

Private Fund Manager Settles with SEC Over Disclosure Practices in Connection with the Manager's Purchase of LP Interests from its Investors

PENpoints

A recent SEC consent order emphasizes the Advisers Act fiduciary duty to disclose material facts to investors, including in end-of-fund life situations seeking investor liquidity.

Last week, a private fund manager and its principal settled with the U.S. Securities and Exchange Commission ("SEC") in connection with the principal's purchase of limited partner interests from investors in the manager's fund based on stale year-end pricing, when the manager and its principal had received financial information indicating a materially higher valuation since year-end.

The consent order¹ alleged that:

- The manager advised a 17-year-old private equity fund with two remaining portfolio companies;
 - Given the age of the fund and small value of remaining investments (approximately 4% of called capital), certain limited partners requested that the manager offer liquidity;
 - The manager determined to make an in-kind distribution of the remaining portfolio companies to the partners and, in connection with such distribution, the manager's principal determined also to make a cash offer to limited partners to purchase their interests in the portfolio companies at the year-end value determined by the manager; this offer was communicated to investors in April, together with a description of the recent down performance of one of the portfolio companies;
 - Shortly after the April communication to investors, the manager received financial information from the two portfolio companies showing improved results and resulting in the manager's finance department increasing the valuation by a material amount from the year-end valuation that had been previously shared with the fund's investors; and
- In May, 80% of investors had accepted the principal's cash offer; the manager thereafter determined to terminate the distribution in kind and proceed with the principal's cash offer for interests based on the year-end valuation; the communication did not discuss the potential increase in valuation from year-end and the manager did not make a timely delivery of financial statements for the quarter to the limited partners reflecting improved results.

In the consent order, the SEC found that the manager and its principal violated the antifraud provisions of the Investment Advisers Act of 1940 ("Advisers Act") by failing to disclose the increased valuation of the portfolio companies. The manager and its principal agreed to a cease and desist from further violations and to pay a civil money penalty of \$200,000.

This consent order emphasizes the Advisers Act fiduciary duty to disclose material facts to investors, including in end-of-fund life situations seeking investor liquidity. Managers should be particularly attentive to such obligations when purchasing investor interests in their funds given the potential for information disparity between the manager and fund investors.

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¹ See [Consent Order](#).

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PENbriefs

UK Seeks to Strengthen its National Security Regime

On July 24, 2018, the U.K. Government's Department for Business, Energy and Industrial Strategy released a white paper titled "National Security and Investment," together with a draft Statutory Statement of Policy. In this white paper, the U.K. government proposed a new framework that will transform how the U.K. assesses and manages national security risk arising from certain types of investments and acquisitions. To learn more, see our recent [Alert](#).

SEC Adopts Amendments to Update and Simplify Disclosure Requirements

On August 17, 2018, the U.S. Securities and Exchange Commission ("SEC") announced the adoption of amendments intended to update and simplify the disclosure of information to investors and reduce compliance burdens for companies. These amendments, while not significantly altering the total mix of information available to investors, could affect the preparation of third quarter 2018 reports on Form 10-Q for calendar year-end companies. To learn more, see our recent [Alert](#).

PENnotes

Kirkland Registered Adviser Seminar & CCO Summit
New York, NY, September 25, 2018
Boston, MA, September 27, 2018
Chicago, IL, October 2, 2018
Houston, TX, October 9, 2018
San Francisco, CA, October 18, 2018
Los Angeles, CA, November 13, 2018

Designed specifically for private fund manager CCOs, general counsel and other senior executives, this annual event enables firms to navigate the evolving regulatory landscape and get timely updates about SEC policy and enforcement developments affecting private fund managers. Click [here](#) for more information.

Advancing Microfinance: Fireside Chat with Dr. Amjad Saqib
Boston, MA, October 2, 2018

Kirkland will host a discussion with Dr. Amjad Saqib, founder and executive director of Akhuwat, the world's largest interest-free microfinance program. Dr. Saqib

will tell the story of Akhuwat and discuss social entrepreneurship, development and private-sector altruism in Pakistan. Click [here](#) for more information.

Women's Alternative Investment Summit
New York, NY, November 8–9, 2018

Kirkland is a sponsor of this annual event, which will bring together more than 400 senior-level women across the broad spectrum of alternatives to network and discuss alternative investments in an emerging new world. Kirkland partners Jennifer Perkins, Stephanie Berdik, Erica Berthou and Linda Myers will participate in 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 seven 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 2018 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 2012-2017, 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 2011-2017*, 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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