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April 11, 2022

**File No. S7-03-22**
**SEC Release No. IA-5955**

Ladies and Gentlemen:

We write in response to the request by the Securities and Exchange Commission (the "Commission") for comments on the proposed amendments published in Release No. IA-5955, File No. S7-03-22 (the "Release"). Our comments are limited to the questions posed in Section II.C of the Release relating to adviser-led secondaries.

General Observations

In our experience, adviser-led secondaries can be of substantial benefit to private funds, their investors and their advisers. Properly implemented, adviser-led secondaries permit advisers and investors to advance important commercial objectives in a fair, efficient, transparent and collaborative manner. We believe the proposals in the Release generally seek to draw an appropriate balance between advancing and protecting the interest of investors while not overly burdening adviser-led secondaries or effectively precluding them. As discussed below, we have comments with respect to the proposed requirement for a fairness opinion and suggest alternatives, but we believe the basic framework contemplated by the proposals in the Release would permit advisers and investors in private funds to continue to implement adviser-led secondaries in a fair and balanced manner that advances their respective commercial interests and objectives.

The term "secondaries" is routinely used in the marketplace to describe a range of transactions, including adviser-led secondaries (as proposed to be defined in the Release), and to encompass a wide range of different transaction structures that achieve similar economic results. In light of the broad use of the term "secondaries", we make two comments with respect to the proposed definition of "adviser-led secondary

transaction" in the Release. First, we suggest the definition of "adviser-led secondary transaction" be revised to read as follows:

*"Adviser-led secondary transaction* means any transaction initiated by the investment adviser to a private fund or any of its related persons that requires private fund investors in such private fund to choose between:

(1) The direct or indirect disposition for cash of their interests in such private fund or in specified assets of such private fund; or

(2) The conversion or exchange of all or a portion of their interests in such private fund or such specified assets of such private fund for interests in another vehicle advised by the adviser or any of its related persons." (additional/replacement text underlined).

We respectfully suggest that the original proposed definition omitted the key component of adviser-led secondaries that the investors not have the option of the status quo – the investors are being offered only the choice between (1) being cashed out of their interest in a private fund or of their indirect interest in specified assets of a private fund or (2) rolling their investment into a different vehicle, with no option for the continuation of their investment in accordance with its original terms.

Second, as noted above, the expression "secondary" in the marketplace describes a range of transactions. If, in connection with the adoption of final rules, the Commission seeks to substantially expand the definition of "adviser-led secondary transaction" such that it would apply to additional forms of transaction that are outside the current proposed definition of "adviser-led secondary transaction", we respectfully request that the Commission seek additional comment from market participants on whether the requirements contemplated by the Release would appropriately apply to such other forms of transaction[1].

Proposed Requirement for Fairness Opinion

We note the proposed requirement in the Release for receipt of a "fairness opinion" in connection with adviser-led secondaries. We respectfully suggest an alternative definition of "fairness opinion", as follows:

[1] For example, a transaction in which a private fund (say, Fund II) sells 100% of an asset to another fund managed by the same investor (say, Fund III), without giving investors the right in connection with that sale to exchange their interests in Fund II for interests in Fund III, is sometimes referred to as a "secondary". While such a secondary might raise some of the same conflict concerns as adviser-led secondaries, the absence of investment discretion on the part of investors in Fund II or Fund III means that the appropriate response to that conflict should be very different and, in our experience, is usually directly addressed in fund documents.

"*Fairness opinion* means a written opinion stating that the value being attributed to any assets the subject of an *adviser-led secondary transaction* in such *adviser-led secondary transaction* is fair." (additional/replacement text underlined).

As noted above, adviser-led secondaries take many forms. In our experience, in all those forms there is a value imputed to the underlying assets the subject of the relevant adviser-led secondary, and any private fund investor that elects to be cashed out in accordance with such adviser-led secondary will receive cash (in accordance with the relevant distribution waterfall in the partnership agreement for the relevant private fund) as if the private fund had sold the relevant underlying assets for cash at that price. It is not, however, the case that the private fund itself always or even usually receives cash equal to the imputed value, and it is rarely the case that the investor receives cash in its pro rata share of that imputed value. Accordingly, we respectfully suggest that the definition of "fairness opinion" should speak not to prices paid or received but to "the value being attributed".

We recognize that, as a matter of investment banking practice, the effect of our proposed revisions to the definition of "fairness opinion" will likely convert the substance of the opinion-giver's analysis from a "fairness opinion" to that of a "valuation opinion". As a matter of investment banking practice, a "fairness opinion" should only be given to a party that has surrendered something in an exchange and should speak to whether that exchange is "fair" to that party. As a logical matter, then, a "fairness opinion" that the price for an asset is fair to the seller does not mean that it is fair to the buyer. In connection with adviser-led secondaries, the central question for each investor is whether to be a seller (i.e., elect the alternative that results in the investor being cashed out of its interest in whole or in part) or a buyer (i.e., elect the alternative of continuing its investment with different terms), and some investors may be sellers and some investors may be buyers. Accordingly, we suggest that the investors will be better served by an opinion that speaks directly to the fairness of the imputed value rather than the fairness of a price that in fact may or may not be paid.[2]

We support the Commission's proposed requirements in the Release with respect to the independence of the opinion giver, including disclosure with respect to prior transactions. We also respectfully suggest that the Commission revise the proposed rule to clarify that the effective date of the valuation as stated in the opinion can be any date within the 12 months preceding solicitation of participation by the investors in the relevant adviser-led secondary. For a variety of reasons, it is not unusual for a privately held company to perform an annual valuation process to set a value for the company; we do not see any reason why the execution of an adviser-led secondary involving an interest in that company should require a new opinion if a relatively recent independent opinion has already been obtained.

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[2] We note the statement in the Release that the Commission or its staff have seen "fairness opinions" in connection with adviser-led secondaries. The fact that some valuation firms have been willing to deviate from sound investment banking practice does not, in our view, justify the Commission imposing a rule requiring a consistent deviation from that practice.

We also strongly believe that the relevant opinion should be limited to the valuation of the relevant assets and should not be required to address any of the other terms of the proposed adviser-led secondary. In practice, the motivating force behind many adviser-led secondaries relates to matters such as liquidity and fee structure. It is not within the competence of an independent valuation firm or financial expert to opine as to the fairness (or even the value) of a proposal to grant or not grant an investor immediate liquidity with respect to an asset or a proposal to recalculate or not recalculate the base price for the determination of any performance fee. Those issues are uniquely within the prerogative of each investor, and it is quite foreseeable that different investors in the same fund will view the same issues very differently. Any opinion that purported to address these matters would most likely, in our experience, expressly or implicitly assume away these questions and thus provide limited value to investors.

We also respectfully suggest that an opinion should not be required in all cases. Consistent with the concept that the primary purpose for the opinion should be to assist investors in assessing the value of the relevant assets held by the private fund for the purpose of electing to be a seller or a buyer, we suggest that an opinion should only be required in the absence of any other external, independent and reliable indicator of value. There are at least two fact patterns that we suggest should give investors comfort as to the valuation of an asset held by the fund and thus obviate the need for a separate opinion. The first is if the asset is publicly traded. We believe investors in private funds being faced with an adviser-led secondary would not derive benefit from an opinion with respect to the valuation of securities that are otherwise publicly traded in an active market. The second fact pattern is if the asset has been the subject of a liquidity event that (1) is independent of the proposed adviser-led secondary, (2) involved an independent third party and (3) was completed within the 12 months preceding solicitation of participation by the investors in the relevant adviser-led secondary. Such a liquidity event might be a partial disposition of the asset to a third party or the introduction of a new third party investor. Whatever might be the facts, however, we respectfully suggest that a transaction between the private fund and an independent third party setting the value of the relevant asset should suffice for the purposes of investors. Should the Commission adopt final rules consistent with these suggestions, we would also support enhanced disclosure by the adviser to the investors as to the method of valuation selected and the basis for the adviser's decision not to seek an independent opinion but rather to provide an alternative indicator of value.

Other Questions Raised

We have addressed above a number of the questions posed by the Commission in the Release relating to adviser-led secondaries. In this section, we will address specifically a number of the Commission's other questions.

Question: Instead of requiring disclosure of any material business relationships between the adviser (or its related person) and the independent opinion provider, should the rule prohibit firms with certain business relationships with the adviser, its related persons, or the private fund from providing the fairness opinion? For example, if a firm has provided consulting, prime broker, audit, capital raising, or investment banking services to the

private fund or the adviser or its related persons within a certain time period – such as two or three years – should the rule prohibit the firm from providing the opinion? If so, should the rule include a threshold of materiality, regularity, or frequency for some or all of such services to trigger such a prohibition?

Response: We believe that a complete prohibition on certain business relationships would likely reduce the quality of the opinion providers, to the detriment of investors.

Question: Should the rule require the fairness opinion to state that the private fund and/or its investors may rely on the opinion? Why or why not?

Response: We respectfully but strongly recommend that the Commission not include any reliance requirement. This requirement would likely result in higher quality valuation firms refusing to give the opinions, and accordingly it would likely reduce the quality and usefulness of the opinions given.

We would welcome the opportunity to discuss any of the above issues further with the Commission. Please direct any inquiries to Richard Hall [redacted]) or David Perkins [redacted]).

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