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February 2, 2011

Delivered via e-mail to: e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary Proposed Rule
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of the Term "Fiduciary" (RIN1210-AB32)

Ladies and Gentlemen:

On behalf of a client who has been a sponsor of closed-end private-equity style real estate funds for the last 15 years, we are writing in response to the request for comment on the Department of Labor's proposed rule that would change the definition of the term "fiduciary." In response to both market pressure from existing and potential fund investors and the Private Fund Investment Advisers Registration Act of 2010 (a component of the Dodd-Frank Wall Street Reform and Consumer Protection Act), which would require our fund sponsor client and many of its peers to register by July 21, 2011, our client has recently registered with the Securities and Exchange Commission as an investment adviser under the Investment Advisers Act of 1940.

The DOL's proposed rule 2510.3-21(c) (in particular rule 2510.3-21(c)(1)(ii)(C), which clarifies that SEC-registered investment advisers will be considered ERISA fiduciaries in certain circumstances) raises concerns that a fund sponsor's status as an investment adviser will make it impossible for the fund sponsor to avoid ERISA fiduciary

status due to existing relationships that they and their affiliate entities have with certain types of ERISA-regulated fund investors. Specifically, a limited number of the investors in our client's funds are (i) defined benefit plans ("Defined Benefit Investors"), investing under the direction of their trustees, and (ii) individuals who have invested through their "individual account plans" (e.g., their IRAs) ("Defined Contribution Investors"). The proposed rule raises similar, but slightly different, concerns with respect to both Defined Benefit Investors and Defined Contribution Investors. Each of these concerns is discussed below.

Defined Benefit Investors

Several of our client's existing fund partnerships have admitted Defined Benefit Investors, and they intend to continue to admit Defined Benefit Investors as they sponsor future funds. Their fund partnership agreements traditionally require that they, as fund sponsor/general partner, provide periodic reports to all of their fund investors (including Defined Benefit Investors) detailing valuations and performance of fund assets. This is often a requirement of state partnership law. For example, section 17-305 of the Delaware Revised Uniform Limited Partnership Act requires that a general partner provide information upon request reasonably related to a limited partner's interest as a limited partner, including true and full information regarding the status of the partnership's financial condition.

In addition, Defined Benefit Investors and their plan fiduciaries often require fund sponsors and their affiliated general partner entities to complete periodic questionnaires regarding fund valuations and performance. Such reports are very common within the private equity fund industry, and are often provided separately from the specific requests fund sponsors/general partners receive to assist their Defined Benefit Investors in the completion of Schedule C to their Series 5500 forms.

It is our view that such partnership reports and questionnaires are "provided for purposes of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code, and the regulations, forms and schedules issued thereunder" within the meaning of the exclusion established under proposed rule 2510.3-21(c)(2)(iii). The investment fiduciaries of the various Defined Benefit Investors insist upon such reports and questionnaires in their roles as fiduciaries, which means that the documents are provided for purposes of compliance with ERISA, although perhaps not directly for purposes of compliance with the reporting and disclosure requirements of ERISA. We request that the DOL revise the text of the proposed rule before final implementation to clarify this point. This clarification will enable fund sponsors and their affiliate general partner entities, without fear of acquiring ERISA fiduciary status, to continue to provide to Defined Benefit Investors the partnership reports and questionnaires that all investors in private real estate funds demand (and, indeed, that are often required under state partnership law).

Defined Contribution Investors

Several of our client's existing fund partnerships have admitted Defined Contribution Investors, and the fund partnership agreements (and state partnership law) typically require that the sponsor and its general partner affiliate entities provide these investors with partnership reports similar to those discussed above under *Defined Benefit Investors*. While proposed rule 2510.3-21(c)(2)(iii) provides an exclusion to ERISA fiduciary status for reports "provided for purposes of compliance with the reporting and disclosure requirements of the Act, the Internal Revenue Code, and the regulations, forms and schedules issued thereunder," this exclusion does not apply where such report "involves assets for which there is not a generally recognized market and serves as a basis on which a plan may make distributions to plan participants and beneficiaries."

The interests held by Defined Contribution Investors in our client's private fund partnerships are not permitted under state and federal securities laws to trade freely on a generally recognized market. Furthermore, the underlying assets of such partnerships (i.e., the real estate investments owned by the funds) are inherently illiquid and often trade in off-market transactions. Moreover, Defined Contribution Investors must use reports regarding these assets (provided pursuant to partnership agreements or state partnership law) as a basis on which to make distributions from the individual retirement account to their participants and beneficiaries.

Therefore, a strict interpretation of the language of proposed rule 2510.3-21(c)(2)(iii) seems to indicate that a fund sponsor and its affiliate general partner entities cannot continue to honor their contractual and state statutory reporting obligations to existing Defined Contribution Investors without attaining ERISA fiduciary status. We request that the DOL revise the text of the proposed rule before final implementation to clarify that a fund sponsor and its affiliate general partner entities will not be deemed to be an ERISA fiduciary solely because of its compliance with existing partnership arrangements and state partnership law reporting obligations.

ERISA Investors in General

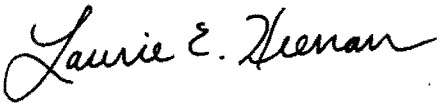
Much of the private-equity fund industry views the party-in-interest limitations, limitations on incentive fees, requirements of terminable investment arrangements, and other implications of ERISA fiduciary status as incompatible with the industry's business model – where illiquid closed-end fund investments and "carried interests" (i.e., incentive fees to general partners) are the norm. Our client agrees with this view, and has therefore always taken care to ensure that admitting ERISA-regulated investors into their funds does not subject them to ERISA fiduciary responsibilities (either by operating their funds as venture capital operating companies, or by capping ERISA-regulated investments below the 25% "substantial participation" threshold). Without the clarifications requested above, our client fears that their business model – which they feel and we agree provides

a valuable investment opportunity for ERISA-regulated investors – could be placed in peril by the DOL's proposed rule. At a minimum, to protect the expectations of both investors and fund sponsors/general partners, any expansion of the definition of fiduciary should be prospective, and should not apply to agreements entered into on or before the effective date of final regulations.

Summary

To enable our fund sponsor client to continue offering investment opportunities to Defined Benefit Investors, our client requests that the regulation clarify that partnership reports and questionnaires be considered "provided for purposes of compliance with the reporting and disclosure requirements of the Act" as that phrase is used in section 2510.3-21(c)(2)(iii). To continue offering those investment opportunities to Defined Contribution Investors, our client requests that, even where those reports and questionnaires are the basis for a distribution to an individual retirement account participant or beneficiary, the reports and questionnaires should not cause the preparer to be considered a fiduciary. At a minimum, our client requests that the regulation be prospective to avoid the disruption of existing investment arrangements.

Sincerely yours,



Laurie E. Keenan