ILPA URGES SECURITIES & EXCHANGE COMMISSION TO TAKE ACTION TO ENSURE ROBUST FIDUCIARY DUTIES FOR INVESTORS IN THE PRIVATE EQUITY MARKET

Nearly Three Dozen Leading Institutional Investors Join in Effort on Behalf of Millions of Beneficiaries

February 12, 2019 – (Washington, DC) – The Institutional Limited Partners Association (ILPA) along with 35 of its members today submitted a letter to the U.S. Securities & Exchange Commission weighing in on the Commission's ongoing effort to issue a comprehensive interpretation of the fiduciary duties that investment advisers owe to their clients. The letter gives concrete examples of the steps the SEC can take to ensure that the fiduciary duties are meaningful in the private equity industry.

In the widely supported letter, Steve Nelson, CEO of ILPA expressed concern regarding the trends associated with this critical concept:

"Unfortunately, LPs have been facing significant resistance in their efforts to retain meaningful fiduciary protections while investing in the private equity market on behalf of themselves or their beneficiaries," said Nelson. "These headwinds can be alleviated if the Commission acts on certain items, well within its authority, to signal to the market that it is important for investment advisers to act in the best interests of their investors."

Today's letter supported previous communications that ILPA has submitted to the SEC on this specific issue on August 6, 2018 and November 21, 2018, which highlighted the increased prevalence of private equity advisers to seek to reduce the fiduciary duties in their limited partnership agreements with investors using "sole discretion" language. These trends are hidden from public view by the confidentiality requirements in these agreements. Likewise, the SEC has increasingly permitted private equity advisers to limit their fiduciary obligations under the Advisers Act by permitting vague, all-encompassing disclosure of conflicts of interest to meet the informed consent requirement.

In a late 2018 ILPA survey conducted of over 80 limited partners, 69% of those investors had seen reduced fiduciary duties in limited partnership agreements, with 54% seeing these terms with increased frequency. Only 7% of the LPs polled were 100% successful in removing these provisions, with those unable remove these harmful terms left with the unfavorable options of investing with reduced protections, or having to walk away from the investment.

ILPA specifically recommends a number of SEC actions to rectify the problematic trend:

- Rescind the Heitman Capital Management No-Action Letter, issued in 2007;
- Make a public statement that SEC enforcement settlements with private fund advisers be conditional on them not seeking indemnification from their investors;
- Require private fund advisers to explicitly and clearly disclose the standard of care owed to investors and the fund;
- Clearly state that the standard of care owed to clients of private fund advisers under the Advisers Act is a "negligence" standard;
- Limit the ability for private fund adviser to "pre-clear" conflicts of interest to ensure informed consent by investors;
- Indicate that private fund advisers should have a limited partner advisory committee (LPAC) as best practice, and all conflicts should be presented to the LPAC for resolution;
- Provide more clarity surrounding hedge clauses, including the limits of their scope and the facts and circumstances in which they can be used.

ILPA looks forward to the response of the SEC and positive momentum going forward.

About ILPA
The ILPA engages, empowers and connects limited partners to maximize their performance on an individual, institutional and collective basis. With approximately 500 member institutions representing over $2 trillion USD of invested capital in private equity, the ILPA is the only global organization dedicated exclusively to advancing the interests of LPs and their beneficiaries through best-in-class education, content, advocacy and networking.

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