January 31, 2018

Jay Clayton, Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Regulatory Reform for Private Equity

Dear Chairman Clayton:

On behalf of the American Investment Council (the "AIC"), I wanted to once again express our appreciation for your taking the time to meet with us on November 15, 2017 to discuss the matters of concern to our members.

The AIC is an advocacy, communications and research organization established to advance access to capital, job creation, retirement security, innovation and economic growth by promoting responsible long-term investment. In this effort, the AIC develops, analyzes and distributes information about the private equity and growth capital industry and its contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC's members are the world's leading private equity and growth capital firms united by their commitment to growing and strengthening the businesses in which they invest. For further information about the AIC and its members, please visit our website at http://www.investmentcouncil.org

As we discussed, certain rules and regulations of the Securities and Exchange Commission (the "SEC") impose a number of regulatory, reporting and recordkeeping requirements that we believe are not necessary for the protection of investors and are also inconsistent with principles of regulation that you articulated in your Remarks at the Economic Club of New York on July 12, 2017. We also believe that our recommendations are consistent with the themes articulated in the October 2017 report of the Department of the Treasury – "A Financial System That Creates Economic Opportunities – Asset Management and Insurance" (the "Asset Management Report").[1]

We believe that the SEC, under your leadership, has made substantial progress in achieving these objectives. First, we were pleased to see that three rulemakings that would have imposed substantial and unnecessary burdens on private equity sponsors have been

[1] *Available at* https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf.

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removed from the SEC's rulemaking agenda.[2] We believe that this action should free up SEC resources to focus on important initiatives that will benefit both investors and private equity sponsors.

As a general matter, we believe that the SEC should pursue initiatives to modernize and appropriately tailor the regulations, recordkeeping and reporting requirements imposed by the Investment Advisers Act of 1940, as amended (the "IAA"). These outdated requirements have been particularly burdensome for private equity fund sponsors, many of whom were only required to register under the IAA by the Dodd-Frank Act. These burdens generally relate to the differences between private equity fund advisers and the types of investment advisers that existed when the IAA was enacted: (i) private equity funds predominantly hold private securities, rather than publicly traded securities; (ii) private equity funds rarely, if at all, engage in frequent trading of public securities as might be the case with a hedge fund; (iii) private equity funds do not offer redemptions in the ordinary course and, therefore, generally only attract long-term investors; and (iv) private equity funds are typically offered only to institutional and other sophisticated investors who extensively negotiate the governing documents.

We discussed a number of matters at our meeting and we believe that the following recommendations would remove substantial burdens from private equity fund sponsors without sacrificing investor protection. We plan to contact the staff of the Division of Investment Management, and where applicable staff of other relevant Divisions, with concrete proposals to address these issues and will keep you apprised of our efforts.

1. Broker-Dealer Status Uncertainties: As we discussed, our members have a critical need for the SEC staff to confirm that broker-dealer regulations do not apply to private equity fund sponsors merely because they may receive fees in connection with the acquisition, financing and sale of portfolio companies they control. A 2013 speech by the then-Chief Counsel of the Division of Trading and Markets ("TM") and a 2016 SEC enforcement settlement, *Blackstreet Capital Management, LLC*, raised substantial confusion over this topic.

Private equity investment advisers are not broker-dealers. They provide investment expertise and advice to their affiliated funds and portfolio companies, they are subject to fiduciary duties, and do not engage in traditional brokerage activities. Receipt of fees in connection with the purchase or sale of portfolio companies alone does not transform a

[2] Two outstanding rule proposals were removed from the Agenda: proposed IAA Rule 206(4)-4 (proposed in 2016), which would have required an investment adviser to have a business continuity plan and transition plan, and proposed amendments to Regulation D, Form D and Rule 156 under the Securities Act of 1933 (proposed in 2013) that would have imposed new burdens on private funds and other issuers offering securities in reliance on Regulation D. The SEC also removed from the agenda consideration of a rule that would have established a program of third-party compliance assessments for registered investment advisers.

private equity sponsor into a broker. The AIC believes that this confusion can best be resolved through a no-action letter that will confirm, subject to certain conditions that have largely been addressed in precedent, that private equity sponsors are not required to register as broker-dealers merely because they receive such fees. We hope to resume our discussions with TM in the near future concerning the scope of such a no-action letter in the near future.

2. Form PF (IAA Rule 204(b)-1): We believe that private equity fund sponsors should be relieved from the burden of responding to Section 4 of Form PF. Private equity funds and sponsors are not systemically important. Therefore, there is no reason to require them to collect and provide detailed and burdensome information on their portfolio companies as required by Section 4. Indeed, the burdens associated with the Section 4 data collection process can be significant, including the sub-optimal timing in the calendar year (conflicting with quarter-end accounting processes), numerous data fields required to populate the responses, and a potentially material time commitment from the firm's personnel to gather the data. Further, obtaining information from portfolio companies that are only nominally (or no longer) controlled by the investment adviser as of the reporting date is often difficult.[3]

Moreover, as we have advised the SEC in the past, the focus on leverage at the portfolio company level as a means of assessing systemic risk is misplaced. Information concerning portfolio company leverage is irrelevant to the assessment of whether a private equity fund sponsor might pose systemic risks, as the leverage of a private equity fund portfolio company is not cross-collateralized or guaranteed by either the fund or its other portfolio companies.[4] There is nothing unique about a lender's loans to private equity portfolio companies that would make them more risky than a wide range of other types of loans made by the lender to other companies owned by public shareholders, public companies or other institutional investors.

3. Custody Rule (IAA Rule 206(4)-2): Rule 206(4)-2 imposes many unnecessary burdens on private fund sponsors with respect to the custody of privately offered or restricted securities (which are not readily transferable and thus not at risk of misappropriation) and smaller friends-and-family funds (where the cost of complying with

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3 We expect to provide the SEC with concrete data concerning these burdens in response to its recent request for comments on the collection of information imposed by Rule 204(b)–1 under the IAA, which requires certain private fund advisers to file Form PF. *Available at* https://www.federalregister.gov/documents/2018/01/10/2018-00267/proposed-collection-comment-request.

4 As we noted in our April 12, 2011 letter to the SEC commenting on SEC Release No. IA-3145 proposing Form PF, if there were concerns that leveraged lending practices raise systemic risk concerns, information concerning these practices should be collected from the lending institutions since we believe they are the best source for this information.

the Custody Rule outweighs the protection that it provides). At the request of the AIC, the staff of the SEC's Division of Investment Management ("IM") had addressed certain issues our members faced through interpretative guidance.[5] We believe that IM could also address the issues described above through interpretative guidance. If they are not in a position to do so, we believe that the SEC should consider rule amendments that address these issues and thereby substantially reduce unnecessary burdens imposed by the Custody Rule on private equity funds.

4. Advertising Rule (IAA Rule 206(4)-1): Rule 206(4)-1, which has not been amended since its adoption in 1961, was designed to address advertising practices generally used by an investment adviser with respect to retail clients. Our members have found that the Rule places limitations on the ability of private equity fund sponsors to present case studies, other relevant "track record" information or references from investors, even though advisers are still subject to liability for false or misleading statements to investors or prospective investors under IAA Rule 206(4)-8 and other provisions of the federal securities laws. We understand that the SEC will be addressing the Advertising Rule as part of its long-term agenda and look forward to engaging with the SEC staff on that broad review. However, we hope that the discrete issues discussed above could be addressed on a more expedited basis.

5. JOBS Act and Public Shareholder Communications: As noted above, we applaud the SEC removing from its regulatory agenda a rule proposal that would have imposed additional burdens on private funds and other issuers offering securities in reliance on Regulation D. But more needs to be done. For example, we believe that the guidance that the SEC provided on the verification requirement in Rule 506(c) under the Securities Act of 1933 has not allowed the benefits contemplated by the JOBS Act (which directed the SEC to amend Regulation D to permit general solicitations and general advertising in offerings made under Rule 506) to be fully realized by investors. We hope to engage with the SEC staff to explore ways in which the means for verification of an investor's status as an accredited investor can be made less burdensome.

In addition, we believe that the SEC's providing greater certainty concerning the application of the "general solicitation" prohibition in Rule 506 to public company business communications to equity and debt holders and others would be desirable. For example, in order to avoid any chilling of the free flow of such information, the SEC could adopt a safe harbor that would clarify that communications containing routine factual business information by a fund sponsor concerning fund investment results, portfolio

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5 *See* Privately Offered Securities under the Investment Advisers Act Custody Rule, IM Guidance Update 2013-4 (August 2013).

company transactions, the status of fund raising or the sponsor's business plans would not constitute a general solicitation.

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Beyond specific regulatory requirements, we hope that we can engage with the SEC staff on initiatives that will allow benefits of private equity investment strategies to be more widely available to retail investors while preserving necessary investor protections.

We also plan to continue to engage with the staff in connection with the SEC's interactions with non-U.S. securities regulators and provide support for their efforts to promote U.S. interests. As the Department of the Treasury recognized in the Asset Management Report, a core principle of U.S. regulation should be to advance American interests in international financial regulatory negotiations and meetings and that "U.S. engagement in the [Financial Stability Board] and international financial regulatory [standard-setting bodies] remains important to . . . level the playing field for U.S. financial institutions, and prevent unnecessary and overly burdensome regulatory standard-setting that could stifle financial innovation."

In this connection we believe that the SEC's ensuring that the Financial Stability Board and the International Organization of Securities Commissions continue to recognize that private equity firms and funds are not sources of systemic risk is particularly important. We also believe that the SEC should encourage European regulators to allow U.S. private equity fund sponsors to have access to European investors and markets with the highest amount of flexibility possible, through "passporting" and retention of national private placement regimes.

Once again, on behalf of our members, we appreciate your engagement in these issues and look forward to working with you, your fellow Commissioners and the SEC staff in the coming year.

Sincerely,

Jason Mulvihill

Jason Mulvihill
General Counsel
American Investment Council