August 26, 2022

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Private Fund Advisers: Documentation of Registered Investment Adviser Compliance Reviews (File Number S7-03-22)

Dear Ms. Countryman:

The National Venture Capital Association ("NVCA") appreciates the opportunity to submit a supplemental comment letter on the proposed rules for private fund advisers. NVCA previously submitted a comment letter on this rule proposal on April 25, 2022, which we hereby incorporate by reference; terms not defined herein have the same meaning as in the April letter.

NVCA is submitting this supplemental comment letter to address questions about the true scope of the liability limitation ban in proposed Rule 211(h)(2)-1, including interaction with the anti-waiver provisions of the Investment Advisers Act.

As the Commission notes in the proposing release, "a waiver of an adviser's compliance with its Federal antifraud liability for breach of fiduciary duty to the private fund or with any other provision of the Advisers Act or rules thereunder is invalid under the [Advisers] Act."[1] This is the anti-waiver provision in Section 215(a) of the Advisers Act, and we note that there are analogous provisions in Section 29(a) of the Securities Exchange Act and in Section 14 of the Securities Act.

Proposed Rule 211(h)(2)-1(a)(5) would prohibit an adviser from seeking reimbursement, indemnification, exculpation or limitation of its liability for "[1] breach of fiduciary duty, [2] willful malfeasance, [3] bad faith, [4] negligence, or [5] recklessness in providing services to the private fund."

In our July 18, 2022 meeting with the Staff of the Division of Investment Management, it was our impression that the Staff was of the view that this proposed rule is no broader than the anti-waiver provision in Section 215(a) of the Advisers Act.

[1] Private Fund Advisers, 87 Fed. Reg. at 16925.

We believe that this perspective is significantly more limited than the actual impact of the proposal. Specifically, the anti-waiver provision only addresses federal liability for breach of fiduciary duty and any other claims arising under the Advisers Act and the rules thereunder. In contrast, Proposed Rule 211(h)(2)-1(a)(5) would extend beyond liability under the Advisers Act to also reach state and common law claims – i.e., clauses [2] to [5] in the above quoted proposed rule text, as well as state-law fiduciary duty claims.

In our April comment letter, we discuss at length why we believe the liability limitation ban would have profoundly destabilizing effects on the venture capital industry, and we will not repeat ourselves here. Our point in this letter is simply to clarify that the liability limitation ban is far broader than the scope of the anti-waiver provision in Section 215(a) of the Advisers Act.

Please feel free to contact me at [redacted] with any questions regarding these comments.

Respectfully submitted,

Bobby Franklin
President and CEO

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