April 25, 2022

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

Re: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (File No. S7-03-22, RIN 3235-AN07); 87 Fed. Reg. 16,886 (Mar. 24, 2022)

Dear Ms. Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned Proposed Rule ("Proposal" or "Release") issued by the Securities and Exchange Commission ("SEC" or "Commission"). The Proposal, if adopted, would implement a variety of essential improvements in the regulation of the private funds markets, making this increasingly important financial sector substantially more fair and transparent.

First, the Proposal would enhance investor protection and transparency by requiring more complete and standardized disclosure of fees, expenses, and fund performance. Second, it would restrict or prohibit certain sales practices, conflicts of interest, and compensation schemes that are contrary to the public interest and investor protection. Third, it would prohibit preferential treatment of some investors by private fund advisers with respect to redemptions and disclosures, and condition other forms of preferential treatment on disclosure of that preferential treatment to existing and prospective investors. Fourth, it would strengthen the accounting regime applicable to private funds by requiring annual financial statement audits of all advised funds. Finally, it would require private fund advisers to maintain books and records to facilitate the Commission's examination efforts and to promote a culture of compliance at private funds.

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

Whether or not the Proposal represents, as some critics claim, a "sea change,"[2] it is without question appropriate and in fact long overdue. All of these reforms are sorely needed given the appalling litany of unfair, predatory, and opaque practices that have become standard practice in the world of private fund advisers. These reforms are also well within the authority delegated by Congress to the Commission in the Investment Advisers Act of 1940 and the Dodd-Frank Wall Street Reform and Consumer Protection Act. And they will certainly advance the Commission's mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. The benefits of this Proposal are far-reaching, affecting not only the wealthy individuals who invest in private funds but also the millions of everyday Americans who participate indirectly in these markets through pension or mutual funds. The $18 trillion private funds market has played an increasingly important role in our capital markets, with implications for systemic stability as well as investor protection, with no signs that its growth is abating. The Commission should move swiftly to enact this Proposal to better protect investors and our capital markets.

BACKGROUND

The value of private fund assets in private markets is vast and growing. According to Form ADV data, there are more than 5,000 registered private fund advisers, representing 35% of all Commission-registered advisers, with over $18 trillion in assets under management.[3] This large pool of capital, which is roughly equivalent to the combined assets under management in the entire countries of the United Kingdom, France, and Germany,[4] is obviously significant to the global economy, and it, therefore, warrants meaningful oversight by the Commission.

This importance is even more pronounced, however, in light of the sources of these assets that are flooding into the private markets. One common misconception is that private markets and private funds are only of concern to "well-heeled investors." This ignores that everyday Americans are, in fact, exposed to private funds in a number of ways, most notably through pension plans. Since the Financial Crisis of 2008 and the lasting low-interest rate environment that has followed it, institutional investors representing pension systems, university, and non-profit foundation endowments, and mutual funds have invested heavily in private markets in search of yield. For example, the average U.S. public pension's capital allocation to private equity alone is up nearly 50% from 2010 to 2021, with some large pension plans increasing their private equity allocation targets to 17% of their portfolios.[5] Thus, private funds play a key role in managing the assets of retail customers, largely in the form of retirement savings.

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2 Comm'r Hester M. Pierce, Statement on Proposed Private Fund Advisers; Documentation of Investment Adviser Compliance Reviews Rulemaking (Feb. 9, 2022), https://www.sec.gov/news/statement/peirce-statement-proposed-private-fund-advisers-020922 ("Today's proposal represents a sea change").

3 Release at 16,887.

4 European Fund and Asset Mgmt. Ass'n, *An overview of the asset management industry: Facts and figures*, 5 (Dec. 2021), https://www.efama.org/sites/default/files/files/Asset%20Management%20Report%202021_3.pdf.

5 Heather Gillers, *Retirement Funds Bet Bigger on Private Equity*, Wall Street Journal (Jan. 10, 2022), https://www.wsj.com/articles/retirement-funds-bet-bigger-on-private-equity-11641810604 ("The $75 billion Los Angeles County Employees Retirement Association lifted its private equity target to 17% of its portfolio in May from 10% while dialing back its target for stock to 32% from 35%").

The statistics drive home the point. For example, in the fourth quarter of 2020, public pension plans had $1.5 trillion invested in private funds while private pension plans had $1.248 trillion invested in private funds, "making up 13.3 percent and 10.9 percent of the overall beneficial ownership in the private equity industry, respectively."[6] In other words, oversight of private funds is not just oversight over the wealth of the richest Americans. Rather, it is oversight over billions of hard-earned dollars belonging to everyday Americans, accumulated over a lifetime of productive work and set aside to secure their retirement.

In the aftermath of the 2008 Financial Crisis, and to bring more transparency to private funds and advisers operating in private markets, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). Recognizing the importance of transparency to protecting markets, investors, and the economy more broadly, Congress passed the Dodd-Frank Act, in part, to "aggressively address gaps in information" related to private funds and other previously opaque financial intermediaries and instruments.[7] Among a vast array of other reforms, the Dodd-Frank Act amended the Investment Advisors Act in several key ways to bring more regulatory oversight to private funds and private fund advisers. Specifically, Congress enacted the following changes to laws affecting private fund advisers:

- repealed the exemption from registration for private fund advisers in Section 203(b)(3) of the Investment Advisers Act;[8]

- required the Commission to impose registration, recordkeeping, and reporting requirements on private funds advisers;[9] and

- delegated to the Commission the authority to require private fund advisers to provide simple and clear disclosures to investors and prohibit or restrict certain activities by private fund advisers the Commission deems "contrary to the public interest and the protection of investors," in Section 211(h) of the Investment Advisers Act.[10]

These reforms marked the beginning of a new era in the Commission's oversight of private fund advisers, enhancing its ability both to protect investors and to identify the build-up of systemic risk in our financial system.[11] However, the rules implementing this framework have remained

6 Amendments to Form PF To Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers, 87 Fed. Reg. 9,105; 9,129 (Feb. 17, 2022).

7 Lloyd Dixon, Noreen Clancy & Krishna B. Kumar, *Hedge Funds and Systemic Risk*, Rand Corp., xix (2012), https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1236.pdf.

8 Dodd-Frank Wall Street Reform and Consumer Protection Act, § 403, Pub. L. No. 111-203, 124 Stat.1376 (2010).

9 Dodd-Frank Wall Street Reform and Consumer Protection Act, § 407, 408, Pub. L. No. 111-203, 124 Stat.1376 (2010).

10 Dodd-Frank Wall Street Reform and Consumer Protection Act, § 913(g), Pub. L. No. 111-203, 124 Stat.1376 (2010).

11 *See* Release at 16,887 (As explained in the Release, the Financial Stability Oversight Council uses the information gathered via the Form PF and Form ADV to "assess private fund impact on systemic risk").

weak and incomplete since the Dodd-Frank Act was signed into law. The Proposal recounts the shocking array of now common practices among private fund advisers that enrich advisers at the direct expense of investors.

The Proposal provides numerous examples of misconduct by private fund advisers that violated existing requirements of the Investors Advisers Act.[12] Examples of private fund advisers improperly charging fees and expenses to funds and investors, which negatively affected returns include: charging "broken deal" expenses despite the fund's contractual terms that those costs would be borne by the adviser; charging accelerated monitoring fees for services never meant to be performed; charging fees not associated with work for that fund; failing to account for write downs within the portfolio which led to excess management fees; and charging fees for travel and entertainment in excess of agreements. Additionally, the Commission has assembled an extensive list of examples of private fund advisers improperly valuing or marketing a fund's performance, including overvaluing assets leading to inflated management fees; failing to adhere to leverage limitations; marketing stale or cherry-picked track records; and marketing projected returns of a fund as actual returns. Examples of private fund advisers failing to disclose conflicts of interests include: an adviser to two different funds misallocating expenses between the funds to benefit one fund over another; moving top-performing traders from one fund to another fund with similar investment strategies, without disclosing the existence of the other fund to investors; charging a fund for services performed in-house by an operations group without disclosure; adding advisers to a portfolio company payroll; and requiring portfolio companies to pay certain bills that should have been assumed by the adviser. The record even includes examples of private fund advisers inserting clauses in agreements that limit or eliminate the advisers' fiduciary duty to investors, in effect creating a license to act in their own interests, which is in direct conflict with requirements of the Investment Advisors Act.[13]

Against this backdrop, it is clear that the Proposal is a vitally important next step in the effort to bring much needed transparency and fairness to this shadowy and often predatory marketplace.

OVERVIEW OF THE PROPOSAL

The Commission is proposing new rules and amendments under the Investment Advisers Act of 1940 to enhance investor transparency and prohibit certain activities of private fund advisers. Specifically, the Proposal would:

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[12] *See* Release at 16,888-16,890 (the Proposal's extensive examples of violations by private fund advisers is amply supported by enforcement actions, cases, and agency risk alerts); *see also, e.g.* SEC, Office of Compliance Inspections and Examinations Risk Alert: The Five Most Frequent Compliance Topics Identified in OCIE Examinations of Investment Advisers (Feb. 7, 2017), https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf; SEC, Office of Compliance Inspections and Examinations Risk Alert: Observations from Examinations of Investment Advisers Managing Private Funds (June 23, 2020), https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf; SEC, Division of Examinations Risk Alert: Observations from Examinations of Private Fund Advisers (Jan. 27, 2022), https://www.sec.gov/files/private-fund-risk-alert-pt-2.pdf.

[13] *See* 15 U.S.C. § 80b-6; 15 U.S.C. § 80b-15.

Disclosure

- Require registered investment advisers and those that are required to register with the Commission to prepare quarterly statements for any private funds they advise and distribute those statements to investors within 45 days after each calendar quarter end. Quarterly statements would be required to disclose, using certain standard methodologies, the private fund's:

    - fees and expenses, including detailed accounting of adviser compensation, offsets, rebates, and waivers; and
    - fund-level performance for both liquid and illiquid assets since inception and over prescribed periods of time;

Financial statements and fairness opinions

- Require private funds to obtain a financial statement audit annually, and upon liquidation, by an independent public accountant;

- Require a registered private fund adviser to obtain a fairness opinion from an independent opinion provider in connection with an adviser-led secondary transaction;

Prohibited practices

- Prohibit any private fund adviser from certain activities, including:

    - Charging fees for unperformed services;
    - Charging fees associated with investigations or examinations by a government or regulatory authority;
    - Reducing adviser clawbacks for tax purposes;
    - Limiting or eliminating liability for adviser misconduct such as breach of fiduciary duty;
    - Charging certain non-pro rata fees and expenses;
    - Borrowing money, securities, or other assets from a private fund client;

Limits on preferential treatment

- Prohibit any private fund adviser from providing preferential terms to investors regarding redemptions or information about portfolio holdings or exposures, and also require all other preferential treatment to be disclosed to current and prospective investors;

Books and records

- Require registered investment advisers to maintain books and records related to the proposed requirements; and
- Require all registered investment advisers to document annual review of their compliance policies and procedures.

COMMENTS

All of the reforms in the Proposal are appropriate and necessary and fully within the Commission's ample legal authority to regulate advisers. We focus primarily on the disclosure and audit requirements; the prohibitions against certain adviser practices; and considerations that should guide the economic analysis supporting the rule. However, we emphasize that all elements of the Proposal, including the books and records and documentation requirements, have value, as they will enhance the Commission's examination and enforcement efforts and instill a stronger culture of compliance among private fund advisers.

I. The Proposal's quarterly statement and mandatory independent audit requirements will bring more transparency to the opaque private funds markets.

The Proposal's quarterly disclosure statement and mandatory independent audit requirements will bring more transparency to the currently opaque private funds markets, specifically as it relates to fees, expenses, and fund performance. Currently, fund disclosures simply do not offer sufficient detail or clarity to enable investors—even sophisticated investors—to develop a clear understanding of the fees and expenses the fund must bear or how well the fund is actually performing. The quarterly statements required to be distributed to investors by private fund advisers will better inform investors about the fees and expenses charged to the fund and the performance of the fund since inception. This will not only better inform investors about their current investments but also bring a level of standardization and efficiency across the entire private fund market. Additionally, the mandatory independent audit requirement will help bolster investor confidence in private market valuations of portfolio assets and create a more level playing field between private fund advisers that currently obtain and disclose independent audits and those that do not.

Despite the sophistication of some institutional investors, fees and expenses charged by private fund advisers are often inscrutable and difficult to calculate due to complex offsets, waivers, and alternative fee arrangements.[14] While there will always be bad actors in any marketplace seeking to take advantage of investors, it is exceedingly difficult for even large institutional investors investing in private funds to fathom the fees and fund expenses they are paying for and whether or not they are justified. For example, the Washington State Investment Board, a large state pension fund with more than $180 billion in assets under management,[15] began

[14] Release at 16,888.
[15] Wash. State Inv. Bd., *40th Annual Report* (2021), https://www.sib.wa.gov/docs/reports/annual/ar21.pdf.

to categorize fees paid by the pension plan to private equity managers in 2020.[16] In categorizing fees into buckets, such as legal, travel, and bank fees, they realized that "about $70 million—or 45% of the money that went to reimburse private equity managers for fund expenses—was labeled 'other'."[17] This opacity has enabled private fund advisers, specifically private equity firms, to rack up billions of dollars in fees at the expense of retail and institutional investors that invest Americans' hard-earned retirement savings. Moreover, after the Dodd-Frank Act gave the Commission more insight into the inner workings of private equity funds, Commission examiners found that more than half of private equity firms were charging unknowing investors unjustified fees and expenses. These abusive practices included "miscalculating fees, improperly collecting money from companies in their portfolio and using the fund's assets to cover their own expenses."[18] The Proposal would improve transparency surrounding the currently opaque fee and expense practices of private fund advisers.

The Proposal would also help bolster investor confidence in fund-level performance, especially for funds with illiquid assets, and it would place private fund advisers on a more level playing field by requiring annual mandatory independent audits. As the Proposal points out, "a fund's adviser may use a high level of discretion and subjectivity in valuing a private fund's illiquid investments, which are difficult to value."[19] This leads to a powerful conflict of interest and creates a breeding ground for fraudulent conduct in the form of inflating asset prices due to the adviser's financial incentives. For example, an adviser could be incentivized to value an illiquid investment at an inflated price to boost fund-level performance metrics. This could serve the interests of the adviser in two ways: first, it could lead to more fees depending on the fee structure of the fund; and second, it could enable the adviser to attract additional investors and capital due to inflated fund-level performance. Requiring private fund advisers to disclose independent audits to investors on an annual basis would help protect investors from inflated valuations by unscrupulous advisers and raise investor confidence in the private fund markets generally.

The Commission has ample legal authority to require private funds advisers to provide simple and clear disclosure of information to investors in connection with fees, expenses, and fund performance, in addition to requiring independently audited financial statements. Section 211(h)(1) of the Investment Advisers Act, as amended by the Dodd-Frank Act, provides that the Commission shall "facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationship with brokers, dealers, and investment advisers, including any material conflicts of interest."[20] In accordance with Section 211(h)(1), the Proposal will require

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[16] Sabrina Willmer, *Private Equity's Opaque Costs Mystify the Pensions That Pay Them*, Bloomberg (Mar. 29, 2022), https://www.bloomberg.com/news/articles/2022-03-29/private-equity-firm-fees-create-headache-for-pension-plans#:~:text=Private%20Equity's%20Opaque%20Costs%20Mystify,to%20research%20to%20%E2%80%9Cother.%E2%80%9D.

[17] *Id.*

[18] Alan Katz, *Bogus Private-Equity Fees Said Found at 200 Firms by* SEC, Bloomberg (Apr. 7, 2014), https://www.bloomberg.com/news/articles/2014-04-07/bogus-private-equity-fees-said-found-at-200-firms-by-sec.

[19] Release at 16,912.

[20] 15 U.S.C. § 80b-11(h)(1).

private fund advisers to provide simple and clear disclosures to investors in the form of quarterly statements that detail the terms of the relationship, specifically as it relates to how fees, expenses, and fund performance are calculated. Likewise, the Proposal's mandatory independent audit disclosure requirement would provide additional disclosures to investors that will help mitigate some of the powerful conflicts of interest motivating private fund advisers, specifically those relating to the valuation of illiquid assets, which is a primary determinant of an adviser's compensation. Financial statement audits are often used by the Commission to verify pooled investment vehicle investments.[21] The conflict of interest that is created by an adviser's discretion and subjectivity in the valuation of illiquid assets calls for additional disclosure in the form of an independent audit. It is clear that the Investment Advisers Act, as amended by the Dodd-Frank Act, delegates to the Commission the authority to require private fund advisers to provide their investors with the proposed disclosures relating to fees, expenses, and fund performance, along with independently audited financial statements.

II. The Proposal takes the right approach to restricting adviser-led secondary transactions and banning material conflicts of interests that do not serve investors or the markets more generally and cannot be cured by disclosure alone.

The Proposal correctly identifies the inherent conflicts of interest arising from adviser-led secondary transactions, and it prohibits the practice unless the adviser obtains an independent fairness opinion. In an adviser-led secondary transaction as defined by the Proposal, a transaction is "initiated by the investment adviser or any of its related persons that offer the private fund's investors the choice to:

(i) sell all or a portion of their interests in the private fund; or
(ii) convert or exchange all or a portion of their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons."[22]

Fairness opinions would help protect investors from unreasonable valuations by private fund advisers when the investors are seeking to liquidate some or all of their holdings in a given fund or roll their investments into a new fund. Coupled with the mandatory annual independent audit, a fairness opinion will provide a more reliable input that can assist investors in accurately assessing the value of their assets in a given fund and serve as a safeguard against inflated valuations. These requirements will prove to be especially important in the case of illiquid assets subject to wide discretion in assigning values.

In addition to the fairness opinion requirement, the Proposal provides other important protections for private fund investors. It appropriately prohibits certain activities that are contrary to the public interest and the protection of investors and cannot be cured by disclosure alone. The Proposal specifically identifies five activities that shall be prohibited for all private fund investment advisers, including: charging fees for unperformed services; assessing certain fees and

[21] Release at 16,912.
[22] Release at 16,918.

expenses associated with examinations or investigations by governmental or regulatory authorities; reducing clawbacks of performance-based compensation for tax purposes; limiting or eliminating liability for adviser misconduct, including breach of fiduciary duty; allocating certain fees and expenses on a non-pro rata basis; and borrowing from the fund.[23] In these cases, disclosure and consent are not sufficient. Even an optimal disclosure regime, although useful, is often by itself little more than a slightly enhanced version of "buyer beware." Disclosures can easily be designed to obscure the real significance of an adviser's conflict of interest, and consent can easily be extracted from eager (and often confused) investors who are seeking higher returns in a low interest rate environment.

This market imbalance is especially troubling in the context of attempts by advisers to limit their liability for breaches of fiduciary duty. This is now all too common. For example, a survey of limited partners investing in private equity found that 71% of respondents saw fiduciary duties modified or eliminated in at least half of their funds. This market trend is unacceptable. The fiduciary duty is the bedrock principle of the Investment Advisers Act, and the Commission must not allow it to be discarded through agreements between savvy advisers and their investors. We support the provisions in the Proposal that will prohibit or restrict these and other activities that pose harm to investors but cannot be cured by disclosure alone.

As with the disclosure and audit provisions, the Commission has the necessary legal authority to prohibit and restrict certain activities and advisor-led secondary transactions that the Commission finds contrary to the public interest and the protection of investors. Section 211(h)(2) of the Investment Advisers Act, as amended by the Dodd-Frank Act, provides that the Commission shall "examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors."[24] In accordance with Section 211(h)(2), the Proposal restricts the ability of an adviser to engage in an adviser-led secondary transaction without obtaining a fairness opinion. The Proposal finds that requiring a fairness opinion is necessary to mitigate or limit an adviser's inherent conflict of interest, which serves the public interest and better protects investors.[25] Likewise, the Proposal prohibits certain activities by a private fund adviser, a measure that is "necessary given the lack of governance mechanisms that would help check overreaching by private fund advisers."[26] The Proposal finds that these activities are contrary to the public interest and do not serve investors because they place the adviser's interests ahead of the investors' interests and can result in investors paying an unfair proportion of fees and expenses.[27] It is clear that the Investment Advisers Act, as amended by the Dodd-Frank Act, gives the Commission all of the authority it requires to implements these reforms.

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23 Release at 16,920.
24 15 U.S.C. § 80b-11(h)(2).
25 Release at 16,917.
26 Release at 16,920.
27 Release at 16,920.

III. The Commission should not be swayed by industry arguments that the Proposal fails a cost-benefit analysis.

To its credit, the Commission has over the last several months been issuing a wide range of proposed rules designed to enhance investor protection, improve the fairness and transparency of our securities markets, and prevent the accumulation of systemic risk in the financial system. As it pursues this agenda, the Commission has been, and will undoubtedly continue to be, bombarded with attacks on the economic analysis that it has conducted for each proposed rule. Yet these attacks are typically misguided and unfounded. They distort the Commission's legal obligation to conduct economic analysis; they exaggerate the alleged costs and burdens of compliance with the new rules; and they downplay if not ignore the enormous benefits that the rules will confer, both individually and as part of a collection of rules that work together to achieve market reforms. Indications are that this Proposal will indeed be subjected to these types of attacks,[28] but this strategy should not sway the Commission or persuade it to dilute the much-needed reforms in the Proposal. Throughout the rulemaking process, the Commission must be guided above all by the public interest and the protection of investors as it considers the economic impact of its rules, not by concerns over the costs of regulation imposed on industry.

Under the securities laws, the Commission has no statutory duty to conduct cost-benefit analysis. In reality, it's far more limited obligation is simply to consider, "**in addition to the protection of investors**, whether the action will promote efficiency, competition, and capital formation.[29] The Proposal appropriately considers these factors, along with the paramount goal of investor protection. For example, first and foremost, the Proposal will undoubtedly help protect investors from excessive fund fees and expenses, misleading performance metrics, and intense conflicts of interest that often motivate advisers to exploit fund investors. Second, the rule will promote efficiency by standardizing fee, expense, and performance disclosure across the industry, enabling institutional investors to more readily and accurately compare costs and anticipated returns across the private funds market.[30] Third, the Proposal will promote fair competition by eliminating information asymmetries that result from the currently opaque, confusing, and inconsistent fund disclosures that characterize the private funds markets, especially where those asymmetries arise from negotiated arrangements between funds and a select few investors with bargaining power.[31] Finally, the Proposal will promote capital formation by raising investor confidence in the securities markets and better equipping investors to identify optimal investment opportunities.[32]

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28 *See* David Blass, *SEC Overreaches in Proposed Rule Changes for Private Funds*, Bloomberg Law, Mar. 23, 2022, https://news.bloomberglaw.com/banking-law/sec-overreaches-in-proposed-rule-changes-for-private-funds; *See* Sullivan and Cromwell, *SEC Proposes Significant Rule Changes for Private Fund Advisers* (Feb. 16, 2022), https://www.sullcrom.com/files/upload/sc-publication-sec-proposes-significant-rule-changes-for-private-fund-advisers.pdf; *See* Yousuf I. Dhamee et al., SEC Proposes Broad Regulations Governing All Private Fund Advisers, Paul Hastings (Mar. 3, 2022), https://www.paulhastings.com/insights/client-alerts/sec-proposes-broad-regulations-governing-all-private-fund-advisers.

29 *See, e.g.,* 78 U.S.C. § 78c(f) (emphasis added).

30 Release at 16,955.

31 Release at 16,956.

32 Release at 16,956.

The Commission acknowledges that it is "unable to quantify certain economic effects because it lacks the information necessary to provide estimates or ranges of costs."[33] The Proposal further comments that it would be a fruitless endeavor to attempt to quantify some of the economic effects because the range would be so wide that is would not be informative or useful.[34] These are appropriate observations about the inevitable difficulties surrounding attempts at quantitative cost-benefit analysis; they are not failings of the Commission that suggest any legal infirmities in the Proposal itself. As the D.C. Circuit has explained, in *Nat'l Ass'n of Mfrs. v. SEC*,[35] "An agency is not required to measure the immeasurable, and need not conduct a rigorous, quantitative economic analysis unless the statute explicitly directs it to do so"—something that Congress never saw fit to impose on the Commission. Indeed, Better Markets has consistently argued that quantitative cost-benefit analysis is, for a host of reasons, a poor methodology for evaluating financial regulation: it is unreliable, speculative, and biased in favor of industry's relentless concerns with minimizing compliance costs while maximizing profits. Moreover, it consumes far more in agency resources than it is worth and ultimately sets the stage for a court challenge instigated by the disgruntled members of industry.[36]

Meanwhile, we note that the quantitative and qualitative costs to investors, the capital formation process, and the overall integrity of our markets of ***not*** moving forward with this rule are clear and formidable. They range from the huge losses incurred by investors victimized by the dreadfully inadequate disclosure regime and intense conflicts of interest currently pervading the private funds market, to the misallocations of capital that investors channel to unworthy funds based on murky and misleading fee disclosures and performance metrics. Just one bit of evidence supporting this sobering assessment can be found in the repeated risk alerts published by the Commission's staff over the past few years, detailing the repeated failures of private funds to act in accordance with their fiduciary duties.[37] Yet further evidence is scattered across the litany of settlements highlighted in the Release requiring private funds to pay fines and restitution for similar failures.[38]

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33 Release at 16,934.

34 Release at 16,934.

35 748 F. 3d 359 (D.C. Cir. 2014).

36 *See, e.g.,* Better Markets, Cost-Benefit Analysis in Consumer and Investor Protection Regulation: An Overview and Update (Dec. 8, 2020), https://bettermarkets.org/sites/default/files/Better_Markets_WhitePaper_CBA_Consumer_Investor_Investor_Protection_Dec-2020.pdf; Better Markets, Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC (July 30, 2012), https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf.

37 SEC, Office of Compliance Inspections and Examinations Risk Alert: The Five Most Frequent Compliance Topics Identified in OCIE Examinations of Investment Advisers (Feb. 7, 2017), https://www.sec.gov/ocie/Article/risk-alert-5-most-frequent-ia-compliance-topics.pdf; SEC, Office of Compliance Inspections and Examinations Risk Alert: Observations from Examinations of Investment Advisers Managing Private Funds (June 23, 2020), https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf; SEC, Division of Examinations Risk Alert: Observations from Examinations of Private Fund Advisers (Jan. 27, 2022), https://www.sec.gov/files/private-fund-risk-alert-pt-2.pdf.

38 *See* Release at 16,888-16,889, n.10-15.

The plain fact is that the Commission has no statutory to quantify costs or benefits, weigh them against each other, or find that a rule will confer a net benefit before promulgating it. The rationale for Congress's decision to impose only a flexible obligation to consider three discrete economic factors is clear: requiring the Commission to conduct a resource-intensive, time consuming, and inevitably imprecise cost-benefit analysis as a precondition to rulemaking would significantly impair the agency's ability to implement Congress's regulatory objectives. The industry's desire to have its costs prioritized over all other costs (what they falsely refer to as "cost-benefit analysis") does not change the law, the reasoned basis for the law, or the underlying policy. The Commission was established for the purpose of implementing the securities laws, and its primary duty is to achieve the legislative objectives of those laws: protecting investors and the public interest from fraud, abuse, and manipulation in the securities markets.

CONCLUSION

We hope these comments are helpful as the Commission finalizes the Proposal.

Sincerely,

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