The SEC has made significant changes better protecting investors and retirees in the $25 trillion private fund industry; more still needs to be done in private market securities

We strongly support the SEC's recently finalized rule requiring the $25 trillion private fund industry to disclose crucial information around basic investment terms. Currently, investing in the $25 trillion private fund industry is not a transparent, standardized process but rather a series of bespoke, bilateral negotiations where investors attempt to negotiate basic terms such as the level of granularity of reporting around fees and expenses that are charged, along with what those fees and charges are, and how their fund's investment performance is reported. The rule together would enable fiduciaries, many overseeing money on behalf of working people saving for retirement and retirees, to have the information necessary to make informed decisions and be able to negotiate on more even terms with their private fund advisers.

All of these negotiations are currently done while remaining in the dark on what terms other investors in the same fund have received. The lack of standard investment terms have led some fiduciaries to comment to the Commission that they "find it necessary to incur substantial time and effort to reach agreement with some [General Partners]" on negotiating basic, sensible terms of investment.[1]

In the absence of the Commission's private fund adviser proposal mandating the disclosure of basic and important information, investors have attempted to take it upon themselves to try and use the existing bilateral negotiation process to secure better terms for themselves using side letters which we support the disclosure of. Privately negotiating various side letters however has instead pitted LPs against one another rather than collectively trying to negotiate for a standard set of disclosures and investment terms from the GPs. The SEC critically restricts side letters that clearly cause harm to other fund investors such as letters that provides one LP with additional information on a fund that other investors are not privy to, creating an unlevel informational playing field. Another example includes preferential liquidity, where one investor can redeem ahead of others.

Registration exemptions should be revisited across the private markets

In addition to the SEC's private fund advisers rule that will better protect investors in the funds, the SEC also needs to propose rules that will end the outdated rules across the private markets that exempt issuers from providing important information to investors in both debt and equity offerings.

Many private market offerings provide very little, and in some cases outright unreliable information to their investors due to their reliance on rules and exemptions from SEC registration written between the 1980s and 1990s.[2] Despite such exemptions being offered back when private markets were a fraction of

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[1] Tarbox, Monte. National Electrical Benefit Fund. Re: File No. S7-03-22. Apr 25, 2022. https://www.sec.gov/comments/s7-03-22/s70322-20126495-287136.pdf

[2] Securities and Exchange Commission. Big "Issues" in the Small Business Safe Harbor: Remarks at the 50th Annual Securities Regulation Institute. Jan 30, 2023. https://www.sec.gov/news/speech/crenshaw-remarks-securities-regulation-institute-013023

the size today and for smaller, less frequent issuers, today, those same exemptions continue to be utilized by some of the largest, most active issuers. It is these exemptions that have allowed for many private companies to remain private for longer, putting a greater share of financial and economic activity where both regulators and investors have far less visibility and protection.

Following the growth already in the 1960s of private markets, Congress had previously authorized the SEC to conduct a special study of the lack of transparency in private markets and how such was contributing to greater incidents of fraud. In response to the study, Congress implemented Section 12(g) of the Exchange Act that would require issuers with a certain number of shareholders of record from having to provide periodic reporting.[3]

Many of these rules were written decades ago and need to be updated to reflect the realities and conditions of today's private markets. Many issuers for example can continue to avoid the reporting requirements of Section 12(g) for example due to thresholds that begin at 2000 shareholders of record, but not incorporating that very few shareholders hold securities under their own name, leaving next to no issuers meeting the shareholder threshold count.

Similarly, a majority of the $2 trillion non-investment grade or "junk" corporate bond market now relies on Rule 144A[4] promulgated in 1990 enabling issuers to avoid registering their debt offering with the SEC. Such exemptions prevent investors from having better information about the debt they are investing in and also making it more difficult to trade in and out of the debt as needed[5] due to these outdated rules that only serve to benefit issuers whose cost of compliance would be in no way burdensome.

Finally, the SEC needs to update the vague filing details required to private market issuers under Regulation D that otherwise allows private issuers to raise unlimited amounts of money from investors, without providing to them adequate information about what they are investing in.[6]

The SEC therefore needs to propose rules that are on its regulatory agenda related to Section 12(g), amend Rule 144A, as well as improve the disclosures over Regulation D to modernize their rules in a way that will adequately provide greater transparency and investor protection in line with how these markets function today.

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[3] Securities and Exchange Commission. Going Dark: The Growth of Private Markets and the Impact on Investors and the Economy. Oct 12, 2021. https://www.sec.gov/news/speech/lee-sec-speaks-2021-10-12
[4] Americans for Financial Reform Education Fund. Giant in the Shadows: Subprime Corporate Debt. January 2023.
https://ourfinancialsecurity.org/wp-content/uploads/2023/01/1.6.23-Subprime-Corporate-Debt-A-Giant-in-the-Shadows.pdf. (Per data from Barclays, the percentage of the junk bond market relying on exemptions from registration under Rule 144A climbed from 19% in 2012 to 67% in 2022)
[5] Han, Song et al. Journal of Financial Markets. Information and liquidity of over-the-counter securities: Evidence from public registration of Rule 144A bonds. June 2022.
https://www.sciencedirect.com/science/article/abs/pii/S1386418121000379
[6] Securities and Exchange Commission. Big "Issues" in the Small Business Safe Harbor: Remarks at the 50th Annual Securities Regulation Institute. Jan 30, 2023.
https://www.sec.gov/news/speech/crenshaw-remarks-securities-regulation-institute-013023