GETTING THE DEAL THROUGH

Private Equity

in 29 jurisdictions worldwide

2014

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10th anniversary edition

Private Equity 2014

Contributing editors:
Casey Cogut and William Curbow
Simpson Thacher & Bartlett LLP

Getting the Deal Through is delighted to publish the fully revised and updated 10th anniversary edition of *Private Equity*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 29 jurisdictions featured. New jurisdictions covered this year include Argentina and Slovenia. The report is divided into two sections: the first deals with fund formation in 19 jurisdictions and the second deals with transactions in 27 jurisdictions.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. ***Getting the Deal Through*** publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. ***Getting the Deal Through*** would also like to extend warm and heartfelt thanks to contributing editor Casey Cogut who has recently retired from Simpson Thacher & Bartlett LLP. Casey has held the position of contributing editor of *Private Equity* since its inauguration 10 years ago, and Casey and his colleagues at Simpson Thacher & Bartlett LLP have been instrumental in the success of the publication. The publisher would like to welcome William Curbow, also a partner at Simpson Thacher & Bartlett LLP, as current and future contributing editor of *Private Equity*. We are delighted to have William on board, and we look forward to future editions in his very capable editorial hands.

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London
February 2014

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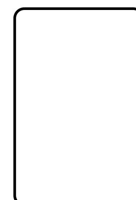

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Formation and terms operation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

In the United States, private equity funds are typically formed as limited partnerships in the State of Delaware, pursuant to the Delaware Revised Uniform Limited Partnership Act (DRULPA). A limited partnership formed under the DRULPA will have a separate legal personality, the existence of which will continue until the cancellation of the limited partnership's certificate of limited partnership. A Delaware limited partnership offers investors the benefits of limited liability as well as flow-through tax treatment in the United States. The personal liability of a limited partner is generally limited to the amount of the capital contributed or that has been agreed to be contributed (or returned) by such investor. The 'manager' is the general partner of the fund with control over and, subject to certain limitations, general liability for the obligations of the partnership.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

A limited partnership requires at least one general partner and one limited partner, neither of which needs to be a Delaware entity. To form a limited partnership, the general partner must execute and file a brief certificate of limited partnership setting forth certain basic information about the partnership. In Delaware, this filing is made with the Office of the Secretary of State. Each Delaware limited partnership must have and maintain (and identify in its certificate of limited partnership) a registered office and a registered agent for service of process on the limited partnership in Delaware. The certificate of limited partnership must also identify the name of the partnership and the name and address of the general partners, although the names of the limited partners need not be disclosed. In addition, depending on the United States jurisdictions in which the private equity fund conducts its business, it may be required to obtain qualifications or authorisations (as well as comply with certain publication requirements) to do business in such jurisdictions. There is generally no time delay associated with filing the certificate of limited partnership; it can normally be prepared and filed on a same-day basis. The initial written limited partnership agreement to be entered into in connection with the formation of a limited partnership can be a simple form agreement, which can be amended and restated with more detailed terms at a later date. For a limited partnership formed in Delaware, the partnership agreement need not be (and generally is not) publicly filed. The fee for filing a certificate of limited partnership in Delaware is US$200 (although an additional nominal fee may be charged for certified copies of the filing or for expedited processing).

There is an annual franchise tax of US$250. The fees for obtaining authorisation to do business in a particular jurisdiction are usually nominal but may be more costly in certain states. There are no minimum capital requirements for a Delaware limited partnership.

A private equity fund will typically engage counsel to draft the certificate of limited partnership and the related partnership agreement. Filings in Delaware, as well as in other jurisdictions where an authorisation to do business is required, are typically handled by a professional service provider for a nominal fee (which also provides the registered agent and registered office services referred to above).

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

A Delaware limited partnership must have and maintain a registered office and a registered agent for service of process in the state of Delaware. This requirement is typically satisfied by the limited partnership engaging for a nominal fee a professional service provider to act in these capacities (see question 2). Although under the DRULPA a limited partnership must maintain certain basic information and records concerning its business and its partners (and in certain circumstances provide access thereto to its partners), there is no requirement that such documents be kept within the State of Delaware. There is no requirement under Delaware law to maintain a custodian or administrator, although registered investment advisers under the Investment Advisers Act of 1940, as amended (the Advisers Act) must maintain an independent custodian of client assets.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

Although the DRULPA provides that limited partners are entitled (if they have a proper purpose) to receive a list of the names, addresses and capital commitments of the other partners, a copy of the partnership agreement and any amendments thereto and certain other information, the limited partnership's partnership agreement may limit or expand this. Further, the partnership agreement may, and typically does, provide that any such information provided to limited partners is confidential and is not to be disclosed by a limited partner to third parties. Therefore, the public is not generally entitled to information (other than the identity of general partners, which is set forth in the certificate of limited partnership) about Delaware

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limited partnerships. Nevertheless, as a result of the US Freedom of Information Act (FOIA), certain similar state public records access laws and other similar laws, certain limited partners who are subject to such laws may be required to disclose certain information in their possession relating to the partnership. Generally, the information that has been released to date pursuant to the FOIA and similar laws has typically been 'fund level' information (for example, overall internal rates of return, other aggregate performance information, amounts of contributions and distributions, etc) but not 'portfolio company level' information (for example, information relating to individual investments by the fund). Also, limited partnership agreements and the list of limited partners have generally been protected from disclosure to the public. A general partner's failure to comply with the reporting requirements of applicable law or the partnership agreement (or both) could result in a limited partner seeking injunctive or other equitable relief, monetary damages, or both.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

Under Delaware partnership law, a limited partner is not liable for the obligations of a limited partnership unless such limited partner is also a general partner or, in addition to the exercise of rights and powers of a limited partner, such limited partner participates in the 'control of the business' of the partnership within the meaning of the DRULPA. It is generally possible to permit limited partners to participate in all aspects of the internal governance and decision-making of the partnership without jeopardising the limited liability status of a limited partner, as long as it is done in a prescribed manner. Even if the limited partner does participate in the control of the business within the meaning of the DRULPA, such limited partner is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner.

In addition, under the DRULPA a limited partner who receives a distribution made by a partnership and who knew at the time of such distribution that the liabilities of the partnership exceeded the fair value of the partnership's assets is liable to the partnership for the amount of such distribution for a period of three years from the date of such distribution, and partnership agreements of private equity funds commonly impose additional obligations to return distributions. There may be additional potential liabilities pursuant to applicable fraudulent conveyance laws. In any case, limited partners are liable for their capital contributions and any other payment obligations set forth in the limited partnership agreement or related agreement (such as a subscription agreement) to which they are a party.

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

A general partner of a limited partnership generally will owe fiduciary duties to the partnership and its partners under Delaware law, which include the duties of candour, care and loyalty. However, under Delaware law, to the extent that, at law or equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by the provisions in the partnership agreement, provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing. Under Delaware law, a partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, provided that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing. In addition, practitioners should note that contractual standards of duty or conduct set forth in the partnership agreement will replace common law fiduciary duties with respect to Delaware limited partnerships (whether such standards are higher or lower); therefore, precise crafting of the language in a partnership agreement with respect to fiduciary duties relating to a Delaware limited partnership is important.

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

Delaware recognises a gross negligence standard of liability to the extent such standard is provided for in the applicable partnership agreement. As a matter of market practice, the exculpation and indemnification provisions in a private equity fund's limited partnership agreement typically carve out acts or omissions that constitute 'gross negligence', but under Delaware law a partnership agreement could expressly exculpate or indemnify for such acts or omissions.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

Restrictions on transfers and withdrawals, restrictions on operations generally, provisions regarding fiscal transparency, special investor governance rights on matters such as removal of the general partner or early dissolution of the private equity fund are all matters typically addressed in the provisions of the partnership agreement and will vary from fund-to-fund. Typically, the partnership agreement will require the consent of the general partner to effect a transfer of a partnership interest in a limited partnership. This requirement enables the general partner to maintain the fund's compliance with applicable legal, tax and regulatory requirements and exemptions, as well as evaluate the appropriateness as a commercial matter of the proposed transferee. Although there is generally no right to withdraw from a Delaware limited partnership under the DRULPA, the limited partnership agreement for a private equity fund may provide for certain withdrawal rights for limited partners, typically only in limited circumstances for legal and regulatory reasons. Limited partners have the right to petition the Delaware Court of Chancery for withdrawal or similar equitable relief in egregious circumstances (for example, fraud); however, obtaining such relief can be difficult.

In converting or redomiciling a limited partnership formed in a non-US jurisdiction into a limited partnership in a US jurisdiction (for example, Delaware), particular attention should be given to requirements of the certificate of limited partnership domestication that may be required to be filed, as well as any other requirements of the applicable state's laws relating to maintaining a limited partnership in such jurisdiction (see question 2). In addition, depending on where the redomiciled fund conducts its business, it may be

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required to obtain qualifications or authorisations to do business in certain jurisdictions. Any provisions of the partnership law of the state into which such domestication is effected that are otherwise inconsistent with the pre-existing governing agreement of such partnership should be reviewed and modified as necessary to ensure conformity with the applicable law. Consideration should also be given to the tax consequences of converting or redomiciling a limited partnership.

Certain aspects of US securities laws apply differently with respect to US and non-US private equity funds. For example, in determining whether a private equity fund formed in the US will qualify for exemption from registration under the Investment Company Act of 1940, as amended (the Investment Company Act), all investors, both US and non-US, are analysed for determining the fund's compliance with the criteria for exemption. By contrast, in the case of a private equity fund formed in a jurisdiction outside the US, only US investors are analysed for the purposes of making that same determination (assuming certain other requirements are met).

- The Securities and Exchange Act of 1934, as amended (the Exchange Act), and the regulations promulgated thereunder generally require that any issuer having 2,000 or more holders of record of any class of equity security and assets in excess of US$10 million register the security under the Exchange Act and comply with the periodic reporting and other requirements of the Exchange Act. These rules have the practical effect of imposing a limit of 1,999 investors in any single US-domiciled private equity fund. It should be noted that prior to the enactment of the Jumpstart Our Businesses Startups Act (the JOBS Act) and its related amendments to the Exchange Act, this 2,000 holder threshold had historically been limited to 500, which imposed a more significant fundraising constraint for certain large private equity funds. In addition, the Exchange Act and the regulations promulgated thereunder provide an exemption from the registration requirement described above for a non-US domiciled private equity fund that qualifies as a 'foreign private issuer' and has fewer than 300 holders of equity securities resident in the United States. A private equity fund that is organised outside of the United States generally qualifies as a 'foreign private issuer', unless more than 50 percent of its outstanding voting securities is held by US residents or any of the following is true:
- a majority of its officers and directors are US citizens or residents, and
- more than 50 percent of its assets are located in the United States or its business is principally administered in the United States.

Although the JOBS Act did not change the threshold of the exemption for foreign private issuers described above, and recent SEC guidance with respect to the foreign private issuer regime has not indicated whether any amendments are forthcoming, it remains possible that the SEC may amend the exemption's existing 300 US resident holder threshold to conform to the 2,000 holder threshold applicable to US-domiciled issuers in the future.

For purposes of generally accepted US accounting principles, to avoid consolidation of the financial statements of a private equity fund with its general partner, which is an issue of particular concern for some publicly listed private equity fund sponsors, the fund must provide its unaffiliated limited partners with the substantive ability to dissolve (liquidate) the fund (and appoint a third party as liquidator) or otherwise remove the general partner without cause on a simple majority basis (often referred to as kick-out rights).

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

Depending on the structure of a private equity fund and its general partner and the specific provisions of their operating agreements, the bankruptcy or insolvency of the ultimate sponsor of a private equity fund could result in the bankruptcy or dissolution of the private equity fund's general partner or advisor or of the fund itself. Moreover, such a bankruptcy or insolvency event could result in the inability of the sponsor to meet its funding obligations with respect to its capital commitment to the private equity fund. Depending on the terms of the private equity fund's partnership agreement, such a default could constitute a 'cause' event and thereby trigger rights of the limited partners to remove the private equity fund's general partner, dissolve the private equity fund itself or cause the forfeiture of all or a portion of the general partner's unrealised carried interest, or all of these. In addition to such 'cause' protections, a sponsor bankruptcy may result in a private equity fund's limited partners seeking to exercise the 'no-fault' remedies included in many partnership agreements, which often permit termination of the investment period, removal of the private equity fund's general partner or dissolution of the private equity fund. With respect to US bankruptcy law, a sponsor that has filed for reorganisation under chapter 11 of the bankruptcy code should still be permitted to operate non-bankrupt subsidiaries (including, for example, related private equity funds and their general partners) as ongoing businesses, although this raises a variety of operational issues including, for example, whether ordinary course investment and private equity fund management decisions must be approved by the bankruptcy court.

A change of control or similar transaction with respect to an institutional sponsor may also give rise to statutory and contractual rights and obligations, including:

- a requirement under the Advisers Act for registered advisers to obtain effective 'client' consent (namely, consent of the private equity fund's limited partners or a committee thereof) to transactions involving an 'assignment' of the sponsor's investment advisory contract (which a change of control generally triggers); and/or
- the ability of the private equity fund's limited partners to cancel the commitment period, dissolve the fund, remove the general partner and/or sue the general partner for a breach of a negative covenant against transfers of interests in the general partner under the terms of the private equity fund's partnership agreement.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

Advisers Act registration requirements

The SEC has the authority to regulate investment advisers pursuant to the Advisers Act. Investment advisers may also be subject to regulatory requirements at the state level. Under the Advisers Act, all advisers to 'private funds' (which generally includes private equity funds) are generally required to be registered with limited exceptions, including:

(i) advisers solely to 'venture capital funds' (private funds that represents itself as pursuing a venture capital strategy to its investors and prospective investors and complies with certain other

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significant requirements, including limitations of the amount and type of assets in which it may invest);

(ii) advisers solely to private funds with assets under management (AUM) in the US of less than US$150 million (the private fund adviser exemption) (discussed further below);

(iii) certain 'foreign private advisers' (generally, advisers who are not holding themselves out to the public in the US or advising registered funds, have no US place of business and have fewer than 15 US clients and investors in private funds, with AUM from such clients and US investors of less than US$25 million);

(iv) certain 'mid-sized' advisers (with US$25–100 million in AUM and that are required to be registered as an investment adviser of the state in which they maintain a principal office and place of business and, if registered, would be subject to examination as an investment adviser by the applicable securities commissioner, agency, or office (advisers are not subject to such examinations in New York or Wyoming)); and

(v) 'family office advisers' (generally speaking, a company owned and controlled by family members that provides investment advice only to family clients and does not hold itself out to the public as an investment adviser).

Private fund adviser exemption

A private fund adviser with its principal office and place of business outside of the US that cannot meet the exemption under clause (ii) above can often rely on the private fund adviser exemption. The private fund adviser exemption provides that an adviser would not be required to register as long as:

- it has no client that is a US person except for qualifying private funds; and
- any assets managed by such adviser at a place of business in the US are solely attributable to private fund assets and valued at less than US$150 million.

In determining whether assets are managed at a place of business in the US, the SEC considers an adviser's principal office and place of business as the location where the adviser controls the management of private fund assets, although day-to-day management of certain assets may take place at another location. An adviser with its principal office and place of business in the US must count all private fund assets, including those from non-US clients toward the US$150 million in assets under management calculation. An adviser with its principal office and place of business outside of the US need only count private fund assets it manages at a place of business in the US toward the US$150 million limit. 'Assets under management' are the securities portfolios for which an adviser provides continuous and regular supervisory or management services. An adviser provides 'continuous and regular supervisory or management services' with respect to a private equity fund from a place of business in the US if its US place of business has 'on-going responsibility to select or make recommendations as to specific securities or other investments the fund may purchase or sell and, if such recommendations are accepted by the fund, the adviser's US place of business is responsible for arranging or effecting the purchase or sale. However, the SEC does not view merely providing research or conducting due diligence to be continuous and regular supervisory or management services at a US place of business if a person outside of the US makes independent investment decisions and implements those decisions. A private fund adviser relying on the private fund adviser exemption is required to file certain portions of Form ADV, Part 1A with the SEC and is considered an exempt reporting adviser (ERA).

Exempt Reporting Advisers (ERAs)

Advisers exempt under clauses (i) or (ii) above (ERAs) are required to file certain basic information with the SEC by completing limited portions of Form ADV, Part 1A, which requires disclosure of certain basic information with respect to the adviser, its activities and the private funds that it advises. The initial filing of this portion of Form ADV must be amended at least annually, within 90 days of the end of the adviser's fiscal year, and more frequently under certain specific circumstances. The SEC is authorised to require an ERA to maintain records and provide reports, and to examine such adviser's records, which means an ERA's books and records are subject to SEC inspection. The SEC has stated that it currently does not intend to perform routine examinations of ERAs, but it retains the authority to do so in its discretion. ERAs are not required to file Form PF described below.

It should be noted that legislation has recently been passed in the US House of Representatives that would eliminate registration requirements under the Advisers Act with respect to certain private equity fund advisers; however, it remains unlikely in the current regulatory climate that such legislation will ultimately be signed into law.

Form PF

A registered private fund adviser with more than US$150 million of AUM is required to file with the SEC 'Form PF', which requires disclosure of the adviser's AUM and certain basic identifying information regarding each private fund it advises, including gross and net asset value, gross and net performance, use of leverage, aggregate value of derivatives, a breakdown of the fund's investors by category (for example, individuals, pension funds, governmental entities, sovereign wealth funds), a breakdown of the fund's equity held by the five largest investors and a summary of fund assets and liabilities. Hedge fund advisers are required to report information about fund strategy, counterparty credit risk and use of trading and clearing mechanisms quarterly. Disclosure requirements for registered advisers to private equity funds with more than US$2 billion AUM are more extensive, with additional focus on fund guarantees of controlled portfolio company obligations, leverage of controlled portfolio companies and use of bridge financing for controlled portfolio companies. Registered advisers to hedge funds with more than US$1.5 billion AUM must report on an aggregated basis information regarding exposures by asset class, geographical concentration and turnover, and for hedge funds with a net asset value of at least US$500 million, certain information relating to such fund's investments, leverage, risk profile and liquidity. For registered advisers that manage only private equity funds (as well as smaller hedge fund advisers), the form has to be filed annually, within 120 days of the fiscal year-end. Large hedge fund advisers must file Form PF on a quarterly basis within 60 days of the end of each fiscal quarter. Unlike Form ADV filings, which are available on the SEC's website, Form PF filings are confidential and such information is exempt from requests for information under FOIA. However, the SEC is required to share information included in Form PF filings with the Financial Stability Oversight Council and in certain circumstances US Congress and other federal departments, agencies and self-regulatory organisations (in each case, subject to confidentiality restrictions). We note that, for purposes of Form PF, a fund that has the ability to pay a performance fee based on unrealised gains to its adviser, borrow in excess of a certain amount, or sell assets short is deemed to be a per se hedge fund.

Regulation applicable to unregistered advisers

Even unregistered advisers are subject to the general anti-fraud provisions of the Exchange Act, the Advisers Act, state laws, and, if required to register as a broker-dealer with the Financial Industry Regulatory Authority (FINRA) (see question 11), similar rules promulgated by FINRA, and the SEC and many of the analogous state regulatory agencies retain statutory power to bring actions against a private equity fund sponsor under these provisions. Those advisers who do register under the Advisers Act (either voluntarily or because there is no applicable exemption) are subject to periodic compliance inspections conducted by the SEC and certain state regulators.

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CFTC regulation

The US Commodity Futures Trading Commission (CFTC) has the authority to regulate commodity pool operators (CPOs) under the US Commodity Exchange Act. The CFTC recently adopted regulations which broadly include most derivatives as instruments that cause a private equity fund holding such instruments to be deemed a 'commodity pool' and its operator a CPO subject to CFTC jurisdiction. While CPOs managing pools that rely on the 3(c)(7) exemption from registration under the Investment Company Act (ie, the 'qualified purchaser' exemption described in question 24 below) are no longer eligible to rely on the exemption from registration previously afforded by CFTC Rule 4.13(a)(4) following its repeal in 2012, the CFTC retained a modified version of the 'de minimis' exemption under CFTC Rule 4.13(a)(3) for CPOs that engage in limited trading of derivatives on behalf of a 'commodity pool'. The confluence of the repeal of the 4.13(a)(4) exemption and the inclusion of swaps within the meaning of 'commodity interests', puts additional regulatory pressure on managers operating private equity funds and the extent to which such private equity funds may be deemed to be 'commodity pools' (for example, because the funds hedge their currency or interest exposure by acquiring swaps), making it increasingly important for sponsors to appropriately assess the registration requirements for CPOs and determine whether they meet the 'de minimis' exemption from such registration, which requires consideration of a number of factors. In addition, while recent amendments to Rule 506 of Regulation D under the US Securities Act of 1933, as amended (the Securities Act), have afforded private equity funds additional flexibility to engage in general solicitations and general advertising in connection with fundraising activities, subject to satisfying certain conditions and procedures (see question 24), to rely on the de minimis exemption described above or CFTC Rule 4.7 (registration lite) interests in a private equity fund must be offered and sold without marketing to the public. This means that until the CFTC rules are harmonised with the recent amendments to Rule 506, it may be difficult for private equity funds relying on the de minimis exemption or CFTC Rule 4.7 to take advantage of the additional flexibility afforded by the Rule 506 amendments.

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

The offering and sale of interests in a private equity fund are typically conducted as 'private placements' exempt from the securities registration requirements imposed by the Securities Act, the regulations thereunder and applicable state law. In addition, most private equity funds require their investors to meet certain eligibility requirements so as to enable the funds to qualify for exemption from regulation as investment companies under the Investment Company Act. Accordingly, there are no approval, licensing or registration requirements applicable to a private equity fund that offers its interests in a valid private placement and qualifies for an exemption from registration under the Investment Company Act.

As a general matter, private equity funds with 'significant' participation by US corporate pension plans, entities whose assets include plan assets (such as a fund of funds) and individual retirement accounts (IRAs) (generally speaking, 25 per cent or more of the total value of investors' capital commitments are from investors using assets of US corporate pension plans, entities whose assets include plan assets and IRAs) must be operated to qualify as a venture capital operating company (VCOC), which generally entails having on its initial investment date and annually thereafter at least 50 per cent of the private equity fund's assets, valued at cost, invested in 'operating companies' as to which the private equity fund obtains direct contractual management rights and exercising such management rights with respect to one or more of such operating companies during the course of each year in the ordinary course of business.

The sponsor of a private equity fund engaging in certain types of corporate finance or financial advisory services may be required to register as a broker-dealer with FINRA and be subject to similar audit and regulation.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

Absent an applicable exemption, a private equity fund's manager will be subject to registration as an investment adviser under the Advisers Act (see question 10).

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

There are no particular education or experience requirements imposed by law on investment advisers, although these are disclosable items in the Form ADV. As a matter of market practice, the required experience level of an adviser's management team will be dictated by the demands of investors. If required to register as a broker-dealer with FINRA, a private equity fund sponsor would need to satisfy certain standards in connection with obtaining a registration (for example, no prior criminal acts, minimum capital, testing, etc). Also, a private equity fund's sponsor is typically expected to make a capital investment either directly in or on a side-by-side basis with the private equity fund (but see question 16 with respect to limitations on sponsor commitments in bank-sponsored private equity funds). Investors will expect that a significant portion of this investment be funded in cash, as opposed to deferred-fee or other arrangements.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

The SEC has adopted Rule 206(4)-5, a broad set of rules aimed at curtailing 'pay-to-play' scandals in the private equity industry. The rules, subject to certain de minimis exceptions, prohibit a registered adviser, as well as an ERA and a foreign private adviser (covered advisers), from providing advice for compensation to any US government entity within two years after the adviser or certain of its executives or employees (covered associates) has made a political contribution to an elected official or candidate who is in a position to influence an investment by the government entity in a fund advised by such adviser. The rules also make it illegal for the covered adviser itself, or through a covered associate, to solicit or coordinate contributions for any government official (or political party) where the adviser is providing or seeking to provide investment advisory services. Advisers are also required to monitor and maintain records relating to political contributions made by their employees.

In addition to the SEC rule, certain US states (including New Mexico and New York) have enacted (or proposed) legislation and certain US public pension plans (including the New Mexico State Investment Council (SIC) and the New York State Common Retirement Fund (CRF)) have established policies that impose similar restrictions on political contributions to state officials by advisers and covered associates.

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15 Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund's investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

The SEC's pay-to-play rules discussed above also broadly prohibit a covered adviser from making any payment to a third party, including a placement agent, finder or other intermediary, for securing a capital commitment from a US government entity to a fund advised by the adviser unless, as recently proposed by the SEC, such placement agent is registered under section 15B of the Exchange Act and subject to pay-to-play rules adopted by the Municipal Securities Rulemaking Board or FINRA, which are at least as stringent as the SEC pay-to-play rules. The ban does not apply to payments by the adviser to its employees or owners.

Certain US states have enacted (or proposed) legislation, and certain US public pension plans have established policies that prohibit the engagement or payment of placement agents by an adviser with respect to investment by some or all of such state's pension systems in a fund advised by such adviser. Interpretation and implementation of such bans often vary. For example, certain US public pension plans (eg, CalPERS and CalSTRS) prohibit contingent fees being paid in connection with an investment by such plan in a fund, but generally otherwise permit interaction with placement agents, whereas certain other US public pension plans do not allow solicitation by placement agents without additional registration (see below). In addition, some other public pension plans such as the Ohio Public Employees' Retirement System, State Board Administration of Florida and the Teacher Retirement System of Texas require disclosure of any placement fees paid (or to be paid) by an adviser in respect of an investment by the pension plan, rather than an outright ban on such payments.

In addition, California enacted legislation that requires placement agents to register as lobbyists before soliciting investments from its two state-level public pension plans (CalPERS, CalSTRS and the University of California to the extent it is investing retirement (as opposed to endowment) assets). The California law also prohibits placement agents from receiving fees that are contingent on securing investments from the plans and requires registration by an adviser's own employees who are involved with the solicitation of investments from the California state pension plans, such as marketing or investor relations personnel, except where those employees spend at least a third of their time on investment-management activities. Advisers who retain third-party placement agents to solicit the California state pension plans or whose employees are covered by the lobbyist-registration law are considered 'lobbyist employers' under California law and are required to make certain public filings.

The California law also requires that placement agents and adviser employees who solicit local public pension plans in California comply with lobbyist reporting rules in the county, city or other jurisdiction where the plan is located. Kentucky has also recently adopted registration requirements with respect to placement agents soliciting investments from Kentucky state pension plans that are similar to those applicable to California state public pension plans (described more fully above).

Various states and localities (including, for example, New York City) also may have lobbying laws that effectively require investment advisers and their employees who solicit state and local pension plans to register as lobbyists.

16 Bank participation

Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

On 10 December 2013, the five US regulatory agencies responsible for implementing the Volcker Rule provisions of Dodd-Frank approved final rules (the Final Rules) that generally prohibit banking entities from acquiring or retaining any ownership in, or sponsoring, a private equity fund (and from engaging in proprietary trading). For purposes of the Final Rules, the term 'banking entity' means any insured depository institution (other than certain limited purpose trust institutions), any company that controls an insured depository institution, any company that is treated as a bank holding company for purposes of the International Banking Act (such as a foreign bank that has a US branch, agency or commercial lending subsidiary) and any affiliate or subsidiary of such entities.

There are a number of exceptions to the basic prohibition on banking entities investing in or sponsoring private equity funds. In particular, banking entities are permitted to invest in private equity funds that they sponsor, provided that the investment does not exceed 3 per cent of the fund's total ownership interest or 3 per cent of the banking entity's Tier 1 capital, and provided that certain other conditions are met.

Upon the expiration of the conformance period for the Volcker Rule (which was extended to 21 July 2015 on an industry-wide basis), banking entities must have wound down, sold or otherwise conformed their activities, investments and relationships to the requirements of the Volcker Rule, although they would not be prohibited from engaging in fund activities during the conformance period. The US Federal Reserve Board has exclusive authority to grant extensions to the conformance period, and may, upon a request by a banking entity, grant up to three separate one-year extensions and a single five-year extension in respect of funds that qualify as illiquid funds, although the recent one-year extension to the conformance period pursuant to the Final Rules counts toward the statutorily imposed limit of three one-year extensions.

In issuing the extension to 21 July 2015, the US Federal Reserve indicated that banking entities should not make new investments with the expectation that an extension would be granted with respect to these investments.

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Generally, a private equity fund vehicle, such as a limited partnership or limited liability company, that is treated as a partnership for US federal income tax purposes, would not itself be subject to taxation with respect to its income or gains. Instead, each partner would take into account its distributive share of the partnership's income, gain, loss and deduction.

If the fund generates income that is effectively connected with the conduct of a US trade or business (ECI), the fund will be required to withhold US federal income tax with respect to such income that is attributable to the fund's non-US investors, regardless of whether it is distributed. In general, subject to an exception for investments in certain real estate companies, trading in stock or securities (the principal activity of most private equity funds) is not treated as generating ECI.

The fund will also be required to withhold with respect to its non-US investors' distributive share of certain US source income of the fund that is not ECI (for example, US source dividends and

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interest) unless, in the case of interest, such interest qualifies as portfolio interest. Portfolio interest generally includes (with certain exceptions) interest paid on registered obligations with respect to which the beneficial owner provides a statement that it is not a US person. A non-US investor who is a resident for tax purposes in a country with respect to which the US has an income tax treaty may be eligible for a reduction or refund of withholding tax imposed on such investor's distributive share of interest and dividends and certain foreign government investors may also be eligible for an exemption from withholding tax on income of the fund that is not from the conduct of commercial activities.

The foreign account tax compliance act (FATCA) requires all entities in a broadly defined class of foreign financial institutions (FFIs) to comply with a complicated and expansive reporting regime or, beginning in July 2014, be subject to a 30 per cent withholding tax on certain payments (and beginning in 2017, a 30 per cent withholding tax on gross proceeds from the sale or other disposition of US stocks and securities). This legislation also requires non-US entities that are not FFIs either to certify they have no substantial US beneficial ownership or to report certain information with respect to their substantial US beneficial ownership or, beginning in July 2014, be subject to a 30 per cent withholding tax on certain payments (and, beginning in 2017, a 30 per cent withholding tax on gross proceeds from the sale of US stocks and securities). This legislation could apply to non-US investors in the fund, and the private equity fund could be required to withhold on payments to such investors if such investors do not comply with the applicable requirements of this legislation.

The taxation of a private equity fund vehicle as a partnership for US federal income tax purposes is subject to certain rules regarding 'publicly traded partnerships' that could result in the partnership being classified as an association taxable as a corporation. To avoid these rules, funds are not commonly traded on a securities exchange or other established over-the-counter market and impose limitations on the transferability of interests in the private equity fund vehicle.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

Non-resident investors that invest directly in a private equity fund organised as a flow-through vehicle in the United States would be subject to US federal income taxation and return filing obligations if the private equity fund (or an entity organised as a flow-through vehicle into which the private equity fund invests) generates ECI (including gain from the sale of real property or stock in certain 'US real estate property holding corporations') (see question 17). In addition, all or a portion of the gain on the disposition (including by redemption) by a non-US investor of its interest in the fund may be taxed as ECI. Similar US state and local income tax requirements may also apply.

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

Generally, no tax ruling would be obtained with respect to the tax treatment of a private equity fund vehicle formed in the US. While there are many special taxation rules applicable to US investors, of particular relevance are those rules that apply to US tax-exempt investors in respect of unrelated business taxable income (UBTI).

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

There are no significant taxes associated with the organisation of a private equity fund in the US.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

Special consideration is given to structure the carried interest such that it is treated as a partnership allocation eligible for taxation on a flow-through basis. It is sometimes desirable to separate the general partner (namely, the recipient of the carried interest) and the investment manager (namely, the recipient of the management fee) into separate entities (see question 32).

Legislation has been introduced in Congress that, if enacted, would result in carried interest distributions that are currently subject to favourable capital gains tax treatment being subject to higher rates of US federal income tax than are currently in effect. The Obama Administration has indicated it supports the adoption of this legislation or legislation that similarly changes the treatment of carried interest for US federal income tax purposes. Whether such legislation will be enacted (or in what ultimate form) is uncertain.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

The US has an extensive network of income tax treaties. How a treaty would apply to the fund vehicle depends on the terms of the specific treaty and the relevant facts of the structure.

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

US tax rules are very complex and tax matters play an extremely important role in both fund formation and the structure of underlying fund investments. Consultation with tax advisers with respect to the specific transactions or issues is highly recommended.

Selling restrictions and investors generally

24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

To ensure that a private equity fund offering securities in the US will satisfy the requirements necessary to avoid registration with the SEC, a private equity fund sponsor will customarily conduct the offering and sale of interests in the private equity fund to meet a private placement exemption under the Securities Act. The most reliable way to do this is to comply with the 'safe harbour' criteria established by Regulation D under the Securities Act. Compliance with these criteria effectively necessitate, among other requirements, that each investor in the private equity fund be an accredited investor (which generally includes a natural person with a net worth of more than US$1 million or income above US$200,000 in the last two years (or US$300,000 in joint income with a spouse for those years) and a reasonable expectation of reaching the same income level in the current year, and entities with more than US$5 million in assets) and that the sponsor not make any offers or sales by

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means of general solicitation or general advertising, although recent amendments to Regulation D now permit general solicitation and general advertising in connection with fundraising activities so long as certain additional requirements are met (as more fully described below). For purposes of the US$1 million net-worth test described above, the value of the investor's primary residence is excluded from the calculation of the investor's total assets and the amount of any mortgage or other indebtedness secured by an investor's primary residence is similarly excluded from the calculation of the investor's total liabilities, except to the extent the fair market value of the residence is less than the amount of such mortgage or other indebtedness. In addition, the SEC is authorised to adjust the 'accredited investor' definition for individuals every four years as may be appropriate to protect investors, further the public interest or otherwise reflect changes in the prevailing economy. In addition, the SEC added a timing provision to the revised net-worth test designed to prevent investors from artificially inflating their net worth by incurring incremental indebtedness secured by their primary residence to acquire assets that would be included in the net worth calculation. Under the timing provision, if a borrowing occurs in the 60 days preceding the purchase of securities in an exempt offering and is not in connection with the purchase of the primary residence, the incremental indebtedness must be treated as a liability for the net worth calculation, even if the value of the primary residence exceeds the aggregate amount of debt secured by the primary residence.

On 10 July 2013, the SEC approved final rules and adopted amendments to Rule 506 of Regulation D that permit the use of general solicitation and general advertising in connection with securities offerings under new Rule 506(c), and disqualify felons and other 'bad actors' from relying on this safe harbour.

While the recent amendments to Rule 506 lift the ban on general solicitation and are historically significant, they also impose substantial additional requirements and limitations with respect to issuers conducting offerings using general solicitation or general advertising, including requirements that all purchasers of securities qualify as 'accredited investors', and the issuer takes 'reasonable steps' to verify the 'accredited investor' status of all purchasers. In determining whether the steps taken by an issuer to verify eligibility are objectively 'reasonable', issuers should consider the particular facts and circumstances of each offering and each purchaser, including:

- the nature of the purchaser and the type of accredited investor that the purchaser claims to be;
- the amount and type of information that the issuer has about the purchaser; and
- the nature, terms and manner of the offering.

The increased verification measures with respect to sales under new Rule 506(c) are likely to result in increased compliance burdens and costs for issuers, and in some cases investors may be sensitive or reluctant to provide the additional information required as part of the enhanced verification procedures (for example, an obligation to provide tax returns or bank account statements). It should be noted, however, that issuers conducting Rule 506 offerings without involving any general solicitation or general advertising are not subject to such enhanced verification procedures required under new Rule 506(c). The SEC has also proposed amendments to Rule 506 that would extend the anti-fraud provisions and guidance applicable to registered investment companies (ie, mutual funds) contained in Rule 156 to the marketing materials and 'sales literature' of all private equity funds engaging in Rule 506 offerings (whether or not involving a general solicitation), which given the illiquid nature of many private equity fund portfolios relative to the more liquid portfolios of mutual funds may present private equity sponsors with issues relating to portfolio valuation and the presentation of performance information if ultimately adopted as proposed.

The amendments to Rule 506 and Regulation D will also likely have an impact on other aspects of a private equity sponsor's regulatory compliance regime. While conducting a Rule 506(c) offering will not cause a private equity fund issuer to be deemed engaged in a public offering for purposes of applicable exemptions under the Investment Company Act, given the nascency of Rule 506(c) and the general solicitation provisions, further harmonisation of the regulatory framework applicable to private equity funds seems to be required. For example, as discussed more fully in question 10 above, private equity funds that have commodities interests (including swaps) in their portfolios may not be able to take advantage of Rule 506(c) since relevant CFTC exemptions still prohibit 'marketing to the public'. Moreover, it is possible that the use of general solicitation or general advertising by a private equity fund under Rule 506(c) could have an adverse impact on its private placement under the securities laws of applicable US states or non-US jurisdictions in which it conducts its offering as the securities laws of some states or non-US jurisdictions may not permit general solicitation in their current form.

In conjunction with lifting the ban on general solicitations and general advertising under Rule 506(c), the SEC also adopted amendments (the 'bad actor' rules) prohibiting issuers from relying on the Rule 506 safe harbour (whether or not the proposed offering involves a general solicitation), if the issuer or any other 'covered person' was subject to a 'disqualifying event'. 'Covered persons' include the issuer and its predecessors, affiliated issuers (which, according to recent SEC guidance, is limited to affiliates of the issuer that issue securities in the same offering, ie, parallel funds and related feeder funds), directors and certain officers, general partners and managing members of the issuer, beneficial owners of 20 per cent or more of an issuer's outstanding voting equity securities (including, notably, any limited partner that owns more than 20 per cent of the voting interests in the related private equity fund), any investment manager to any pooled investment fund issuer, any 'promoter' connected with the issuer and any persons compensated for soliciting investors (eg, placement agents), as well as the general partners, directors, officers and managing members of any compensated solicitor. For purposes of the bad actor rules, 'disqualifying events' include certain criminal convictions, court injunctions and restraining orders, final orders of state and federal regulators, SEC disciplinary orders, stop orders and cease-and-desist orders, suspension or expulsion from a securities self-regulatory organisation (SRO) and US Postal Service false representation orders. A number of the disqualifying events are required to occur in connection with the purchase or sale of securities and include a look-back period of five to 10 years depending on the particular facts surrounding the disqualifying event. While only disqualifying events that occur after the rule's effective date (23 September 2013) will disqualify an issuer from relying on Rule 506, disqualifying events that occurred prior to such date would nonetheless be required to be disclosed to investors in connection with any sales of securities under Rule 506 after such date. Similarly, sales of securities made prior to the effective date of the bad actor rules will not be affected, even if part of an otherwise continuous offering. Only sales made after the effective date will be subject to the new bad actor rules. The bad actor rules will not apply if an issuer can show that it did not know and, in the exercise of reasonable care, could not have known that the issuer or any other covered person was subject to a disqualifying event, although this reasonable care exception requires factual inquiry. Additionally, the SEC may grant waivers from disqualification under certain circumstances, including a change of control subsequent to the disqualifying event.

To ensure that a private equity fund will satisfy the requirements necessary to avoid regulation as an 'investment company' under the Investment Company Act, each investor in the fund will typically be required to represent that it is a 'qualified purchaser' as defined in section 2(a)(51) of the Investment Company Act. In the event that not all of a private equity fund's investors are 'qualified purchasers', then the fund may still qualify for an exemption (the 3(c)(1) exemption) by limiting the number of investors to not more than

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100 (all of which must still be accredited investors and with respect to which certain 'look through' attribution rules apply). A 'qualified purchaser' generally includes a natural person who owns not less than US$5 million in investments, a company acting for its own account or the accounts of other qualified purchasers that owns and invests on a discretionary basis not less than US$25 million in investments and certain trusts. 'Knowledgeable employees' (namely, executive officers and directors of the sponsor, and most investment professionals actively involved with the private equity fund's investment activities) are ignored for the purposes of the foregoing requirements. If the sponsor of a private equity fund is a registered investment adviser under the Advisers Act, then in certain circumstances each investor may need to represent that it is a 'qualified client' as defined under the Advisers Act. A 'qualified client' generally includes a natural person or company with a net worth exceeding US$2 million or that has US$1 million under management with the adviser, although the SEC is required every five years to adjust these dollar amounts for inflation, excluding the value attributable to such person's primary residence (as more fully described above).

A private equity fund relying on the private placement safe harbour contained in Regulation D under the Securities Act must file electronically with the SEC a notice on Form D within 15 calendar days after the first sale of securities. Form D sets forth certain basic information about the offering, including the amount of securities offered and sold as well as whether any sales commissions were paid to any broker-dealers and, if so, the states in which purchases were solicited by such broker-dealer. With respect to the filing deadline for the new Form D, the SEC has confirmed its previously stated interpretation that a 'sale' is the date on which the first investor is irrevocably contractually committed to invest, which, depending on the terms and conditions of the contract, could be the date on which the private equity fund receives the investor's subscription agreement and not necessarily as late as the closing date. The SEC has also proposed additional amendments to Regulation D, which would impose additional procedural requirements on issuers seeking to rely on new Rule 506(c) to engage in a general solicitation by requiring that an initial Form D be filed at least 15 days before commencing any such general solicitation (containing heightened disclosure requirements) and that a final amendment to Form D be filed within 30 days of the termination of any such offering. Under proposed amendments to Regulation D, failure to comply with the Form D filing requirements (whether or not involving a general solicitation) would result in an automatic one-year disqualification from relying on the Rule 506 safe harbour. In addition to federal securities law compliance, most states also have similar notice-filing requirements, and while state securities law filings are generally pre-empted by the filing of Form D with the SEC, private equity sponsors should be cognizant of the various state law notice-filing requirements in the various jurisdictions in which they have offered or sold limited partnership interests to investors to ensure continued compliance in limited circumstances where such filings may nonetheless be required.

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

Other than compliance with certain aspects of the anti-money laundering provisions of the USA PATRIOT Act (the Patriot Act) discussed in question 28, as a general matter there are no such restrictions other than those imposed by applicable securities laws described above or which may arise under the laws of other jurisdictions. Sponsors of private equity funds may choose to limit participation by certain types of investors in the light of applicable legal, tax and regulatory considerations and the investment strategy of the fund. Restrictions may be imposed on the participation of non-US investors in a private equity fund in investments by the private equity fund in certain regulated industries (for example, airlines, shipping, telecommunications and defence). (See question 16 with respect to recently enacted restrictions on bank holding companies investing in private equity funds.)

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

There is generally no requirement to notify the state of Delaware or the SEC as a result of a change in the identity of investors in a private equity fund formed in Delaware (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager, except that in the case of a manager or investment adviser registered under the Advisers Act, changes in identity of certain individuals employed by or associated with the investment adviser must be reflected in an amendment to part I of the adviser's Form ADV promptly filed with the SEC, and in certain circumstances a change of control of the manager or investment adviser may require the consent of the investors in the private equity fund. In the event of a change of the general partner of a Delaware limited partnership, an amendment to the fund's certificate of limited partnership would be required to be filed in Delaware and such change would need to be accomplished in accordance with such limited partnership's partnership agreement. Additionally, a private equity fund that makes an investment in a regulated industry, such as banking, insurance, airlines, telecommunications, shipping, defence, energy and gaming, may be required to disclose the identity and ownership percentage of fund investors to the applicable regulatory authorities in connection with an investment in any such company.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

Generally, the sponsor of a private equity fund in the US would not be required to register as a broker or dealer under the Exchange Act as they are not normally considered to be 'engaged in the business' of brokering or dealing in securities. The rules promulgated under the Exchange Act provide a safe harbour from requiring employees and issuers to register as a broker or dealer subject to certain conditions, including such employees not being compensated by payment of commissions or other remunerations based either directly or indirectly on the offering of securities. If compensation is directly or indirectly paid to employees of the sponsor in connection with the offering of securities, the sponsor may be required to register as a broker-dealer (see questions 10 and 11). If a private equity fund retains a third party to market its securities, that third party generally would be required to be registered as a broker-dealer.

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

Although private equity funds generally are not currently subject to the anti-money laundering regulations of the Patriot Act, the Treasury Department has in the past issued proposed rules that would require advisers of hedge funds and, possibly, private equity funds to adopt anti-money laundering procedures in accordance with the Patriot Act. Although these proposed rules are recently

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Update and trends

The following noteworthy trends and developments have occurred recently in the private equity industry:

- Continued consolidation in the private equity industry, with private equity fundraising totals for 2013 at the highest levels since the financial crisis, while institutional limited partners are tending to make larger commitments to fewer and more established sponsors. This trend towards consolidation has been paired with a noticeable 'flight to quality' in favour of larger established sponsors with proven track records (resulting in mega-funds taking up an increasing share of the fundraising market).
- An increased focus on customised fund arrangements (including funds-of-one and managed accounts) for large or influential investors, which may be operated on a stand-alone basis or as part of a broader investment programme, and the continued importance of strategic relationships between such investors and sponsors, often involving long-term commitments, 'anchor' investments and other 'umbrella' arrangements.
- Continued limitations on allocations to the private equity asset class for some and regulatory constraints for others (particularly US public pension plans, banks and other financial institutions) has led to a shift in the key participants in private equity funds, with sovereign wealth funds playing an increasingly important role, and has caused many private equity sponsors to seek out new categories of investors that have not been historically significant participants in the private equity asset class (high-net-worth investors, retirement accounts, etc).
- Increased regulation of the private equity industry has created challenges and uncertainty for many private equity firms, prompting a shift towards the adoption of more systematic and institutionalised compliance functions and operations that entail the dedication of additional resources at substantial cost.
- The need for banks and similar financial institutions to sell certain long-term assets (like private equity fund interests) for capital and regulatory reasons has increased the size of the overall secondary market for private equity fund interests and has created additional opportunities for firms with secondary investment programmes, while at the same time certain private equity sponsors have introduced private matching systems and other transfer arrangements that afford limited partners the opportunity to sell their illiquid fund interests (subject to certain conditions), further contributing to the overall availability of secondary private equity fund interests.
- At the same time, banks and other similar financial institutions are often no longer viewed as attractive sponsors of separate private equity businesses, which has resulted in the migration of a number of private equity and secondary groups to more traditional private equity firms and alternative asset managers.
- A number of the larger and more established private equity firms and alternative asset managers face distinct firm issues relating to the interplay between their status as public companies and their sponsorship and management of private funds.
- Increased flexibility to market to investors using general solicitation and general advertising, though the waters largely remain untested and the new obligations imposed on issuers seeking to engage in general solicitations may reduce the attractiveness of the new rules from a commercial perspective.

withdrawn and are not currently effective, as a best practice many private equity funds have already put into place anti-money laundering programmes that meet the requirements set forth in the Patriot Act's regulations. These requirements include:

- developing internal policies, procedures and controls;
- designating an anti-money laundering compliance officer;
- implementing an employee training programme; and
- having an independent audit function to test the programme.

Currently, there are no regulations in effect that would require the disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor. If an investment adviser to a private equity fund is registered under the Advisers Act, the adviser must disclose on Form ADV the educational, business and disciplinary background of certain individuals employed by or associated with the investment adviser. Part 1 of the adviser's Form ADV is available on the SEC's website. Similar disclosure may be required for advisers that are or have affiliates that are broker-dealers registered with FINRA. (See also question 10 for disclosure obligations under Form PF.)

Exchange listing

29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

Because of certain adverse tax consequences arising from status as a 'publicly traded partnership' and the difficulty that such a listing would impose on being able to establish an exemption from registration under the Investment Company Act, private equity funds do not typically list on a securities exchange in the US (see also question 17). The applicable listing requirements would be established by the relevant securities exchange.

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

As discussed above, private equity funds do not typically list on any US exchange. However, if listed, the ability of such a fund to restrict transfers of its interest would be dictated by the listing requirements of the relevant securities exchange as well as the other governing agreements of such fund.

Participation in private equity transactions

31 Legal and regulatory restrictions

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

The primary restrictions concerning the types of investments that a private equity fund may make are typically contained in the private equity fund's limited partnership agreement. These restrictions often include limits on the amount of capital (typically expressed as a percentage of the fund's capital commitments) that may be deployed in any one investment, a restriction on participation in 'hostile' transactions, certain geographic diversification limits, a restriction on investments that generate certain types of tax consequences for investors (for example, UBTI for US tax-exempt investors or ECI for non-US investors), a restriction on certain types of investments (for example, venture capital investments, 'blind pool' investments, direct investments in real estate or oil and gas assets) and so on. Individual investors in a private equity fund may also have the right (either pursuant to the partnership agreement or a side letter relating thereto) to be excused from having their capital invested in certain types of investments (tobacco, military industry, etc) and to participate in certain types of investments in a certain manner (for example, to participate in UBTI or ECI investments through an alternative investment vehicle and/or an entity treated as a corporation for US federal tax purposes).

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There may also be limits on and filing requirements associated with certain types of portfolio investments made by a private equity fund. For example, investments in certain media companies may implicate the ownership limits and reporting obligations established by the US Federal Communications Commission (FCC). Other similarly regulated industries include shipping, defence, banking and insurance. Regulatory considerations applicable to M&A transactions generally (for example, antitrust, tender-offer rules, etc) also apply equally to private equity transactions completed by funds. Consideration should also be given to the potential applicability of the Sarbanes-Oxley Act and applicable US state laws relating to fraudulent conveyance issues, as discussed in more detail in the US transactions chapter.

In addition, depending on the composition of a private equity fund's investors, the private equity fund may, to avoid being subject to onerous fiduciary requirements under the Employee Retirement Income Security Act 1974, as amended (ERISA) and prohibited transaction rules under ERISA and the Internal Revenue Code of 1986, as amended, need to structure its investments in a manner so as to ensure that the private equity fund will qualify as a VCOC, which generally entails having on its initial investment date and annually thereafter at least 50 per cent of the private equity fund's assets, valued at cost, invested in 'operating companies' as to which the private equity fund obtains direct contractual management rights and exercising such management rights with respect to one or more of such operating companies during the course of each year in the ordinary course of business.

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

Depending on the state in which a private equity fund is formed and operates, there may be tax advantages to forming separate entities to receive the carried interest and management fee (and other fee) payments in respect of the fund and other unique structuring requirements. For example, funds whose manager has a place of business in New York City typically use this bifurcated structure. Additionally, as noted in question 21, legislation has been introduced in Congress that, if enacted, would result in typical carried interest distributions being taxed at a higher rate. Moreover, recently enacted legislation limits a sponsor's ability to use fee deferral arrangements to defer payment of tax on compensation and similar profits allocations.

The sponsor's ability to take transaction fees is likely to be the subject of negotiation with investors in the fund, who may seek to have a portion of such fees accrue for their account as opposed to that of the sponsor through an offset of such fees against the management fee otherwise to be borne by such investors.

In certain circumstances, depending on the structure of a private equity fund, the manner in which a sponsor may charge a carried interest or management fee can be affected by the requirements of ERISA or the Advisers Act.

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