple portfolio companies fail even in a highly successful fund. Failures can often lead to lawsuits. Because of the often-intimate relationship between nascent growth companies and their venture capital investors, where representatives of advisers to venture capital funds often take board seats and sometimes even act as company operators, an increased exposure to litigation as a consequence of this proposal would severely disrupt a venture capital fund adviser's ability to most effectively manage startup investments.

As an investor in venture capital funds managed by other advisers, we are very comfortable with the current exculpation and indemnification provisions, because we believe that they are necessary to attract and retain quality portfolio management. We therefore do not support this proposal and are very concerned about the harm it will do to fund managers' ability to most effectively develop and support companies and, ultimately, the impact it will have on investor returns in the asset class.

Moreover, in our view it would be inappropriate for the SEC to use an Advisers Act rule to upset the law of the jurisdiction in which the private fund was organized when the terms under which the fund was organized are fully disclosed to all investors. State jurisdictions have made policy decisions that the SEC should not try to upset in a misguided effort to take risk allocation decisions away from the participants in a private fund. Investors who are not comfortable with exculpatory and indemnification provisions of a private fund should, and can, seek investment elsewhere.

Tax clawbacks

If we understand the SEC proposal correctly, funds would not be required to have clawback provisions, but if they do, the amount of the clawback could not be adjusted for taxes that were paid by the general partner when it received the performance allocation. Thus the Commission proposes to penalize a fund manager that agrees to return fees it has received, thus discouraging managers from offering clawback provisions that benefit limited partners. This seems to us to be a peculiar proposal for the Commission to make for the purpose of protecting investors, and one we believe is likely to harm our interests as an investor in venture capital funds.

Post-tax clawbacks are commonly used as a middle ground between pre-tax clawback provisions and limited partnership agreements not providing for any clawbacks. They are negotiated amongst the parties during the fundraising process and play an important role in aligning interests between a general partner and its limited partners. They allow for faster distributions from the fund to investors (because actual tax obligations cannot be determined until later) and support the ability of investors to request clawback provisions in partnership agreements. Banning post-tax clawbacks will create two consequences, both of which will hurt Top Tier as an investor. First, a number of venture capital funds may simply stop offering clawback provisions in the partnership agreements. Second, we are concerned that the funds that do incorporate pre-tax clawbacks will be incentivized to slow distributions so as not to get

caught in a phantom tax trap, reducing investor access to capital and hurting our internal rates of return.

We would expect that prohibiting post-tax clawbacks will also have a damaging impact on increasing diversity in venture capital, as most emerging venture capital managers will not have the personal financial wealth to accept the risk that managing a fund with a pre-tax clawback arrangement would create. This would create a barrier to entry into the industry and hurt the financial performance of those funds that do participate in venture capital, by extension also hurting their investors.

Examination, investigation, regulatory or compliance fee ban

Cash is fungible. To avoid the economic consequences of this rule, funds in high demand will simply demand higher fees at the outset of the fund, meaning we (as an investor in many venture capital funds) will still pay for regulatory and compliance costs, just in a less transparent manner. Using the Commission's regulatory power to allocate expenses among participants in a private fund (all of whom are presumed to be in a position to protect their own interests) is not only unnecessary, it is a meaningless exercise.

Side letter rights rule

Side letters are common features in all venture capital partnership agreements and are frequently requested by limited partners and general partners. Side letters are negotiated during the fundraising process for a broad range of reasons and are effective tools in facilitating partnerships between different entities with varying investment needs, interests, and other unique circumstances. Further, the concerns stated in the SEC's proposal prohibiting certain information in LP side letters are not relevant in the context of closed-end funds. We are also particularly concerned about how this proposal could impact the creation of new venture capital funds and emerging managers where preferential rights for early investors are often critical to the successful creation of a new fund.

Quarterly reporting rule

As investors into a number of closed-ended venture capital funds, we do not see the application to venture capital funds of the quarterly reporting rules, which may be a more appropriate fit for hedge funds as helpful to their investors. Most capital funds are in operation for a decade or longer, often back individual portfolio companies for five years or longer, and do not allow redemptions. This is a dramatically different structure than the type of fund for which these reporting rules are being proposed.

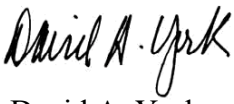
Contractual arrangements pre-dating rule changes

This proposal must protect existing provisions having been previously negotiated among the parties to a fund's partnership agreement in order to avoid generating confusion and chaos in the private funds industry. As investors into multiple venture capital funds, we are particularly concerned about the impact that requiring us to renegotiate and open to amendment partnership

agreements that have been in effect and have been actively governing the relationships between sophisticated parties for years, would have on the industry and its investors. The time and expense of such an undertaking alone would be prohibitive.

Thank you for the opportunity to submit our views and concerns with the proposed rule. Please contact me with any questions regarding these comments.

Sincerely,



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