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October 8, 2015

The Honorable Mark Mazur
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: **Comments on Proposed Regulations Relating to Disguised Payments for Services in the Partnership Context under Section 707 of the Internal Revenue Code**

Dear Messers. Mazur and Koskinen:

We are pleased to submit to you, on behalf of the Tax Section of the Connecticut Bar Association, the attached comments (the "Comments") on the proposed regulations (the "Proposed Regulations") [1] under Section 707 of the Internal Revenue Code of 1986, as amended (the "Code"). The Proposed Regulations aim to treat certain allocations of partnership income as disguised payments for services pursuant to Section 707(a)(2)(A). Our Comments are focused on certain clarifications that we believe should be made in the final regulations (the "Final Regulations"), and generally provide as follows:

I. We believe, as a broad matter, that it is critical that the Final Regulations emphasize the risk of loss and opportunity for gain as the fundamental features that separate a bona fide partnership equity interest from a disguised compensatory arrangement. In that regard, we recommend that:

   A. The Final Regulations require a related distribution for an allocation to be treated as a disguised payment for services (as prior to distribution, allocated amounts will generally be subject to the risk of loss and opportunity for gain with respect to future allocations).

   B. The Final Regulations establish a safe harbor mechanism whereby an income allocation that is sufficiently subject to entrepreneurial risk within the partnership would qualify as a bona-fide equity interest that is not subject to the Final Regulations.

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[1] REG-115452-14

II. The Proposed Regulations provide for a presumption of a lack of "significant entrepreneurial risk" based on five enumerated sub-factors. With respect to such sub-factors, we recommend the following.

A. Primarily, we recommend that these sub-factors be revised to address the importance of risk of loss and opportunity for gain in differentiating between compensatory arrangements on the one hand and equity interests on the other. To incorporate the risk of loss and opportunity for gain into the sub-factors set forth in the Proposed Regulations, we recommend that:

1. each of the existing sub-factors be revised to require that the recipient of such allocation not bear "significant risk of loss" or "significant opportunity for gain" with respect to the allocation; and

2. three additional sub-factors be created that would establish a rebuttable presumption that the arrangement provides "significant risk of loss" or "significant opportunity for gain."

B. We also recommend that the five sub-factors establishing significant entrepreneurial risk be modified to enhance the predictability and administrability of such sub-factors.

1. With respect to the first sub-factor, "**capped allocations of partnership income if the cap is reasonably expected to apply in most years**," we believe that the "reasonably expected to apply" standard is overly restrictive and could result in the unintentional recasting of bona fide equity interests. We would suggest that the phrase "reasonably expected to apply" be replaced with "substantially certain to apply."

2. We recommend that the fourth sub-factor, **"an allocation from specific accounting periods" which "does not depend on the long-term future success of the enterprise**" both be clarified and revised to shift the emphasis from the "long-term future success of the enterprise" to a focus on whether the service provider is subject to the same risk of loss or opportunity for gain as non-service providing partners.

III. With respect to the intended changes to the profits interest safe harbor found in Revenue Procedure 93-27 (the "Safe Harbor") we make the following recommendations.

A. The Proposed Regulations argue that issuance of a profits interest to an affiliate of a service providing partner falls outside of the Safe Harbor. We suggest that this position is not supported by the case law which serves as the foundation for the Safe Harbor and its exclusions. As such, we recommend that the issuance of a profits interest to an affiliate of the service provider remain within the Safe Harbor.

B. We recommend that any language modifying the Safe Harbor be narrowly and carefully drafted such that the exclusions from the Safe Harbor properly apply only to arrangements where the relinquishment of substantially fixed compensation in exchange for partnership profits interest affixes a market value to such profits interest as a factual matter (instead of reflecting a negotiated allocation of the risk of the business enterprise between a partnership and a service provider).

We appreciate your consideration of our attached Comments.

Respectfully submitted,

Daniel L. Gottfried, Chair

Enclosure

cc: Michael P. Spiro, Esq.
Jordan L. Fieldstein, Esq.
Brett W. Dixon, Esq.
Dan M. Smolnik, Esq.
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CONNECTICUT BAR ASSOCIATION
TAX SECTION

COMMENTS TO PROPOSED REGULATIONS RELATING TO DISGUISED PAYMENTS FOR SERVICES UNDER SECTION 707(a)(2)(A) OF THE CODE[1]

The Tax Section of the Connecticut Bar Association (the "Section") is pleased to submit the following comments to Proposed Regulations issued on July 23, 2015 under Section 707(a)(2)(A) of the Internal Revenue Code of 1986, as amended (the "Code"). The Section generally supports the Department of the Treasury's desire, via the Proposed Regulations, to establish clear parameters around when a purported partnership equity instrument should be recast as a compensatory arrangement. However, the Section is concerned that, in some cases, the Proposed Regulations are overbroad in their application, and reach arrangements which are best characterized as true partnership equity interests (albeit, in some cases, partnership equity interests that may not meet the criteria for treatment as "profits interests"). The following recommendations are intended to aid the Department of the Treasury in appropriately narrowing the scope of the Proposed Regulations to those arrangements that, notwithstanding being cast in the form of equity, do not meet established standards for bona fide equity interests.

I. Treatment of Purported Allocation as Compensation without Associated Distribution.

As a broad matter, we are concerned by Treasury's decision to base determinations of whether an arrangement constitutes a disguised payment for services on allocations without regard to the related distributions (particularly given the statutory language which, as noted in the Preamble to the Proposed Regulations[2] (at Section I.B), requires both an allocation and an associated distribution). We believe that Treasury's argument in the Preamble that "an income allocation correlates with an increased distribution right, justifying the assumption that an arrangement that provides for an income

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[1] The principal drafter of this comment was Michael P. Spiro, with substantial assistance from Jordan L. Fieldstein. Helpful comments were received from Brett W. Dixon.
[2] REG-115452-14 (Hereinafter, the "Preamble").

allocation should be treated as also providing for an associated distribution for purposes of applying section 707(a)(2)(A)" fails to account for the importance of "risk of loss" in distinguishing between a compensatory arrangement and an equity interest (albeit in some cases, an equity interest that is received by a service provider pursuant to a compensatory arrangement). That is, an allocation does not correlate to an increased distribution right if that income allocation is eliminated via subsequent losses prior to the partner being entitled to a distribution under the terms of the partnership agreement. The failure of the Proposed Regulations to appropriately consider risk of loss (as well as its corollary—the opportunity for gain arising from the investment of an undistributed allocation in the partnership) in its determination of whether a purported allocation should be recast as disguised compensation results in significant confusion and ambiguity.

A. **Cash Compensation vs. Equity Compensation.** The Code and related administrative guidance provide extensive rules governing the taxation of equity compensation. If a purported partnership allocation and distribution right give rise to a bona-fide equity interest, the tax consequences of the receipt of that equity interest are governed by Revenue Procedures 93-27 and 2001-43, and, in the case of the grant of a capital interest, Code Section 83 and Regulations thereunder. We understand the Proposed Regulations to apply in the case where a purported allocation and distribution, when viewed together, are <u>not</u> sufficient to constitute an equity interest at all, and thus should be analyzed as a compensatory arrangement (and not as the grant of a capital interest subject to current taxation). However, by having the Proposed Regulations apply to allocations independent of associated distributions and without regard to the degree to which the recipient of the income allocation bears risk of loss (and opportunity for gain) with respect to future allocations, the Proposed Regulations fail to fully take into account one of the most significant factors in distinguishing between compensatory arrangements and equity ownership.

In distinguishing between a bona fide equity instrument and a contractual arrangement that is not equity (most commonly, a debt instrument), courts have generally looked to whether the purported equity interest "analyzed in terms of its economic reality, constitutes risk capital entirely subject to the fortunes of the corporate venture." *Fin Hay Realty Co. v. U.S.*, 398 F.2d 694, 697 (3d Cir. 1968). That is, the salient question is whether the holder of an instrument has "a reasonable expectation of repayment regardless of the success of the venture" on the one hand, or whether by contrast, the investment is "placed at the risk of business." *TIFD III-E, Inv. vs. U.S.* 459 F.3d 220, 233 (2d Cir. 2006) *citing Gilbert v. Comm'r*, 248 F.2d 349, 406 (2d. Cir. 1957) *and Hambuechen vs. Comm'r*, 43 T.C. 90, 99 (1964); *See also Comm'r v. Culbertson*, 337 U.S. 733 (1949)(finding that presence of a partnership (and partner status therein) is based on intent to "join together in the conduct of an enterprise").

Where an allocation comes prior to a distribution, the allocated amounts are generally at risk inside the partnership unless and until they are distributed, and in most cases, those amounts will attract further allocations of income, thus providing significant "upside" potential as well. Thus, we would suggest that a safe harbor be established whereby if there are sufficient limitations on non pro rata distributions following an allocation (e.g. two years between allocation and distribution), and during the pendency of any such special distribution, the interest "participates in the fortunes of the corporate venture" by being eligible for allocations of income and loss, the interest would qualify as a bona-fide equity interest that is not subject to the Proposed Regulations. Note that this would not necessarily mean that there is not a compensatory element to the arrangement. To the extent that the equity interest granted did not qualify as a profits interest (either under safe harbor provided in Rev. Proc. 93-27 or under the common law more generally), it would be subject to current taxation as a compensatory grant. If, however, the arrangement is treated as fully compensatory under the Proposed Regulations (and not as an equity interest), it is unclear how to account for the interest granted, thus raising

significant questions surrounding (i) the allocation of subsequent income losses and (ii) the deductibility of the purported allocation (and future allocations) when made.[3]

II. Significant Entrepreneurial Risk.

A. Risk of Loss or Opportunity for Gain As a Necessary Element

Proposed Regulations 1.707-2(c)(1) provides for a presumption of a lack of "significant entrepreneurial risk" based on any of five sub-factors. Our primary comment to these sub-factors is that they should be revised to address the importance of risk of loss and opportunity for gain in determining the appropriate characterization of an arrangement as a compensatory arrangement as opposed to an interest in partnership equity.[4] As is discussed above, treating even a certain allocation as a compensatory arrangement rather than equity interest raises considerable confusion and ambiguity where that allocation is subject to risk of loss or opportunity for gain as a result of its receipt of allocations of subsequent partnership losses or income. By the same token (and as is appropriately reflected in the Proposed Regulations) even a highly contingent allocation may be better characterized as compensation where the allocation does not result in the service provider bearing any risk of future loss or enjoying any opportunity for future gain with respect to the allocation and related distribution. We would thus suggest that:

1. Each existing sub-factor establishing a presumption of a lack of significant entrepreneurial risk be revised to include the requirement that the recipient of the allocation not bear "significant risk of loss" or "significant opportunity for gain" with respect to the allocation.

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[3] That is, if the allocation is subject to reversal as a result of subsequent losses, query whether the amount has truly been received under a "claim of right" and whether the applicable test for deduction of such amount under Code Section 461 has been met.

[4] It has also been suggested that the establishment by regulation of presumptions of a lack of significant entrepreneurial risk may not be appropriate in this context, as the legislative history to the Deficit Reduction Act does not appear to support the creation of such presumptions. *See generally* S. Rep. No. 98-169 pp 223-232 (1984).

In connection with this revision, we would further suggest that the current examples be revised to include a discussion of "risk of loss" and "opportunity for gain." By way of illustration, in Example 3,[5] M receives a priority allocation and distribution in lieu of a fee. Subsection (iii) of the Example provides that "[t]he priority allocation to M is an allocation of net profit from any 12-month accounting period in which the partnership has net gain and thus it does not depend on the overall success of the enterprise." Under the circumstances described in the Example, this is true, but only because the allocation is immediately distributed to M. If the allocation was not distributed to M, M would be subject to the risk of subsequent partnership losses (and would potentially enjoy the benefit of future partnership income allocations depending on the drafting the partnership agreement), such that until such time as a distribution was made to M, M would indeed be subject to the overall success of the enterprise. Thus, in our view, it is the lack of risk of loss and opportunity for gain to M, and not the priority allocation in and of itself, that makes M's purported allocation more appropriately characterized as a fee.[6]

2. Three additional sub-factors be introduced that would establish a rebuttable presumption that the arrangement does provide for "significant risk of loss" or "significant opportunity for gain." We would suggest the following three such positive sub-factors:

(i) Significant amount of time between the allocation and a related distribution during which the partner bears risk of loss or opportunity for gain that is commensurate with the risk of loss borne by non-service providing partners. We would suggest a two year safe-harbor to be consistent with Rev. Proc. 93-27.

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[5] All references to Examples refer to those set forth in Proposed Regulation 1.707-2(d).

[6] Treating the priority allocation to M as a bona fide partnership allocation would mean that M's right to the allocation and any distributions is appropriately characterized as a partnership interest. It would not, however, be determinative as to whether the grant of the partnership interest entitling M to that allocation is appropriately characterized as a capital interest or a profits interest. To the extent that a valuation of the enterprise (which would take into account the probability of future income) would result in the interest not having a liquidation value of $0, the interest may very well constitute a capital interest subject to tax upon grant.

(ii) Continued receipt of allocations of income and loss in a manner that is commensurate with the allocation of income and loss to non-service providing partners prior to distributions.

(iii) A clawback obligation on the part of the service providing partner to the extent necessary to cause the partnership interest represented by the subject allocation and distribution to be subject to the same risk of loss as that borne by non-service providing partners.

- By way of illustration, if a service providing partner receives a distribution with respect to a specified allocation prior to the time that non-service providing partners are entitled to a distribution, that distribution would be subject to a clawback to the extent necessary to cause the service providing partner to be subject to the same degree of risk of loss as non-service providing partners.

B. Additional Comments to Sub-Factors for Significant Entrepreneurial Risk.

In addition to the foregoing comments as to the determination of "significant entrepreneurial risk," we would also suggest the following revisions be made to the current sub-factors establishing a lack of significant entrepreneurial risk with the goal of enhancing the predictability and administrability of the existing sub-factors:

1. Sub-Factor (i) A capped allocation of partnership income if the cap is reasonably expected to apply in most years.

We believe that the "reasonably expected to apply" standard as applied to a cap on partnership allocations is overly restrictive and could have the effect of causing a bona-fide equity interest to be recast inappropriately. It would appear that the rationale behind this sub-factor is that if a cap is

expected to apply, then the interest reflects a reasonably certain income stream that is not truly subject to adequate risk or reward to constitute equity. While we do not object to this principle, virtually all business begin operations with rosy expectations, and in many cases, these expectations are "reasonable" if optimistic. We believe that this initial optimism should not be the yardstick by which true risk is measured. Instead, if Treasury's goal is to prevent arrangements with substantially certain income streams from being characterized as equity, the test should be based on certainty rather than expectations. We would thus suggest that the words "reasonably expected to apply" be replaced by the words "substantially certain to apply." This would comport with prior Treasury guidance in this area including Rev. Proc. 93-27, which, in excluding certain income streams from the profits interest safe harbor uses the standard of a "substantially certain and predictable stream of income from partnership assets, such as income from high-quality debt securities or a high-quality net lease."

2. Sub-Factor (iv) An allocation that is predominantly fixed in amount, is reasonably determinable under all the facts and circumstances or is designed to assure that sufficient net profits are highly likely to be available to make the allocation to the service provider (e.g. if the partnership agreement provides for an allocation of net profits from specific transactions or accounting periods and this allocation does not depend on the long-term future success of the enterprise).

First, as a matter of drafting, we would note that all partnership allocations consist of "an allocation from specific accounting periods" which "does not depend on the long-term future success of the enterprise." This is due to the fact that allocations are always made on an annual (or shorter) basis without regard to future income or loss outside of the annual accounting period. We believe that the language in the Proposed Regulations is intended to address a series of allocations that are temporally limited such that the allocation does not correspond to sufficient risk of loss or opportunity for gain with respect to future partnership activities. This should be clarified.

Moreover, we believe that the emphasis in this sub-factor on the "long-term future success of the enterprise" may be overbroad in many cases, and that instead, the emphasis should be ensuring

that the service provider is subject to the same risk of loss or opportunity for gain as non-service providing partners. By way of illustration, there are several common arrangements in the hedge fund context that could be viewed as running afoul of this sub-factor but do not offend the policy rationale behind the Proposed Regulations.

Hedge Fund Incentive Allocations. In a typical hedge fund (which, for purposes of this comment, will be used to refer to a private investment fund that (i) provides periodic opportunities for new investment and withdrawal and (ii) invests substantially all of its assets in marketable securities), the fund will annually revalue its assets pursuant to Treasury Regulations 1.704-1(b)(2)(iv)(f)(5)(v), and a portion of the net profit will be allocated to the general partner as an "incentive allocation." This incentive allocation is generally distributable to the general partner on the same terms and conditions as apply to a limited partner's right to withdraw its capital account. While the allocation is not necessarily subject to the "long-term future success" of the enterprise (which, given the open-ended nature of a hedge fund is totally indeterminate), it is subject to the same risk of loss and "entrepreneurial risk" as the investments of non-service providing partners. As such, we believe that it should not be treated as a compensatory arrangement under the Proposed Regulations. In this connection, we would note that we view Example 4 as insufficient to provide comfort on this point as it appears to require that the fund make an election under Code Section 475(f). We do not understand why this method of accounting should be at all determinative in this regard. Additionally, Example 4 may be over broad, as it does not rely on the distribution to M being made on terms and conditions that are comparable to those applicable to non-service providing limited partners. If M is entitled to a distribution based on appreciation in value over a single twelve-month period while the non-service providing investors are not entitled to distributions with respect to that incremental gain (as could occur if those investors are subject to a "lock-up" during that period), we believe that the arrangement with M may lack significant entrepreneurial risk, as M is bearing less risk of loss than other investors.

Partnerships with Multiple Series. In some cases, a single partnership will engage in multiple related business enterprises or, in the case of a private investment fund, multiple investment strategies. One example of such a strategy includes a hedge fund structure commonly referred to as a "multi-advisor fund." In a "multi-advisor" fund, a hedge fund will allocate investments among different portfolio managers. Each portfolio manager will be entitled to an incentive allocation with respect to its portfolio without regard to the performance of other portfolios. While such an arrangement can be done by treating each portfolio as a separate partnership (thus allowing each incentive allocation to be based on the success of the entire enterprise), such a structure may require significant additional compliance and related costs. Where investors have the right to select the allocation of their investment, we believe that an incentive allocation based on the performance of only a specified portion of the overall portfolio provides the portfolio manager with the same level of risk as the non-service providing investors with respect to that particular investment decision of the investor. As such, we would suggest (as per above) that the relevant determination be based on the relative risk of the service provider as compared to that of the investors, and that an example be added to clarify that this determination of relative risk should be based on each investment decision of the investor (such that when an investor makes a decision to allocate a portion of its investment to a particular portfolio, this portion of the investment should be viewed in isolation for purposes of comparing the investor's risk to the risk experienced by the portfolio manager).

III. Changes to Profits Interest Safe Harbor:

In addition to the Proposed Regulations, the Preamble suggests that Treasury Department intends to revise Revenue Procedure 93-27 (the "Safe Harbor") so as to (i) take the affirmative position that management fee waiver transactions in which a service partner waives a management fee in connection with the issuance of profits interest to an affiliated entity fall outside of the profits interest

safe harbor because the recipient of the profits interest is not providing services to the partnership and the service provider is effectively disposing of the partnership interest within two years of receipt; and (ii) add language to exclude from the safe harbor "profits interests issued in conjunction with a partner forgoing payment of an amount that is substantially fixed."

A. Transfers to Affiliates. The two foundational cases in the profits interest area are *Diamond v. Commissioner,* 492 F.2d 286 (7th Cir. 1974) and *Campbell v. Commissioner*, 943 F.2d 815 (8th Cir. 1991), and the Safe Harbor and its exclusions are based primarily on the rulings in those cases.

In *Diamond*, the taxpayer (Sol Diamond) was a mortgage broker and entered into an agreement with an investor whereby in exchange for arranging for a $1.1 million mortgage financing of a commercial property, Diamond was granted a 60% interest in the income generated by the property. Upon a sale of the property, money would first be returned to the investor to the extent of the invested capital, and then split 60%/40% between Diamond and the investor. Three weeks after obtaining the financing, Diamond sold his 60% profits interest to a third party for $40,000 and claimed that the resulting gain was capital in nature (and thus could be offset by capital losses). The IRS argued that Diamond should have recognized $40,000 in ordinary compensation income upon the grant of the profits interest. The Seventh Circuit, in analyzing the law, began by noting that as a general matter, receipt of a partnership interest only in future earnings is not a taxable event at the time of grant. However, the Court determined that the policy underlying this general rule is that the value of an interest in future earnings is not ascertainable at the time of grant. Under the facts of Diamond, the interest granted to the taxpayer did have an ascertainable market value at the time of grant (as demonstrated by his ability to sell it for $40,000 immediately after the grant). Thus, the Court, ruled, the grant of the profits interest was treated as ordinary compensation income.

In *Campbell*, the taxpayer (William Campbell) was engaged in the business of syndicating limited partnership interests in investment vehicles on behalf of his employer, Summa T. Group. *Campbell, 943 F.2d at 816.* Campbell received, as part of his overall compensation, profits interests in the investment vehicles. Although the Commissioner acknowledged that the grant of a profits interest to a partner for services to the partnership would not be taxable, the Commissioner argued that Campbell's services were to his employer (Summa T. Group), and that his profits interests should therefore not fall into this category, and should instead be treated as having been issued to him by Summa T. Group as compensation. The Eighth Circuit, however, relied on *Diamond* in finding that the primary basis for not taxing profits interests upon receipt is their speculative value. As such, in the absence of a readily ascertainable value (as in *Diamond*), the receipt of the profits interests should be tax-free. *Campbell at* 818-823.

The argument that the issuance of a profits interest to an affiliate of a service provider to a partnership should fall outside of the Safe Harbor seems to run directly contrary to the ruling in *Campbell*. *Campbell* stands for the proposition that the relevant inquiry in determining whether a profits interest grant is taxable is whether it has ascertainable value—not whether it is being issued directly to the provider for services to the partnership. Although, as per *Diamond*, an arms-length transfer of the profits interest for consideration close in time to the issuance thereof does create a presumption of ascertainable value, a transfer to an affiliate without consideration creates no such presumption. As such, we would recommend that issuance of a profits interest to an affiliate of a service provider not fall outside of the Safe Harbor.

B. **Transfers in Conjunction with a Waiver of a Substantially Fixed Amount.** We suspect that the type of arrangement that Treasury intends to target in its anticipated guidance are those in which a service provider has a regular opportunity to choose between a fixed compensation amount and

the receipt of a profits interest (as is sometimes the case in a private equity fund "fee waiver" arrangement). Presumably, per the *Diamond* and *Campbell* decisions, the theory underlying this exception from the Safe Harbor is that where a person waives a substantially fixed amount in favor of receipt of a profits interest, that profits interest will be presumed to have ascertainable value equal to the waived amount. We have no objection to this general principle.

However, there are numerous situations in which up-front negotiations between partnerships and service providers that result in adjustments between profits interests and fixed compensation reflect allocations of risk rather than tax planning, and should not be outside of the Safe Harbor. By way of illustration:

1. In the formation of new private investment funds, there is often significant negotiation with early stage seed investors surrounding the compensation of the fund manager. Generally, a private investment fund manager will be compensated via a combination of (i) a management fee based on a percentage of assets under management and (ii) a "carried interest" based on fund profitability (which is generally a partnership profits interest). The theory underlying this compensation structure is that the management fee is a substantially fixed amount to be used by the fund manager to meet fixed expenses (e.g. salaries, rent and other overhead), while the carried interest is incentive compensation to reward the manager for successful management. While a fund manager may wish for a higher fixed management fee (and comparably less carried interest) so as to be able to better budget for expenses and enjoy a larger proportion of risk-free compensation, investors would generally prefer to allocate more of the compensation to the carried interest (so that a greater proportion of the management compensation is paid only upon proven success of the fund). There is often thus a fulsome negotiation between the manager and the early investors as to the relative proportions of the management fee and

the carried interest. In some cases, a fund manager may accept a lower management fee (either overall or with respect to a particular investor) in exchange for a higher carried interest.

2. In many start-up business enterprises organized as partnerships (often as limited liability companies), early employees are encouraged to accept lower salaries in exchange for partnership profits interests. This type of incentive compensation arrangement allows the partnership to preserve cash, and allows the employees to effectively tie their compensation to the success of the new enterprise.

In situations like the foregoing, in which parties are negotiating at the commencement of a service relationship as to the relative breakdown in compensation between "substantially fixed amount" and a partnership profits interest, the negotiation reflects an allocation of risk between the service provider and service recipient rather than a crystallization of profits interest value. Indeed, these situations generally arise where profits interest are of particularly indeterminate value (and thus are viewed as a means of shifting risk of enterprise success to the service providers). As such, we would recommend that any language that modifies the Safe Harbor be narrowly and carefully drafted so as to appropriately apply only to those arrangements where the relinquishment of substantially fixed compensation can be viewed as affixing a market value to the profits interest.