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Director, TA&I—FSP  
Financial Accounting Standards Board  
401 Merritt 7  
PO Box 5116  
Norwalk, CT 06856-5116

**Re: Proposed EITF Issue No. 04-5, "Investor's Accounting for an Investment in a Limited Partnership When the Investor Is the Sole General Partner and the Limited Partners Have Certain Rights"**

Dear Director:

We appreciate the opportunity to respond to the tentative conclusions of the EITF on Issue 04-5. The control issue is an important one for our company, as we find ourselves on both sides of the issue – at times we are the sole general partner (GP) where the limited partners (LPs) have certain rights that call into question whether we control the partnership; and at other times we are the LP and are vested with such rights.

We are concerned by the direction taken by the EITF in Issue 04-5, because it will result in inappropriate consolidation conclusions. While the Issue states that all relevant facts and circumstances should be considered, the incorporation of the bright-line, 'simple majority of unrelated interests' test inherently ignores such relevant factors as the sophistication and attentiveness of the LP group, the reasonableness of the number of LPs that must vote together to exercise a kick-out right or a participating right, and our own history with similar partnership arrangements, and in many cases, our history with the LPs themselves. Rather than adopting the definition of 'substantive kick-out rights' that were described in FIN 46(R) and incorporating the same concepts into a definition of substantive participating rights, the EITF should state that the definition in FIN 46(R) should not apply to the determination of whether control exists, or should describe such rights with significant amendments as compared to the FIN 46(R) definition, such as the deletion of the simple majority requirement.

Kick-out rights

The objective consideration in paragraph 6.a. states that a kick-out right is not substantive if it requires a vote of more than a simple majority of voting interests held by parties other than the sole GP and the GP's related parties, except that even if a supermajority vote is required, a kick-out right would be viewed as substantive under the exposure draft if it could be exercised by a vote of a single LP and its related parties. However, the determination of whether an entity controls another entity is by its nature subjective. All other aspects included in an ARB 51 control analysis are subjective, and rightly so. It is inappropriate to incorporate the bright-line determination from FIN 46(R) to a control-based evaluation. Doing so will result in substantive rights being excluded from the determination, and perhaps also will result in non-substantive rights being viewed as substantive under this test.

The 'simple majority' vote language in FIN 46(R) was written to have a very different impact than the same language would have to a 'control' conclusion. For VIEs, the simple majority language determines whether decision maker fees are to be included in the analysis to identify the primary beneficiary of the VIE. It does not automatically create a consolidation result. In that circumstance, the inclusion or exclusion of fees into the analysis may be acceptable on a bright line basis.

Outside of a VIE analysis, preparers must be able to use their judgment in evaluating all of the relevant facts and circumstances, including those mentioned above as being excluded by action of the 'simple majority' requirement. Representational faithfulness (i.e., consolidation should result if and only if control exists) is more important than comparability among companies. Under the draft guidance, there will be more consistent determinations among GP's

consolidation determinations, in that GPs will consolidate more often, regardless of very different fact patterns (GPs will consolidate where control exists and where control does not exist). The 'single LP vote' comment added by the EITF to the guidance from FIN 46(R) does not adequately address this issue. Paragraph 6.a. should be deleted. Separately, the final guidance should clearly state that the final guidance to the effect that the objective criteria described in FIN 46(R) is not applicable to consolidation issues not involving VIEs.

The subjective consideration required by paragraph 6.b. is described as a partial list of factors to be considered, which in practice already factor into the judgments about the substance of kick-out rights, and therefore we do not disagree with the formalization into a standard. We do, however, request that the EITF consider providing an example of an 'explicit, reasonable mechanism' in paragraph 6.b.(4). Many partnership agreements provide LPs the right to call a meeting, with a provision elsewhere in the partnership agreement describing the rights to remove the GP. We believe that should be sufficient.

#### Participating rights

EITF 04-5 also incorporates a redraft of EITF Issue No. 96-16, to amend the original language to apply to partners or investors generally, rather than to shareholders of a corporation. In the interests of the FASB's simplification project, we question whether it wouldn't be easier to amend 96-16 with a simple statement that the same concepts apply to investments in limited partnerships, for purposes of a GP's determination of whether LPs have substantive participating rights.

The one area where the proposed language varies from 96-16 is in paragraph 19, in which the same objective and subjective tests used to determine whether a kick-out right is substantive, are applied to participating rights. This includes the 'simple majority of other interests' concept. We disagree with its inclusion in paragraph 19 for the same reasons we disagree with its application to kick-out rights.

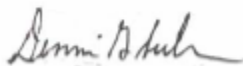
Additionally, there is no basis to apply these concepts to partnerships, as proposed by EITF 04-5, but not incorporated entities as described in EITF 96-16. In our view, these concepts should not be applied in any control determination.

Lastly, the draft EITF issue describes a two-step process. The GP must first assess whether there are substantive kick-out rights, and if not, proceed to the question of whether the LPs have substantive participating rights. Rather than describing this as a step-by-step process, the guidance should be more simply written. To this end, the following statement could replace all of paragraph 5:

*The sole general partner of a limited partnership that is not a variable interest entity will consolidate the limited partnership, unless EITHER:  
(a) the limited partners hold substantive kick-out rights (reference to paragraphs 6 – 8); OR  
(b) the limited partners hold substantive participating rights (reference to EITF Issue 96-16, as amended if necessary).*

Since the order doesn't matter, an order should not be artificially created. This simplification would permit a GP to address either item first, which may be useful for example if GP can more easily determine that substantive participating rights exist.

Sincerely,



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