

Structuring the Purchase and Sale of Partnership/LLC Interests in Private Equity Funds

LOIs, Due Diligence, Drafting the PSA, Negotiating Transfer Agreements, and
Determining the Tax Ramifications of a Transfer

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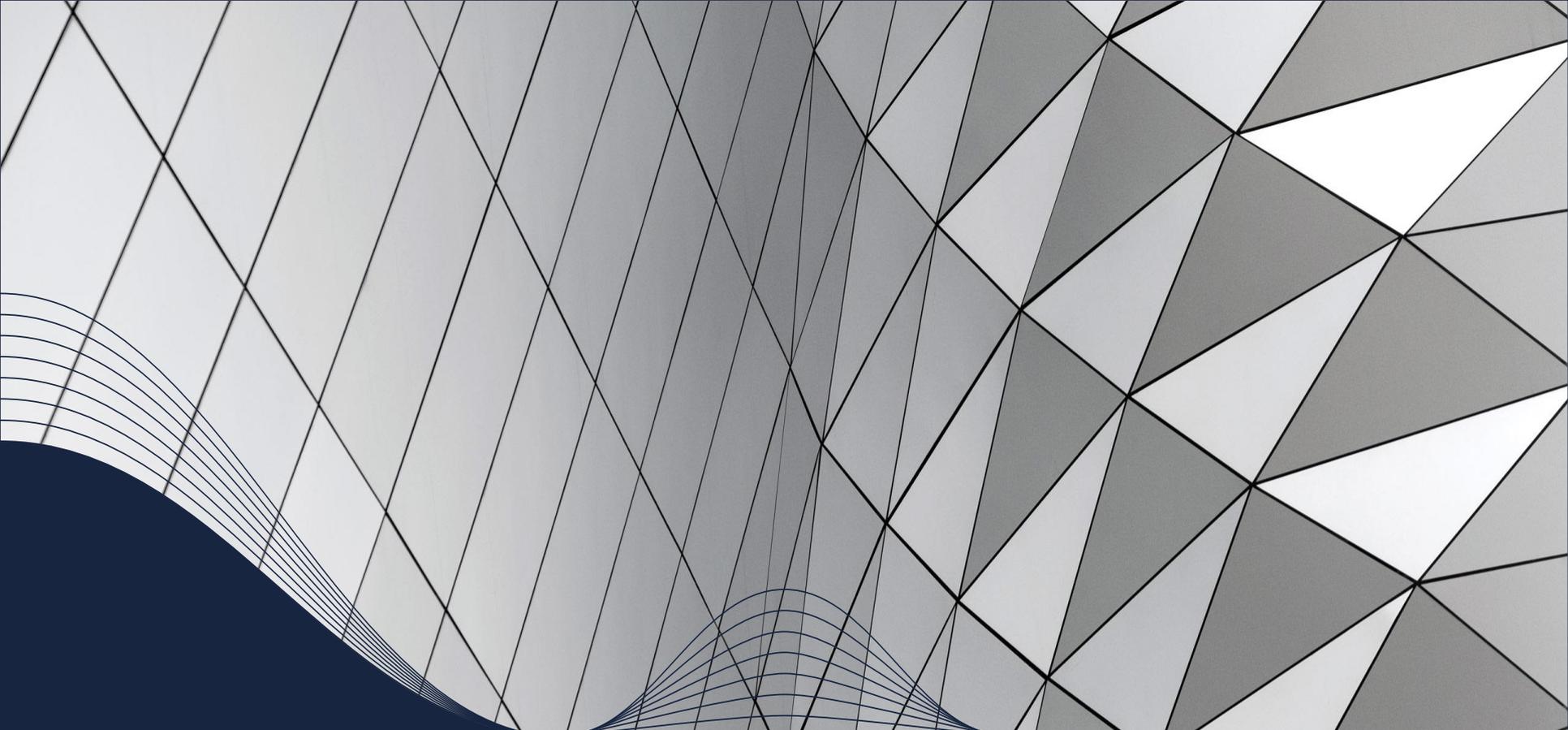
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Secondary Fund Transactions: Buying & Selling LP/LLC Interests

Adam Tope and Witek Jurewicz



Secondary Fund Transactions

- Lifecycle of a secondary transaction:
 - Letter of Intent
 - Underlying Fund Diligence
 - Purchase and Sale Agreement
 - Fund Transfer Agreements

Letter of Intent

- Consideration
- Adjustments
- Conditions
- Exclusivity
- Costs
- Confidentiality

Letter of Intent - Consideration

- **Cash Consideration:** “Buyer will pay Seller XXX% of the total Capital Account Balance (the “Cash Consideration”) for the Funds as listed in Schedule A. In addition, the Buyer will assume the Undrawn Commitments remaining as of the Cut-Off Date with respect to each of the Funds.”
 - Price is always linked to a Cut Off Date / Record Date
 - Price is always based on the Capital Account Balance
 - LOI will usually specify that the buyer takes over undrawn commitments
- **COVID:** “The Cash Consideration will be paid according to the following schedule:”
 - Since Covid, delayed payments or scheduled payments are popular
 - Think about default risk of the counterparty

Letter of Intent - Adjustments

- **Adjustments:** “The Initial Cash Consideration will be adjusted
 - i) upward by the amount of capital calls paid into the Funds by the Seller and
 - ii) downward by the amount of all distributions paid out of the Funds,
 - in each case from each Fund’s Cut-Off Date through the closing of this transaction.”

Letter of Intent - Conditions

- **Conditions:** “The Buyer’s commitment to purchase the Funds and the Seller’s commitment to sell the Funds is subject to the following conditions:
 - The information provided to date, including Schedule A, and the information to be provided in the future by the Seller is and will be, in each case, current, correct, and complete, not misleading and Seller will inform Buyer immediately if this ceases to be so;
 - The Seller has not opted out of any investments or entered into any waivers with respect to the Funds, and is not in breach of any agreements governing the Funds;
 - Confirmation that each commitment represents 100% of the Seller’s exposure to each Fund;
 - Satisfactory outcome of legal and tax due diligence;
 - Execution of a reasonably negotiated purchase and sale agreement and the satisfaction or waiver of its closing conditions;
 - The general partners of each Fund consenting to the proposed transaction, providing the waiver of any transfer restrictions.”

Letter of Intent - Exclusivity

- **Exclusivity:** “The Seller may not solicit, discuss, entertain or accept any other offer, bid or expression of interest to purchase the Funds. Buyer and Seller will move forward as soon as practicable to negotiate and execute a binding purchase and sale agreement with terms and conditions reasonable and customary of private equity secondary transactions.”

Letter of Intent - Costs

- **Costs:** “Any costs or other encumbrances incurred by each party in furtherance of this LOI shall be for the sole account of that party. In the event of a transaction, Buyer and Seller will split any transfer costs passed on by a Fund’s general partner as well as any transfer or stamp taxes for international transactions.”

Letter of Intent - Confidentiality

- **Confidentiality:** “The Seller will not disclose, without Buyer’s written consent, the existence or terms of this agreement to any third party, except and only to the extent such disclosure is necessary to facilitate the presently contemplated transaction, required by law or requested by regulatory authority, from the date of this letter for one year.”

- LOI is signed.... Now what....

Underlying Fund Diligence

- Does the fund LPA allow transfers?
 - Is there a ROFR or other restrictions on the transfer?
 - Are opinions required? (Generally waived by fund manager)
 - Who pays the transfer fees of the fund?
- Has the seller invested into any alternative investment funds (AIVs/AIFs)?
- Is there a side letter?
 - Does it transfer to buyer?
- Is the fund “plan assets” (ERISA)?

Underlying Fund Diligence - Tax

- Is there any PTP restriction on the transfer?
- Will the fund create UBTI or ECI?
- How did the seller invest?
 - Blocked or unblocked?
- Does the fund hold any US real property interests? *[We will describe in more detail later]*
- Were Schedule K-1s issued to Seller?
 - Are they available?

Publicly traded partnership (PTP) rules and exceptions

Overview

- A "publicly traded partnership" is treated as a corporation for all federal tax purposes.
- "Publicly Traded Partnership" Defined:
 - "traded on an established securities market" or
 - "readily tradable on a secondary market (or the substantial equivalent thereof)."
- Secondary Market
 - Partnership interests are "regularly quoted" by a person "making a market" in the interests.
 - Any person "regularly makes available to the public...bid or offer quotes" on partnership interests and "stands ready to effect buy or sell transactions at the quoted prices."
 - Partners have "a readily available, regular, and ongoing opportunity to sell or exchange [their] interest[s] through a public means of obtaining or providing information of offers to buy, sell, or exchange interests in the partnership."
 - Prospective buyers and sellers have an "opportunity to buy, sell, or exchange interests in the partnership in a time frame and with the regularity and continuity that is comparable to that" of one of the preceding three means.

Publicly traded partnership (PTP) rules and exceptions

Safe harbors

- Private transfers
 - A transfer where the basis of the interest carries over from the transferor to the transferee.
 - Transfers at death from an estate or testamentary trust.
 - “Block transfers” – transfers by a partner and related persons in one or more transactions within a 30-day period of more than 2% percent of the total interests in capital or profits.
- Private placements of partnership interests
 - If all interests in the partnership were issued in transactions not required to be registered under the Securities Act of 1933 and the partnership does not have more than 100 partners during the year.
- Lack of trading – transfers of partnership interests are disregarded if the sum of the interests traded, in other than private transfers, under redemption and re-purchase agreements and through qualified matching services does not exceed 2% of the total interests in partnership capital or profits during the year.

- Let's turn to the purchase and sale agreement

Purchase and Sale Agreement

Contents of a Typical PSA

- Definitions
- Sale
- Closing
- Purchase Price
- Reps and Warranties of Buyer and Seller
- Covenants
- Conditions of Buyer and Seller
- Survival
- Indemnification
- Termination
- Post-Closing Covenants
- Other

PSA - Definitions

- Key definitions:
 - Excluded Interest
 - Excluded Obligations
 - Cut Off Date
 - Final Closing Deadline
 - Portfolio Property Agreements

PSA – Sale

- Sale
 - Subject to the terms and conditions of this Agreement, and in reliance on the representations, warranties and agreements set forth in this Agreement, at each Closing, (i) Seller shall sell, assign, transfer and deliver to Buyer, and Buyer shall purchase and acquire from Seller, all of Seller's right, title and interest in and to the applicable portion of the Portfolio Property transferred at such Closing, and (ii) Buyer agrees to assume and perform from and after such Closing all liabilities and obligations of Seller under the Portfolio Property Agreements with respect to the portion of the Interests transferred to Buyer at such Closing **(other than any Excluded Obligation)**. The Interests to be sold, assigned, transferred and delivered by Seller and purchased by Buyer are set forth on Schedule I.

PSA – Sale

- What is an Excluded Obligation?
 - (i) any Losses arising under or relating to the breach by Seller of any Portfolio Property Agreement applicable to Seller, any Additional Seller's Documents or this Agreement,
 - (ii) any liabilities or obligations which arise, accrue or relate to the period through and including the applicable Closing Date and result from acts or omissions of Seller (excluding any Remaining Capital Commitment),
 - (iii) any **LP Clawback Obligation**,
 - With respect to each Interest, any liabilities relating to such Interest or under the applicable Portfolio Property Agreement arising by operation of any "limited partner clawback," "all partner clawback," capital contribution or similar obligation to return or repay Distributions or otherwise contribute capital (whether such return, repayment or contribution obligation shall be effected by repayment, drawdown, deduction from any capital account, set-off against any subsequent Distribution or otherwise) or as required by applicable law and directly relating to (i) all or part of a Distribution made to Seller on or prior to the Record Date or (ii) any underlying portfolio investment that was otherwise realized (including by write-down or write-off), in whole or in part, on or prior to the Record Date, whether or not there was a distribution related to such realization event

PSA – Sale

- (iv) any liabilities or obligations relating to any **Excluded Interest** or arising under any Portfolio Property Agreement relating to any Excluded Interest,
- (v) any (A) obligations or liabilities which arise with respect to management fees that are due or accrue through the Record Date or (B) obligations to satisfy (through reductions in subsequent Distributions or allocations) or make payments relating to any waiver or deferral of carried interest or other allocations or distributions that would otherwise have been allocable or distributable to the Manager or its Affiliates on or prior to the Record Date, and
- (vi) any obligations or liabilities relating to taxes or other governmental fees attributable to the (A) ownership of the Interest up to and including the Closing Date (including any liabilities for withholding taxes with respect to Distributions or allocations to Seller, and any audit adjustments with respect to the Interest attributable to the period prior to the Closing Date, and any amount paid by or imposed on an AIV or “blocker corporation” in respect of taxes), and (B) the disposition of the Interest by Seller (including Transfer Expenses borne by Seller hereunder and any withholding taxes pursuant to Sections 1445 or 1446 of the Code),

Taxes that are "Excluded obligations"

- The following types of taxes should be considered:
 - any obligations or liabilities of Seller relating to taxes, fees, penalties or other governmental charges
 - attributable to the ownership or sale by Seller and/or Seller's predecessor, if any, of the Interests, including
 - any liabilities for withholding or other taxes with respect to distributions, allocations or payments from the Partnership or AIV to Seller,
 - withholding taxes imposed in respect of the Purchase Price under Section 1445 or Section 1446(f) of the Code (but excluding Buyer's portion of any Transfer Expenses)
 - together with any interest, penalties or additions to tax with respect thereto,
 - any liability arising from an audit by a taxing authority that relates to a reviewed year in which Seller or any such Seller's predecessor owns the applicable Interest.
- Example Seller definition:

any obligations or liabilities of Seller relating to taxes, fees, penalties or other governmental charges attributable to the ownership or sale by Seller of the Interests (but excluding Buyer's portion of any Transfer Expenses).

FIRPTA

FIRPTA

- FIRPTA imposes a tax and withholding on gains realized from the disposition of a U.S. real property interest (USRPI), which includes direct real estate holdings and:
 - Partnership/flow-through entities that hold U.S. real estate
 - Interests in a U.S. real property holding corporation (USRPHC)
 - Other instruments that represent direct or indirect rights to share in proceeds, appreciation or profit of U.S. real estate
- FIRPTA subjects a foreign (non-U.S.) person's gains and losses from disposition of a USRPI to U.S. federal income taxation as if those gains or losses were effectively connected with a trade or business within the United States.
- Non-U.S. person with FIRPTA gain also incurs a U.S. federal income tax filing obligation.

Section 1445 Withholding

Overview

- Section 1445(a) imposes a 15% withholding tax on the gross "amount realized" on a disposition of a USRPI by a foreign person.
 - "Amount recognized" includes all cash and the FMV of other property received as consideration and also relief of liabilities.
- Broad definition of USRPI.
- Withholding taxes must generally be paid and reported to IRS on IRS Form 8288 within 20 days of transfer.

Section 1445 Withholding Exceptions

Exceptions

- Transferor furnishes non-foreign affidavit.
 - This could include the transferor qualifying a "qualified foreign pension fund" (QFPF).
- IRS Withholding (IRS Form 8288-B) Certificate Obtained. Must be filed by Buyer or Seller before closing.
 - Can reduce or excuse withholding. Can also help with withholding on "installment sales" where payments are deferred.
- Nonrecognition rule apply. This requires a "notice of nonrecognition" to be exchanged with transferee and filed with the IRS.
- Sometimes foreign sovereigns are exempt.

Section 1446(f) Withholding

- Section 1446(f) of the Code, enacted as part of 2017 tax law changes, generally requires the transferee of a partnership interest to withhold a tax equal to 10% of the "amount realized" on a disposition of an interest in an entity classified as a partnership if the transferor is a foreign partner and any portion of the gain would be treated as effectively connected with the conduct of a trade or business within the United States under Section 864(c)(8) ("ECI") (i.e., to the extent that the partner would have recognized ECI if the partnership had sold all of its assets at fair market value at the time of the disposition of the interest in the partnership).
- To the extent a transferee fails to withhold, Section 1446(f) imposes secondary liability on the partnership, which is required to withhold from distributions to the transferee.
 - This secondary liability has been deferred pursuant to IRS Notice 2018-29 and Section 1446(f) proposed regulations (the "Proposed Regulations").
- If Sections 1445 and 1446(f) are both applicable, generally only Section 1445 applies.

Section 1446(f) Exceptions - Highlights

Exceptions – IRS Notice 2018-29 vs. 1446(f) proposed regs.

<u>Type</u>	<u>When exception applies</u>	<u>Who makes it</u>	<u>Material changes in proposed regulations</u>
Transferor Tax Status	Certificate of non-foreign status (including Form W-9)	Transferor	No material changes
	Treaty exemption	Transferor	New exception (see discussion on treaty exceptions)
Certifications on gain	Certificate of no realized gain (including no Section 751 income)	Transferor	Clarifies that realization of ordinary income and an overall loss eliminates this certification
	De minimis effectively connected gain on deemed sale under Section 864(c)(8)	Partnership	Threshold reduced from 25% to 10%
Certification on ECTI	De minimis effectively connected taxable income (ECTI) in prior three years	Transferor	<ul style="list-style-type: none"> •Threshold reduced from 25% to 10% •Transferor's allocable share of ECI must be less than \$1m each year •Transferor must have filed returns and paid tax for all three years in the test
Certification of nonrecognition	Nonrecognition transaction	Transferor	No material changes

De minimis effectively connected gain on deemed sale

- No withholding is required if a partnership provides the transferee a certification stating that if the partnership sold all of its assets at fair market value, the amount of net effectively connected gain resulting from the deemed sale of the partnership's assets would be less than 25% of the total net gain. The Proposed Regulations contains a similar exception, but at a threshold of 10%.

De minimis ECTI in prior three years

- Certification must provide that for the transferor's immediately prior taxable year and the two taxable years that precede it (i) the transferor was a partner for the entirety of each of those years and (ii) the transferor's allocable share of ECTI from the partnership was less than 25% of the transferor's total distributive share of income from the partnership.
 - The transferee cannot rely on the certificate prior to the transferor's receipt of Forms 8805 and Schedule K-1. Thus, if the partnership is not in compliance with Section 1446 withholding on ECTI, the partner cannot use this exception. In addition, a transferor that did not have a net distributive share of income in any such year cannot avail itself of this exception.
- The Proposed Regulations reduce the threshold from 25% to 10%. The Proposed Regulations add an additional certification requirement that, in each of the three taxable years, the transferor's allocable share of ECTI was less than \$1 million (including ECTI allocated to certain persons related to the transferor).
 - The Proposed Regulations clarify that a transferor may not make this certification if it has not received a Form 8805 (Foreign Partner's Information Statement of Section 1446 Withholding Tax) because it had no ECTI for which the partnership paid Section 1446 tax in its "immediately prior taxable year" and the preceding two taxable years.

Claim of Treaty Benefits

- The Proposed Regulations provide an exception to Section 1446(f) withholding when a transferor certifies that it is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and another country. This exception applies only when a transferor (as opposed to owners of an interest in the transferor) qualifies for the benefits of an income tax treaty.
- The certification to the transferee must include a valid IRS Form W-8BEN-E that supports the claim for treaty benefits. The transferee must provide the IRS a copy of the certification within 30 days after the transfer.
- A transferor may obtain a partial reduction to the withholding amount based on income treaty benefits.

Certification of Maximum Tax Liability

- The certification must identify the amount of its gain that would be treated as ECI on the "Determination Date."
 - The Determination Date may be either (1) the date of the transfer, (2) any date that is no more than 60 days before the date of the transfer, or (in certain circumstances) (3) the date that is the *later* of (a) the first day of the partnership's taxable year in which the transfer occurs, or (b) the date, before the date of the transfer, of the most recent revaluation event under Section 704.
- The transferor must represent that it has obtained a statement from the partnership that includes, among other things, information relating to the transferor's distributive share of effectively connected gain in connection with a deemed sale described in Section 864(c)(8)(B) as of the Determination Date.

Partnership Liabilities

- Section 1446(f) withholding is based on the amount realized, which includes any cash and other consideration *plus any liabilities assumed*.
- In limited circumstances, a transferor can certify its share of partnership liabilities.
 - Schedule K-1 may only be used for a partnership taxable year that closed no more than 10 months before the date of transfer. Proposed Regulations extend this to 22 months.
- Alternatively, the partnership may issue a certification with respect to the transferor's share of partnership liabilities no more than 30 days prior to the transfer.
 - Under Proposed Regulations, the partnership may use the Determination Date.
- If the transferee is unable to determine the amount realized because the transferee lacks knowledge of the transferor's share of partnership liabilities, then the transferee is required to withhold an amount equal to the **entire amount realized** (excluding the partnership liabilities).
 - This results in withholding on the full purchase consideration.

PSA –Closing

- When does the closing occur?
 - When all conditions are met or waived
 - Not past the Final Closing Date
 - May require one or more mandatory interests to transfer
- What happens at closing?
 - Certificates delivered (closing certificates)
 - Wires (**Covid**: More installment payments)
 - Execution of transfer agreements from each fund
- Delivery of Pre-Closing Notice (“PCN”)

PSA - Closing

Example Closing Certificate

This Certificate is delivered pursuant to Section [] of the Purchase and Sale Agreement dated as of [] (the "**Purchase Agreement**"), by and between [] ("**Seller**") and [] ("**Buyer**"). Unless otherwise defined herein, all capitalized terms shall have the meaning given to them in the Purchase Agreement.

Buyer hereby certifies to Sellers that:

THE REPRESENTATIONS AND WARRANTIES OF [BUYER] CONTAINED IN THE PURCHASE AGREEMENT AND IN THE ADDITIONAL BUYER'S DOCUMENTS SHALL BE TRUE AND ACCURATE IN ALL RESPECTS AS OF THE DATE WHEN MADE AND AT AND AS OF THE DATE HEREOF AS THOUGH SUCH REPRESENTATIONS AND WARRANTIES WERE MADE AT AND AS OF THE DATE HEREOF.

[BUYER] HAS PERFORMED IN ALL MATERIAL RESPECTS ALL AGREEMENTS AND OBLIGATIONS AND COMPLIED WITH ALL CONDITIONS REQUIRED BY THE PURCHASE AGREEMENT TO BE PERFORMED OR COMPLIED WITH BY BUYER AT OR PRIOR TO THE DATE HEREOF.

[ALL APPROVALS REQUIRED TO PERMIT THE TRANSFER AND ASSIGNMENT TO BUYER OF THE APPLICABLE PORTFOLIO PROPERTY RELATING TO THE INTERESTS TO BE TRANSFERRED AT THE APPLICABLE CLOSING HAVE BEEN OBTAINED.] [**SELLER CERT**]

PSA – Closing - PCN

[Buyer Address]

Attn: [_____]

Re: **Purchase and Sale Agreement**

Ladies and Gentlemen:

Reference is hereby made to the Purchase and Sale Agreement made and entered into as of [_____] (the “**Purchase Agreement**”), by and between [_____] (“**Buyer**”) and [_____] (“**Seller**”). Capitalized terms used herein but not defined herein shall have the respective meanings given to such terms in the Purchase Agreement.

In accordance with Section 3.2 of the Purchase Agreement:

The Closing Date will be [_____].

The calculation of the Allocated Portion of the Purchase Price for the Interests, including the dates and amounts of all Funded Capital Commitments and Distributions after the Record Date used to determine such price, is set forth on Annex A and has been calculated in accordance with Section 4 of the Purchase Agreement.

An update to Schedule I to the Purchase Agreement is set forth on Annex B hereto in accordance with Section 4 of the Purchase Agreement.

Seller’s updated wire instructions (if different from Schedule IV of the Purchase Agreement) are attached hereto as Annex C.

PSA – Purchase Price

- How is it calculated?
 - (i) the Purchase Price for each Interest shall be increased by an amount equal to the sum of all Funded Capital Commitments attributable to such Interest, and
 - (ii) the Purchase Price of each Interest shall be reduced by an aggregate amount equal to the sum of all Distributions with respect to such Interest after the Record Date and on or prior to the applicable Closing Date
- What if multiple currencies?
- Withholding?
 - Section 1445
 - Section 1446(f)

PSA – Representations and Warranties

- Authorization
- Title
- No Conflicts
- Agreements
- Litigation
- Brokers
- Lists of Distributions, Capital Contributions and Commitments
- Certain Conduct
- Compliance with Law
- Source of Funds
- Solvency
- Independent Appraisal
- ERISA
- Tax Matters

PSA - Covenants

- Cooperation
- Matters Pending Final Closing
- Exclusivity
- Notices / Quarterly and Annual Reports
- Tax Cooperation

PSA - Conditions

- Representations and Warranties remain true
- No legal proceedings
- Closing certificates
- Delivery of purchase price and assignment agreements
- Threshold partnerships, if any
- Updated schedules
- Tax certificates

PSA - Survival

- How long do the representations and warranties last?
 - Most are 1-2 years
 - Certain representations last until the statute of limitations ends
 - Authorization
 - Brokers
 - Compliance with Law
 - Certain representations last even longer – often until each fund is dissolved
 - Title

PSA - Indemnification

- What do sellers indemnify for?
 - Seller agrees to defend, indemnify and hold harmless Buyer, its affiliates and their respective partners, employees, officers, directors, members, managers, agents, successors and assigns (together, the “*Seller Indemnitees*”), from and against any and all losses, damages, claims (whether or not successful, compromised or settled), actions, suits, litigations, arbitrations, proceedings, investigations, liabilities, costs, fees and expenses (including settlement costs, interest, penalties, reasonable attorneys’ fees and any reasonable legal or other expenses for investigation or defense of any actions or threatened actions) (collectively, “*Losses*” or “*Claims*,” as the context requires) which may be imposed, sustained, incurred or suffered or asserted as a result of, relating to or arising out of
 - (a) any inaccuracy in or breach of any representation or warranty of Seller contained in this Agreement, the Portfolio Property Agreements, the Additional Seller’s Documents to which it is a party, or the Assignment Agreement with respect to an Interest,
 - (b) any failure by Seller to perform any covenant, agreement or obligation of Seller contained in this Agreement, the Portfolio Property Agreements or the Additional Seller’s Documents to which it is a party (unless waived in writing by Buyer at or prior to the applicable Closing Date),

PSA - Indemnification

- (c) any claim by any Person with whom or which Seller has, directly or indirectly, dealt for any finder's or broker's fee or commission in connection with the transactions contemplated by this Agreement,
- (d) any Excluded Obligations,
- (e) any claim by any Person entitled to indemnification pursuant to the terms of any agreement pursuant to which an Interest is transferred, which claim relates to a misrepresentation by Seller or a breach or violation of any warranty, covenant or other obligation of Seller, and
- (f) any Transfer Expenses borne by Seller hereunder.

PSA - Indemnification

- What do buyers indemnify for?
 - More or less the inverse
- Are there limits to the indemnification?
 - Threshold?
 - Fraud back to dollar one
 - Generally capped at purchase price

PSA - Termination

- How does a PSA terminate?
 - Mutual consent
 - By Buyer:
 - Manager notified buyer that it won't give approval
 - By either party:
 - Material breach of representations (sometimes a cure right)
 - Failure to close before the final closing

PSA – Post Closing Covenants

- Delivery of notices
- Delivery of \$\$\$\$
- Tax Information
- Withholding Refunds
- Access and Retention of Records

PSA - Other

- Expenses
 - Each party bears their own PSA expenses
 - Parties usually split fund expenses
- Assignment
 - Often buyers will use an SPV to acquire the interests so an assignment provision is important
- Governing Law
 - NY or DE are common
- Publicity / Confidentiality

PSA - Exhibits

Name of Partnership	Capital Commitment	Seller's Percentage Ownership of the Partnership	Capital Account Balance (as of the Record Date)	Remaining Capital Commitment (as of the Record Date)	Allocated Portion of the Purchase Price (as of the Record Date)	Distributions after the Record Date	Funded Capital Commitments after the Record Date	Net Purchase Price Allocation
Total:								[\$]

PSA - Exhibits

List of Portfolio Property Agreements

	<u>Entity</u>	<u>Portfolio Property Agreements</u>
1.		
2.		
3.		
4.		
5.		

Description of AIVs

<u>Name of AIV</u>	<u>Elected to be Treated as a Corporation for U.S. Federal Income Tax Purposes (Yes / No)</u>

PSA - Exhibits

Distributions of the Partnerships after the Record Date (sorted by Partnership)

<u>Partnership</u>	<u>Date</u>	<u>Description of Distribution</u>	<u>Value</u>

Notices of Distributions to be made after the Record Date (which have not yet been made, sorted by Partnership)

<u>Partnership</u>	<u>Proposed Distribution Date</u>	<u>Description of Proposed Distribution</u>	<u>Estimated Value</u>

Funded Capital Commitments to the Partnerships (After the Record Date)

<u>Partnership</u>	<u>Date</u>	<u>Description of Commitment</u>	<u>Amount of Contribution</u>

Capital Contributions Due But Not Paid as of the Applicable Closing Date

<u>Partnership</u>	<u>Scheduled Date of Payment (if known)</u>	<u>Description of Commitment</u>	<u>Amount of Contribution</u>

Fund Transfer Agreement

- Provided by the fund GP and negotiated by buyer and seller
- Usually 10 pages or so
- Generally signed by GP, buyer and seller
 - Note European funds will have different set ups with multiple documents
- If representing the buyer, there will be a subscription agreement attached which looks like a fund subscription

Fund Transfer Agreement

- Representations
 - Legal capacity
 - No conflict
 - Clean title
 - PTP/Tax Representations
 - Accredited investor / qualified purchaser representations (for purchaser)
- The transfer
 - Waiver of opinions
 - Release of transferor
- Indemnification
- Release
- Conflicts with the purchase agreement

Allocation of Partnership Income Between Buyer and Seller

- *Interim Closing Method.* Under the interim closing method, the partnership closes its books on the date of the variation in partnership interests and allocates income or loss based on the resulting segments.
- *Proration Method.* The proration method simply allocates the partner's share of partnership income or loss based on the total number of days he/she is a partner during the year, or the proration period.
- Extraordinary items *must* be allocated among all partners in proportion to their interests on the day and at the time the extraordinary item occurred.
 - An “extraordinary items” includes items arising from dispositions of assets, Section 481 adjustments, discharges of debt, settlements of torts or similar third-party liability, credits that arise from non-ratably allocated activities or items, or other items identified by the IRS if they result in a substantial distortion of income in any return in which the item is included.

Thank you

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