AMERICAN INVESTMENT COUNCIL
Growth Through Long-Term Investment

July 27, 2022

VIA ELECTRONIC SUBMISSION

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

Re: Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (SEC Release No. IA-5955; File No. S7-03-22 (February 9, 2022)).

Dear Ms. Countryman:

The American Investment Council ("**AIC**") writes to further supplement its comments[1] on the proposed rules (the "**Proposal**") regarding investment advisers to private funds[2] in light of the Supreme Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). *West Virginia* confirms what the text and structure of the securities laws already establish: the Securities and Exchange Commission does not have the authority to fundamentally alter the longstanding, widely used business arrangements of private funds.[3] Congress purposefully exempted private funds from the detailed regulatory regime applicable to registered investment companies—recognizing that the large, sophisticated investors who invest in private funds are well-positioned to look after their own interests.[4] The Commission has no authority to disturb this balance.

West Virginia emphasizes a "common sense" principle of statutory interpretation known as the major questions doctrine: Congress does not delegate to agencies highly consequential powers—including the power to resolve "major questions"—in "modest

[1] Comments of the American Investment Council, SEC Release No. IA-5955, File No. S7-03-22 (June 13, 2022), https://www.sec.gov/comments/s7-03-22/s70322-20131146-301343.pdf ("AIC June Comments"); Comments of the American Investment Council, SEC Release No. IA-5955, File No. S7-03-22 (Apr. 25, 2022), https://www.sec.gov/comments/s7-03-22/s70322-20126669-287340.pdf ("AIC April Comments").

[2] Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 87 Fed. Reg. 16,886 (Mar. 24, 2022). All citations to the Proposal will refer to the Federal Register page unless otherwise indicated.

[3] *See* AIC April Comments 7-20.

[4] *See id.* at 8-9.

words, vague terms, or subtle devices."[5] To the contrary, when Congress "wishes to assign to an agency decisions of vast economic and political significance," Congress "speak[s] clearly."[6]

This is a major questions case (the Commission's inexplicable failure to designate the Proposal as a "major rule," notwithstanding[7]). In arguing that the Investment Advisers Act empowers it to "substantially restructure" the business arrangements of private funds, the Commission claims to have discovered an unheralded power representing a "transformative expansion in its regulatory authority."[8] As AIC has previously explained, and as the Commission itself has long recognized, the Commission's traditional role has not been to protect investors from themselves, but rather to promote informed decision-making based on fair and accurate disclosures.[9] That is particularly true in the private funds space, where Congress has long recognized that the large, extremely sophisticated investors who invest in private funds are more than capable of appreciating and bearing the risks of their own investments.[10] The proposed rules would turn this regulatory regime on its head. Instead of allowing private fund investors to work out the terms of their own investments as they have for decades, the Commission would take up the mantle of merits regulation and impose a litany of paternalistic prohibitions on longstanding, widely-accepted business practices. These circumstances are reason enough to be "skeptic[al]" of the Commission's claim to authority.[11]

The economic consequences of the Proposal provide even more reason for pause. Congress does not lightly confer on an agency an extravagant statutory power to regulate a "significant portion of the American economy"[12] or to require "billions of dollars in spending" by private entities.[13] Yet that is exactly what the Commission claims here. Private funds are a major driver of economic growth. They back thousands of

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5 *West Virginia*, 142 S. Ct. at 2609 (cleaned up).

6 *Id.* at 2605 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

7 *See* Proposal at 16,974.

8 *West Virginia*, 142 S. Ct. at 2610 (cleaned up) (quoting *Util. Air*, 573 U.S. at 324).

9 AIC April Comments 24.

10 *Id.* at 8-9.

11 *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air*, 573 U.S. at 324).

12 *Id.* at 2608 (quoting *Util. Air*, 573 U.S. at 324).

13 *King v. Burwell*, 576 U.S. 473, 485 (2015); *accord West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

companies, with millions of employees,[14] and, over the years, have returned trillions of dollars in gains to investors.[15] If Congress really intended to empower the Commission to "fundamentally and dramatically alter the regulatory regime" for this massively important industry,[16] while socking it with billions of dollars in added regulatory costs,[17] Congress would have provided "clear congressional authorization" to that effect.[18]

All the Commission can point to, however, is a general anti-fraud provision[19] and a clean-up provision entitled "Other Matters" that allows the agency to regulate "certain sales practices, conflicts of interest, and compensation schemes."[20] That is a "wafer-thin reed" on which to rest a measure as consequential as the Proposal.[21] It is telling, moreover, that in the decade those provisions have been on the books, the Commission has never before claimed the expansive authority it asserts now. The first time the Commission even attempted to use its authority to regulate "certain sales practices, conflicts of interest, and compensation schemes" was in 2020, and even then, the Commission sought only to regulate the account-opening process for retail investors who wished to invest in certain types of funds.[22] The Commission never even thought to use this authority to alter the structure of the funds themselves. This is a "telling indication" that the current Proposal "extends beyond the agency's legitimate reach."[23]

For these and a multitude of other reasons documented in the record, the Commission should abandon this misguided Proposal.

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[14] *See, e.g.*, AIC April Comments 1; Comments of the National Venture Capital Association 2-3, SEC Release No. IA-5955, File No. S7-03-22 (Apr. 25, 2022), https://www.sec.gov/comments/s7-03-22/s70322-20130106-296800.pdf.

[15] *See, e.g.*, AIC April Comments 1; AIC June Comments 3-4.

[16] AIC April Comments, Appendix 2, Report of Mark J. Flannery ¶ 1 (Apr. 25, 2022).

[17] *See, e.g.*, Comments of the Alternative Investment Management Association 22-23, SEC Release No. IA-5955, File No. S7-03-22 (Apr. 25, 2022), https://www.sec.gov/comments/s7-03-22/s70322-20128423-291344.pdf.

[18] *West Virginia*, 142 S. Ct. at 2614.

[19] *See* AIC April Comments 10-12.

[20] *See id.* at 13-19.

[21] *West Virginia*, 142 S. Ct. at 2608 (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2487 (2021) (per curiam)).

[22] *See* Use of Derivatives By Registered Investment Companies and Business Development Companies, 85 Fed. Reg. 4446, 4492-93 (Jan. 24, 2020).

[23] *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 666 (2022); *see also West Virginia*, 142 S. Ct. at 2610 ("[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.").

Respectfully submitted,

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American Investment Council