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March 21, 2022

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

Submitted via email to rule-comments@sec.gov

Re: Amendments to Form PF (Investment Adviser Act Release No. 5950; File No. S7-01-22)

Dear Ms. Countryman:

The Committee on Compliance, the Committee on Private Investment Funds and the Committee on Investment Management Regulation of the New York City Bar Association (collectively, the “**Committees**”) submit this letter in response to the request of the Securities and Exchange Commission (the “**Commission**”) for comment in response to Investment Advisers Act Release No. 5950 (January 26, 2022) in which the Commission proposed amendments to Form PF, the confidential reporting form for certain Commission-registered investment advisers to private funds, to require current reporting upon the occurrence of certain key events, among other changes (the “**Proposal**”, the “**Proposing Release**” or the “**Proposed Rule**”). The Committees are composed of lawyers with diverse perspectives on investment management issues, including attorneys from law firms, counsel and compliance professionals to financial services firms, investment company complexes, investment advisers and investors in private funds.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

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I. SUMMARY

The Proposal seeks to amend Form PF to require current reporting upon the occurrence of certain key events. The proposed amendments also would decrease the reporting threshold for large private equity advisers and require these advisers to provide additional information to the Commission about the private equity funds they advise. Finally, the Proposal seeks to amend requirements concerning how large liquidity advisers report information about the liquidity funds they advise. The stated design of the Proposal is to “enhance the Financial Stability Oversight Council’s (“**FSOC**”) ability to monitor systemic risk as well as bolster the [Commission’s] regulatory oversight of private fund advisers and investor protection efforts”.¹ The Committees are providing comments on certain aspects of the Proposals as detailed below.²

The Committees appreciate the opportunity to comment on the Commission’s Proposal. The Committees support the Commission’s objective to address system-wide risk and to improve the quality of information available to investors and regulators while providing oversight to the industry, yet in doing so, are acutely aware of the burdens placed on industry participants caused by increased regulation and are desirous of the appropriate balance.

II. PROPOSAL TO FORM PF

The Proposal would significantly increase the reporting requirements for private fund advisers that currently file Form PF and expand the number of private equity fund advisers that would be required to complete Section 4. The Proposal sets forth new requirements that would (1) require large hedge fund advisers and private equity advisers to file Section 5 and Section 6 reports, respectively, with the Commission within one business day of the occurrences of certain specified events, (2) lower the threshold for an adviser reporting as a large private equity adviser from \$2 billion to \$1.5 billion in private equity fund assets under management, (3) increase the amount of information reported by large private equity advisers under Section 4 and (4) expand reporting for large liquidity fund advisers. We discuss these proposed new requirements in turn below.

A. Current Reporting for Large Hedge Fund Advisers and Adviser to Private Equity Funds: the One Business Day Reporting Requirement

The Committees agree that the frequency as to which advisers must report certain triggering events, especially when such events pose a risk to the financial system or potential harm to investors, should be updated in some situations. The Committees believe generally, however, that the requirement that these reports be made within one business day is unduly onerous and is unlikely to further investor protection or risk monitoring of the financial system.

¹ See Amendments to Form PF to Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers, Release No. IA-5950; File No. S7-01-22 (Jan. 26, 2022) (hereinafter, the “Form PF Release”).

² The Committees note that Form PF has imposed burdens on some funds registered under the Investment Company Act of 1940, as amended (the “**1940 Act**”) that utilize special purpose vehicles, such as so-called “blocker subsidiaries”, to achieve tax efficiencies. Because the blocker subsidiaries often rely on the exclusions under Section 3(c)(1) or Section 3(c)(7) of the 1940 Act, there are many instances where registered fund managers have been required to complete Form PF for their blocker subsidiaries. Reporting for these entities serves no purpose related to the original intent of Form PF and, instead, imposes a substantial burden on advisers that otherwise might not need to consider Form PF at all. The Committees respectfully request that the Commission clarify that Form PF need not be completed for blocker subsidiaries or provide an exception in Form PF from the reporting requirements.

The Committees believe that it is overly burdensome to require advisers to immediately report a triggering event, especially when it is likely that the employees responsible for reporting such events are the same individuals whose time and efforts would otherwise be consumed with resolving or otherwise attending to the facts and circumstances giving rise to the triggering event. For example, a significant disruption or degradation of the fund's key operations would require the attention of much of the adviser's staff to address, and the staff would need to work to expediently rectify such situation for the benefit of the fund's investors. An added need to report the disruption on Form PF would distract from such staff's efforts to rectify the immediate situation at hand. As another example, if a fund's general partner has been removed, the adviser would need to navigate multiple issues at once, especially at a time likely to coincide with disruptions within the adviser's personnel (or, worse, departures of personnel). An added requirement to report the removal within one business day on Form PF is unlikely to result in factors that would improve the situation and is more likely to be an added burden to the adviser's (remaining) staff. This is only likely to harm, not help, the fund's investors. In any event, it is not clear that the Commission's receipt of the information within one business day would result in any action by the Commission or its staff that would assist fund investors. Other examples are discussed below.

In addition, it may often be the case that the personnel with the knowledge and responsibility with respect to Form PF reporting might be unavailable within one business day of a triggering event. This could be the case for a variety of reasons, including illness, travel or someone otherwise being out of the office in a location without a reliable internet connection. For advisers who rely on a third party contractor to handle their Form PF filings, the personnel of the contractor may be unreachable or unavailable within one business day of a triggering event for similar reasons. Even if such personnel or advisers were available, requiring the expedited preparation of a report could impact the accuracy of such report, reducing or eliminating opportunities to catch any such inaccuracies and generally increasing the incidence of false positive reports. Accordingly, an adviser may simply be unable to meet the deadline or, even if met, is likely to produce a report with information that is not indicative of systemic risk.

Furthermore, a one business day reporting requirement in this context is virtually unprecedented. The Committees are only aware of one other securities regulation in this context that requires reporting within one business day, and that requirement is distinguishable. Rule 206(4)-2 under the Investment Advisers Act of 1940 (the "**Advisers Act**") requires, after a surprise examination, any material discrepancy to be reported to the Commission within one business day by the auditor performing such examination. However, such report requires no analysis by the adviser: the auditor either cited a material discrepancy or the auditor did not, and if the auditor did, the auditor described the discrepancy. In contrast, the type of reporting required by the Proposal necessarily requires the adviser to analyze whether a report is required in the first place. The conclusion often might not be clear and could take time to analyze carefully, likely with the assistance of outside counsel. Time would also be required if the determination were to require gathering information from a number of different sources. Accordingly, the requirement under Rule 206(4)-2 is a much more manageable reporting obligation than the one business day requirement in the Proposal. Set forth below are some suggestive alternatives to a one-business day reporting standard.

Finally, the Committees believe the Commission should be mindful of not overextending itself. Requiring near immediate reporting of localized events would expand Form PF into a tool for the government to micromanage private fund risk management, instead of remaining a systemic examiner. The sheer volume of information that would be provided to the Commission under the Proposal would also likely inhibit the Commission's ability to meet its core mission to protect investors. Given that information within each report on Form PF could potentially be market-changing and require immediate attention, the Proposal could fundamentally shift the daily activities of the Commission and its staff away from existing priorities and require careful review and analysis of such information. The Committees are concerned that the Commission and its staff do not have the resources to meaningfully review and analyze this information.

In any event, set forth below is our discussion of the application of the one business day reporting requirement in the context of most of the specific triggering events described in the Proposed Rule. The Proposal requires large hedge fund advisers to report, within one business day, triggering events such as extraordinary investment losses; certain margin events; counterparty defaults; material changes in prime broker relationships; operations events (*e.g.* significant disruption or degradation of the fund’s key operations); and certain events associated with redemptions (*e.g.* large redemption requests, suspensions of withdrawals/redemptions, material restrictions on withdrawals/redemptions, and an inability to satisfy redemptions). Further, under the Proposal, private equity firms must report within one business day the occurrence of an adviser-led secondary transaction, implementation of a general partner or limited partner clawback, removal of a fund’s general partner, termination of a fund’s investment period or termination of a fund.

1. Large Hedge Fund Adviser Current Reporting on Qualifying Hedge Funds

a. Extraordinary Investment Losses

As noted above, the Proposal would require large hedge fund advisers, whose advised qualifying hedge funds experience extraordinary losses within a short period of time, to provide a current report describing the losses. The Form PF definition of “hedge fund” encompasses a large number of private funds that invest in a wide range of assets. Form PF filers are currently required to report a summary of each reporting fund’s assets and liabilities categorized by a hierarchy (Level 1, Level 2 and Level 3), which recognizes that many funds have assets and liabilities that are not easily valued (*i.e.*, Level 2 and Level 3 assets and liabilities). Private funds with Level 2 and Level 3 assets and liabilities typically only value those assets and liabilities on a monthly basis (and in some cases quarterly). A reporting requirement that requires daily tracking of the fair value of Level 2 and Level 3 assets and liabilities, such as the one outlined in the Proposal, would require significant change to industry practice and, at best, require significant expense. The Committees believe that daily valuation of Level 2 and Level 3 assets and liabilities is realistically not possible. In addition, even if a reporting requirement with respect to extraordinary investment losses were limited to “marketable securities”, the FSOC does not need Form PF reporting to track systemic risk associated with downturns in public markets. Information on the pricing of publicly traded securities is readily available to the FSOC through numerous public sources. Accordingly, the Committees believe that the requirement for Form PF filers to report extraordinary investment losses within one business day of the occurrence of the required reporting event is either not practicable (or possible) to the extent a reporting fund has Level 2 and Level 3 assets and liabilities, and is duplicative of information readily available to the FSOC to the extent required with respect to marketable securities. If the Commission does not have sufficient timely access to the value of publicly traded securities from certain exchanges, the Committees respectfully ask the Commission to consider a more direct solution: requiring better access to the exchanges from which the Commission is not receiving the information it requires.

Furthermore, this proposed reporting requirement does not provide the FSOC with information to address systemic risk. The information is reactive and lagging—by the time private funds are experiencing extraordinary investment losses, the stress or distress in the markets has occurred, and the FSOC has access to this public information as described in the preceding paragraph.

b. Significant Margin and Default Events

The Proposal would require current reporting of significant margin and default events that occur at qualifying hedge funds advised by large hedge fund advisers or at their counterparties. One rationale for the mandatory reporting of margin defaults is to alert the Commission to a margin default by a “highly levered hedge fund” which could have systemic risk implications. The Committees recognize that knowledge of unfolding systemic issues would be important information for the Commission and other

federal regulators. However, the Committees also believe that this report would have limited or no utility for the Commission, as a counterparty default, in general, is a lagging indicator of an issue. A far better, and more holistic, source of information of these kinds of systemic issues would be the major broker-dealers, banks and major swap counterparties, each of whom is required to make reports of material issues to other federal financial regulators. Accordingly, the Committees respectfully recommend that the Commission remove such requirement from the Proposed Rule.

The Proposal indicates that the counterparty default reports would be useful on the macroeconomic level, stating that “current reports would be especially useful during periods of market volatility and stress, when the Commission and FSOC are . . . determining whether and how to respond in a timely manner.”³ Again, if the goal is to allow the federal financial regulators to receive and assess actionable information, the Committees believe the amended Form PF would not serve its intended purpose. The Committees respectfully ask the Commission to consider instead requiring the submission of standardized reports from the largest extenders of credit to hedge funds, rather than trying to sort through and normalize data on thousands of funds in real time.

In addition, the substantive facts triggering this reporting obligation would be wholly duplicative of other situations that are contemplated by the Commission in the Proposal. The triggers for a Form PF report are not a perfect match with the default provisions under industry standard documents. This means that advisers will be in the position of making idiosyncratic interpretative decisions on reporting obligations in the middle of a crisis. This would do little other than burden compliance and legal personnel when their efforts and attention would be best directed to the problem at hand.

c. Counterparty Defaults

The proposed “Counterparty Default” disclosure in Item E would require advisers to report margin defaults by a counterparty to a private fund. According to the Proposing Release, the rationale for this new requirement is based on the principle that disclosures of fund-level risk can help identify systemic risks. However, while this rationale is appealing in the abstract, the Committees fear that there will be unintended consequences that will result in these reports being of limited or no utility (or being duplicative of more focused reports that the federal government already receives).

The Committees believe that that this new reporting obligation will not ultimately yield information that is useful to the Commission. Broker-dealers, banks and major swap counterparties are subject to multiple reporting and supervision regimes that provide more prompt and actionable information for a variety of federal financial regulators and self-regulatory organizations. The systemic failures that would be identified by counterparty default reports from private fund managers and other advisers will be numerous, overlapping, inevitably inconsistent and potentially overwhelming for Commission staff members. We would encourage the Commission to discuss with its staff members how they would receive, assess and act upon a crisis situation where hundreds or even thousands of individual (and potentially inconsistent) reports are received in real time. Given that this information can be obtained, and in a condensed and cleaned format, from the groups described above that are the linchpins of credit, the Committees urge the Commission to consider more effective ways to obtain this market intelligence.

The Committees also want to recognize the Commission’s desire not to impose unduly burdensome obligations on advisers through the proposed *de minimis* threshold of 5% of a fund’s net asset value. The Committees recognize that the reporting threshold is intended to reduce the industry’s reporting burden without diminishing the usefulness of the information to be reported to the Commission. The Committees believe, however, that 5% is too low a threshold to achieve the goals of balancing the reporting burden with

³ See The Form PF Release, at 13.

the informational value in general. If the Commission determines to proceed with the adviser-side reporting requirement, the Committees would recommend that a material threshold, such as 20% of a fund's net asset value, be utilized. When applied across the industry, a 20% threshold would act as a natural filter, allowing the Commission's staff to quickly identify systemic issues and impending failures that threaten the integrity of the markets.

In addition, the reporting obligation is based on a bilateral notional amount, but measured against a net value. The Committees predict that the unintended result of this "apples and oranges" approach will also reduce the value of the relief intended by the *de minimis* threshold and result in more reporting than is expected, desired, or anticipated. If the Commission determines to proceed with this requirement, the Committees would recommend that net counterparty exposures be employed, rather than notional amounts.

The Committees also read the triggers for a Form PF counterparty default notification as differing somewhat from the default provisions utilized in industry standard documents. This means that advisers will be in the position of making idiosyncratic interpretative decisions on reporting obligations in the middle of a crisis. Again, if the Commission determines to proceed with this requirement, the Committees would recommend that the definitions and default provisions in the standard documents be expressly incorporated into this Form PF obligation.

d. Material Change in Relationship with Prime Broker

Proposed Section 5, Item F would require large hedge fund advisers to report, within one business day of its occurrence, a material change in the relationship between the reporting fund and a prime broker. Such material changes include material changes to the fund's ability to trade or a termination of the prime brokerage relationship. The Proposal notes that the Commission believes that these sorts of material changes in a reporting fund's prime brokerage relationship could signal that such prime brokers are no longer willing to work with a fund client due to apprehensiveness regarding such fund's trading practices, investment positions or risk profile as a counterparty. Furthermore, the Commission notes that material changes to such relationships may indicate "that the fund or the brokers with whom the fund transacts are experiencing stress and may be subject to an increased risk of default or in the case of the reporting fund, potential liquidation," and that such possible fund-level stress may have broader implications for the market, lead to investor harm or indicate broader systemic risk concerns.⁴

Exclusion of Routine Business Changes. The Committees agree that certain material changes to the relationship between the reporting fund and a prime broker could indicate underlying fund-level or general market stress. The Committees believe, however, that the new definition of "material change" is broader than it needs to be if the objective is to obtain timely information indicative of market stress. The universe of material changes to a prime broker relationship covered by the Proposed Rule includes the termination of the prime broker relationship and changes that "concern material trading limits or investment restrictions on the reporting fund including requests to reduce positions, or unwind positions completely (material changes in margin, collateral or an equivalent requirements)."⁵ There could be a myriad of reasons for such a termination, with underlying fund-level or general market stress being only one of them.

Accordingly, the Committees believe that the Proposed Rule should be clarified to exclude routine business changes. An investment adviser may change its relationship with its existing prime brokers in the ordinary course of business, rather than as a result of any material event which could provide the sort of indications regarding fund and market-level stress and health that the Proposed Rule is intended to obtain.

⁴ See The Form PF Release, at 29–30.

⁵ See The Form PF Release, at 216 (p. 49 of 55 of the proposed Form PF).

For example, such prime broker relationship change may result from (i) lower fees or better service from another prime broker; (ii) a prime broker not having the capacity to handle as effectively a specific type of security that a different prime broker has particular expertise in; and (iii) transfers among affiliated prime brokers—just to name a few.

Ultimately, the inclusion of any “material change” in the Proposal will be disruptive to investment adviser compliance and impose a material administrative burden on legal and compliance personnel, as well as on other market participants, who have to review such fund reporting. Given that it is these individuals and participants on the “front lines” of compliance matters that ultimately protect investors, the additional burden should be balanced against the likelihood that burden will produce a benefit for investors at large.

Four Business Days. As noted above, while the Committees agree that prompt reporting is important for timely decision making by regulators and market participants, the Committees also believe that for many investment advisers it would be a challenge to produce current reports regarding material changes in a fund’s relationship with a prime broker within one business day. In other contexts, the Commission has required disclosure from funds and investment advisers within four business days of certain trigger events. For example, Rule 206(4)-2 under the Advisers Act requires notification to the SEC by filing Form ADV-E within four business days of the resignation or dismissal of the engagement with the adviser. Additionally, the Commission requires filing of a report by publicly reporting companies within four business days of the occurrence of certain events for purposes of Form 8-K.

The Committees believe, therefore, that the Commission should change the timing requirement for current reports with respect to material changes in a relationship with a prime broker and respectfully ask the Commission to revise it to the four-business day standard described above for Form 8-K and Rule 206(4)-2 under the Advisers Act.

e. Operations Events

The Proposal would require an adviser to submit a report on Form PF when the adviser or reporting fund experiences a “significant disruption or degradation” of the reporting fund’s “key operations,” whether as a result of an event at the reporting fund, the adviser, or other service provider to the reporting fund. In some cases, a significant disruption or degradation would rightfully be of interest to the Commission in fulfilling its mission to monitor systemic risk and protect investors. However, this aspect of the Proposal, as currently worded, is overbroad and would require an adviser’s staff to concern themselves in many cases with complying with new reporting obligations at a time when their focus and attention should be on ensuring the continuity of operations of both the adviser and fund, including when events unrelated to the marketplace itself cause the disruption or degradation.

For example, the Proposing Release notes that “events such as a severe weather event causing widespread power outages that significantly disrupt or degrade key operations also would require reporting.”⁶ An advisory firm that is subject to the damaging effects of a hurricane could therefore find itself subject to reporting requirements under the Proposal. The Committees believe that the Commission would not expect advisory personnel to prioritize their Form PF reporting obligations over the maintenance of critical business operations (or the health and safety of its personnel). Indeed, the Commission has repeatedly provided relief to investment advisers where, for example, a hurricane would disrupt the adviser’s ability to comply with its obligations under the Advisers Act and rules thereunder.⁷ Moreover,

⁶ See The Form PF Release, at 34.

⁷ See, e.g., SEC Provides Regulatory Relief and Assistance for Hurricane Victims (Oct. 16, 2018), available at <https://www.sec.gov/news/press-release/2018-237>.

the Commission generally requires that public companies report certain material events within four business days on Form 8-K, presumably based on the recognition that companies require ample time to analyze events and prepare and submit appropriately disclosed filings.

The Committees therefore request that the Commission reconsider and narrow the scope of the events that would necessitate reporting due to a significant disruption or degradation. The Committees also request that the Commission provide advisers with additional time to report a significant disruption or degradation, given the adviser's immediate interest in preserving business operations.

f. Withdrawals and Redemptions

The Proposal would require an adviser to submit a report on Form PF if the adviser receives cumulative requests for redemption exceeding 50% of the most recent net asset value (after netting against subscriptions and other contributions from investors received and contractually committed). While well-intentioned and focused on the possibility that investors are making a “run on funds” more broadly in the marketplace, large redemptions in a single fund are less likely indicative of market stress and more likely indicative of stress within the fund in question. Indeed, in many cases, large redemptions are driven by commercial considerations specific to the fund, rather than broader systemic issues in the marketplace. For example, an investment adviser with a poor performance track record or the departure of a key portfolio manager faces an increased risk that its investors will “vote with their feet” by redeeming their investments in a particular fund. In some cases, redemptions by one or more large institutional shareholders from a poor-performing fund could trigger a reporting obligation, while not otherwise being indicative of broader systemic risk in the marketplace. Moreover, regulatory changes could drive large shareholders, such as institutional investors, to redeem their shares from certain funds. For example, the Volcker Rule, originally adopted in 2013, imposed significant restrictions on the ability of banks to invest or remain invested in certain private funds. Banks invested in these private funds were required to redeem their investments in order to comply with the Volcker Rule's new requirements. To the extent that similar regulatory changes were enacted by the Commission or other governmental agencies, a fund could find that it is subject to a reporting obligation when its investors redeem their shares for regulatory reasons, which would not be indicative of systemic risk. The Committees therefore request that the Commission reconsider and narrow the scope of the redemption events that would necessitate reporting.

2. Private Fund Adviser Current Reporting on Private Equity Funds

a. Adviser-led Secondary Transactions

The Proposal would require private equity fund advisers to report adviser-led transactions within one business day of completion. The Proposal indicates that part of the intent is to monitor transactions of this type as they could indicate an inability to sell portfolio companies through more traditional exit avenues or a declining market.⁸ However, the Committees believe that the choice to pursue an adviser-led secondary transaction is not a good indicator—or any indicator at all—that the assets being sold in such transaction cannot be sold through more traditional means, or that the broader financial market is declining. Indeed, the past few years, which have seen a marked increase in the frequency of adviser-led secondary transactions, have also been accompanied by an unprecedented bull market.⁹ Adviser-led secondary transactions should be viewed in the same way as they are viewed by the market: as simply another tool in

⁸ See The Form PF Release, at 45–46.

⁹ See Preqin Secondary Market Update H1 2021, at 9 (“GP-led deals spiked in interest. During the pandemic, these types of transactions outweighed LP-led deals. Anecdotal evidence suggests the quality of GPs and assets improved, and the secondary market saw approximately 3x the number of single asset deals compared to the year before. Now that the economic landscape is stabilizing, GP-led deals should be here to stay.”)

the private equity adviser's toolbox when considering liquidity solutions and exit opportunities that maximize value on behalf of their investors.

If the Commission seeks to aggregate data on adviser-led secondary transactions, the Committees believe that that data would be better collected in ways other than reporting each and every adviser-led transaction by all advisers to private equity funds within one business day after its completion. For example, an annual report summarizing such transactions for certain large advisers would be much less burdensome and much less likely to result in "foot-faults" by smaller, more leanly resourced advisers. As with the other events for which the Proposal requires one-day reporting, the Committees believe that immediate reporting of adviser-led secondary transactions would be unduly burdensome, interfere with the adviser's ordinary course management of its funds and serve very little purpose in promoting Form PF's goal of monitoring systemic risk.

b. General Partner or Limited Partner Clawback

The Proposal would require private equity fund advisers to report, within one business day of its occurrence, the implementation of a general partner clawback. The proposed reporting would require that advisers include the effective date of the clawback and the reason for such clawback. Specifically, reporting would be required under the Proposed Rule if the general partner is required to return to a fund it advises any performance-based compensation it received in excess of the amount it was ultimately entitled to receive under such fund's governing documents. Additionally, the Proposed Rule requires reporting in the event that a limited partner clawback (or clawbacks) exceeds an aggregate amount equal to 10% of the reporting fund's aggregate capital commitments. The Proposing Release notes that in the view of the Commission, this reporting is important as the extensive implementation of clawbacks may be a sign that the reporting fund is under stress or is anticipating being under stress or more generally of a "deteriorating market environment, which may have systemic risk implications."¹⁰

The Committees agree that the triggering of certain significant general partner or limited partner clawback mechanics may merit disclosure to the extent that such events are indicative of systemic risks. The Committees believe, however, that the blanket requirement for disclosure of the effectuation of clawbacks as a general matter is overbroad and will result in the reporting of clawbacks much more likely to have very little to do with systemic risk and much more to do with the idiosyncrasies of a particular fund and/or of its adviser.

Material Investment Losses. The current proposed definition of "general partner clawback" in the Proposing Release covers "any obligation of the general partner, its related persons, or their respective owners or interest holders to restore or otherwise return performance-based compensation to the fund pursuant to the fund's governing agreements."¹¹ An important cornerstone of the Proposed Rule is providing notice of events that could signal that a fund or the market more generally is under stress or subject to an event that merits prompt reporting so that investors, regulators and other market participants are able to conduct more targeted and timely risk-based monitoring. In this regard, the Committees believe that reporting of general partner clawbacks that are not effectuated as a result of material investment losses by the reporting fund are not indicative of declining financial market health and should not require a current report to be filed.

As noted in the Proposing Release, providing relevant stakeholders with prompt reporting of general partner clawbacks is intended to capture events that could provide the Commission and FSOC a

¹⁰ See The Form PF Release, at 48.

¹¹ See The Form PF Release, at 47.

signal that the financial market is in the early stages of stress or turmoil and provide them with the ability to identify particular sectors which may merit additional monitoring given the potential consequences for investors and financial market stability. However, in the experience of the members of the Committees, there are a multitude of reasons as to why a general partner clawback may be effectuated, most of which are not indicative of the type of systemic risk, general distressed market environment or significant event meriting the reporting that the Proposed Rule aims to require. For example, two reporting funds may be subject to the same risks but have very different clawback requirements as a result of one fund being paid out on a “deal-by-deal” basis (in which case the clawback is more likely to be needed), rather than only after all of the investors capital contributions have been returned. Alternatively, an obligation by the general partner to effectuate a clawback could arise as a result of the fund not achieving a particular preferred rate of return without any accompanying investment losses. By not limiting the reporting requirement to instances of actual investment losses, the reporting requirement would ignore the temporal elements inherent in clawback determinations. The Committees do not believe that a clawback that results merely from the fact that significantly profitable investments were realized earlier in the fund’s lifecycle than one or more investments that were realized, for example, at cost, is indicative of systemic risk.

Ultimately, in the Committees’ view, the Commission’s implementation of such a broad general partner clawback definition could be disruptive to investment adviser compliance and existing fund structures and economic and contractual arrangements that are more likely to require general partner clawbacks despite not presenting a different risk profile or more insight into possible market stress. And as noted elsewhere in this letter, it is more likely to simply create a significant administrative burden for legal and compliance personnel tasked with making such current reports, and with regulators and investors who review such reports for purposes of determining if a significant fund or market event has occurred.

Furthermore, the Committees believe that for any such reporting to be useful for market participants evaluating market risk, the reporting submitted by reporting funds should be uniform, objective and comparable across reporting funds. As previously discussed, certain general partners may have nuanced and bespoke contractual triggers with respect to their clawback provisions, which may be unrelated to investment losses and not a signal that a fund or the market generally are under stress or subject to a material event. However, the Proposed Rule would still require reporting of such clawbacks, which could distort the data that regulators are seeking to collect, make it more difficult for regulators to find relevant reporting of significant events and make evaluating, contrasting and comparing reports to get a sense of market health more difficult.

In conclusion, the Committees respectfully suggest that such a broad definition of, and fundamental change to reporting regarding, general partner clawbacks is simply unnecessary. The Committees respectfully urge the Commission to revise the definition of “general partner clawback” to require that such clawback must have been caused as a direct result of material investment losses suffered by a reporting fund.

Clawback In Excess of a Threshold. As previously described, the current proposed definition of “general partner clawback,” which requires reporting under the Proposed Rules in a current report, is broad and does not include a requirement that a threshold amount be clawed back before reporting is required. That is, the effectuation of any general partner clawback, no matter how immaterial, or in any event not indicative of systemic risk, would require disclosure within one business day under the Proposed Rules. The Committees are concerned about the lack of a threshold trigger excepting reporting of clawbacks below a certain dollar threshold.

The Committees believe that reporting of general partner clawbacks should at a minimum be subject to a threshold trigger. Including a threshold trigger would be consistent with the Proposed Rule’s treatment of limited partner clawbacks, which “require reporting when an adviser implements a limited

partner clawback (or clawbacks) in excess of an aggregate amount equal to 10% of a fund's aggregate capital commitments."¹² The Commission notes that this threshold amount is appropriate in the context of limited partner clawbacks because it believes "a clawback of this magnitude would be associated with an event that could have a significant negative impact on a fund's investors and, if a pattern emerges among multiple private equity advisers, could indicate financial stability concerns."¹³ The Committees believe that this policy applies equally to general partner clawbacks, where a general partner returning a *de minimis* amount of what it has received does not warrant a current report as it is not indicative of a larger trend of financial stability concerns or an event that could have a significant negative impact on a fund's investors. Additionally, in the Committees' view, requiring such broad reporting of general partner clawbacks creates the possibility that a large volume of unnecessary and non-instructive reporting is required to be made, which could skew or obfuscate the reporting and generally run contrary to the general policy goal expressed in the Proposing Release in providing additional useful reporting for market participants. Thus, the Committees believe that, as with limited partner clawbacks, because not all general partner clawbacks imply market or fund-level stress or significant events, reporting of all general partner clawbacks is not appropriate, and that production of a current report should only be required for general partner clawbacks exceeding a threshold of 50% of the aggregate distributions received by the general partner with respect to the applicable fund as performance-based compensation, subject to a minimum reporting threshold of \$25,000,000.

Furthermore, the Commission did not elaborate on how the threshold trigger with respect to limited partners would be calculated, beyond the basis being 10% of a private equity fund's aggregate capital commitments.¹⁴ The Committees believe that the Proposed Rule should be revised to clarify that the threshold for reporting, and the amounts reported on any current report, should be based on amounts actually returned by the general partner. That is, the amount to be reported should be on an after-tax basis to the extent so determined in accordance with the governing documents of the applicable reporting funds.

c. Removal of General Partner, Termination of the Investment Period or Termination of a Fund

The Proposed Rule requires an adviser to report when a fund receives notification that fund investors have removed the adviser or an affiliate as the general partner or similar control person of a fund, elected to terminate the fund's investment period or elected to terminate the fund, in each case as contemplated by the fund documents. The Commission noted that it believes that events of this nature are rare and that current reporting should, as a result, also be rare. The Commission continued to note, however, that "we believe these events could provide an indication of market deterioration and also raise investor protection issues, including potential conflicts of interest, and merit the Commission's and FSOC's timely monitoring".¹⁵

The Committees are concerned that the mere fact that these events *could* provide an indication of market deterioration and raise investor protection issues, including potential conflicts of interest, is a sufficient basis to impose an additional reporting requirement which, as noted above, will distract the adviser's legal and compliance personnel at a time when a fund could be in turmoil, regardless of whether such events are rare or not. Indeed, by the same token, the Committees also believe that there *could* be a myriad of reasons resulting in the removal of a general partner, the termination of its investment period or

¹² See The Form PF Release, at 48.

¹³ See The Form PF Release, at 48.

¹⁴ See The Form PF Release, at 48.

¹⁵ See The Form PF Release, at 50.

the termination of the fund itself that have very little, if not nothing, to do with broader market forces. For example, most private equity fund agreements provide for a “caused based” removal mechanism, enabling some percentage of the limited partners (usually a majority or super majority) to forcibly remove a general partner should it be determined that it has committed a “bad act”, such as an act of fraud or a criminal act giving rise to economic losses to fund investors. Fund investors have grown accustomed to demanding such governance rights in fund documents and general partners often concede them. Certain private equity fund agreements also provide for “without cause based” removal mechanics which do not require any such bad act, but usually cannot be triggered without a vote of a significant number of fund investors. The primary argument for such without caused based removal mechanisms coupled with the vote of a significant number of fund investors is the belief that, while certain events may not constitute a “bad act”, they may nevertheless be a sufficient basis for the fund’s general partner to be removed.

In either event, the actual implementation of a removal mechanism is far more likely to be indicative of a unique, general partner-specific issue (if not an issue attributable to a single individual) than market deterioration. In fact, market deterioration is often precisely when fund investors need fund general partners at the helm, to ensure that their fund investments are properly cared for. All of the above can also be said of mechanisms permitting fund investors to terminate investment periods or the funds themselves. There could be instances when these elections are made at the behest of the general partner itself, should it determine that the investment thesis behind the fund is no longer viable. Moreover, investment periods are most often subject to suspension or termination due to “key person events”, which include the death, disability or the mere departure of one or more of the key individuals that oversee the general partner’s operations. Again, none of these events would be indicative of market deterioration. As such, the Committees respectfully request that the Commission reconsider and remove this reporting trigger entirely.

B. Large Private Equity Adviser Reporting

1. Reduction in Large Private Equity Adviser Reporting Threshold

Currently, “large private equity fund advisers” (*i.e.*, private equity fund advisers with at least \$2 billion in assets under management (“AUM”)) must complete certain additional sections of Form PF. If adopted, the Proposal would lower this threshold to \$1.5 billion.

The Committees believe that lowering the threshold by half of a billion dollars is unnecessary given (and likely inconsistent with) the Commission’s 2011 rationale with regard to the current threshold. The Commission explained that “these thresholds are designed so that the group of Large Private Fund Advisers filing Form PF will be relatively small in number but represent *a substantial portion of the assets of their respective industries*” (emphasis added).¹⁶ Under this rationale, it would make more sense for the threshold to be raised, rather than lowered. As the industry has grown, it should be expected (and is likely the case) that more fund advisers have reached, if not surpassed, the existing \$2 billion threshold. Thus, the natural growth in the industry already accomplishes the Commission’s newly-stated goal of capturing more of these advisers. And as there are more “Large Private Fund Advisers”, raising the threshold would capture the same small number of advisers that make up a substantial portion of the industry’s assets. While lowering the threshold will certainly further increase the number of advisers captured, it will do so without representing a substantially greater portion of the overall industry assets.

¹⁶ See Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Release No. IA-3308; File No. S7-05-11 (Oct. 31, 2011) at 31.

2. Large Private Equity Adviser Reporting Generally

The Proposal seeks to amend Form PF's Section 4 to require more disclosures from large private equity fund advisers of portfolio company-level information, including fund strategies, their use of leverage, controlled portfolio companies and their borrowings, investments in different levels of the same portfolio company's capital stack, and portfolio company restructurings or recapitalizations. Although we discuss certain of these in turn further below, as a general matter, the Committees believe that the increased reporting required by the Proposal would create undue burdens on investment advisers and increase expenses to advisers, which in turn may be passed along to clients either directly or in the form of increased fees. The Committees are also not certain of the benefit of providing much of this formation or how such information will ultimately be used.

a. Private Equity Fund Investment Strategies

The Commission proposes to add Question 68 to collect information about private equity fund investment strategies and would require advisers to report the percentage of capital deployed for their private equity funds to, among other strategies, private credit, private equity, real estate, annuity and life insurance policies, litigation finance, digital assets, general partner stakes investing, and "other" strategies. In this regard, the Commission noted, "We believe that reporting on investment strategies would allow the Commission and FSOC to understand and monitor better the potential market and systemic risks presented by the different strategies to both markets and investors. For example, a shift in private equity assets towards riskier strategies could provide valuable information about emerging systemic risks."¹⁷

The Committees are concerned about the manner in which the information collected in response to Question 68 will be used by the Commission and FSOC and the criteria against which the Commission and FSOC will assess the risk profile of particular strategies. Because the Proposal does not describe any particular framework under which an investment strategy would be considered to present a greater degree of risk, it appears that any assessment would be qualitative in nature (or, worse, arbitrary). The Committees are concerned about the extent to which any such risk assessments could have unintended consequences or impose an undue burden on advisers, for example, by informing potential rulemakings or policies of the Commission's examination program on the basis of an inaccurate qualitative risk assessment. The Committees therefore respectfully request that Question 68 be deleted. In the alternative, the Committees ask that the information collected in response to Question 68 not be used to inform future Commission rulemakings or the criteria on which the Division of Examinations identifies registrants for examination.

b. Restructuring/Recapitalization of a Portfolio Company

The Proposal would require additional information regarding restructurings or recapitalizations of the reporting fund's portfolio companies. The Committees do not believe that this increased disclosure is justified or is the most efficient way of gathering additional information desired by the Commission, for the reasons stated below.

The Commission states that it believes that data on portfolio company restructurings and recapitalization would be useful to FSOC regarding the extent to which activities of private funds pose systemic risk, and would provide the commission with targeted information for use in its regulatory program.¹⁸ However, information about restructurings will not necessarily provide the Commission or FSOC with information about financial risk to portfolio companies. Private funds may restructure or

¹⁷ See The Form PF Release, at 55.

¹⁸ See The Form PF Release, at 9.

recapitalize portfolio companies for a multitude of reasons, most of which are unrelated to financial stress or distress of ongoing investments. For example, turnaround funds acquire companies that are in financial stress or distress and recapitalize them as part of their investment strategy, leading to an overall improvement of the companies' financial situations. Other private funds often refinance or recapitalize portfolio companies to take advantage of better economic terms that become available over time, either based on changing market conditions or improvements in the company's financial performance. Accordingly, there is not necessarily any positive correlation between the data the Commission seeks to receive and systemic risk or regulatory issues relating to portfolio companies of private funds. Moreover, information about restructurings and recapitalizations will not necessarily provide the Commission with information about systemic risk to private funds themselves, because a fund's investment in a portfolio company would not necessarily be impaired as a result of a refinancing or restructuring. For instance, the refinancings described in the above examples would tend to enhance the value of the funds' investments in their portfolio companies, demonstrating that in many cases such restructurings or recapitalizations have nothing to do with system risk. Reporting of such events only documents a single event for a company without any contextual information of why such event took place. For these reasons, the Committees believe it would be more useful for the Commission to narrowly tailor the definition of "restructuring" and "recapitalization" to include only those restructurings or recapitalizations that are due to post-investment financial stress or distress of a portfolio company, or otherwise lead to an impairment of the value of a fund's investment in a portfolio company.

The Committees also believe that, if financial restructurings of private companies are considered a reliable indicator of systemic risk, the Commission should be seeking this data from all private companies—not just those controlled by advisers to private funds. Thus, obtaining data solely from private fund sponsors would give an incomplete and inaccurate picture of the level of systemic risk.

The Commission states that post-investment period restructurings and recapitalizations would give the Commission and FSOC more information about the current market environment.¹⁹ It is unclear why the Commission would only take post-investment period restructurings into account. As described above, if the reporting of restructurings were required on Form PF, the Committees believe it should be tied to restructurings or recapitalizations that are due to post-investment financial stress or distress of a portfolio company, or otherwise lead to an impairment of the value of a fund's investment in a portfolio company. The Committees believe this is a better indicator of systemic risk than looking at post-investment period restructurings or recapitalizations, which the Committees believe is an arbitrary distinction, since companies may also run into financial difficulties during a private fund's investment period.

The Committees respectfully ask the Commission to exempt private fund advisers from reporting on restructurings or recapitalizations if any of the following are true: (i) a core component of the reporting fund's investment strategy is to invest in stressed or distressed companies or the reporting fund otherwise employs a turnaround strategy, (ii) such restructuring or recapitalization was with respect to a portfolio company not controlled by the reporting private fund adviser; or (iii) such restructuring or recapitalization was otherwise consummated at the initiative of a third party not affiliated with the reporting fund adviser. A private fund that engages in restructuring as a fundamental component of its investment strategy should be exempted from this reporting requirement because restructurings by these funds are not necessarily triggered by post-acquisition financial stress or distress of a portfolio company, and restructurings engaged in by these advisers are more likely to enhance the value of the applicable portfolio companies. An adviser that has made a non-controlling investment (whether through one or multiple of the private funds it manages) should also be carved out of this reporting requirement because such adviser would not have initiated such restructuring or recapitalization. To the extent the Commission is, as it indicated, seeking to

¹⁹ See The Form PF Release, at 58–59.

obtain information in connection with its examination and investigation efforts, there is too great a risk that inaccurate conclusions will be drawn from reporting by advisers with non-controlling investments. The Committees note that such non-controlling investments will typically be made alongside other investment advisers who would make (and presumably also report) the decision to restructure the applicable company. A non-controlling adviser's reports would therefore be duplicative of the reports from controlling advisers, and moreover a non-controlling adviser may not have all of the information that is necessary to accurately report. Restructurings undertaken at the initiative of a party other than the reporting adviser should be excepted from the reporting requirement for the same reasons.

c. Investments in Different Levels of a Single Portfolio Company's Capital Structure by Related Funds

The Proposal would require reporting on Form PF of investments in different levels of a portfolio company's capital structure. The purpose of this requirement, as described in the Proposing Release, is to identify circumstances under which such practice would occur in order to monitor market trends regarding this practice and enhance the Commission's investor protection efforts.

While the Committees recognize that these types of investments may involve additional or more acute conflicts of interest than would otherwise be the case (depending on the circumstances), the Committees believe that those conflicts are more appropriately monitored through other compliance monitoring tools at the Commission's disposal, in particular in forums that allow for a more targeted analysis. It is not clear to the Committees that this information will provide meaningful value in the context of systemic risk monitoring for which the Form PF is designed, especially in light of the potential breadth of the question and the wide variety of very different structures that may fall in scope, as noted below.

As currently formulated, the proposed question does not clarify what constitutes different classes, series or types of securities in a portfolio company for purposes of this question. As a result, the question may be read to include a wide range of commonly used transaction structures that do not give rise to the types of conflicts of interest concerns that appear to have prompted the Proposal and that, if included, would substantially increase the reporting burden while also reducing the utility of the data collected for purposes of monitoring related systemic risks. For example, it is very common for private equity funds to invest in portfolio companies indirectly through different holding vehicles, blockers, aggregators or other intermediate vehicles for tax, regulatory, administrative or other reasons. In many cases, these intermediate entities may be capitalized through a combination of debt, equity and other instruments. If the question is adopted, the Committees believe there would be benefit in clarifying that these types of intermediate structures are not "in scope" where the investment in the underlying operating company itself is in the same type of security.

In addition, the Proposal does not differentiate the facts and circumstances under which investments in different levels of the same portfolio company's capital structure are made, which may vary significantly. For example, a fund may make a follow-on investment in new debt issued by an existing portfolio company when the other funds that also invested in the same portfolio company have exhausted their available capital or are subject to contractual restrictions to make follow-on investments. This raises meaningfully different issues than a situation where one reporting fund invests solely in the equity, and another reporting fund invests solely in the debt, of a portfolio company. Similarly, the equity and/or debt positions may be either control or minority positions. As a result, the proposed question is likely to yield data that is difficult to compare at a systemic level.

d. Other Topics

In addition to the expansions to Form PF summarized and commented on above, the Committees recognize that the Proposed Rule is also seeking information on fund-level borrowings, the financing of portfolio companies by parties related to the adviser, floating rate borrowings of controlled portfolio companies (“CPCs”), CPCs owned by private equity funds and events of default, bridge financings to CPCs and the geographic breakdown of investments. In the case of certain of these proposals, the Committees are concerned that the Commission believes that each of these practices are necessarily indicative of abusive or conflicted behavior that warrants monitoring and policing or practices that are so prevalent that they warrant the same.

In some cases, such as the proliferation of the use of fund-level borrowings, in the early-years of the development of this market practice, the adoption of such facilities was sought by as many in the investor community as it was by fund general partners themselves. Beyond this, there is no particular “magic” as to how these facilities work such that the provision of information on Form PF is likely to afford the Commission with any more insight into how private equity funds obtain leverage than the Commission probably already has (beyond the sheer number of funds that implement this practice). The Commission noted that the concern around the practice is exacerbated for investors with commitments to multiple private equity funds because advisers may call capital simultaneously—particularly when liquidity is generally constrained across the market resulting in investors receiving large, concurrent capital calls. This indeed occurred at the beginning of the Covid-19 Pandemic. Any implied concern regarding this practice, however, should recognize that investors who make “dry” commitments to private funds should bear the responsibility of ensuring that they have set aside appropriate cash reserves to fund their commitments, regardless of when a particular fund is likely to call capital (whether because it uses leverage or not). Moreover, the Committees fail to see how the availability of information on Form PF regarding information on each borrowing, the total dollar amount available and the average amount borrowed could give any insight into the possibility of mass capital calls. If anything, such information is more readily obtainable from the banks that lend to private equity funds.

In other cases, such as the proposal to add Question 67 that would require an adviser to report on how many CPCs a reporting private equity fund owns, the Committees do not understand how such information has any relationship to fund concentration risk or the “interconnectedness of private equity funds and their portfolio companies”. There is an entire category of private equity funds (*i.e.*, buyout funds) whose sole purpose is to acquire control of private companies. Most of these funds contain single-investment concentration limits; however, these limits have nothing to do with the fact that these funds assume control and everything to do with prudent portfolio construction and diversification. Indeed, most funds that do not assume control of the portfolio companies in which they invest also contain single-investment concentration limits. As such, collecting information on the number of CPCs that a particular fund holds will yield very little useful information to the Commission beyond identifying which funds pursue a controlled buyout strategy.

The Committees respectfully ask the Commission to reconsider the inclusion of these disclosure requirements if the belief is that extracting such information will ultimately be useful to the Commission for the reasons stated in the Proposal. As noted above, the Committees do not believe it will be.

C. Large Liquidity Fund Adviser Reporting

The Proposal would require that liquidity fund advisers with at least \$1 billion in AUM report substantially the same information that money market funds would report on Form N-MFP.

The Committees support the notion that this part of the Proposal represents a fundamental shift from the original intention of Form PF (*i.e.*, to assist the FSOC in its monitoring obligations under Dodd Frank)²⁰ to the protection of alternative investment investors. It is not clear to the Committees, however, that this enhanced reporting requirement would enhance monitoring capabilities, yet the Proposal would seem to enhance the Commission's regulatory and enforcement function. The Committees question whether more data is in fact necessary. What will the FSOC or the Commission do with the extra information, as it is unclear how it would be used to help investors?

As with all threshold reductions or reporting expansions, the Commission should balance the need for such expansion with the burden and economic costs to the industry's participants. Here, as Jessica Wachter, Chief Economist and Director of the Division of Economic and Risk Analysis, acknowledged during the Open Meeting for the Proposal, increased reporting requirements likely would increase costs for private fund advisers, which she expected would be passed on to investors.²¹

* * *

The Committees appreciate the opportunity to comment on the Proposal. If we can be of any further assistance in this regard, please contact Patrick Campbell or Michael Hong at the contact information provided below.

Respectfully,

Patrick T. Campbell
Chair, Compliance Committee

Michael S. Hong
Chair, Private Investment Funds Committee

John Fitzgerald
Chair, Investment Management Regulation Committee

cc: The Honorable Gary Gensler
The Honorable Caroline Crenshaw
The Honorable Allison Herren Lee
The Honorable Hester Peirce

Drafting Subcommittee:

The Committees would like to express their gratitude to Adam D. Gale and Jeffrey A. Slavin of Baker & Hostetler LLP, and certain members of the Committee on Compliance and the Committee on Private Investment Funds for their assistance in drafting this letter.

²⁰ See Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, Release No. IA-3308; File No. S7-05-11 at 17 ("Form PF is primarily intended to assist FSOC in its monitoring obligations under the Dodd-Frank Act, but the Commissions may use information collected on Form PF in their regulatory programs, including examinations, investigations and investor protection efforts relating to private fund advisers.").

²¹ SEC Open Meeting. January 26, 2022, 10:00 AM.