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Alternative Investment Funds 2021

A practical cross-border insight into alternative investment funds work

Ninth Edition

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GP-Led Transactions: The Investor's Perspective

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As an increasing number of funds launched in the post-global financial crisis alternatives boom mature, and as investors generally look for smoother and more regular liquidity throughout the lives of the funds to which they have exposure, managers are exploring ever-more innovative ways of providing liquidity solutions for their investors. Alongside more traditional options, including net asset value (NAV)-based borrowing facilities and preferred equity solutions (which, as well as being applied for their more traditional use of allowing further capital deployment to support a portfolio, can be used to provide some liquidity), there has been significant recent growth in the number of general partner (GP)-led secondary transactions being brought to the market. A number of potential structures have emerged to meet varying investor and manager needs, from relatively straightforward limited partner (LP) tender offers to more sophisticated continuation fund arrangements.

Why are Managers Pursuing GP-Led Solutions?

Much has been written about the merits of these transactions from the manager's perspective. Whilst they offer an opportunity to potentially enhance a fund's internal rate of return (IRR) and distribution to paid-in (DPI) ratio, just as important from a manager's point of view is the ability to retain its own exposure to quality, high-performing asset portfolios (and, increasingly, single assets) over an extended horizon (whether by extending the existing term as part of an LP-tender process or with the use of a new continuation vehicle), whilst meeting the desire of those investors who would prefer an exit to continued investment exposure with a suitable liquidity solution. Pausing or resetting the ticking clock on the fund's presumed lifecycle allows managers to avoid realising the fund's portfolio within a fixed and arbitrary timeframe, with the attendant depressive effect on values this may have. Managers may have a vision for the next stage in a portfolio company's evolution which is not consistent with the exit timing imposed by the impending termination of the fund; this is perhaps particularly likely in the context of investments made late in the fund's investment period or those which have been adversely impacted by unforeseen external events (such as the COVID-19 pandemic). Where this is additive to the portfolio (or relevant asset), GP-led transactions allow managers to raise additional capital to bring those visions to fruition in a manner that best maximises value, for example by facilitating a route to an initial public offering that the company may simply not have been in a position to achieve at the end of the original fund's term. Additionally, a new continuation vehicle or amended governance structure with a more wide-reaching investment mandate potentially frees a manager from the restrictions in the original fund agreements relating to the permitted lifecycle stage of portfolio companies.

Maintaining personal contact with premium companies over an extended horizon will be increasingly important in a world where managers are looking to create value by building and managing their portfolios as business ecosystems, leveraging the network of relationships and synergies between the companies within the portfolio. Generally, the secondaries market has shown itself to be resilient during the COVID-19 crisis with only a modest drop in activity, and it looks set to make a strong recovery in the second half of 2021 with a significant amount of dry powder available. Recent data shows that, in 2020, for the first time, GP-led transactions accounted for more than half of all secondary deals and we envisage them continuing to increase in number and complexity in the immediate and medium-term future.

The Investor Perspective

Investors themselves generally favour more active management of investments and the realisation of companies throughout the hold period of the portfolio rather than a raft of exits towards the end of a fund's life, and so GP-led secondary transactions can present an attractive commercial option for investors as well as managers. The requirement for an investor to determine whether or not it wishes to maintain its exposure to a particular asset or portfolio means that it is clearly moving away from blind pool capital to a deployment option where the investor is able to exercise its own commercial judgment as to the growth prospects of the companies which it is being invited to back on a continuing basis. Whilst the investors will inevitably be able to take much comfort from the level of experience and knowledge of the assets that the manager will have gleaned since their acquisition, and therefore its decision that there remain further opportunities to extract value from the portfolio, the investors will gain an element of control over their capital which may be attractive (particularly for those with, for example, a complementary co-investment programme which means that they have the skills and expertise to undertake a sophisticated analysis of individual portfolio companies).

However, as investors are asked to consider more and more of these transactions, it will be important for them, and those who have appointed advisory committee members of underlying funds in particular, to be aware of the implications and potential pitfalls of the different transaction structures beyond their immediate commercial drivers.

First and foremost, investors need to consider whether they, and the limited partner advisory committee (LPAC) itself, have the appropriate expertise to properly assess the implications of the proposed transactions. The complexity, form and substance of the deals that are being presented to LPACs and investors vary greatly from one to the next, and it is of course

fundamental to being able to properly evaluate an opportunity that investors understand, and are fully informed in relation to, the proposal which is being put to them. Do LPACs and investors have the experience and knowledge to raise pertinent questions and to challenge the manager on both the thesis behind the contemplated transaction and the specific characteristics of the proposal being advanced? It is important for LPACs or investor groups that they have a central role in negotiations with managers and buyers, and so they will need to ensure that they are appropriately advised on a consolidated basis from an early stage; it is far too easy for individual investors to seek their own independent advice which, whilst perhaps giving them a level of protection as to their own position, limits the scope for holistic thinking and a centralised and consistent approach to issues being raised with the manager.

Taking a step further back, investors should now have one eye on GP-led transactions when assessing the investor protection package being offered by a manager at the point of their initial commitment to a fund. At the time the majority of funds approaching maturity were established, GP-led secondaries were rarely envisaged as an option to provide liquidity and so many limited partnership agreements (LPAs) are not designed with these types of transactions in mind. Nowadays, investors should seek to ensure that they or the LPAC have all the necessary oversight and information rights to allow for any proposals advanced to be properly reviewed and consider how they wish the investor base to be involved in any process, whether via consent or consultation rights for the investor base and/or LPAC. If the LPAC is going to have a material role in the process, it should have the right to procure legal advice by engaging counsel, with this being a permitted ongoing expense of the fund. Additionally, any attempt by managers to carve out GP-led secondary transactions from the conflict provisions if certain conditions are met should be resisted. This is a particularly acute risk for co-investors who take direct positions alongside lead GPs and who expect to have tag rights in relation to any transfer by the GP, as there will often be a carve-out from the tag right for transfers to ‘affiliates’, which could include a continuation vehicle managed by the lead GP. Investors in multi-investor funds should also consider if and where there is scope to reference GP-leds in other contexts, for example to make any extension of a fund term conditional upon the manager exploring at that stage whether a liquidity option could be offered.

Conflicts of Interest

Given the number of stakeholders, there is a host of potential conflicts of interest that are inherent in GP-led transactions: existing investors either participating in a tender process or taking liquidity out; existing investors rolling into any new structure; new investors backing the portfolio going forward; and the GP’s own stake and fee package on both sides of the transaction all need to be considered. Thus, access to information, oversight and early engagement by the manager are likely to be key considerations for investors who will be concerned to understand the commercial drivers behind the deal and the advantages each of the options on the table might present given its particular return priorities. Managers should be forthcoming with all relevant information relating to the deal and smaller investors will be keen to ensure that the manager complies with its regulatory obligations relating to equality of information *vis-à-vis* larger or strategic investors. An increasing number of deals concern more recent vintages rather than mature funds, and whilst particularly early liquidity can be an attractive prospect for some investors, clearly the rationale that additional time is required to fully maximise the value of an asset that has upside potential towards the end of a fund’s life does not apply. As a result, investors will need to have a stronger focus on the true drivers of the deal and the heightened risk of conflicts arising; whether these conflicts can be effectively managed or mitigated will depend on the particular situation under consideration.

Transparency will always be crucial for investors but is of particular importance in relation to pricing and how the commercial conditions attaching to a proposal have been developed. Maximising value by achieving the best possible price for investors should be the principal aim for a manager, but inevitably there are complexities surrounding these types of transactions and investors should be on the lookout for circumstances with the potential to compromise this aim. Examples of this might include:

- Is the manager currently undertaking a primary fundraising? Is there a potential stapled commitment to that fund from a secondary buyer in the GP-led? This raises the prospect of a better bid being rejected on the basis that it does not come with the desired stapled commitment. Clearly, this risk is more acute where the terms of any such new fund are more manager-friendly than those of the existing vehicle.
- Similarly, in running the liquidity process at this stage in the first place, could the manager have one eye on freeing up capital from their investor base for this new fund; i.e. does the transaction provide the best outcome for investors or is it driven by a desire to demonstrate the delivery of returns (of itself important to supporting a fundraising) which can then be re-invested elsewhere in the manager’s programme?
- Does the net carry position of the manager change even if there is no actual carry payment at the point of the transaction, i.e. are terms such as those relating to clawback, guarantees, escrow or even the headline carry rate improved under the new vehicle? GP-led transactions should not be used as a backdoor method of hiving off high-performing assets into a new vehicle with improved carried interest terms.

A robust price discovery procedure is therefore essential. Investors should expect a thorough explanation of the valuation process from the manager and may wish to consider requiring a ‘fairness opinion’ from an independent valuer to the effect that the price genuinely reflects the fair market value of the relevant interests. Alternatively, investors may be satisfied with auditor oversight and sign-off on the valuation and pricing process. Investors should note, however, that certain considerations other than the price, such as execution risk and suitability as a long-term participant in the manager’s programme (for example, if the bidder is a competitor of the manager) may legitimately be taken into account by the manager in any GP-led process.

Maintaining Alignment

Typical blind-pool dynamics will still largely apply in the context of GP-led transactions, and so one key question for investors will be how, if at all, alignment with the manager is changing as part of the transaction. Certain transaction structures will involve the manager ‘rolling over’ and reinvesting any carried interest from the original fund which is generated by the transaction and, in some cases, the manager may be required to make an additional management commitment to the new vehicle (in particular where a component part of the transaction involves accessing new capital to support the manager’s plans for the development of the portfolio). Investors may therefore benefit from enhanced alignment as a result (in addition to any ‘soft’ alignment inherent in the fact that the manager is willing to

stand behind the specific assets that are the subject of the transaction, given that it is in the best possible position to assess the position and potential of the assets). Careful consideration will need to be given, therefore, to the treatment of any carried interest on the transaction. If the manager is *not* reinvesting any carry it receives, this will fundamentally alter the conflict analysis; transactions should not be supported if they are simply trying to achieve an early payment of carried interest for the management team. Investors should also carefully consider the possible divergence in the alignment of the manager and the executive management team of the underlying asset (who are likely to only access incentivisation programmes on a full exit of the underlying portfolio).

On a related note, deal structures that do envisage the re-investment of carried interest may involve the notional payment of carry to the carry recipients (and investment returns to investors wishing to maintain their exposure) and the reinvestment of those amounts in the new vehicle. This tends to be the simplest and cheapest arrangement, and tax-exempt investors will generally be comfortable with the approach if there is no taxable event on such payments to them. This may not be the case for the carried interest recipients, however, who as individuals may have to pay tax on any amounts received and therefore only reinvest the net proceeds in the new vehicle. Therefore, if the manager is structuring to try and minimise tax leakage or if, more generally, the transaction seems disproportionately complex to deliver the underlying commercial objectives, investors will need to satisfy themselves that the proposed arrangements are justified, since there is a danger of structuring being undertaken (and significant costs incurred) purely for the carry holders' benefit or for the benefit of a particular sub-group of investors.

Liability Profile

GP-led processes should impose as little liability as possible on investors as compared with a 'stand still' position or traditional asset sale by a fund manager. A key question here is: what exactly is the role of investors or the LPAC in the process? What are they being asked to do? From an investor's or LPAC member's perspective, it will be important to ensure that their role is limited to those areas where they have a clear responsibility under the terms of the fund documentation. Ideally, they will be required only to waive certain conflicts or the application of LPA provisions rather than to positively approve the transaction or any part thereof; accordingly, the manager should define the LPAC's or investors' role as early as possible and clearly explain why it believes that is within the LPAC's mandate (where applicable). LPAC members who are involved in any decision-making process will need to ensure that they are adequately covered by the fund's exculpation and indemnity provisions (which, for LPAC members, should not be subject to any carve-outs other than in the case of fraud or bad faith). It will also be helpful if there are express limitations on any duty which may subsist for members of the LPAC to the wider investor base (typically this should be no more than to act in good faith).

When considering how liabilities are apportioned under the transaction documents, the structure of the deal will be important for the following reasons:

- In the case of an LP-tender process, as a counterparty to the sale documents, investors are likely to be required to give representations and warranties directly to the buyer of their LP interests. This contrasts with the normal position where a fund realises an asset as the counterparty and simply distributes the sale proceeds to investors (with no further action on their part). For this reason, investors need to ensure that they are not incurring undue obligations under the terms of the transaction documentation. Traditionally, private equity (PE) managers give very limited warranties on a sale of a portfolio company (typically limited to fundamental warranties relating to title and capacity), but because an LP-tender process involves the sale of partnership interests relating to a portfolio of assets rather than the assets themselves, there is a tension between the seller's ability to give warranties as an investor with no management control over the portfolio and the buyer's need to get some comfort as to the underlying investments (management of the underlying portfolio companies are unlikely to be willing to provide warranties as they are not achieving an exit). A number of solutions have been seen in the market in this regard, including the manager itself giving limited warranties (perhaps backed by any carried interest arising as a result of the transaction), but ultimately this needs to be addressed on a case-by-case basis. Investors, however, should look to avoid taking on liability for warranties and indemnities that are in excess of those it would indirectly be liable for as an investor in the fund on a normal PE asset sale.
- If the transaction involves the formation of a continuation fund, (exiting) investors will again be keen to ensure that the fund as seller is not entering into overly onerous warranties, with the starting point being that they should be in line with those on a traditional PE sale.
- The existing investor giveback obligations will be relevant in both scenarios, either in respect of warranty claims under the sale documents in the case of a purchase of a portfolio by a continuation fund or in respect of historic warranty claims in the case of an LP-tender process, so investors should be clear how the transaction will interact with such provisions. Investors will also need to consider how liabilities relating to events that occurred before the transaction and shared liabilities such as transfer taxes are apportioned under the sale documents and how any claims in relation to such matters will be enforced.

Deal-Specific Considerations

Given the variety of possible options for structuring GP-led transactions, each deal will present its own unique set of challenges and issues which an investor will have to understand and analyse. However, there are a number of common themes that investors should be alive to:

- If a continuation vehicle is being used to acquire fund assets, what are the terms on offer and how does this interrelate with the position of an investor as a participant in the existing structure? For example, to what extent are existing 'rollover' investors required to make new capital commitments to the continuation fund (to allow for further deployment into the assets) and, if there is optionality in this regard, how will they be diluted by any new capital? If additional capital is required to be committed, investors will have to carefully consider whether they want to be on risk for a further number of years, not only in respect of their original commitment but also the additional amounts, when early de-risking is possible in the alternative.
- Depending on the constitutional documents of the fund, there could be a prohibition on selling assets to entities affiliated with the manager on the disclosure of confidential information (thereby preventing effective due diligence by any buyer) or (where this is a component part of the structuring) distributions *in specie* of continuation vehicle interests. Each of these might require engagement with investors to secure the requisite amendments to fund documentation to permit the deal to go ahead

(and the voting thresholds required to approve the amendment may vary depending on the nature of the particular change); therefore the more complex the deal is, the greater the execution risk as there is likely to be a wider engagement with LPs and ultimately an investor or small group of investors could effectively hold a veto right over the consummation of the transaction.

- Are investors confident in the manager's ability to manage the assets to the next stage in their lifecycle and ultimately deliver the growth that underpins projected investment returns? This will be particularly acute where a manager originally sold their expertise in a particular area, for example a specialist venture capital manager who now proposes to manage a company through its growth stage. It may also be the case that a more activist approach to the management of longer-term assets puts pressure on the resources of the manager and dilutes the focus on the core strategy (even if this is not the case, is there an implied cross-subsidy where the core programme will be generating the revenue which allows for certain assets to be held for more extended periods?). On a related note, investors will have to consider whether the holding of one or more companies to a later stage than originally intended impacts their own asset allocations.
- To ensure that investors are receiving fair value for their interests, they will need to ensure that the price calculation methodology in the sale documents works appropriately and that a transparent and effective price discovery process has been undertaken. For example, is the purchase price calculated by reference to NAV at a particular date? If so, is there a revaluation mechanism that takes account of better information being made available after completion about the NAV as at the valuation date? Similarly, is there a price adjustment mechanism for any exits pre-completion or to take account of drawdowns and distributions during the period between the reference pricing date and completion?
- Tax considerations will always be relevant, even for tax-exempt investors. US tax issues in particular can cause unexpected problems, even for funds that themselves hold no US assets following recent changes to the US rules on 'Effectively Connected Income' (ECI). Under these rules, non-US persons must pay US tax when they transfer an interest in a partnership and realise a gain if that partnership would normally generate ECI. Buyers can be required to withhold 10% of the purchase price and the enforcement provisions can impact the sellers, so investors will need to satisfy themselves that the manager and buyer have carried out careful due diligence and have maintained a solid audit trail if this withholding is intended to be avoided.
- Particular difficulties can arise in respect of excused investors. If an investor has been excused from an investment, which looks set to become more common with investors' environmental, social and governance (ESG) programmes and opt-out requirements becoming more robust, how does the manager propose to deal with this? Can investors roll over into the continuation vehicle and maintain their excused position? Even if they are able to do so, how is the excuse quantified and reflected in the purchase price and amounts received by the investors? This is a potentially more difficult issue where, as is often the case, the buyer does not carry out line-by-line pricing. Whether they are excused investors or otherwise, investors will need to ensure that whatever decision is arrived at allocates fairly the purchase price and any adjustments.

Conclusions

There is no doubt that GP-led transactions are a useful element of the toolkit available to managers to drive returns and meet the objectives of their investors. As managers increasingly have to balance the advantages of further developing assets to maximise returns over a longer period with the natural desire to observe the investment horizons which have been agreed with investors, a GP-led transaction provides an obvious route for bridging this gap. Ultimately, for an investor, its view on a particular proposal may simply come down to an analysis as to whether it believes that a better overall outcome would be achieved if the manager was to realise the portfolio on the original timeframe. However, no matter the circumstances of the deal, the key takeaway for investors is understanding the role the LPAC will play in the majority of these transactions and therefore the importance of it: (a) having all the relevant information it needs to assess the transaction; and (b) having access to appropriate professional advice (financed by the fund). Even for investors who are unlikely themselves to be participating as LPAC members, these issues remain vital as each investor needs to be confident that the LPAC is properly equipped to represent and protect the interests of the investor group as a whole.

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