**SUBMITTED ELECTRONICALLY**

September 24, 2019

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

**RE: Concept Release on Harmonization of Securities Offering Exemptions, Release Nos. 33-10649; 34-86129; IA-5256; IC-33512; File No. S7-08-19**

Dear Ms. Countryman:

The American Investment Council ("AIC" or "we", as applicable) is pleased to submit this letter in response to Release No. 33-10649 (the "Concept Release"), in which the Securities and Exchange Commission (the "Commission") has requested comments on ways to simplify, harmonize and improve the exempt offering framework to promote capital formation and expand investment opportunities for retail investors while maintaining appropriate investor protections.

We commend the Commission for seeking comment on this topic. The Commission's willingness to consider these important issues presents an opportunity to level the playing field for retail investors. The Concept Release recognizes the key role that pooled investment vehicles, such as private equity funds, can play in increasing retail access to higher-return, lower-risk products currently available only to institutional investors and other sophisticated investors.

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, growth capital and private credit 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.

## Introduction

Private equity funds are vehicles formed to acquire large (typically controlling) stakes in growing, undervalued or underperforming businesses. Private equity funds seek to improve the management and operations of acquired businesses to grow and strengthen such businesses over the long-term. Between 2013 and 2018 alone, private equity firms invested an estimated $3.4 trillion in approximately 25,000 U.S. based companies.[1] Private equity-backed U.S. companies employ approximately 5.8 million people in the United States.

Studies of private equity funds find that private equity returns—net of fees and of carried interest—consistently outperform public market alternatives while providing diversification, lower volatility and protection in times of market stress.[2] Based on an average private equity fund investment period of five years, the outperformance of top-performing private equity funds (i.e., the top 25%) is 7.3% over the S&P 500 on an annual basis.[3] To illustrate the impact of this outperformance more fully for retail investors, consider that a $10,000 investment in a retirement account that earned 7% annually from the S&P 500 over 30 years would result in an ending balance of $76,123. Alternatively, if that same $10,000 had been invested in a private equity fund that earned 7.3% above the S&P 500 annually, the ending balance would be $551,299, resulting in an overall increase in retirement savings of 624%.[4] Research also suggests that private equity returns generally do not come with an increase in risk. A 2017 study from Voya Investment Management found that private equity returns from 1996-2016 not only outperformed the S&P 500 index by 4% annually, but were also less risky than public market returns.[5] The Voya paper further found that adding a private equity component to an investment portfolio helps provide protection during times of market stress.

Previously, retail investors had the opportunity to access private equity funds and their corollary benefits indirectly through employer-sponsored retirement accounts. Over the past several decades, however, private sector employers have embraced defined contribution plans, such as 401(k)s, and shifted away from defined benefit plans.[6] Evidence demonstrates that defined benefit plans consistently outperform defined contribution plans. For instance, a study from the Boston College Center for Retirement Research found that, from 2003 to 2012, private defined benefit plans with more than $100 million in assets outperformed similarly sized private defined

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[1] PitchBook.

[2] *See*, e.g., David Robinson & Berk Sensoy, Cyclicality, Performance Measurement, and Cash Flow Liquidity in Private Equity, 122 J. Fin. Econ. 251 (2016); Robert Harris et al., Private Equity Performance: What Do We Know?, 69 J of Fin. 1851 (2014); Voya Investment Management, An Overview of Private Equity Investing 3, 7 (Oct. 2017). Private markets investing encompasses other asset classes beyond private equity, including private credit and other alternative strategies. Because the Concept Release focuses on providing opportunities to retail investors to access exempt offerings, this letter focuses on private equity, but we note that our views would extend across all private markets asset classes.

[3] Robert Harris et al., Private Equity Performance: What Do We Know?, 69 J of Fin. 1851, 1873 (2014).

[4] *Id*. *See also* Committee on Capital Markets Regulation, Expanding Opportunity for Investors and Retirees: Private Equity at 15 (November 2018) (hereinafter CCMR Report).

[5] Voya at 7.

[6] CCMR Report at 45.

contribution plans by 1.5% on an annual basis.[7] For retirement savers with long-term investment horizons, the compound effect of this outperformance is significant.

One of the critical differences between defined benefit plans and defined contribution plans is that defined benefit plans frequently invest in private equity funds, while defined contribution plans generally do not.[8] Based on the strong performance of private equity funds and review of the Boston College study, a recent report concluded that private equity funds are likely contributing to defined benefit plans' outperformance relative to defined contribution plans.[9]

The U.S. public equities market has also experienced a dramatic shift – over the past several decades, the number of publicly listed companies has decreased by 50% and the public issuers that remain are generally older, larger, slower growing and represent a larger portion of overall market capitalization.[10] As companies increasingly wait until they are more mature to go public, the public market offers retail investors limited exposure to younger companies with potential for rapid growth and excess returns.[11]

As a result of the shrinking opportunity set in public markets and the shift away from defined benefit plans, retail investors currently have a limited ability to access the complete U.S. equity market. In discussing this issue, Chairman Jay Clayton has asked if there are "ways that we can give retail investors access to…private equity or venture capital where we haven't lessened the investor protection?"[12] We believe that expanding the ability of retail investors to access professionally managed funds that make investments in private companies is one way to achieve this goal. When retail investors access private companies through a pooled investment vehicle they benefit from holding a diversified set of private companies under the management of a registered investment adviser who owes fiduciary duties to the pooled vehicle and has the resources and sophistication to review and diligence investments on behalf of the pooled vehicle's investors. These characteristics of pooled investment vehicles enhance investor protections. On the other hand, when retail investors invest in private companies directly they are expected to protect their own interests and as a result, must possess the financial skills to analyze and assess the value of a company before investing.

One of the Commission's core values is to strive for innovative, flexible, and pragmatic regulatory approaches that achieve the Commission's goals and recognize the ever-changing nature

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[7] Alicia H. Munnell et al., Investment Returns: Defined Benefit vs. Defined Contribution Plans, Center For Retirement Research at Boston College 3 (Dec. 2015), https://crr.bc.edu/wp-content/uploads/2015/12/IB_15-211.pdf

[8] CCMR Report at 50. Sponsors of defined-contribution plans are hesitant to permit alternative investments, such as private equity funds, in their 401(k) offerings, citing the lack of clear guidance on the implications of deviating from traditional mutual fund options. *See* Scott Higbee, *It's Time To Let 401(k) Holders Invest Like the Pros,* Wall St. J. (Jan. 30, 2014).

[9] *Id*.

[10] *The Shrinking Public Market and Why it Matters*, Pantheon (June 27, 2017).

[11] The Incredible Shrinking Universe of Stocks: The Causes and Consequences of Fewer U.S. Equities, Credit Suisse (March 22, 2017).

[12] Bipartisan Policy Center, *Reference Rate Reform: Impact on the Economy and Consumers*, YouTube (Oct. 11, 2018), https://www.youtube.com/watch?v=kMnEK3JJSG8.

of our capital markets.[13] In furtherance of this objective, we believe the Commission should consider the following regulatory changes that we believe would expand retail investor access to professionally managed funds that make investments in private companies without compromising core investor protections, and encourage innovation in the funds space: (1) eliminate the accredited investor requirement for offering of registered funds of private funds; (2) ease liquidity restraints for target date funds; (3) allow retail investors to access registered funds offered by private equity sponsors, in part by allowing parity with respect to carried interest-like features; and (4) provide increased flexibility for interval funds with longer investment periods.

## 1. <u>Eliminating the Accredited Investor Requirement for Offering of Registered Funds of Private Funds</u>

Retail investors who do not qualify as accredited investors[14] typically gain exposure to private companies through certain exempt offerings pursuant to Regulation D, Regulation A or Regulation Crowdfunding and through registered investment companies, business development companies, 401(k) plans and collective investment trusts. There are benefits to investing in private markets through a pooled investment vehicle, including "the ability to have an interest in a diversified portfolio that can reduce risk relative to the risk of holding a security of a single issuer."[15] These diversification benefits may be further realized when a pooled investment vehicle employs a "fund of funds" strategy, whereby a registered fund invests a significant portion of its assets in private equity funds and other types of private funds.

Open-end mutual funds, which offer daily redemptions, are subject to liquidity restrictions that create challenges to holding a significant amount of illiquid assets, such as securities issued by private companies and private equity funds. Closed-end funds, however, generally do not offer shareholders redemption rights and as a result, are well positioned to invest in illiquid assets. Certain closed-end funds registered under the Investment Company Act of 1940, as amended (the "Investment Company Act") invest a significant portion (more than 15%) of their assets in private equity funds and other types of private funds relying on Sections 3(c)(1) and 3(c)(7). Such registered funds are referred to as "funds of private funds." The Commission staff, however, has taken the position that a heighted suitability standard for the offering of such funds of private funds is needed, limiting the offering of such funds to Accredited Investors only.[16] There is no statute, rule or regulation imposing this limitation and the Commission staff has not publicly stated the legal or policy basis for its position. The Commission staff should reconsider this position, and remove this obstacle to offering funds of private funds to retail investors.

It is possible the Commission staff's position is based on the argument that retail investors should be excluded from such funds of private funds because they are not eligible to invest directly

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[13] U.S. Securities and Exchange Commission, Strategic Plan Fiscal Years 2018-2022, https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL.pdf (hereinafter Strategic Plan).

[14] Approximately 87% of U.S. households do currently not qualify as Accredited Investors. *See* Concept Release at 36, Table 3.

[15] Concept Release at 173 (*citing* Harry Markowitz, Portfolio Selection, 7 J. of Finance 77 (1952)).

[16] *See*, *e.g.,* Wildermuth Endowment Strategy Fund, SEC Comment Letter (Oct. 11, 2013); Cross Shore Discovery Fund, SEC Comment Response Letter, (Sept. 17, 2015); Resource Real Estate Diversified Income Fund, SEC Comment Letter (Oct. 19, 2012); Oxford Lane Capital Corp., SEC Comment Response Letter, (Aug. 17, 2015).

in the underlying private funds. However, retail investors are eligible to invest in mutual funds and other closed-end funds that frequently make investments such investors would not be eligible to make directly, such as securities issued in Rule 144A offerings and other private placement transactions. Moreover, closed-end funds are often advised by registered investment advisers who possess the necessary experience and sophistication to invest in private funds and are subject to fiduciary duties and board oversight.

Typically, registered funds provide shareholders with liquidity by either listing the fund on a registered stock exchange or making periodic offers to repurchase a portion of the fund's outstanding shares. Additionally, as discussed above, a registered fund, like private equity funds, diversifies its holdings to reduce the risk that any losses at any single underlying company will outweigh successful investments. Established investment advisers also have the appropriate resources and sophistication to review and diligence investments on behalf of a registered fund's investors. In his comment letter dated July 11, 2019, Commission Investor Advocate Rick A. Fleming raises some of the challenges associated with retail investors directly participating in exempt offerings (i.e., not through a fund), including limited liquidity and the risk of failed investments.[17] These challenges, however, are significantly lessened when retail investors access private companies and private funds through a registered fund advised by a sophisticated party.

Additionally, allowing more investors access to registered funds of private funds would greatly enhance the ability of digital investment advisory programs (e.g., "robo-advisers") and other innovative advisory services to incorporate exposure to private investments into client portfolios. As the Commission notes in the Concept Release, such advisory programs have grown in recent years and are making it easier for retail investors with smaller account balances to obtain professional investment advice[18] We believe that funds of private funds are more easily incorporated into these types of advisory service models than individual investments in private companies because funds have track records that can be quantitatively analyzed and they offer less risk through diversification and other benefits discussed previously. Enhancing the ability of these innovative advisory service models to consider private investments for their clients has the potential to dramatically expand retail investor access to those investments, and registered funds of private funds are an ideal way to accomplish this goal.

In light of the foregoing, the Commission should consider changing its policy limiting the offering of registered funds of private funds to Accredited Investors, thereby expanding retail investor access to a diversified set of private companies under the management of a registered investment adviser who owes fiduciary duties to such pooled vehicle. In recent remarks to the Economic Club of New York, Chairman Clayton suggested that "appropriately structured funds" are one way to facilitate "Main Street investor access to private investments in a manner that ensures incentive alignment with professional investors — similar to our public markets — and otherwise provides appropriate investor protections."[19] As we have explained above, we agree with Chairman Clayton that Main Street investor access to private investments is appropriate, and also

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[17] https://www.sec.gov/comments/s7-08-19/s70819-5800855-187067.pdf

[18] Concept Release at 173.

[19] *Remarks to the Economic Club of New York*, (Sept. 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09.

agree that in so doing it is important to consider whether such access provides appropriate investor protection.

In that regard, we note that the primary investor protections provided by a registered fund of private funds structure are and should be found by the structure itself, which is designed by law to provide investment management by registered investment advisers with fiduciary duties to the funds they manage, under the oversight of a majority independent board, and sold by intermediaries who must act in the best interest of the investor.[20,21] The registered investment adviser to a registered fund of private funds would, for example, be expected to conduct appropriate diligence on private funds, including the tenure of the investment team, success of the investment team and private fund sponsor over multiple vintages and market cycles, and appropriateness of the terms of the private fund.

We further observe that the fact that private funds are designed for sophisticated institutional and individual investors offers a benefit to retail investors, as these sophisticated investors negotiate favorable terms for their investments. If the Commission were to limit registered funds of private funds to investing in private funds that are mostly owned by sophisticated investors, it would prevent investments in private funds specifically designed for indirect retail investment where the benefits of institutional ownership would be lost. For example, the Commission could consider requiring a private fund that permits investments by registered funds of private funds to commit to not allowing registered funds, in the aggregate, to own more than a certain percentage of the private fund on a commingled basis (e.g., 50%). As a result, retail investors in a registered fund of private funds would have the ability to invest indirectly alongside institutional investors in the underlying private funds, creating a structure where "Main Street investors and professional investors are in it together."[22] We believe imposing such a limitation on underlying private funds would be an effective way of ensuring that retail investors are exposed only to private funds that are sponsored by experienced private equity managers and have an institutional investor base where the terms of the funds are negotiated by sophisticated institutional investors.

In addition, to promote diversification in registered funds of private funds, the Commission could consider imposing limitations that would prevent a registered fund of private funds from (i) owning more than a certain percentage of the voting securities of a single private fund on a

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[20] *See* Section 203(a) of the of the Advisers Act of 1940, as amended (the "Advisers Act") (requires registration of investment advisers); Section 36(b) of the Investment Company Act (establishes a fiduciary duty on the part of advisers to registered investment companies with respect to receipt of fees); Rule 0-1(a)(7) of the Investment Company Act (requires that the board of directors of a registered investment company be composed of at least a majority of disinterested directors); and Regulation Best Interest (imposes a requirement for registered broker-dealers to act in the best interest of retail customers when making a recommendation regarding a securities transaction or investment strategy involving securities).

[21] An adviser to a registered fund of private funds would also be prohibited from investing in affiliated private funds. We believe this prohibition may be unduly restrictive and recommend that the Commission consider providing relief from the affiliated transactions of Section 17(a) of the Investment Company Act to permit a registered fund to invest in affiliated private funds. For an example of the types of conditions the Commission could impose in connection with such registered funds of affiliated private funds, see Simpson Thacher, Registered Funds Alert at 7 (Jan. 2019), https://www.stblaw.com/docs/default-source/Publications/registeredfundsalert_january2019.pdf.

[22] Chairman Jay Clayton*, Remarks to the Economic Club of New York,* YouTube (Sept. 9, 2019), https://www.youtube.com/watch?v=CTsqvpaG2tI.

commingled basis or (ii) investing more than a certain percentage of its assets in a single private fund (e.g., 40%). These types of restrictions may seem familiar to the Commission, as they are similar in construction to those found in Section 12(d)(1) of the Investment Company Act. While Section 12(d)(1) is intended to prevent pyramiding of fees and one fund exercising undue influence over another fund in the registered fund space, if similar restrictions were imposed on registered fund of private equity funds' ability to invest in private funds it could serve important investor protection interests while still providing retail investors significant access to private investments.

### 2. Easing Liquidity Restraints for Target Date Funds

Retail investors saving for retirement are increasingly looking to certain types of registered investment companies specifically designed for investors with longer investment horizons.[23] Target date funds continue to be a popular and convenient choice for retirement savers as they provide a diversified mix of equity and fixed income investments that automatically rebalances over time. For example, a 25-year old planning to retire at age 66 could invest in a target date 2060 fund. Over time, as the investor's retirement date approaches, the fund's portfolio manager will rebalance the fund so that it becomes more conservative, shifting from a capital appreciation strategy to an income producing strategy.

The intended long-term holding period of target date funds makes them particularly well suited to serve as the vehicle through which retail investors access private companies and private equity funds. A study from the Georgetown Center for Retirement Initiatives recently found that allocating just 20% of a target date fund's portfolio to private equity funds increased median annual retirement income by 13%, as compared to a baseline portfolio without private equity investments.[24] However, as a registered open-end fund, a target date fund is prohibited under Rule 22e-4 from investing more than 15% of its net assets in illiquid securities, thereby limiting the extent to which it may invest in private companies and private funds. We recommend that the Commission consider amending Rule 22e-4 to ease liquidity constraints for target date funds with longer investment horizons to provide such funds greater flexibility to invest in illiquid assets, including private equity funds. Such a revision may, for example, permit a fund whose explicit strategy is to invest in multiple funds to meet longer-term investment horizons to exceed the 15% limit in accordance with an appropriate liquidity risk management program approved by its board of directors and disclosed to shareholders. We believe this change could significantly improve retirement savings outcomes for retail investors by providing such investors with indirect access to private equity funds and the concomitant opportunity for excess and uncorrelated returns associated with allocations to private equity funds[25] and is consistent with the Commission's goal of increasing retail investor access to long-term investment opportunities.[26] We encourage the

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[23] Investment Company Institute, *Target Date Funds Widely Used by Younger Plan Participants* (Sept. 10, 2018), https://www.ici.org/401k/news/18_news_ebri_perspective.

[24] Georgetown Center for Retirement Initiatives, *The Evolution of Target Date Funds: Using Alternatives to Improve Retirement Plan Outcomes* (June 2018), https://cri.georgetown.edu/wp-content/uploads/2018/06/PolicyReport18-01.pdf.

[25] *Id. See also* Voya Investment Management, An Overview of Private Equity Investing (Oct. 2017).

[26] Strategic Plan at 6.

Commission to coordinate with the Department of Labor, as appropriate, as they both navigate the possibility of increasing retail investor access to private markets in defined contribution plans.

### 3. Allow Accredited Investors to Access Registered Funds Offered by Private Equity Sponsors, in Part by Allowing Parity with Respect to Carried Interest-Like Features

A manager receiving a portion of a fund's realized profits, commonly referred to as "carried interest," is a key component of profit participation in the private equity industry and reflects a private equity manager's entrepreneurial vision and expertise. In fact, carried interest is found throughout industries and market segments in which one party has entrepreneurial vision and expertise and other parties invest cash capital. For example, developers of real estate, infrastructure and oil and gas typically realize carried interest as part of their arrangements with their investors. Under Rule 506 of Regulation D, Accredited Investors are eligible to invest directly in exempt offerings of private companies and start-up ventures utilizing carried interest arrangements. However, due to the prohibitions in Section 205(a)(1) of the Advisers Act, an Accredited Investor would be prohibited from investing in a registered fund where its investment adviser similarly received carried interest. To address this dissonance and as discussed more fully below, we recommend that the Commission consider amending the definition of Qualified Client under Rule 205-3 of the Advisers Act to include Accredited Investors.

Managers of private funds typically receive a fixed base management fee and, in the event of exceptional performance, may also receive a portion of the fund's overall profits in the form of carried interest. Carried interest is a portion of the realized profits generated by a private equity fund that is retained by the fund's general partner at the start of the fund. A carried interest participation is equal to a specified percentage (often 20%) of the cumulative net profits from a private equity fund's investments, such that carried interest distributions are made to the general partner only if the fund overall is sufficiently profitable above a specified rate of return (i.e., the "hurdle"), which is typically a 7-8% rate of return.

Carried interest arrangements are also often subject to a "clawback" mechanism to ensure that carried interest distributions made to the general partner over the life of the fund correspond with the fund's ultimate performance. As an added protection, some private equity managers require that a portion of carried interest distributions be placed in escrow or otherwise held back pending final realization of all of a fund's investments to secure any potential clawback obligation. Clawbacks backed by personal guarantees or escrows are a unique feature of the private equity business model and seek to ensure that the long-term financial interests of private equity managers are aligned with investors.

Under Section 205(a)(1) of the Advisers Act, registered investment advisers are generally prohibited from receiving compensation based on "a share of capital gains upon, or capital appreciation of" the assets of a registered investment company unless the offering of such company is limited to "Qualified Clients" as defined by the Advisers Act. Established private equity managers have been hesitant to offer long-term, private equity-style strategies in retail products because carried interest is, for purposes of Section 205(a)(1) of the Advisers Act, deemed to be compensation based on a share of capital gains or capital appreciation, thus prohibiting managers from being properly rewarded for the entrepreneurial risk associated with a private equity strategy.

As a result, retail investors are limited in their ability to access long-term private equity strategies through registered funds.

As discussed above, because carried interest is typically subject to mechanisms designed to protect investor interests, it is distinguishable from the types of profit-sharing arrangements Section 205(a)(1) was designed to address. Accordingly, we believe the Commission should take action to expand the ability of retail investors to access registered funds that provide managers with carried interest; specifically, we recommend that the Commission revise the definition of "Qualified Client" to align with the definition of "Accredited Investor." Should the Commission separately expand the definition of Accredited Investor as discussed in more detail in the Concept Release, the Commission should maintain this alignment.[27] To qualify under the existing definition of Accredited Investor, an individual must have at least $1 million in net worth (excluding the value of a primary residence) or have earned annual income of at least $200,000 (or $300,000 with a spouse) for each of the last two years.[28] In contrast, under the current Qualified Client standard, a natural person must have at least $2.1 million in net worth (excluding the value of a primary residence).[29] Harmonizing the Qualified Client definition to track the Accredited Investor definition has the potential to greatly expand investor access to established private equity managers offering higher-return, lower-risk strategies through registered funds.[30]Aligning the definition of Qualified Client with the definition of Accredited Investor would permit advisers to registered funds to receive carried interest with respect to a broader investor base, incentivizing established private equity managers to launch more retail-focused products. Absent such change, there would be a risk that only private equity managers that are incapable of attracting institutional assets would provide private equity-style products to retail investors. As discussed above, the top-quartile of private equity managers consistently outperform the S&P 500 on an annual basis.

Carried interest fairly rewards private equity managers for outperformance and entrepreneurial vision without incentivizing inappropriate risks or compensating for underperformance. The proposed solution has the potential to encourage innovation in the registered funds space and expand investor access to new products and private equity strategies, while preserving core investor protections. Accordingly, we recommend that the Commission consider amending the definition of Qualified Client to include Accredited Investors to eliminate the disincentive for top-performing private equity managers to offer products to retail investors.

### 4. Increased Flexibility for Interval Funds with Longer Investment Periods

As discussed earlier, registered closed-end funds are well positioned to invest in illiquid assets, such as private companies. An interval fund is a type of registered closed-end fund that makes periodic repurchase offers pursuant to Rule 23c-3 of the Investment Company Act. However, under the current landscape of Rule 23c-3, asset managers face a number of regulatory hurdles that discourage or foreclose the offering of an interval fund utilizing a private equity-style investment strategy, including the requirement for an interval fund to make repurchase offers on a

[27] Concept Release at 32-60.

[28] Rule 501(a) of Regulation D under the Securities Act.

[29] Rule 205-3 of the Advisers Act.

[30] Concept Release at 36.

fixed schedule. In October 2017, the U.S. Department of the Treasury prepared a report that recommended, among other things, that the Commission review its rules regarding interval funds to determine whether more flexible provisions might encourage the creation of registered closed-end funds that invest in offerings of smaller public companies and private companies whose shares have limited or no liquidity.[31] We agree with the recommendations in the 2017 Treasury Report and further recommend that the Commission consider the amendments to the interval fund rules discussed below.

Under existing Rule 23c-3, an interval fund must complete its first repurchase offer within two years (at most) of the effective date of the fund's registration statement. A typical private equity fund has an investment period of five to seven years before the fund begins returning capital to investors. Given the longer-term nature of a private equity strategy, it would be impractical for an interval fund utilizing such a strategy to comply with the existing rules without a corresponding impact to the fund's overall returns. Private equity funds typically pursue "buy and hold" strategies, investing in and holding the illiquid securities of operating companies that are perceived to have growth potential. Over its life, a private equity fund will work with its portfolio companies to create long term value, including by optimizing operations to improve efficiency, revamping management teams, entering new business lines and/or geographies and executing spin-offs or consolidations. The fund will then seek to "exit" the company by taking the business public or selling it for a higher valuation than it was purchased. Without a longer investment term before periodic repurchases must commence, the fund may be forced to exit its investments prematurely to fund repurchase requests. Providing increased flexibility under the interval fund rules also allows a private equity-style interval fund to align its investment period with those of other private funds resulting in more effective co-investment opportunities alongside such funds.

The Commission initially proposed Rule 23c-3 "to provide investors with greater investment flexibility and the option to invest in less liquid securities, including venture capital and small business securities."[32] In practice, Rule 23c-3 requires repurchase offers be made on a fixed schedule that generally does not align with the liquidity profile of a portfolio that pursues a private equity-style investment strategy. The Commission's Strategic Plan recognizes the importance of identifying and taking steps to address existing Commission rules and approaches that are not functioning as intended.[33] Therefore, we recommend that the Commission consider amending Rule 23c-3 to allow for "long-term interval funds" and provide such funds more flexibility before a repurchase offer must commence, such as allowing a five to seven year investment period with periodic repurchase offers thereafter. Additionally, we believe the Commission should consider amending Rule 23c-3 to permit long-term interval funds to make repurchase offers upon a liquidity event at an underlying portfolio company, instead of on a fixed

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[31] *See* A Financial System That Creates Economic Opportunities Capital Markets, U.S. Dept. of the Treasury (Oct. 2017 ("2017 Treasury Report"), https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf.

[32] 57 Fed. Reg. 34701, 34706 (Aug. 6, 1992).

[33] *See* Strategic Plan at 8.

schedule.[34] Our proposed solutions are consistent with the original intent behind the interval fund structure and the recommendations found in the 2017 Treasury Report.[35]

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The AIC appreciates the opportunity to comment on the Concept Release and would be pleased to answer any questions you might have regarding our comments, or regarding the private equity and growth capital industry more generally.

Respectfully submitted,

Jason Mulvihill
Chief Operating Officer & General Counsel
American Investment Council

[34] *See* 2017 Treasury Report at 37.

[35] We note that "tender offer funds" are another method of providing registered fund shareholders with periodic liquidity. "Tender offer funds" are closed-end funds that periodically conduct tender offers to provide liquidity to shareholders, rather than secondary (i.e., exchange-listed) liquidity. Registered funds utilizing a private equity-style investment strategy could be structured as tender offer funds. If the Commission determines that tender offer funds are the appropriate mechanism to provide investors in private equity-style registered funds with periodic liquidity, we would recommend the Commission consider allowing tender offer funds to use the conditions described in Rule 23c-3(c) in place of the Exchange Act tender offer rules and consider revising Rule 23c-3(c) to allow repurchase offers to occur more frequently than once every two years. The tender offer rules under the Exchange Act, including Rule 13e-4, are generally more burdensome and expensive than the requirements for interval funds under Rule 23c-3. For instance, under Schedule TO a tender offer fund must pay a filing fee to the Commission with respect to the total amount of the repurchase offer. There is no comparable filing fee requirement for interval funds under Rule 23c-3. Additionally, unlike interval funds, a tender offer fund must file various transaction documents as exhibits to a tender offer statement on EDGAR, resulting in increased costs to the tender offer fund for printer processing. We believe allowing tender offer funds to utilize the repurchase mechanisms under Rule 23c-3(c) would result in decreased costs for tender offer fund shareholders while preserving core investor protections.