

Morgan Lewis

2017 ANNUAL

PRIVATE FUND INVESTORS ROUNDTABLE

Private Funds: Latest Issues and Trends

October 5, 2017

PRIVATE FUNDS: LATEST ISSUES AND TRENDS

MARION GILIBERTI BARISH

CHRISTOPHER DLUTOWSKI

GAWAIN HUGHES

GEORGETTE SCHAEFER

Private Equity: The LP Focus in 2017

- Partnership Expenses
- Affiliates as Service Providers
- Transfer of Carried Interest/Change of Control
- Borrowing

Private Equity: The LP Focus in 2017

- Management Fee and Offsets
- Key Person Replacements/Time and Attention/Succession Plans
- Conflicts
- Disclosure and Transparency

Hedge Funds: The LP Focus in 2017

- Management Fees and Performance Allocations/Fees
 - Downward pressure on management fees
 - Expanded use of hurdles and benchmarks
 - Discounts
 - Alternative approaches
- Standard of Care, Exculpation and Indemnification
 - Contractual fiduciary duties
 - Expanded carve-outs to and other limits on exculpation and indemnification
 - Notice of indemnification claims and payments

Hedge Funds: The LP Focus in 2017

- Enhanced Transparency
 - Customized reporting
 - Notice of material events
- Investor Pressure for Improved Liquidity
 - Less notice and more frequent withdrawal rights for liquid funds
 - Limits on lock-ups
 - Limits on withdrawal gates
 - Accelerated withdrawal rights upon certain events

Issues and Trends in the Finance Area

- Subscription Facilities/Capital Call Lines
 - Issues highlighted in ILPA guidance
 - Current market trends for investor letters
 - Expansion of types of lenders
- New Product Offerings
 - Hybrid facilities combining traditional lending and financial products
 - Expanded use of central clearing for repurchase transactions

Issues and Trends in the Finance Area

- Impact Investing
 - When investment takes the form of a loan
 - Monitoring benchmarks
 - Incentives for achieving benchmarks

UK Legislative Changes to Private Fund Limited Partnership Law

- Legislative reform of the UK Limited Partnership Act 1907 has created a new category of “user friendly” limited partnerships for private investment funds.
- Private Fund Limited Partnership (PFLP) – a modern and flexible regime for private funds.
- Came in to force – 6 April 2017
- Designation as a PFLP
 - New private fund limited partnerships will apply for PFLP status.
 - Existing private fund limited partnerships can also apply for PFLP status on a going-forward basis (no automatic “grandfathering”)
- Conditions of PFLP status
 - Partnership is constituted by a written agreement
 - Partnership is a “collective investment scheme”
 - Conditions fulfillment confirmation required from general partner

UK Legislative Changes to Private Fund Limited Partnership Law

- Capital contributions from limited partners
 - No longer strictly required.
 - Capital contributions can be withdrawn during the PFLP's lifetime.
 - No need for capital and loan commitment splits.
- Easing administrative burden
 - No requirement to register or update details that are not of significance to the public.
 - No requirement to disclose nature of partnership business, amount of each limited partner's Capital contribution, and the term of the limited partnership.
 - Exempted from publishing Gazette Notices for transfers of limited partner interests.
- Winding up
 - Limited partners will be permitted to appoint a third party to wind up a PFLP subject to agreement.

UK Legislative Changes to Private Fund Limited Partnership Law

Non-Exhaustive “White List” of Limited Partner Permitted Actions, Including:

- Participating in decisions about:
 - variation/waiver of LPA term or associated documents;
 - changing nature of partnership business
 - inclusion/removal of partners; and
 - ending/extending partnership term;
 - Entering/acting under contract with other partners (excluding taking part in management);
 - Consulting or advising with GP/Manager about affairs/accounts of partnership;
 - Participating in decisions about changing persons conducting day-to-day partnership management;
 - Acting, or authorising a representative to act, as director, member, employee, officer or agent of,
 - or a shareholder or partner in
 - a general partner in the partnership or
 - another person appointed to manage or advise the partnership in relation to the affairs of the partnership;
 - Appointing/nominating of (or revoking) a representative on a committee to take any action not involving partnership management;
- provided that the limited partner does not take part in the management of the partnership business;

UK Legislative Changes to Private Fund Limited Partnership Law

Non-Exhaustive “White List” of Limited Partner Permitted Actions, Including:

- Participating in a decision approving/authorising proposed action by GP/Manager on:
 - disposal/acquisition of partnership business;
 - acquisition/disposal of type of (or specific) investment;
 - exercise of partnership’s rights in an investment;
 - participation by a limited partner in a particular investment by the partnership;
 - incurring, extending, varying or discharging of debt by the partnership; and
 - the creation, extension, variation or discharge of any other obligation owed by the partnership.

Politicisation of EU Fund Structures post-Brexit?

- **Indications**

- Anecdotal signs of European Investment Fund (EIF) now avoiding investing in UK fund vehicles due to Brexit.
- Choosing other European jurisdictions instead, such as Luxembourg SCSP.
- This includes EIF's existing sponsor relationships where previous fund vehicles have been in UK.
- This may be a policy decision.
- Werner Hoyer, EIB President, said shareholders would be right to ask 'why they should approve projects at the bank's board that commit us for 25 years while we know exactly that the UK will no longer be a member of the EU after three years'. (Bloomberg)

- **EIF Influence**

- UK may lose anchor investor in an EU divorce.
- Cornerstone in many European first-time funds.
- 2011-2015, EIF committed €2.3 billion to 144 UK-based venture/private equity firms
- 2014, directly contributed 12% of all venture money raised in Europe.
- Funds with EIF as a key limited partner responsible for 45% of European venture money raised.
- 2015, EIF had €9.9 billion committed to venture capital and private equity in Europe.

- **Impact on UK Fund Vehicles**

- Too early to say what the extent of the EIF's Brexit-related politicisation of UK fund vehicles will be. We will monitor developments.

*Invest Europe - <http://www.investeurope.eu/>