National Association of Private Fund Managers

July 21, 2023

Via Electronic Submission

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

Re: Rel. No. 34–93784 (File No. S7–32–10); Rel. No. 34–94062 (File No. S7–02–22); Rel. Nos. IA–5955 (File No. S7–03–22); Rel. Nos. 33–11028; 34–94197; IA–5956; IC–34497 (File No. S7–04–22); Rel. Nos. 33–11030; 34–94211 (File No. S7–06–22); Rel. No. 34-94313 (File No. S7–08–22); Rel. No. 34–94524 (File No. S7–12–22); Rel. Nos. 33–11068; 34–94985; IA–6034; IC–34594 (File No. S7–17–22); Rel. No. IA–6083 (File No. S7–22–22); Rel. No. IA–6176 (File No. S7–25–22); Rel. No. 34-95763 (File No. S7-23-22); Rel. No. 33-11151 (File No. S7-01-23); Rel. No. IA-6240 (File No. S7-04-23)

Dear Ms. Countryman:

Managed Funds Association ("**MFA**")[1] and the National Association of Private Fund Managers ("**NAPFM**")[2] submit these comments to the Securities and Exchange Commission ("**Commission**" or "**SEC**") in response to the Commission's request for comments on the above-referenced proposals that impact private fund advisers and fund investors ("**Proposals,**" and each

[1] MFA, based in Washington, DC, New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 170 member firms, including traditional hedge funds, credit funds, and crossover funds, that collectively manage nearly $2.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

[2] NAPFM is a Texas-domiciled non-profit organization whose members include investment advisers in the private fund management industry. The Association was founded for, among other things, providing education to its members and representing their legal and economic interests before the government and in the courts.

a "**Proposal**").[3] These comments supplement the comment letters MFA and NAPFM previously submitted on each of the Proposals.[4] We urge the Commission in its cost-benefit analysis in the above-referenced rulemakings to consider the aggregate cost of the Proposals on private fund advisers, their investors, and the markets generally.

We have long advocated for appropriate regulatory oversight of registered investment advisers and recognize the importance of well-crafted rules that help govern the activities of advisers with respect to their private fund clients and fund investors. We further support the Commission's overall mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. However, we are concerned that the sheer volume and scope of recent Commission rulemakings would have negative unintended consequences that the Commission has not fully considered.

First, the Commission has failed to conduct a comprehensive cost-benefit analysis of the Proposals when considered in the aggregate.

Since the end of 2021, the Commission has proposed rulemakings that are unprecedented in both their scope and number and that collectively would dramatically change the regulatory, business, and investment landscape for private fund advisers and fund investors. In our previous comment letters, we identified significant problems with the cost-benefit analysis in each of the Proposals, noting in many cases that the Commission failed to consider the real costs of the Proposal, overstated its benefits, or failed to adequately consider less burdensome alternatives. We also noted that the Commission has not conducted a comprehensive, holistic cost-benefit analysis that includes an aggregate review of the impact of all of the Proposals on market participants or an analysis of whether the totality of its actions would promote efficiency, competition, and capital formation. This view is shared by the Commission's Asset Management Advisory Committee (AMAC), which wrote:

> Given the breadth, scope, and depth of the regulatory requirements on all registrants and considering the growing aggregate or cumulative impact of compliance costs on the balance sheet health of small advisers/funds, economic analysis done in a vacuum has limited utility. While economic analysis on a rule-by-rule basis is necessary, it is insufficient to provide the Commission (and public commenters) the picture necessary to be fully informed in considering and commenting on rulemaking initiatives.[5]

Second, if the Proposals were adopted as proposed, it would impose staggering aggregate costs and unprecedented operational and other practical challenges, particularly for smaller and emerging managers.

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[3] The Proposals are listed by name in Appendix A, along with links to comment letters submitted by the MFA and NAPFM, respectively, on each of the Proposals.

[4] *See id.*

[5] *See* AMAC, Final Report and Recommendations for Small Advisers and Funds (Nov. 3, 2021), at 7, available at: https://www.sec.gov/files/final-recommendations-amac-sec-small-advisers-and-funds-110321.pdf.

We believe the sheer number and complexity of the Proposals, when considered in their totality, if adopted, would impose staggering aggregate costs, as well as unprecedented operational and other practical challenges, neither of which have been considered by the Commission in its Proposals to date and neither of which are warranted by such Proposals' limited benefits. Instead, we believe the aggregate effect of the Proposals would be to decrease the efficiency of the markets and, ultimately, to negatively impact the very investors that the Commission is attempting to protect. We are particularly concerned that the costs and burdens of the Proposals, if adopted, would disproportionately affect new and smaller investment advisers, many of which are women- or minority-owned (ownership that is already under-represented in the industry). New entrants are pipelines for talent and contribute to innovation and competition in the industry. The result of the Proposals, if adopted in their current form, would be to harm investors by increasing costs, making private funds less accessible, and decreasing competition by making it cost-prohibitive for many private fund advisers to remain in business and for new advisers to enter the market. This would lead to industry consolidation as smaller and even mid-sized advisers would be forced out of the market because they do not have the scale and ability to absorb the increased costs and regulatory obligations of the Proposals.

Third, the Commission has deprived the public of the ability to meaningfully comment on the Proposals because of their sheer number and interlocking nature.

Not only does the sheer number of Proposals make it challenging for the Commission to conduct a cost-benefit analysis that truly reflects the aggregate costs of the Proposals (*e.g.*, because the baseline is constantly going to change), which it has failed to do, it also makes it challenging for interested parties to meaningfully comment on the Proposals. In order to comment on one Proposal, it is often necessary to consider how other Proposals, if adopted, would impact the analysis (consider, for example, the interplay of the Dealer and Treasury Clearing Proposals or the Outsourcing and Cybersecurity Proposals). This is particularly difficult when one considers that most Proposals contain hundreds of questions and solicit comments on numerous alternatives, some of which the Commission may adopt but many others it will not. It is simply not possible for interested parties to comment on every alternative raised, sometimes in passing, by the Commission within one Proposal, let alone consider the myriad of possible combinations of proposed rules and alternative approaches across multiple Proposals.

Key Recommendations

For these reasons, and as further explained below, before finalizing any additional Proposals, we strongly urge the Commission to:

- Evaluate the costs and benefits of the Proposals, in the aggregate, for private fund advisers, their investors, and the markets generally—focusing, in particular, on whether there are less burdensome alternatives that can achieve the Commission's policy objectives without resulting in increased costs to investors, market consolidation, or the creation of barriers to entry for new advisers;

- Allow sufficient opportunity for interested parties to provide meaningful comment on the Proposals, recognizing that it is impossible for interested parties to comment on every question or consider every alternative raised in a Proposal, given the sheer

number and interconnectedness of the Proposals and the multitude of questions asked and alternatives posed in the Proposals;

- In the event the Commission is determined to move forward with adopting any more of the Proposals, we strongly urge the Commission to:
    - Consider grandfathering for existing arrangements where applicable (*e.g.*, in connection with the Private Fund Adviser Proposal); and
    - Propose (and receive comment on) a reasonable, workable schedule for adoption and implementation of the Proposals given their overlapping nature, their immense associated compliance and operational burdens (likely insurmountable for smaller or emerging managers), and, in several key examples, their embedded assumptions about the availability of various accounting, insurance, custodial and other products and services that are not offered or available today.[6]

* * *

In the following, we discuss these concerns and recommendations in greater detail by providing:

(i) An overview of the Commission's obligation under relevant law, as well as its own rulemaking guidance, to conduct a robust cost-benefit analysis;

(ii) A discussion of the need for the Commission to provide a meaningful opportunity for public comment on the Proposals in light of their sheer number and interconnected nature;

(iii) An analysis of the business impact and compliance and operational costs of each of the Proposals when considered individually;

(iv) An analysis of certain of the negative unintended consequences of the Proposals, considered in the aggregate, and harmful impact on fund investors; and

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[6] There is precedent for such an approach in another context where the Commission revamped an entire industry (albeit that time at the express direction of Congress). In connection with implementing Title VII of the Dodd-Frank Wall Street and Consumer Protection Act of 2010, the Commission solicited comment on a sequencing plan for compliance with the security-based swap provisions of Title VII, in light of the complex legal, operational, and regulatory issues that they raised. *See* Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 77 Fed. Reg. 35625 (June 14, 2012), available at: https://www.govinfo.gov/content/pkg/FR-2012-06-14/pdf/2012-14576.pdf.

(v) A discussion of the anti-competitive impact of the Proposals on smaller and emerging managers.[7]

I. Overview of Economic Analysis Requirements in Commission Rulemakings

A robust cost-benefit analysis is an integral part of the rulemaking process. Section 202(c) of the Investment Advisers Act ("**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.[8]

As the Commission is aware, courts have held that rulemaking that is "unsupported by substantial evidence" constitutes unlawful agency action.[9]

According to the "Current Guidance on Economic Analysis in SEC Rulemakings" ("**Guidance**"),[10] which articulates the Commission's approach to conducting high-quality economic analysis in rulemakings, the following four substantive components must be addressed in any rulemaking:

1. The clear identification of a need for the rulemaking—the so-called "market failure"—and an explanation of how the proposed rule will meet that need;
2. The characterization of an appropriate economic baseline against which to measure the proposed rule's likely economic impact ("in terms of potential benefits and costs, including effects on efficiency, competition and capital formation in the market(s) the rule would affect");

[7] In this letter, we do not address the question whether the Commission's proposed rules exceed the Commission's statutory authority, although we are concerned that many of them do. *See, e.g.,* Letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, MFA, to Vanessa Countryman, Secretary, SEC (Apr. 25, 2022), available at: https://www.managedfunds.org/wp-content/uploads/2022/04/MFA-Comment-Letter-on-Private-Fund-Adviser-Proposal-with-Economic-Study-as-submitted-on-4.25.22.pdf.

[8] *See also Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (finding that the Commission's adoption of Rule 14a-11 under the Securities Exchange Act of 1934 ("**Exchange Act**") violated the Administrative Procedure Act ("**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).

[9] *See Susquehana Int'l Grp., LLP v. SEC*, 866 F. 3d 442 (D.C. Cir. 2017).

[10] Memorandum Re: "Current Guidance on Economic Analysis in SEC Rulemakings," Division of Risk, Strategy and Financial Innovation (RSFI) and the Office of the General Counsel (OGC), SEC (Mar. 16, 2012), available at: https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

3. The identification and evaluation of reasonable alternatives to the proposed regulatory approach; and
4. An assessment of the potential economic impact of the proposed rule and reasonable alternatives "by seeking and considering the best available evidence of the likely quantitative and qualitative cost and benefits of each."

In addition, the Commission has a statutory obligation to evaluate the impacts of its rulemaking on several broad economic factors, including efficiency, competition, and capital formation. These provisions impose on the Commission a "statutory obligation to determine as best it can the economic implications of the rule," and caution that failure to do so will result in a finding that the rule is "arbitrary and capricious."[11]

As demonstrated by the above, the Commission has the burden of proof in conducting a rulemaking—it must establish "substantial evidence" of, among other things, a market failure and the sufficiency of the purported benefits of any rule in light of the likely costs. However, because the Commission has not conducted adequate (or, in some cases, any) cost-benefit analysis of the Proposals, including having failed to comprehensively consider the benefits and burdens of the Proposals taken as a whole, it has effectively delegated its responsibilities to market participants and, in so doing, converted its burden of proof into a presumption that must be rebutted. We find this deeply troubling.

II. Need for Commission to Provide Meaningful Opportunity For Public Comment

The Commission's proposal of numerous significant, interlocking rules in separate rulemakings creates another issue: the Commission has deprived the public of the ability to meaningfully comment on the Proposals. As discussed below, the Proposals impose related requirements and would require resources from the same personnel, with potentially overlapping compliance schedules. By failing to consider the cumulative impact of the Proposals, the Commission has not only failed to carry out its cost-benefit burden, but also failed to afford the public an opportunity to comment on the "combined impact of" the Proposals.[12] Accordingly, the Commission should holistically examine all of the pending Proposals, consider the potential overlap between them, and propose (and receive comment on) a reasonable, workable schedule, while also evaluating the costs and benefits of the Proposals in light of one another. If one Proposal, for example, alleviates the same type of risk of another Proposal, the existence of the first Proposal must be factored into the assessment of the second, and that assessment must likewise be exposed to public comment.[13]

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[11] Guidance at 3.

[12] *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 541 (N.D. Cal. 2020).

[13] For example, both the Dealer and the Treasury Clearing Proposals are designed to address perceived risk in the U.S. Treasury markets. Accordingly, if the Commission finalizes the Treasury Clearing Proposal, there would be significantly less justification for adopting the Dealer Proposal, or at a minimum it would require a significant reworking of the cost-benefit analysis in the Dealer Proposal. *See, e.g.*, Craig Lewis Study at ¶ 104 in Letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, MFA, to Vanessa Countryman, Secretary, SEC (Dec. 5, 2022) (noting

III. An Analysis of the Business Impact and Compliance Costs of the Proposals

As noted above, the totality of the Proposals, if adopted as proposed, would dramatically change the regulatory landscape for investment advisers, investors, and market participants more generally. These rulemakings would increase, to an unprecedented degree, the regulatory, compliance, and legal costs of operating an investment adviser, which costs would likely be passed along to investors. The Commission and its staff have considered the policy and cost-benefit weightings of its rules on an individual basis. However, the APA requires the Commission to consider every "important aspect of the problem."[14] And, here, as the Commission proposes regulations that are unprecedented in both their scope and number and largely overlapping in time, the Commission has failed to consider the costs and benefits of the Proposals in the aggregate to avoid significant disruption and harm to investors, registrants, and markets. This is a significant oversight. As the Department of Justice explained in connection with the Commission's market structure proposals, without considering the aggregate burdens of the Commission's substantial, often interlocking proposals, the Commission cannot adequately assess whether its actions would disrupt and harm investors, registrants, or markets.[15]

As explained further below, we believe the Commission's overlapping Proposals would significantly impact private fund advisers by requiring them to, among other things:

- Reassess the investment strategies they offer investors as well as the economics of their businesses more generally;
- Reassess the basic terms and structures of the private funds they advise;
- Renegotiate substantially all of their contractual arrangements with investors, counterparties, and vendors, including offering documents, organizational documents, investment advisory agreements, and certain side letters;
- Retain and negotiate contractual arrangements with additional vendors, service providers, and/or other counterparties;
- Build or otherwise acquire substantial new infrastructure or modify existing infrastructure;
- Hire a significant number of additional staff, including programmers, compliance personnel, accountants, and other professionals, to assist with implementation (many of whom would likely charge premium pricing given demand, despite minimal training time—the phenomenon of "surge pricing"); and

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that the Dealer Proposal fails to consider the merits of clearing versus dealer registration), available at: https://www.sec.gov/comments/s7-12-22/s71222-20152322-320250.pdf.

[14] *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[15] *See* Comment of the Antitrust Division of the United States Department of Justice (Apr. 11, 2023), available at: https://www.sec.gov/comments/s7-29-22/s72922-20164065-334011.pdf.

- Develop new policies, procedures, controls, and recordkeeping and reporting practices with respect to multiple rules over contemporaneous time periods and hire additional compliance and other staff to assist in development and oversight of such new policies, procedures, controls, and reporting obligations.

Engaging in the above with respect to any one rule would be time consuming, resource-intensive, risk-increasing, and burdensome—let alone doing so with respect to a dozen or so new sets of regulations, many of which could have overlapping implementation periods. The Proposals, if adopted as proposed, would have serious ramifications for advisers and the investors they serve, and would make it impossible for certain advisers to continue operating their business (particularly smaller and emerging managers, including women- and minority-owned advisers). Furthermore, the overall operating costs for advisers—and therefore the investors they serve—would likely be even greater than discussed in this letter as trading and other counterparties, vendors, and service providers are each likely to pass along costs related to the Proposals, either directly or indirectly.

Accordingly, it is critical that the Commission consider the aggregate costs and benefits of its rulemakings on advisers, investors, and the markets, as well as how each rule may intersect or impact other rules, should the Commission proceed with adopting final rules. This holistic consideration by the Commission would give rise to a more thoughtful consideration of reasonable alternatives, limited exemption from requirements as appropriate, and more realistic implementation periods.

Below, we outline the rules with which an investment adviser to a private fund would likely need to comply to demonstrate the significant new regulatory framework the Commission is proposing for a single registrant.[16] Please see Appendix A, a list of previously submitted MFA and NAPFM comment letters, for a more complete discussion of the costs and unintended consequences of the applicable rules.

A. Proposals That Will Materially Interfere with Fund Investment Strategies and Operations

Since the end of 2021, the Commission has proposed new substantive and wide-ranging obligations on private fund advisers in a number of rulemakings, touching almost every aspect of an adviser's business operations.[17] With respect to these rulemakings, an investment adviser

[16] While not considered in this letter, it should be noted that the Commission has proposed a set of four proposals overhauling U.S. equity market structure. MFA's members are some of the most significant and active participants in the U.S. equity securities markets. Therefore, any proposed changes to equity market structure also could have a significant impact on investment advisers, depending on their business. *See* Disclosure of Order Execution Information, 88 Fed. Reg. 3786 (Jan. 20, 2023); Regulation Best Execution, 88 Fed. Reg. 5440 (Jan. 27, 2023); Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, 87 Fed. Reg. 80266 (Dec. 29, 2022); Order Competition Rule, 88 Fed. Reg. 128 (Jan. 3, 2023).

[17] We agree with the Investment Advisers Association ("**IAA**") when they wrote in a recent comment letter to the Commission:

would need to make significant business, operational, and regulatory changes, as well as establish new and complex reporting systems,[18] at considerable cost (regardless of size). The following is a summary of the business impact and operational costs of each of the Proposals, which the Commission should consider in aggregate as it weighs the costs and benefits of rulemaking. We are strongly concerned that the aggregate cost of rulemaking would significantly harm investors, competition, and markets.

1. *Custody/Safeguarding Proposal*

- *Summary*—The Proposal would greatly expand the scope of the current custody rule applicable to investment advisers by increasing the breadth of the rule's coverage from "client funds and securities" to all "client assets" of which an adviser has custody and expanding the meaning of "custody" itself. The Proposal also would include significant new (largely unworkable) requirements for both investment advisers and third parties that act as qualified custodians.
- *Business Impact*—As a result of the Proposal, investment advisers would need to:
    - Renegotiate contractual arrangements with qualified custodians and independent auditors and enter into new agreements with clients' custodians, in certain cases for products and services that are not currently offered or available and as to which there is significant

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> When taken together, the Adviser Proposals, if adopted, will significantly overhaul the current regulatory regime under the [Advisers Act] and rules thereunder, requiring massive implementation efforts from advisers. They will also disrupt existing infrastructures and relationships, with substantial implications—foreseen and unforeseen—for advisers, investors, service providers, and the markets. Even if the Commission were to modify the Adviser Proposals pursuant to the recommendations we made in our comment letters, there will be significant changes to current practices requiring substantial implementation efforts by advisers.

Letter from Gail Bernstein, General Counsel, and Sanjay Lamba, Associate General Counsel, IAA, to Ms. Vanessa A. Countryman, Secretary, SEC (June 17, 2023) ("**IAA Comment Letter**"), available at: https://www.sec.gov/comments/s7-25-22/s72522-206959-416942.pdf.

[18] In addition to the Proposals discussed below requiring investment advisers to establish new reporting systems, under a recent proposal from the U.S. Treasury's Office of Financial Research ("**OFR**"), investment advisers would be required to establish an entirely new reporting system for non-centrally cleared bilateral transactions in the U.S. repurchase agreement market. *See* Collection of Non-Centrally Cleared Bilateral Transactions in the U.S. Repurchase Agreement Market, 88 Fed. Reg. 1154 (Jan. 9, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-01-09/pdf/2022-28615.pdf. *See also* Letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, MFA, to Michael Passante, Chief Counsel, OFR (Mar. 10, 2023), available at: https://www.managedfunds.org/wp-content/uploads/2023/03/Final-MFA-Comment-Letter-on-OFR-Proposal-on-Repo-Transparency-As-submitted-on-3.10.23-.pdf.

uncertainty as to the feasibility and/or commercial viability of providing such products/services;

- Choose between entering into contractual arrangements with a suboptimal qualified custodian that may demand commercially unreasonable terms and/or significantly higher fees, or rely on an exemption that would be expensive and disruptive to trading, or alternatively exit certain markets entirely, particularly foreign markets.
- Address, to the extent possible, the introduction of significant costs and delays for a variety of transactions;
- Address the interference of the Proposal with other regulatory frameworks (*e.g.*, CFTC for swaps and futures, FERC for commodities);
- Address the uncertainty regarding the status of foreign financial institutions ("**FFIs**") as qualified custodians, which limits the ability to funds to invest in certain foreign jurisdictions; and
- Reassess the economics of certain investments, as well as whether investor fees need to be adjusted and renegotiated.

- *Compliance Costs*—The Proposal would require investment advisers to:
  - Reevaluate and implement new safeguarding systems and policies and procedures, significantly increasing costs for firms that trade privately-offered securities, physical assets, and non-delivery versus payment assets;
  - Provide more detailed disclosure of the firm's safeguarding/custody practices, drawing on internal resources throughout the firm and creating greater risk of disclosure of sensitive commercial information;
  - Keep detailed records of trade and transaction activity and position information for each client account of which adviser has custody; and
  - Incorporate Form ADV disclosures describing the firm's custody practices, again increasing risk of exposure of sensitive commercial information.

2. *Private Fund Adviser Proposal*

- *Summary*—The Proposal would greatly expand regulatory compliance obligations for all investment advisers to private funds, including by prohibiting certain long-standing business practices for the very first time (*e.g.*, indemnification provisions and pass-through expense models), creating costly new reporting obligations, and requiring fairness opinions for adviser-led secondary transactions, among other requirements.

- *Business Impact*—The Proposal would fundamentally alter the relationship between advisers and their investors in myriad ways, including by (a) limiting the right of advisers and investors to shape such relationship through arm's length negotiation, full and fair disclosure, and informed consent, thereby interfering with the freedom of contract between sophisticated parties, needlessly upending the Commission's longstanding approach to regulation in this area, and (b) imposing substantial and unnecessary costs on advisers and, in turn, their investors. As a result, the Proposal would impose very significant restructuring and other costs on the private funds industry. Among other things, as a result of the Proposal, investment advisers would need to:
    - Review and renegotiate the basic terms of the contractual arrangements with investors, including offering documents, organizational documents, investment advisory agreements, and side letters, in each case at significant costs to not only the adviser, but also to its investors, who in many cases would be deprived of the benefit of a contractual term or concession that was a condition precedent to their investment (assuming that the Proposal does not include a grandfathering provision for current arrangements);[19]
    - Reevaluate their business liability, including by obtaining insurance if available and commercially reasonable or, if unable to obtain insurance, consider whether to exit the private fund business due to the inability to self-insure or by avoiding more complex and innovative strategies and activities where mistakes may be more likely;
    - More generally, reeevaluate the economics of their business and their private fund terms and offerings in light of the prohibitions and other new requirements;
    - Reconsider their approach to accommodating investor requests, whether through side letters or otherwise, as well as day-to-day investor questions; and
    - (Re)negotiate contractual terms with insurance carriers, service providers, and/or other counterparties, likely at higher costs and with fewer options—assuming insurance coverage is even available—as many providers will likely be unwilling to cover the new risks and requirements.

[19] Institutional investors that typically spend months and, in some cases, years diligencing individual advisers and negotiating side letters before obtaining the necessary approvals on their side would also be forced to undertake such lengthy and resource-intensive processes all over again and simultaneously, undoubtedly creating lags in their allocation abilities and therefore harming their end investors as well.

- *Compliance Costs*—The Proposal would require an investment adviser to:
  - Develop a new quarterly report and associated infrastructure and systems and consider whether bespoke reports—for which many institutional investors have heavily negotiated, and on which they rely in order to manage risks and exposures across their portfolios, and in order to report to their own investors—should be terminated;
  - Continually monitor the information that it provides investors and deny requests for tailored reporting from investors to avoid violating the new preferential treatment prohibitions and to comply with the other new requirements; and
  - Adopt new policies, procedures, and training to reflect new rules and prohibitions, including new record retention and annual review documentation, among other requirements.

3. *Dealer Proposal*

- *Summary*—The Proposal would establish three overly broad qualitative tests and one unprecedented one-factor quantitative test to determine whether a market participant is a "dealer" or "government securities dealer" and therefore subject to registration with the Commission and FINRA as a broker-dealer, along with unprecedented aggregation provisions.
- *Business Impact*—As a result of the Proposal, an investment adviser would need to:
  - Assess the impact of the adviser and/or its fund(s) registering as a broker-dealer, including the impact of complying with requirements that are in many cases inconsistent with the operation of a private fund, such as permanent capital requirements on investment vehicles that are designed to meet investor redemptions and restrictions with respect to the trading of IPO shares;
  - Consider strategy modifications to avoid triggering dealer registration, such as reducing liquidity in relevant markets (*e.g.*, in the Treasury market to not trigger the quantitative test);
  - To address aggregation requirements, reassess the use and independence of portfolio managers, both within a single fund and across funds; and
  - If registering the adviser or fund as a dealer, consider the implications for the adviser, the fund, and investors in the fund of the (i) loss of customer status, (ii) loss of SEC and FINRA sales practice protections, (iii) loss of liquidity rights, (iv) lost access to the U.S. IPO market, (v)

lost access to certain investment strategies, and (vi) increased personnel and infrastructure costs, among other negative ramifications.

- *Compliance Costs*—The Proposal would require an investment adviser to:
  - If registering the adviser or a fund(s) as a broker-dealer, among other things:
    - Have at least two FINRA-registered principals (including a Finance and Operations Principal) and a FINRA-registered Chief Compliance Officer;
    - In many instances, register traders and other personnel with FINRA;
    - Establish specialized infrastructure to comply with applicable financial and operational requirements, such as the net capital rule, and infrastructure enabling inter-day computation, monitoring, and reporting of capital, likely with allocation of capital charges by portfolio or trading desk;
    - Establish a clearing relationship with another broker-dealer or become a member of a clearing agency; and
    - Establish written supervisory procedures and a continuing education program.
  - If seeking to avoid being required to register as a broker-dealer:
    - Incorporate into policies and procedures monitoring of trading activities with respect to trading thresholds to avoid registration requirements, including by monitoring/coordinating trading activity of previously separate and uncoordinated portfolio managers (thereby introducing key person departure risk).

4. *Large SBS Position Reporting*

- *Summary*—The Proposal would require market participants to implement and maintain extensive new compliance systems, including the infrastructure required to monitor transactions continuously, identify security-based swap ("**SBS**") positions subject to the reporting requirement, and update reports as necessary (which, for many market participants, would be on a daily or near-daily basis), at substantial initial and ongoing cost and burden.
- *Business Impact*—As a result of the Proposal, investment advisers would need to:
  - Assess whether to reduce funds' willingness to engage in certain investment and hedging strategies in light of next-day, public

disclosure requirements for SBS, reducing overall market liquidity and efficiency.

- *Compliance Costs*—The Proposal would require investment advisers to:
  - Develop technological and operational systems to track and report on a next-day basis SBS positions, including underlying securities, narrow-based security indexes and baskets (both at the index-/basket-level and the component security-level), the delta-adjusted notional amount of any options, security futures and other derivative instruments;
  - Develop procedures to ensure compliance with qualitative disclosures, including the composition of the SBS position as it relates to direction, tenor/expiration, product ID, FIGI (or other unique security identifier(s)) of each underlying security, LEI of the issuer of each underlying security, and the number of shares attributable to the position (to the extent that the reporting threshold is based on the number of shares); and
  - Update policies and procedures to reflect new, next-day reporting requirements.

5. *Modernization of Beneficial Ownership Reporting Proposal*

- *Summary*—The proposed amendments under Sections 13(d) and 13(g) would expand the concept of "group" formation to investors who merely "act as a group; accelerate filing deadlines to as short as 5 days and 1 day for initial and amended filings, respectively; and deem holders of certain cash-settled derivatives (*i.e.*, futures and options) to be beneficial owners of the reference securities.
- *Business Impact*—As a result of the Proposal, investment advisers would need to:
  - For Schedule 13D filers, assess whether an investment strategy that involves the intent to influence or change control of an issuer needs to be recalibrated in light of the accelerated disclosure requirement; and
  - Assess whether previously permissible communications with other market participants may subject the adviser to Section 13(d) disclosure requirements—or even strict liability for insider trading under Section 16—based on conversations or subsequent parallel trading with other investors, regardless of whether there was an intent to coordinate action, influence or change control of the issuer, or otherwise effect a specific outcome.
- *Compliance Costs*—The Proposal would require investment advisers to:
  - With regard to the Proposal's accelerated filing deadlines:

        - For Schedule 13G filers, develop technological and operational systems to transition from making a single set of filings during one predictable, annual period to making detailed, issuer-by-issuer filings every month; and
        - For Schedule 13D filers, develop technological and operational systems to transition from making initial and amended filings on a 10-day and "promptly" basis to making such filings on a 5-day and 1-business day basis, respectively;
    - With regard to the proposed deeming of cash-settled derivatives as conferring beneficial ownership of the underlying securities, develop technological and operational systems to track and report the delta-adjusted notional amount of cash-settled derivatives (other than SBS) on a daily basis;
    - With regard to the proposed redefining of the concept of "group," develop policies and procedures to mitigate risks from unintentional "group" formation, including, among others:
        - To ensure that communications with other investors that may trade securities in the same issuer cannot be viewed as "acting as a group"; and
        - To ensure that counterparties have not separately transacted with an investor with a control intent with respect to a class of equity securities;
    - Review investment management agreements in which clients delegate discretion over their voting and investment decisions to determine whether such terms still would constitute a valid delegation and, therefore, would not implicate this new concept of a "group"; and
    - Hire more staff to assist with compliance with the accelerated reporting and other requirements.

6. *Short Position and Short Activity Reporting*

    - *Summary*—While the Proposal helpfully only proposes to publish aggregated, anonymized short position data,[20] the proposed rule and form nonetheless

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[20] Similarly, the U.K. government recently announced it intends to replace its current public disclosure regime based on individual net short positions with an aggregated net short position disclosure regime. *See* U.K. HM Treasury, Short Selling Regulation Review: Government Response (July 2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1169119/Short_Selling_Regulation_Review_-_Government_response__1.pdf. *See also* Letter from Jillien Flores, Executive Vice President and Managing Director, Global Government Affairs, MFA, to Securities and Markets, HM Treasury (Feb. 28, 2023), available at: https://www.managedfunds.org/wp-

would create an entirely new, extremely complicated, and very costly reporting framework for advisers, including the requirement to track daily activity in positions over the relevant threshold.

- *Business Impact*—In considering the business impact of the Proposal, investment advisers would need to:
    - Evaluate the cost of entering into short sales versus the use of other instruments in light of the added costs and disclosure risks of the new reporting requirements, which in turn could reduce market efficiency.
- *Compliance Costs*—The Proposal would require investment advisers to:
    - Develop and build a system to capture the very detailed daily short sale position and activity information required by the rule, much of which information is not currently gathered by investment advisers;
    - Make very subjective determinations, such as whether positions are hedged, partially hedged, or not hedged;
    - Build a new reporting system to submit required reports to the Commission in a timely manner; and
    - Hire additional staff to assist with the manual review of filings.

7. *Treasury Clearing*

- *Summary*—The Proposal would require most secondary market Treasury transactions (both cash and repo transactions) entered into by members of a covered clearing agency for U.S. Treasury securities with a large class of counterparties, including private funds, to be centrally cleared.
- *Business Impact*—As a result of the Proposal, investment advisers engaging in Treasury repo or cash transactions would need to:
    - Negotiate or update clearing agreements and relationships with FICC clearing members;
    - Restructure current bilateral trading arrangements and establish new trading infrastructure, which would disrupt existing operational and custodial practices and thereby add cost to transacting in the Treasury market, such as, for example, by limiting the number of counterparties available to execute trades; and

content/uploads/2023/03/MFA-Response-to-HMT-Call-for-Evidence-on-the-Short-Selling-Regulation_Signed_FINAL.pdf.

    - Evaluate and manage increased counterparty risk, including increased concentration of risk at the Fixed Income Clearing Corporation (“**FICC**”).

- *Compliance Costs*—The Proposal would require investment advisers engaging in Treasury repo or cash transactions to:
    - Update margin and collateral management practices and procedures, including with respect to risk management for U.S. Treasury transactions; and
    - Update policies and procedures to reflect new trade clearing and margin requirements and counterparty relationships.

B. Proposals Significantly Changing Adviser Regulation and Requiring Time-Consuming and Costly Renegotiation of Contracts with Investors and Service Providers

In addition to Proposals impacting investment decisions, the Commission has proposed multiple new requirements applicable to the operations of all advisers (regardless of size) that would require advisers to make significant business, operational, and regulatory changes, at considerable cost, as detailed below.

1. *Outsourcing Proposal*

- *Summary*—The Proposal would require registered investment advisers that engage third parties to provide certain services and functions (very broadly construed under the proposed rule) to, among other things, satisfy specific due diligence elements before retaining a service provider, obtain various contractual assurances from such provider, and subsequently carry out periodic monitoring of the service provider’s performance.
- *Business Impact*—As a result of the Proposal, investment advisers would need to:
    - Update or renegotiate agreements with service providers that perform a wide range of services or functions for advisers and their businesses (not just truly “outsourced” functions), or terminate such agreements and hire and train new employees to perform the applicable functions in-house; and
    - Only use vendors that are willing to accommodate the new regulatory requirements, both as an initial matter and on an ongoing basis (which would increase the burden on vendors, who would either pass costs to advisers and ultimately investors or cease to work with registered investment advisers altogether—exacerbating the problem, because advisers would be faced with fewer options in the vendor marketplace).

- *Compliance Costs*—The Proposal would require investment advisers to:
  - Update policies and procedures to reflect how the firm conducts initial and ongoing due diligence of service providers;
  - Retain records of due diligence and monitoring of service providers;
  - Establish an operational due diligence infrastructure to fulfill the vendor oversight requirements (and then query what happens when a vendor does not want to complete the operational due diligence ("**ODD**") questionnaire), or refuses to do so within the timing requirements to which the adviser is subject; and
  - Require disclosure of commercially sensitive third-party arrangements on Form ADV and prepare for increased cybersecurity risks as a result of disclosures of specific service provider identities and functions.

2. *Cybersecurity Risk Governance Proposal*

- *Summary*—The Proposal would impose more prescriptive requirements compared to existing SEC cybersecurity guidance and rules related to safeguarding information, such as Regulation S-P. The Proposal would require most registered investment advisers to add additional elements to their cybersecurity programs, as well as to undertake additional reporting and disclosure obligations during periods of intense stress.
- *Business Impact*—As a result of the Proposal, investment advisers would need to:
  - Renegotiate contractual terms with service providers or seek new service providers that would contractually agree (or hire in-house if service providers would not agree) to modify their own cybersecurity risk management programs to effectively comply with the proposed rules, even those service providers that are not subject to SEC oversight or that do not provide critical services to the investment adviser.
- *Compliance Costs*—The Proposal would require investment advisers to:
  - Divert resources from current risk-weighted cybersecurity programs to develop a broader program to protect a wide range of "adviser information" (broadly defined), including information that, even if exposed by a cyberattack, would be unlikely to cause actual harm to an adviser's business or its clients;
  - Divert resources to comply with highly prescriptive reporting requirements to report cybersecurity incidents to the Commission that would apply when efforts to investigate and mitigate the impact of a cybersecurity incident are still underway;

  - Report incidents on an expedited basis and then re-report the same incidents once the adviser has additional information regarding the incident, creating potential for investor confusion and premature reactive responses by investors;
  - Disclose cybersecurity risks and incidents on Form ADV Part 2A; and
  - Rewrite policies and procedures, and conduct training, to reflect new cybersecurity requirements, including oversight of third-party service providers.

3. *ESG for Investment Advisers Proposal*

- *Summary*—The Proposal would require registered investment advisers to, among other things, disclose information about their incorporation of any environmental, social, or governance ("**ESG**") factors into their investment processes. The Proposal would introduce specific disclosure requirements regarding an adviser's strategies that incorporate ESG elements (a category that is extremely broad and, under the Proposal, would capture nearly all strategies offered by any given adviser) in fund offering materials, annual reports, and adviser brochures.
- *Business Impact*—As a result of the Proposal, investment advisers would need to:
  - Categorize nearly all of their strategies as falling into one of the three categories outlined in the Proposal, even where a given strategy only considers ESG-related factors for purely financial reasons and where the adviser does not market the strategy as "ESG-related" in any way—thus creating risk of investor confusion;
  - Consider limiting the ESG approaches and strategies available to investors, thereby hampering the efforts of private fund advisers to participate in the evolution of ESG-related approaches to investing; and
  - Analyze and address inconsistencies and conflicts with ESG-related requirements in other jurisdictions, which would create confusion and duplicative expenses/efforts and may result in advisers no longer being able to offer their products to investors in certain markets due to conflicting standards.
- *Compliance Costs*—The Proposal would require investment advisers to:
  - Incorporate new detailed disclosures on the firm's ESG practices into fund and adviser materials, even if the applicable fund does not have an ESG objective and is not being marketed to investors as pursuing an ESG objective;

- Categorize every product offered by the firm using the Proposal's new terminology, much of which would lead to investor confusion due to overbreadth and lack of clarity;
- Document ESG factors considered and reviews of ESG processes in a written annual review; and
- Incorporate disclosures in Form ADV describing the firm's ESG practices, regardless of commercial sensitivity.

4. *Proposed Form PF Amendments*

- *Summary*—The Proposal would make complex and sweeping changes to Form PF, requiring reporting on a disaggregated basis for many master-feeder structures and trading vehicles (even though advisers do not account for risk on a disaggregated basis and such reporting would be misleading to regulators) and require large hedge fund advisers to report more granular information on, among other things, investment exposures, borrowing and counterparty exposure, and market factor effects, even in cases where such information is not gathered by the adviser (and may be difficult or even impossible to obtain).
- *Business Impact*—As a result of the Proposal, investment advisers would need to:
  - (Re)negotiate contract(s) with administrators and outside vendors;
  - Build new internal infrastructure to self-report or engage, at additional costs, administrators/third-party service providers to understand their capabilities and what information and corresponding internal builds the adviser would need to make to be able to provide the administrator with the requisite data for reporting purposes; and
  - Coordinate the implementation of the proposed amendments to Form PF with the other new requirements for Form PF recently adopted by the Commission.[21]
- *Compliance Costs*—The Proposal would require investment advisers to:
  - Build from scratch an entirely new Form PF reporting infrastructure to report data of limited regulatory value, while continuing to report data on current Form PF;

[21] *See* Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers, Final Rule, 88 Fed. Reg. 38146 (June 12, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-06-12/pdf/2023-09775.pdf.

  - Expend significant resources synergizing among key firm executives and departments, including the Chief Operating Officer, Chief Legal Officer, Chief Financial Officer, Chief Technology Officer, Chief Compliance Officer, and others, to assess how to gather and calculate the new detailed information required by the sweeping changes to Form PF on a legal entity-by-entity basis;
  - Prepare to expand significantly more time to review and prepare filings each month than for the existing Form PF;
  - Revise policies, procedures, and training to reflect procedural steps leading to compliance with the proposed new reporting requirements; and
  - Keep detailed records to backup reporting on Form PF.

C. Additional Rulemakings Impacting Advisers

The following are other Proposals that impact advisers depending on the nature of their businesses.

1. Conflicts of Interest in Securitizations

- *Summary*—The Proposal would prohibit a securitization participant with respect to an asset-backed security ("**ABS**") from directly or indirectly engaging in any transaction that would involve or result in any "material conflict of interest" between the securitization participant and an investor in the ABS during a specified period of time.
- *Business Impact*—As a result of the Proposal, investment advisers would need to:
  - Assess on an organization-wide basis whether it engages in trading that would be prohibited under the rule;
  - Identify its securitization participants and reconcile those individuals against its access persons to ensure that non-securitization persons are behind established, robust, and evolving information barriers; and
  - Determine whether to cease participating in securitization because of the potential limitations on hedging exposures on related positions in the capital structure of an entity (*e.g.*, debt issuances).
- *Compliance Costs*—The Proposal would require investment advisers to:
  - Analyze its hedging activity to determine whether it falls within the exception for risk-mitigating hedging activity and develop procedures and controls to ensure that such hedging activity stays within this

limited exception (including potentially hedging activity with respect to related positions in an issuer's capital structure);

    - Establish policies and procedures to address trading that is covered by the rule;
    - Develop necessary compliance and procedural systems to identify the specific conflicts contemplated by the Proposal and take efforts to address the conflict through mitigation and/or disclosure; and
    - Maintain and preserve records demonstrating that they have complied with the exceptions to the prohibitions or document that they have determined that they are in compliance with the rule.

2. *Regulation ATS and Definition of "Exchange"*

- *Summary*—The Proposal would, among other things, expand the definition of "exchange" to include systems that offer the use of non-firm trading interest (*e.g.*, requests for quote ("**RFQs**")) and communication protocols to bring together buyers and sellers of securities. The Proposal did not clearly indicate that it does not intend order management systems ("**OMS**"), order execution systems ("**OES**"), single firm trading interest communication systems, or order routing systems to be deemed "exchanges" within the scope of the proposed definition.
- *Business Impact*—As a result of the Proposal, investment advisers would need to:
    - Determine whether any of its proprietary OMS or OES are exchanges under the new definition of "exchange"; and
    - If so, determine whether it is more efficient to register as an exchange or ATS or stop using the OMS/OES entirely in spite of the negative impact it would have on execution quality and resulting harm to funds and investors in the funds.
- *Compliance Costs*—The Proposal would require investment advisers to:
    - If its proprietary OEMS and/or OES are considered "exchanges" under the revised definition, then the adviser would be obligated to register the OEMS/OES as a broker-dealer with the Commission and FINRA. Such an undertaking would require, among other things, the adviser to:
        - Complete the Form ATS on an initial and ongoing basis;
        - Appoint a Chief Compliance Officer and a Finance and Operations Principal and secure appropriate licenses and qualifications with FINRA for the personnel supporting this new registrant for which licensure is required;

- Develop technological and operational systems to comply with FINRA and SEC recordkeeping and audit trail requirements;
- Develop procedures and controls to comply with the fair access rule if applicable, and to report transactions to the Trade Reporting and Compliance Engine (TRACE);
- Develop and implement surveillance systems to check for potential market irregularities;
- Build appropriate firewalls to separate the functions of this new ATS from any other broker-dealer functions; and
- Engage an auditor facilitate compliance with capital and related financial requirements;

- If the adviser uses OMS/OES of a third party that would now be subject to ATS or exchange regulation, the adviser would be obligated to erect a compliance and due diligence infrastructure to ensure that the third-party systems is appropriately registered with FINRA and the Commission and conduct regular oversight of the third-party ATS to ensure its compliance with applicable regulatory requirements;
- If the adviser has determined that the OMS/OES (whether proprietary or provided by a third party) is not an "exchange," establish policies and procedures to monitor the activities of the OMS/OES to ensure that its operation would not fall within the new definition of exchange; and
- When developing new OMS/OES, consider the initial and ongoing costs—technological, operational, procedural, and staffing—in its overall development budget.[22]

IV. Certain Negative Unintended Consequences of the Proposals, Considered in the Aggregate, and the Harmful Impact on Fund Investors

We have urged the Commission in its cost-benefit analysis to consider the aggregate costs of the Proposals on private fund advisers, their investors, and the markets generally. As detailed above, each Proposal has its own key business impacts and poses compliance and operational challenges that are significant. However, when considered in the aggregate, the

[22] As the Commission itself noted, the Exchange Proposal would cause market participants to "decrease and slow down the development of new products and technologies[, as the] need for more extensive compliance review, uncertainty about the application of the Proposed Rules, and concerns that new systems may inadvertently meet the definition of exchange could make such a process more difficult." Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange," 88 Fed. Reg. 29448, 29481 (May 5, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-05-05/pdf/2023-08544.pdf.

myriad of legal, regulatory, compliance, and operational costs from the Commission's proposed rules impacting private fund advisers and fund investors would be simply massive.[23] Before the Commission brings about such a radical overhaul of the private fund industry, it should consider the full impact on private fund advisers and their investors—for example, the likelihood of increased costs, less accessibility to private funds, and decreasing competition—as well as its embedded assumptions about the availability of various accounting, insurance, custodial and other products and services that are not offered or available today.

A. Disruption of Fund Investment Strategies Leading to Less Investment Opportunities and Higher Costs for Investors

A number of the Proposals would require existing investment advisers to restructure their businesses, sometimes in radical ways, which will have the negative unintended consequence of disrupting fund investment strategies and leading to less investment opportunities and higher costs for investors—including pensions, foundations, and endowments—located in all 50 states.

For example, the Private Fund Adviser Proposal would prohibit investment advisers from passing through certain fees and expenses to their clients, which is a long-standing practice that is desirable for certain advisers and investors. For many advisers, this would change their economic bargain with fund investors and require them to restructure how they pay for ongoing expenses (such as by offsetting with a new or increased asset management fee). For existing funds this would mean amending the limited partnership documentation and the offering memoranda to account for this new, SEC-mandated economic reality. Similarly, the Custody Proposal would require investment advisers to renegotiate contractual arrangements with qualified custodians and independent auditors and enter into new agreements with clients' custodians. The Custody Proposal also may require advisers to determine, for privately-offered securities, physical assets, and non-delivery versus payment assets, whether to (i) enter into contractual arrangements with a suboptimal qualified custodian that may demand commercially unreasonable terms or (ii) rely on an exemption that would be expensive and disruptive to trading, or alternatively exit certain markets entirely, particularly foreign markets.[24]

The Treasury Clearing Proposal would require investment advisers that transact in the Treasury market—whether cash or repurchase or reverse repurchase agreements—to move their

[23] Consider that implementing the sweeping new Marketing Rule, adopted by the Commission in December 2020, called for a significant allocation of personnel and operational resources by investment advisers, and that was just one rule. *See* Investment Adviser Marketing, 86 Fed. Reg. 13024 (Mar. 5, 2021), available at: https://www.govinfo.gov/content/pkg/FR-2021-03-05/pdf/2020-28868.pdf.

[24] *See* Letter from John Boozman, Ranking Member, Senate Committee on Agriculture, Nutrition, and Forestry, and Debbie Stabenow, Chairwoman, Senate Committee on Agriculture, Nutrition, and Forestry, Glenn "GT" Thompson, Chairman, House Committee on Agriculture, and David Scott, Ranking Member, House Committee on Agriculture, to Chair Gary Gensler, SEC (July 20, 2023) (requesting that the Commission withdraw the Custody Proposal because of the effects the Proposal would have on the U.S. derivates and commodities markets, and noting that the Proposal would "upend the markets overseen by the CFTC, eroding their essential risk management function and putting the nation's farmers and producers at risk").

existing bilateral relationships to a cleared environment. This is a costly and time-consuming process and likely would result in decreased execution partners available to funds, which would increase the cost of transacting in the Treasury market. The Dealer Proposal also raises potential restructuring issues of a different magnitude. Depending on what shape the final rule takes, many investment advisers may be forced to scale back their trading activity or cease trading altogether in certain asset classes (*e.g.*, U.S. Treasuries) in order to avoid becoming a dealer and subject to ill-fitting registration requirements.[25] With the Exchange Proposal, moving the business of an OMS/OEM into an affiliated broker-dealer would require considerable amendment to the broker-dealer's membership agreement with FINRA, developing a new procedures and controls infrastructure to accommodate what now is an ATS, and hiring additional personnel. The burden is greater if the adviser lacks a broker-dealer business and must create and register a new broker-dealer with FINRA and the Commission.

We therefore urge the Commission to consider the various ways in which the Proposals would disrupt fund investment strategies and make appropriate changes to avoid creating less investment opportunities and higher costs for investors.

B. <u>Increased Liability for Advisers and Costs to Investors</u>

As a result of certain of the Proposals, investment advisers would be subject to substantially greater risk and potential liabilities. This will have the negative unintended consequence of disincentivizing risk taking by advisers on which investor depend for diversification of their portfolio and generally raising costs for investors.

For example, the Private Fund Adviser Proposal would prohibit investment advisers from seeking reimbursement, indemnification, exculpation, or limitation of its liability for simple negligence and certain other matters, thus creating a higher liability standard than is currently the case in the market. The contractual standard of legal liability for private funds has developed over time through negotiation of fund documents between managers and their investors and is calibrated to account for the additional risks an adviser is expected to take with the objective of delivering returns that are higher than and/or less correlated with more traditional investments. In many cases, investors depend on these alternative investments to diversify their portfolios, achieve internal benchmarks, and meet financial obligations to their stakeholders (including retirees covered by government and corporate pensions, students who rely on college endowments for financial assistance, and charitable causes supported by funding from philanthropic organizations). Imposing a negligence standard by fiat would disincentivize prudent risk taking and harm these institutional and other sophisticated investors, who would be deprived of a crucial portfolio management tool. As noted above, to address this increased liability, investment advisers will need to reevaluate their business liability, including by obtaining insurance if available and commercially reasonable or, if unable to obtain insurance, consider whether to exit the private fund business due to the inability to self-insure or to avoid

[25] We are also concerned that the Dealer Proposal could discourage institutional investors from submitting bids to qualified auctions as proposed by the Order Competition Rule (*see supra* note 16) in the event the Commission determines that providing liquidity in such a way is a dealer activity under the qualitative tests in the Dealer Proposal and requires registration as a broker-dealer.

more complex and innovative strategies and activities where mistakes may be more likely and costly.[26]

The Custody Proposal similarly would impose a negligence standard on qualified custodians and require them to obtain insurance to compensate for this additional risk (insurance that may not be available or, if it is, it likely would be very costly to obtain). Qualified custodians would be compelled to pass along these increased costs to investment advisers, thus effectively making the adviser liable for simple acts of negligence by the custodian. This is because advisers that are required to enter into agreements with the client's custodian likely would be presented with a form agreement from the custodian with little or no room to negotiate given the thousands of agreements the custodian would be entering into with advisers. These "take it or leave it" custodial contracts most assuredly will tilt liability in favor of the custodian—at the expense of the adviser and its clients. More generally, the increased costs of these requirements would ultimately be borne by investors in private funds, whether through increased fees and expenses, other offsetting charges to fund terms, and/or additional and higher-priced insurance, assuming such insurance is even attainable.

We therefore urge the Commission not to subject investment advisers to greater legal liability than they currently are exposed to avoid disincentivizing risk taking by advisers on which investor depend for diversification of their portfolio.

C. Requirements Demanding Renegotiation of Contractual Agreements Disrupting Existing Economic Bargain Between Advisers and Investors

Many of the Proposals would require investment advisers to renegotiate agreements with investors, causing a massive disruption of the existing economic bargain between advisers and investors, which not only raises costs for both advisers and investors, but potentially raises stability concerns in the private fund industry as nearly every investor is forced to reevaluate its investments.

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[26] In connection with this point, it is worth noting our previous comment on the availability of insurance policies:

> The Proposed Rule also fails to consider certain important practical and contractual limitations on an adviser's ability to make claims under its insurance policies, including but not limited to (a) significant retention or deductible amounts (which are likely to increase further as advisers seek higher levels of overall insurance to offset the greater risks allocated to advisers by the Proposed Rule), (b) standard insurance industry exclusions from the types of losses that can be covered by insurance (*e.g.*, certain types of contractual breaches, certain reductions in the value of property), and (c) the requirement under most policies that someone (e.g., an investor) must first assert a bona fide claim against the adviser before the adviser can make a claim on its insurance (*i.e.*, most policies do not permit an adviser to make proactive claims in the absence of an underlying dispute).

Letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, MFA, to Vanessa Countryman, Secretary, SEC (June 13, 2022), available at: https://www.sec.gov/comments/s7-03-22/s70322-20131144-301341.pdf.

For example, the Private Fund Adviser Proposal includes prohibitions that would fundamentally reorder the relative rights and liabilities of advisers and their private fund investors, requiring more than simple repapering of existing agreements but a renegotiation of the original economic bargain.[27] We do not believe that the resulting arrangements would benefit investors in the aggregate, and investors that are able to do so may elect to terminate previously beneficial investments. The Commission has institutionally and historically declined to insert itself in the adviser-client relationship, and yet with several of its Proposals the Commission has chosen to do just that. Indeed, the Private Fund Adviser Proposal seeks to apply the new prohibitions and other elements of the Proposal to existing contractual arrangements, some of which were entered into more than a decade before, without exemption or accommodation for arrangements that were entered into prior to the effective date of any final rules.

Similarly, the Custody Proposal would require investment advisers to renegotiate their agreements with qualified custodians, and to the extent this changes the basic economics of the relationship, advisers also would have to change their agreements with their clients. Our experience is that renegotiating custodial agreements is a tremendously time-consuming process, partly due to the length and complexity of the custody agreement, the decreasing number of custodians and increasing number of advisers using them, and the limited number of legal staff at custodians to perform the legal review and amendment. Renegotiating agreements with clients would be particularly difficult if multiple Proposed Rules are adopted and implemented on different timelines, which could require investment advisers to renegotiate terms of their relationship with a particular client multiple times. We also urge the Commission to consider that additional time would be needed given the limited legal resources that would be available at any one time, which could potentially impact the ability of many advisers and investors to comply with the new requirements or get adequate legal representation.

We therefore urge the Commission to consider the many ways the Proposals would require investment advisers to renegotiate agreements with investors and take steps to prevent a massive disruption of the existing economic bargain between advisers and investors that could raise stability concerns in the private fund industry.

D. Sweeping Requirements to Build New or Update Existing Reporting Systems Impose Significant Initial and Ongoing Operational Costs

Depending on the investment strategy of a particular fund (*e.g.*, whether they employ short selling or SBS), they will be required under certain of the Proposals to build new reporting systems from scratch or update the reporting system they already have in place (*e.g.*, Form PF Proposal). In addition, various Proposals would require firms to create new reports for investors (*e.g.*, the Private Fund Adviser Proposal) or the Commission (*e.g.*, the Cybersecurity Proposal and Form PF Final Rule). Each of these reporting systems would require the development or acquisition of costly infrastructure. It is important that the Commission recognize that these components are different from and additive to other compliance software that managers already

[27] It would make the business model for private funds much more expensive and inefficient, without a commensurate investor benefit, and would be likely to result in a less competitive industry, all of which are contrary to the Commission's stated goals.

use to comply with existing reporting and other requirements applicable to advisers, as well as additive to operational builds advisers would need to make to comply with new requirements that the Commission and other regulators[28] have proposed to make. Furthermore, in addition to the initial compliance build, these systems would impose ongoing compliance costs on managers, including the hiring of additional personnel and/or engagement of third-party vendors, which may not be available.

We therefore urge the Commission to take into consideration the potential unavailability of qualified personnel and third-party vendors as it sets compliance deadlines.

E. Fundamentally Changing How Advisers Engage With and Supervise Third Parties, Including Registered Third Parties

Certain of the Proposals would require investment advisers to renegotiate the contractual terms with third-party service providers to include new duties and obligations (*e.g.*, the Outsourcing, Cybersecurity, and Custody Proposals), even when the third party is registered (*e.g.*, a broker-dealer or bank). With respect to third parties directly subject to SEC regulation and oversight, such as registered investment advisers and broker-dealers, applying the new rule would be overly burdensome and duplicative.

For example, the Custody Proposal would require investment advisers to enter into new contractual relationships with qualified custodians and independent public accountants. Not only would such renegotiations be costly and time consuming, but there also may be limitations on the ability of advisers to find third-party vendors that have the ability to assist the adviser in complying with the new rules. Vendors also may be unwilling to comply with the operational due diligence questionnaires or reviews the adviser would be obligated to undertake, leaving the adviser with the choice of continuing with that vendor or pursuing a different vendor, which itself may pose challenges if the product or service offered is not one that is easily substituted. Furthermore, given the volume of new requirements, advisers would need to hire additional compliance and other personnel. Not only would there likely be limited qualified, experienced personnel available, given the increased demand, but costs for experienced personnel would likely increase. One potential solution for the adviser would be to outsource these compliance functions to a third party, which creates its own challenges under the Outsourcing Rule and more generally.

The Outsourcing Proposal would require registered investment advisers that engage third parties to provide certain services and functions (very broadly construed under the proposed rule) to, among other things, satisfy specific due diligence elements before retaining a service provider, obtain various contractual assurances from such provider, and subsequently carry out periodic monitoring of the service provider's performance. As a result, advisers would be forced to only use vendors that are willing to accommodate the new regulatory requirements, both as an initial matter and on an ongoing basis. This would increase the burden on vendors, who would either pass costs to advisers and ultimately investors or cease to work with registered investment advisers altogether—exacerbating the problem, because advisers would be faced with fewer

[28] *See supra* note 18.

options in the vendor marketplace. Similarly, the Cybersecurity Proposal would require investment advisers to renegotiate contractual terms with service providers or seek new service providers that would contractually agree (or hire in-house if service providers would not agree) to modify their own cybersecurity risk management programs to effectively comply with the proposed rules.

We believe the Commission should recognize that the Proposals do not merely require changes to business practices, but they fundamentally change the private fund industry. For this reason, we urge the Commission to allow time not just for advisers to come into compliance with any new requirements, but also allow time for the industry to adjust and adapt.

F. Creating Significant Additional Documentation Requirements That Will Unnecessarily Divert Compliance Resources

A number of the Proposals would impose additional recordkeeping and documentation requirements on investment advisers (*e.g.*, Private Fund Adviser, Outsourcing, and Cybersecurity Proposals). Again, many of these rules are burdensome in their own right, but that burden is only compounded by the multiple pending Proposals. The more rules that require investment advisers to document compliance with rules or their due diligence, the more compliance resources are going to be required. And the more rules that do this at or near the same time—pulling resources from the same compliance and other teams—the harder the task becomes. This is particularly problematic when the documentation requirement becomes an end in itself, divorced from the real risk faced by the adviser, such as in the case of the Cybersecurity Proposal, which ends up requiring investment advisers to divert resources from current risk-weighted cybersecurity programs to develop a broader program to protect a wide range of "adviser information" (broadly defined), including information that, even if exposed by a cyberattack, would be unlikely to cause actual harm to an adviser's business or its clients.

In considering all the additional documentation requirements in the Proposals, we urge the Commission to weigh the benefit of requiring advisers to further document their compliance with requirements in the Proposals, particularly when they pertain to less risky behavior, against the potential to divert compliance resources from other more risky behavior. Instead, we urge the Commission to allow firms to take a more risk-based approach, with appropriate documentation requirements.

G. Updating Policies and Procedures & Form ADV

All of the Proposals would require investment advisers to update, and in some cases completely rewrite, their internal policies and procedures as well as update their Form ADV. While this may be challenging for any one rule, here the Commission is poised to adopt a number of rules, many potentially simultaneously. The simultaneous or near-simultaneous adoption of multiple rules would pose ever greater compliance challenges for advisers, especially ones with relatively fewer compliance personnel and financial resources. Moreover, the Commission historically has expressed skepticism with "cookie-cutter" disclosure provided by compliance consultants or others, and yet by proposing a slew of disparate rulemakings with overlapping compliance dates, it is itself creating an environment where smaller advisers will

have little choice but to rely on third parties to provide ADV disclosure or miss the compliance date.

We therefore urge the Commission to evaluate all of its pending proposals, assess the overlap between them, and develop a rational, workable compliance schedule.

V. Anti-Competitive Impact of the Proposals on Smaller and Emerging Managers

While the aggregate cost of the Proposals would be substantial, if adopted as proposed, we believe it would be almost insurmountable for smaller and newly-formed advisers, including women and minority-owned advisers (which are under-represented in the industry).[29] If the Proposals were adopted in their current form, it would have an anti-competitive impact, creating barriers to entry for new advisers, which would further contribute to industry consolidation, with the result being decreased investment competition and investor choice.[30]

The alternative investment industry thrives on new entrants, entrepreneurship, and competition. Imposing significant costs and eliminating long-standing industry practices that enable smaller and newer firms to incentivize early investors and tailor fund terms appropriately would make it harder to launch new firms and harder for new managers to succeed, thereby harming investors' ability to generate returns on behalf of their ultimate beneficiaries.[31]

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[29] *See, e.g.,* Letter from Congressman Steven Horsford to Chair Gary Gensler, SEC (May 3, 2023), available at: https://www.sec.gov/comments/s7-03-22/s70322-183839-337242.pdf (encouraging the Commission "to reconduct the cost-benefit analysis for any proposal that did not originally adequately take into account the specific impact on minority- and women-owned firms" and noting that it is "equally important to consider the aggregate impact and costs of the Commission's twenty-plus proposals on minority- and women-owned firms"); Letter from Bill Huizenga, Chairman, Subcommittee on Oversight and Investigations, House Financial Services Committee, and Steve Womack, Chairman, Subcommittee on Financial Services and General Government, House Appropriations Committee, to Gary Gensler, Chair, SEC, and Jessica Wachter, Chief Economist and Director of the Division of Economic and Risk Analysis, SEC (July 6, 2023), available at: https://huizenga.house.gov/uploadedfiles/private_funds_letter_to_the_sec_7.6.23.pdf (expressing concern that "the Commission conducted an insufficient economic analysis and failed to consider the impact on underserved businesses and communities, including emerging minority and women-owned asset managers" in the Private Fund Adviser Proposal).

[30] *See, e.g.,* Letter from Marcus Glover, General & Managing Partner, Lockstep Ventures, to Vanessa Countryman, Secretary, SEC (Apr. 25, 2022), at 1-2, available at: https://www.sec.gov/comments/s7-03-22/s70322-20126650-287354.pdf ("As a small firm, we believe the Proposal would unnecessarily burden our firm and other emerging private fund managers who do not have the in-house capacity to review and respond to each of the proposed rules. Further, the Proposal would hurt investors if preferential treatment rules were eliminated, thereby destroying our ability to keep or attract certain investors.").

[31] *See, e.g.,* Letter from Major L. Clark, III, Deputy Chief Counsel, Office of Advocacy, U.S. Small Business Administration, and Meagan E. Singer, Assistant Chief Counsel, Office of Advocacy, U.S. Small Business Administration to Vanessa A. Countryman, Secretary, SEC (May 5, 2023), available at: https://www.sec.gov/comments/s7-04-23/s70423-184679-338462.pdf (expressing concern regarding the

It stands to reason that the aggregate burden of all the Commission's recently proposed rules would have a similar effect on private fund advisers, especially smaller and newly-formed advisers, which often have tighter margins and fewer resources to apply to compliance. Such advisers may well decide to exit the market or be deterred from entering the market in the first place, resulting in fewer, larger managers with more market power and less investor choice, diversity, and competition within the industry—the exact opposite of one of the primary purported goals of the rulemakings.[32]

Accordingly, as the Commission weighs the costs and benefits of the Proposed Rules—and their effect on competition, efficiency, and capital formation—we believe it should address the fact that the likely result of all the Commission's recently proposed rules would be consolidation in the private fund industry, where only large firms can bear the costs of applicable rules. Instead of implementing rules that would cause these harmful effects, the Commission should carefully reconsider how it can better address investor protection concerns for which it has presented sufficient evidence in ways that avoid unnecessary compliance costs for all advisers, especially smaller and emerging managers, and unintended consequences for investors.

VI. Conclusion

We urge the Commission to evaluate the costs and benefits of the Proposals, in the aggregate, for private fund advisers, their investors, and the markets generally. In this evaluation, the Commission should focus, in particular, on whether there are less burdensome alternatives that can achieve the Commission's policy objectives without resulting in increased costs to investors or market consolidation and the creation of barriers to entry for new advisers. Furthermore, the Commission should allow sufficient opportunity for interested parties to provide meaningful comment on the Proposals. In this respect, recognizing that it is impossible for interested parties to comment on every question or consider every alternative raised in a Proposal, given the sheer number and interconnectedness of the Proposals, the Commission should repropose Proposals where it is considering significant modifications from the rule text that was proposed.

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disproportionate cost of the Custody Proposal "to small registered investment advisers (advisers) will result in industry consolidation or small firms exiting the market").

[32] We agree with the IAA when they wrote:

> New regulations, especially when they are prescriptive, often require substantial fixed investments in infrastructure, personnel, and technology. Depending on the requirements, they may need new or upgraded systems, relating, for example, to documentation and recordkeeping, contract and vendor management, compliance monitoring and testing, operations, custody, business continuity planning, and more. They may also need to expend significant resources on outsourcing, as well as on legal and consulting services. In addition to the considerable burdens borne directly by these smaller advisers, these costs could create meaningful barriers to entry for emerging advisers, and increase pressure on existing advisers for industry consolidation, thereby reducing competition and the investment choices available to investors.

IAA Comment Letter at 9-10.

In the event the Commission is determined to move forward with adopting any more of the Proposals, we strongly urge the Commission to establish a reasonable timeline for adoption and implementation of the Proposals given their overlapping nature, their immense associated compliance and operational burdens (likely insurmountable for smaller or emerging managers), and, in several key examples, their embedded assumptions about the availability of various accounting, insurance, custodial and other products and services that are not offered or available today. We further urge the Commission to consider grandfathering for existing arrangements where applicable (*e.g.*, in connection with the Private Fund Adviser Proposal).[33]

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MFA and NAPFM appreciate the opportunity to provide additional comments to the Commission on the Proposals. We welcome the opportunity to discuss our views with you in greater detail. Please do not hesitate to contact Matthew Daigler, Vice President & Senior Counsel, or the undersigned, at (202) 730-2600, with any questions that you, your respective staffs, or the Commission staff might have regarding this letter.

Very truly yours,

\s\ NATIONAL ASSOCIATION OF PRIVATE FUND MANAGERS

Very truly yours,

\s\ Jennifer W. Han

Jennifer W. Han
Executive Vice President
Chief Counsel & Head of Global Regulatory Affairs

cc: The Hon. Gary Gensler, Chair
The Hon. Hester M. Peirce, Commissioner
The Hon. Caroline A. Crenshaw, Commissioner
The Hon. Mark T. Uyeda, Commissioner
The Hon. Jaime Lizárraga, Commissioner
Mr. William A. Birdthistle, Director, Division of Investment Management
Dr. Jessica Wachter, Chief Economist and Director, Division of Economic and Risk Analysis
Dr. Haoxiang Zhu, Director, Division of Trading and Markets

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[33] We agree with the IAA when they wrote:

> For example, tiering and staggering compliance requirements would better enable advisers to implement and operationalize the many new requirements under the Adviser Proposals that we anticipate will be adopted within a short time of one another. A reasonable timeline would also demonstrate that the Commission appreciates that advisers will need to implement these new rules while at the same time maintaining and executing their existing compliance programs and, most importantly, continuing to serve their clients.

IAA Comment Letter at 3.

Appendix A

The following lists the major proposed and final Commission rulemakings affecting investment advisers and provides links to comment letters submitted by the MFA and NAPFM on each of the rulemakings.

Proposed Rules

1. 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, 87 Fed. Reg. 6652 (Feb. 4, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-02-04/pdf/2021-27531.pdf; Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions, 88 Fed. Reg. 41338 (June 26, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-06-26/pdf/2023-13447.pdf.

   - MFA Comment Letter (May 16, 2023), available at: https://www.sec.gov/comments/s7-32-10/s73210-190219-374542.pdf.

   - MFA Comment Letter (Mar. 21, 2022), available at: https://www.sec.gov/comments/s7-32-10/s73210-20120700-272867.pdf.

2. Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities, 87 Fed. Reg. 15496 (Mar. 18, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-03-18/pdf/2022-01975.pdf; Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange," 88 Fed. Reg. 29448 (May 5, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-05-05/pdf/2023-08544.pdf.

   - MFA Comment Letter (Apr. 18, 2022), available at: https://www.sec.gov/comments/s7-02-22/s70222-20123993-280134.pdf.

   - MFA Comment Letter (June 13, 2022), available at: https://www.sec.gov/comments/s7-02-22/s70222-221039-464602.pdf.

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

   - MFA Comment Letter (Nov. 23, 2022), available at: https://www.sec.gov/comments/s7-03-22/s70322-20151670-320146.pdf.

   - MFA Comment Letter (June 13, 2022), available at: https://www.sec.gov/comments/s7-03-22/s70322-20131144-301341.pdf.

- MFA Comment Letter (Apr. 25, 2022), available at: https://www.sec.gov/comments/s7-03-22/s70322-20126631-287270.pdf.

- National Association of Private Fund Managers Letter (Apr. 25, 2022), available at: https://www.sec.gov/comments/s7-03-22/s70322-20126565-287200.pdf.

4. Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies, 87 Fed. Reg. 13524 (Mar. 9, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-03-09/pdf/2022-03145.pdf.

   - MFA Comment Letter (June 22, 2023), available at: https://www.sec.gov/comments/s7-04-22/s70422-208479-421502.pdf.

   - MFA Comment Letter (May 22, 2023), available at: https://www.sec.gov/comments/s7-04-22/s70422-192519-383102.pdf.

   - MFA Comment Letter (Apr. 11, 2022), available at: https://www.sec.gov/comments/s7-04-22/s70422-20123280-279547.pdf.

5. Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13846 (Mar. 10, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-03-10/pdf/2022-03222.pdf.

   - MFA Comment Letter (Apr. 11, 2022), available at: https://www.sec.gov/comments/s7-06-22/s70622-20123269-279539.pdf.

6. Short Position and Short Activity Reporting by Institutional Investment Managers, 87 Fed. Reg. 14950 (Mar. 16, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-03-16/pdf/2022-04670.pdf.

   - MFA Comment Letter (June 15, 2023), available at: https://www.sec.gov/comments/s7-08-22/s70822-206120-414822.pdf.

   - MFA Comment Letter (Apr. 26, 2022), available at: https://www.sec.gov/comments/s7-08-22/s70822-20126815-287523.pdf.

7. Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer, 87 Fed. Reg. 23054 (Apr. 18, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-04-18/pdf/2022-06960.pdf.

   - MFA Comment Letter (Apr. 6, 2023), available at: https://www.sec.gov/comments/s7-12-22/s71222-20163765-333921.pdf.

   - MFA Comment Letter (Dec. 5, 2022), available at: https://www.sec.gov/comments/s7-12-22/s71222-20152323-320251.pdf.

   - MFA Comment Letter (Dec. 5, 2022), available at: https://www.sec.gov/comments/s7-12-22/s71222-20152322-320250.pdf.

- MFA Comment Letter (May 27, 2022), available at: https://www.sec.gov/comments/s7-12-22/s71222-20129911-296085.pdf.

- National Association of Private Fund Managers Letter (May 27, 2022), available at: https://www.sec.gov/comments/s7-12-22/s71222-20129914-296098.pdf.

8. Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (June 17, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-06-17/pdf/2022-11718.pdf.

   - MFA Comment Letter (Aug. 15, 2022), available at: https://www.sec.gov/comments/s7-17-22/s71722-20136728-307562.pdf.

9. Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, 87 Fed. Reg. 53832 (Sep. 1, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-09-01/pdf/2022-17724.pdf.

   - MFA Comment Letter (Mar. 16, 2023), available at: https://www.sec.gov/comments/s7-22-22/s72222-20159964-328328.pdf.

   - MFA Comment Letter (Dec. 7, 2022), available at: https://www.sec.gov/comments/s7-22-22/s72222-20152435-320304.pdf.

10. Outsourcing by Investment Advisers, 87 Fed. Reg. 68816 (Nov. 16, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-11-16/pdf/2022-23694.pdf.

    - MFA Comment Letter (Dec. 20, 2022), available at: https://www.sec.gov/comments/s7-25-22/s72522-20153177-320682.pdf.

11. Standards for Covered Clearing Agencies for U.S. Treasury Securities and Application of the Broker-Dealer Customer Protection Rule With Respect to U.S. Treasury Securities, 87 Fed. Reg. 64610 (Oct. 25, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-10-25/pdf/2022-20288.pdf.

    - MFA Comment Letter (Dec. 21, 2022), available at: https://www.sec.gov/comments/s7-23-22/s72322-20153289-320728.pdf.

12. Prohibition Against Conflicts of Interest in Certain Securitizations, 88 Fed. Reg. 9678 (Feb. 14, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-02-14/pdf/2023-02003.pdf.

    - MFA Comment Letter (May 16, 2023), available at: https://www.sec.gov/comments/s7-01-23/s70123-190279-374603.pdf.

13. Safeguarding Advisory Client Assets, 88 Fed. Reg. 14672 (Mar. 9, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-03-09/pdf/2023-03681.pdf.

- MFA Comment Letter (May 8, 2023), available at: https://www.sec.gov/comments/s7-04-23/s70423-186599-340484.pdf.

Final Rules

1. Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers, Final Rule, 88 Fed. Reg. 38146 (June 12, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-06-12/pdf/2023-09775.pdf.

    - MFA Comment Letter (Mar. 16, 2023), available at: https://www.sec.gov/comments/s7-22-22/s72222-20159964-328328.pdf.

    - MFA Comment Letter (Mar. 21, 2022), available at: https://www.sec.gov/comments/s7-01-22/s70122-20120683-272854.pdf.

2. Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers, 88 Fed. Reg. 42546 (June 30, 2023), available at: https://www.govinfo.gov/content/pkg/FR-2023-06-30/pdf/2023-12592.pdf.

    - MFA Comment Letter (Mar. 21, 2022), available at: https://www.sec.gov/comments/s7-32-10/s73210-20120732-272888.pdf.