



California Public Employees' Retirement System

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Ms. Vanessa Countryman, Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-0609

*Via email:* [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

April 25, 2022

**Subject: Release Nos. IA-5955; File No. S7-03-22 Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews**

Dear Ms. Countryman,

On behalf of the California Public Employees' Retirement System (CalPERS), I write to express our support for the Securities and Exchange Commission's (SEC or Commission) proposed new rules to require registered investment advisers to private funds to provide transparency regarding the full cost of investing in such funds. Such transparency should include and the performance of such funds, an annual financial statement audit of each private fund it advises and, in an adviser led secondary transaction, a fairness opinion from an independent opinion provider (Proposed Rules or Proposal).

As the largest public defined benefit pension fund in the United States, CalPERS manages approximately \$470 billion in global assets on behalf of more than 2 million members. We seek long-term, sustainable, risk-adjusted returns through efficient capital allocation and stewardship in line with our fiduciary duty. We are guided by CalPERS' Investment Beliefs<sup>1</sup> which recognize that "Long term value creation requires effective management of three forms of capital: financial, physical and human."<sup>2</sup> Accordingly, our fiduciary duty requires that we proactively assess whether the managers we invest with are managing capital effectively. We adopted a Sustainable Investment Strategic Plan with one of the priorities focusing on private equity transparency of fees and profit sharing and have embraced such transparency required by State of California law.

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<sup>1</sup> CalPERS Investment Beliefs, <https://www.calpers.ca.gov/page/about/organization/calpers-story/our-mission-vision#investment-beliefs>.

<sup>2</sup> Id.

CalPERS is a member of the Institutional Limited Partners Association (ILPA). We commend the Commission for acknowledging the persistent challenges raised by ILPA's members over the years and for taking decisive action to enhance investor protections through its rulemaking powers. While our comments in this letter address key aspects of the proposed rules that we support, we note that ILPA will provide a more comprehensive response on behalf of its members.

### Quarterly Reporting

We support the Proposed Rule to require registered investment advisers to disclose all direct and indirect fees and expenses quarterly. We agree with Chair Gensler's assessment that the proposal would "increase transparency and would provide comparability to fund investors."<sup>3</sup> We further believe that the Commission could improve the proposal by preserving LP-level disclosures where the adviser has agreed to provide them and requiring managers to provide such reporting at the request of an investor.

Across multiple statements and risk alerts, the SEC has noted issues with calculations and/or disclosures of fees and expenses, due to practices that did not conform to procedures as agreed in the investment contract.<sup>4</sup> Without clear and consistent disclosures, the tracking of fees and expenses charged in a private fund is exceedingly challenging. As regular reporting on costs is not currently a regulatory requirement, individual investors must engage in bilateral negotiations with fund managers to secure access to this information, typically agreed through side letter agreements rather than within the LPA, which outlines information granted to all investors in the fund.<sup>5</sup> Investor access to basic transparency is therefore the product of market dynamics, disproportionately limiting smaller investors' access to this information.

As proposed, the rule would require the disclosure of fees and expenses at the fund level. However, many institutional investors have successfully negotiated for fee and expense reporting provided at the *pro rata* individual investor or limited partner level. This information is essential for ILPA member institutions who 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.<sup>6</sup> The SEC rule should not erode what has become market practice among many institutional investors and their managers by erecting a maximum compliance threshold rather than a minimum standard.<sup>7</sup> We

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<sup>3</sup> Chair Gary Gensler, Statement on Private Fund Advisers Proposal, US Securities and Exchange Commission (February 9, 2022).

<sup>4</sup>Spreading Sunshine in Private Equity., U.S. Securities & Exchange Commission (May 6, 2014), <https://www.sec.gov/news/speech/2014--spch05062014ab.html>; Div. of Exams, Risk Alert: Observations from Examinations of Private Fund Advisers (Jan. 27, 2022), <https://www.sec.gov/files/private-fund-risk-alert-pt-2.pdf>; Div. of Exams, Risk Alert: Observations from Examinations of Investment Advisers Managing Private Funds (June 23, 2020), [https://www.sec.gov/files/Private%20Fund%20Risk%20Alert\\_0.pdf](https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf).

<sup>5</sup> In 2020, only 8% of LPs indicated that a commitment to provide the ILPA Reporting Template was included in the LPA for all investors' benefit; 75% indicated the commitment was typically either made through the side letter or informally and not reflected in fund documents at all, [https://ilpa.org/wp-content/uploads/2020/06/ILPA-Industry-Intelligence\\_Private-Market-Fund-Terms-Survey\\_2020.pdf](https://ilpa.org/wp-content/uploads/2020/06/ILPA-Industry-Intelligence_Private-Market-Fund-Terms-Survey_2020.pdf).

<sup>6</sup> In certain jurisdictions, public pensions are required to produce such disclosures annually, e.g., California Assembly Bill 2833 (2016); Texas Senate Bill 322 (2019).

<sup>7</sup> In 2021, 59% of LPs reported receiving the ILPA Fee Template at least 50% of the time: see <https://ilpa.org/wp-content/uploads/2021/10/Key-Findings-Industry-Intelligence-Report-Fund-Terms.pdf>.

therefore respectfully request the Commission consider improving the final rule by requiring private fund advisers to provide fee and expense reporting at the *pro rata* investor level, upon request by an investor.

We believe with this proposal, the Commission is creating the conditions for market-wide adoption of established standards such as the ILPA Reporting Template, which was expressly designed to capture cost information for private equity funds.<sup>8</sup>

### **Preferential Treatment**

We support greater transparency in the industry. However, we acknowledge that the Proposal concerning preferential treatment as proposed could have unintended consequences. The Proposal would “prohibit all private fund advisers, regardless of whether they are registered with the Commission, from providing preferential terms to certain investors regarding redemption or information about portfolio holdings or exposures.”<sup>9</sup> The Proposal would also prohibit private fund investment advisers “from providing *any other preferential treatment* to any investor in the private fund unless the adviser provides written disclosures to prospective and current investors in a private fund regarding all preferential treatment the adviser or its related persons are providing investors in the same fund.”<sup>10</sup>

CalPERS considers side letters important, as a means of securing critical governance, statutory, and regulatory protections that otherwise may not be included in Limited Partnership Agreements.

We are concerned that the Proposal’s facts and circumstances standard for determining material, negative impacts for preferential redemption rights or transparency may impede limited partners’ ability to negotiate for certain side letter terms. We urge the Commission to provide greater specificity as to the nature of terms deemed to have a material, negative impact on other investors in the same fund. Further, we request that the SEC clarify that this rule does not prohibit investors from entering into bespoke arrangements with private fund advisers to secure essential institution-specific requirements.

As proposed, the requirement to provide written notice of preferential terms to prospective investors would be procedurally misaligned with the Most Favored Nation (MFN) process that runs after the fund has closed. We encourage the Commission to consider existing industry best practices around disclosure, such as a best-in-class MFN process, that could be elevated as the minimum standard rather than advance or annualized notices yielding less timely or less actionable information.

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<sup>8</sup> ILPA Reporting Template, *available at*: <https://ilpa.org/reporting-template/>. The ILPA Template was expressly designed to reflect direct and indirect fees, offsets, partnership expenses and carried interest charged by private equity advisers and their affiliates.

<sup>9</sup> Proposal, at 16928.

<sup>10</sup> Proposal, at 16928 (emphasis added).

## **Fiduciary Duty**

We support the Commission's actions to restore fiduciary duty by requiring fund advisers to be held to the same fiduciary standards as are investors, who themselves invest in private funds as fiduciaries on their beneficiaries' behalf. We have observed the widespread use of sole discretion language and expansive indemnification and exculpation provisions. Taken together with the growing complexity of the private funds industry, the erosion of fiduciary duties has magnified these risks, as evidenced by the SEC's comments on persistent inadequacies in the disclosure of conflicts.

Additionally, we encourage the SEC to clarify that any penalties or disgorgement resulting from an enforcement action that terminates in a settlement rather than court finding will be borne by the GP and not indemnifiable.

## **Closing**

The Proposed Rules would implement welcome changes to the requirements for investment advisers to private funds in order to strengthen transparency and correct informational imbalances. We commend the Commission's efforts on this important issue and urge the Commission to adopt the Proposed Rules.

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Thank you for the opportunity to share our comments. If you have any questions or wish to discuss in more detail, please do not hesitate to contact James Andrus at [James.Andrus@calpers.ca.gov](mailto:James.Andrus@calpers.ca.gov).

Sincerely,

Marcie Frost  
Chief Executive Officer

cc: James Andrus