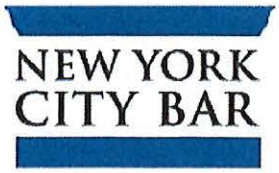

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November 1, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (Advisers Act Release No. 5955 (February 9, 2022)): File No. S7-03-22; RIN 3235-AN07

Dear Ms. Countryman:

The New York City Bar Association's Compliance Committee (the "Compliance Committee") submits this letter in response to the request of the Securities and Exchange Commission (the "SEC" or the "Commission") for comment on Advisers Act Release No. 5955 (February 9, 2022), in which the Commission proposed rules regarding investment advisers to private funds (the "Proposal" or the "Proposing Release"). The Compliance Committee appreciates the opportunity to comment on the Commission's Proposal.

Although not initially proposed by the Commission in the Proposing Release, this comment letter suggests that the Commission adopt a new provision applicable to investment advisers to private funds that would be similar to proposed Rule 15Fh-4(c) under the Securities Exchange Act of 1934 (the "Exchange Act"), which was included in the Commission's proposed rules prohibiting fraud, manipulation, and deception in connection with security-based swap transactions and undue influence over chief compliance officers ("CCOs") of security-based swap dealers and major

security-based swap participants (the "CCO Provision").[1] The Compliance Committee previously issued a comment letter in support of the CCO Provision in the SBS Proposal and proposes via this comment letter that the SEC extend the CCO Provision to apply to advisers to private pooled investment vehicles ("Private Fund Entities") under the Investment Advisers Act of 1940 (the "Advisers Act"). The Compliance Committee membership includes many compliance professionals at various financial institutions, in addition to attorneys from law firms, in-house counsel and in-house compliance professionals, consultants, and representatives of federal and state law enforcement, regulatory and government agencies. We believe the Compliance Committee's diverse membership focused on the compliance function enables it to provide a thoughtful view on matters impacting the compliance function specifically and the financial community generally.

I. SUMMARY

The SBS Proposal proposed the CCO Provision as new Rule 15Fh-4(c) under the Exchange Act, which would make it unlawful for any officer, director, supervised person, or employee of security-based swap dealers and major security-based swap participants (a "SBS Entity"), or any person acting under such person's direction, to directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the SBS Entity's CCO in the performance of his or her duties under the federal securities laws or the rules and regulations thereunder.

The Compliance Committee shares the Commission's view that CCOs of SBS Entities play a critical role in preventing fraud and manipulation by SBS Entities and their personnel through designing and maintaining effective compliance systems. Accordingly, the Compliance Committee supports the Commission's proposal to adopt an additional measure under Section 15F(h) of the Exchange Act to protect CCOs in the furtherance of those duties. The Compliance Committee believes that CCOs of Private Fund Entities play a similar critical role, and thus believes that a similar rule should apply under the Advisers Act in the private fund market. We believe that the CCO Provision, as modified to apply in the private fund market, will help to deter attempts by officers, directors, supervised persons, or employees of Private Fund Entities to manipulate or fraudulently influence a CCO in the performance of his or her duties.

In this comment letter, we first discuss the substantial obligations that CCOs of Private Fund Entities have and highlight the continuing perceived increased risk of personal liability of CCOs. We then highlight the Compliance Committee's view that now is an opportune time to adopt the CCO Provision for Private Fund Entities, as well. Finally, we discuss the ample precedent that exists for adopting the CCO Provision for Private Fund Entities.

II. CCOs OF PRIVATE FUND ENTITIES HAVE SUBSTANTIAL OBLIGATIONS AND ARE CRITICAL TO EFFECTIVE RISK MANAGEMENT

The duties for which a CCO of a Private Fund Entity is responsible are both many and essential to establishing an effective risk management program at a Private Fund Entity. For

[1] *See* Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions, Exchange Act Release No. 93784 (Dec. 15, 2021), 87 Fed. Reg. 6652 (Feb. 4, 2022) (the "SBS Proposal").

example, these duties include (i) taking reasonable steps to ensure that the Private Fund Entity establishes, maintains, and reviews written policies and procedures reasonably designed to achieve compliance with the Advisers Act and the rules and regulations thereunder relating to its business as a Private Fund Entity, (ii) taking reasonable steps, in consultation with the board of directors or the senior officer of the Private Fund Entity, to ensure that the Private Fund Entity discloses or resolves material conflicts of interest that may arise, and (iii) administering each required policy and procedure. Moreover, a CCO must conduct an annual review (which the Proposal proposed should be in written form) of the Private Fund Entity's policies and procedures. Finally, CCOs have various duties in overseeing the ongoing transactions performed by Private Fund Entities.

Despite these duties, there is a structural tension inherent in the role of compliance officers given that they are employees whose jobs and livelihoods ultimately depend on their employers. Accordingly, it is imperative that market participants have CCOs with real authority and autonomy to influence corporate decision-making to prevent or head off risks and to police firms from within. Indeed, this is one of the most efficient and effective tools available to regulators. In the performance of their duties, CCOs prevent numerous violations of the securities laws, and regulators would be stretched far too thin if their capabilities were not supplemented in this way. This is all the more important today, as CCOs continue to face a perceived increased risk of individual liability, which flows from an increase in enforcement actions brought against compliance officers, recent regulatory focus on holding individuals liable for compliance failures,[2] and an expanding set of regulatory requirements that stretch the compliance function's resources and present greater exposure for compliance officers in their individual capacity.[3]

In a number of regulatory actions, CCOs appear to be held personally liable by regulators for having "caused" their firms' failures to design and implement effective policies and procedures. CCOs may sometimes be singled out as the individual responsible for an entity's failure to adopt and follow compliance policies and procedures even though, by statute, these responsibilities fall on the regulated entity rather than any particular employee.[4] There are various

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[2] *See* Andrew Ceresney, Dir., Div. of Enf't, U.S. Sec. & Exch. Comm'n, Keynote Address at Compliance Week 2014 (May 20, 2014) (noting that the SEC has brought "and will continue to bring – actions against legal and compliance officers").

[3] The long-term increase in the risk of individual liability is well documented. As just one example, in its 2005 *White Paper on the Role of Compliance*, the Securities Industry Association (now the Securities Industry and Financial Markets Association ("SIFMA")) noted that "[o]nly in limited circumstances have the [SEC] and [self-regulatory organizations] brought failure to supervise actions against non-line personnel, such as Compliance Department officers." *White Paper on the Role of Compliance*, THE SEC. INDUS. ASS'N 11 (Oct. 2005), https://www.sifma.org/wp-content/uploads/2017/08/2005RoleofComplianceWhitePaper.pdf (last visited Mar. 9, 2022). By 2013, SIFMA noted, in *The Evolving Role of Compliance*, that "the view of enforcement authorities of Compliance's role" had "recently" changed, as compliance personnel had been named in enforcement actions advancing then-novel theories under which compliance personnel could be held liable for failures to "supervise" others who engaged in alleged violations. *See The Evolving Role of Compliance*, THE SEC. INDUS. AND FIN. MARKETS ASS'N 9 (Mar. 2013), https://www.sifma.org/wp-content/uploads/2017/05/the-evolving-role-of-compliance.pdf (last visited Mar. 9, 2022).

[4] *See, e.g.*, Advisers Act Release No. 4065 (Aug. 6, 2015), https://www.sec.gov/litigation/admin/2015/ia-4065.pdf (last visited Mar. 9, 2022) (the SEC charged BlackRock Advisors' CCO for having "caused" BlackRock to willfully violate rules under the Advisers Act and certain BlackRock funds to violate the Investment Company Act of 1940 even though the statutes and rules impose requirements on the investment adviser generally, not specifically on an adviser's CCO); Windsor Street Capital, L.P., Exchange Act Release No. 80908 (June 12, 2017), https://www.sec.gov/litigation/admin/2017/34-80908.pdf (last visited Mar. 9, 2022) (finding the CCO liable for aiding

obligations under the Advisers Act for Private Fund Entities, however, that are expressly imposed on CCOs.

Empowering CCOs, and the compliance function writ large, with real authority and independence can offer CCOs comfort that (i) they can provide objective advice and counsel that will be appropriately considered and (ii) a culture of compliance can be achieved at their firms with less risk of inappropriate retribution. This should reduce the risk of individual CCO liability and, as importantly, also promote Private Fund Entities in which the pursuit of profits is appropriately balanced by compliance with applicable law. Taking steps to protect CCOs' independence in their fulfillment of their various duties, such as by adopting the CCO Provision for Private Fund Entities (for all of their duties as CCO, not just those that specifically relate to the status of the investment vehicles as private funds), would be an entirely appropriate endeavor by the Commission.

III. THE TIME IS RIPE TO ADOPT A RULE PREVENTING UNDUE INFLUENCE ON CCOS OF PRIVATE FUND ENTITIES

The Compliance Committee believes that now is an opportune time to extend the CCO Provision to Private Fund Entities. The Commission has proposed significant rulemaking – both the Proposal, which relates exclusively and directly to Private Fund Entities, as well as various other rules that would apply to Private Fund Entities and other investment advisers.[5] Such rules will require significant additional duties of CCOs and increase, even in the perception of CCOs, the risk for individual liability. Extending the CCO Provision to Private Fund Entities would permit CCOs to focus exclusively on their duties and help the Commission operationalize whatever rules ultimately are finalized for the mutual benefit of the Commission, investors and Private Fund Entities.

IV. THE CCO PROVISION WOULD REINFORCE EXISTING CCO INDEPENDENCE REQUIREMENTS

The CCO Provision, if adopted, would essentially address conflicts and possible "bad acts" by persons above, below, and at the same level of the CCO, including persons directed by any such persons, thereby ensuring that the entire continuum of personnel at a Private Fund Entity is subject to a prohibition against seeking to unduly influence the CCO. The duties of a CCO span many areas of a Private Fund Entity's business and require input from all levels of seniority in the organization. If an individual associated with a Private Fund Entity intends to participate in problematic conduct, such activities can originate at any level in the organization. The CCO Provision would make explicit that no personnel of a Private Fund Entity – whether an officer,

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and abetting and causing the firm's failure to file suspicious activity reports under the Bank Secrecy Act despite such requirements applying solely to the firm).

[5] See, e.g., Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Release Nos. 33-11038, 34-94382, IC-34529 (Mar. 9, 2022), 87 Fed. Reg. 16590 (Mar. 23, 2022); Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, Release Nos. 33-11068, 34-94985, IA-6034, IC-34594 (May 25, 2022), 87 Fed. Reg. 36654 (June 17, 2022).

director, or any other supervised person or employee – may seek to unduly influence the execution of the CCO's role.

Given that attempts by officers, directors, supervised persons, or employees to manipulate or fraudulently influence a CCO in the performance of his or her duties would undermine a Private Fund Entity's risk management and thus could pose risk to the market, the Compliance Committee believes that it is appropriate to adopt a rule expressly prohibiting interference with the performance of a CCO's duties.

V. PRECEDENT SUPPORTS ADOPTION OF THE CCO PROVISION

There is ample precedent supporting the Commission's adoption of the CCO Provision that has been widely accepted by the industry. For example:

- **Exchange Act Rule 13b2-2** – In 2003, pursuant to Section 303(a) of the Sarbanes-Oxley Act of 2002, the Commission adopted rules supplementing Regulation 13B-2, which addresses the falsification of books, records, and accounts and false or misleading statements, or omissions to make certain statements, to accountants.[6] Specifically, the SEC adopted Rule 13b2-2(b)(1), which prohibits officers and directors, and persons acting under their direction, from coercing, manipulating, misleading, or fraudulently influencing the auditor of an issuer's financial statements when the officer, director, or other person knew or should have known that the action, if successful, could result in rendering the issuer's financial statements materially misleading.[7] The SEC also adopted Rule 13b2-2(b)(2) to provide examples of actions that improperly influence an auditor that could result in rendering the issuer's financial statements materially misleading, as well as Rule 13b2-2(c), which applies similar provisions to audits of investment companies' financial statements.[8]

- **Exchange Act Rule 13n-11** – In 2015, the SEC adopted Rule 13n-11(h) in relation to security-based swap data repositories ("SDRs").[9] That rule states that "[n]o officer, director, or employee of a security-based swap data repository may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the security-based swap data repository's chief compliance officer in the performance of his or her duties under this section."[10] Like the CCO Provision, Rule 13n-11(h) was designed to prevent personnel at an SDR from seeking to improperly affect the SDR's CCO in the performance of his or her responsibilities and more generally to promote the independence of an SDR's CCO while maintaining the CCO's effectiveness by mitigating the potential conflicts of interest between the CCO and the SDR's officers, directors, and employees.

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[6] *See* Improper Influence on Conduct of Audits, Exchange Act Release No. 47890 (May 20, 2003), 68 Fed. Reg. 31820 (May 28, 2003).

[7] *See* 17 C.F.R. § 240.13b2-2(b)(1).

[8] *See id.* at § 240.13b2-2(b)(2) & (c).

[9] Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 74246 (Feb. 11, 2015), 80 Fed. Reg. 14438 (Mar. 19, 2015).

[10] 17 C.F.R. § 240.13n-11(h).

- **Investment Company Act Rule 38a-1** – In 2003, the SEC adopted Rule 38a-1 under the Investment Company Act of 1940, which requires fund boards to adopt written policies and procedures reasonably designed to prevent the fund from violating the federal securities laws.[11] The procedures must provide for the oversight of compliance by the fund's advisers, principal underwriters, administrators, and transfer agents through which the fund conducts its activities. Rule 38a-1(a)(4) includes a requirement that each fund designate one CCO responsible for administering the fund's policies and procedures whose designation and compensation must be approved by the fund's board of directors, including a majority of the directors who are not interested persons of the fund.[12] Rule 38a-1(c) prohibits undue influence and states:

> No officer, director, or employee of the fund, its investment adviser, or principal underwriter, or any person acting under such person's direction may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the fund's chief compliance officer in the performance of his or her duties under this section.[13]

Like accountants, CCOs of SDRs, and fund CCOs, CCOs of Private Fund Entities are critical gatekeepers to the financial markets. This is especially the case given the size and importance of the private fund market to the financial markets more broadly. The Compliance Committee believes that the Commission should adopt the CCO Provision for Private Fund Entities because further strengthening the objectivity and independence of Private Fund Entities' CCOs – key gatekeepers to the security-based swap market – is directly aligned with other well-established regulatory objectives.

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The Compliance Committee appreciates the opportunity to comment on the Proposal. If we can be of any further assistance in this regard, please feel free to contact us.

Respectfully submitted,

Patrick T. Campbell
Co-Chair, Compliance Committee

Adam B. Felsenthal
Co-Chair, Compliance Committee

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[11] Compliance Programs of Investment Companies and Investment Advisers, Advisers Act Release No. 2204 (Dec. 17, 2003), 68 Fed. Reg. 74714 (Dec. 24, 2003).

[12] *See* 17 C.F.R. § 270.38a-1(a)(4).

[13] *Id.* § 270.38a-1(c).

cc: The Hon. Gary Gensler, Chairman
The Hon. Hester M. Peirce, Commissioner
The Hon. Caroline A. Crenshaw, Commissioner
The Hon. Mark T. Uyeda, Commissioner
The Hon. Jaime Lizárraga, Commissioner