Dated [__], 20[__]

(1) ____________________________
    Name of Applicant
    - and -

(2) [NAME OF GENERAL PARTNER]
    - and -

(3) [NAME OF FUND]

SUBSCRIPTION AGREEMENT
relating to

[NAME OF FUND]
NOTES FOR APPLICANTS

1. If you have any queries in relation to this Agreement, including as to which execution clause is to be used, please contact [insert name of GP-counsel].

2. This subscription agreement (including any Schedules and Appendices hereto, in each case as amended, supplemented or restated from time to time, this "Agreement") contains the actions required and the information to be provided in connection with an Applicant's subscription for an interest in [name of fund] (the "Partnership").

3. The General Partner [and [insert name of administrator] (the "Administrator" (as at the date of this document)] are required to comply with anti-money laundering and tax laws and regulations in connection with the admission of investors to the Partnership. In the first instance, you are required to complete and execute the relevant form at Schedule [7]. Your attention is also drawn to the representations and warranties at clause [3]. The General Partner or any administrator appointed by the General Partner may request any additional information and documents from you in order to comply with its obligations under any laws and regulations or as evidence of your authorisation to invest in the Partnership, and you will not, under any circumstances, be admitted to the Partnership unless the General Partner is satisfied that it has received all necessary information and documents.

4. In the first instance, please complete this Agreement in draft and return it by email to [insert name of GP-counsel] in order that it can be confirmed that all sections have been completed appropriately. Following confirmation that this Agreement is ready for execution, please be aware of the additional notes below:

   (a) A copy of your completed Agreement along with any other relevant documentation (e.g. board resolutions, powers of attorney, etc.) evidencing the authority of the signatories to sign or to carry out any other relevant step (including for example affixing of a seal) should be returned by email to [insert name of GP-counsel]. The original Agreement should be sent by post or courier to:

   [insert name and address of GP, Administrator or GP counsel]

   (b) Please also send any forms required by clause [5] and all information required by Schedule [7].

   (c) In the event that there are errors in completion of this Agreement, the [General Partner] [Administrator] may be required to return this Agreement to you for amendment and re-execution.

   (d) If you require the [General Partner] [Administrator] to return to you a countersigned duplicate of this Agreement, please provide two completed and executed copies of this Agreement.
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APPENDIX 1: DEFINITIONS OF "UNITED STATES" AND "US PERSON"
THIS INSTRUMENT is made BETWEEN:

BETWEEN:¹

(1) _______________________________________________

[full legal name of applicant],

whose address is:

_____________________________________________

_____________________________________________

_____________________________________________

[full address of applicant]

(the "Applicant");

AND

(2) [INSERT NAME OF GENERAL PARTNER], a [insert jurisdiction of establishment] [insert type of entity] of [insert address of General Partner] (the "General Partner");

AND

(3) [INSERT NAME OF PARTNERSHIP], a [insert jurisdiction of establishment] limited partnership of [insert address of Partnership] (the "Partnership"), acting by its general partner, the General Partner.

1. DEFINITIONS AND INTERPRETATION

1.1 Unless otherwise defined herein, capitalised terms that are defined in the Partnership Agreement (as defined below) shall have the same meanings in this Agreement, including as set forth in its Schedules and Appendices.

1.2 Unless expressly stated otherwise, references to clauses, schedules and appendices are respectively to the clauses of, and Schedules and Appendices to, this Agreement.

1.3 The headings of this Agreement are for convenience only and shall not affect the construction hereof.

2. APPLICATION FOR ADMISSION AS A LIMITED PARTNER AND/OR AN INVESTOR

2.1 Subject to clause [2.6] below, the Applicant hereby applies and offers to become a Limited Partner on the terms of a limited partnership agreement of the Partnership in the same form as the most recent version of the limited partnership agreement of the Partnership that has been provided to the Applicant by or on behalf of the General Partner and acknowledged and agreed by the Applicant, as amended, supplemented or

¹ [Update as necessary to reflect parties to the agreement.]
restated from time to time in accordance with the terms thereof (the "Partnership Agreement").

2.2 The Applicant hereby acknowledges, agrees and confirms that by returning this signed Agreement it is authorising any representative of the General Partner (including, without limitation, any solicitor of [insert name of GP counsel]) to date such Agreement on behalf of the Applicant on the date that the Applicant is admitted to the Partnership and the Applicant authorises any such person to make such amendment to this Agreement.

2.3 The Applicant acknowledges and agrees that acceptance of this Agreement by or on behalf of the General Partner shall constitute the Applicant as:

2.3.1 a Limited Partner with a commitment to the Partnership of such amount or amounts up to the maximum commitment applied for set forth in [part 2 of Schedule 1] below as the General Partner shall insert on its execution clause to this Agreement (its "Commitment"); and

2.3.2 a party to the Partnership Agreement,

and, following such acceptance, the Applicant shall have all the rights and shall observe and comply with and be bound by all of the obligations of a Limited Partner set forth in the Partnership Agreement. For the avoidance of doubt, the Applicant acknowledges and agrees that the General Partner may, in its sole discretion, accept or reject this Agreement in whole or in part and admit the Applicant as a Limited Partner with a lesser Commitment than the Applicant applied for.

2.4 The General Partner shall promptly inform the Applicant of the acceptance by the General Partner of all or any part of the commitment for which the Applicant has applied and/or if the Applicant’s application is rejected in whole or in part.

2.5 The Applicant, the Fund and the General Partner hereby agree that the General Partner's acceptance of all or any part of the commitment for which the Applicant has applied in accordance with this Agreement will immediately create a legally binding and enforceable contract between the Applicant and each of the Persons from time to time bound by the Partnership Agreement on the terms of the Partnership Agreement in respect of the Applicant’s Commitment.

2.6 Notwithstanding anything to the contrary, if the General Partner has not (a) accepted all or any part of the commitment for which the Applicant has applied, (b) admitted the Applicant to the Partnership as a Limited Partner with a corresponding Commitment, and (c) notified the Applicant of such admission, in each case on or before the date that is [three] months from the date of the submission by the Applicant of this Agreement to the General Partner or its representatives, the Applicant shall be entitled at any time by written notice to the General Partner to revoke this Agreement, and upon delivery of any such notice to the General Partner this Agreement shall automatically be void ab initio and be of no further force or effect.²

² [Best practice is to include a long-stop date for acceptance of subscriptions, however can be removed if not a concern for a particular LP (for instance if fund likely to be over-subscribed).]
3. REPRESENTATIONS AND WARRANTIES

3.1 The Applicant hereby represents and warrants to the General Partner and the Fund that:

*Investment decision, professional investor, risk investment, transfer*

3.1.1 it has read [the Private Placement Memorandum of the Partnership,] dated [__] (the “Memorandum”), the Partnership Agreement, this Agreement and any and all information provided to it in respect of an investment in the Partnership carefully and is purchasing an interest in the Partnership in reliance solely on the information contained therein [and in the Applicant’s Side Letter] and in any legal opinion addressed to the Applicant in connection with its admission to the Partnership, and not on any other written or oral statement made by any person with respect to the offering of interests in the Partnership;

3.1.2 it has been given the opportunity to ask questions of, and receive answers from, the General Partner or its representatives with respect to the business to be conducted by the Partnership, the financial condition and capital of the Partnership, the terms and conditions of the offering and other matters pertaining to investment in the Partnership, and has been given the opportunity to obtain all such additional information necessary as it requires to evaluate the merits and risks of investment in the Partnership;

3.1.3 it has sufficient knowledge and experience in financial and business matters as to be capable of evaluating the merits of, and it is able to bear the economic risk, of its investment in the Partnership;

3.1.4 it understands the risks of an investment in the Partnership including the risk of the complete loss of its investment; [and]

3.1.5 it has no immediate need to liquidity in respect of its investment in the Partnership and it understands that under the Partnership Agreement, Limited Partners cannot withdraw from the Partnership and an interest in the Partnership cannot be transferred, except as provided in the Partnership Agreement and, consequently, it acknowledges and it is aware that it may have to bear the economic risk of investment in the Partnership until such time as the Partnership is terminated in accordance with the Partnership Agreement; and

3.1.6 it understands that the interests in the Partnership have not been registered under any securities laws in any jurisdiction and none of the Partnership, the General Partner nor any of their respective affiliates have any intention of registering the interests in the Partnership under any securities laws.

*Reliance*

3.1.7 neither the General Partner nor any of its Affiliates has provided any investment advice to the Applicant and, in particular, that none of the General Partner nor any

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3 [Representations and warranties to be limited to factual matters (i.e. not including any legal determinations) that the Applicant can assess easily and without taking specialist or jurisdiction-specific advice.]

4 [Insert references to other documents that the LP has agreed.]

5 [Insert defined term if not included in Partnership Agreement.]

6 [Only to be inserted if accurate (i.e., do not include for a fund that has been registered in any jurisdiction).]
of its Affiliates have, and are not, advising it on, or making any recommendation to the Applicant in relation to, the merits of becoming a Limited Partner, and that no representative of the General Partner or any of its Affiliates has behaved in any way that would lead the Applicant to believe otherwise. The Applicant has sought its own independent legal, investment and tax advice before deciding to participate in the Partnership and it has only relied on the advice of, or has only consulted with, its own independent, professional advisers in respect of its investment in the Partnership, and such advice or consultation is the only advice or consultation on which it has based its determination that an interest in the Partnership is a suitable investment for it. It is not investing in the Partnership in reliance upon any representation, warranty, confirmation or guarantee given by any Person as to the performance to be achieved by the Partnership;

*Capacity, legality, authority, execution, compliance*

3.1.8 it is duly formed and validly existing under the laws of its organisation, and has all requisite power and authority to be a Limited Partner, and to enter into and perform its obligations under the Partnership Agreement and this Agreement [and the Applicant’s Side Letter];

3.1.9 the execution, delivery and performance by the Applicant of [the Applicant’s Side Letter,] the Partnership Agreement and this Agreement will constitute legal, valid and binding obligations of the Applicant enforceable against the Applicant in accordance with their respective terms;

3.1.10 the execution and delivery of this Agreement, the performance by the Applicant of its obligations under [the Applicant’s Side Letter,] the Partnership Agreement and this Agreement, and the consummation of the transactions contemplated by [the Applicant’s Side Letter,] the Partnership Agreement and this Agreement will not constitute a breach by the Applicant of any law or regulation to which the Applicant is subject in the jurisdiction in which it is established and will not conflict with, result in any violation of or default under any provision of any agreement or other instrument by which the Applicant is a party or by which it is bound, nor any provision of any governing instrument of the Applicant;

*Offering*

3.1.11 it is not applying to purchase an interest in the Partnership with the current intent to sell, distribute or transfer the interest to any other person or persons;

3.1.12 neither Applicant nor any of its Affiliates have discretionary authority or control with respect to the assets of the Partnership;

3.1.13 it shall not offer, sell, transfer, pledge, hypothecate or otherwise dispose of, directly or indirectly, all or any part of its interest in the Partnership (or any interest therein), except in accordance with the terms and provisions of the Partnership Agreement [and the Applicant’s Side Letter]; 7and

---

7 [Avoid language along the lines that the Applicant will only transfer in accordance with applicable law (including the Securities Act of 1933 or an exemption therefrom); or that is not currently making a market in interests in the Partnership and will not, at any time after its admission, make a market in any such interests, and it will not sell, transfer or otherwise dispose of all or any part of its interest in the Partnership (or any interest therein) on an]
3.1.14 it is not subscribing for any interest in the Partnership as a result of any form of general solicitation or general advertising, including (a) any advertisement, article, notice or other communication published in any newspaper, magazine or similar media (including any internet site that is not password protected) or broadcast over television or radio, or (b) any seminar or meeting whose attendees were invited by any general solicitation or general advertising.

3.2 By accepting all or any part of the commitment for which the Applicant has applied, the General Partner makes the representations and warranties to the Applicant set forth in Schedule 8.

4. PROVISION AND DISCLOSURE OF INFORMATION; ANTI-MONEY LAUNDERING

4.1 The Applicant hereby represents and warrants that it shall promptly provide the General Partner with any such information relating to the Applicant (or its direct or indirect owners) that is reasonably requested from time to time by the General Partner and that the General Partner determines in good faith are necessary in order for any of (a) the Partnership, (b) any Limited Partner, (c) the General Partner, (d) any entity in which the Partnership holds (directly or indirectly) an interest, or (e) any Affiliate of any of the foregoing, to allow any such Person to comply with or satisfy any requirement imposed on such Person under any law or regulation (including without limitation any anti-money laundering or “know your customer” laws, regulations or rules) or to assist the Partnership in obtaining any exemption, reduction or refund of any withholding or other taxes imposed on the Partnership, on amounts paid to the Partnership or on amounts payable by the Partnership, by any competent legal, tax or regulatory authority.

4.2 The Applicant hereby agrees, represents, warrants and confirms that it shall use its commercially reasonable efforts to update or replace any information that it has provided to the General Partner in this Agreement to the extent that it is aware that there are any changes to any such information that are material to the Partnership or the General Partner.

Disclosure of Information

4.3 Please tick either box A or box B:

The Applicant hereby represents, warrants and confirms that it is not subject to any laws, regulations or policies that might require the Applicant to publicly disclose any information about its investment in the Partnership, or any information provided to the Applicant by or on behalf of the General Partner or the Partnership about the Partnership’s Investments or performance;

OR

"established securities market", a "secondary market", an "over-the-counter market" or the "substantial equivalent thereof", in each case within the meaning of section 7704 of the United States' Internal Revenue Code of 1986, as amended (the "Code"), and the Treasury Regulations promulgated thereunder. The Applicant does not necessarily have the knowledge or information to make such determinations and so should not be required to. Instead it is for the GP to make those determinations and decide whether or not to admit the Applicant or consent to a transfer by the Applicant on a case by case basis.]
The Applicant hereby represents, warrants and confirms that it is subject to the following (and only the following) freedom of information, public disclosure or other laws, regulations or policies that might require the Applicant to disclose information provided to the Applicant by or on behalf of the General Partner or the Partnership to a third party:

_______________________________________________

_______________________________________________

_______________________________________________

(if the Applicant has ticked box B of this clause [4.3] insert details of the relevant freedom of information, public disclosure or other laws, regulations or policies).

5.  POWER OF ATTORNEY

The Applicant hereby irrevocably authorises the General Partner pursuant, and upon acceptance of the Applicant's Commitment in accordance with, this Agreement by the General Partner, to execute the Partnership Agreement on the Applicant's behalf as the Applicant's attorney.\(^8\)

6.  ACCURACY OF INFORMATION; BREACH OF REPRESENTATIONS AND WARRANTIES, SURVIVAL

6.1 The Applicant hereby represents and warrants that all of the information that it has provided in this Agreement (including, for the avoidance of doubt, each Schedule and Appendix to this Agreement), or which it subsequently provides pursuant to this Agreement, and each of the representations and warranties set forth in this Agreement, is complete and accurate, and acknowledges that the Partnership, the General Partner and any Affiliate of the General Partner (the "Relying Entities") shall rely on them in respect of the Applicant's Commitment.

6.2 To the fullest extent permitted by law (and with the intention that this clause [7] will be enforceable by them), the Applicant hereby irrevocably agrees to hold each Relying Entity harmless from any liability for, and indemnify each of them against, any and all claims, liabilities, demands, losses, damages, costs and expenses whatsoever or howsoever arising as a result of any breach by the Applicant of any representations or warranty given by it in this Agreement, provided that the aggregate amount that the Applicant can be required to pay pursuant to this clause [6.2] shall not exceed the amount of such Applicant's Commitment.\(^9\)

\(^8\) [Provided that the Partnership Agreement contains a customary PoA there should not be any reason for the PoA to extend further than executing the Partnership Agreement. In some jurisdictions – including the US - it is customary for the Agreement to include a signature page to the Partnership Agreement. If that is the case, then it may not strictly be necessary to include any PoA.]

\(^9\) [Preference not to include an indemnity at all, however it may be acceptable to include so long as it is limited to breaches of reasonable representations and warranties that the Applicant is confident that it understands and can give. It should not be used to allow the manager to shift the burden and risk of making legal determinations (such as compliance with applicable laws in respect of the formation of the fund, the marketing of interests therein to the Applicant and the admission of Applicant to the fund) onto the Applicant.]
6.3 All representations and warranties contained herein will survive the execution, delivery and performance of this Agreement.

7. ENTIRE AGREEMENT

This Agreement, [the Applicant’s Side Letter] and the Partnership Agreement constitute the entire agreement between the Applicant, the General Partner and the Partnership relating to the Applicant's application for an interest or the interest granted to it in the Partnership.

8. COUNTERPARTS

This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which taken together shall constitute a single agreement.

9. GOVERNING LAW AND JURISDICTION

9.1 This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of any offering document circulated in relation to the Partnership shall be governed by and construed in accordance with the laws of [insert governing law of the Partnership Agreement]. All the parties irrevocably agree that the courts of [insert governing law of the Partnership Agreement] are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the acquisition of Commitments. Accordingly, any suit, action or proceedings arising out of or in connection with this Agreement or the acquisition of Commitments shall be brought in such courts. The parties hereby waive, to the extent not prohibited by applicable law, and agree not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that it is not subject personally to the jurisdiction of such courts, that any such proceeding brought in such courts is improper or that this Agreement or any offering document circulated in relation to the Partnership, or the subject matter hereof or thereof, may not be enforced in or by such court.

9.2 IN WITNESS THEREOF, this Agreement has been executed and delivered on the date set forth on the first page of this Agreement.

[SIGNATURE PAGES FOLLOW]

[10] [Conform to governing law and jurisdiction provisions in the Partnership Agreement.]
EXECUTION CLAUSE FOR THE SUBSCRIPTION AGREEMENT IN RESPECT OF [INSERT NAME OF FUND] FOR THE INVESTOR:

Date of application: [__]

Executed by:

[insert name of investor]

acting by:

___________________________             ___________________________
(signature of first director)            (signature of second director)

___________________________            ___________________________
(print name of first director)          (print name of second director)

Director                Director
EXECUTION CLAUSE FOR THE SUBSCRIPTION AGREEMENT IN RESPECT OF [INSERT NAME OF FUND] FOR THE GENERAL PARTNER:

The General Partner hereby accepts the subscription evidenced by this Agreement in respect of a Commitment of [US Dollars] ______________.

Executed by:

[insert name of general partner] in its capacity as general partner of [insert name of fund]

acting by:

___________________________             ___________________________
(signature of first director)                  (signature of second director)

___________________________                   ___________________________
(print name of first director)                       (print name of second director)

Director                      Director
EXECUTION CLAUSE FOR THE SUBSCRIPTION AGREEMENT IN RESPECT OF [INSERT NAME OF FUND] FOR THE PARTNERSHIP:

Executed for and on behalf of [insert name of fund]
acting by:

Executed by:

[insert name of general partner] in its capacity as general partner of [insert name of fund]
acting by:

___________________________             ___________________________
(signature of first director)                  (signature of second director)

___________________________                   ___________________________
(print name of first director)                       (print name of second director)
Director                      Director
SCHEDULE 1: APPLICANT'S DETAILS

[Please complete in block capitals]

1. Name of the Applicant  
   (insert full legal name of Applicant) _______________________________________

2. Commitment applied for  
   (insert amount in [US Dollars]) ___________________________________________

3. Applicant's postal address  
   _______________________________________
   _______________________________________
   _______________________________________

4. Name of principal contact  
   (All notices sent pursuant to clause [19.10 (Notices) of the Partnership Agreement or pursuant to this Agreement will be marked for the attention of this person) _______________________________________

5. Telephone number  
   _______________________________________

6. Fax number  
   _______________________________________

7. Email address  
   _______________________________________

8. Tax identification number  
   (if applicable) _______________________________________

9. United Kingdom Unique Taxpayer Reference Number  
   ("UTR")  
   (if applicable) _______________________________________

10. Bank account details  
    (distributions will be made to this bank account)  
    (a) Bank: _______________________________________
    (b) Branch: _______________________________________
    (c) Account Number: _____________________________________

---

11 Please note that ILPA has not endorsed a particular investor questionnaire, and this information is included as a placeholder only. Users should feel comfortable to use the ID Register’s Universal Subscription Questionnaire (USQ), or their pre-existing investor questionnaire in place of the relevant sections after the signature page.

12 Please provide your UTR if you have been issued with one.
(d) Sort Code: _____________________________________

11. Legal status of the Applicant (if the Applicant is not a natural person)

   (a) Legal form of Applicant (i.e. limited company, partnership, limited partnership, limited liability company, corporation, trust, custodial account or other entity): ____________________________

   (b) Jurisdiction of organisation: ____________________________

   (c) Location of principal place of business: ____________________________

12. Contact details of person preparing this Agreement
   (This information will be used along with the address above should there be any issue with this Agreement)

   (a) Name: ________________________________________________

   (b) Company: ______________________________________________

   (c) Client: ________________________________________________

      (If completing this Agreement on behalf of a client (e.g. you are legal counsel), provide the name of the client)

   (d) Email address __________________________________________

   (e) Telephone number _______________________________________
SCHEDULE 2: STATUS OF APPLICANT

The Applicant hereby represents, warrants and confirms that it has ticked all of the boxes in this Schedule [2] that apply to it at the date of this Agreement and that, at the date of this Agreement and for so long as the Applicant is a Limited Partner:

1. Under the law of the jurisdiction in which the Applicant is constituted, the Applicant is deemed to have separate legal personality, and the Applicant will, as a result, be a single partner in the Partnership;

*(please consult a legal advisor if unsure as to the answer to this question)*

2. the Applicant will hold its interest in the Partnership for itself beneficially;

OR

the Applicant will hold its interest in the Partnership as trustee for the following beneficiaries

Name: __________________________________________________

Address: __________________________________________________

________________________________________________

________________________________________________

*Continue on a separate sheet if necessary*

Where the Applicant has ticked box [C] in this clause [2], the Applicant hereby acknowledges that any and all of the agreements, authorisations, confirmations, representations and warranties given by the Applicant pursuant to this Agreement are given both on behalf of itself and also separately on behalf of each of the beneficiaries and consequently, where appropriate, references to the Applicant in this Agreement shall be read as references to each of the beneficiaries. Further the Applicant confirms that it is duly authorised and qualified to give the agreements, authorisations, confirmations, representations and warranties set forth in this Agreement on behalf of each of the beneficiaries and will provide such other representations and information about such beneficiaries as the General Partner shall reasonably request;

3. the Applicant is NOT a "US Person" NOR was in the "United States" when the interest in the Partnership was offered to or accepted by it, NOR is the Applicant a [United Kingdom] [Canadian] resident becoming a limited partner in a [United Kingdom] [Canadian] placement, and the Applicant additionally agrees represents, warrants and confirms as set forth in Schedule [3] (Special Investment Conditions for Non-US Applicants);

OR

the Applicant IS either a "US Person" or was in the "United States" when the interest in the Partnership was offered or accepted and the Applicant additionally agrees,

---

1 If you tick box C, please provide details of the beneficiary or beneficiaries of the trust.
2 The terms "US Person" and "United States" are set forth in Appendix 1 to this Agreement.
3 Insert schedules for any jurisdictions that have specific requirements (UK, Canada, Japan, etc.)
represents, warrants and confirms as set forth in Schedule [4] (Special Investment Conditions for Applicants in US Placements);

[OR]

the Applicant is a [United Kingdom] [Canadian] resident becoming a limited partner in a [United Kingdom] [Canadian] placement and the Applicant additionally agrees, represents, warrants and confirms as set forth in Schedule [3] (Special Investment Conditions for Non-US Applicants) and Schedule [5] (Special Investment Conditions for Applicants in [United Kingdom] [Canadian] Placements);[4]

4. the Applicant is a pension, profit sharing, annuity or employee benefit plan (a "Plan") described in the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), or a plan or account (including an individual retirement account) described in section 4975 of the Code, whether or not subject to ERISA or section 4975 of the Code, or the Applicant is an entity whose underlying assets include "plan assets" for purposes of ERISA by reason of a Plan's investment in the Applicant;

AND

if the Applicant HAS ticked box [G] above, the Applicant is a Plan that is subject to ERISA or a plan or account that is subject to section 4975 of the Code;

OR

if the Applicant has NOT ticked box [H] above, the Applicant is not purchasing the interest in the Partnership with funds that constitute the assets of any of the above,

AND

if the Applicant ticked box [G] in this clause [4], the Applicant hereby additionally agrees, represents, warrants and confirms as set forth in Schedule [6];

4 [Delete, include and/or update (insert jurisdiction-specific schedules) to the extent necessary specific jurisdictions.]
SCHEDULE 3: SPECIAL INVESTMENT CONDITIONS FOR APPLICANTS IN NON-US PLACEMENTS

The Applicant hereby represents, warrants and confirms that:

1. the Applicant has a principal address outside the United States and was not in the United States at the time that an interest in the Partnership was offered to the Applicant, and the Applicant was not in the United States at the time such offer was accepted; and

2. the Applicant is not a US Person and the Applicant is not acquiring an interest in the Partnership for the account or benefit of any US Person nor with a view to the offer, sale or delivery, directly or indirectly of any such interest within the United States or to a US Person.
SCHEDULE 4: [SPECIAL INVESTMENT CONDITIONS FOR APPLICANTS IN US PLACEMENTS]

[Insert US-securities and tax specific representations, drafted as requests for objective facts (i.e., with no determinations as to law) about the Applicant that it can be reasonably be expected to determine without the advice of counsel or accountants.]
SCHEDULE 5: [SPECIAL INVESTMENT CONDITIONS FOR APPLICANTS IN [UNITED KINGDOM] [CANADIAN] PLACEMENTS]

[Insert jurisdiction-specific securities and tax specific representations, drafted as requests for objective facts (i.e., with no determinations as to law) about the Applicant that it can be reasonably be expected to determine without the advice of counsel or accountants.]
SCHEDULE 6: REPRESENTATIONS AND WARRANTIES RELATING TO BENEFIT PLAN INVESTORS

[Insert ERISA-specific securities and tax specific representations, drafted as requests for objective facts (i.e., with no determinations as to law) about the Applicant that it can be reasonably be expected to determine without the advice of counsel or accountants.]

1 [Example language only. Subject to ERISA review.]
SCHEDULE 7: ANTI-MONEY LAUNDERING LAW REQUIREMENT

[Insert jurisdiction-specific AML representations, drafted as requests for objective facts (i.e., with no determinations as to law) about the Applicant that it can be reasonably be expected to determine without the advice of counsel or accountants.]
SCHEDULE 8: GENERAL PARTNER’S REPRESENTATIONS AND WARRANTIES

The General Partner hereby represents and warrants to the Applicant as follows:

1. **Formation and Standing.** Each of the Partnership, the General Partner [and the Manager] is duly formed and validly existing under the laws of their organisation, and has all requisite power and authority to carry on its business as now conducted and as proposed to be conducted as described in [the Applicant’s Side Letter,] the Memorandum, the Partnership Agreement [and the Management Agreement].

2. **Authorisation of Agreement, etc.** The execution, delivery and performance by the General Partner [and the Manager] of each of [the Applicant’s Side Letter,] [the Management Agreement,] this Agreement and the Partnership Agreement, have been authorised by all necessary action on behalf of the General Partner [and the Manager], and each of [the Applicant’s Side Letter,] [the Management Agreement,] this Agreement and the Partnership Agreement are legal, valid and binding agreements of each of the General Partner [and the Manager (as the case may be)], enforceable in accordance with their respective terms.

3. **Compliance with Laws and Other Instruments.** The execution and delivery of this Agreement by the General Partner [and the Manager], the performance by each of the General Partner [and the Manager] of its obligations under this Agreement [,the Applicant’s Side Letter,] [the Management Agreement,] and the Partnership Agreement, and the consummation by the General Partner [and the Manager] of the transactions contemplated hereby and thereby will not conflict with or result in any violation of or default under (a) any provision of any governing instrument of the Partnership, the General Partner [or the Manager] or (b) any provision of any agreement or other instrument to which the Partnership [,the Manager] or the General Partner is a party or by which they are bound, or any permit, franchise, judgment, decree, statute, order, rule or regulation applicable to any of the Partnership [,the Manager] or the General Partner.

4. **Offer of Interests.** The offer of interests in the Partnership has been made in accordance with all applicable laws. All licenses, approvals, consents, filings or registrations required by the Partnership, the General Partner [and/or the Manager] for the formation of the Partnership and the carrying out of its activities, the due execution, delivery or performance of [the Management Agreement,] this Agreement and the Partnership Agreement, and the due acceptance of the Applicant as a Limited Partner have been duly obtained, received, filed or registered (as applicable).

5. **Disclosure.** The Memorandum, when read in conjunction with this Agreement and the Partnership Agreement, does not contain any untrue statement of a material fact or omit to state a fact necessary in order to make the statements contained therein misleading in any material respect.[2]

6. **Liabilities.** As of the date of the first closing of the Partnership, the Partnership had no material liabilities other than in respect of [Organisational Expenses][3].

7. **Litigation.** There is no material litigation, claim or legal action, arbitration, governmental or administrative investigation, inquiry or proceeding pending or, to the best of the General Partner’s knowledge, threatened against the Partnership [or] [,] the General Partner [or the Manager].]

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1 [To be updated on a case by case basis to reflect the structure.]
2 [To be inserted or not, depending on preference of the manager/investors.]
3 [Insert correct defined term from the Partnership Agreement.]
4 [Only to be included for first closing of the fund.]
DEFINITIONS OF "UNITED STATES" AND "US PERSON"

"United States" means the United States of America, its territories and possessions, any state of the United States, and the District of Columbia.

"US Person" means:

(a) any natural person resident in the United States;

(b) any partnership or corporation organised or incorporated under the laws of the United States;

(c) any estate of which any executor or administrator is a US Person;

(d) any trust of which any trustee is a US Person;

(e) any agency or branch of a non-US entity located in the United States;

(f) any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a US Person;

(g) any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organised, incorporated, or (if an individual) resident in the United States; and

(h) any partnership or corporation if: (A) organised or incorporated under the laws of any jurisdiction other than the United States; and (B) formed by a US Person principally for the purpose of investing in securities not registered under the Securities Act, unless it is organised or incorporated, and owned, by "accredited investors" (as defined in Rule 501 (a) under the Securities Act) who are not natural persons, estates or trusts.

Notwithstanding the foregoing parts (a) through (h), the following are not "US Persons":

(a) any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-US Person by a dealer or other professional fiduciary organised, incorporated, or (if an individual) resident in the United States;

(b) any estate of which any professional fiduciary acting as executor or administrator is a US Person if: (i) an executor or administrator of the estate who is not a US Person has sole or shared investment discretion with respect to the assets of the estate; and (ii) the estate is governed by laws other than those of the United States;

(c) any trust of which any professional fiduciary acting as trustee is a US Person, if a trustee who is not a US Person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a US Person;

(d) an employee benefit plan established and administered in accordance with the law of a country other than the United States and the customary practices and documentation of such country;

(e) any agency or branch of a US Person located outside the United States, if the agency or branch: (i) operates for valid business reasons; (ii) is engaged in the
business of insurance or banking; and (iii) is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located; and

(f) the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, or their agencies, affiliates and pension plans and any other similar international organisations, their agencies, affiliates and pension plans.
August 6, 2018

Brent Fields
Secretary
U.S. Securities & Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation – File No. S7-09-18

Dear Mr. Fields:

The Institutional Limited Partners Association ("ILPA"), appreciates the opportunity to provide comments to the U.S. Securities & Exchange Commission (“Commission” or “SEC”) in response to the Proposed Interpretation Regarding Standard of Conduct for Investment Advisers and Request for Comment on Enhancing Investment Adviser Regulation (“Proposed Interpretation”). The focus of our letter is to seek additional clarity and address concerns in the Proposed Interpretation about the fiduciary duties owed by investment advisers advising private funds, duties greatly relied upon by our members and necessary for a robust and vibrant private equity market.

ILPA is the voice of institutional investors in the private equity asset class, known as Limited Partners (“LPs”). Our 470+ member institutions represent over $2 trillion in private equity (“PE”) assets under management and include U.S. and global public and private pension funds, insurance companies, university endowments, charitable foundations, family offices and sovereign wealth funds, all of which invest in the U.S. private equity market. LPs provide the capital that fuels private equity and venture capital investment, generating economic growth and job creation, across America and around the world. In addition to providing this critical capital for economic growth, LPs

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2As an illustration of the members we represent, the ILPA Board of Directors includes representatives from: Guardian Life Insurance Company, Teacher Retirement System of Texas, Oregon State Treasury, Washington State Investment Board, California State Teachers Retirement System (CalSTRS), Tufts University Investment Office, and the Alaska Permanent Fund Corporation, among others: https://ilpa.org/who-we-are/board-of-directors/
are the trusted financial stewards investing the assets of average Americans in a class of investments consistently providing high investment returns so that they may enjoy financial security and comfort. Limited partner beneficiaries include teachers, first responders, students receiving university scholarships, charity recipients, and insurance policyholders, among others. ILPA is based in Washington, D.C. with additional offices in Toronto.

ILPA is strongly supportive of the requirement that investment advisers to private equity funds (known as General Partners or “GPs”) be registered under the Investment Advisers Act of 1940 (“Advisers Act”) and be subject to the regulations under that law, including fiduciary duties. SEC oversight of the private equity industry has encouraged more transparency and disclosure and provided greater assurance to LPs that GPs will act in accordance with their fiduciary duties. We believe the Proposed Interpretation will provide more certainty regarding the fiduciary duties owed by private fund advisers to their clients. We also encourage the SEC to go further to clarify and address certain significant concerns and challenges specific to the private fund adviser context that are distinct from the retail adviser environment. Once these issues are addressed in the final version of the Proposed Interpretation, we encourage the Commission to formally codify the final interpretation into SEC regulation.

I. The Proposed Interpretation Provides Helpful Clarity about the Duty of Loyalty and Required Disclosures of Adviser Conflicts of Interest

The Proposed Interpretation helpfully provides a broad overview of the fiduciary duties owed by an investment adviser to their clients, that has previously been outlined over many years through various court decisions, SEC releases and rulemakings.³ An issue of particular importance to ILPA’s members and private fund investors, however, is the level to which an investment adviser may disclaim or diminish their fiduciary duties under the law in the state in which the private fund is domiciled, most commonly Delaware.

We applaud the Commission for providing significant guidance and detail on the obligations owed by investment advisers under the Advisers Act. In particular, we appreciate the helpful guidance regarding the requirement that “an investment adviser [must] put its client’s interests first” and that in seeking to meet its duty of loyalty:

an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship. In addition, an adviser must seek to avoid conflicts of interest with its clients, and, at a minimum, make full and fair disclosure of all material conflicts of interest that could affect the

³ Proposed Interpretation at 6, f.n. 10.
advisory relationship. The disclosure should be sufficiently specific so that a client is able to decide whether to provide informed consent to the conflict of interest. Because an adviser must serve the best interests of its clients, it has an obligation not to subordinate its clients’ interests to its own. For example, an adviser cannot favor its own interests over that of a client. Accordingly, the duty of loyalty includes a duty not to treat some clients favorably at the expense of other clients.  

This duty of loyalty is critical to LPs, given the increased diversity of GP services that has accompanied the growth and maturation of this asset class. As the private equity industry has grown, many GPs have dramatically expanded their business lines, effectively becoming large asset managers. The increased scale and breadth of private fund advisers’ activities, as well as the varying types of clients and funds they advise, has resulted in a concurrent rise in potential and actual conflicts of interest, and therefore greater risk of breaching their duty of loyalty.

Since 2014, there have been 18 SEC enforcement actions against private fund advisers that were found to have breached their fiduciary duties. Many of these enforcement actions included: In the Matter of THL Managers V, LLC and THL Managers VI, LLC (June 29, 2018) (Failed to disclose accelerated monitoring fees); In the Matter of Aisling Capital, LLC (June 29, 2018) (Failed to offset consulting fees charged to investors); In the Matter of WCAS Management Corp. (April 24, 2018) (Failed to disclose conflicts of interest between adviser & clients); In the Matter of TPG Capital Advisers, LLC, (December 21, 2017) (Failed to disclose accelerated monitoring fees); In the Matter of Capital Dynamics, Inc., (August 16, 2017) (Inappropriately charged management expenses to the fund/investors); In the Matter of SLRA Inc., as successor to Liquid Realty Advisors III, LLC and Scott M. Landress, (February 7, 2017) (Failure to disclose fees and expenses); In the Matter of Centre Partners Management, LLC (January 1, 2017) (Failure to disclose potential conflicts of interest and omission of material facts); In the Matter of New Silk Route Advisors, LP (December 14, 2016) (Failure to obtain LPAC consent for co-investments); In the Matter of Apollo Management V, VI, VII and Apollo Commodities Mgmt, LP. (August 23, 2016) (Failure to disclose accelerated monitoring fees, failing to disclose accrued allocation of accrued interest from a loan would benefit only one fund); In the Matter of JH Partners, LLC (November 23, 2015) (Favoring one client over another, failure to disclose conflicts of interest, failure to obtain consent from LPAC on investments outside LPA coverage); In the Matter of Cherokee Investment Partners, LLC and Cherokee Advisers, LLC, (November 5, 2015) (Failure to disclose funds would be charged for GP legal and compliance expenses); In the Matter of Fenway Partners, LLC et. al., (November 3, 2015) (Failure to disclose conflicts of interest regarding use of outside consultants and application of fee offsets); In the Matter of Blackstone Management Partners LLC, III and IV, (October 7, 2015) (Failure to disclose accelerated monitoring fees, failure to disclose disparate legal fee discount between GP and Fund); In the Matter of Guggenheim Partners Investment Management, LLC (August 10, 2015) (Failure to disclose that...
actions were against well-known and significant GPs, managing billions of dollars in assets. Most of these actions highlighted the breach of the duty of loyalty, and most significantly the failure to disclose either real or potential conflicts of interest or inappropriately charged fees & expenses. While these actions are believed to have deterred other advisers from engaging in similar breaches of fiduciary duty, they have also resulted in a “mountain” of disclosures in the limited partnership agreements (LPAs) and Private Placement Memorandums (PPMs) drafted by investment advisers. These complex and opaque documents do not present these disclosures in a standardized way, and often fail to ensure that LPs are clearly informed about the various conflicts that an adviser has or may have, or the fees and expenses that will be charged. As a result, it is often difficult for an LP, even a sophisticated LP, to truly give informed consent when confronted with written LPA terms and PPM disclosures that are broad, opaque, voluminous, inclusive of comprehensive possibilities or potential conflicts that are not thought to be relevant, complex, and sometimes contradicted by the oral statements of the investment adviser.

a. The SEC Should Provide More Clarity on the Requirements for “Informed Consent” and Require a Delivery of a Conflict of Interest Summary to Institutional Investors in Private Funds

Given these market realities, we appreciate the Proposed Interpretation’s clarity on informed disclosure and believe it takes the right approach towards addressing the opacity and complexity of the conflicts of interest in the private equity marketplace. We would support going further to, as suggested in the Form CRS proposal for retail investors, requiring that a private fund adviser also provide a detailed summary of conflicts of interest to their investors to further address the requirement to have “informed consent.” We would suggest this be in a structured format, developed with industry, to ensure effective disclosure and “informed consent.”

The Commission is correctly applying the ruling in SEC v. Capital Gains, by requiring that an adviser “at a minimum, [must] make full and fair disclosure to its clients of all material conflicts of interest that could affect the advisory relationship.”7 Also, the Proposed Interpretation correctly points out that disclosure of a conflict alone is not always sufficient

an executive received a loan to personally participate in a Guggenheim acquisition, inadvertently billing a client for management fees on non-managed assets); In the Matter of Kohlberg Kravis Roberts & Co, LP, (June 29, 2015)(Failing to allocate broken deal expenses to co-investors rather than fund); In the Matter of Alpha Titans LLC et. al., (April 29, 2015) (Using fund assets to pay expenses without clear authorization in the LPA); In the Matter of BlackRock Advisors, LLC, (April 20, 2015) (Failing to disclose conflict of interest involving the outside business activity of a portfolio manager); In the Matter of Lincolnshire Management, Inc., (September 22, 2014) (Failing to follow expense allocation policy in LPA).

7 Proposed Interpretation at 17.

to satisfy the investment adviser’s duty of loyalty under the Advisers Act.\textsuperscript{8} Clients must be provided with “sufficiently specific facts so that the client is able to understand the adviser’s conflict of interest and business practices well enough to make an informed decision…and an adviser disclosing that it ‘may’ have a conflict is not adequate disclosure when the conflict exists.”\textsuperscript{9} Further, the SEC states that:

\begin{quote}
[\ldots] It would not be consistent with an adviser’s fiduciary duty to infer or accept client consent to a conflict where either (i) the facts and circumstance indicate that the client did not understand the nature and import of the conflict, or (ii) the material facts concerning the conflict could not be fully and fairly disclosed. For example, in some cases, conflicts may be of a nature and extent that it would be difficult to provide disclosure that adequately conveys the material facts or the nature, magnitude and potential effect of the conflict necessary to obtain informed consent and satisfy an adviser’s fiduciary duty. In other cases, disclosure may not be specific enough for clients to understand whether and how the conflict will affect the advice they receive. With some complex or extensive conflicts, it may be difficult to provide disclosure that is sufficiently specific, but also understandable, to the adviser’s clients. In all of these cases where full and fair disclosure and informed consent is insufficient, we expect an adviser to eliminate the conflict or adequately mitigate the conflict so that it can be more readily disclosed.\textsuperscript{10}
\end{quote}

There are significant issues with real and potential conflicts of interest with private fund advisers. Ensuring increased clarity of disclosures and enhanced understanding of these conflicts has been both a priority of the Commission\textsuperscript{11} and ILPA. The language above is significantly helpful to make clear what is required of the investment adviser in making their disclosure, and in confirming that not all conflicts may be readily understood by LPs. In that vein, ILPA supports a requirement like that proposed in Form CRS, to require a clear and detailed listing of all potential and actual conflicts of interest of a private fund adviser, to be provided to their investors.

\section*{II. Further Action and Clarity is Needed Regarding the Application of Fiduciary Duties to Investors in Private Funds}

\footnotesize
\begin{itemize}
    \item \textsuperscript{8} \textit{Id.}
    \item \textsuperscript{9} \textit{Id.} at 18.
    \item \textsuperscript{10} \textit{Id.} at 18-19.
\end{itemize}
While the Proposed Interpretation is helpful in many areas, it should go further to emphasize the fiduciary duties owed by private fund advisers. The current interpretation is highly retail-focused, given the dual role of the Advisers Act in covering retail advisers as well as investment advisers to private funds. We believe this provides an important and necessary opportunity for the SEC to ensure that the fundamental principles of the Advisers Act are also applied to private fund advisers, given the industry trend toward the limitation of fiduciary obligations of private fund advisers under state law. The trend of increased utilization of these “hedge clauses” under state law is extremely harmful to investors, and the fundamental fiduciary duties that are the tenets of the Advisers Act. These clauses are only permissible because of relief granted by the Commission through the Heitman Capital Management no-action letter that was issued in 2007. Therefore, we encourage the SEC to rescind the Heitman Capital Management no-action letter and clarify that private fund advisers should not be permitted to disclaim their fiduciary duties under state law in the LPA.

a. The SEC Should Revert to Their Pre-2007 Position on “Hedge Clauses” and Prevent Advisers from Disclaiming Their Fiduciary Duties under State Law

Increasingly, LPs have seen a noteworthy increase in GPs seeking to waive their fiduciary duties owed to investors under Delaware law, where many private funds are structured. This is increasingly common in the case of venture and energy funds, as well as private equity funds. Eliminating or significantly modifying fiduciary requirements under state law is particularly concerning because there is a limited private right of action under the Advisers Act, and investors in a private equity fund are locked up for a significant number of years (with 15 years not being out of the ordinary) with limited withdrawal rights. In 2007, the SEC issued a no-action letter which magnified this issue by giving safe harbor to investment advisers that incorporate so-called “hedge clauses” into their LPAs, limiting their liability including their fiduciary duties. Both changes have resulted in a “perfect storm” that negatively impacts investors in private funds, and results in unnecessary potential litigation and significantly reduced investor protection.

12 Heitman Capital Management, LLC, SEC Staff No-Action Letter (February 12, 2007).
13 Note, this may also occur in other jurisdictions besides Delaware, including the Cayman Islands, Channel Islands and Luxembourg, among others. We would encourage the SEC to extend this to any private fund adviser under their purview, regardless of the domicile in which that fund entity is structured.
14 The opportunity for litigation to occur has increased because previously hedge clauses were not permissible, and under the no-action relief granted by the Commission in Heitman Capital Management, the Commission permitted hedge clauses for the first time, but stated that whether they would be permissible depending on the “facts and circumstances” of the particular clause language. As a result, what was once clear in the contract, is not a litigable issue to be addressed, reducing economic efficiency, increasing litigation costs, and burdening the courts.
We encourage the SEC to rescind this no-action letter to prevent the continued abuse of the objectives of the Advisers Act and ensure that the fiduciary duties owed to private fund investors are clear. At the very least, the Commission should address clearly in the Proposed Interpretation the specific requirements by which a “hedge clause” is permissible in an LPA, particularly in terms of “informed consent” by LPs.

1. The GP and Investment Adviser Are Treated as the Same Entity Under Current Legal Precedent

Currently many private funds are structured as partnerships, with a General Partner that manages the investment activities, contributes financially and enjoys participation in the financial returns from the fund. Limited Partners are not, by definition, engaged in the management of the fund’s investment activities, while receiving financial returns from the fund. In some cases, funds are structured as limited liability companies, with the role of the GP outlined above being taken over by the managing member of the LLC. In almost all cases, the GP or the managing member of the partnership is a special purpose entity that contracts out the actual management of the fund to a separate investment adviser. Current legal precedent supports the view that the GP should be treated as synonymous with the investment adviser to the fund.\(^\text{15}\) As highlighted in *United States v. Onsa*, “In *Abrahamson v. Fleschner*…we held that a general partner of an investment fund ‘who managed the partnership’s investment’…and received a portion of the firm’s profits as compensation…fell within the definition of an investment adviser.”\(^\text{16}\) While current federal case law has clearly held that a GP is synonymous with an investment adviser if it is managing the fund’s investment and receiving a portion of the fund’s profits as compensation, the Proposed Interpretation fails to highlight this. As the fiduciary duty of an investment adviser flows from Section 206 of the Advisers Act, this should necessarily extend beyond that of the investment adviser itself to the GP entity as well.\(^\text{17}\) Moreover, Congress, when drafting the Advisers Act, did not intend for investment advisers to engage in regulatory arbitrage between federal and state law.\(^\text{18}\) The Advisers Act should therefore preempt the ability for a GP to disclaim its fiduciary duties under state law in the LPA, if it were not for the no action relief granted by the Commission in *Heitman Capital Management*. This no-action relief permits advisers to include so-called “hedge clauses” in their contracts with investors.

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2. **The No Action Relief Granted by the SEC in Heitman Capital Management Permitted Investment Advisers to Disclaim Their Duties under the Advisers Act**

Prior to 2007, the SEC had “taken the position that hedge clauses that purport to limit an investment adviser’s liability to acts involving gross negligence or willful malfeasance are likely to mislead a client who is unsophisticated in the law into believing that he or she has waived non-waivable rights, even if the hedge clause explicitly provides that rights under federal or state law cannot be relinquished.”²⁹ On February 12, 2007, the SEC issued no-action relief which permitted a investment adviser to disclaim fiduciary duties (and limit the advisers’ liability to their investors) in an LPA. This is subject to the “facts and circumstances” including “the form and content of the particular hedge clause (e.g., its accuracy), any oral or written communications between the investment adviser and the client about the hedge clause, and the particular circumstances of the client.”²⁰ Where previously, the disclaimer of fiduciary duty under state law in an LPA would be *per se* a violation of the Advisers Act, this now become a rebuttable presumption subject to judicial interpretation. Something that was previously clear under the Advisers Act has now become something to be litigated in federal court, resulting in less certainty in the marketplace, and a reduction in investor protection, in contravention of the SEC’s mission. This, combined with changes to Delaware uniform partnership and limited liability company law, has significantly reduced the obligations of a manager to act in the best interests of its investors and has also driven up legal cost and uncertainty for investment advisers and LPs in the private fund marketplace.

3. **Changes in Fiduciary Duty Requirements Under Delaware Law and Through SEC Action Have Caused Significant Harm to Investors & Loss of the Federal Protections Intended under the Advisers Act**

In 2004, the Delaware legislature enacted laws that permitted GPs and LLC Managing Members to disclaim their fiduciary duties of care, loyalty and good faith owed to LPs and LLC members.²¹ Prior to 2004, Delaware, where many partnerships and LLCs are domiciled, required fundamentally the same fiduciary duty obligations for GPs as those for investment advisers under the Advisers Act. “By contractually waiving fiduciary obligations, a fund manager ‘has almost no extracontractual constraints on it’…the limited partners are left to rely upon the ‘implied covenant of good faith and fair dealing, which is

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²⁹ *Heitman Capital Management* at 3-4.
²⁰ *Id.* at 4.
explicitly protected within the Delaware statutes, but seldom found by the Delaware courts as a source of protection.” 22 The resulting Delaware legislation was much more aggressive than the corresponding law in the Cayman Islands (where many private funds are domiciled) in permitting the modification or effective elimination of fiduciary duty requirements.23 This, combined with the relief received by private fund advisers in the Heitman Capital Management No-Action letter in 2007, has resulted in the increasing loss of fiduciary duty protections to LPs in the course of LPA negotiations.

This change in Delaware law and the Commission no-action relief has resulted in an explosion of efforts to modify or eliminate fiduciary duties, to the disadvantage of LPs and in contravention of the aims of the Advisers Act. While the impact of these legal changes was not immediately felt in the private equity marketplace due to the Great Recession, as the market has rebounded, the legal terms have becoming immensely more challenging. This has been exacerbated by the current fundraising environment, which is characterized by unprecedented fund raising levels and speed, where GPs have significant leverage in negotiations, and many LPs, particularly public pensions, are forced to deploy capital under disadvantaged terms in order to achieve certain performance thresholds designed to allow them to meet their pension and other disbursement requirements.24 LPs, including even the nation’s largest public pensions, with correspondingly reduced leverage in negotiations, have continued to face a market where they are forced to accept these reductions in the applicability of basic duties of fairness, loyalty and good faith owed to them by the investment advisers they invest with. This is extremely harmful to LPs and their beneficiaries and prevents them from addressing wrongdoing by an adviser through self-help, while also conflicting with the goals of the Advisers Act at the federal level. As many of these investors need to deploy their capital to meet their obligations to their beneficiaries, they are unable to walk away from these investment terms while still meeting their funding obligations.

Moreover, there is a heightened risk for private pension plans investing with private fund managers that seek to disclaim their fiduciary duties. Under the Employee Retirement Income Security Act (“ERISA”), pension plan managers that delegate investment

22 Id. at 2.
23 “[T]he conclusion must be that Cayman law does not go as far as Delaware in permitting an ELP’s partnership agreement to exclude entirely the GP’s duty to take into account the interest of the ELP.” See Giorgio Subiotto, Keeping the Faith: What is the duty of a GP managing a Cayman exempted limited partnership?, Ogier, September 10, 2015, available at: https://www.ogier.com/publications/keeping-the-faith-what-is-the-duty-of-a-gp-managing-a-cayman-exempted-limited
discretion to fund managers, can only do so to registered investment advisers, acknowledging in writing that the adviser is a fiduciary with respect to the pension plan.\textsuperscript{25}

For example:

If the fiduciary institutional investor delegates, but then waives, fiduciary duty for the general partner or investment manager and/or provides substantial other exculpation and indemnification protection as to create a de facto elimination of fiduciary duty, there is no one left with any fiduciary duty at all. This waiver could be seen by a court as a backdoor method for eliminating the entire fiduciary duty of the plan sponsor or trustees, which might be in violation of state or federal law and public policy. What are being bargained away, indeed if there is any bargaining at all, are fundamental fiduciary principles.\textsuperscript{26}

Addressing this complex issue through the Proposed Interpretation—i.e., preventing the waiver of Advisers Act fiduciary duties under state law—would benefit investors in the asset class and the marketplace as a whole. Many LPs would be freer to invest more capital into private funds if they did not have to rely on their ability to negotiate these concessions in the LPA. Finally, addressing this issue would be good public policy, upholding the fundamental principles in place since 1940 and before; that an investment adviser owes its investors a duty of care, duty of loyalty and duty of good faith.

We look forward to working with you to address the issues around fiduciary duty in the private equity market and as you work to finalize the Proposed Interpretation.

Sincerely,

\begin{center}
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Steve Nelson
Chief Executive Officer
Institutional Limited Partners Association (ILPA)

\textsuperscript{25} Id. at 3.
\textsuperscript{26} Jeffrey E. Horvitz, \textit{Fiduciary duty waivers of LPs may expose sponsors}, PENSIONS & INVESTMENTS, October 14, 2013, \textit{available at}: http://www.pionline.com/article/20131014/PRINT/310149994(fiduciary-duty-waivers-of-1ps-may-expose-sponsors)
cc.  The Honorable Jay Clayton  
The Honorable Kara M. Stein  
The Honorable Robert J. Jackson, Jr.  
The Honorable Hester M. Peirce  

Dalia Blass, Director, Division of Investment Management