

SEC Settles with PE Fund Manager over Broken-Deal Expenses

PENpoints

In light of a recent SEC settlement, managers should continue to review fee and expense practices against the disclosures made to investors at the time of commitment.

On September 21, the SEC settled an enforcement proceeding against a private equity fund manager alleging that the manager's private equity funds were inappropriately allocated and charged broken-deal expenses attributable to affiliated co-investors. According to the [Consent Order](#), the manager permitted co-investors (including personnel of the manager and its affiliates) to co-invest through single-investment vehicles formed to invest alongside its private equity funds in an annually determined percentage. The SEC alleged that the funds' governing documents did not contain sufficiently detailed disclosure to permit the funds to bear the co-investment vehicles' share of broken-deal expenses, and cited the manager's lack of a written policy governing broken-deal expense allocation practices. Although the Consent Order notes that the practices started in 2004, the SEC required that the manager pay approx-

imately \$1.9 million of disgorgement dating back to 2012,¹ together with prejudgment interest, in addition to a \$1.5 million civil penalty.

The settlement follows a 2015 SEC [Consent Order](#) relating to broken-deal expense practices involving committed co-invest vehicles or co-invest programs, particularly involving manager affiliates and employees, as well as a 2016 sweep examination of West Coast-based private equity managers relating to broken-deal expense practices.

In light of the ongoing SEC focus, managers should continue to review their fee and expense practices against the disclosures made to investors at the time of commitment, and adopt policies designed to assist with appropriate allocations.

¹ The Consent Order makes specific reference to the five-year statute of limitations period for disgorgement under 28 U.S.C. § 2462 in light of the recent Supreme Court decision in *Kokesh*.

If you have any questions about the matters addressed in this *KirklandPEN*, please contact the following Kirkland authors or your regular Kirkland contact.

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PENbriefs

The Trump Administration Sharpens Secondary Sanctions — China and Russia Are On Notice

Whereas President Trump once offered inducements to China in particular for its assistance in dealing with North Korea, the administration is now increasingly willing to use secondary sanctions — coercive trade measures against third-country individuals and entities — in an attempt to resolve the crisis. To learn more, see our recent [Alert](#).

President Trump Signs Sanctions Bill Targeting Russia, North Korea and Iran

President Trump recently signed into law the “Countering America’s Adversaries Through Sanctions Act,” which imposes new sanctions on Russia, North Korea and Iran and highlights the continuing challenges that companies face in complying with the constantly evolving sanctions landscape. To learn more, see our recent [Alert](#).

Unanimous Texas Court of Appeals Reverses Controversial Jury Verdict: No “Common Law” Business Partnership in Texas

A Texas Court of Appeals recently reversed a trial court verdict finding a common law partnership between two entities that had signed term sheets and other preliminary documents in contemplation of a potential investment. The ruling provides greater certainty that the express language in term sheets, letters of intent, indications of interest and similar documents that contain conditions precedent to the formation of a partnership will be given significant weight in determining whether binding arrangements have been formed. To learn more, see our recent [Alert](#).

KirklandAIM Update

Recently in our *KirklandAIM* newsletter, which is directed toward Chief Compliance Officers and other compliance professionals, we discussed: a recent SEC settlement of a proceeding against two affiliated investment advisers, their principal, sole owner and Chief Compliance Officer for failure to register an investment adviser to two private funds and other practices (click [here](#) to access this edition of *KirklandAIM*); an SEC report weighing in on the circumstances under which a virtual currency token will be deemed a security (click [here](#) to access this edition of *KirklandAIM*); and effective date, and the new information required by, the SEC’s revised Form ADV (click [here](#) to access this edition of *KirklandAIM*).

PENnotes

PENews Conference Call Series

Kirkland regularly hosts short PENews conference calls covering topics most critical to private equity business professionals. Recent topics include “Cracking the Credit Code: Differences in Private Debt and Private Equity Fund Terms.” Click [here](#) to listen to a recording of the call.

Women in Alternative Debt

New York, NY, September 26, 2017

Senior women in the alternative debt space from THL Credit, Bain Capital Credit, Liberty Mutual Investments and Kirkland & Ellis have formed Women in Alternative Debt (WIAD) to promote the development of senior women investors and managers active in alternative debt — GPs and LPs alike. WIAD provides informative programming and opportunities for women focused on debt investing to establish a solid network of like-minded professionals. WIAD will host author and Director of Solutions at Bergdorf Goodman, Betty Halbreich, for an evening of networking. Click [here](#) for more information about the reception or WIAD.

**Kirkland Registered Adviser Seminar and CCO Summit
San Francisco, CA, September 26, 2017**

Chicago, IL, October 3, 2017

Boston, MA, October 12, 2017

Los Angeles, CA, October 17, 2017

Houston, TX, October 24, 2017

As the SEC continues its focus on private fund managers registered as investment advisers, firms must be familiar with the evolving regulatory environment. This seminar is designed specifically for private fund manager CCOs, general counsel and other senior executives. Seminar topics will include: market and fundraising developments; practical tips for private fund managers operating in today’s regulated environment, and legislative and regulatory developments, among other topics. Click [here](#) for more information.

PLI Hot Topics in Mergers & Acquisitions 2017

New York, NY, September 26, 2017

Chicago, IL, October 20, 2017

An expert faculty of lawyers, general counsel, regulators and investment bankers will explore the state of M&A and trends for the year ahead. Kirkland partners Scott Falk and Sarkis Jebejian are co-chairs of the event and will serve as panelists on the “Current Landscape of the M&A Market.” Partner Sara Zabloutney will be a panelist on “Important Tax Issues in M&A.” Click [here](#) for more information.

**PLI Understanding the Securities Laws 2017
Chicago, IL, September 27-28, 2017**

This program will provide an overview and discussion of the basic aspects of the U.S. federal securities laws by in-house and law firm practitioners as well as SEC staff. Emphasis will be placed on the interplay among various regulations, as well as legislative and regulatory changes in the wake of the election. Kirkland partner Bradley Reed will be a panelist on “Regulation of Proxy Solicitations” at the Chicago event. Click [here](#) for more information.

**Kirkland Structuring and Negotiating LBOs Seminar
San Francisco, CA, October 12, 2017**

Chicago, IL, October 17, 2017

New York, NY, October 24, 2017

This biennial seminar will review the legal, tax, structuring and practical negotiating aspects of buyouts and other complex private equity deals. Topics covered will include structuring buyouts, utilizing rep and warranty insurance, negotiating acquisitions and related debt and equity financings, and special issues in acquiring public companies. Click [here](#) for more information or to register.

**9th Annual Womens’ Alternative Investment Summit
New York, NY, November 2-3, 2017**

The Women’s Alternative Investment Summit will bring together more than 400 senior-level women — fund managers, institutional investors, and advisers to the industry — across the broad spectrum of alternatives. Multisession tracks address the many asset classes, including private equity, venture capital, hedge funds, real estate, infrastructure and real assets investing. Kirkland partners Sarah Kirson and Erica Williams will moderate panels, and partner Linda Myers will participate in the keynote presentation and discussion. The Firm is also a platinum sponsor of the event. Click [here](#) for more information.

Private Equity Practice at Kirkland & Ellis

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Kirkland & Ellis' nearly 500 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and fund formations on behalf of more than 400 private equity firms and hedge funds around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in each of the last six years by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. U.S. News Media Group and Best Lawyers have ranked Kirkland as a Tier 1 law firm for Leveraged Buyouts and Private Equity Law for seven consecutive years and as a top-tier firm for Private Funds/Hedge Funds Law since 2012. The Firm was recognized as the #1 law firm for private equity in the 2017 Vault 100 rankings, and, in 2016, Private Equity International named the Firm "Law Firm of the Year in North America: Fund Formation" for the third year in a row.

In 2012-2016, Chambers and Partners ranked Kirkland as a Tier 1 law firm for Investment Funds in the United States, United Kingdom, Asia-Pacific and globally. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011-2016*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

The Lawyer magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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