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Breaking Up Is Hard to Do, So Let's Stay Together: An Analysis of Issues in Continuation Funds

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Private equity funds are intended to be self-liquidating at the end of a specific term. When the sponsor of a fund (or the GP for purposes of this article) determines that the end of a fund's term is not an opportune time to sell an asset remaining in the fund, the historical approach generally has been to place the asset in a liquidating trust until disposition. This approach, however, is not an optimal outcome for investors when an asset requires additional capital in order to maximize its value. One solution to this problem is a continuation fund, which is a structure designed to provide additional capital to maximize an asset's value beyond the formal end of a fund's life. We have seen an increase in continuation funds recently. Despite the recent popularity of continuation funds, regulatory guidance in this space has been limited. Without such guidance, running afoul of fiduciary obligations is more likely, which can have significant ramifications. In particular, GPs should thoughtfully consider both the formal conflicts of interest and the attendant investor relationship issues that continuation funds present.

This article begins with an overview of continuation funds and their mechanics. We then explore the regulatory, legal and practical issues that may arise in connection with continuation funds, providing questions that GPs should consider carefully before forming a continuation fund. Finally, this article concludes with a brief overview of the possible regulatory outlook for continuation funds.

Overview of Continuation Funds

Typically, a continuation fund is a new vehicle that is launched to buy an asset of a closed-end fund that is nearing the end of its lifespan (initial fund for purposes of this article). Private equity funds typically have a 10-year life span, subject to an extension period.[1] Even with these extensions, the GP may believe that it is not advantageous to dispose of an asset at the end of a fund's term and that additional capital is necessary to maximize the asset's value.

A continuation fund can solve these problems by allowing a GP to continue to manage the asset alongside the initial fund's limited partners (LPs) that decide to opt in to the continuation fund. A continuation fund also provides liquidity for the LPs who want to end their exposure to the asset by allowing them to, in effect, sell their interest in the asset to the continuation fund. A continuation fund is similar in many respects to other methods that GPs have used to resolve end-of-term illiquid assets, including liquidating trusts and the sale of an asset from an initial fund to its successor fund. However, unlike a traditional liquidating trust, a continuation fund admits investors other than the LPs of the initial fund, such as third parties and one or more successor funds managed by the GP, and can also afford LPs in the initial fund the opportunity to increase their exposure to the asset. Similarly, the sale of the asset from the initial fund to its successor fund provides liquidity to the LPs of the initial fund and does not raise as many conflicts of interest and practical concerns for LPs as a continuation fund.

At the outset, structuring a continuation fund depends on navigating the terms of the operative documents of the initial fund. We have only recently seen limited partnership agreements (LPAs) that directly address the possibility of a continuation fund. However, the initial fund's LPA invariably contains specific provisions relating to the fund's term, investment period and amendment requirements, and also generally provides for a limited partner advisory committee (LPAC) to advise on, and provide consent to, conflicts of interest and other issues raised by the GP during the course of a fund's life. In addition, side letters between the fund and its LPs may contain provisions that impact how the GP is able to structure or offer a continuation fund.

The genesis of a continuation fund typically follows a standard process. First, the GP will identify a potential asset to roll over to a continuation fund. The GP and its advisors will then perform a valuation analysis and prepare the continuation fund documents. While this process may take several months, the LPs generally do not have visibility into this process and likely will be unaware that the GP is considering a continuation fund. Assuming the GP concludes that an asset is appropriate for a continuation fund, the GP will then present a disclosure and election package to the LPs. Typically, within 30 days, the LPs will need to decide whether to (a) sell their interest in the asset at a value presented by the GP or (b) roll over the asset to the continuation fund. The LPs that elect to roll over the asset may also have the option to make an additional commitment to the continuation fund. The sale price to the continuation fund will then run through the initial fund's distribution waterfall, potentially giving rise to carried interest for the GP or changes to its clawback obligation to investors. To reduce the potential conflicts of interest arising from the GP determining a value on which it will receive carried interest, we have seen GPs elect to take their carried interest partly in cash and partly through an interest in the continuation fund.

In determining whether to roll over an asset to a continuation fund, a GP should consider:

- Is it optimal that the asset be liquidated well after the end of the initial fund's term?
- Would it be better suited for the asset to be put into a liquidating trust or sold to a successor fund, particularly given the additional concerns associated with a continuation fund?
- How should the GP structure the continuation fund to minimize conflicts with the LPs?

Legal, Regulatory and Practical Considerations

The structure of a continuation fund presents inherent conflicts of interest and other regulatory issues between the GP, the continuation fund and its LPs, and the initial fund and its LPs. To analyze these issues, we start with an overview of fiduciary duties and then explore common issues that arise in connection with a continuation fund and how the GP's fiduciary duties are implicated. We then discuss some of the practical considerations that GPs should consider to be a good partner to their investors.

Fiduciary Standard

When forming a continuation fund, a GP wears at least two hats in the transaction, as it serves in a fiduciary capacity to both the initial fund that is selling the asset and to the continuation fund that is purchasing the asset. If a successor fund is purchasing an interest in the continuation fund, then the GP also serves in a fiduciary capacity to that fund. Pursuant to the Investment Advisers Act of 1940 (as amended, the Advisers Act), the GP owes fiduciary duties to each of the funds that it advises.[2] In *Securities and Exchange Commission v. Capital Gains Research Bureau*, the Supreme Court noted that "[c]ourts have imposed on a fiduciary an affirmative duty of utmost good faith and full and fair disclosure of all material facts."[3] While the Advisers Act grants the Securities and Exchange Commission (SEC) with substantial oversight power, it offers little to private parties and does not provide LPs with a private right of action.[4] The SEC and its Staff frequently cite the Supreme Court's decision in *Capital Gains* to support the notion of a substantive federal fiduciary standard for investment advisers.[5] Given the limited private remedies available, and the focus of both the courts and the SEC on conflict disclosure,[6] GPs should focus on ensuring that there is full and fair disclosure of all material information to the LPs in connection with continuation funds.

Depending on where a fund is organized, GPs may also be subject to fiduciary duties established by state law. These duties may differ in practice from the Advisers Act, both in scope and application. Unlike federal law where the GP only owes fiduciary duties to the client (that is, the private fund entity),[7] some states, such as Delaware, treat a GP as owing such duties to both the fund *and* the investors in the fund.[8] Under Delaware partnership law, an LPA can expand, restrict or eliminate a partner's fiduciary duties by provisions in the LPA, except for the implied contractual covenant of good faith and fair dealing.[9]

By contrast, under federal law, investment advisory clients (including, for this purpose, a fund's LPs) may not contractually waive an investment adviser's fiduciary duties;[10] however, investment management agreements and LPAs may shape the contours of the relationship, provided that there is full and fair disclosure and informed consent.[11] In addition, the GP may owe specific duties to the fund or an LP pursuant to a side letter negotiated with the LP; for instance, side letters with ERISA and other similar investors may impose a fiduciary standard. While the application of the investment adviser's fiduciary duties can vary for these reasons, the relationship in all cases remains that of a fiduciary to the client. At a minimum, this requires full and fair disclosure of the fiduciary's conflicts as a prerequisite to effective consent. Whether or not something more might be required, and how GPs can (and cannot) receive the consent of LPs to those conflicts, are matters to be left to future regulatory, and perhaps litigation, developments.[12]

Economics: Valuation and Downside Risk

The price at which the initial fund sells the asset to the continuation fund is a primary concern for both the GP and the LPs. With rare exceptions, a private equity fund relies on cash metrics (that is, invested capital and the proceeds from the sale of investments) to determine the allocation of economics in the fund between a GP and the LPs.[13] The creation of a continuation fund, however, necessitates a valuation of the underlying asset, with that valuation serving as the economic basis of the asset's sale from the initial fund to the continuation fund. Given that the asset is not public and any number of contingencies that may affect the value, the current value may be difficult to ascertain. If the acquired asset ultimately results in a sale at a much higher price in the continuation fund than the valuation for which it was sold by the initial fund, the LPs of the initial fund may complain that they were misled into selling at a discount. This may be especially likely if the increase in the sale price from the valuation cannot be explained satisfactorily by subsequent events, such as an increase in a company's value from the effective use of new capital to improve products or marketing. By contrast, an incorrect high valuation will disadvantage the LPs of the continuation fund. While the GP can obtain a valuation opinion or a fairness opinion, this may not ultimately insulate a GP from the assertion of claims that it breached its fiduciary duties to the fund or from regulatory scrutiny.

Generally, as a fiduciary to both the initial fund and the continuation fund, the GP has an obligation to act in the best interest of each client. Case law regarding the application of the federal fiduciary standard for advisers has not directly addressed this particular conflict scenario. However, valuation remains a perennial focus of the SEC in other contexts, and it has charged private fund advisers with violations of their fiduciary duties when making misleading statements regarding valuation or causing fund assets to be improperly valued.[14]

A Delaware Court of Chancery case illustrates that even when valuation experts and a conflicts committee are involved in a conflicted asset sale, a court may determine that the conflict was not adequately resolved. In *El Paso Pipeline Partners*, the court considered an asset sale from the corporate parent of the GP to a master limited partnership (MLP).[15] Although the MLP had waived the GP's fiduciary duties under Delaware law, the court nevertheless found the GP liable to the fund for a valuation deficiency in connection with an asset sale because it did not satisfy the standard of conduct explicitly required in the LPA, namely the requirement that it act in "the best interests of [the partnership]." Conflicted transactions were explicitly subject to approval by the conflicts committee and the members of that committee were required to act in the best interests of the MLP. The conflicts committee approved the transaction after engaging legal and financial advisors and securing a fairness opinion. Nevertheless, the court was skeptical that the fairness opinion provided any value with respect to the GP's obligations, noting that its issuer "failed to perform the real work of an adviser to the [conflicts] committee . . . ." The court also explained that "[w]hen pressed at trial, [the issuer] ultimately could offer little more than the claim that, in every case, [it] exercised judgment. Every one of [the issuer's] judgments benefitted [the GP], not [the MLP]."[16] Thus, the fairness opinion undercut, "[r]ather than helping . . . bolster . . . [the] claim to have acted in good faith."[17] While fairness opinions are helpful in many contexts, this case illustrates that they are not a panacea.

In addition, the court found that members of the conflicts committee did not actually conclude that the challenged transaction was in the best interests of the MLP. The court explained that the committee had exclusively considered the amount by which the cash distributions for common unitholders of the MLP would be expected to increase, but failed to take into account the value of the assets being acquired by the MLP under traditional valuation analyses in reaching its determination. The court found that this was inconsistent with the "best interests" contractual standard in the LPA because, even though the transaction was beneficial to the LPs, the transaction ought to, in the court's view, have been undertaken at a price that would have been more beneficial. As a result, the conflict committee's approval was inadequate to insulate the GP from liability arising from the conflict. As a result, *El Paso Pipeline Partners* provides useful guidance on properly framing a valuation analysis for an asset subject to a conflicted transaction. It underscores that a GP should not assume that an advisory committee's approval of a conflict transaction is always sufficient to render the GP's conduct, and its satisfaction of its fiduciary obligations, beyond scrutiny.

Finally, the valuation of the asset will impact the carried interest received by the GP with respect to both the initial fund and the continuation fund, which in turn raises questions of fairness if the GP makes the final valuation decision and how the clawback should be structured. Given the need for finality with respect to the investments made by the initial fund, we have seen the clawback not apply when an asset is sold to a continuation fund. As the value is crystalized when an asset is moved to a continuation fund, the GP will likely receive carried interest on any "mark-to-market" gain (that is, the portion of the valuation in excess of the historical cost basis, subject to any preferred return due to the LPs) in the initial fund, while retaining upside (where the ultimate sale price exceeds the sum of the valuation, any additional capital infusions and any applicable preferred return) in the continuation fund. However, if the ultimate sales price of the asset by the continuation fund is less than the crystalized value at which the asset was transferred to the continuation fund, we typically do not see a clawback. Accordingly, the GP would not share the risk borne by LPs of the initial fund that rolls over to the continuation fund.[18] This in part represents that the asset is being deemed a "new" investment by the continuation fund and any carried interest paid with respect to the asset by the initial fund would be deemed no longer relevant. To provide for finality, there should be a point at which all contingent liabilities of the initial fund are extinguished. Extinguishing these contingent liabilities puts all the LPs that were in the initial fund in the same position with respect to the carried interest paid to the GP by the initial fund. This does, however, put the LPs that roll over to the continuation fund at a risk of overpaying carried interest if the ultimate exit price in the continuation fund is less than that the sale price by the initial fund and there is no clawback from the GP with respect to the loss.

In light of these considerations, when structuring a continuation fund, GPs should consider how to address the following issues:

- How does the GP propose to value the target asset? Will it seek one or more valuation or fairness opinions? Will it enlist a financial intermediary to conduct an auction-style sale process?
- Does the GP involve the LPAC and/or the LPs in the valuation process?
- What are the assumptions underlying the valuation(s), and how and to whom are those assumptions disclosed?
- What representations or conditions will the GP agree to in connection with the asset's valuation?
- If there are competing opinions on the asset's valuation, how will the GP resolve these differences?
- If the asset value or other material terms change during the transaction, how will the GP account for such changes and how will they be disclosed?
- How should the GP address the carried interest that it will receive from the sale of the asset to the continuation fund?

Disclosure and Consent to Conflicts

Determining whether the GP has actually received informed consent from the client to the conflicts associated with a proposed continuation fund is a key concern. Questions often arise as to whether a GP has satisfied its applicable fiduciary duties and has obtained the requisite informed consent. Informed consent can be either explicit or, depending on the facts and circumstances, implicit; however, the SEC has previously stated its view that it would not be consistent with an adviser's fiduciary duties to infer or accept client consent to a conflict where the adviser was aware, or reasonably should have been aware, that the client did not understand the nature and import of the conflict.[19] In applying this statement to the LPs of a fund, if a GP has reason to know that an LP has not been fully apprised of the conflict, including the opportunity to review meaningfully the disclosure provided, it arguably would not be consistent with its fiduciary duties to infer consent from the LP's non-response. As such, it may be prudent for a GP to rely on actual consent, rather than negative or "deemed" consent.

A related challenge for any GP is how to present fair choices to the LPs and what is sufficient LP consent. While the GP may receive LPAC input, the GP should also consider that the LPAC may not represent the best interests of the LPs taken as a whole or of any individual LP. In addition, when an LP is presented with only a handful of options proposed by the GP, the options may not necessarily present a real choice for the LP, who initially elected to invest in a fund with a 10-year life (subject to extensions). Generally, majority in interest consent is required to approve amendments to an LPA. If a continuation fund triggers the need to amend the LPA, the GP should consider whether to have super majority consent even if the LPA provides that majority consent will suffice.

As noted above, whether a GP has properly obtained informed consent will depend on whether it sufficiently disclosed all material facts of the transaction, in addition to its potential or actual conflicts of interest. Material information includes the pricing and terms of the transaction, and a GP should consider what other information should be included in the disclosure packet. Another consideration, which is apparent in a related context in the Delaware Chancery Court's *El Paso* opinion, is whether there has been appropriate consideration (in the *El Paso* context) or appropriate disclosure (in this context) about the alternatives that have been considered and rejected, and why the particular approach taken, in the GP's view, maximizes value and, thus, is "in the best interests of the [fund]."

In structuring a continuation fund, a GP should consider how it will address the following disclosure and conflicts issues:

- How will the GP disclose conflicts of interest to the LPAC and the LPs? What should be disclosed?
- Will the GP seek affirmative consent? If not, how will the GP assess whether an unresponsive LP or LPAC has provided consent to the conflicts presented?
- How will the continuation fund impact the management fee and carried interest? If the management fee will increase, should the LPs from the initial fund that are rolling over to the continuation fund be given a fee break?
- Has there been a drift in the investment strategy from what was presented to investors and should future funds have a term that is longer than 10 years, plus the applicable extensions? For a GP to rely on a continuation fund once is perhaps justified by the argument that the circumstances which gave rise to the continuation fund were not contemplated when the initial fund was established. For the situation to arise serially suggests that a longer term ought to have been contemplated in subsequent funds. Alternatively, if it actually is contemplated that continuation funds may be used, the GP should consider providing disclosure on this point in the initial fund's documents.

Practical Considerations with respect to LPs

Continuation funds raise a variety of practical considerations for a GP seeking to be mindful of its fiduciary duties and, perhaps more significantly, a good partner to its LPs. This is especially important for large private equity funds that depend on large institutional LPs for capital, as these LPs must consider a variety of internal issues and stakeholders, and often are subject to onerous regulatory and policy constraints. As noted above, in many cases, GPs typically provide LPs with a limited amount of time to review a continuation fund, often 30 days. This limited time period may be due to confidentiality concerns of the GP regarding the transaction or deal timing considerations. Nonetheless, the 30-day window is much shorter than the typical time period in which an institutional investor reviews a new investment, which often takes several months. In many cases, the GP sends the disclosure packet relating to the continuation fund to an investor's investment team, who then liaise with their internal legal function, who in turn may then engage outside counsel. This process further limits the period available for meaningful review. LPs may need to request time extensions to review the complex issues presented by the diligence packet on the short timeline set by a GP. It is important for an LP to review the initial fund documents to determine if there is a deemed consent provision which could be applicable to the approval of selling the asset to a continuation fund and also to review the disclosure packet to determine if it, in turn, contains a deemed consent provision or a "default provision" by which a decision is made on behalf of the LP regarding participation in the continuation fund.

Another issue to consider is how the transaction will be characterized internally at an LP. While the GP may view a continuation fund as part of the initial investment, some LPs may view a continuation fund as a new transaction, necessitating the need to do additional due diligence, receive board consent and update side letter provisions. Selecting an option in the disclosure packet may be outside the scope of an LP's authorization for the initial investment and therefore necessitate a new formal approval process, including board consent.

How to address new provisions in the continuation fund documents as well as new regulatory requirements applicable to an LP is an issue that both the GP and the LPs should consider. Often, the side letter for the initial fund applies to the continuation fund and LPs are not given the ability to negotiate new terms. Theoretically, the continuation fund organizational documents should mirror the terms in the initial fund's organizational documents. However, these documents need to be updated to address new laws and regulations. In addition, a GP may have updated terms within its fund documents. By changing the terms, the GP is then imposing new terms on the investors without the ability of the investors to negotiate these terms. For example, the continuation fund's documents may have been updated to address changes to legal and regulatory considerations applicable to the fund, and an LP may well have created a new form side letter provision that addresses these changes. If the LP is unable to negotiate the terms for the continuation fund, it is unable to apply its typical terms to the continuation fund.

In reviewing any changes in laws, regulations or policies applicable to an LP, the LP will need to determine if any such changes require an updated side letter. This is particularly a concern if the continuation fund would be deemed a new investment under the LP's internal process. If new provisions are necessary, the LP should discuss this with the GP.

While each situation is unique and ultimately a GP wants to minimize expenses associated with renegotiating an investment, a GP should be mindful of the legal and policy concerns facing an LP. Ignoring such issues could create reputational issues for the GP or limit an LP's willingness to continue investing with a GP. While presenting an LP with stark options that the LP must choose between on an abbreviated schedule may not rise to a breach of the GP's fiduciary duties, at some point, ignoring the policy and other issues facing LPs may create relationship and reputational issues for the GP. GPs who are mindful of their reputation among institutional investors should not put their LPs in difficult situations, and doing so may well lead to an LP electing to pass on the GP's next fund.

In looking at practical LP considerations, a GP should consider:

- Should the LPs be given advance notice, such as providing a letter previewing the potential for a continuation fund prior to providing the disclosure packet?
- How should the GP balance advance notice to the LPs with confidentiality concerns for the investment?
- Are the LPs given enough time to review the disclosure packet and make an election?
- How should the GP address legal, regulatory and policy issues specific to an LP in a manner that provides all LPs the ability to address such issues without unduly slowing the process?
- If an LP has participated in a subsequent fund, should the side letter from the subsequent fund be used for the continuation fund as it will have addressed the most up to date legal and policy requirements?

Regulatory Outlook

Although the SEC has yet to issue specific guidance addressing continuation funds, it has signaled that it is aware of issues presented by these transactions and is actively monitoring this space. In a 2020 Risk Alert, the SEC's Office of Compliance Inspections and Examinations (now the Division of Examinations) published its observations from private fund examinations involving adviser-led fund restructurings.[20] Recently, the Division published its 2021 Exam Priorities, which indicated that it intends to conduct examinations of private fund advisers to assess conflict of interest issues related to fund restructurings.[21] Moreover, industry groups, such as the Institutional Limited Partners Association, have been raising concerns with these types of funds and ways for them to address the needs of investors more generally. The challenge facing GPs, like any issues involving conflicts of interest, is that continuation funds exist in a gray area and it is up to the GP to determine how to act, both as a fiduciary and as a business to ensure that LPs will want to continue to invest with the GP. In the end, it is important for a GP to be a good partner to its LPs and consider their individual interests, which may include regulatory issues applicable to the LP and practical issues that are internal to the LP. GPs should consider how they are addressing these issues when forming continuation funds and take steps to ensure that they are upholding their fiduciary and contractual obligations.

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NOTES

1 A typical extension provision might be that the GP can extend the term, in its discretion, for two additional one-year periods, with further extension(s) being subject to LP consent.

2 *See* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963). While the Advisers Act grants the SEC with substantial oversight power, it offers little to private parties and does not provide LPs with a private right of action. Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979) (the only remedy available to a private party was "a limited private remedy . . . to void an investment adviser's contract, but that the Act confers no other private causes of action, legal or equitable.").

3 *Capital Gains*, 375 U.S. at 195 (internal quotations omitted).

4 *Transamerica Mortg. Advisors*, 444 U.S. at 24 (the only remedy available to a private party was "a limited private remedy . . . to void an investment adviser's contract, but that the Act confers no other private causes of action, legal or equitable").

5 *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers,* Advisers Act Rel. No. 5248, 8 (June 5, 2019) (hereinafter Fiduciary Release); *see also Capital Gains*, 375 U.S. at 194.

6 *See, e.g., In the Matter of TPG Capital Advisors, LLC,* Advisers Act Rel. No. 4830 (Dec. 21, 2017); *In the Matter of Blackstone Management Partners LLC*, Advisers Act Rel. No. 4219 (Oct. 7, 2015).

7 *See* Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006). After the Goldstein decision, the SEC adopted Rule 206(4)-8 to extend the antifraud provisions of the Advisers Act to communications with investors and prospective investors in private funds. *See Prohibition*

of Fraud by Advisers to Certain Pooled Investment Vehicles, Advisers Act Rel. No. 2628 (Aug. 3, 2007).

8 *See* Boxer v. Husky Oil, 329 A.2d 995, 997 (Del. Ch. 1981).

9 *See* 6 Del. C. § 17-1101(d). In 2004, the Delaware General Assembly amended the Delaware Limited Partnership Act and Limited Liability Company Act explicitly to permit parties to eliminate fiduciary duties. *See* 74 Del. Laws 589 and 612 (2004). Prior to these amendments, a LPA could expand or restrict a partner's fiduciary duties, but not eliminate them. *See* Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 167 (Del. 2002).

10 *See* Fiduciary Release at n. 31.

11 Fiduciary Release at 9-10.

12 In the corporate law context, for instance, Delaware courts grant substantial deference to boards of directors applying business judgment to corporate matters, *see* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (Del. 1985), but, in conflict situations where the procedural remedies employed by the board do not resolve the conflict properly, it becomes incumbent upon the board to prove the "entire fairness" of the transaction. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983). El Paso, below at n.15 and the associated text, illustrates the litigation burden fiduciaries in a limited partnership face when courts do not defer to the judgment of those fiduciaries.

13 One exception which is often seen is that a material impairment in an asset's value may be treated as a realized loss both for purposes of the distribution waterfall and for management fees due after a fund's investment period.

14 *See* SEC v. Bluepoint Investment Counsel, Case No. 19-cv-809 (W.D. Wis., Sept. 30, 2019) (alleging that an adviser breached its fiduciary duties by unreasonably valuing portfolio company assets, including by, among other things, interfering with the independent appraiser's valuation to cause a higher appraisal value); *see In the Matter of Deer Park Road Management Company, LP and Scott E. Burg*, Advisers Act Rel. No. 5245 (June 4, 2019).

15 *See* In re El Paso Pipeline Partners, L.P. Deriv. Litig., C.A. No. 7141-VCL, 9 (Del. Ch. Apr. 20, 2015).

16 *Id.* at 54.

17 *Id.* at 55.

18 This is one aspect in which the prior practice of selling an asset between an initial fund and a subsequent fund better aligned interests. In that instance, the effect of an incorrectly high valuation would be to reduce the economics to the investors in the subsequent fund, and thus to the GP in respect of its carried interest.

19 *See* Fiduciary Release, *supra* n.5, at 7-8. Notably, the Fiduciary Release suggests *less* disclosure suffices for institutional clients. Thus "[t]he fact that disclosure must be full and fair does *not* require advisers to make an affirmative determination that a particular client understood the disclosure and that the client's consent to the conflict was informed. Rather, disclosure *should* be designed to put a client in a position to be able to understand and provide informed consent . . . ." *Id.*

20 *See* Observations from Examinations of Investment Advisers Managing Private Funds (June 23, 2020) (observing that "[a]dvisers purchased fund interests from investors at discounts during restructurings without adequate disclosure regarding the value of the fund interests" and "did not provide adequate information in communications with investors about fund restructurings" in certain fund restructurings).

21 *See* SEC Division of Examinations, 2021 Exam Priorities, 30 (Mar. 2021) (explaining that it will examine private fund advisers for, among other things, "conflicts around liquidity, such as adviser led fund restructurings, including stapled secondary transactions where new investors purchase the interests of existing investors while also agreeing to invest in a new fund").