ETHICAL CONSIDERATION FOR PRE-DESIGNATED INVESTORS' COUNSEL IN PRE-DOCUMENTED (Non-Rule 144A) PRIVATE PLACEMENTS

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FINAL ETHICS ANALYSIS OF THE ACIC GUIDING PRINCIPLES FOR PRE-DESIGNATED INVESTORS' COUNSEL OCTOBER 2006

***Caveat*:**

This memorandum contains an ethical/fiduciary analysis of the Guiding Principles for Pre-Designated Investors' Counsel included in the Report of the Ad Hoc Committee of the American College of Investment Counsel on the Role Pre-Designated Investors' Counsel, October 2006 (the "Guiding Principles") in light of our understanding of the current practices of Pre-Designated Investors' Counsel ("Pre-Designated Counsel") in the pre-documented (non-Rule 144A) private placement marketplace. We intend that this memorandum be read in conjunction with the Guiding Principles and Sample Form Engagement and Conflict Disclosure Letter.

No guarantees can be given that adoption of the approaches described in this memorandum and in the Guiding Principles will assure that a lawyer or firm will not be subject to damage claims or disciplinary proceedings. These are changing areas of law and the law may vary from jurisdiction to jurisdiction. It also is not possible to anticipate all potential factual circumstances. Nevertheless, we have endeavored to build upon the wisdom that is reflected in the Guiding Principles to suggest approaches that we believe are consistent with pertinent ethical concerns as we understand them.

Introduction:

The American College of Investment Counsel ("ACIC") and its ad hoc committee have developed a model, in the form of the *Guiding Principles,* to align the activities of Pre-Designated Counsel in the private placement market with the business expectations of the participants and related ethical requirements. As counsel to the committee, we have endeavored to align their recommendations with the rules of professional responsibility for lawyers. The

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result is a balance of issues and interests in which the details do matter. This memorandum addresses the principal issues and interests as we see them.

In this memorandum: the Issuer and Investment Banker/Placement Agent are collectively referred to as "Issuer"; the prospective and actual investors before they become clients of the Pre-Designated Counsel in the transaction in question are referred to as "Prospective Investor-Clients"; "Investor-Clients" refers to the prospective and actual investors after they become clients of the Pre-Designated Counsel. This topic is discussed further below.

The issues in this memorandum are primarily discussed in terms of the existing New York Disciplinary Rules (the "DRs"), although some references are also made to the ABA Model Rules ("MRPC") and to the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) ("RESTATEMENT").[2]

Preliminary Matters

Our recommendations to the committee are based upon our work as professional responsibility lawyers. We do not, and have not been asked to, give recommendations as to the business aspects of these practices. Our recommendations are made in the interests of the lawyers acting as Pre-Designated Counsel and their clients, but are necessarily general in nature and neither reflect nor create an attorney-client relationship between our firm and one or more Pre-Designated Counsel, Prospective Investor-Clients or Investor-Clients.

The *Guiding Principles* and any conflict disclosure and waiver letter ("**Engagement and Conflict Disclosure Letter")** are not without risk. As a general principle, the types of limitations that are proposed in this model are enforceable only where reasonable and necessary. Further, even for conflicts that can be waived (and not all can be), full disclosure must occur for any such waiver to become effective.

Finally, Pre-Designated Counsel should be advised not to place too much reliance on the sophistication of the parties. None of what is recommended in the *Guiding Principles* or this

[2]We are aware that in 2007, New York may replace the DRs with Rules of Professional Conduct ("RPCs") modeled after the MRPC. *See* NYSBA Committee on Standards of Attorney Conduct, Proposed NY Rules of Professional Conduct Introduction at: www.nysba.org/Content/ContentGroups/COSAC_Report/COSAC093005REPORTINTRODUCTION.pdf. As we presently understand them, the proposed changes would not affect our principal conclusions.

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memorandum would be possible without an extremely high degree of client sophistication. *Cf.* N.Y. City Op. 2006-01 (2006). Nevertheless, it can be extremely unwise for lawyers to assume that even their most sophisticated clients fully understand the implications of all lawyer conflicts. In addition, no amount of sophistication wholly obviates a lawyer's duties of disclosure. *See, e.g., Financial General Bankshares v. Metzger,* 523 F.Supp. 744,760 (DDC 1981) (attorney breached duty to highly sophisticated clients despite his claim that he "did everything but stand on the walls" to disclose the adverse representation when those disclosures omitted critical details about the representations).

A. CONFLICTS OF INTERESTS WITH THE ISSUER

A.1 Relevant Rules:

A.1.1 A lawyer is prohibited from representing a client in a matter adverse to a current client of the lawyer or the lawyer's firm.

DR 5-105 Conflict of Interest; Simultaneous Representation provides in relevant part:

> **A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 105(C).**
>
> . . . .
>
> **C. [A] lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each <u>and</u> if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. (Emphasis supplied).**
>
> . . . .

Pursuant to DR 5-105, a lawyer may not, without a waiver, represent an Investor-Client if the lawyer or his or her firm simultaneously represents the Issuer in any matter. *See International Business Machines Corporation v. Levin,* 579 F.2d 271 (2d. Cir. 1978) (even in a sophisticated business setting, compliance with the rule requires adequate disclosure and consent from clients who are represented by the same firm in unrelated matters).

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A.1.2 A lawyer is prohibited from undertaking representation that might be influenced by the lawyer's or firm's own economic or business interests without full disclosure and consent of the client.

DR 5-101 Conflicts of Interest—Lawyer's Own Interests provides:

> **A. A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby <u>and</u> the client consents to the representation after full disclosure of the implications of the lawyer's interest. (Emphasis supplied).**

See also NC Eth. Op. RPC 9, 1986 WL 327912 (a lawyer receiving payment from a third party must disclose to the client this fact along with a statement of any regular relationship between the attorney and the paying corporation).

Pursuant to these rules, a law firm with regular employment by an Issuer as Pre-Designated Counsel, or any "side deals" that benefit the lawyer or law firm, must make full disclosure to, and obtain consent from, the Prospective Investor-Client before representation may begin.

A.1.3 Absent consent based on full disclosure from the current and the former client, a lawyer is prohibited from representing a current client adversely to a former client if the present and former matters are substantially related.

DR 5-108 Conflict of Interest – Former Client Conflicts provides:

> **A. [A] lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:**
>
> **1. Thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client.**
>
> **2. Use any confidences or secrets of the former client . . . .**
>
> **. . . .**

Although this rule only speaks to the need for the former client's consent, ethics opinions and case law make clear that consent must also be obtained from the client to be represented. Consequently, Pre-Designated Counsel who has previously represented the Issuer, another

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Investor-Client or any other party in prior and substantially related matters must obtain conflicts waivers from both present and former clients if the interests of the present and former clients are adverse.

A.2 Presentation of issue in the *Guiding Principles*:

A.2.1. Section 2.4 of the *Guiding Principles* addresses the importance of an Engagement and Conflict Disclosure Letter for current or former client conflicts with the Issuer. We have prepared a sample draft letter for this purpose attached as Appendix B to the *Guiding Principles*. In the absence of an Investor-Client's review and acceptance of a conflicts waiver, Pre-Designated Counsel acts at far greater risk, to themselves and their clients, than we believe to be appropriate.

A.2.2 Sections 2.1 and 2.3 of the *Guiding Principles* provide that Pre-Designated Counsel should make full disclosure of prior employment as Pre-Designated Counsel and any additional fee arrangements with the Issuer.

A.3 Related Issues:

A.3.1 The *Guiding Principles* are intended to resolve issues that are common to most Pre-Designated Counsel engagements but not all forms of conflicts. Pre-Designated Counsel must address additional conflicts of interest that are beyond the scope of the *Guiding Principles* on a case by case basis. For example, Pre-Designated Counsel must take steps to be aware of conflicts of interests between Investor-Clients that exist by virtue of other matters that Pre-Designated Counsel or its Firm are handling on behalf of one or more Investor-Clients, and conflicts that arise due to new matters taken on during the course of representation. S*ee* N.Y. City Op. 2004-02 (2004).

A.3.2 As discussed in more detail in C.5.1 *infra*, Pre-Designated Counsel should not perform individual legal services for any Prospective Investor-Client until an Engagement and Conflict Disclosure Letter is accepted in writing, whether by letter or by return email. Pursuant to Section 1.3 of the *Guiding Principles*, Pre-Designated Counsel will draft the Note Purchase Agreement in advance of an offering. At this stage the prospective investors are Prospective Investor-Clients to whom some limited duties may be owed but are not Investor-Clients who are entitled to the full benefits of an attorney-client relationship. *See* MRPC 1.18 Comment 1; RESTATEMENT Section 15 (e).

A.3.3 Current client conflicts and economic/business interest conflicts require waivers on both the Issuer and Investor-Client sides. These materials do not expressly address conflicts other than those created by the Pre-Designated Counsel relationship as such and do not contain a form of letter to be sent to the Issuer side.

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B. THIRD PARTY PAYER

B.1 Relevant Rule:

B.1.1 A lawyer may not collect a legal fee from someone other than the client without the informed consent of the client.

DR 5-107 Avoiding Influence by Others than the Client provides in relevant part:

> **A. Except with the consent of the client after full disclosure a lawyer shall not:**
>
> > **1. Accept compensation for legal services from one other than the client.**
>
> . . . .

See, e.g., In re: The Matter of Edgar Jordan III, 299 A.D.2d34 (2002) (New York lawyer disbarred for repeated representation of buyers in real estate transactions while collecting legal fees from the brokers or sellers without informed client consent).

B.2 Presentation of issue in the *Guiding Principles*:

B.2.1. Section 3.1 of the *Guiding Principles* addresses the importance of a letter that discloses material elements of the fee arrangement between Pre-Designated Counsel and the Issuer. Section 4.7 of the existing ACIC *Model Form Note Purchase Agreement* version of April 15, 2006, affirms as part of the agreement that the Company has paid or agreed to pay the special counsel legal fees.

B.2.2 Section 3.2 of the *Guiding Principles* provides that the Engagement and Conflict Disclosure Letter should explain the nature of the fee arrangement between the Issuer on the one hand and counsel on the other. It is generally sufficient if the Engagement and Conflict Disclosure Letter explains the basic nature of the fee arrangement (hourly or flat fee), but if the Prospective Investor-Client or Investor-Client requests additional information, Pre-Designated Counsel must provide it. As described in A.1.2, *supra*, in the event that the fee arrangement contains separate agreements or side deals that benefit Pre-Designated Counsel, there will be a personal or business interest conflict which must also be affirmatively disclosed and waived.

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C. TRIGGERING THE ATTORNEY-CLIENT RELATIONSHIP

The successful use of the Pre-Designated Counsel model turns in significant part on the clarity of the relationship between the parties. Pre-Designated Counsel's relationships with the Issuer and investors must be clearly defined at each stage.

C.1 Relevant Rules:

C.1.1 Restatement Third of the Law Governing Lawyers (2000) ("Restatement") Section 14 Introductory Note provides in relevant part:

> **A fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe few duties. It therefore may be vital to know when someone is a client and when not.**
>
> **. . . .**

C.1.2 Restatement Section 14 Formation of a Client-Lawyer Relationship provides in relevant part:

> **A relationship of client and lawyer arises when:**
>
> **(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either**
>
> **(a) the lawyer manifests to the person consent to do so; or**
>
> **(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.**
>
> **. . . .**

C.1.3 Restatement Section 16 A Lawyer's Duties to a Client—In General provides in relevant part:

> **[A] lawyer must . . . .**

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(1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;

(2) act with reasonable competence and diligence;

(3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and

(4) fulfill valid contractual obligations to the client.

C.2 The Issuer:

Pre-Designated Counsel will often discuss the proposed transaction and draft documents with the Issuer before Investor-Clients, or perhaps even Prospective Investor-Clients, have been identified. Given that the Issuer pays Pre-Designated Counsel's legal fees, this presents a material risk that in the absence of a clear statement to the contrary, a court or disciplinary body could infer an attorney-client relationship between the Issuer and Pre-Designated Counsel in the particular transaction. S*ee, e.g., Nelson v. Nationwide Mortgage Corporation,* 659 F.Supp 611 (DDC 1987) (attorney answered questions of a non-client party during a transaction without clarifying that he did not represent that party; the court inferred an attorney-client relationship and held the attorney liable for malpractice); *In re Baer*, 298 Or. 29, 688 P.2d 1324 (1984) (attorney disciplined where court found that attorney represented both buyer and seller to real estate transaction even though attorney only intended to represent buyer).

C.3 Presentation of the Issue in the *Guiding Principles* as to the Issuer:

Section 3.1 of the *Guiding Principles* provides that Pre-Designated Counsel should deliver a fee letter to the Issuer setting forth the terms of their fee arrangement but also stating that Pre-Designated Counsel will act solely on the behalf of the Investors. Likewise, the sample form Engagement and Conflict Disclosure Letter that we have prepared and attached as Appendix B to the *Guiding Principles* clearly identifies Investor-Clients as clients and disclaims any representation of the Issuer in the transaction at issue.

C.4 The Investor:

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C.4.1. Except as otherwise agreed through one or more waiver letters, full duties of diligence, confidentiality and undivided loyalty are owed to each Investor-Client as soon as an attorney-client relationship is formed. Any unwaived conflicts existing at that moment expose the lawyer to disciplinary and civil liability. It is therefore important to identify clearly the moment that Pre-Designated Counsel's representation of an Investor-Client begins. In order to satisfy the requirements of the respective conflict rules, an Engagement and Conflict Disclosure Letter must be in place at the outset of the formation of this relationship.

C.4.2. As soon as Pre-Designated Counsel forms an attorney-client relationship with Investor-Clients who will benefit from these prior services and whose interests may be affected by the earlier services, Pre-Designated Counsel must provide Investor-Clients with all relevant and material information about the work performed, the points addressed and any negotiation "wins" and "losses" on the Investor-Client's behalf. The Investor-Client must then either agree to go forward in light of this information or refuse to do so. Pre-Designated Counsel who fails fully to inform Investor-Clients about important matters will be in breach of his or her ethical and fiduciary duties to the client. *See* New York State Code of Professional Responsibility EC 7-8; *Spector v Mermelstein*, 361 F.Supp. 30 (SDNY 1972) (defendant attorney breached fiduciary duty owed to client in a loan transaction by failing to provide all necessary information in his possession and failing to inquire further when it appeared that his client was not being fully informed by others).

C.5 Presentation of the Issue in the *Guiding Principles* as it relates to the Investor-Client:

C.5.1 Section 2.3 of the *Guiding Principles* provides that an attorney-client relationship with respect to a particular transaction will generally come into existence (and in our opinion should only come into existence) at the point at which the Prospective Investor-Client expresses, in writing, a willingness to be represented by Pre-Designated Counsel subject to terms and conditions acceptable to both Pre-Designated Counsel and the Prospective Investor-Client. This means that the Prospective Investor-Client and Pre-Designated Counsel must be in contact with each other before the relationship is formed. The attorney-client relationship may form either before or after circle.

We caution, however, that an attorney-client relationship may be found to exist even without a writing or before agreement upon an Engagement and Conflict Disclosure Letter if a lawyer provides legal advice to a party that subjectively and reasonably believes itself to be a client. *See Atlas Partners Limited II, v. Brumberg, Mackey & Wall*, PLC 2006 WL 42332 (W.D.Va 2006) (setting out analysis to determine the existence of an attorney client relationship in a transaction setting where lawyer denied representation of particular investor entity; court found relationship and allowed malpractice action against firm). *See also*, *Westinghouse Elec. Corp. v. Kerr-McGee Corp*., 580 F.2d 1311, 1319 (7th Cir.), cert. denied, 439 WL U.S. 955, 99 S.Ct. 353, 58

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L.Ed.2d 346 (1978); ("the fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, even when actual employment does not result."); *Seeley v. Seeley*, 129 A.D.2d 625, 627, 514 N.Y.S.2d 110, 112 (1987) (same). The expectation of many institutional investors (and therefore their subjective belief) as to the timing of the onset of the attorney-client relationship is noted in the introductory comments to the *Guiding Principles*. If an attorney-client relationship is formed with one or more Investor-Clients and without any agreed-upon conflicts waivers or other limitations on the scope of the representation, Pre-Designated Counsel would presumably owe the client the full range of attorney-client duties, including but not limited to the duty of undivided loyalty.

We repeat that the scope and terms of the attorney-client relationship will be decided in large part by the subjective beliefs of the Investor-Client. This is why we recommend that Pre-Designated Counsel be diligent in requiring the execution of the Engagement and Conflict Disclosure Letter before work begins for an individual Investor-Client and that any divergence from the Guiding Principles (upon which the Investor-Clients will rely) be clearly set out by Pre-Designated Counsel. [3]

C.5.2 Section 4.5 of the *Guiding Principles* provides that Pre-Designated Counsel must prepare an issues memorandum regarding the key points in a transaction, including work that was done before any particular Prospective Investor-Client becomes a formal Investor-Client. Consistent with the careful definition of the attorney-client relationship, protection of the attorney-client privilege and proper clarification of the parties' respective rights and obligations, the issues memorandum should be provided to the Investor-Client only after an Engagement and Conflict Disclosure Letter is signed and returned or the parties otherwise agree--for example, through their own engagement and conflict waiver letter--that an attorney-client relationship has been formed. In our opinion, the establishment of an attorney-client relationship without the use of an Engagement and Conflict Disclosure Letter or a similar letter with equivalent content poses grave potential risks for both attorneys and clients.

C.6 Related Issues:

C.6.1 We repeat that a lack of clarity or misunderstanding about the point at which an attorney-client relationship exists between Pre-Designated Counsel and an investor-Client can

[3] Although exigent circumstances may sometimes make it necessary or appropriate to begin work before a conflicts waiver is obtained. exigency is unlikely to be found in most transactional circumstances. *Cf. In re Jeffrey*, 321 Or. 360, 371, 898 P.2d 752 (1995) ("consent" document signed by clients "fell short in form because the written consent was not obtained at the time the accused undertook the dual representation").

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expose all concerned to unnecessary risks and litigation. As previously noted, the Engagement and Conflict Disclosure Letter should be in place before Pre-Designated Counsel represents an Investor-Client in connection with a transaction.

C.6.2 In each instance, an Engagement and Conflict Disclosure Letter must expressly set out when the attorney-client relationship begins and ends.

D. CONFLICTS OF INTEREST AMONG CO-CLIENTS

D.1 Relevant Rules:

D.1.1 DR 5-105 Conflict of Interest; Simultaneous Representation provides in relevant part:

> **A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 105(C).**
>
> **. . . .**
>
> **C. [A] lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. (Emphasis supplied).**
>
> **. . . .**

D.1.2 DR 7-101 Representing a Client Zealously provides in relevant part:

> **A. A lawyer shall not intentionally:**
>
> > **1. Fail to seek the lawful objectives of the client through reasonably available means permitted by law and Disciplinary Rules . . . .**
> >
> > **. . . .**

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3. Prejudice or damage the client during the course of the professional relationship, except as required by [rule cites provisions not relevant to this inquiry.]

. . . .

D.1.3 DR 4-101 Preservation of Confidences and Secrets of a Client provides in relevant part:

. . . .

B. [A] lawyer shall not knowingly:

1. Reveal a confidence or secret of a client.

2. Use a confidence or secret of a client to the disadvantage of the client.

. . . .

D.1.4 At Common Law (Confidentiality amongst co-clients):

Clients who are represented by a common lawyer in a common defense or shared interests may generally assert attorney-client privilege as against the outside world, but generally may not do so as between themselves. *In re Regents of University of California,* 101 F.3d 1386 (Fed. Cir. 1996).

D.1.5 Pre-Designated Counsel represents the group of Investor-Clients insofar as they have a common interest in evaluating and deciding whether to make an investment in a particular private placement. The interests of the Investor-Clients may well be in conflict by the basic nature of competition, and this is almost certainly so when there is an oversubscribed offering or a dispute over potential terms. The rules of professional conduct prohibit a lawyer from undertaking such a group representation in the absence of waivers obtained after full disclosure. If, in fact, the dispute or disagreement becomes too serious, a lawyer may be required to withdraw.

D.1.6 Except as expressly and permissibly modified, a lawyer's duty of undivided loyalty or zealous advocacy runs fully to each client. A lawyer is required to keep each clients informed of all information relevant to the representation. Equally and at the same time, a lawyer must maintain the confidences of all clients. Where there is competition between Investor-Clients or any type of divergence of interests, the duties owed to each Investor-Client can be inconsistent. In order to advance the interests of one Investor-Client, the lawyer would normally be required to disclose the strategy of another Investor-Client either to the other

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Investor-Client or to the Issuer. In this event, non-waiveable conflicts of interest could arise, in which case the lawyer must withdraw from representation of all parties. Without a careful definition of their the relationships in an adequate Engagement and Conflict Disclosure Letter, it is not permissible for one lawyer or firm to represent competing Investors in a single offering. Insofar as material hereto, a conflict for one lawyer at a firm is a conflict for all lawyers at the firm. *See* MRPC 1.10.

D.1.7 A client may consent to a limitation of the attorney-client relationship if reasonable and necessary under the circumstances. S*ee* N.Y. City Op. 2004-02 (2004); ABA Formal Op. 93-372 (1993); RESTATEMENT Section 19. Based upon our understanding of the pre-documented (non-Rule 144A) private placement market and the *Guiding Principles*, this is or at least should be considered such a circumstance. Success of limitations as significant as those required here will require that a detailed Engagement and Conflict Disclosure Letter be provided and executed before the attorney-client relationship is formed and before Pre-Designated Counsel should do any work for an individual Investor-Client.

D.1.8 Pre-Designated Counsel may act as a conduit for questions and good faith negotiation for terms that are in the best interest of all of the Investor-Clients and upon which they concur. Investor-Clients must explicitly agree that Pre-Designated Counsel is under no obligation to assist them in competition with each other. Investor-Clients must further agree that Pre-Designated Counsel's duty of zealous advocacy and undivided loyalty is limited by the attorney's duties to other Investor-Clients.

D.2 Presentation in the *Guiding Principles*:

D.2.1 Competition and Confidentiality: Section 1.9 of the *Guiding Principles* notes that Pre-Designated Counsel's clients are competitors and that the lawyer should take care not to pass on information specific to any other client. The footnote to this section further provides that insofar as this requirement is inconsistent with a lawyer's duty of zealous advocacy and duty to keep clients fully informed, the representation must be limited in a Engagement and Conflict Disclosure Letter.

D.2.2 Conflicts of Interest Between Investor-Clients Section 5.1 of the *Guiding Principles* describes how Pre-Designated Counsel should resolve conflicts between multiple Investor-Clients. In the event of a dispute or disagreement between Investor-Clients on a particular point, Pre-Designated Counsel should make reasonable efforts with the Investor-Clients to seek consensus. In the event that consensus is not reached, Pre-Designated Counsel must not advocate for the interests of one Investor-Client as against another but may close a transaction for those Investor-Clients willing to do so on mutually acceptable terms. This approach to multiple client conflicts must be set forth in the Engagement and Conflict Disclosure

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Letter and accepted by the Prospective Investor-Client before the beginning of the representation.

E.1 Mechanics of Disclosure and Waiver:

E.1.1. The substance of the conflicts disclosure and waiver process is essential. The precise means by which information is disclosed and consent obtained from Prospective Investor-Clients is subject to change.

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E.1.2 We therefore recommend the use of a two part Engagement and Conflict Disclosure Letter such as in the form attached thereto as Appendix B.

E.1.3 In the event the Pre-Designated Counsel chooses not to use the form letter in Appendix B, an Engagement and Conflict Disclosure Letter should contain, at minimum, the following features:

1. The letter should state that Pre-Designated Counsel is acting in accordance with the *Guiding Principles* or, if not, should note and clarify any departures from the *Guiding Principles*.

2. The letter should clearly identify the Investor-Clients as clients and should disclaim any representation of the Issuer or Agent in the transaction at issue.

3. The letter should clarify the beginning and end points of the attorney-client relationship.

4. The letter should describe the work performed prior to the point at which the Prospective- Investor-Client became an Investor-Client.

5. The letter should describe the work to be performed during the attorney-client relationship, including any express limitations.

6. The letter should explain the nature of the fee arrangement between the Issuer on the one hand and Pre-Designated Counsel on the other.

7. The letter should make disclosures and seek appropriate conflict waivers relating to: (1) Pre-Designated Counsel's relationships with the Issuer; (2) the potential for conflicts resulting from the simultaneous representation of multiple Investor-Clients in a single transaction and the approaches to be taken if such a conflict arises; and (3) any other pertinent conflicts issues.

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8. The letter should disclose and seek consent regarding the means by which Pre-Designated Counsel will protect the Investor-Client's confidences and secrets.

E.1.3 The best Engagement and Conflict Disclosure Letter will be inadequate to protect any party if it exists solely on paper and not in reality. "[I]t bears emphasis that both the lawyer and client must adhere scrupulously to [any] limitation. Indeed, it goes without saying that a lawyer may not circumvent the limitation by acting adversely 'behind the scenes.'" N.Y. City Bar Op 2001-03 (2003), citing *Fund of Funds Ltd. v. Arthur Andersen &Co*., 567 F.2d 225, 234 (2d Cir. 1977).

Conclusion:

Both Pre-Designated Counsel and their clients will benefit from full compliance with ethical obligations, and those ethical obligations do not impose insurmountable difficulties for those who wish to comply with them. When it comes to conflicts, it is far better to be safe now than sorry later.

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