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July 21, 2015

VIA EMAIL: *e-ORI@dol.gov* and *e-OED@dol.gov*
Office of Regulations and Interpretations
Office of Exemptions Determinations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Definition of the Term "Fiduciary" (RIN 1210-AB32);
Best Interest Contract Exemption (ZRIN 1210-ZA25)

Ladies and Gentlemen:

American Healthcare Investors, LLC ("AHI") hereby submits the following comments regarding (1) the proposed rule by the U.S. Department of Labor (the "Department") entitled "Definition of the Term 'Fiduciary'; Conflict of Interest Rule – Retirement Investment Advice" (the "Proposed Rule"), (2) the Department's proposed class exemption entitled "Proposed Best Interest Contract Exemption" (the "BIC Exemption"), and (3) the related proposed and amended prohibited transactions exemptions that were issued by the Department and published in the Federal Registrar on April 20, 2015 (together, the "Proposal").[1]

AHI is a real estate investment management firm that specializes in the acquisition and management of healthcare-related real estate assets. AHI is also a leading sponsor of alternative investment programs such as non-traded, publicly-registered real estate investment trusts that are sold by financial advisors to individual investors, often through individual retirement accounts ("IRAs") subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). Real estate investment programs sponsored by AHI have raised more the $4 billion in capital from thousands of individual and institutional investors, and AHI currently manages a portfolio of healthcare-related real estate assets valued in excess of $6.9 billion on behalf of multiple real estate investment programs. As such, AHI supports the Department's goal of ensuring that financial advisors put the best interests of retirement plans, plan participants and IRA owners first. However, AHI has a number of specific concerns about the scope of the Proposed Rule and the BIC Exemption, which AHI believes would have a negative effect on AHI's business and on the availability of quality investments, like publicly registered, non-listed real estate investment trusts ("Non-Listed REITs"), to IRA accountholders.

AHI's primary concern relates to the Department's definition of "Assets" in the BIC Exemption. The Department has requested comment on the proposed definition of Assets and has specifically asked that commenters who believe that additional investments should be included in the scope of the exemption provide the Department with information supporting their inclusion. As a threshold matter, AHI believes that the Department's goal of protecting the

[1] *See* Proposed Conflict of Interest Rule, 80 Fed. Reg. 21928 (proposed Apr. 20, 2015 (to be codified at 29 C.F.R. pts. 2509 & 2510); and Proposed Best Interest Contract Exemption, 80 Fed. Reg. 21960 (proposed Apr. 20, 2015 (to be codified at 29 C.F.R. pt. 2550).

interests of retirement investors will only be hindered by the creation of a "legal list" of "Assets" (the "Legal List") eligible for the BIC Exemption and such list is inconsistent with ERISA's previously stated goals and the current language in the Proposed Rule. Nevertheless, if the Department determines that maintaining a Legal List is appropriate, AHI respectfully requests that the Department include Non-Listed REITs on that list given their common use, performance and structure.

The Department Should Reject the Concept of a Legal List.

The attempt to select a discrete list of investment products eligible for prohibited transactions exemptions is out of step with the concept of investor choice and portfolio diversification, and it is unnecessarily restrictive and arbitrary. The Department itself has previously recognized that it is not appropriate "to include in the regulation any list of investments, classes or investment, or investment techniques that might be permissive under the 'prudence' rule. No such list could be complete; moreover, the Department does not intend to create or suggest a 'legal list' of investments for plan fiduciaries."[2]

In the preamble to the proposed BIC Exemption, the Department emphasized that it intended to adopt a "principles-based" or "standards-based" approach that "would flexibly accommodate a wide range of current business practices" while minimizing conflicts of interest.[3] Maintaining a Legal List will restrict access to current and future products that have been, or may be, beneficial for IRA accountholders.

The benefits of flexibility, and an unconstrained fiduciary standard, would be best obtained by an open set of assets eligible for the BIC Exemption. The BIC Exemption has ample disclosure requirements and investor protections to allow for an open-ended number of investments. For example, the BIC Exemption explicitly requires disclosure of information relating to fees, compensation and material conflicts of interest. The BIC Exemption also requires a contractual agreement to adhere to impartial conduct standards, and the adoption of policies and procedures designed to mitigate material conflicts of interest. BIC contracts would be subject to judicial enforcement. Within such rubric, it does not make sense to further restrict access to certain investment products that may meet the investor protections and disclosure requirements of the BIC Exemption but have been arbitrarily omitted from the Legal List.

The Set of Assets Eligible for the BIC Exemption Should Include Non-Listed REITs.

If the Department determines to proceed with a Legal List of investments eligible for the BIC Exemption, the definition of "Assets" in such exemption should be expanded to include Non-Listed REITs. As discussed in the comment letter submitted to the Department by the Investment Program Association with respect to Non-Listed REITs and other direct participation programs (the "IPA Letter"), Non-Listed REITs have become common retail investments for IRAs. Non-Listed REITs have a number of favorable attributes that make them appropriate for inclusion in a well-diversified retirement portfolio. In addition, Non-Listed REITs provide investors with best-in-class sponsors and asset managers, like AHI, that might normally only be available to institutional and high net worth investors.

[2] 44 Fed. Reg. 37225 (June 26, 1979) (amending 29 C.F.R. pt. 2550).
[3] Proposed BIC Exemption, at 21961.

As the IPA Letter notes, in 2014 alone, more than $16 billion was invested in Non-Listed REIT programs, of which approximately 41% of the Non-Listed REIT investments was held by IRAs. Moreover, as discussed extensively in the IPA Letter, Non-Listed REITs are already subject to extensive federal and state regulations that are sufficiently protective of investor interests as to warrant inclusion as Assets eligible for the BIC Exemption.

Existing Regulatory Oversite of Non-Listed REITs

REITs were created by Congress through the enactment of the Real Estate Investment Trust Act in 1960. Non-Listed REITs are subject to the same requirements under the Internal Revenue Code as exchange-listed REITs, including the requirement that they distribute at least 90% of taxable income to shareholders annually. Also, like exchange-listed REITs, offers and sales of interests in Non-Listed REITs are registered with the U.S. Securities and Exchange Commission ("SEC") under the Securities Act of 1933, as amended. In addition, Non-Listed REITs must file with the SEC (and make publicly available) periodic and current reports, such as Forms 10-Q, 10-K and 8-K, as well as proxy statements, filed pursuant to the Securities Exchange Act of 1934, as amended.

The primary difference between the regulation of exchange-listed and Non-Listed REITs is that exchange-listed REITs are subject to the corporate governance and other requirements of the stock exchanges whereas Non-Listed REITs are subject to the corporate governance and other requirements imposed by state securities regulators, which generally follow the North American Securities Administrators Association ("NASAA")'s Statement of Policy Regarding Real Estate Investment Trusts (the "NASAA REIT Guidelines").[4] Non-Listed REITs become subject to the NASAA REIT Guidelines because in order to offer and sell their interests to the public, they must register and be approved for sale by the state securities divisions of each of the states and U.S. territories in which offers and sales of the interests will be made. The state specific regulations to which Non-Listed REITs are subject provide significant additional protection to investors that are not applicable to securities offerings of exchange-listed companies. For example, like exchange-listed REITs, Non-Listed REITs must have boards of directors that are comprised of a majority of independent directors and those boards act in a fiduciary capacity with respect to stockholders.[5] However, Non-Listed REITs are subject to additional fiduciary requirements including an express fiduciary duty of the external manager to the REIT and its stockholders, and an additional fiduciary duty of the independent directors to stockholders to supervise the relationship of the Non-Listed REIT with its external manager. Further, the NASAA REIT Guidelines impose significant limitations on the types of investments a REIT can make, the fees and expenses it can pay, the level of its borrowings and the indemnification it can provide its directors and external manager, among others.[6] Moreover, the NASAA REIT Guidelines impose strict investor suitability, corporate governance and conflict of interest requirements on Non-Listed REITs, and a number of states have adopted investor suitability requirements that are even more stringent than those imposed by the NASAA Guidelines.

[4] *See* http://www.nasaa.org/wp-content/uploads/2011/07/g-REITS.pdf.
[5] *See e.g.*, NASAA's Statement of Policy Regarding Real Estate Investment Trusts at Section I.B.14; available at: http://www.nasaa.org/wp-content/uploads/2011/07/g-REITS.pdf. NASAA defines an independent director (or, in the context of a Non-Listed REIT that is in the form of a trust, an independent trustee) as: persons "who are not associated and have not been associated within the last two years, directly or indirectly, with the sponsor or advisor of the [Non-Listed] REIT."
[6] *Id.* at Section II.G and Section IV.

The primary channel used to distribute Non-Listed REITs is through broker-dealers that are registered with the SEC, Financial Industry Regulatory Authority ("FINRA"), and the relevant state securities regulatory authorities. Federal law and FINRA rules require brokers to "adhere to high standards of conduct in their interactions with investors."[7] The suitability requirements of FINRA Rule 2111 and the FINRA Rule 2310(b)(2)[8] mandate that broker-dealers have a reasonable basis to believe that a recommended investment in Non-Listed REIT securities is suitable for each customer based on reasonable diligence[9] into the investor's investment profile.

Broker-dealers offering investments in Non-Listed REITs are also subject to additional product-specific disclosure requirements pursuant to FINRA Rule 2310. Prior to investing, Section (b)(3) of the Rule requires "that all material facts are adequately and accurately disclosed [to offerees] and provide a basis for evaluating the program."[10] In determining the adequacy of disclosure, FINRA sets minimum guidelines for broker-dealers, such as: "(i) items of compensation; (ii) physical properties; (iii) tax aspects; (iv) financial stability and experience of the sponsor; (v) the program's conflict and risk factors; and (vi) appraisals and other pertinent reports.[11]

As such, Non-Listed REITs are subject to extensive federal and state regulation, and the broker-dealers and investment advisers who offer these products to their clients are also heavily regulated. These regulations are even more rigorous than those applicable to many of the products currently included in the Legal List. In light of the existing federal and state regulations applicable to the offer and sale of Non-Listed REITs, if the Department is going to add additional regulatory oversight by adopting the Proposed Rule, it should extend access to the BIC Exemption to Non-Listed REITs.

Non-Listed REITs are Appropriate Investments for Retirement Plans

As accurately described in the IPA Letter, Non-Listed REITs are transparent, widely held investments that have a strong performance history, relatively low volatility and significant diversification advantages. Also as described in the IPA Letter, Non-Listed REITs have shown a lower correlation to public equity markets than exchange-listed REITs, and, as a result, Non-Listed REITs provide even better diversification against market swings. The fact that a particular REIT is not listed on a securities exchange also provides a degree of protection against adverse market sentiment. Because they are not exposed to equity market fluctuations, the value of Non-Listed REITs typically is less volatile than that of exchange-listed REITs.

Non-Listed REITs invest in a broad array of asset classes, including commercial office, industrial, retail, hotels, healthcare and the debt secured by such assets. Direct investments in real estate assets can also provide a superior hedge against inflation and rising interest rates compared to most fixed income investments which do not provide for any potential appreciation of the

[7] *See, e.g.*, Securities and Exchange Commission, Study on Investment Advisers and Broker–Dealers at 13 (Jan. 2011), available at: http://sec.gov/news/studies/2011/913studyfinal.pdf.
[8] *See, e.g.*, FINRA Rule 2111.
[9] For example, broker-dealers have a duty to "to conduct reasonable investigation of securities, including those sold in a Regulation D offering. *See, e.g.*, FINRA Regulatory Notice 10-22, available at: http://www.finra.org/industry/notices/10-22.
[10] *See, e.g.*, Disclosures for Direct Participation Programs, which includes REITs discussed herein, Section (b)(3)(A) of FINRA Rule 2310, available at: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8469.
[11] *See, e.g.*, Disclosures, Section (b)(3)(B)(i)-(vi) of FINRA Rule 2310.

capital invested, and which also offer limited liquidity. Inflation is a significant risk to retirement income and the purchasing power of saving. Unlike bond and fixed income portfolios where the purchasing power of invested capital can be eroded by inflation, asset-based direct investments, like Non-Listed REITs, can provide capital protection through appreciation of value of the assets induced by inflation. Accordingly, direct investments in real estate have been a fundamental component of the investment portfolios of institutional pension plans and endowments for years.

Excluding Non-Listed REITs from the BIC Exemption altogether limits the diversification, inflation hedging, downside protection, lower volatility and income options available to retirement plan investors that research and analysis have proven enhances overall returns as well as reduces risk. The Department should include Non-Listed REITs as Assets eligible for the BIC Exemption and thus retain these important investment strategies that are currently available and widely used by the public for prudent retirement investing.

For the reasons discussed above, the Department should not adopt the Proposed Rule. If the Department does adopt the Proposed Rule, AHI believes that the BIC Exemption should be modified to eliminate any legal list of investment options; however, if the Department determines to maintain such a list, AHI believes that it is essential to modify the list to include Non-Listed REITs.

Thank you for your consideration of this request.

Sincerely,

Mathieu B. Streiff
Managing Director