The Private Equity Review

Twelfth Edition

Editor
Stephen L Ritchie

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Twelfth Edition

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Stephen L Ritchie

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PREFACE

The 12th edition of *The Private Equity Review* comes in the wake of a successful – but bumpy – year for dealmakers, which came on the heels of 2021's record-breaking level of activity. While private equity dealmakers remained active in 2022, with merger and acquisition (M&A) activity at the second-highest level on record (and well above 2020 and pre-pandemic levels), that activity was largely a continuation of 2021's unprecedented momentum carrying into the first half of 2022 before dropping sharply in the latter part of the year. That drop was due to a confluence of factors, including rising borrowing costs, challenged debt markets, high inflation, fears of a potential recession and declining boardroom confidence. The net result was an overall reduction in deal activity of roughly 40 per cent by value and 15 per cent by deal count from 2021. Large deals were up slightly as a percentage of overall M&A value but down in absolute numbers from 2021 levels, driven by the steep drop in mega-deals in the second half of 2022. Private equity exit activity decreased substantially in 2022, with value down 63 per cent and count down 28 per cent. Consistent with these trends, initial public offering and M&A by special purpose acquisition corporations (SPACs) – one of the biggest drivers of 2021's record-breaking deal volume – came to a screeching halt in 2022. The number of liquidated SPACs, with SPAC funds being returned to investors without a deal being done, shot up in the fourth quarter of 2022, with more expected as additional SPACs face upcoming expirations. Although 2022 did see a steady increase in announced de-SPAC M&A activity, likely due in part to SPAC sponsors seeking a deal ahead of the significant number of SPACs approaching their expiry dates, these deals were done at much smaller average sizes than peak 2021 levels and amid an overall background of increasing numbers of terminated de-SPAC transactions.

That said, more than US$1 trillion of global activity in 2022 was attributed to private equity sponsors – at roughly 33 per cent of global deal value, exceeding the prior all-time-high metric set in 2021. Private equity sponsors continued to seek out larger public targets in record number, with overall take-private activity and value surpassing recent levels – the average take-private deal size was US$3.5 billion in 2022, up significantly from US$2.6 billion in 2021. With continued confidence in the performance of private equity as an asset class, fundraising activity remained strong as well, with private equity funds raising aggregate capital of over US$1.2 trillion and continued record amounts of available capital, or dry powder, at, by one estimate, over US$1.4 trillion.

The year 2022 again demonstrated private equity's enormous impact and the continuing creativity of private equity dealmakers. Given private equity funds' success, creativity and available capital, private equity will continue to play a major role in the global economy, not

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only in North America and Western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa, notwithstanding ongoing and potential additional political, regulatory and economic challenges.

Private equity professionals need practical and informed guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. We intend for *The Private Equity Review* to help address this need. It contains contributions from leading private equity practitioners in 14 different countries, with observations and advice on private equity dealmaking and fundraising in their respective jurisdictions.

As private equity has grown, it has faced increasing regulatory scrutiny throughout the world. Adding to this complexity is the fact that regulation of private equity is not uniform from country to country. As a result, the following chapters also summarise these various regulatory regimes.

I want to thank everyone who contributed their time and labour to making this 12th edition of *The Private Equity Review* possible. Each of these contributors is a leader in their respective markets, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2023

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Part I

Fundraising

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Chapter 12

UNITED STATES

Joseph A Smith and Allison Scher Bernbach[1]

I GENERAL OVERVIEW

As was the case for other economic sectors, 2022 was a fulcrum year for the private equity markets in the United States. The year was marked by the resurgence of inflationary pressures that had been unseen for a generation, in response to which central banks acted swiftly to end an era of cheap money, and recessionary fears further stoked by geopolitical events in Europe and Asia. By the middle of the year, these factors combined to make fundraising and deal underwriting much more difficult than they had been since the brief recession at the inception of covid lockdowns in early 2020 and perhaps even the financial crisis of 2007 and 2008. Meanwhile, proposals to expand the federal regulation of private equity fundraising imposed additional burdens on the industry. Notwithstanding these challenges, robust fundraising earlier in 2022, combined with a general view by market participants that private equity business is fundamentally cycle durable, left fundamental long-term optimism unshaken. The legal architecture of this industry and recent regulatory developments are discussed below.

II LEGAL FRAMEWORK FOR FUNDRAISING

i Fund structures

Private equity funds investing in the United States are predominantly structured as limited partnerships, with the jurisdictions of choice being Delaware and the Cayman Islands. The limited partnership statute and specialised judicature of Delaware are widely recognised as providing a flexible and reliable legal framework for private funds. Onshore structures are typically preferred by domestic investors. Foreign investors frequently have tax considerations associated with investing in United States-based private funds (including state and federal filing obligations, financial reporting and concerns over 'effectively connected income', discussed below) that favour investment through an offshore 'blocker' entity, established as either a parallel or a feeder vehicle to the main fund.

Fund sponsors generally establish a special purpose vehicle to act as the general partner to a fund vehicle, usually structured as a Delaware limited liability company (LLC) or limited partnership, the general partner of which is most often, in turn, an LLC. A separate investment manager or adviser entity is commonly used for a series of funds, which provides

1 Joseph A Smith and Allison Scher Bernbach are partners at Schulte Roth & Zabel LLP. The authors would like to thank David Cohen, Elie Zolty, Georgia Haniuk and Sergio Pagliery for their contributions to this chapter.

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ongoing office infrastructure and bears ongoing registration and compliance burdens concomitant with this role (see Section III.iii below). This structure permits the sponsor or key executives to maintain control of investment decisions and operational budgets, while segregating incentive payments and investment income among funds and executives on a tax-neutral basis.

ii Fund terms

From a commercial standpoint, very few changes have been witnessed in the headline terms for US funds in recent years. The consistency in prevailing fund terms is a function of an adverse selection process in which terms are driven by top-quartile fund managers, and the pandemic has only perpetuated this. The strongest managers, aided by the 'flight to quality' (or, as some say, 'flight to the familiar'), are able to maintain their desired terms and consistent comments from limited partners belie their acceptance of classical private equity fund terms. First-time and even partially challenged managers with sufficient investor interest are then able to leverage these accepted market terms in their favour, with concessions that can be material but nonetheless maintain the paradigm established by more successful general partners.

iii Taxation of the fund and its investors

Taxation of the fund

Typically, the fund is organised as a limited partnership, which is a 'pass-through' entity for federal tax purposes and is thus generally not subject to federal income taxes at the fund level. Instead, the income is passed through to its investors, which are taxed on their respective shares of income attributable to the fund.

A partnership may, however, be subject to taxation at the level of the fund (as distinct from any additional federal income tax that is imposed on investors) if the partnership is publicly traded, which private equity funds generally are not.[2]

Taxation of fund investors

Because most private equity funds are structured so that the fund itself is not subject to tax, the fund's income instead passes through to its investors, who then pay tax on their proportionate share of such income. It is worth noting that private equity funds typically

2 A publicly traded partnership (PTP) is a foreign or domestic partnership whose interests are 'traded on an established securities market' or are 'readily tradable on a secondary market or the substantial equivalent thereof'. Private equity funds are rarely traded on an established securities market; however, transfers of interests in private equity funds may arguably cause a fund to be deemed to be readily tradable on the 'substantial equivalent' of a secondary market. While these concepts are not well defined, US Treasury Regulations provide a number of 'safe harbours' on which a fund can rely to avoid PTP status. If the fund falls within a safe harbour, interests in the fund will not be deemed readily tradable on a secondary market or the substantial equivalent thereof. Typically, the fund will rely on the 'limited trading' safe harbour and the 'block transfer' safe harbour. The limited trading safe harbour, often referred to as the 2 per cent safe harbour, applies if the fund does not permit transfers of more than 2 per cent of the total interests in a partnership's capital or profits in any fiscal year. The block transfer safe harbour allows the fund to disregard transfers of more than 2 per cent of total interests in the partnership's capital or profits. A number of rules apply for the purposes of computing the 2 per cent limit, but discussing them is beyond the scope of this chapter.

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raise a significant proportion of their capital from entities that are US tax-exempt institutions (such as university endowments and pension funds) or non-US entities (such as pension funds or sovereign wealth funds). As a general rule, each of these types of investor is not subject to US tax on its share of income generated by a private equity fund. There are important exceptions to this general rule, which are described below.

Under Section 512(b) of the Internal Revenue Code (the Code), US tax-exempt organisations are exempt from federal income tax on passive income such as interest, dividends and capital gains. Nonetheless, these organisations are subject to federal income tax on their unrelated business taxable income (UBTI). There are two sources of UBTI: (1) income derived from an unrelated trade or business and (2) debt-financed income. The former type of income is typically generated when a fund invests in an operating business that is itself structured as a pass-through for tax purposes. The latter type of income is generated when the fund itself borrows money to make investments. In order to maximise their after-tax return, US tax-exempt investors often require the fund to take action to minimise UBTI.

In general, non-US investors are exempt from federal income tax on their share of capital gains generated by a private equity fund. Non-US investors that are engaged in a trade or business in the United States are taxed on their income that is 'effectively connected' with that business, often referred to as effectively connected income (ECI). Additionally, if a non-US investor has ECI or is a member of a partnership that is engaged in a trade or business in the United States, the investor is required to file a US federal income tax return. Typically, ECI is generated from two sources: (1) income from a business that is itself organised as a pass-through entity and (2) any gain from the disposition of US real property interests (USRPI). A USRPI will generally consist of interests in land, buildings and any US corporation for which 50 per cent or more of the fair market value of its real estate and trade or business assets consists of USRPIs. Non-US investors will also typically seek to maximise their after-tax returns by requiring the fund to undertake to minimise ECI.

III REGULATORY FRAMEWORK

Private equity funds in the United States are regulated principally by federal statutes, although fund entities, if formed in the United States, are formed and governed pursuant to state law.

The primary federal statutes – namely, the Securities Act of 1933, as amended (the Securities Act), the Investment Company Act of 1940, as amended (the Investment Company Act), the Investment Advisers Act of 1940, as amended (the Advisers Act), and the Employee Retirement Income Security Act of 1974, as amended (ERISA) – are discussed briefly below. The Securities Exchange Act of 1934, as amended (the Exchange Act), plays a significant role in the contexts of placement agent activities.[3]

3 The Exchange Act imposes significant additional restrictions on an issuer with more than US$10 million in assets where 2,000 or more persons hold any class of the issuer's equity securities (Section 12(g) and Rule 12g-1). General anti-fraud provisions of the Exchange Act nevertheless operate to attach civil liability to material misstatements and omissions of material fact in connection with any offering of securities (Section 10(b) and Rule 10b-5).

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i The Securities Act

The sale of interests in a private equity fund is governed by the Securities Act, which requires securities sold in the United States to be registered with the Securities and Exchange Commission (SEC) unless an exemption is available. To avoid the burdensome registration and disclosure requirements under the Securities Act, most funds structure their offerings in a manner that qualifies for one or both of the safe harbours promulgated by the SEC that operate within the scope of a general statutory exemption for private placements under Section 4(a)(2) of the Securities Act. Importantly, the Securities Act also applies to any resale of limited partnership interests in the secondary market, so the governing documents of a fund generally restrict the manner in which an investor may transfer its interest.

Regulation D provides an exemption for private offerings of securities to US persons who qualify as 'accredited investors',[4] and was amended in 2013 to permit general solicitation (i.e., advertising to the public) in limited circumstances subject to certain other limitations. Issuers relying on Regulation D are required to file Form D with the SEC providing brief details of the offering within 15 calendar days of the date of first sale, and to amend Form D on an annual basis in respect of an ongoing offering.[5] In addition, issuers relying on Rule 506 of Regulation D[6] must not be subject to any 'disqualifying event', as set forth in the Rule.[7]

Regulation S[8] provides an exemption for certain offers and sales of securities outside the United States, whether conducted by foreign or domestic issuers, in recognition of the underlying policy and objectives of the Securities Act to protect US investors. In general,

4 'Accredited investors' are, generally: regulated entities (such as banks, insurance companies or registered investment companies); natural persons (or spouses or spousal equivalent) with (joint) net worth of more than US$1 million (excluding the value of any primary residence) or meeting certain income thresholds; natural persons based on certain professional certification, designations or credentials or other credentials issued by an accredited educational institution; natural persons who are 'knowledgeable employees'; corporations, trusts, partnerships, limited liability companies with assets of more than US$5 million; SEC and state-registered investment advisers, exempt reporting advisers, rural business investment companies and certain employee benefit plans; any entity that owns 'investments', as defined in Rule 2a51-1(b), in excess of US$5 million and was not formed for the specific purpose of investing in the securities offered; family offices with at least US$5 million in assets under management and their 'family clients'; and directors, executive officers or general partners of the issuer selling the securities (see Rule 501 of Regulation D). Securities can be sold to 35 other sophisticated purchasers (who are not accredited investors) without losing the benefit of the Regulation D safe harbour (see Rule 506 of Regulation D).

5 See further: https://www.sec.gov/education/smallbusiness/exemptofferings/formd.

6 Rule 506 of Regulation D (17 CFR 230.501 et seq.) sets out the requirements with which an issuer must comply in order to benefit from the safe harbour assurance that its offering falls within the private offering exemption contained in Section 4(a)(2) of the Securities Act. An offering that fails to satisfy the requirements of Regulation D can nevertheless qualify for exemption under Section 4(a)(2) of the Securities Act, unless general solicitation has taken place pursuant to Rule 506(c) (discussed below).

7 17 CFR Section 230.506(d). The 'bad actor' rule applies when a 'covered person' is subject to a 'disqualifying event'. The term 'covered person' includes both the issuer and the investment adviser to the issuer. 'Disqualifying events' include certain criminal convictions, certain court injunctions and restraining orders, certain SEC disciplinary and cease and desist orders, final orders of certain state and federal regulators, and suspension or expulsion from any self-regulatory organisation, as well as other events enumerated in the rule.

8 Rules 903 and 904 of Regulation S (17 CFR 230.901 et seq.) establish requirements in order for the issuer and any reseller, respectively, to benefit from the safe harbour assurance that its non-US sale or resale is exempted from the registration requirements contained in Section 5 of the Securities Act.

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two basic requirements must be met for an offering to qualify under Regulation S: first, the offer or sale must be made in an 'offshore transaction'; and, second, no 'directed selling efforts' may be made in the United States by the issuer, a distributor, any of their respective affiliates or any person acting on their behalf in respect of the securities.[9] Notwithstanding the latter requirement, contemporaneous domestic and offshore offerings may be undertaken in reliance on both Regulations D and S.

ii The Investment Company Act

An investment fund (as distinct from any manager or adviser thereof) is generally subject to regulation by the SEC as an 'investment company' unless an exception from the Investment Company Act applies. Although the term 'investment company' broadly encompasses any entity that is engaged primarily in the business of investing, reinvesting or trading in securities,[10] in practice, private equity funds make use of two key exceptions from this definition.

First, under Section 3(c)(1), an entity that would otherwise qualify as an investment company is exempt from registration if it does not make a public offering of its securities and does not have more than 100 beneficial owners (or, in the case of a qualifying venture capital fund,[11] 250 persons).[12] Although this exception is available irrespective of the financial sophistication or wealth of the investors (and permits participation by a potentially unlimited number of 'knowledgeable employees'),[13] compliance with Regulation D (discussed above) will generally require investors to satisfy the 'accredited investor' test.

In addition, beneficial ownership is determined on a 'look-through' basis for any entity:

a that has been 'formed for the purpose' of investing in the fund;

b that holds more than 10 per cent of the outstanding securities of the fund and itself relies on an exception pursuant to Section 3(c)(1) or 3(c)(7); or

c whose investors retain investment discretion in respect of their participation in the entity's individual investments.

9 See further Rules 902(c) and (h) of Regulation S.

10 Investment Company Act, Section 3(a)(1).

11 A qualifying venture capital fund is 'a venture capital fund that has not more than $10,000,000 in aggregate capital contributions and uncalled committed capital, with such dollar amount to be indexed for inflation once every 5 years by the Commission, beginning from a measurement made by the Commission on a date selected by the Commission, rounded to the nearest $1,000,000'. 'Venture capital fund' is defined in Investment Advisers Act Rule 203(l)-1.

12 The SEC has developed guidance on 'integration' (primarily in the form of no-action letters) indicating when parallel offerings will be combined for purposes of calculating the 100 beneficial owner threshold (e.g., side-by-side onshore and offshore offerings to facilitate efficient tax treatment of different classes of investors are typically not subject to integration (Shoreline Fund, LP, SEC No-Action Letter, April 11, 1994)). The doctrine extends to integration of offerings under the Securities Act, where the SEC's integration framework has been codified in Rule 152.

13 'Knowledgeable employees' for this purpose are defined in detail by Rule 3c-5(a)(4) and include executive officers, directors and trustees of a company that would be an 'investment company' but for the exclusions contained in Section 3(c)(1) and 3(c)(7) of the Investment Company Act, as well as employees who have participated in the investment activities of such company (or substantially similar functions or duties for another company) for at least the preceding 12 months. Issuers must nevertheless take care to observe applicable requirements such as those under tax regulations and the Exchange Act.

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This exception also requires that no public offering of the securities be made in the United States, which will normally be the case when an issuer has complied with the requirements of Regulation D or S to avoid registration under the Securities Act (including offerings employing general solicitation under Rule 506(c)).

Second, a further exception is available under Section 3(c)(7) for an 'investment company' if it does not make a public offering of its securities (see above) and the ownership of such securities is limited exclusively to 'qualified purchasers', which include:[14]

a individuals who own at least US$5 million in investments (including joint or communal property);[15]

b family companies with at least US$5 million in investments;

c trusts not formed for the specific purpose of acquiring the securities in question, provided that the trustee or discretionary manager is otherwise a 'qualified purchaser'; and

d companies with at least US$25 million in investments.[16]

This exception is favoured by larger funds due to the higher qualification standard and lack of 100-investor limitation. For investors in offshore funds, these qualification criteria apply only to US persons who are admitted into the fund (in keeping with the SEC's jurisdictional policies focused on protecting domestic investors).[17]

iii The Investment Advisers Act

In addition to the private fund itself, the investment adviser or manager of a fund is generally subject to registration and regulation under the Advisers Act,[18] which is intended to address the fiduciary nature of the advisory relationship and focuses on the mitigation or disclosure of conflicts of interest inherent in such a relationship.[19]

Investment advisers with more than US$100 million in regulatory assets under management[20] (and certain 'mid-sized' investment advisers with regulatory assets under

14 Section 2(a)(51)(A) of the Investment Company Act.

15 'Investments' for this purpose are defined in detail by Rule 2a51-1 and exclude real estate property that serves as an individual's principal residence for tax purposes (Section 280A of the Code).

16 Those meeting the definition of 'qualified institutional buyer', which includes certain types of registered insurance companies, investment companies, investment advisers and employee benefit plans that in the aggregate own and invest on a discretionary basis at least US$100 million in unaffiliated securities (Rule 144A), are likely to meet the qualified purchaser requirements.

17 Touche Remnant & Co, SEC No-Action Letter (27 August 1984); Goodwin, Procter & Hoar, SEC No-Action Letter (28 February 1997). See also Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Investment Advisers Act, SEC Release No. IA-3222 (22 June 2011), note 294.

18 An 'investment adviser' is any individual or entity that, 'for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities' (Advisers Act, Section 202(a)(11)).

19 See, e.g., SEC Staff of the Investment Adviser Regulation Office, Division of Investment Management: 'Regulation of Investment Advisers by the US Securities and Exchange Commission', March 2013 (SEC Regulation of Investment Advisers).

20 An investment adviser's 'regulatory assets under management' are calculated by determining the market value of the securities portfolios to which the adviser provides continuous and regular supervisory or management services, or the fair value of such assets where market value is unavailable (see also Schulte Roth & Zabel LLP, Client Memorandum, 'Final Rules for the Private Fund Investment Advisers Registration Act of 2010', 8 August 2011). The revised definition includes uncalled capital commitments,

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management between US$25 million and US$100 million) are required to register with the SEC unless an exemption from registration is available, although advisers that qualify for one of the exemptions from SEC registration may also be subject to state-level regulation under similar state statutes.[21] No specific qualifications or exams are required to register as an investment adviser, although detailed disclosures are required about the advisory business, services and fees, background of principals, and applicable policies and procedures.

The SEC mandates comprehensive Form ADV disclosures that are accessible to the public, which must be updated by the investment adviser at least annually (or more promptly in the event of certain material changes).[22] Registered advisers are required to provide each client or prospective client with a 'brochure' containing all the information in Part 2A of Form ADV and a 'brochure supplement' containing all of the information in Part 2B of Form ADV before or at the time of entering into an investment advisory contract and, although not strictly required, as a matter of best practice and consistent with SEC expectations, will frequently provide a copy of Part 2 of Form ADV to each investor in the private funds they manage. In addition, registered investment advisers that manage private fund assets of at least US$150 million are also required to report certain information to the SEC on Form PF, typically on an annual basis within 120 days of the adviser's fiscal year end.[23]

Exemptions from SEC registration and exempt reporting advisers

The Advisers Act provides several exemptions from SEC registration, including exemptions available to advisers to private funds that qualify as either a 'private fund adviser' or a 'venture capital adviser'.[24] While advisers who are exempt from registration are exempt from most compliance obligations under the Advisers Act, certain exempt advisers remain subject to certain provisions of the Advisers Act, including, among others, the anti-fraud provisions contained in Section 206 of the Advisers Act and the pay-to-play rules under Rule 206(4)-5 of the Advisers Act (the Pay-to-Play Rules).[25]

The two most common exemptions applicable to private fund advisers are summarised as follows.

proprietary and family accounts, accounts managed or advised without compensation, and accounts of clients who are not US persons (see also Breslow, SR & Schwartz, PA, Private Equity Funds: Formation and Operation, Section 10:2).

21 SEC Regulation of Investment Advisers, note 47.

22 Annual updating amendments are required to be filed within 90 days of the registered adviser's fiscal year end: Rule 204-1. See also Form ADV General Instructions, Question 4, 'Other-than-annual amendments'.

23 Rule 204(b)-1 was adopted by the SEC and the Commodity Futures Trading Commission in order to assist the Financial Stability Oversight Council in monitoring systemic risk in the US financial system, as mandated by the Dodd-Frank Act. In January 2022, the SEC proposed changes to Form PF reporting for private equity advisers, including, but not limited to, mandatory disclosure within one business day of the occurrence of adviser-led secondary transactions, clawbacks by a general or limited partner, removal of a fund's general partner or termination of a fund or a fund's investment period.

24 Several exemptions from SEC registration are available to investment advisers that satisfy the conditions for each exemption; however, a discussion of all available exemptions is beyond the scope of this chapter.

25 Advisers relying on exemptions from SEC registration may be required to register with one or more state securities regulators.

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Private fund adviser exemption

Private fund advisers are investment advisers with less than US$150 million in assets under management in the United States and which exclusively advise clients that are private funds, whereby:

a a 'private fund' is an issuer that would be an investment company but for the exceptions provided for in Section 3(c)(1) and 3(c)(7) of the Investment Company Act;

b 'assets under management' in the United States include the gross market value (or fair value, if the market value is unavailable) of those assets attributable to any US place of business, including undrawn capital commitments. Proprietary assets (i.e., any sponsor's and affiliates' commitments) may not be excluded for this purpose, but an adviser with its principal office and place of business outside the United States may exclude consideration of its non-US clients for this purpose;[26] and

c the value of such private fund assets under management in the United States must be reviewed annually by the private fund adviser. A private fund adviser whose assets under management in the United States equal or exceed US$150 million has 90 days from the date of its annual update filing to file for registration as an investment adviser with the SEC.[27]

In practice, many foreign advisers with a minimum US presence will qualify for the private fund adviser exemption and file with the SEC as exempt reporting advisers, even if their assets under management exceed US$150 million on a worldwide basis. Careful consideration needs to be given to the activities being conducted from the foreign private fund adviser's US place of business as assets under management from such US place of business must be limited in order to qualify for this exemption.

Venture capital adviser exemption

Venture capital advisers are investment advisers that exclusively advise one or more venture capital funds, regardless of the amount of assets under management. A 'venture capital fund' is a private fund (see above) that:

a represents to investors that the fund pursues a venture capital strategy;

b does not provide investors with redemption rights;

c holds no more than 20 per cent of the fund's assets in non-qualifying investments (excluding cash and certain short-term holdings);[28]

d does not borrow (or otherwise incur leverage amounting to) more than 15 per cent of the fund's assets, and then only on a short-term basis (i.e., for no more than 120 days); and

e is not registered under Section 8 of the Investment Company Act and has not elected to be treated as a business development company.[29]

Advisers relying on the private fund adviser or venture capital adviser exemption report to the SEC as 'exempt reporting advisers' by filing an abridged Form ADV and may be

26 An investment adviser's principal office and place of business is the executive office of the investment adviser from which the officers, partners or managers of the investment adviser direct, control and coordinate the activities of the investment adviser (Rule 203A-3(c)).

27 SEC Regulation of Investment Advisers, note 82.

28 See Rule 203(l)-1(c)(3) for a list of investments considered a qualifying investment.

29 Rule 203(l)-1(a).

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subject to SEC examinations, albeit on a more limited basis. Importantly, exempt reporting advisers are not automatically exempted from state registration, so careful analysis is required when maintaining an office, employing personnel or conducting substantial activities in any US state.

Foreign private advisers

Although there is no general exemption for non-US advisers, a foreign investment adviser with no place of business in the United States and a *de minimis* US investor base may be exempt from registration as a 'foreign private adviser' if it:

a has, in total, fewer than 15 clients in the United States and investors in the United States in private funds advised by the adviser;

b has aggregate assets under management attributable to these clients and investors of less than US$25 million; and

c does not hold itself out generally to the public in the United States as an investment adviser, which does not preclude participation by an adviser in a non-public offering conducted pursuant to Regulation D.[30]

Non-US advisers that satisfy the requirements of a foreign private adviser do not report to the SEC as an exempt reporting adviser, but rather are exempt from SEC registration and reporting obligations entirely.

Compliance obligations of registered investment advisers

In addition to recent regulatory developments discussed further below, registered investment advisers are subject to numerous compliance obligations, including record-keeping obligations and requirements to maintain up-to-date policies and procedures reasonably designed to detect and prevent violations of, inter alia, the Advisers Act, including a code of ethics and the appointment of a chief compliance officer (CCO) responsible for administering those policies. An annual review must be undertaken to consider and address compliance matters that arose during the previous year, changes in the adviser's business, and the effectiveness and comprehensiveness of the adviser's policies or procedures.[31] The SEC's Division of Examinations (formerly the Office of Compliance Inspections and Examinations) conducts periodic routine examinations of registered advisers and, on a more limited basis, exempt reporting advisers, but may also conduct 'for cause' and 'sweep' examinations under certain circumstances.

30 Section 203(b)(3); Section 202(a)(30) of the Advisers Act and Rule 202(a)(30)-1 thereunder.

31 While Rule 206(4)-7 itself does not enumerate specific elements of the required policies and procedures, SEC staff recognise that the application of such policies and procedures may vary widely depending on the size and nature of an adviser's business. In November 2020, SEC Division of Examinations staff issued a risk alert regarding examination observations of investment adviser compliance with Rule 206(4)-7 and specifically observed that 'although the Compliance Rule requires only annual reviews, advisers should consider the need for interim reviews in response to significant compliance events, changes in business arrangements, and regulatory developments'. See also SEC Release No. IA-2204 (17 December 2003); OCIE Risk Alert, OCIE Observations: Investment Adviser Compliance Programs (Nov. 19, 2020).

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Specific restrictions also apply to performance-based compensation,[32] which a registered adviser may charge only to sufficiently sophisticated investors, including Section 3(c)(7) funds (see Section III.ii above) and qualified clients,[33] as well as non-US persons. In addition, registered advisers are required to comply with the requirements of Rule 206(4)-2 under the Advisers Act (the Custody Rule), including the requirement to hold client assets through a qualified custodian (such as a bank or registered broker-dealer), but may be eligible for an exception to certain requirements of the Custody Rule if the requirements of the pooled vehicle audit exception are satisfied.

iv ERISA

US employee benefit plans continue to represent an important source of capital for private equity funds, with almost US$25 trillion in retirement assets available for investment within this sector (up from US$14.2 trillion just seven years ago).

ERISA and extensive rules and regulations promulgated thereunder by the US Department of Labor govern the obligations of fiduciaries responsible for managing pension plans in private industry.[34] Due to the myriad complexities of ERISA and the potentially significant consequences for a fund and its manager if the fund's assets are treated as 'plan assets' for purposes of ERISA of those investors in the fund that are subject to ERISA (including, among other things, heightened fiduciary standards, rules governing the receipt of carried interest and prohibited transaction rules), specialist expertise should always be sought if a private equity fund anticipates accepting commitments from such investors.

In practice, private equity funds generally seek to avoid being classified as holding plan assets by relying on one of the following exemptions, each of which can be described only very generally here.

Limited participation in the fund by benefit plan investors

If benefit plan investors own less than 25 per cent of each class of equity interests of the fund, then the assets of the fund will not be treated as plan assets for the purposes of ERISA. It should be noted that governmental plans, most church plans and non-US employee benefit plans are not counted as benefit plan investors for this purpose. In making this determination, the manager must exclude the interests in the fund held by the fund manager and its affiliates (other than interests held by individual retirement accounts of employees and partners of the fund manager and such affiliates) from the denominator for the purposes of this calculation. In addition, the 25 per cent test must be performed not just at each closing but also every time there is an investor default, a transfer of fund interests, formation of a co-investment

32 Section 205(a) of the Advisers Act restricts the scope of persons from whom investment advisers may receive 'compensation on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client'.

33 Rule 205-3: A 'qualified client' includes an investor that has at least US$1.1 million under management with the investment adviser, a net worth of at least US$2.2 million (including joint property but excluding the value of a natural person's primary residence), qualified purchasers (footnote 14, above), and certain knowledgeable employees of the investment adviser. Under Rule 205-3, the SEC is empowered to update by order the dollar thresholds in the 'qualified client' definition to adjust for inflation. The dollar amounts listed above reflect the June 2021 SEC Order. See SEC Release No. IA-5756 (June 17, 2021).

34 In particular, the Plan Asset Regulation issued by the US Department of Labor (29 CFR 2510.3-101).

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vehicle or formation of an alternative investment vehicle. In the latter two cases, if not all investors participate in such vehicle, the chances could increase that such vehicle may fail the 25 per cent test.

The venture capital operating company exception

A private equity fund may qualify as a venture capital operating company (VCOC) if, among other things, it invests at least 50 per cent of its assets (other than short-term investments pending long-term commitment or distribution to investors), valued at historical cost, in operating companies as to which it obtains direct contractual management rights (qualifying investments) and it actually exercises those rights each year in the ordinary course in respect of at least one of its qualifying investments.[35] Once again, there are several formal hurdles to surmount to obtain and maintain VCOC status. Among other things, the 50 per cent test described above must be met at the time the fund makes its first long-term investment. Hence, if a fund's first long-term investment is not a qualifying investment, the fund can never qualify as a VCOC. Because of this strict requirement, if a fund initially meets the under 25 per cent test described above but the fund is designed to permit it to fail the 25 per cent test at the fund's final close and the fund makes its first long-term investment before it is closed to new investors, the fund will want to ensure that its first investment will be a qualifying investment unless, at the time of the first investment, it is willing to give up the possibility of failing the 25 per cent test.

Also, although the 50 per cent test for VCOCs recognises that not all long-term investments must be qualifying, the 50 per cent test must be passed on one day during a 90-day valuation period, which typically begins on the anniversary of the first investment.[36] For the purposes of the VCOC rule, operating companies are companies that are, either themselves or through majority-owned subsidiaries, actively engaged in the production of goods and services, but also include real estate operating companies (REOCs), which are discussed below. Thus, the VCOC exception is not available to funds of funds and will typically not be available to secondaries funds because the underlying investments are funds and not operating companies. Further, the VCOC exception will not typically be available to credit funds that lend to creditworthy borrowers because of the inability of such funds to obtain direct contractual management rights from the borrowers, particularly if that fund is not heavily engaged in loan origination. Notwithstanding that the VCOC rule is cumbersome, the VCOC requirements are generally consistent with the basic business objective of most standard private equity funds: active involvement with the management of the underlying portfolio companies in pursuit of value creation on behalf of fund investors.

35 Qualifying investments are either venture capital investments in respect of which the fund has obtained certain management rights permitting the fund 'to substantially participate in, or substantially influence the conduct of, the management of the operating company' or derivative investments that arose from a prior venture capital investment: see 29 CFR 2510.3-101(d).

36 There is an exception to this 50 per cent rule for a VCOC that has elected to declare that it is in its distribution period. This will occur, if at all, towards the end of the life of the fund and it is subject to other technical requirements

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The REOC exception

The REOC exception is similar to the VCOC exception and is used by many real estate funds or by the underlying real estate ventures in which a fund that itself qualifies as a VCOC may invest.[37] For a real estate investment to qualify for REOC compliance purposes, the REOC must have rights to participate directly in the management or development of the underlying real property. As an obvious corollary to this principle, the real estate must be actively managed or developed. Accordingly, fallow land and triple net leased assets will not qualify as 'good' assets for REOC qualification. As is the case with VCOCs, if a REOC's first long-term investment is not a qualifying investment, the entity in question can never qualify as a REOC, and 50 per cent of a REOC's investments, once again measured by historical cost, must be qualifying investments on at least one day during a 90-day annual valuation period (typically beginning on the anniversary of the first long-term investment). Among other things, a REOC must also actually exercise management rights in the ordinary course in respect of at least one of its qualifying investments in any given year. In sum, although the rules for REOC qualification are also complex and nuanced, they are generally consistent with the investment objectives of most value-added, opportunistic and core real estate private equity funds that seek to create value through active involvement in the management of underlying real estate assets.

IV REGULATORY DEVELOPMENTS

i The fiduciary duty

Regardless of their registration status, investment advisers are subject to statutory and common law fiduciary obligations towards their clients, including duties of care and loyalty. Interpreted by courts in tandem with the anti-fraud provisions of the Advisers Act,[38] these duties effectively require an investment adviser to act in its clients' best interests.

In 2019, the SEC issued the Commission Interpretation Regarding the Standard of Conduct for Investment Advisers (the Fiduciary Interpretation), in which it provided guidance in respect of the waivers of fiduciary duty, the disclosure of potential conflicts of interest that may result in impartial advice being given to a client, contractual limits, the duty of care and allocation policies. In particular, the Fiduciary Interpretation highlighted the SEC's position that a fiduciary duty exists, that it exists for all categories of clients[39] and that it cannot be categorically waived.[40] Importantly, in the Fiduciary Interpretation, the SEC

37 29 CFR 2510.3-101(e).

38 Principally contained in Section 206 of the Advisers Act and rules promulgated thereunder.

39 However, the SEC recognises that retail and institutional investors are differently positioned in their ability to assess conflicts. Specifically, institutional clients generally have a greater capacity and more resources than retail clients to analyse and understand complex conflicts and their ramifications. While the application of the investment adviser's fiduciary duty will vary with the scope of the relationship, the relationship in all cases remains that of a fiduciary to the client.

40 Section 206 of the Advisers Act prohibits investment advisers from employing any device, scheme or artifice to defraud any client or prospective client, and from engaging in any transaction, practice or course of business that operates as a fraud or deceit upon any client or prospective client. Advisers Act Rule 206(4)-8 prohibits investment advisers to pooled investment vehicles from (1) making any untrue statement of a material fact or omitting to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or (2) otherwise engaging in any act, practice or course of

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acknowledged that advisers are not required to 'seek to avoid' all conflicts of interest; rather, an adviser may utilise disclosure in lieu of eliminating a conflict, and validated an 'informed consent' concept for conflict of interest disclosures by an adviser.

ii Compliance focus on private fund advisers

The SEC's Division of Examinations 2022 Examination Priorities, released on 30 March 2022 (the Examination Priorities), made it clear that private fund advisers remain a top area of SEC focus. The Examination Priorities emphasised that the Division of Examinations staff (the Examinations staff) would continue to review private fund issues under the Advisers Act, including fiduciary duties, compliance programmes, fees and expenses, custody, fund audits, valuation, conflict of interest, disclosure of investment risks and controls around material non-public information (MNPI).[41]

In addition to the above, the SEC continues to pursue violations under Section 204A of the Advisers Act, signalling that this continues to remain a top priority for the SEC.[42] Importantly, the SEC can and has brought charges against private fund advisers for Section 204A failures even when no insider trading or misuse of MNPI is alleged. In May 2020, the SEC settled charges with a private fund manager alleging that the firm failed to implement and enforce its policies and procedures designed to prevent the misuse of MNPI while a member of its deal team sat on a portfolio company's board and while it was subject to confidentiality provisions in a loan agreement with the portfolio company.[43] Notably, the SEC did not allege that any insider trading or misuse of MNPI occurred.

iii Compliance programme and CCO deficiencies

Over the past year, there has also been an increased focus on the adequacy and effectiveness of an adviser's compliance programme. The Examinations staff continue to emphasise the importance of 'well-designed and resilient' compliance programmes (i.e., those that engage compliance efforts across business and operational lines, that have established processes in place to monitor effectiveness and to pivot or be updated when appropriate, and that include testing on a routine periodic basis, among other characteristics).[44]

business that is fraudulent, deceptive or manipulative in respect of any investor or prospective investor in the pooled investment vehicle. The Fiduciary Interpretation also emphasised that an adviser must eliminate or make full and fair disclosure of all conflicts of interest that might incline the adviser, consciously or unconsciously, to render advice that is not disinterested such that a client can provide informed consent to the conflict.

41 *See* SEC Division of Examinations, *2022 Examination Priorities* (March 30, 2022).

42 Section 204A requires investment advisers to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of MNPI by the adviser or any of its associated persons. Advisers Act Rule 204A-1 (Code of Ethics Rule) requires a registered investment adviser to adopt and maintain a code of ethics, which must set forth standards of conduct expected of advisory personnel and address conflicts that arise from personal trading by advisory personnel.

43 *See In re Ares Management LLC*, Advisers Act Release No. 5510 (May 26, 2020).

44 *See* SEC Division of Examinations, *2022 Examination Priorities* (March 30, 2022), which highlight the calculation and allocation of fees and expenses, including the calculation of post-commitment period management fees and the impact of valuation practices at private equity funds; the potential preferential treatment of certain investors by advisers to private funds that have experienced issues with liquidity, including use of gates or suspensions on fund withdrawals; compliance with the Custody Rule and, in particular, with the 'audit exception' requirements; the adequacy of disclosure and compliance with

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The Examinations staff have continued to stress that CCOs cannot shoulder the compliance responsibilities alone and are not solely responsible for compliance failures. This sentiment, however, does not mean that CCOs can evade SEC scrutiny. During the past year, deficiency letters have cited perceived inadequacies of CCOs, and the SEC settled charges with two separate firms, in which the firms' CCOs were held personally liable for the firm's compliance violations.[45]

iv The Private Fund Rules

Perhaps one of the most significant regulatory developments facing the private fund industry is the SEC's proposed Private Fund Rules – a series of significant reforms, including new rules and amendments to existing Advisers Act rules, applicable to private fund managers (the Proposed Rules). If adopted, the Proposed Rules will, among other things, (1) require specified and standardised quarterly disclosures regarding performance, fees and expenses; (2) prohibit private fund managers from engaging in certain activities that have traditionally been addressed through disclosure and informed consent; (3) require disclosure of, and in some cases limit, preferential treatment provided to certain private fund investors; (4) require that all private funds be subject to annual audit; (5) add a written documentation requirement for annual reviews; and (6) create requirements to keep records of compliance with the Proposed Rules.

Notably, the Proposed Rules are not limited to registered investment advisers. While certain aspects of the Proposed Rules apply only to registered advisers to private funds, other aspects apply to all investment advisers to private funds, even those advisers that are not SEC registered. In particular, the Proposed Rules would prohibit all private fund advisers from engaging in certain activities and practices, such as (1) charging certain fees and expenses to a private fund or its portfolio investments; (2) reducing the amount of any clawback by the amount of taxes; (3) seeking reimbursement, indemnification, exculpation or limitation of its liability by the private fund or its investors for certain misconduct; or (4) borrowing money, securities or other fund assets, or receiving an extension of credit, from a private fund client. The Proposed Rules would also prohibit private fund advisers from giving certain forms of preferential treatment to investors in a private fund, and would require disclosure of all other kinds of preferential treatment given to investors.

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regulatory requirements for cross trades, principal transactions or distressed sales; and 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.

45 *See In re Hamilton Investment Counsel LLC and Jeffrey Kirkpatrick*, Advisers Act Release No. 95189 (June 30, 2022) (finding that the CCO wilfully 'aided and abetted' and caused the investment adviser to be in violation of Rule 206(4)-7); *In re Two Point Capital Management, Inc and John B McGowan*, Advisers Act Release No. 6199 (Dec. 5, 2022) (finding that the CCO caused the investment adviser to violate Sections 204, 204A and 206(4) of the Advisers Act).

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v The Amended Marketing Rule

The amended Rule 206(4)-1 (the Amended Marketing Rule), which took effect on 4 November 2022, significantly impacts on registered investment advisers' marketing materials, placement agent arrangements, performance calculations and related disclosures. The Amended Marketing Rule includes a two-prong definition of 'advertisement'.[46]

The Amended Marketing Rule sets forth specific requirements with regard to the presentation of performance, including, among other things, requirements in respect of the presentation of gross and net performance, hypothetical performance, related performance and extracted performance. The Amended Marketing Rule also prohibits advertisements that include a material statement of fact that the adviser does not have a reasonable basis for believing that it will be able to substantiate upon demand by the SEC.

Finally, the Amended Marketing Rule requires certain compliance policies and procedures be implemented and additional books and records be maintained, and requires amendments to Form ADV that include new disclosures in respect of an adviser's marketing materials.

vi Environmental, social and governance examination priorities

Not surprisingly, as environmental, social and governance (ESG) factors become more important to investors, the SEC is paying closer attention to representations made to investors regarding the role of ESG in a firm's investment process. The Examination Priorities noted that Examinations staff will continue to focus on ESG-related advisory services and investment products, focusing their review of whether registered advisers are (1) accurately disclosing their ESG investing approaches and have adopted and implemented policies, procedures and practices designed to prevent violations of securities laws in connection with their ESG-related disclosures, including review of their portfolio management processes and practices; (2) voting client securities in accordance with proxy voting policies and procedures and whether the votes align with their ESG-related disclosures and mandates; or (3) overstating or misrepresenting the ESG factors considered or incorporated into portfolio selection (e.g., greenwashing), such as in their performance advertising and marketing.[47] The SEC has also settled charges against registered investment advisers for various ESG-related violations.[48]

46 The first prong includes 'any direct or indirect communication an investment adviser makes to more than one person, or to one or more persons if the communication includes hypothetical performance, that offers the investment adviser's investment advisory services with regard to securities to prospective clients or investors in a private fund advised by the investment adviser or offers new investment advisory services with regard to securities to current clients or investors in a private fund advised by the investment adviser . . .' Extemporaneous, live oral communications, information contained in statutory or regulatory notices and filings, and certain one-on-one communications are excluded from this definition. The second prong generally includes 'any endorsement or testimonial for which an adviser provides compensation, directly or indirectly . . .' This prong expands coverage of solicitation arrangements to include placement agent arrangements for private fund investors.

47 *See* SEC Division of Examinations, *2022 Examination Priorities* (March 30, 2022).

48 *See* Advisers Act Release No. 6032 (May 23, 2022); *See* Advisers Act Release No. 6189 (Nov. 22, 2022).

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vii Off-channel communications

The SEC is increasingly focused, in both the examination and enforcement contexts, on employees' business-related communications occurring through off-channel communications platforms (e.g., WhatsApp, iMessage and WeChat, etc.) that are not captured by and therefore not retained in the adviser's systems and records (off-channel communications). The SEC considers the use of such off-channel communications for business purposes to be a violation of a registered investment adviser's (1) books and records obligations under Rule 204-2; (2) policies and procedures requirements under Rule 206(4)-7); and (3) obligations to monitor for, and prevent the misuse of, MNPI under Section 204A of the Advisers Act.[49]

viii 'Broken windows' enforcement

In September 2022, the SEC brought several enforcement actions for highly technical violations of the Custody and the Pay-to-Play Rules indicating a greater willingness on behalf of the SEC staff to pursue technical violations of Advisers Act rules, even in the absence of actual investor harm.[50] Specifically, the SEC settled charges with nine private fund advisers for their failure to (1) deliver timely audited financial statements, required under the Custody Rule; or (2) make timely updates on Form ADV regarding such audits, in violation of Rule 204-1(a). None of the cases involved allegations of theft or loss of any client assets or any other potential wrongdoing by the adviser. Similarly, the SEC settled charges with four investment advisers (including exempt report advisers) on account of political contributions made by personnel to individuals who were 'officials' of pension plan investors.[51] In all four cases, the investment advisers had established advisory relationships with the pension plans prior to the contributions. None of the cases involved allegations of any intent to actually influence the allocation of pension investments.

49 Notably, on Sept. 27, 2022 the SEC announced settled enforcement proceedings against Deutsche Bank AG's indirect subsidiary, DIMA, a registered investment adviser, for violations of, among other things, Rule 204-2(a)(7) (which requires the preservation of originals of all written communications received and copies of all written communications sent relating to investment recommendations and investment advice) arising from DIMA employees engaging in substantive business-related communications via personal text messages or other text messaging platforms, such as WhatsApp, on their personal devices.

50 *See In re BiscayneAmericas Advisers LLC*, Advisers Act Release No. 6119 (Sept. 9, 2022); *In re of Garrison Investment Group LP*, Advisers Act Release No. 6113 (Sept. 9, 2022); *In re Janus Henderson Investors US LLC*, Advisers Act Release No. 6114 (Sept. 9. 2022); *In re Lend Academy Investments LLC*¸ Advisers Act Release No. 6118 (Sept. 9, 2022); *In re Polaris Equity Management Inc*, Advisers Act Release No. 6115 (Sept. 9, 2022); *In re QVR, LLC*, Advisers Act Release No. 6116 (Sept. 9, 2022); *In re Ridgeview Asset Management Partners, LLC*, Advisers Act Release No. 6117 (Sept. 9, 2022); *In re Steward Capital Management Inc*, Advisers Act Release No. 6111 (Sept. 9, 2022); *In re Titan Fund Management, LLC*, Advisers Act Release No. 6112 (Sept. 9, 2022).

51 *See In re Asset Management Group of Bank of Hawaii*, Advisers Act Release No. 6127 (Sept. 15, 2022); *In re Canaan Management, LLC*, Advisers Act Release No. 6126 (Sept. 15, 2022); *In re Highland Capital Partners, LLC*, Advisers Act Release No. 6128 (Sept. 15, 2022); *In re StarVest Asset Management, Inc*, Advisers Act Release No. 6129 (Sept. 15, 2022).

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The increase in enforcement activity relating to these rules, the violations of which do not require intent, signals a possible return to the SEC's 'broken windows' approach to enforcement, pursuant to which the Division of Enforcement pursues and punishes technical violations of Advisers Act rules in an effort to deter more serious violations of the securities laws. Private fund advisers should continue to pay close attention to the SEC's enforcement activities and assess areas in their compliance programmes that may need to be strengthened or revised in light of the actions being pursued by the Division of Enforcement.

V OUTLOOK

Notwithstanding the significant economic changes brought by 2022 and the expansion of government regulation, most market participants expect the demonstrated cycle durability of private equity to continue. Indeed, illiquid private capital markets continue to expand as pensions, endowments and other institutions continue to look to private equity to provide the superior returns necessary to meet their long-term funding obligations. Whether due to inflation, increased borrowing costs or recession, the industry expects both fundraising and transactional underwriting to be particularly challenging over the next few years. Nonetheless, the very illiquidity that has mitigated private market volatility in the past is seen as a stabilising ballast for the future. The American private equity industry believes that its very business model is there to help solve these economic problems.

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Appendix 1

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Joseph A Smith is a partner in the investment management group at Schulte Roth & Zabel LLP. Joe's practice focuses on the formation and operation of private equity funds, as well as private equity transactions, real estate capital markets and REITs. He represents US and international private equity fund sponsors and institutional investors in connection with fund formation, the acquisition and disposition of portfolio investments, and the implementation of exit strategies. In this capacity, he advises clients on securities, governance, ERISA, Investment Advisers Act and structural issues. Joe has extensive experience with all alternative asset classes, including LBO, venture capital and later-stage growth equity investments, credit funds, REITs and real estate funds, as well as complex secondary investments and funds of funds.

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Allison Scher Bernbach is a partner in the investment management group at Schulte Roth & Zabel LLP. She focuses her practice on counselling private fund advisers on navigating the increasingly complex regulatory landscape, including compliance with the requirements of the Investment Advisers Act of 1940. Allison regularly counsels private fund advisers with SEC registration, structuring their compliance programmes, complex regulatory matters, SEC examinations and advice in connection with the structuring of acquisitions of other investment managers. Allison has more than 25 years of regulatory compliance experience servicing global, multi-strategy asset management firms, including more than 15 years of experience advising private equity sponsors, both as outside counsel and in-house.

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