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2007 Employee Benefits Seminar

Current Pension Investment Issues

Presenters: **Roberta Ufford (Moderator)**
Jenny Eller
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Topics: **Hedge Funds and Private Equity**
Self-Managed Accounts
New Products

Materials: **Presentation**
Current Pension Investment Issues
Pension Protection Act Investment Advice Exemption Developments
Collective Investment Trusts
Alternative Investments – Audit Considerations
A Practice Aid for Auditors (AICPA)

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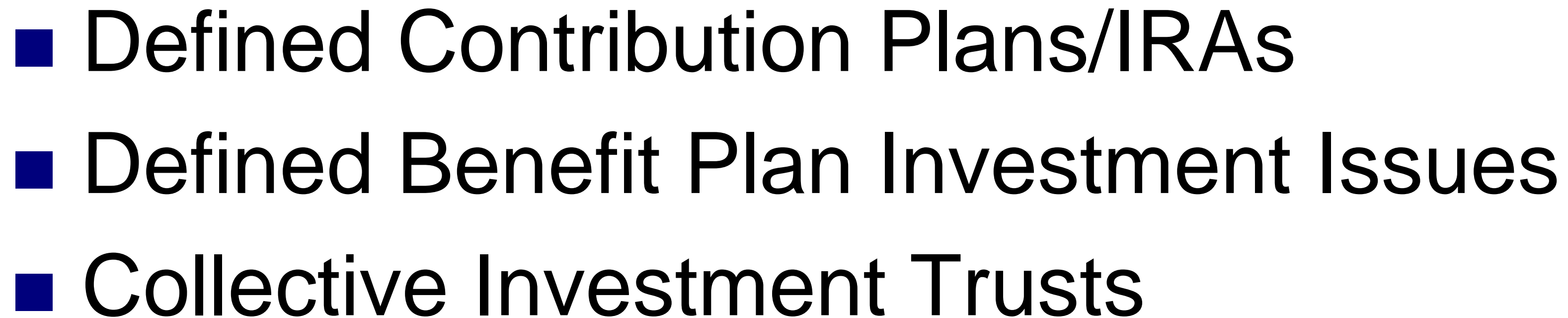
Defined Contribution Plans/IRAs
Defined Benefit Plan Investment Issues
Collective Investment Trusts

Defined Contribution/IRAs - PPA Investment Advice

- ERISA §408(b)(14) exempts –
  - investment advice provided to participants by "fiduciary advisers" and
  - the adviser's receipt of compensation (e.g., commissions and other fees) as a result of plan investments based on the advice.
- Requires an "eligible investment advice arrangement."
  - two types of "eligible arrangements" -
    - fee-neutral: adviser's fees do not vary based on advice, or
    - computer model based advice: advice provided using a computer model certified annually by an independent expert.
- Not covered: discretionary investment management services and advice to plan sponsors (e.g., fund selection).

Defined Contribution/IRAs - PPA Investment Advice

- **FAB 2007-01** provided some guidance.
- Fee-Neutral Condition – Applies to a financial institution and its individual representatives who provide advice.
  - Fees of affiliates may vary. This allows a firm to provide advice about products marketed by its affiliates, even if an affiliate's fees could change based on advice provided.
- Pre-PPA Guidance – Interpretations under SunAmerica and COUNTRY Bank Advisory Opinions are not affected.
  - PPA provides that existing exemptions are not altered.
- Plan Sponsor Shield – Sponsor duties/liability for engaging participant advice fiduciaries are the SAME under the new statutory exemption and under other approaches.

Defined Contribution/IRAs - Undirected Balances

- ERISA §404(c) relieves fiduciaries from liability for losses that are a "direct and necessary" result of participants' exercise of control.
  - Regulations require "affirmative" participant directions.
- PPA extends ERISA § 404(c) protection to fiduciaries –
  - For "default investments" - ERISA § 404(c)(5)
  - For "mapping" - ERISA § 404(c)(4)
- ERISA §404(c)(1)(A)(ii) extends 404(c) relief during "black-out" periods where fiduciaries comply with requirements for implementing a black-out.

Defined Contribution/IRAs - PPA Mapping Relief

- **New ERISA §404(c)(4)** – participants treated as "exercising control" in a "qualified change" in investment options, if participant provided prior instructions.
- "Qualified change" – a reallocation among other plan options or new plan options, if –
  - replacement options (including their risk and return characteristics) are "reasonably similar" to replaced options previously elected by the participant, and
  - notice to participants at least 30 days/not more than 60 days before change compares old and new options and informs participants how their account will be invested, unless the participant objects.

Defined Contribution/IRAs - IRA Rollover/Senior Sweeps

- Class actions by 401(k) plan participants against a recordkeeper and investment provider allege ERISA and securities law claims based on sales of IRA rollovers.
- FINRA (formerly NASD) settlement re: use of misleading and inadequate disclosures to induce employees to rollover to IRAs. http://www.finra.org/PressRoom/NewsReleases/2007NewsReleases/PO19240
- SEC/NASAA/FINRA "Sweep" Exam of "Free Lunch" Seminars, Sept. 2007 http://www.sec.gov/spotlight/seminars/freelunchreport.pdf
- DOL Guidance – See Adv. Op. 2005-23A (December 7, 2005) (Deseret Mutual Benefit Administrators).

Defined Benefit Plan Investment Issues

- PPA Service Provider Exemption
  - ERISA §408(b)(17))
- Securities Lending
- Private Equity and Hedge Funds:
  - AICPA Guidance on Alternative Investments
  - Tax Proposals - Carried Interest & Taxation of Offshore Funds

Service Provider Exemption

- Covers purchases, sales, loans, transfers of plan assets with service providers.
- Single Condition: Plan may not pay more (or receive less) than "adequate consideration."

- Does not apply to –
  - Transactions with a fiduciary with discretion over the assets involved in the transaction
  - Transactions with employers or their affiliates

Service Provider Exemption

- Service Providers reluctant to use - particularly in instances where there is no "generally recognized market" for the asset involved in the transaction.

- Service provider concerns:
  - Fiduciary's good faith determination as to fair market value- objective valuation concerns
  - Fear of being sued as fiduciary for advising with respect to valuation

Securities Lending

- Availability of Service Provider Exemption
- PTE 2006-16

Securities Lending

- Losses on collateral investments in plan securities lending programs?
- Is collateral a plan asset?
- Reason to re-think risks associated with securities lending programs?

AICPA Alternative Investment Guidance

- Guidance labels as "alternative" any investment not traded on an exchange or the OTC markets, or for which quoted market prices are not available, including: private equity funds, hedge funds, real estate funds, fund of funds, and unregistered collective investment funds.
  - Existence
  - Valuation
  - Management Representations
  - Disclosure
  - Reporting

AICPA Alternative Investment Guidance

- DB Plan Investment Fiduciaries should consider a conversation with the plan's auditors regarding:
  - Materiality of Alternative Investments
  - Access to Information

Tax Proposals

- H.R. 2864 – would re-characterize “carried interest” income earned by investment managers of certain types of funds as ordinary income
  - Carried interest is currently taxed as capital gains (15% rate)
  - If taxed as ordinary income, rates would be substantially higher (up to 35%).

- Changes to UBTI rules to apply to investments by tax-exempt entities through funds organized as offshore corporations as are currently applied to such investors who invest in funds organized as domestic partnerships.

Collective Investment Trusts

- **What is a collective investment trust?**
  - Participation limited to certain retirement plans (see below).
  - Corporate (bank or trust company) trustee.
  - "Maintained" by the bank trustee.
  - Will hold ERISA "plan assets" (see below).
  - Created pursuant to a declaration of trust.

Collective Investment Trusts

- Common regulatory structure:
  - Banking law: Office of the Comptroller of Currency ("OCC") regulations section 9.18(a)(2).
  - SEC exemptions:
    - Securities Act of 1933 section 3(a)(2).
    - Investment Company Act of 1940 section 3(c)(11).
  - Exempt from taxation pursuant to IRS Revenue Ruling 81-100.
  - Holds ERISA "plan assets"

Collective Investment Trusts

- Eligible investors:
  - Essentially unrestricted: (a) 401(a) tax-qualified corporate retirement plans and Keogh plans (Rule 180); (b) Governmental retirement plans; (c) Other CITs; and (d) Insurance company separate accounts (if limited to the foregoing).
  - Eligible, but subject to registration under the securities laws unless offered via a private offering exemption: (a) IRAs; and (b) 403(b)(7) plans.
  - Not eligible: (a) Non-qualified deferred compensation plans; (b) VEBAs; and (c) Foreign plans.

Collective Investment Trusts

- **Application of ERISA to CITs**
  - CIT holds ERISA "plan assets"
    - The trustee and advisers will be ERISA fiduciaries
    - Transactions of the fiduciaries and transactions between the CIT and third parties will be subject to ERISA's prohibited transaction rules
    - The CIT will be subject to annual reporting (Form 5500)
    - Any adviser will be subject to ERISA bonding (trustee should be exempt)

Collective Investment Trusts

- Potential ERISA prohibited transactions in connection with investment "in" its own CIT:
  - CIT itself is not likely to be a party in interest.
  - If the investing fiduciary is the trustee or its affiliate, the transaction may constitute prohibited self-dealing, the "use" of plan assets to benefit the fiduciary, and or a transaction between "adverse" parties (the plan and the trust).
  - ERISA section 408(b)(8):
    - Allows trustee to charge additional fees for portfolio management (i.e., no offset required)
    - Requires approval by an unaffiliated fiduciary (plan sponsor) or approval written into the plan documents
    - Does it cover non-discretionary advice?
    - Compare with PTE 77-4 for mutual funds, which requires offset of advisory fees, various disclosures, and affirmative consent.

Collective Investment Trusts

- Potential prohibited transactions in connection with investments "of" the CIT:
  - Potential transactions with parties in interest:
    - Alternative investments and derivatives.
    - Investing in proprietary mutual funds or other proprietary products.
    - Investing in securities of participating plan sponsors.
  - Exemptions available:
    - PTE 84-14 ("QPAM").
    - PTE 91-38 (CIT transactions).
    - New ERISA section 408(b)(17) ("service provider").

Collective Investment Trusts

- **"Conversion" of mutual funds to CITs:**
  - Typically involves an in-kind transfer
  - Need to remove ineligible investors
  - Potential prohibited transaction issues: how to address?
  - How to address the ERISA conflicts?
    - Individual PTE
    - Arms-length transaction
    - Independent fiduciary.
    - "De-register"

Collective Investment Trusts

- Why are CITs becoming increasingly popular?
  - "Systems" capabilities have allowed CITs to operate like mutual funds
  - Mutual fund fee investigations/lawsuits
  - "Simple" structure and exemption from SEC registration – cost savings
  - ERISA section 408(b)(8) advantages over mutual fund PTEs
  - Ability to use as "wrapper" for alternative investments
  - Flexible structure for constructing "default" investment options, *e.g.*, target date funds
  - More financial institutions are setting up affiliated trust companies
  - "Private label" CITs

PENSION PROTECTION ACT
INVESTMENT ADVICE EXEMPTION DEVELOPMENTS

Section 601 of the Pension Protection Act of 2006 ("PPA") added a new prohibited transaction exemption under the Employee Retirement Income Security Act of 1974 ("ERISA") for the provision of investment advice to participants under ERISA-covered 401(k) and similar participant-directed plans. The exemption also covers investment advice offered to individual retirement accounts ("IRAs"). Of course, even before the PPA, many plan sponsors offered investment education and advice programs of various types to their plan participants. The new statutory investment advice exemption raised many questions, including questions about the investment advice programs already being offered to plan participants and questions about how to implement the new investment advice exemption. This article reviews legal approaches to participant advice programs before the PPA and discusses recent developments relating to the new PPA exemption.

I. Background

As participant-directed retirement plans have developed from supplemental retirement plans into the primary retirement savings vehicle for American workers, interest also has grown in providing participants with assistance, *i.e.,* investment advice, in managing their individual plan accounts. Financial institutions, including financial institutions that offer investment products and services to plans, are a source of this type of assistance. However, ERISA prohibits plan fiduciaries from engaging in transactions involving self-dealing and other conflicts of interest. If a financial institution provides investment advice to plan participants it could become a plan fiduciary. As a plan fiduciary, a financial institution could violate the fiduciary responsibility provisions under ERISA by providing investment advice if it may affect its compensation (or compensation of its affiliates) by recommending plan investments in the financial institution's own "proprietary" investment products or in non-proprietary products that pay commissions or other compensation, such as shareholder service or sub-transfer agency fees, to the financial institution or its affiliates. Financial institutions that provide investment advice to IRAs are similarly at risk because IRAs are subject to prohibited transaction excise tax provisions under section 4975 of the Internal Revenue Code ("Code"), which are substantially similar to the prohibited transaction rules under ERISA.

Even before participant-directed plans became popular, the U.S. Department of Labor ("DOL") recognized that investment advice might be helpful to plans in certain circumstances, even if it might be "conflicted." As a result, DOL issued several class prohibited transaction exemptions that allow financial institutions to provide investment advice and investment management services to plans even if fee arrangements could raise self-dealing and conflict of interest issues under ERISA (and Code) prohibited transaction rules. For example —

- Prohibited Transaction Class Exemption ("PTE") 77-4 permits financial institutions to invest plan assets in proprietary mutual funds if (among other

conditions) the plan does not pay double fees for investment advisory services and an independent plan fiduciary approves the investment after full disclosure;

- PTE 84-24 allows mutual fund principal underwriters and their affiliates to recommend plan investments in proprietary mutual funds if certain disclosure and other conditions are met; and

- PTE 75-1, Part II, permits broker-dealers and their affiliates to recommend plan investments in non-proprietary mutual funds and receive commissions as a result of these transactions under certain conditions.

DOL also has issued a number of similar individual exemptions to financial institutions.

Depending on the particular facts and circumstances, one or more of these DOL exemptions could exempt investment advice services provided to plan participants from ERISA's prohibited transaction rules. All of the exemptions provide relief under the prohibited transaction excise tax provisions of the Code, and therefore, might also be used by financial institutions when providing services to IRAs.

In addition to these exemptions, DOL has issued guidance on other permissible approaches to assisting plan participants with investment decision making.

- Interpretative Bulletin ("IB") 96-1 provides a safe harbor for "investment education" services. Under IB 96-1, a financial institution that limits its services to investment education would not be providing investment advice of the type that results in fiduciary status. The safe harbors offered by IB 96-1 apply to general investment information as well as generically presented asset allocation materials and 'interactive' materials (*e.g.,* self-scoring questionnaires, computer programs, etc.) that participants may use in deciding how to invest their accounts.[1]

- In advisory opinions (*e.g.*, AO 1995-15A issued to Frost Bank and AO 2005-10A issued to Country Trust Bank), DOL agreed that a financial institution can avoid prohibited transactions by rebating fees received from third parties, such as proprietary or non-proprietary mutual funds, against fees the plan otherwise would have to pay on a dollar for dollar basis (the "dollar for dollar offset approach").

- Another advisory opinion (AO 2001-09A issued to SunAmerica) explains that, under certain conditions, investment providers may offer asset allocation services

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[1] If a financial institution limits its services to investment education as described by IB 96-1, and therefore does not provide investment advice that results in fiduciary status, the financial institution might rely on AO 1995-16A (issued to Aetna) and AO 2003-09A (issued to ABN AMRO) to receive compensation from third parties, including fees from mutual funds, in connection with plan transactions. These advisory opinions explain that, generally, a financial institution acting as a directed trustee may receive fees from mutual funds in connection with plan transactions, so long as the directed trustee is not acting as a fiduciary in connection with the plan's investment transactions by, e.g., providing investment advice or retaining discretion to substitute plan investment options.

to plan participants without violating ERISA's prohibited transaction rules, if the asset allocation advice is provided by an independent financial expert (the "independent expert approach"). In this advisory opinion, the independent expert provided a series of model portfolios and a methodology for recommending a portfolio to each participant, but the investment provider remained responsible for the administrative aspects of the service.

II. The PPA Investment Advice Exemption

The new exemption for eligible investment advice arrangements under the PPA added additional complexity for financial institutions considering how to meet plan and IRA client requests for investment advice services. Generally, the exemption is designed to allow a "fiduciary adviser" to provide investment advice to plan participants and beneficiaries. The exemption applies even if the fiduciary adviser or its affiliate may receive commissions or other types of compensation as a result of the fiduciary adviser's investment recommendations. Any bank, broker-dealer or registered investment adviser, and their affiliates, may act as a "fiduciary adviser" covered by the exemption.

The new exemption covers three types of transactions: (a) a "fiduciary adviser's" provision of investment advice to participants and beneficiaries (not plan-level fiduciaries such as a plan sponsor); (b) the plan's acquisition, sale or holding of any security or other property pursuant to such investment advice; and (c) the direct or indirect receipt of compensation by the "fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative) in connection with the provision of the advice . . . ." It also provides relief from liability to plan sponsors who select an eligible investment advice arrangement for their plans. So long as plan sponsors prudently select an eligible investment advice arrangement for their plans, they are not required to monitor the specific investment advice given to any participant.

Conditions under the new exemption are detailed. First, in order to be an "eligible investment advice arrangement" the arrangement must be structured in one of two ways. Under the "level fees" approach, the fiduciary adviser's fees may not vary depending on the investment option selected. The alternative approach is that the advice is provided using a computer model meeting specific conditions. One condition (among others) is that the computer model must take into account all investment options under the plan. Also, the computer model must be periodically certified by an independent "eligible investment expert" as meeting the requirements of the exemption.

In addition to the specific conditions for the two types of eligible investment advice arrangements, the exemption imposes additional conditions on all investment advice arrangements under the exemption. These include (among other conditions) —

- express authorization of the arrangement by an independent plan fiduciary,
- written acknowledgment by the fiduciary adviser of its fiduciary status with respect to the advice provided in connection with the arrangement,

- the fiduciary adviser must obtain an annual audit from an independent expert demonstrating compliance with the conditions of the exemption (this condition is in addition to the required annual certification of a computer model), and

- initial and periodic comprehensive disclosures to plan participants.

III. Field Assistance Bulletin 2007-1

On February 2, 2007, DOL issued Field Assistance Bulletin 2007-01 (the "FAB") to clarify some of the conditions under the new PPA exemption.

First, the FAB clarified that all pre-PPA approaches to participant-level investment advice remains valid, including DOL's interpretations approving independent advice programs and programs that employ a dollar-for-dollar offset approach in connection with the provision of investment advice. This clarification was in addition to a PPA provision that specified that no previously issued DOL class or individual exemption was affected by the new investment advice exemption adopted in the PPA.

Second, DOL stated that plan sponsors that select any type of investment advice arrangement for plan participants (whether or not covered by the new PPA exemption) are not responsible for the specific advice provided to participants. However, plan sponsors remain liable for prudent selection and monitoring of fiduciary advisers. Therefore, according to the FAB, all plan sponsors must engage in a "diligent" process in hiring or retaining investment advice providers (and any other plan service providers) that is designed to elicit information necessary to assess the investment advice provider's qualifications. This process should include consideration of factors such as (1) experience and qualifications of the investment adviser, including the adviser's registration in accordance with applicable federal and/or state securities law, (2) the willingness of the adviser to assume fiduciary status and responsibility under ERISA with respect to the advice provided to participants, and (3) the extent to which advice to be furnished to participants and beneficiaries will be based upon generally accepted investment theories.

Finally, the FAB clarified the requirement under the "level fees" approach that a fiduciary adviser's fees may not vary depending on the investment option selected. DOL stated that, for purposes of this requirement, the "fiduciary adviser" means an individual providing advice and the financial institution (*i.e.,* investment adviser, broker dealer or bank) supervising the individual. Importantly, the term does not include affiliates of the fiduciary adviser. This means that the level fees approach under the exemption covers investment advice provided by a fiduciary adviser, even where fees received by an *affiliate* of the fiduciary adviser could change as a result of the advice. For example, a bank acting as a directed trustee to ERISA-covered plans could receive fees paid from mutual funds in connection with plan transactions, even if an affiliated registered investment adviser provides investment advice to plan participants and makes recommendations that may affect the directed trustee's fees. This interpretation has substantially improved the usefulness of the "level fees" approach provided by the new PPA investment advice exemption.

IV. DOL Requests for Information and Hearings

The PPA requires DOL to develop a model fee disclosure form for use in connection with the new exemption and also directs DOL to determine whether using a computer model to provide investment advice to IRAs is feasible. If DOL determines that the use of a computer model with respect to IRAs is not feasible, the PPA requires DOL to issue a related class exemption. To comply with these requirements, in December 2006, DOL issued Requests for Information ("RFIs") relating to certification requirements for computer modeling programs, qualification requirements for "eligible investment experts," disclosure of investment advice fees and the feasibility of applying the computer model provisions to IRAs and similar accounts. Both RFIs included questions about fee disclosure.

DOL held a public hearing on July 31, 2007 to obtain additional information. The central issue was the meaning of the PPA requirement that any computer model must "take into account the full range of investments, including equities and bonds, in determining the options for the investment portfolio of the account beneficiary." Commenters at the hearing took the opportunity to urge DOL to issue further regulatory guidance regarding the new investment advice exemption, particularly with respect to the "level fees" approach.

V. Outlook

DOL is expected to issue more guidance on the application of the new PPA investment advice exemption, including guidance on both the level fee and computer model approaches in the near future. The expected guidance may also include guidance for financial institutions providing services to plan participants as well as to IRAs.

COLLECTIVE INVESTMENT TRUSTS

I. What is a Collective Investment Trust?

A. The term "collective investment trust" is generally used to describe one particular type of trust vehicle used to commingle the assets of unaffiliated retirement plans for investment purposes. A CIT must meet certain specific requirements:

1. Participation limited to certain retirement plans (see below).

2. Corporate (bank or trust company) trustee.

3. "Maintained" by the bank trustee.

4. Will hold ERISA "plan assets" (see below).

5. Created pursuant to a declaration of trust.

B. The CIT often is a vehicle of choice for the pooling of retirement plan assets because it typically has several favorable characteristics:

1. Created pursuant to banking law:

   (a) Federal: Office of the Comptroller of Currency ("OCC") regulations section 9.18(a)(2).

   (b) State: typically similar or adopt the OCC regulations by reference.

2. Exempt from SEC registration.

   (a) Securities Act of 1933 (public offering of securities) – section 3(a)(2).

   (b) Investment Company Act of 1940 – section 3(c)(11).

3. Exempt from entity-level taxation (without the complexities/limitations applicable to "pass-through" vehicles such as investment companies or partnerships) pursuant to IRS Revenue Ruling 81-100.

4. Recognized vehicle for certain ERISA purposes; certain prohibited transaction exemptions available.

5. Recognized and accepted by investors.

6. Permitted to "advertise."

C. Who is eligible to invest in a CIT? Generally:

1. Any of the following:

(a) 401(a) tax-qualified corporate retirement plans.

(b) 401(a) tax-qualified plans covering self-employed individuals (Keogh plans) of certain professionals (SEC Rule 180).

(c) Governmental retirement plans.

(d) Other CITs.

(e) Insurance company separate accounts whose participation is limited to the above accounts.

2. The following may invest under banking and tax law, but offers of interests of a CIT would be subject to registration under the securities laws unless offered via a private offering exemption (caution: private offering exemptions generally are not available for use by 401(k) plans because each participant is treated as an "investor"):

(a) Individual retirement trusts.

(b) 403(b)(7) plans.

3. The following are not eligible to participate:

(a) Non-qualified deferred compensation plans.

(b) VEBAs.

(c) Foreign plans.

D. "Common trust funds" are distinguished and typically subject to more restrictive conditions, but they may sometimes provide an alternative vehicle if it is desirable to put otherwise ineligible investors into the pool.

II. Application of ERISA to CITs

A. ERISA "plan assets."

1. Generally, every CIT in which an ERISA plan invests is subject to ERISA regulation, unless the CIT is registered as an investment company.

2. Specifically, ERISA regulations provide that if an ERISA plan holds an interest in a trust, the “plan assets” of the plan are deemed to include its undivided interest in every underlying asset of the trust on a “look-through” basis.

3. ERISA does not apply to a CIT comprising only governmental plans.

B. The key consequences of having ERISA apply to a CIT include the following:

1. The trustee will be an ERISA fiduciary; certain trust company personnel who perform fiduciary functions on behalf of the trustee probably will also be fiduciaries.

2. The fiduciaries will be subject to ERISA's standards of care.

3. Transactions of the fiduciaries and transactions between the CIT and third parties will be subject to ERISA's prohibited transaction rules.

4. The CIT will be subject to certain reporting and disclosure obligations (e.g., Form 5500).

5. Unless an exception applies, every fiduciary and all non-fiduciary personnel who "handle" funds of the CIT must be bonded in accordance with ERISA. (Generally, the trustee itself will be exempt.)

6. ERISA will preempt (i) any inconsistent state laws, and (ii) any state laws, even if not inconsistent with ERISA, except banking, securities, and insurance laws, or generally applicable criminal laws. However, ERISA does not preempt other Federal laws.

C. Potential ERISA prohibited transactions in connection with investment "in" the CIT:

1. CIT itself is not likely to be a party in interest.

2. If the investing fiduciary is the trustee or its affiliate, the transaction may constitute prohibited self-dealing, the "use" of plan assets to benefit the fiduciary, and or a transaction between "adverse" parties (the plan and the trust).

(a) Caution: Both banking and securities laws appear to require that the trustee have some fiduciary responsibility over the investment "into" the CIT, even if directed.

3. ERISA section 408(b)(8)

(a) Allows charging additional fees for portfolio management (i.e., no offset required).

(b) Requires approval by an unaffiliated fiduciary (plan sponsor) or approval written into the plan documents.

(1) A footnote in DOL Advisory Opinion 96-15 (Scudder) suggests that Section 408(b)(8) may not cover investment advice, i.e., non-discretionary recommendations regarding the selection of plan options, only discretion.

(2) An alternative reading of the footnote is that it permits investment advice, but does not permit charging a separate fee for that advice.

(3) Arguably, the footnote is wrong.

(c) Compare with PTE 77-4 for mutual funds, which requires offset of advisory fees, various disclosures, and affirmative consent.

D. Potential prohibited transactions in connection with investments "of" the CIT:

1. Potential transactions with parties in interest:

(a) Alternative investments and derivatives.

(b) Investing in proprietary mutual funds or other proprietary products.

(c) Investing in securities of participating plan sponsors.

2. Exemptions available:

(a) PTE 84-14 ("QPAM").

(b) PTE 91-38 (CIT transactions).

(c) New ERISA section 408(b)(17) ("service provider").

E. Other fiduciary conflicts, including “self-dealing” (hiring an affiliate for an additional fee), direct conflicts (representing a plan and an “adverse party” in the same transaction), or accepting compensation from a third party dealing with the plan (“kickbacks”).

F. "Conversion" of mutual funds to CITs:

1. Typically involves an in-kind transfer.

2. Need to remove ineligible investors.

3. Potential prohibited transaction issues:

(a) Conflict of interest (valuation).

(b) Self-dealing.

(c) "Use" of plan assets to benefit parties in interest.

4. Potential ways to address ERISA conflicts:

(a) Generally, the class PTEs only cover in-kind transfers from CITs to mutual funds, not the other way around.

(b) Individual PTE.

(c) In-kind distribution from the mutual fund to each plan in an arms'-length transaction, followed by in-kind purchase of CIT units.

(1) ERISA section 408(b)(8) may cover the purchase transaction.

(d) Independent fiduciary.

(e) "De-register"?

III. Why Are CITs Becoming Increasingly Popular?

A. "Systems" capabilities have allowed CITs to operate like mutual funds.

1. Daily valuation capabilities and multi-class structures.

2. Distribution on NSCC capable platforms.

B. Mutual fund fee investigations/lawsuits.

C. "Simple" structure and exemption from SEC registration result in cost savings/improved performance.

D. ERISA section 408(b)(8) advantages over mutual fund PTEs 77-4 and 84-24.

E. Ability to use as "wrapper" for alternative investments.

1. Hedge funds/private equity

2. ETFs

3. Derivatives

F. Flexible structure for constructing "default" investment options, e.g., target date funds.

G. More financial institutions are setting up affiliated trust companies.

H. Third-party trustees willing to "private label" CITs for unaffiliated investment advisers.

ALTERNATIVE INVESTMENTS – AUDIT CONSIDERATIONS

A PRACTICE AID FOR AUDITORS

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[1] The term *issuer* is defined in Section 2 of the Sarbanes-Oxley Act as an issuer (as defined in Section 3 of the Securities Exchange Act of 1934), the securities of which are registered under Section 12 of that Act, or that is required to file reports under Section 15(d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933, and that it has not withdrawn.

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TABLE OF CONTENTS

FOREWORD 1

GENERAL CONSIDERATIONS PERTAINING TO AUDITING ALTERNATIVE INVESTMENTS 1

EXISTENCE ASSERTION 2

VALUATION ASSERTION 4
- **Investor Management's Responsibility for the Valuation Process and Related Internal Control** 4
- **Auditor's Approach** 6
- **Obtaining an Understanding of Internal Control** 8
- **Fair Value Method of Accounting** 10
- **Cost Method of Accounting** 12
- **Equity Method of Accounting** 12

MANAGEMENT REPRESENTATIONS 13

DISCLOSURE OF CERTAIN SIGNIFICANT RISKS AND UNCERTAINTIES 14

REPORTING 14
- **Emphasis of a Matter Paragraph** 14
- **Modifications to the Auditor's Report** 14

APPENDIX 1: EXAMPLE CONFIRMATION FOR ALTERNATIVE INVESTMENTS 17

APPENDIX 2: ILLUSTRATIVE EXAMPLES OF DUE DILIGENCE, ONGOING MONITORING, AND FINANCIAL REPORTING CONTROLS 20

Foreword

This Practice Aid addresses challenges associated with auditing investments for which a readily determinable fair value does not exist (that is, investments not listed on national exchanges or over-the-counter markets, or for which quoted market prices are not available from sources such as financial publications, the exchanges, or the National Association of Securities Dealers Automated Quotations System (Nasdaq)). These investments include private investment funds meeting the definition of an *investment company* under the provisions of the AICPA Audit and Accounting Guide *Investment Companies*, such as hedge funds, private equity funds, real estate funds, venture capital funds, commodity funds, offshore fund vehicles, and funds of funds, as well as bank common/collective trust funds. Collectively, these types of investment funds are referred to herein as "alternative investments." Alternative investments may be structured as limited partnerships, limited liability corporations, trusts, or corporations.

Investors in alternative investments include, but are not limited to, colleges and universities, hospitals, pension plans, and investment companies – including funds of funds. Some of these entities invest a small percentage of their investment portfolios, while others invest a substantial percentage of their total investments in these vehicles. Some of these investors invest in a single alternative investment, while other investors have portfolios of hundreds of alternative investments. In addition, the underlying investments of the alternative investments can range from marketable securities to complex and/or illiquid investments. Alternative investments can present challenges with respect to obtaining sufficient appropriate audit evidence in support of the existence and valuation assertions, because of the lack of a readily determinable fair value for these investments and the limited investment information generally provided by fund managers.

General Considerations Pertaining to Auditing Alternative Investments

The principal auditing standard for investments is AU section 332, *Auditing Derivative Investments, Hedging Activities, and Investments in Securities* (AICPA, *Professional Standards,* vol. 1). AU section 332.21 describes procedures for obtaining audit evidence relating to the existence assertion. AU section 332, paragraphs .28 through .34, describes auditing procedures relating to the valuation assertion where valuation of the investments is based on the investee's financial results, and AU section 332, paragraphs .35 through .46, describes procedures relating to the valuation assertion where valuation of the investments is based on estimated fair value. AU section 328, *Auditing Fair Value Measurements and Disclosures* (AICPA, *Professional Standards,* vol. 1), also addresses auditing issues relevant to investments.

Although the guidance in AU section 332 and AU section 328 pertains to alternative investments, such guidance was not intended to be specific to alternative investments.

Interpretation No. 1, "Auditing Investments in Securities Where a Readily Determinable Fair Value Does Not Exist," of AU section 332 (the Interpretation) was issued to assist auditors in applying the provisions of AU section 332 to alternative investments. The Interpretation provides auditing guidance related to the existence and valuation assertions for investments in securities where readily determinable fair values do not exist.

This Practice Aid focuses on the existence and valuation assertions associated with alternative investments. The auditor's approach is based on an assessment of the risk of material misstatement of the financial statements. As stated in AU section 312.11, *Audit Risk and Materiality in Conducting an Audit* (AICPA, *Professional Standards*, vol. 1), the auditor's consideration of materiality is a matter of professional judgment, and materiality judgments involve both quantitative and qualitative considerations. The risk of material misstatement includes inherent risk and control risk.

The auditor's risk assessment depends on the particular facts and circumstances, including (1) the significance of alternative investments to the financial statements; (2) the nature, complexity, and liquidity of the underlying investments; (3) the nature and extent of management's process and related internal controls associated with valuation of alternative investments; and (4) the nature and extent of information available to management to support its valuation process and valuation conclusions. When an investor entity has a significant number of individual alternative investments, for the purpose of assessing risk, the auditor may need to group the alternative investments based on similar characteristics and/or processes.

The auditor often obtains sufficient appropriate audit evidence with respect to the existence and valuation assertions associated with alternative investments in the form of (1) observable market prices (for example, from recent sales or purchase transactions), (2) details of values in the underlying investments, or (3) audited financial statements of the alternative investment. Given the wide range of types of alternative investments, thoughtful assessment of the risk of material misstatement and evaluation of the sources of possible audit evidence to support the existence and valuation assertions are necessary to design effective audit procedures. Because of the assessed level of risk of material misstatement and the constraints on the availability of audit evidence, there may be circumstances where the auditor may not be able to obtain sufficient appropriate audit evidence over the existence or valuation assertions.

Existence Assertion

The existence assertion addresses whether alternative investments exist at a given date, and whether recorded transactions have occurred during a given period.

The auditor obtains an understanding of internal control sufficient to plan the audit by performing procedures to understand the design of controls relevant to the audit and determine if they have been placed in operation. The discussion of internal control in this

document is included in the section on the valuation assertion; however, certain of the controls in that section also are relevant to the existence assertion.

For investments in alternative investments, the auditor typically confirms with the fund manager the investor entity's interest in the fund (for example, number of units held or percentage ownership, and value of the investor entity's proportionate share of net assets/capital account balance) as of the balance sheet date. The Interpretation provides guidance on this confirmation process. The Interpretation states that, in circumstances in which the auditor determines that the nature and extent of audit procedures should include verifying the existence of alternative investments, simply confirming investments in the aggregate does not constitute adequate audit evidence with respect to the existence assertion. The Interpretation also states that, if the auditor concludes that the nature and extent of audit procedures should include confirming existence of the entity's investments, confirmation of the holdings of the alternative investments on a security-by-security basis typically would constitute adequate audit evidence with respect to the existence assertion. Refer to Appendix 1 for an illustrative confirmation for use by practitioners.

The auditor's uncertainty as to whether the fund manager will provide the requested information does not obviate the auditor's requirement to obtain sufficient appropriate audit evidence – either through confirmation or otherwise. If the confirmation request is not returned to the auditor or the details of the underlying investments are not otherwise provided by the fund manager, the auditor performs alternative procedures directed toward assessing existence of the alternative investments. In addition, depending upon the significance of the alternative investments to the investor entity's financial statements taken as a whole, even if the fund manager confirms all requested information, it may be necessary for the auditor to perform additional audit procedures. Such alternative or additional procedures may include:

- Observing management site visits or telephone calls to investee funds (or reviewing documentation of such calls or visits)
- Reviewing executed partnership, trust, limited liability corporation, or similar agreements
- Inspecting other documentation supporting the investor's interest in the fund (for example, correspondence from the fund or trustee acknowledging transactions with the fund)
- Reviewing periodic statements from the fund or trustee reflecting investment activity and comparing activity with amounts recorded by the investor
- Vouching relevant cash receipts and disbursements

Determining whether one or more of these alternative or additional audit procedures provides the auditor with sufficient appropriate audit evidence with respect to the existence assertion requires considerable auditor judgment.

Valuation Assertion

The valuation assertion addresses whether alternative investments are reflected in the investor entity's financial statements at appropriate amounts.

Alternative investments may be accounted for under three basic accounting methods: cost, equity (valuations based on an investee's financial results), or fair value. The determination of the appropriate accounting method is dependent on various factors, including the type of investor entity (for example, not-for profit, health care, investment company, or employee benefit plan), structure of investment entity (for example, partnership vs. corporation), and the percentage ownership. Auditing management's valuation assertion includes considering the appropriateness of the accounting method used for measurement and disclosure. Even in situations where the cost or equity method are required to be used as the carrying amounts for alternative investments, consideration must be given to fair value disclosures required by generally accepted accounting principles (GAAP).

Investor Management's Responsibility for the Valuation Process and Related Internal Control

The auditor's consideration of the valuation assertion typically begins with understanding the process used by the investor entity's management in developing its fair value estimates and the controls that have been established relative to those estimates.

Management of the investor entity is responsible for the valuation of alternative investment amounts as presented in the investor entity's financial statements. With respect to valuations based on fair value, AU section 328.04 states:

> *Management* is responsible for making the fair value measurements and disclosures included in the financial statements. As part of fulfilling its responsibility, *management* needs to establish an accounting and financial reporting process for determining the fair value measurements and disclosures, select appropriate valuation methods, identify and adequately support any significant assumptions used, prepare the valuation, and ensure that the presentation and disclosure of the fair value measurements are in accordance with GAAP. [Emphasis added]

This responsibility cannot, under any circumstances, be outsourced or assigned to a party outside of the investor entity's management. Although the investor entity's management may look to the fund manager for the mechanics of the valuation, management must have sufficient information to evaluate and independently challenge the fund's valuation. The underlying investments generally are measured at estimated fair value by the fund manager in accordance with its stated valuation policies for determining net asset value.

Taking responsibility for the valuation of the alternative investments will necessitate that the management of the investor entity has a sufficient understanding of the nature of the underlying investments, the portfolio strategy of the alternative investments, and the method and significant assumptions used by the fund manager to value the underlying investments. The nature and extent of management's process for valuing investments, and the related internal controls, are particularly important when the investor entity invests in securities for which readily determinable fair market values do not exist. In these instances, management should have in place a process and internal control over that process to ensure that its alternative investments are recorded at amounts in accordance with its stated accounting policies.

An effective process for supporting fair value estimates of alternative investments includes the investor entity's management having an understanding of the underlying investments. The timing and extent of the understanding is based upon management's assessment of the risk of material misstatement of the financial statements. In higher risk situations, an effective valuation process may include periodic access to a detailed listing of the underlying investments along with their estimated fair values and, if relevant, the related debt or other obligations of the alternative investment.

In the absence of availability of a detailed listing of the underlying investments as of the investor entity's year end, the investor entity's management may gain sufficient understanding of the fund through other activities. These activities could include, but not be limited to, periodic interviews with fund management to understand the fund's strategy, positions, and valuation methodologies sufficient to provide the investor entity's management with the ability to compare the data obtained from the fund manager with other available information, such as sector data, indexes, and cash distributions. Such data could be further corroborated with information regarding the underlying investments obtained through the annual audited financial statements of the alternative investment.

The extent of the process utilized by the investor entity's management and the related controls should reflect the significance of the alternative investments to the investor entity's financial statements, the nature of the underlying investments, and management's risk assessment. A smaller portfolio of alternative investments that are themselves invested in readily marketable securities ordinarily requires a less sophisticated process and related controls than a large portfolio of alternative investments with underlying investments that are more complex and difficult to value. Management's process may include a variety of approaches due to the different types of alternative investments within its portfolio.

Management's valuation process need not include recalculation of estimated fair values for alternative investments, but it should ensure that the investor entity's management has a sufficient understanding of the characteristics of the underlying investments and the alternative investment's valuation process for investments held as of the investor entity's balance sheet date. As such, the investor entity need not prepare a separate valuation of the underlying investments unless it becomes aware that valuation methodology or assumptions used by the fund manager are incorrect, incomplete, or otherwise

unsatisfactory. Although obtaining the detail of the underlying investments may indicate a strong process, simply obtaining the detail is not sufficient by itself for management to support its assertion regarding the valuation of the alternative investments.

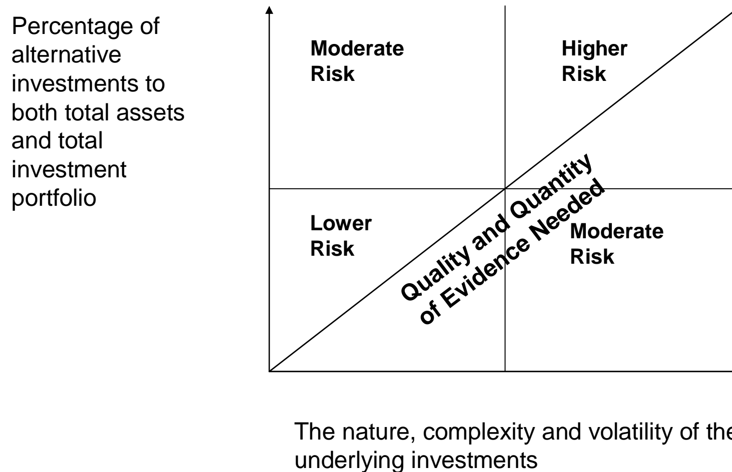
Refer to Appendix 2 for illustrative examples of due diligence (that is, those procedures performed before the initial investment), ongoing monitoring (that is, those procedures performed post-investment), and financial reporting controls. These examples are intended to assist auditors in evaluating management's process. However, the examples are not intended to be all-inclusive or to be used as a checklist. Due diligence controls are key elements of an investor entity's risk management. However, due diligence controls are by their nature difficult to link to the financial statement valuation assertion and do not replace controls over monitoring and financial reporting in support of the valuation process.

Auditor's Approach

The auditor's approach is based on an assessment of the risk of material misstatement of the financial statements. This approach includes (1) an identification of the risks associated with relevant financial statement assertions, (2) an assessment of those risks, (3) a determination of the significant risk of material misstatement, and (4) the design of procedures responsive to those significant risks so as to reduce such risks to the acceptable level to enable the auditor to express an opinion on the financial statements taken as a whole.

The auditor should consider the sufficiency and appropriateness of audit evidence to be obtained when assessing risks and designing further audit procedures. Sufficiency is the measure of quantity of audit evidence. Appropriateness is the measure of the quality of audit evidence, that is, its relevance and reliability in providing support for, or detecting misstatements in, the classes of transactions, account balances, and disclosures and related assertions. The quantity of audit evidence needed is affected by the risk of misstatement (the greater the risk, the more audit evidence is likely to be required) and also by the quality of such audit evidence (the higher the quality of audit evidence, the less the audit evidence that may be required). Accordingly, the sufficiency and appropriateness of audit evidence are interrelated. However, merely obtaining more audit evidence may not compensate if it is of lower quality. As illustrated in Exhibit 1, "Risk Assessment," the extent of the audit evidence necessary for the auditor to conclude on the sufficiency and the appropriateness of audit evidence increases as:

1. The percentage of alternative investments to both total assets as well as the total investment portfolio increases.
2. The nature, complexity, and volatility of the underlying investments increases.



As the risk moves into the upper right quadrant of the graphic, the need for higher quality and a greater quantity of audit evidence increases. Audited financial statements of the alternative investment as of the investor entity's balance sheet date are among the highest quality audit evidence. Limited visibility into the underlying investments detracts from the quality of the audit evidence, while a detailed listing of the underlying investments as of the date of the investor entity's year end enhances the quality of audit evidence. A fund's condensed schedule of investments or a detailed listing of the underlying investments as of a date other than the investor entity's year end may provide some audit evidence that falls between these two extremes. The evaluation of the quality of such evidence is subject to the auditor's professional judgment.

To illustrate, consider the following four examples. The examples are for illustrative purposes only and are not intended to create specific parameters.

Example 1. If 5 percent of the investor entity's net assets are in alternative investments, and the underlying investments have readily determinable market values, the risk of material misstatement may be assessed as lower. Therefore, the quality and quantity of audit evidence that the auditor would need to obtain in order to conclude that the financial statements are not materially misstated may be lower.

Example 2. If 5 percent of the investor entity's net assets are in alternative investments, and the underlying investments are complex and/or illiquid (such as investments in natural resources or start-up entities), the risk of material misstatement may be assessed as moderate. The auditor might conclude that the quality and quantity of audit evidence necessary to conclude that the financial statements are not materially misstated would be moderate.

Example 3. If 35 percent of the investor entity's net assets are in alternative investments, and the underlying investments are in vehicles with a readily determinable market value, the risk of material misstatement may be assessed as moderate, as the lower inherent risk associated with these types of underlying investments mitigates the risk associated with the significance of the investments to the financial statements taken as a whole. The auditor exercises professional judgment in determining the sufficiency and appropriateness of audit evidence to conclude that the financial statements are not materially misstated.

Example 4. If 35 percent of the investor entity's net assets are in alternative investments, and the underlying investments are complex, volatile or illiquid (such as investments in natural resources or start-up entities), the risk of material misstatement may be assessed as higher, as the increased inherent risk associated with the more esoteric investments is compounded by the significant impact a misstatement would have on the financial statements taken as a whole. Therefore, the quality and quantity of audit evidence that the auditor would need to obtain would be higher.

Obtaining an Understanding of Internal Control

In accordance with AU section 319, *The Effect of Information Technology on the Auditor's Consideration of Internal Control in a Financial Statement Audit* (AICPA, *Professional Standards,* vol. 1), the auditor obtains an understanding of internal control sufficient to plan the audit by performing procedures to understand the design of controls over financial reporting and determine if they have been placed in operation. With respect to valuations based on estimated fair values, when obtaining an understanding of internal control related to valuation, the auditor might consider the following:

- Management's process used to determine the estimated fair value of the investments, including the selection and consistent application of the relevant accounting principles and valuation methods
- The availability of information used in determining estimated fair value, including any details of the underlying investments of a hedge fund or investment partnership that may be available to investor entities
- The nature of the underlying investments, including the complexity of the investment strategies, the liquidity of the principal trading markets, and the frequency of trading activity (that is, frequently moving in and out of various trading positions or hedging strategies)
- How often management interacts with the fund manager and the nature of such interactions, including the extent to which they enable management to estimate fair value as of the balance sheet date
- The competence and experience of the investor entity's personnel assigned to monitor and estimate the fair value of the investor entity's investments, particularly investments in hedge funds or similar vehicles using complex investing strategies

- The availability of SAS 70 reports surrounding the controls and procedures in place at a service provider, in the determination of unit values and shareholder transactions such as for common/collective trust funds
- Use of an investment adviser to monitor the alternative investments, including the underlying investments, and/or to monitor markets or market indicators and their effect on the estimated fair values of the entity's investment
- The availability of audited financial statements for the alternative investments and whether such statements are as of the same date as the client's financial statements, the timing of when such audited financial statements become available, and whether the audits are conducted by qualified and reputable independent audit firms

The illustrative controls outlined in Appendix 2 may assist auditors in identifying relevant controls. While due diligence controls (that is, those procedures performed before the initial investment) are a key element of an investor entity's risk management, extensive due diligence does not replace controls over monitoring (that is, those procedures performed post investment) and financial reporting.

It may not be practical or possible for the auditor to obtain sufficient audit evidence only from substantive procedures. Therefore, the auditor may (1) identify specific controls relative to specific assertions, (2) perform tests of controls, and (3) conclude on the assessed level of control risk. Such an assessment may result in a more effective and efficient audit.

The auditor considers the results of the internal control testing and determines whether significant deficiencies or material weaknesses in the design or operation of internal control with respect to management's process for valuing alternative investments exist. These matters may include:

- Lack of management understanding of the nature or extent of the alternative investments held by the entity or the risks associated with such investments
- Lack of a comprehensive policy on strategy and objectives for investing in alternative investments
- Lack of segregation of duties between authorizing and recording alternative investment activity
- Failure to obtain appropriate information, including visibility into the underlying investments, to support the financial statement assertions relative to the estimate of fair value of assets of significant alternative investments
- Instances in which the alternative investment's risk profile does not appear to be consistent with the entity's investment policy

Based on the auditor's understanding of the process and of the results of tests of related controls, if any, the auditor assesses the risk of material misstatement. Based on that risk assessment, the auditor determines the nature, timing, and extent of the substantive audit procedures.

Fair Value Method of Accounting

In determining the nature, timing, and extent of auditing procedures to be applied to a specific account balance or class of transactions, the auditor designs procedures to obtain reasonable assurance of detecting misstatements that he or she believes, based upon the preliminary judgment of materiality, could be material, when aggregated with misstatements in other balances or classes, to the financial statements taken as a whole, (AU section 312.25). Whether one or a combination of substantive procedures is used to address a particular assertion-level risk depends on the auditor's assessment of the inherent and control risk, as well as the auditor's judgment about a procedure's effectiveness (AU section 332.19).

When alternative investments are accounted for at fair value, the valuation assertion may involve significant judgment by management in the assessment of the estimate of fair value of the investment. The more complex or illiquid the investment and/or the lack of sufficient management processes and records over valuation, the greater the risk of misstatement, and the more persuasive audit evidence that needs to be obtained by the auditor.

The auditor's understanding of the reliability of the process used by the investor entity's management to determine estimated fair value is an important element in support of the resulting amounts and therefore affects the nature, timing, and extent of audit procedures. The auditor may test management's fair value estimate as of the balance sheet date by using one or more of the following approaches. The approach(es) taken may not be the same for all alternative investments in an investor entity's portfolio because the nature of the underlying investments and associated risk, as well as the information available to management and the auditor, likely will be different for each alternative investment. The higher the assessed risk of material misstatement, the greater the need for the auditor to utilize a combination of the following approaches. For additional guidance, auditors refer to AU section 328, paragraphs .26 through .39.

- *Confirm the alternative investment.* The Interpretation states that if the auditor determines that the nature and extent of auditing procedures should include testing the measurement of the investor entity's investment, simply receiving a confirmation from the alternative investment of its investments in securities, either in aggregate or on a security-by-security basis, does not, in and of itself, constitute adequate audit evidence with respect to the valuation assertion. The extent of the additional audit procedures is directly related to the assessed risk of material misstatement of the financial statements.
- *Review and test the investor entity's significant assumptions and the underlying data in its valuation or its analysis of the assumptions and data obtained from the fund manager.* A confirmation on a security-by-security basis may provide support of the data used by investor's management in its valuation process. In

drafting a confirmation, the auditor considers requesting a description of each investment, ownership percentage, or shares owned and estimated fair value. If detailed information is not available, the auditor looks to the other data that management used in its valuation and performs tests on such data. The nature of the tests depends on the types of data used by management and the auditor's assessment of the risk of material misstatement of the financial statements.

- *Reconcile to audited financial statements as of the same date*. If audited financial statements of the alternative investment are available as of the date of the investor entity's year end and the alternative investment follows fair value accounting, the audited financial statements and an accompanying auditors' report may provide significant audit evidence regarding the valuation of the investment. However, the investor entity and the fund often have different fiscal year ends. In lower or moderate risk situations, the auditor might be able to perform additional procedures, such as obtaining interim financial information and testing management's tracking analysis.
- *Review transactions at or near the balance sheet date.* Evidence of an actual transaction, such as an investment in or liquidation of a portion of its alternative investment as of a date close to the investor entity's fiscal year end, may provide information for management to support the valuation of the alternative investment. The auditor may consider how often settlements occur and the terms used to determine the value of the settlement. Issues to consider include whether the process used for the settlement is the same process used for financial reporting; whether there are holdbacks or potential true-ups subsequent to the balance sheet date, and the possibility that the parties to the transactions were not both willing buyers and sellers, such as in a distress sale.

If management estimates the fair value of a significant portion of its alternative investments as of an interim date, management will need a robust process and strong internal control over the roll-forward period to the balance sheet date. Because the valuation assertion embedded in the financial statements is as of the balance sheet date, management needs to have the ability to obtain sufficient information to record the investments at estimated fair value as of the balance sheet date, including changes in the estimated fair value during the roll forward period. In this situation, the auditor tests both the estimation process as of the interim date and the roll-forward process.

Cost Method of Accounting

Pursuant to the guidance provided in AU section 332.28, when auditing the valuation assertion of alternative investments that are accounted for using the cost method, the auditor may consider substantive procedures such as:

- Confirming with the issuer or holder
- Inspecting documentation that indicates the purchase price of the investment
- Evaluating management's conclusion about the need to recognize an impairment loss for a decline in the investment's estimated fair value below its cost that is other than temporary

The auditor also audits the investor entity's estimated fair value disclosures, taking into account the considerations discussed in the previous section.

Equity Method of Accounting

AU section 332, paragraphs .28 through .30, provides guidance when auditing the valuation assertion of investments that are accounted for using the equity method:

> For valuations based on an investee's financial results, including but not limited to the equity method of accounting, the auditor should obtain sufficient evidence in support of the investee's financial results. The auditor should read available financial statements of the investee and the accompanying audit report, if any. Financial statements of the investee that have been audited by an auditor whose report is satisfactory, for this purpose,[1] to the investor's auditor may constitute sufficient evidential matter.
>
> If in the auditor's judgment additional evidential matter is needed, the auditor should perform procedures to gather such evidence. For example, the auditor may conclude that additional evidential matter is needed because of significant differences in fiscal-year ends, significant differences in accounting principles, changes in ownership, changes in conditions affecting the use of the equity method, or the materiality of the investment to the investor's financial position or results of operations. Examples of procedures the auditor may perform are reviewing information in the investor's files that relates to the investee such as investee minutes and budgets and cash flows information about the investee and making inquiries of investor management about the investee's financial results.
>
> If the investee's financial statements are not audited, or if the investee auditor's report is not satisfactory to the investor's auditor for this purpose,

[1] In determining whether the report of another auditor is satisfactory for this purpose, the auditor may consider performing procedures such as making inquiries as to the professional reputation and standing of the other auditor, visiting the other auditor and discussing audit procedures followed and the results thereof, and reviewing the audit program and/or working papers of the other auditor.

> the investor's auditor should apply or should request that the investor arrange with the investee to have another auditor apply, appropriate auditing procedures to such financial statements, considering the materiality of the investment in relation to the financial statements of the investor.

Although investor entities may share the same year end as the alternative investment, the timing of the investor entity's audit may be such that audited financial statements of the alternative investments are not available before the investor entity's audited financial statements are issued. In addition to the guidance provided in AU section 332, paragraphs .28 through .30, the auditor may consider the procedures articulated in the fair value section of this document in order to obtain sufficient appropriate audit evidence with respect to the valuation assertion under the equity method of accounting.

Management Representations

The auditor is required to obtain written representations from management as part of an audit of financial statements in accordance with generally accepted auditing standards. In connection with this requirement, the auditor ordinarily would obtain appropriate written representations related to alternative investments. The auditor may consider obtaining representations regarding the following:

- Appropriateness of the measurement methods and consistency in the application of the methods
- Completeness and adequacy of the disclosures related to estimated fair value information
- Subsequent events requiring adjustment to the estimated fair value measurements and disclosures.

AU section 328 suggests a number of items to be included in the management representation letter valuation assertion related to fair value estimates. The auditor ordinarily considers the following:

- The reasonableness of significant assumptions
- Whether the assumptions appropriately reflect management's intent and ability to carry out specific courses of action

Management representations are part of the audit evidence that the auditor obtains, but they are not a substitute for the application of those auditing procedures necessary to afford a reasonable basis for an opinion regarding the financial statements under audit.

Disclosure of Certain Significant Risks and Uncertainties

With respect to alternative investments, the use of estimates to value securities may be an uncertainty as contemplated by Statement of Position No. 94-6, *Disclosure of Certain Significant Risks and Uncertainties*. In addition to other GAAP disclosures regarding investments and contingencies, SOP 94-6 provides guidance on the disclosures of risks and uncertainties regarding certain significant estimates used in the preparation of financial statements.

If the auditor concludes that a matter involving a risk or uncertainty is not adequately disclosed in the financial statements in conformity with GAAP, the auditor would express a qualified or adverse opinion (AU section 508.46).

Reporting

Emphasis of a Matter Paragraph

The more complex or illiquid the underlying investments are, the greater the inherent uncertainty in management's estimated fair value. As the inherent uncertainty in the estimate increases, as well as the significance of the alternative investments to the financial statements, auditors may consider inclusion of an emphasis of matter paragraph in the auditors' report such as the following, tailored for the specific facts and circumstances:

> As explained in note X, the financial statements include investments valued at $ _______ (____ percent of net assets), whose fair values have been estimated by management in the absence of readily determinable fair values. Management's estimates are based on information provided by the fund managers or the general partners.

An emphasis of matter paragraph is not used to introduce information to the financial statements and neither replaces any required financial statement note disclosure nor reduces the required audit evidence needed to support an unqualified opinion. Such paragraphs are never required and are included solely at the auditor's discretion. The above emphasis of matter paragraph would be consistent with GAAP disclosures made in the financial statements.

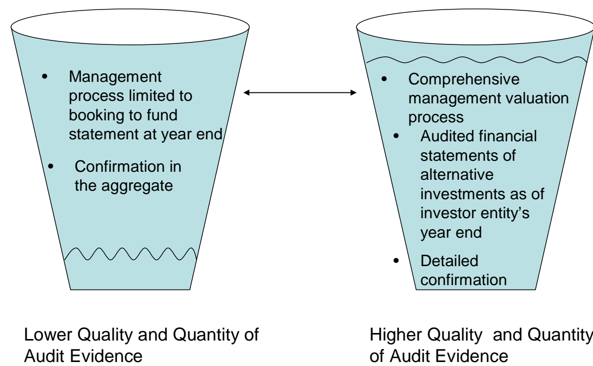
Modifications to the Auditor's Report

The auditor's objective is to obtain sufficient appropriate audit evidence to provide a reasonable basis for forming an opinion. There are often significant challenges to management obtaining sufficient information to support its assertions relevant to alternative investments, and auditors will face similar challenges in obtaining audit evidence and evaluating its sufficiency. The amounts and types of audit evidence

necessary to support an opinion are matters for the auditor to determine in the exercise of his or her professional judgment, after careful study of the particular circumstances. Exhibit 2, "Evaluation of Sufficiency and Appropriateness of Audit Evidence," illustrates the auditor's consideration of the sufficiency and appropriateness of audit evidence to support the auditor's conclusion that he or she has obtained sufficient appropriate audit evidence in order to provide reasonable assurance that the financial statements are free of material misstatement.

Exhibit 2

Evaluation of Sufficiency and Appropriateness of Audit Evidence



In evaluating audit evidence, the auditor considers whether the specific audit objectives have been met. The consideration might include such factors as:

- The significance of the alternative investments for which neither the underlying detail nor audited financial statements was available as of the balance sheet date
- The adequacy of management's process and related internal control
- Timeliness of the estimated fair value of the underlying investments

The auditor's justification for the expression of his or her opinion rests on the conformity of the audit with generally accepted auditing standards. When a *significant* amount of securities are stated at "estimated fair value," the auditor considers both the uncertainties inherent in the investment valuations and the extent of audit evidence supporting those valuations. The assessment of reasonableness of valuations considers their effects on the financial statements taken as a whole, not solely the investment caption in the financial statements. If the auditor is unable to obtain sufficient appropriate audit evidence to support the financial statement assertions, it will be necessary to qualify or disclaim an opinion on the financial statements due to a scope limitation.

AU section 508, paragraphs .22 through .26, provides guidance to the auditor in determining the appropriate form of opinion.

Scope limitations related to sufficiency of evidence are different from situations in which the auditor concludes that the financial statements are materially misstated due to

departures from GAAP related to inadequate disclosure of uncertainties inherent in the investment valuations, failure to apply a valuation method required by GAAP, or valuations that are not supported or are not reasonable. If the potential effect of the GAAP departure is material to the investor entity's financial statements taken as a whole, the auditor issues a qualified opinion or an adverse opinion as described in AU section 508, paragraphs .35 through .49.

Appendix 1

EXAMPLE CONFIRMATION FOR ALTERNATIVE INVESTMENTS

{CLIENT LETTERHEAD}

{FUND ADDRESSEE NAME AND ADDRESS}

{DATE}

Dear {NAME}:

Our auditor, {NAME OF ACCOUNTING FIRM}, has been engaged to audit the financial statements of {CLIENT NAME} as of {end of client fiscal period}, and for the year then ended. In connection therewith, please complete the attached confirmation related to the {CLIENT NAME} investment in {INVESTEE FUND NAME} and return it along with any other requested information as delineated below to our auditor no later than {DATE}.

All correspondence with our auditors should be faxed to {NAME} at {FAX NUMBER} and then mailed directly to {NAME OF ACCOUNTING FIRM}, {ACCOUNTING FIRM ADDRESS}. A pre-addressed, postage paid envelope is enclosed for your use.

If you have any questions regarding this request, please contact me at {PHONE NUMBER}. We greatly appreciate your cooperation with our auditors and, specifically, your assistance with this confirmation.

Sincerely,

{CLIENT SIGNATURE}

{NAME}
{TITLE}

Please provide the following information for {CLIENT NAME}'s investment in {INVESTEE FUND NAME} as of and for the year ended {FISCAL YEAR END OF THE CLIENT}.

Capital Balance:

1 Balance as of {beginning of client fiscal period or initial investment date if later} ____________________
Contributions ____________________
Withdrawals ____________________
Management fees charged ____________________
Incentive allocation/fees charged or to be allocated ____________________
Net income after allocation and fees ____________________
Balance as of {end of client fiscal period} ____________________

2 Valuation date for capital account balance{end of client fiscal period}, if other date used then please indicate date: __/__/____ ____________________

3 Class of shares/units held ____________________

4 Ownership interest as a percent of fund net assets{end of client fiscal period}:
____

5 Allocated appreciation that is attributable to "New Issues," as defined by the NASD under its Free-Riding and Withholding Interpretation[2]:
____

6 Date of most recent partnership agreement, as amended: ____________________

7 Date of any additional or side letter agreements, if any ____________________

8 Please provide our auditors with a detail list of the investment holdings as of {end of client fiscal period}, including value of each underlying investment and ownership percentage [the fund's ownership of the underlying]

9 Basis of accounting used to complete this confirmation (please circle one):

US GAAP (Fair Value) Tax Basis Other; please describe

[2] This item generally would only be appropriate for a confirmation prepared by the auditor of a fund of fund

****

PREPARED BY:

____
Signature

____
Printed Name

____
Title

____
Date

Appendix 2

Illustrative Examples of Due Diligence, Ongoing Monitoring, and Financial Reporting Controls

Management's controls related to alternative investments would include procedures for *initial due diligence (that is, procedures performed before the initial investment), ongoing monitoring (that is, procedures performed post-investment), and financial reporting*.

Initial Due Diligence

- Conduct face-to-face meetings with the investment firm's management team

- Conduct on-site visit(s), including back office and operational due diligence

- Evaluate investment strategy, process and portfolio
    - Review historical performance and attribution analysis (audited, if possible)
    - Review valuation procedures

- Request documents review by investment staff
    - Offering memorandum
    - Legal agreements
    - Pitch books
    - Information requests
    - Financial statements
    - Form ADV (used by advisers to register with SEC as investment advisers)

- Evaluate how the specific allocation fits within the asset class and the overall portfolio

- Solicit information regarding the team/firm from knowledgeable third parties
    - Inform investment committee members that a manager is under consideration and request their input if they know the manager
    - Consultants
    - Competing investment managers

- Perform reference checks
    - Other investors
    - Investee companies
    - Service providers
    - Prior employers

- Perform third-party background checks on senior professionals
  - Verify biographical information
  - Perform criminal background search
  - Perform press search

- Review and negotiate legal agreements

- Complete a formal investment memorandum/write up or other investment approval review

Ongoing Monitoring

- Conduct regular in person or telephonic meetings with the investment firm management team

- Conduct on-site visit, typically done on an annual basis (often substitute with attending annual meeting)[3]

- Review fund communications
  - Review fund communications including quarterly shareholder's letters, etc.
  - Obtain and review audited financial statements, note whether the opinion is qualified, any change in the auditor, change in valuation procedures
  - For drawdown funds, compare partners' capital statements with internal transaction records

- Review SAS 70 reports if available, and ensure that identified user controls are in place at the investor entity

- Perform valuation
  - Request and review, if available, the valuation of portfolio holdings for reasonableness
  - For custodial assets, reconcile with custodian's pricing
  - Request and review any changes to valuation policies and procedures
  - For hedge funds, receive estimated value from fund and final value from fund administrator; compare for reasonableness
  - Compare the institution's statement of value received as of the fund's year end to the value based on the fund's audited financial statements and follow up on significant discrepancies

[3] Many institutions delegate this function to the a third-party investment adviser or consultant.

- Monitor portfolio performance
  - — Compare performance to benchmark and expected returns if appropriate
  - — Compare performance to publicly available data (for example, public sector indices for hedge funds)
  - — Compare cash returns to previously reported market values throughout the year
  - — Inquire periodically as to the total long and short positions throughout the year (for hedge funds)
  - — Review portfolio holdings on a regular basis
  - — If the investment strategy changes from the original investment approach, conduct comprehensive review of manager/team/strategy

- Monitor firm/manager
  - — Review press reports for significant management/structure/personnel/portfolio developments[4]
  - — Obtain and review Form ADV
  - — Monitor staffing levels, personnel changes
  - — Monitor size of assets under management in the strategy and firm wide

Financial Reporting

- Maintain a formal investment policy approved by the board of directors (or similar board that governs overall strategy, risks, authorized transactions, etc.)
- Have an investment committee of the board that is responsible for oversight of all investments and compliance with formal investment policy
- Continuously update a detailed listing of alternative investments grouped by fund or manager
- Review the most recent audited financial statement of each fund, noting basis of accounting, summary of significant accounting policies and procedures pertaining to the valuation of alternative investments, name of audit firm, and type of opinion
- Compare investment balances reported by fund manager to the general ledger
- Monitor the level of the ownership of the fund to determine proper accounting method (for certain types of investor entities)
- Perform and document an assessment of the risk of material misstatement of the financial statements related to the valuation of alternative investments

[4] Often includes search for damaging information on NASD or SEC sites