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April 18, 2022

Vanessa A. Countryman, Esq.
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
(duplicate via e-mail to
rule-comments@sec.gov)

re: File Number S7-03-22
Private Fund Advisers; Documentation of Registered
Investment Adviser Compliance Reviews (Feb. 9, 2022)

Dear Madame Secretary:

I submit this comment letter with respect to certain policy aspects of the above-referenced release (the “Proposing Release”) regarding proposed rules (the “Proposed Rules”) under the Investment Advisers Act of 1940 (the “Advisers Act”),¹ in my personal capacity.² I am aware of other comment letters that have been submitted or that are being prepared for submission to the Commission; my views are generally in accord with those views recommending against the adoption of the Proposed Rules, and I do not reiterate here arguments that I know or understand are being (or will be) made in those other letters. Instead, those views are incorporated here by reference.

I am also aware of, and share, significant legal questions regarding the Commission’s authority to adopt some of or all the Proposed Rules; again, I do not burden this letter by reiterating those concerns here. The

¹ See Advisers Act Rel. No. 5955 (Feb. 9, 2022), available at <https://www.sec.gov/rules/proposed/2022/ia-5955.pdf>.

² I am and have been affiliated with Private Fund managers all of whom would be affected (some or all of them adversely) by the Proposed Rules. Depending on the form of any final rules that may be adopted by the Commission, how the affected funds respond to them, and how the funds’ investors respond in turn, I could have financial interests that would be adversely affected.

Commission has excellent lawyers on its staff to advise it in that regard, and other lawyers in the private sector are lending their expertise as well. I assume all the salient considerations will be raised and appropriately considered, either by the Commission or in a subsequent challenge if the Proposed Rules are adopted in whole or part. For present purposes, I simply note that the questions surrounding the Commission's authority to proceed with its proposals are substantial and troubling, and I adopt those comments as if set forth in this letter.

I understand from various sources that, if the Proposed Rules are adopted in something approaching the form in which they have been proposed, judicial challenges are likely.³ As a result, I urge the Commission to be very careful in this regard. In past years, the Commission has, I believe, adopted rules without sufficient regard to the extent of its legal authority and, in so doing, has impaired its reputation in the courts, ineluctably undermining the Agency's claim to deference in challenges to subsequent rules.⁴ Having served as the Commission's General Counsel (as well as its Chairman), I am sensitive to such concerns, and urge the Commission to exercise caution before adopting the current Proposed Rules, or anything remotely similar to them.

Historically, the Commission has generally and properly refrained from intervention in markets in the absence of a perceived significant market failure or inadequacy, particularly when, as here (and as discussed below) the investors in those markets are highly sophisticated (or have sufficient assets to hire highly sophisticated advisors), are easily capable of understanding and protecting their own interests, and the nature of the market is such that there are many participants operating competitively with whom those investors can interact.⁵

³ See, e.g., C. Cumming, "SEC Signals Shift in Attempt to Ban Certain Private-Equity Practices," WALL ST. J.L. (Feb. 10, 2022), available at <https://www.wsj.com/articles/sec-signals-shift-in-attempt-to-ban-certain-private-equity-practices-11644494400> (Noting the likelihood of industry challenges should the Proposed Rules be adopted).

⁴ As the Commission undoubtedly is aware, the current Supreme Court Term includes a challenge to the so-called *Chevron* doctrine—addressing the extent to which, if any, judicial deference should be accorded to agency determinations regarding statutory interpretations of their own authority. See *American Hospital Assoc., et al. v. Becerra* (argued Nov. 30, 2021).

⁵ See, e.g., E. Reed, "What Is a Sophisticated Investor?," SMARTASSET (Feb. 2, 2021), available at <https://smartasset.com/investing/sophisticated-investor> (Noting that "One way the [SEC] protects investors is by restricting who can put their money into particularly high-risk, loosely regulated or complex financial offerings . . . to what it calls the 'sophisticated investor'"); C. Fletcher, III, "Sophisticated Investors under the Federal Securities Laws," 1988 Duke L.J. 1081 (Dec. 1988), available at <https://www.jstor.org/stable/1372532?seq=1>.

With respect to the investors whose interests the Commission apparently is interested in protecting via the Proposed Rules, virtually all the meaningful funds to which the Proposing Release is directed are so-called “3(c)(7)” funds, specifically exempted from the requirements of the Investment Company Act of 1940 (the “ICA”).⁶ The terms of that exemption are such that the investors must (with extremely limited, and very seldom relevant, exceptions) be “qualified purchasers,” that is, generally, natural persons with at least \$5,000,000 in investments, or others with at least \$25,000,000 in investments. Recognizing that these are the investors to whom the Commission’s Proposed Rules are primarily directed is important for three reasons:

First, as embodied in the language of ICA §3(c)(7) itself, Congress has taken the approach, with which I concur, that such investors can “fend for themselves” and do not need over-intrusive governmental protection. The protections afforded these and all investors by the antifraud provisions of the federal securities laws are fully sufficient.⁷

Second, creating a regulatory scheme governing funds with such investors will add to the expense of operating a fund, and those expenses will ultimately be borne by those who invest in them.

Third, if a regulatory scheme of that nature is applied to such funds, there will be generated an ongoing substantial expenditure of public money to examine funds to ensure compliance and to bring enforcement proceedings in the case

⁶ 15 U.S.C. §80a-3(c)(7).

⁷ The Commission has previously opined that the

exclusion provided by section 3(c)(7) reflects Congress’ recognition that financially sophisticated investors are in a position to appreciate the risks associated with certain investment pools and do not need the protection of the 1940 Act.

See, e.g., “Trusts under the Will of Marion Searle,” SEC No-action Letter (Mar. 29, 2005) at n.3, available at <https://www.sec.gov/divisions/investment/noaction/searle032905.htm>. Vis-à-vis §3(c)(7), Congress expressly understood that

Generally, these investors can evaluate on their own behalf matters such as the level of a fund’s management fees, governance provisions, transactions with affiliates, investment risk, leverage, and redemption rights.

S. Rep. No. 293, 104th Cong., 2d Sess. 10 (1996).

of instances of noncompliance. Public funds should not be used on behalf of investors fully capable of protecting their own interests.

These concerns caution strongly against the establishment of an unnecessary regulatory structure.

Given that the market for investments in Private Funds is characterized by highly sophisticated investors in a competitive marketplace, and the terms of investments are the result of arm's-length bargaining, it is appropriate, and perhaps critical, to inquire why some investors, or organizations of investors, have supported the Proposed Rules, and have supported some research, such as that of Professor Clayton (discussed below)⁸ purporting to suggest a need for such rules. The answer is simple: inherent in arm's-length bargaining between sophisticated parties with available alternatives is the notion that neither side of the bargaining will dominate. As a result, it is perfectly rational for one side or the other to seek the assistance of outside parties, such as the Commission, to alter the equilibrium achieved through negotiations.

Also relevant to the inquiry is the nature of the market with which we are here concerned. The asset management market is massive, and highly competitive. No vendor in the market has anything approaching any sort of monopoly power, and there are extremely limited barriers to entry (although, as noted below, the Proposed Rules would operate to increase barriers to entry). The highly sophisticated investors referred to above have no shortage of managers who would like to manage their money. As the Proposing Release notes, there are some 44,378 private funds managed by registered investment advisers in the United States and thousands of other exempt reporting advisers, not to mention innumerable other asset managers on a global basis in what is essentially a global industry.⁹ All those asset managers are essentially offering one product: asset management services. It is among the most purely competitive

⁸ In his article, W. Clayton, "*High-End Bargaining Problems*," VANDERBILT L. REV. (forthcoming), (Curr. Draft, Jan. 8, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900197, and cited in the Proposing Release, Professor Clayton acknowledges (n. *)

[T]he Institutional Limited Partners Association for working with me on the design of the survey presented in this Article and for providing me with access to the full survey data. I am also thankful to . . . the 2021 Institutional Limited Partners Association Legal Conference for helpful comments and conversations. Thanks are also due to the many institutional investors who shared their perspectives with me on bargaining practices in the private equity industry.

⁹ Fed. Reg., p. 16,935.

markets in the world. It is a market singularly reflecting that allowing market forces to work naturally will be highly effective.

To that point, there has been no market failure or inadequacy indicating a need for regulatory intervention, and the Proposing Release suggests none. Rather, the Proposing Release generally offers two types of observations in attempting to justify the Proposed Rules. The first are conclusory assertions that certain activities proposed to be prohibited *could* involve adverse incentives, conflicts of interest, or *might* lead to fraud. A typical statement is the following:

To the extent that these charges [referring to expenses associated with an examination or investigation], even when disclosed, create adverse incentives for advisers to allocate expenses to the fund at a cost to the investor, they represent a *possible* source of investor harm.¹⁰

To what “adverse incentives” does this refer? Either the underlying investment management agreement provides for those expenses to be charged to the fund, or it does not. We should assume that investment managers will live up to their agreements, and there are available remedies if they do not. “Adverse incentives” should not come into play. And even then, these purported “adverse incentives” only “represent a *possible* source of investor harm” (emphasis supplied). To warrant a significant regulatory intrusion, as the Proposed Rules would unquestionably effect, especially in a highly competitive market with sophisticated investors, there should be some evidence that market forces have operated ineffectively. Indeed, the Proposing Release effectively concedes that there is little or no such evidence:

[S]everal factors make the quantification of many of these economic effects of the proposed amendments and rules difficult. For example, there is a lack of data on the extent to which advisers engage in certain of the activities that would be prohibited under the proposed rules, as well as their significance to the businesses of such advisers. . . . Similarly, it is difficult to quantify the benefits of these prohibitions, because there is a lack of data regarding how and to what extent the changed business practices of advisers would affect investors, and how advisers may change their behavior in response to these prohibitions.¹¹

¹⁰ Fed. Reg., p. 16948 (emphasis supplied).

¹¹ *Id.*

The only other “evidence” presented in support of this intrusion into a highly competitive market with sophisticated investors is a series of seemingly random market “observations.” But the only bases for these “observations” that are identified are citations to an extremely limited universe of cases—twenty-four cases are identified. Even assuming, solely for purposes of argument, that each of those cases represents, in fact, improper behavior by an asset manager,¹² twenty-four cases over several years involving a pool of thousands of asset managers hardly establishes a market failure or inadequacy, or any need for intervention.

Further, twenty-two of the twenty-four cases cited in the Proposing Release involved settlements, not litigated findings. Respondents in Commission enforcement proceedings settle them for a number of reasons. Some respondents did not engage in improper conduct but find it less expensive to settle than to defend. Some—most—fear the reputational harm accompanying a drawn-out enforcement action and settle primarily to avoid repeated doses of adverse publicity. Some respondents recognize that they violated the law (or even worse) and settle because they believe they would lose if the Commission brought an action.

Whatever the reason, control over the description of the alleged misconduct in a settled case rests with the Commission’s Enforcement Staff, and frequently reflects a one-sided view of what the actual transgressions, if any, or their materiality, may have been. Neither I, nor the Commission, can divine why a given case might have been settled, but a settled case does not, and cannot, provide evidence of underlying wrongful behavior.¹³

I turn to the specific content of the Proposed Rules.

Generally, the Proposed Rules fall into one of two categories: disclosure rules, mandating additional disclosures that Private Funds and/or those who manage them should make to existing or potential investors; and substantive rules, mandating or prohibiting certain specified conduct or activities.

I am generally supportive of disclosure-oriented rules, subject to the qualification that some disclosure requirements could be so constructed as unnecessarily to put some asset managers at a competitive disadvantage to others or could otherwise be more costly to market participants than the value of the benefits those disclosures theoretically might provide to investors; to the extent those circumstances prevail, I urge

¹² Under Rule 408 of the Federal Rules of Evidence, a settlement is not admissible “either to prove or disprove the validity or amount of a disputed claim”

¹³ *Id.*

careful consideration and caution. Otherwise, it is a fundamental tenet of economics that decisions, including investors' decisions, are only as good as the information on which they are based. Absent competing considerations, more disclosure is better, and that is the philosophy that underlies most, if not all, of the federal securities laws.

With respect to the substantive rules generally contained in Proposed Rules 211(h)(2)-1, 211(h)2-2 and 211(h)2-3, however, I do not see in the Proposing Release evidence of a market failure or inefficiency that warrants the Commission's taking the extraordinary step of actively mandating (or prohibiting) specific agreements or activities. From all available evidence, I seriously doubt that any such market failure or inadequacy exists. Consequently, adopting the Proposed Rules in the form they are proposed would necessarily be arbitrary and capricious.

My concern with such provisions is magnified where, as noted above, it is generally the case with respect to Private Funds that their investors are wealthy, highly sophisticated (or employ highly sophisticated advisors of their own) and are ably represented. Such investors are entirely capable of negotiating to protect their own interests as they see them, and do not need the federal government to substitute its judgment for theirs, or to lend its support to their positions in negotiations. Moreover, investors' own judgments can be adjusted to fit the individual facts or circumstances of the fund in which an investment is being made (or contemplated), unlike rules promulgated by the Commission that are necessarily of a "one-size-fits-all" nature.

The introductory language of the portion of the Proposing Release relating to "Prohibited Activities" is instructive:

We are also proposing to prohibit a private fund adviser from engaging in certain sales practices, conflicts of interest, and compensation schemes that are contrary to the public interest and the protection of investors. We have observed certain industry practices over the past decade that have persisted despite our enforcement actions and that disclosure alone will not adequately address. As discussed below, we believe that these sales practices, conflicts of interest, and compensation schemes must be prohibited in order to prevent certain activities that could result in fraud and investor harm. We believe these activities incentivize advisers to place their interests ahead of their clients' (and, by extension, their investors'), and can result in private funds and their investors, particularly smaller investors that are not able to negotiate preferential deals with the adviser and its related persons, bearing an unfair proportion of fees and expenses. The proposed rule would prohibit these activities regardless of whether the private fund's

governing documents permit such activities or the adviser otherwise discloses the practices and regardless of whether the private fund investors . . . have consented to the activities¹⁴

The first sentence is entirely conclusory and entitled to little or no weight. It is reminiscent of the famous riddle Abraham Lincoln is said to have posed to Stephen A. Douglas in the 1858 Lincoln-Douglas debates:

“If you call a tail a leg, how many legs would a dog have?,” asked Lincoln. “Why, five,” responded Douglas. “No,” said Lincoln, “it would still have four. Calling a tail a leg does not make it one.”¹⁵

In the same vein, calling these “activities” “contrary to the public interest and the protection of investors” (or worse, “fraudulent”) does not make them so.

The simple fact is that there is no demonstration in the Proposing Release of any appreciable degree of market failure or inadequacy warranting these intrusive regulations, and as the statement quoted above clearly indicates, the entire basis for the Proposed Rules seems to be speculation as to possible abuses that *could* result from agreements of the sort described. Moreover, an analysis of the prohibited activities themselves suggests that there could not be much of a showing in this regard (again, assuming in all instances, full, fair, and adequate disclosure to fund investors).

For example, Proposed Rule 211(h)(2)-1(a)(1) would prohibit acceleration of portfolio monitoring fees a manager might charge to a portfolio company held by the fund—such acceleration typically occurring on a sale of the portfolio company. But if the investors in the fund are aware that such fees would be accelerated in the event of a sale of the portfolio company, how could this involve fraud? Certainly, characterizing them as fees for services that are not performed sounds as though they are improper. In fact, however, if the manager’s anticipated economics—agreed to by the investors in the fund with full disclosure—include monitoring fees for a stated period, it is not unreasonable for the manager to accelerate payment of those fees in the event the term of the investment is shorter than had been anticipated. It is the equivalent of a prepayment provision in a debt instrument, and would seem unobjectionable, rather than being in any sense fraudulent.

¹⁴ Fed. Reg., p. 16,920.

¹⁵ See W. Safire, “*Essay; Calling a Tail a Leg*,” N.Y. TIMES, p. A. 17 (Feb. 22, 1993), available at <https://www.nytimes.com/1993/02/22/opinion/essay-calling-a-tail-a-leg.html>.

Equally important, the design and effect of such a contractual provision is better to align the interests of the manager with those of fund investors. Absent such a provision, a manager might be incentivized to refrain from accepting a beneficial purchase offer for a portfolio company (or, if applicable, an IPO at a market-propitious time and price) in order to maintain the stream of income represented by the monitoring fee. In that case, it is manifest that the proposed rule would create, rather than eliminate, a conflict of interest, and I would expect the Commission to support such an interest-aligning provision.

Proposed Rule 211(h)(2)-1(a)(2) also describes a concern in which fraud appears nonexistent. That proposed rule would provide that

An investment adviser . . . may not . . . [c]harge the private fund for fees or expenses associated with an examination or investigation of the adviser or its related persons by any governmental or regulatory authority.

As the Proposing Release indicates, some investment managers pay the expenses of examinations or investigations themselves, being compensated for doing so within their management fee, typically in the order of 2% of the assets under management, while others pass such expenses through to the funds they manage. The Proposing Release provides no basis for assuming that it is improper, or in some sense might be fraudulent, if the sophisticated investors who invest in such funds agree with the investment manager that the fund will pay such expenses itself. Indeed, where the expenses are paid by the fund, the investor knows that the fund's response to the examination is being provided "at cost." Anecdotal evidence suggests that, where such expenses are paid by the manager, and included within an annual management fee, that fee usually includes some element of profit to the manager.

In this regard, it must be emphasized that the proposal would cover *all* expenses of examination or investigation, regardless of whether there has been any suggestion of impropriety by the manager. The Commission has an entire division (the largest Division, I understand) devoted to regular, routine examinations—the costs related to which would be covered by the rule—designed to see whether there is any such suggestion of impropriety. Moreover, even where a basis for further investigation is ascertained, the conduct in question covers a spectrum of activity, from wholly innocent and beneficial conduct (where the Commission's staff, after investigation, determines that no further action is warranted) to outright frauds. Along that spectrum, many—if not most—cases are settled by the respondent and, as noted above, it is impossible (as well as improper) to determine whether the settlement fairly implies impropriety.

Further, the proposed rule serves little or no purpose. It is entirely unnecessary. Rules of the Commission ordinarily serve two purposes. One is guiding the behavior of registrants, day in and day out, when no one is “watching” that behavior. The other is providing a basis for the punishment of miscreants. Neither function is served by this proposed rule. By definition, the government is on the scene and “watching” when a registrant responds to an examination or investigation. If, under the prevailing facts and circumstances of a given matter the Commission comes to believe that payment of the related expenses by the fund would be inequitable, it can insist as a condition of any settlement, or it can ask the court to order in the few cases that are litigated, that the manager pay those expenses itself.

Such an approach is clearly preferable to the proposed rule in that it can be tailored to the specifics of the case, and is not a uniform approach, applicable regardless of those circumstances. In fact, of course, the Commission and its staff have taken such an approach (or its equivalent) in numerous instances in the past, requiring respondents to refrain from seeking insurance, deducting expenses from tax returns, and the like. As a completely unnecessary rule, it is inherently arbitrary and capricious.

Indeed, the only economic consequence of the Proposed Rule that I can ascertain is that by shifting the financial burden of defense from the fund to the manager, the proposal might create additional pressure to settle potential cases. That is not an indication of market failure or inadequacy justifying the Commission’s determination to substitute its judgment for the judgment expressed by the agreement between manager and fund investors.

Proposed Rule 211(h)(2)-1(a)(3) would provide that

An investment adviser . . . may not . . . [c]harge the private fund for any regulatory or compliance fees or expenses of the adviser or its related persons.

Here, too, there is no evidence of market failure or inadequacy that would support the need for a governmental mandate *prohibiting* the agreement of the parties. Indeed, I believe this provision would prove counterproductive from the Commission’s perspective. A quick example demonstrates the ill-advised nature of this provision:

Assume a universe in which there are two private fund managers, PT and MF. PT, a “pass-through” manager, charges no management fee as such but passes through all expenses to investors (including all compliance expenses), and has a profits participation of Z%. MF, a “management fee” manager,

charges a management fee that is a percentage of assets under management, absorbs all or substantially all operating expenses (including all compliance expenses) and also has a profits participation of Z%. Then assume that an opportunity becomes available to both PT and MF that involves an expenditure of \$Y per year and an expected benefit to the fund estimated at \$X per year. (For analytical purposes, it does not matter whether the benefit is in the form of increased profits or reduced operational expenses to the fund or some less easily measured, intangible benefit, such as improved reputation, etc.) The expense would be paid by the fund in the case of PT, since that manager passes through all expenses, but in the case of MF, the expense would be paid by MF itself.

The alternatives faced by MF and PT, and their economic benefit can be easily seen. PT will be financially benefitted in every case that satisfies the condition $X > Y$. In all such cases, PT will benefit through its profit participation by $Z*(X-Y)$ and the fund's investors will benefit by $(1-Z)*(X-Y)$. MF, on the other hand, will be financially benefitted only in cases that satisfy the condition $(Z*Y) > X$, that is, only if MF's percentage of the benefit attributable to the expenditure (measured by MF's participation in the resultant increase in profits or reduction in losses) is greater than the amount of the expenditure itself.

To convert the abstract into a numerical example,

If the profit participation of both managers, Z, is 20%, the expense, Y, is \$750,000 per year, and the anticipated benefit to the fund, X, is \$1,000,000 per year, then

1. PT will incur the expense in every case, since $X-Y$ is positive (\$250,000); the fund's investors will receive 80% of the net benefit (\$200,000) and PT will receive 20% of the net benefit (\$50,000).
2. MF will be financially incentivized to decline the opportunity, since MF's participation in the benefit will be $Z*Y = (.2)*(1,000,000) = \$200,000$, but the expense to MF would be \$750,000, resulting in an annual net loss of \$550,000.

Thus, the effect of this Proposed Rule would inevitably be to reduce the compliance expenditure of the affected firms—and it bears noting (based on my extensive experience) that this is an industry particularly attuned to financial incentives. I believe the Commission should be strongly

encouraging processes that lead to an *increased* commitment to the compliance function.

The remainder of the prohibited activities similarly do not appear to relate to any ascertainable market failure or inadequacy.

I also offer my observation on the research and analysis of Professor William Clayton of Brigham Young University Law School, cited in the Proposing Release. That work provides insights into the bargaining process that can take place in this environment but is largely unseen, and advances our understanding of the process, at least from the perspective of the sources on which it is based. I do not, however, believe it is a sufficient basis for extrapolation to the extent suggested by the Proposed Rules. I offer four observations:

First, it appears that much of Professor Clayton's analysis is taken from survey responses of, and interviews conducted with, institutional investors. It should not be surprising that information garnered from only one side of the bargaining parties paints a distorted picture.

Second, Professor Clayton's research relates only to Private Equity Funds, while the Proposed Rules are directed to all Private Funds (including Venture Capital and Hedge Funds); the Proposing Release does not demonstrate any basis for extrapolating from the universe of Private Equity Funds to other Private Funds.

Third, and likely most important, given the myriad issues that are covered by relevant agreements, and the different interests of a given investor in each fund, it is practically impossible to draw legitimate conclusions whether agreements that are reached are, or even may be, objectively "sub-optimal," as Professor Clayton indicates.

Fourth, Professor Clayton's analysis, even if it were assumed, for purposes of argument, to be fully valid and applicable to all Private Funds, examines only the question whether investors in Private Equity Funds successfully negotiate what *he* perceives to be an optimal result. A separate question, that he does not address, is whether and to what extent taxpayer funds should be devoted to altering the balance of negotiating power between highly sophisticated parties, and whether that altered balance would lead to an objectively "optimal" result.

Instead, I suggest that the affected market is reasonably, if not perfectly, efficient in leading to entirely reasonable negotiated agreements, and that

governmental intervention is not warranted. Certainly, on the current record, the Commission's heavy burden of demonstrating a legitimate need for governmental intervention has not been met.

Finally, I note in passing that, as a group, the Proposed Rules would create serious barriers to entry in the Private Fund management industry. Too often, regulatory demands make it difficult or impossible for new entrants to gain traction in an industry, to the detriment of those who could otherwise have been clients or customers of new entrants; too often also, there is no voice at the table representing the interests of that segment of the industry. For that reason alone, it would be beneficial, and in the public interest, for regulators generally, including the Commission, to refrain from adopting rules that inhibit competition in the absence of real and unambiguously demonstrable compelling need. No such need is reflected in the Proposing Release.¹⁶

I urge the Commission to reconsider the Proposed Rules in light of the foregoing, as well as in light of the other comment letters raising serious questions about the wisdom, predicates and authority underlying the Proposed Rules.

Sincerely,

/S/ Harvey L. Pitt

Copies to:

Hon. Gary Gensler, *Chair*
Hon. Hester M. Peirce, *Commissioner*
Hon. Allison Herren Lee, *Commissioner*
Hon. Caroline A. Crenshaw, *Commissioner*
Dr. William A. Birdthistle, *Director*,
Division of Investment Management
Mr. Dan Berkovitz, *General Counsel*

¹⁶ The Commission has had an unfortunate history of creating barriers to entry with poorly constructed rules. See, e.g., L. White, "A Brief History of Credit Rating Agencies: How Financial Regulation Entrenched this Industry's Role in the Subprime Mortgage Debacle of 2007-2008," MERCATUS CENTER (Oct. 2009), available at <https://www.mercatus.org/publications/monetary-policy/brief-history-credit-rating-agencies-how-financial-regulation>.