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April 25, 2022
Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549–1090
Submitted Electronically

Re: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, File No. S7-03-22

Dear Ms. Countryman:

Teachers Insurance and Annuity Association of America ("TIAA") and its wholly-owned subsidiary Nuveen, LLC ("Nuveen") welcome the opportunity to submit this comment in response to the Securities and Exchange Commission's ("SEC" or the "Commission") proposed new rules under the Investment Advisers Act of 1940 (the ''Advisers Act'') for registered investment advisers to private funds (the "Proposal").[1] The Proposal seeks to provide greater transparency to private fund investors in a number of ways, including by requiring advisers to make new disclosures about the investment costs and performance history of the private funds they advise, and to obtain an annual financial statement audit of each private fund, as well as an independent fairness opinion in connection with adviser-led secondary transactions. Additionally, the Proposal would prohibit all private fund advisers from engaging in certain practices that raise potential conflicts of interest, and from providing preferential treatment to certain private fund investors without disclosing such treatment to current and prospective investors.

We understand that the Proposal is meant to address the Commission's concern that there is currently a "lack of transparency regarding costs, performance, and preferential terms [that] causes an information imbalance between advisers and private fund investors," which in many cases "prevents private bilateral negotiations from effectively remedying shortcomings in the private funds market. . ." and ". . . leaves many investors without the tools they need to effectively protect their interests, whether through negotiations or otherwise."[2] While we appreciate the Commission's stated goal of enhancing investor protection and access to

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[1] 87 Fed. Reg. 16886 (Mar. 24, 2022), *available at*: https://www.govinfo.gov/content/pkg/FR-2022-03-24/pdf/2022-03212.pdf.

[2] *Id*. at 16888.

information, we have serious concerns about the Proposal's potential impact on the private fund industry. As a general matter, we believe the Proposal would dramatically increase the costs associated with private fund reporting, without meaningfully improving investors' understanding of their private fund investments. In addition, we are particularly concerned that the Proposal would have unintended consequences for collateralized loan obligation issuers ("CLOs"), as its requirements are not well designed to account for CLOs' unique structure and investor base. Below we have provided our viewpoints and recommendations as to how the SEC can modify the Proposal to produce a final rule that we believe would be more appropriate in scope, balanced in its consideration of advisers' and investors' interests, and effective in furthering the Commission's worthy objectives. We have also reviewed the comment letter drafted by the Securities Industry and Financial Markets Association ("SIFMA") in response to the Proposal, and we echo many of the concerns and arguments expressed therein, as explained further below.

I. **About TIAA and Nuveen.**

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over its century-long history, TIAA's mission has always been to aid and strengthen the institutions and participants it serves and to provide financial products that meet their needs. To carry out this mission, TIAA has evolved to include a range of financial services, including asset management and retail services. Today, TIAA's investment model and long-term approach serve more than five million retirement-plan participants at more than 15,000 institutions. With its strong nonprofit heritage, TIAA remains committed to our mission of serving the financial needs of those who serve the greater good.

As TIAA's asset management arm, Nuveen offers a wide range of specialized investment solutions through several investment advisory affiliates. The Nuveen organization includes investment advisers that collectively manage over $1 trillion in assets, the large majority of which comes from the TIAA General Account, the TIAA Variable Annuity Separate Account, and mutual fund assets. Nuveen affiliates also manage private equity funds, hedge funds, and structured vehicles. In addition, Nuveen's leveraged finance platform is one of the industry's largest and best resourced providers of high yield credit, broadly syndicated loans, CLOs and alternative credit strategies. Drawing from our broad experience in the private funds market, and with CLOs in particular, we have identified a number of serious concerns with the Proposal and its potential impact on private fund advisers. We hope our discussion of our concerns, as well as our recommendations for how the Proposal might be improved, are helpful as the Commission works to issue a final rule on this topic.

II. **The SEC should exclude CLOs from the Proposal's definition of "private funds."**

As a general matter, we believe the Proposal is overly broad in scope, and would inappropriately apply to certain types of investment vehicles with unique structures that differentiate them from other types of private funds. More specifically, we are concerned that the

Proposal would have a number of significant and presumably unintended impacts on CLOs. CLOs are investment vehicles that are collateralized with a pool of loans, which are often backed by corporate loans with low credit ratings or loans taken out by private equity firms to conduct leveraged buyouts. CLOs offer higher-interest returns and provide institutional investors with reliability by generating constant, consistent investment returns, allowing companies to meet their investment needs while also providing debt funding. While CLOs do qualify as "private funds," they possess unique features and operate differently from other types of private funds, where an adviser controls, or has a controlling influence over, the core portfolio companies.

Our comments about CLOs in this letter are intended to refer equally to CLOs that are predominantly collateralized by Broadly Syndicated Loans ("BSLs") and to middle-market CLOs that hold diversified portfolios of loans that are not comprised of BSLs. In certain letters submitted to the Commission in response to the Proposal, including those authored by SIFMA and the Loan Syndications and Trading Association ("LSTA"), it is unclear whether references to CLOs are intended to refer only to BSL CLOs, or to middle-market CLOs as well. Regardless of the position taken by other commenters, we believe the concerns the Proposal raises for CLOs are just as relevant for middle-market CLOs as they are for BSL CLOs. As such, we respectfully ask the Commission to consider our comments herein as applying to both types of CLOs.

In many ways, the inclusion of CLOs in the Proposal does not seem to align with the Commission's stated goal of providing investors with much-needed additional transparency into the costs and performance of private funds. Nowhere in the Proposal does the SEC identify any concern that is specific to CLOs, as opposed to private funds generally. Additionally, CLOs provide investors with a great deal of transparency already, issuing both monthly and quarterly reports that detail the CLO's portfolio composition and characteristics, purchases and sales, balances and reconciliation of accounts, as well as information about distributions due to investors and relevant compliance information. In addition, CLOs are different from other types of private funds because their assets are usually controlled not by the CLO manager but by an independent trustee who acts as a representative for CLO investors and approves the CLO manager's trades to ensure compliance with portfolio requirements. Additionally significant restrictions are placed on the CLO manager's ability to access the vehicle's assets.

We would also note that most U.S.-managed CLOs rely on Section 3(c)(7) of the Investment Company Act to avoid registration as an investment company. As discussed in SIFMA's comment letter, in order to qualify under Section 3(c)(7) of the Investment Company Act, CLO investors must be deemed qualified purchasers – and in the vast majority of cases, CLO investors qualify as Qualified Institutional Buyers, or "QIBs," with at least $100 million in securities portfolios. As a general matter, CLOs engage with sophisticated investors that arguably do not need the same level of protection that the SEC seeks to provide to retail investors. In addition, the Commission expresses its concern in the Proposal that private funds generally lack governance, but that is not the case for CLOs. To echo SIFMA's argument on this point, CLOs have a robust governance structure. CLOs maintain an independent trustee that has authority over accounts and cash flows; issue notes that are rated and supervised by at

least one SEC-regulated rating agencies; have diversified portfolios in corporate loans; and generally do not allow CLO managers to have a controlling interest in any of the obligors in the portfolio. In addition, unlike other types of private funds whose asset managers serve as general partners, CLOs engage third-party service providers to serve as independent directors. Thus, if the Commission is motivated, at least in part, to apply new regulatory requirements to private funds due to their lack of governance, this concern should not be nearly as relevant in the CLO context.

We believe the Proposal is not well designed to apply to CLOs given their unique structure, and we are concerned that the Proposal's failure to differentiate among various types of private funds could result in a final rule that is not appropriately tailored and adds unnecessary complexity and undue burdens for CLOs. Given that the Commission does not reference CLOs at all in the Proposal, we question whether the SEC actually did intend for the Proposal to apply to CLOs. Regardless of the SEC's initial intent, for all the reasons discussed above, we urge the Commission to exclude CLOs that meet certain criteria from the Proposal's definition of "private funds." We largely agree with the criteria set forth in SIFMA's comment letter for "Excluded CLOs" – namely, that a CLO should be excluded from the Proposal's definition of "private fund" if it (i) relies on Section 3(c)(7) of the Investment Company Act; (ii) has an independent trustee with authority over accounts and cash flows; (iii) issues notes that are rated and surveilled by one or more SEC-regulated rating agencies; (iv) does not have (nor does its manager have) a controlling interest in any of the obligors in the portfolio; and (v) has diversified portfolios in corporate loans. Note that our recommended criteria differ slightly from those suggested by SIFMA in one aspect: namely, SIFMA would require Excluded CLOs to have a diversified portfolio in *broadly traded* corporate loans, which would leave out middle-market CLOs that are not predominantly collateralized by BSLs. It is unclear to us whether SIFMA intended to leave middle-market CLOs off the list of Excluded CLOs – but in our view, middle-market CLOs should be excluded from the Proposal's definition of "private funds" just as BSL CLOs are. We believe all CLOs meeting the criteria listed above are sufficiently different from other types of private funds such that they do not raise the same concerns identified by the SEC in the Proposal, and should be left out of its scope.

While we believe CLOs should be completely excluded from the Proposal's definition of "private funds," If the SEC does not agree to carve out CLOs from the Proposal entirely, we would urge the Commission to exempt them from certain aspects of the Proposal that we believe are the most ill-suited in the CLO context. We identify those provisions and discuss them in more detail in the following sections.

III. **The Proposal's prohibition on preferential redemption rights should apply when such rights are exercised, not when they are granted**.

The SEC notes in the Proposal that some private fund advisers may choose to grant certain investors more favorable redemption rights than other investors enjoy. For example, a large investor may "negotiate, through a side letter or other side arrangement, to be able to redeem

its interest in the fund before, or more frequently than, other investors." [3] The Commission argues that "granting preferential liquidity terms on terms that the adviser reasonably expects to have a material, negative effect on other investors in the private fund or in a substantially similar pool of assets is a sales practice that is harmful to the fund and its investors."[4] In an effort to curtail this potentially harmful behavior, the Proposal would prohibit a private fund adviser from granting an investor in the private fund the ability to redeem its interest on terms that the adviser "reasonably expects to have a material, negative effect on other investors in that private fund or in a substantially similar pool of assets."[5] The SEC acknowledges that there may be instances where a private fund benefits from its preferential treatment of certain investors, including by attracting additional investors and spreading expenses over a broader investor and asset base – but warns that there are also scenarios where the preferential liquidity terms may harm the fund and its investors, including where a preferred investor's early exit from a fund leaves the fund with a less liquid pool of assets, inhibiting its ability to carry out its investment strategy or satisfy other redemption requests.[6]

In the CLO context, a majority of a CLO's equity investors may be granted a call option giving them potential control over the entire CLO. After the expiration of an initial non-call period, these equity investors can exercise the call option with the consent of the CLO manager to direct a refinancing in some or all CLO debt in an effort to enhance equity returns. CLOs usually grant call options in their offering memoranda, rather than in a separate side letter. We do not believe the SEC intended to include CLO call options in the Proposal's prohibition on preferential redemption rights. Unlike other types of preferential redemption rights referenced in the Proposal, the exercise of a call option impacts all investors in the CLO, not just the majority equity investors who were granted the call option. Additionally, the Proposal's focus on side letters as a means of granting preferential rights would suggest that CLO call options are outside the scope of this provision. However, if the SEC does in fact take the view that CLO call options are a type of prohibited preferential redemption right, we would urge the Commission to reconsider this position. Call options are inherently designed to increase a CLO's equity returns, and do not pose the same potential harmful effects on other non-equity investors in the CLO that other types of preferential redemption rights do. Moreover, because call options are fully disclosed in a CLO's offering memorandum, there should be no concern that CLO investors lack information about the granting of these options. Given the many differences between CLO call

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[3] *Id.* at 16929.

[4] *Id*.

[5] *Id*. at 16928.

[6] *Id*. at 16929.

options and the preferential redemption rights granted by private funds to certain investors, we urge the Commission to confirm that CLO call options are outside the scope of this provision.

IV. **The Proposal's restrictions on the use of side letters to grant preferential treatment should not apply to CLOs**.

The Proposal would also prohibit a private fund adviser's granting of other preferential terms to investors, including through the use of side letters, unless the adviser provides certain written disclosures to prospective and current investors.[7] The Commission acknowledges that side letters can benefit the fund, in addition to the adviser – for example "if the adviser signs a side letter with a large, early stage investor, then the fund will increase its assets. . ." which may ". . . enable the fund to make certain investments, for example of a larger size, which ultimately benefits all investors." However, the Commission also cautions that "preferential terms do not necessarily benefit the fund or other investors that are not party to the side letter agreement and . . . these terms can have a material, negative effect on other investors."[8] The Commission intends to address these concerns with its proposed requirement that preferential treatment granted through a side letter or other instrument be prohibited unless disclosed in advance to other investors.

If the Commission does not agree to exclude CLOs from the definition of "private funds" altogether, then the Proposal should at the very least exclude CLOs from the proposed restrictions on the granting of preferential treatment to investors through side letters without a separate disclosure. As SIFMA notes in its comment letter, it is common practice for CLO managers to enter into side letters pursuant to which the manager agrees to rebate some of its management fees to certain CLO investors. As part of these arrangements, legal counsel provides assurance letters that the statements contained in the CLO's offering memoranda do not contain material misinformation, and prospective CLO investors are given an opportunity to request additional information when they receive these materials. Moreover, standard disclosures in CLO offering memoranda include a notification to investors that the CLO may enter into side letters that give certain investors preferential fees, and that other investors have no right to see these side letters or enjoy the same preferential treatment. Taken together, we believe the disclosures that CLOs already provide to investors (all of whom are sophisticated, and almost all of whom qualify as QIBs) regarding side letters are sufficiently thorough, detailed, and accessible. Requiring CLOs to make additional disclosures whenever they enter into a side letter would, in our view, be unnecessarily costly and time consuming, and would not benefit CLO investors in any material way. It could even have a chilling effect on CLO managers' willingness to enter into side agreements in the first place, to the detriment of CLOs' ordinary course business activity. We would urge the Commission not to make a common CLO practice

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[7] *Id*. at 16930.

[8] *Id.*

needlessly complicated and expensive by imposing new disclosure requirements that are not well designed to meaningfully improve the investor experience.

V. **The Proposal's restrictions on an adviser's ability to limit liability are inappropriate, particularly in the CLO context**.

In addition to certain other common practices the Proposal would prohibit or severely restrict, the Proposal would also bar private fund advisers (including CLO managers) from seeking reimbursement, indemnification, exculpation, or limitation of liability for breach of duty, willful malfeasance, bad faith, recklessness, or even simple negligence in providing services to the funds they advise.[9] The SEC argues that "these practices, even when disclosed and permissible under state law, may involve breaches of fiduciary duty to the fund or investors, and possible harms to investors, and so investors will likely benefit from their prohibition."[10] While we understand the SEC's desire to protect investors from harm, the fact that the Proposal seeks to bar private fund advisers from limiting their liability in the case of simple negligence for any service represents a dramatic, unjustified, and highly concerning shift. Given the investment sophistication of the vast majority of private fund investors, we believe it is wholly unnecessary and inappropriate to subject private fund advisers to a simple negligence standard. Not even advisers of mutual funds, which are largely aimed at retail investors, are held to such a standard. Making private fund advisers liable for simple negligence will almost surely hinder their willingness to take reasonable risks in their investment decisions, causing them to be overly cautious and reluctant to enter into transactions due to fear of litigation. This cannot be beneficial for the private fund investors who expect their advisers to take calculated investment risks based on their own education and experience for the benefit of the fund.

As SIFMA notes in its comment letter, this provision is particularly inappropriate in the CLO context. It is standard practice in the CLO market to hold CLO managers liable for gross negligence, reckless disregard of obligations, bad faith, or willful misconduct. Changing the standard of liability that applies to CLO managers will force CLOs to modify their agreements with CLO investors, investment banks, and rating agencies, as well as their management agreements. This would be a time-intensive and costly process, and we doubt CLO investors would welcome the added expense, complication, and diminished returns that would likely result. CLO investors have already demonstrated their willingness to agree to limitation of liability provisions that include a gross, rather than simple, negligence standard. As we've discussed previously, CLO investors (typically banks, funds, large institutional asset managers, and insurance companies) by definition are sophisticated and have significant investment experience. The level of documentation and periodic reporting CLOs provide to investors gives them great transparency into how the CLO is managed, the composition and value of its portfolio, the CLO's performance, and its compliance with collateral quality tests. Again and again, these investors have made a considered choice to invest in CLOs based on their

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[9] *Id*. at 16950.

[10] *Id*. at 16950-51.

extensive knowledge and market experience, factoring in the appropriate allocation of risk between themselves and the CLO, as well as their expectations around the CLO manager's approach to investment management. We see no reason why CLO agreements should be upended and CLO managers subjected to a standard of liability that will likely increase costs, decrease returns, and impede their willingness to make educated, considered investment risks – especially given the sophistication levels of CLO investors and the extensive disclosures that CLOs already provide. For these reasons, we recommend that CLOs be carved out from the Proposal's limitation of liability requirements.

Regardless of whether the SEC agrees to carve out CLOs entirely, we would strongly urge the Commission at the very least to add a provision in the final rule stating that the new limitation of liability requirements will not apply to contracts retroactively. Private fund agreements can be extremely difficult to amend, and if the SEC does not grandfather them as a general matter, we fear it will be nearly impossible – not to mention incredibly expensive and time-intensive – to amend all existing limitation of liability provisions to comply with the new standard under the Proposal.

VI. **The Proposal's audit requirements should not apply to SPVs or to CLOs that do not have custody of their own assets.**

In addition to mandating new disclosure requirements for private fund advisers, the Proposal would require advisers to obtain an audit of their private funds' financial statements on an annual basis. The SEC argues that this proposed audit requirement would provide "protection for the fund and its investors against the misappropriation of fund assets," as well as "an important check on the adviser's valuation of private fund assets, which often serve as the basis for the calculation of the adviser's fees."[11] The Proposal's audit requirement is based on the current Custody Rule[12] under the Advisers Act, and the two rules contain many similar or identical requirements (though compliance with one rule would not automatically satisfy the requirements of the other). Most significantly, an adviser may obtain a surprise examination under the Custody Rule instead of an audit, whereas the Proposal would not give private fund advisers the same choice – they must obtain an audit.[13]

We echo SIFMA's position that special purpose vehicles ("SPVs") that are used to hold underlying portfolio investments ("Investment SPVs") should be excluded from the Proposal's audit requirement. As discussed by the Commission in the adopting release of the Custody

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[11] *Id*. at 16911

[12] 17 CFR § 275.206(4)-2.

[13] 87 Fed. Reg. at 16912.

Rule,[14] as well as SEC staff in subsequent guidance on the Custody Rule,[15] investment advisers of pooled investment vehicles may from time to time use Investment SPVs to facilitate investment by the pool in certain securities. These Investment SPVs may qualify as private funds, and would thus be subject to the Proposal's audit requirement. However, we believe that subjecting the financial statements of Investment SPVs to a separate audit would be expensive and time consuming, with little to no additional benefit for investors that we can identify. Instead, we believe the assets of an Investment SPV should only be captured in any audit required by any private fund that happens to be an equity investor in the Investment SPV, such that those assets are included in any audit of the private fund's financial statements. This approach would mirror that described by SEC staff in the Custody Rule Guidance Update, which provides that where an adviser "treats the Investment SPV's assets as assets of the pooled investment vehicles of which it has custody indirectly, such assets must be considered within the scope of the pooled investment vehicles' financial statement audit."[16]

In addition, we second SIFMA's recommendation that the SEC exclude CLOs from the audit requirement unless they have custody of their own assets. The Commission specifically asks in the Proposal whether the proposed audit requirement should "provide any full or partial exceptions, such as when an adviser plays no role in valuing the fund's assets, receives little or no compensation for its services, or receives no compensation based on the value of the fund's assets."[17] We believe CLOs should be granted a full exception given their general lack of control over their own assets. As a general matter, a CLO's assets are controlled not by the CLO itself, but by an independent trustee, and significant restrictions are placed on the CLO manager's ability to access the vehicle's assets. For this reason, many CLO managers take the view that they do not have custody of the CLO's assets for purposes of the Custody Rule. Using this same reasoning, we do not believe CLO managers that lack custody of the CLO's assets should be required to produce audited financial statements under the Proposal. Additionally, we would highlight that the valuation of a CLO's assets is typically performed by an independent third party, not by the CLO manager. It is also noteworthy that unlike other types of private funds, the management fees earned by CLO managers are usually unrelated to the value of the CLO's assets, and are instead calculated as a percentage of the underlying portfolio of bank loans' par value. Given all of the above, we recommend the SEC provide CLO managers a full exemption,

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[14] *Custody of Funds or Securities of Clients by Investment Advisers*, 75 Fed. Reg. 1456 (Jan. 11, 2010), *available at*: https://www.govinfo.gov/content/pkg/FR-2010-01-11/pdf/2010-18.pdf.

[15] SEC Division of Investment Management Guidance Update No. 2014-07*, Private Funds and the Application of the Custody Rule to Special Purpose Vehicles and Escrows* (June 2014), *available at*: https://www.sec.gov/investment/im-guidance-2014-07.pdf (the "Custody Rule Guidance Update').

[16] *Id.*

[17] 87 Fed. Reg. at 16916.

and subject CLOs to the proposed audit requirements only where the CLO manager has custody of the vehicle's assets.

VII. **Advisers should not be required to obtain a fairness opinion in the context of CLOs**.

The Proposal would additionally require private fund advisers to obtain a fairness opinion for certain adviser-led secondary transactions where the adviser offers fund investors the option to sell their interests in the fund, or to exchange them for new interests in another of the adviser's investment vehicles. Specifically, advisers would be prohibited from completing an adviser-led secondary transaction with respect to any private fund, "unless the adviser distributes to investors in the private fund, prior to the closing of the transaction, a fairness opinion from an independent opinion provider and a summary of any material business relationships the adviser or any of its related persons has, or has had within the past two years, with the independent opinion provider."[18] This provision is designed to "provide an important check against an adviser's conflicts of interest in structuring and leading a transaction from which it may stand to profit at the expense of private fund investors."[19]

While we appreciate the concerns underlying this provision of the Proposal, we do not believe it would be appropriate to apply the fairness opinion to CLOs. The Proposal does not make clear what transactions would qualify as "adviser-led secondary transactions" in the CLO context. Common types of CLO transactions such as issuer repurchase of notes, re-pricings, and refinancings could qualify under a broad reading of the term. Additionally, as SIFMA notes in its comment letter, we are concerned that CLO re-issue transactions might fall under this definition. In those transactions, a CLO's debt is redeemed through the sale of the CLO's portfolio to a new CLO, whose investors acquire the equity instruments in the original CLO. Equity investors in the original CLO must consent to the sale, and are granted the option of acquiring equity instruments in the new CLO, rather than cash, if they so choose. We do not believe investors would benefit from a requirement that the CLOs involved in such a transaction obtain a fairness opinion – and take on the costs involved in doing so – in this context, given that the equity investors of the original CLO and new CLO must all consent to the redemption and purchase.

With respect to the common types of CLO transactions listed above, we do not think the benefit to investors of having access to a fairness opinion outweigh the costs and burdens associated with obtaining one – many of which would be passed down to investors themselves. As such, we recommend the SEC clarify the definition of "adviser-led secondary transactions," and make clear that the common types of CLO transactions we have listed here are not included in that definition. If the SEC nevertheless decides that the definition should cover CLO transactions, we urge the Commission at the very least to apply the fairness opinion requirement only to CLO re-

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18 *Id*. at 16917.

19 *Id.*

issue transactions, and allow advisers to disclose to investors the proposed prices for the sale of the original CLO's portfolio to the new CLO, rather than obtaining a fairness opinion.

Given that Nuveen's private fund complex includes two different CLO platforms, we have focused in this section, and throughout this letter, on the ways in which the Proposal may have unintended and/or particularly undesirable consequences for CLOs. However, we wish to reiterate our comments regarding CLOs in this Section VII in the context of private funds more generally. We also echo SIFMA's arguments that requiring private fund advisers to obtain a fairness opinion for certain types of transactions – especially adviser-led secondary transactions – would not provide a material benefit for investors, and would impose needless costs and burdens on private funds. We urge the SEC to consider amendments that would make this aspect of the Proposal more beneficial for private funds generally, and CLOs especially.

VIII. **CLOs should not be subject to the Proposal's quarterly statement requirement.**

Currently, private fund advisers may provide investors with a quarterly statement containing information about the fees, expenses, and performance of the funds they advise, but are not required to do so. The Proposal would make this practice mandatory, requiring private fund advisers to distribute a quarterly statement to investors that includes certain information regarding fees, expenses, and performance for any private fund that it advises within 45 days after the end of each calendar quarter.[20] The SEC has proposed this requirement "to improve the quality of information provided to fund investors, allowing them to assess and compare their private fund investments better" and "monitor the private fund adviser to ensure compliance with the private fund's governing agreements and disclosures."[21] More specifically, the Commission believes these statements will "help an investor better understand the relationship between the fees and expenses the investor bears and the performance the investor receives from the investment," which may be difficult for investors to understand currently because of the "opaque nature of the fees and expenses typically associated with private fund investments."[22]

As is the case with certain other proposed disclosure requirements we have discussed above, we are concerned that the SEC's proposed quarterly statement requirement would impose significant costs on private fund advisers (and ultimately their investors), without producing any material benefit for investors. Private fund advisers are already required to provide detailed periodic disclosures to investors, including information on a fund's performance, financial information, fees, and holdings. Many private fund advisers also choose to provide investors with additional information on a voluntary basis, including audited financial statements. The SEC seems to take the view in the Proposal that additional disclosures are needed, or would be helpful to investors – but given the level of disclosures private fund advisers already make to

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[20] *Id*. at 16890.

[21] *Id*.

[22] *Id*.

investors, we question whether adding a new quarterly reporting requirement would make a meaningful difference to them. This point is particularly concerning given the costs private fund advisers will have to bear to produce new statements every quarter.

Our concerns that the burdens associated with the new quarterly statement requirement may not outweigh the potential benefits are heightened in the CLO context, because CLOs generally provide their investors even more disclosures than do advisers of other types of private funds. As discussed in great detail in the SIFMA comment letter, CLO investors receive monthly Collateral Administrator Reports that contain extensive detail about the composition and activity of the CLO's portfolio and the characteristics and value of the loans contained therein. These reports are also provided to third-party cash flow modeling service providers. In addition, prospective CLO investors usually get access to draft CLO transaction documents in advance, and have the ability to negotiate with the CLO underwriter for access to additional information, which may be included in the monthly Collateral Administrator Report. Most CLO notes are also reviewed and rated by third-party rating agencies that publish their ratings and the results of their stress tests to the broader market. We would also note that the format of Collateral Administrator Reports is generally standard across the industry, giving different CLO investors the same categories of information from one report to the next. This standardization is a direct result of CLO investors dictating the type of information they most want to see. We believe it is fair to say that investors already have access to the information they most want and need, and would not materially benefit from additional quarterly statements.

Given the level of transparency that investors, and the market more generally, already have into CLOs, their performance, and the value and characteristics of their portfolios, we believe imposing additional requirements on CLOs to provide quarterly statements to investors would be unnecessarily costly and largely unhelpful. In our view, the additional information provided would not make a material difference to investors, and would ultimately make it more expensive for them to invest in CLOs. We therefore urge the Commission to carve CLOs out of the proposed quarterly reporting requirement for private funds.

IX. **Conclusion**.

We appreciate the Commission's careful attention to this important topic, and its continued efforts to ensure that private fund investors are adequately protected and have access to the information they need to make informed decisions. If the changes we have suggested above are implemented, we believe the SEC can achieve its objectives in issuing the Proposal, while still striking a balance between enhancing investor transparency and avoiding imposing unnecessary costs and burdens on advisers – particularly in the context of CLOs. We hope the comments we have offered assist the SEC in formulating an effective, well-tailored final rule, and we welcome further engagement on any aspect of the foregoing.

Sincerely,

John McCally

John McCally

Jennifer Johnson

Jennifer Johnson