

Via E-Mail

April 7, 2022

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

Re: File No. S7-03-22

Dear Madam Secretary:

I am writing of behalf of the Council of Institutional Investors (CII) in response to the Securities and Exchange Commission's (SEC or Commission) proposed new rules under the Investment Advisers Act of 1940<sup>1</sup> establishing certain requirements for registered investment advisors to private funds (Proposed Rules).<sup>2</sup>

CII is a nonprofit, nonpartisan association of United States (U.S.) public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.<sup>3</sup>

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<sup>1</sup> See Investment Advisers Act of 1940, Pub. L. No. 115–417 (as amended through Jan. 3, 2019), *available at* <https://www.govinfo.gov/content/pkg/COMPS-1878/pdf/COMPS-1878.pdf>.

<sup>2</sup> See Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 5,955, 87 Fed. Reg. 16,886, 16,886 (proposed Feb. 9, 2022), <https://www.federalregister.gov/documents/2022/03/24/2022-03212/private-fund-advisers-documentation-of-registered-investment-adviser-compliance-reviews>.

<sup>3</sup> For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

As the leading voice for effective corporate governance and strong shareholder rights, CII has long held the view that private fund advisors should provide disclosures that:

[F]oster transparency and accountability throughout the capital markets, thus enhancing confidence in the markets. They would also . . . guard against misuse of fund assets and abuses of the power inherent in large pools of capital.<sup>4</sup>

Our long-standing view of the need for improved private fund advisor disclosures has been confirmed by the “work of the Division of Exams, [in which] the Commission has identified, among other things, many concerning examples of private fund advisers’ . . . inconsistent disclosures, and improper allocations of fees and expenses.”<sup>5</sup>

In addition, a recent Bloomberg analysis of data collected from more than two dozen U.S. public pension plans indicates that:

[M]ost of those investors aren’t tracking details of so-called partnership expenses across their private equity portfolios [because] . . . the task is too difficult [as a result of] . . . fund managers . . . reporting the costs in vastly different ways or fail[ing] to break out expenditures at all.<sup>6</sup>

In furtherance of our long-standing view, on October 28, 2021, CII submitted a letter to SEC Chair Gary Gensler (October Request) expressing “our strong support for the October 26, 2021, written request of the Institutional Limited Partners Association (ILPA) and the institutional members of the ILPA<sup>7</sup> seeking a [SEC] ‘rulemaking action that would mandate the regular

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<sup>4</sup> Investors’ Working Group, U.S. Financial Regulatory Reform: The Investors’ Perspective 17 (July 2009), [https://www.cii.org/files/issues\\_and\\_advocacy/dodd-frank\\_act/07\\_01\\_09\\_iwg\\_report.pdf](https://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_report.pdf). Following its issuance, the Investors’ Working Group report was reviewed and subsequently endorsed by the CII board and membership. For more information about the Investors’ Working Group, please visit CII’s website at [https://www.cii.org/investors\\_working\\_group](https://www.cii.org/investors_working_group); see, e.g., Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Maxine Waters, Chair, Committee on Financial Services, United States House of Representatives et al. 2 (Nov. 25, 2019), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/November%2025%202019%20Letter%20to%20Committee.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/November%2025%202019%20Letter%20to%20Committee.pdf) (“We continue to support improvements to the disclosures provided by private equity managers to member funds, including fee and expense reporting.”).

<sup>5</sup> Commissioner Caroline A. Crenshaw, Private Fund Advisers Proposal – Statement in Support of Accountability Enhancing Updates (Feb. 9, 2022), <https://www.sec.gov/news/statement/crenshaw-private-fund-20220209>; see Div. of Exams, Risk Alert: Observations from Examinations of Private Fund Advisers 1 (Jan. 27, 2022), <https://www.sec.gov/files/private-fund-risk-alert-pt-2.pdf> (“In light of the significant role of private fund advisers in the financial markets, we are publishing this risk alert detailing additional observations: (A) failure to act consistently with disclosures; (B) use of misleading disclosures regarding performance and marketing; . . .”).

<sup>6</sup> Sabrina Willmer, *Private Equity’s Opaque Costs Mystify the Pensions That Pay Them*, Bloomberg, Mar. 29, 2022, available at <https://www.bloomberg.com/news/articles/2022-03-29/private-equity-firm-fees-create-headache-for-pension-plans>.

<sup>7</sup> Letter from Steve Nelson, Chief Executive Officer, Institutional Limited Partners Association (ILPA) et al. to Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission 1 (Oct. 26, 2021), [https://ilpa.org/wp-content/uploads/2021/10/26.10.21\\_ILPA-Member-Letter-to-SEC-on-Fee-Transparency.pdf](https://ilpa.org/wp-content/uploads/2021/10/26.10.21_ILPA-Member-Letter-to-SEC-on-Fee-Transparency.pdf).

reporting of all direct and indirect fees and expenses charged by private fund advisers and their affiliates to investors in private funds.”<sup>8</sup>

CII commends the Commission for promptly responding to the October Request. And we agree with SEC Chair Gensler that the Proposed Rules’ provisions would appropriately “increase transparency and would provide comparability to fund investors on a quarterly basis around three items:

- Fees, such as management fees, performance fees, and portfolio investment fees;
- Expenses; and
- Performance metrics.”<sup>9</sup>

Consistent with the October Request, the following CII comments focus on the Proposed Rules’ provisions regarding quarterly disclosure of fees and expenses and performance.<sup>10</sup>

### **Fee and Expense Disclosure**

CII supports the Proposed Rules’ provisions that an investment advisor that is registered or required to be registered and that provides investment advice to a private fund is “required to . . . provide to each of the private fund investors . . . a quarterly statement containing certain information regarding fees and expenses, including fees and expenses paid by underlying portfolio investments to the adviser or its related persons . . . .”<sup>11</sup>

We agree with the SEC that the proposed fee and expense disclosures could “lower the cost to investors of monitoring fund fees and expenses, lower the cost to investors of monitoring any conflicting arrangements, improve the ability of investors to negotiate terms related to the governance of the fund, and improve the ability of investors to evaluate the value of services provided by the adviser and other service providers to the fund.”<sup>12</sup>

We also agree, as indicated in the Bloomberg analysis, that some CII’s members and other “sophisticated investors have reported difficulty in measuring and evaluating compensation made to fund advisers and determining if adviser fees comply with the fund’s governing agreements [and the proposed fee and expense disclosures] . . . would address these difficulties.”<sup>13</sup>

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<sup>8</sup> Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to The Honorable Gary Gensler, Chair, Securities and Exchange Commission 1 (Oct. 28, 2021), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2021/October%2028%202021%20SEC%20ILPA%20letter%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2021/October%2028%202021%20SEC%20ILPA%20letter%20(final).pdf).

<sup>9</sup> Chair Gary Gensler, Statement on Private Fund Advisers (Feb. 9, 2022), <https://www.sec.gov/news/statement/gensler-statement-private-fund-advisers-proposal-020922>.

<sup>10</sup> 87 Fed. Reg. at 16,976-77 (proposed § 275.211(h)(1)-2).

<sup>11</sup> *Id.* at 16,944; *see id.* at 16,976-77 (proposed § 275.211(h)(1)-2(b)-(d)).

<sup>12</sup> *Id.* at 16,944.

<sup>13</sup> *Id.* at 16,945; *see* Letter from State Treasurers and Comptrollers to Mary Jo White, U.S. Securities & Exchange Commission (July 21, 2015), [https://comptroller.nyc.gov/wp-content/uploads/documents/SEC\\_SignOnPDF.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/SEC_SignOnPDF.pdf) (“Though private equity firms generally disclose information on all types of fees, it is often reported deep in annual financial statements and is not reported directly to limited partners on a quarterly basis.”).

Overall, we agree with Commissioner Allison Herren Lee’s conclusion that the proposed disclosure of fees and expenses would provide “detailed, simple, and clear information [that] would give retail and institutional investors alike standardized cost information in a straightforward and digestible, tabular format.”<sup>14</sup>

While CII supports the Proposed Rules’ provisions requiring the disclosure of fees and expenses at the fund level,<sup>15</sup> we note that many institutional investors have successfully negotiated for fee and expense reporting provided at the pro-rata individual investor or limited partner (LP) level. We believe this information is both beneficial to understanding an individual investor’s ultimate costs and essential for those CII members that are required to provide an annual accounting of all investment costs to their own beneficiaries or governing bodies, often on a fiscal year cadence that does not align with annual reporting by the manager.

In our view, the final rule should be a minimum standard and not a maximum compliance threshold. We, therefore, respectfully request the Commission consider improving the final rule by requiring that private fund advisors provide pro-rata fee and expense reporting at the LP level upon request of the LP.

### **Performance Disclosure**

CII supports the Proposed Rules’ provisions that would require “standardized fund performance information in each quarterly statement provided to fund investors.”<sup>16</sup>

We agree with the SEC that as a result of the proposed performance disclosures many investors, including many CII members:

[W]ould find it easier to use information about the performance of their private fund investments. They may, for example, find it easier to monitor the performance of their investments and compare the performance of the private funds in their portfolios to each other and to other investments. In addition, they may use the information as a basis for updating their choices between different private funds or between private fund and other investments. In doing so, they may achieve a better alignment between their investment choices and preferences.<sup>17</sup>

And we share SEC Commissioner Caroline A. Crenshaw’s conclusion that “[t]his additional information should help private fund investors better assess the adviser’s performance and decide

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<sup>14</sup> See Commissioner Allison Herren Lee, Statement on Proposed Rules for Private Fund Advisors (Feb. 9, 2022), <https://www.sec.gov/news/statement/lee-private-fund-20220209>.

<sup>15</sup> 87 Fed. Reg. at 16,976 (proposed § 275.211(h)(1)-2(e)).

<sup>16</sup> *Id.* at 16,944; *see id.* at 16,976 (proposed § 275.211(h)(1)-2 (e)); *cf.* Investors’ Working Group, U.S. Financial Regulatory Reform: The Investors’ Perspective at 17 (“5. Institutional investors—including pension funds, hedge funds and private equity firms—should make timely public disclosures about their proxy voting guidelines, proxy votes cast, investment guidelines, and members of their governing bodies and report annually on holdings and performance.”).

<sup>17</sup> 87 Fed. Reg. at 16,946-47.

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whether to remain invested in a particular private fund, how to invest other assets, and whether to invest in private funds managed by the adviser in the future.”<sup>18</sup>

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Thank you for consideration of CII’s views. If we can answer any questions or provide additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeff Mahoney  
General Counsel

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<sup>18</sup> Commissioner Caroline A. Crenshaw, Private Fund Advisers Proposal – Statement in Support of Accountability Enhancing Updates.