

## Beginner's Glossary to Fund Finance

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The following glossary is intended to serve as a reference tool for those that are new to the private equity fund finance space by demystifying some of the more commonly utilized terms in the fund finance industry. Please note that these definitions/explanations are accurate as of the date of publication, but that these terms may evolve as applicable law and market custom change.

**Account Pledgor** means a loan party that has the right to receive Capital Contributions from Investors and that pledges the deposit account or securities account into which Investor Capital Contributions are to be funded to the lender.

**Aftercare Facility** means a credit line advanced to a private equity Fund borrower whose Commitment Period has expired. Post-Commitment Period expiration, Fund borrowers typically have significantly reduced borrowing availability under a traditional Subscription-backed Credit Facility borrowing base; as such, Aftercare Facilities often have expanded borrowing base advance rates, limited or no Concentration Limits and/or rely on a net asset value covenant for additional lender protection. Aftercare Facilities are sometimes unsecured, though more frequently they are secured by one or more of a combination of traditional Subscription-backed Credit Facility collateral, distribution proceeds from the borrower Fund's investments, equity interests in holding companies through which the borrower Fund makes investments and the equity interests

relating to the borrower Fund's investments themselves.

**Bad Boy Carve-Out** is an exception to the non-recourse nature of a loan that provides for a loan party to have full or partial personal recourse liability for the loan in the event certain events occur (e.g., filing a voluntary bankruptcy action). In a traditional Subscription-backed Credit Facility, bad-boy carve-outs typically apply to the General Partner of the Fund borrowers/guarantors and are limited to actual damages of the lender arising as a result of the fraud, willful misrepresentation or willful misappropriation of loan or Capital Contribution proceeds on the part of such General Partner.

**Blocker** is an entity, often a C-corporation, through which Tax-Exempt Investors invest in a private equity Fund so as to shield such Tax-Exempt Investors from having to pay US income tax and file a US federal tax return.

**Borrowing Base** is used in asset-based lending facilities to calculate the borrowing value of a borrower's assets. The Borrowing Base determines the maximum borrowing availability under the line of credit. Typically, a Borrowing Base is calculated by applying a discount factor to each asset class (often, though not always, constituting the collateral) against which the lender will advance funds (e.g., uncalled Capital Contributions, accounts receivable, inventory, loan assets, etc.).

**Capital Call** means the legal right of a private equity Fund (or its General Partner) to demand from its Investors that they fund a portion of

the money the Investors agreed to commit to the Fund.

**Capital Call Notice** is a notice issued by a private equity Fund (or its General Partner) instructing its Investors to make a Capital Contribution to the Fund to permit the Fund to make an investment or pay for Fund Expenses or liabilities. Often referred to as a drawdown.

**Capital Commitment** is the promise by an Investor in a private equity Fund to make Capital Contributions to the Fund over a specified period of time. The Investor receives an interest in the Fund at the time it makes the Capital Commitment.

**Capital Contributions** means the money or other assets transferred to a private equity Fund by an Investor with respect to the Investor's Capital Commitment.

**Cascading Pledge** is an alternative tiered-collateral structure employed when tax, regulatory or ERISA concerns prevent a Feeder Fund from guaranteeing and directly pledging collateral to the lender to support a Fund borrower's obligations under a Subscription-backed Credit Facility. In a Cascading Pledge, the Feeder Fund grants a security interest in its Capital Commitments and call rights to a Blocker entity; the Blocker entity in turn grants a security interest in its rights under the security agreement from the Feeder Fund to the Fund borrower; the Fund borrower in turn grants a security interest in its rights, including those under the security agreement, from the Blocker entity to the lender.

**Clawback (either General Partner or Limited Partner)** means, with reference to a General Partner or manager, a mechanism whereby a private equity manager is obligated to return a portion of its previously received Promote or performance fee payment if as a result of timing and Fund performance, the General Partner receives more carry or performance fee during the life of the Fund

than the General Partner would be entitled to receive had profits and losses been allocated on an aggregate basis at the time of dissolution of the Fund. With reference to a Limited Partner, the obligation of an Investor to return previously received distributions to the Fund if the Fund requires such amounts to fulfill its indemnification obligations or satisfy expenses or other liabilities.

**Closed-End Fund** means a collective investment vehicle in which the total committed capital and Investors are fixed at the end of a proscribed fundraising period, wherein the Investors each commit a specified amount of capital and have limited or no rights to redeem their interest or withdraw invested capital until the dissolution of the Fund.

**Collateral Account** is a deposit or securities account into which collateral (Capital Contributions) is deposited and over which a lender has a perfected security interest.

**Commitment Period** is the time frame, typically a period of 3-5 years, during which a private equity Fund is permitted to call capital from Investors to make new investments or additional investments in portfolio companies.

**Concentration Limit** means, in an asset-based lending facility, a specified percentage of the total eligible Borrowing Base over which no loan value is given with respect to a particular asset or type of collateral, thereby promoting diversification in the Borrowing Base. In a Subscription-backed Credit Facility, a Concentration Limit may work to limit the aggregate unfunded Capital Commitments that a single Investor or a class of Investors (e.g., High-Net-Worth Investors) can contribute to the overall Borrowing Base.

**Defaulting Investor** is an Investor in a private equity Fund that has breached the Fund's constituent documents, namely by failing to make a Capital Contribution when required pursuant to a Capital Call Notice. Defaulting

Investors are subject to various remedies under a Fund's partnership agreement, which may include a forced sale of the Defaulting Investor's interest at a discount as well as loss of certain rights, such as participating in future investments and voting.

**ERISA Fund** means a private equity Fund that consists of, or is deemed to hold, plan assets and operates as a plan asset vehicle that is subject to Title I of ERISA and/or Section 4975 of the Internal Revenue Code. In the context of a Subscription-backed Credit Facility, borrowers and lenders have concerns regarding ERISA Funds and potential prohibited transactions with lenders which may subject the Fund and the lender to heavy tax penalties.

**ERISA Limited Partner** is an Investor that is (i) an "employee benefit plan" (as defined in ERISA) subject to Title I of ERISA; (ii) any "plan" defined in and subject to Section 4975 of the Internal Revenue Code; or (iii) any other entity whose assets include or are deemed to include the assets of one or more such employee benefit plans in accordance with ERISA and related regulations.

**Feeder Fund** is an upper-tier special-purpose entity formed by a private equity Fund to facilitate investment in the Fund by one or more Investors, usually to address a tax concern. As such, the Investors to a Feeder Fund invest in the Fund indirectly through the Feeder Fund.

**Follow-On Investments** are investments in an existing portfolio company of a private equity Fund that are made to protect or enhance the value of the Fund's investment. Follow-On Investments are often permitted to be made throughout the life of the Fund, though the amount of capital that may be called to fund a Follow-On Investment may be limited after the Fund's Commitment Period has expired and Concentration Limits may apply to the overall investment in any given portfolio

company that is the subject of a Follow-On Investment.

**Fund** means a private collective investment vehicle formed to make equity and/or debt investments in accordance with the criteria and investment objectives set forth in the Fund's constituent documents, including a private equity Fund and a Hedge Fund, as the context may require.

**Fund Expenses** broadly refers to the liabilities incurred in connection with (i) establishing a private equity Fund (frequently referred to as "organizational expenses") and (ii) operating a Fund (frequently referred to as "operating expenses"). Organizational expenses generally include the out-of-pocket costs incurred by the sponsor in forming the Fund, such as legal, accounting, filing, travel and similar expenses; organizational expenses are often capped at a specified amount. Operating expenses generally include liabilities related to acquiring, maintaining and disposing of investments, Management Fees paid to the sponsor, taxes, third-party service providers and borrowing costs, expenses and principal amounts. Both organizational expenses and operating expenses are paid by the Fund's Investors.

**Fund of One** means a private equity or hedge Fund that has a single dedicated Investor. The General Partner or manager controls the vehicle that holds the assets in a Fund of One and makes investment decisions on behalf of the vehicle. Some primary benefits of a Fund of One over a comingled investment vehicle are that the investment mandate of the Fund can be customized for the Investor and the Investor is protected from co-Investor (default) risk. A Fund of One shares many of the same qualities as a Separate Account.

**Funding Ratio** is a metric used to measure the financial condition of an Investor that is a retirement system or pension plan for purposes of inclusion (or exclusion) from the

Borrowing Base in a Subscription-backed Credit Facility. The Funding Ratio is often defined as the actuarial present value of the assets of the retirement system or pension plan over the actuarial present value of the system or plan's total benefit liabilities.

**General Partner** means the one responsible for making investment decisions, issuing Capital Call Notices and managing portfolio investments in a private equity Fund structured as a limited partnership. The General Partner (sometimes referred to as the sponsor) owes various legal duties to the Fund and is typically compensated for its services through receipt of a Management Fee and a percentage of the Fund's profits. The General Partner may also have an equity commitment to the Fund.

**Guarantor** is one that promises performance or payment of the obligations of another. One who provides a guaranty.

**High-Net-Worth Investor** means an Investor that is a natural person with a high net worth. There is no definitive dollar threshold or methodology for determining high net worth, though an individual with at least \$1 million of investable assets (excluding the value of any homes and illiquid assets) is often considered to be a High-Net-Worth Investor.

**Initial (Fund) Closing Date** means the date on which a Fund first accepts Capital Commitments from Investors, typically after the Fund manager has raised the minimum amount of capital needed to execute the Fund's investment program. A Fund may hold multiple Investor closings in order to reach the manager's desired aggregate commitment amount. The fundraising period is usually limited to a period of six months to one year from the date of the initial closing in a Closed-End Fund.

**Investment Limitations** are provisions in a Fund's governing documents that place restrictions on the types of investments the

Fund may undertake, which may include limitations on the size, geography, industry, concentration or return characteristics of investments or restrictions arising out of applicable regulations or law.

**Investment Period** is the time frame, typically a fundraising period of 12 months, during which a private equity Fund is permitted to accept new Investors or subscriptions.

**Investor** means one that makes a commitment to contribute capital to a Fund in exchange for an equity interest in the Fund. Also referred to as a Limited Partner.

**Investor Letter** is an undertaking agreement or acknowledgement made by an Investor in favor of a Subscription-backed Credit Facility lender whereby the Investor makes representations, acknowledgments and covenants in favor of the lender as a condition to the Investor being included in the Borrowing Base. Typically, an Investor Letter will include an acknowledgement of the existence of the Subscription-backed Credit Facility and the pledge of the right to receive and enforce the Subscription-backed Credit Facility collateral, and the Investor will agree to make Capital Contributions upon notice by the lender during an event of default.

**Investor Opinion** is a letter issued by legal counsel to an Investor stating various legal conclusions with respect to the Investor, delivery of which is often a condition to the Investor being included in the Borrowing Base of a Subscription-backed Credit Facility. Under certain circumstances, an authority certificate can be delivered in lieu of an Investor Opinion.

**Key Person Event** means the departure of a certain number of specified investment professionals from a Fund sponsor that triggers certain rights granted to the Investors under the Fund's governing documents, such as the right to terminate the Commitment Period or replace the Fund manager. Key Person Events may also encompass minimum

requirements for devotion of time to the Fund by specified investment professionals or the occurrence of bad acts by a key person (e.g., fraud).

**Limited Partner** is an Investor in a private equity Fund that takes the form of a limited partnership. Limited Partners of a limited partnership are generally not personally liable for the obligations of the limited partnership. As such, a Limited Partner's liability to make payments or contribute capital to a limited partnership is limited to its Capital Commitment and its portion of the assets of the Fund (subject to applicable law and certain exceptions).

**Limited Partner Excuse** means the right by which an Investor is permitted to opt-out from an investment on a case-by-case basis, often as a result of regulatory issues or due to a policy of the Investor that would prohibit the Investor from participating in a particular investment. Also used to describe the right a General Partner has to exclude an Investor from participating in investments on a case-by-case basis for regulatory or other legal reasons.

**Limited Partner Transfer** is the legal sale, assignment, pledge or disposition of all or an undivided portion of an Investor's interest in a Fund, including its obligation to make Capital Contributions and its right to receive distributions of Fund assets. The constituent documents of a private equity Fund will place limitations on an Investor's ability to transfer or encumber its interest, except in accordance with the terms and conditions set forth therein and with the General Partner's consent.

**Limited Partner Withdrawal** is the termination of an Investor's participation in a private equity Fund. Rights of withdrawal (either mandatory or voluntary) are typically limited to situations where the Investor's continued participation in the Fund would

result in the Investor or the Fund violating applicable regulations or law.

**Lock-Up Period** is the period of time during which an Investor in an Open-End Fund is not permitted to redeem or sell its equity interest.

**Management Fee** is the compensation paid to a Fund's manager for providing management and investment advisory services. The Management Fee varies based on a number of factors but has historically equaled approximately 2 percent per annum of the total amount of capital committed to the Fund (it may be higher or lower or based on other metrics).

**Most Favored Nations Clause** is a contract provision by which a Fund sponsor promises to provide an Investor with terms no less favorable than the terms provided to any other Investor in the Fund. Most Favored Nations Clauses entitle an Investor to elect to have any more-favorable right or privilege granted to another Investor by the Fund apply to it. There are often numerous exceptions, qualifications and exclusions to rights granted under a Most Favored Nations Clause.

**Open-End Fund** is a collective investment vehicle in which interests are continuously offered and Investors are generally permitted to redeem their equity interests subject to limited timing and notice requirements.

**Parallel Fund** is a Fund investment vehicle generally established to make the same investments and dispositions of assets at the same time as the main Fund to which it is related. Parallel Funds have substantially the same terms as the main Fund, and are formed to accommodate the tax, regulatory or other requirements of the Investors that are investing through the Parallel Fund.

**Parent (of Investor) Comfort Letter (also known as a Parent Keepwell or Parent Guaranty)** is an agreement in favor of a lender by which a credit-worthy parent agrees

to provide credit support to, or guarantee the obligations of, an affiliate that is investing in a Fund. Delivery of a Comfort Letter from a credit-worthy parent will often enable a lender to include a less credit-worthy Investor or special purpose vehicle in the Borrowing Base.

**Placement Agent** is the person or entity hired by a Fund manager to assist in raising capital for the Fund.

**Promote** is the compensation paid to a Fund General Partner in the form of an allocation of the profits of the Fund, typically calculated as a set percentage of the profits of the Fund (often 20 percent) after returning the Investors' Capital Contributions and a preferred rate of return. The Promote will be set forth in a distribution Waterfall in the Fund's constituent documents, and it is often subject to significant negotiation between the General Partner and the Investors. Also known as "carried interest," "carry" and "performance allocation."

**Qualified Borrower** is a Fund vehicle (often a holding company for an investment or a portfolio company) that is a borrower under a Subscription-backed Credit Facility whose obligations are guaranteed by the Fund vehicle itself. Qualified Borrowers do not typically provide collateral.

**Redemption Period** is the time frame after an initial Lock-Up Period during which an Investor may withdraw its capital (in whole or in part) from a Fund, usually on a quarterly basis. Typically applies to hedge Funds, core real-estate Funds and other Open-End Fund investment vehicle structures.

**REIT or "real estate investment trust"** is a company that owns and often operates real-estate assets, and that must annually distribute at least 90 percent of its taxable income to its shareholders.

**Separate Account** is an investment vehicle with only one Investor (commonly an

institutional Investor) that is willing to commit significant capital to an investment manager subject to the terms of a two-party agreement (commonly referred to as an investment management agreement). It is not atypical for a Separate Account to be non-discretionary in terms of investment decisions made by the manager (with Investor approval being required on a deal-by-deal basis).

**Side Letter** means any letter or other agreement of any type that amends or supplements an Investor's Subscription Agreement and/or the partnership agreement or other applicable constituent document of a Fund.

**Sidecar Fund** is an investment vehicle used in a private equity Fund structure to provide for co-investment opportunities by one or more Investors in the Fund, which investments are generally made alongside investments by the main Fund.

**Special Limited Partner** is an Investor in a private equity Fund that is an affiliate of the Fund's sponsor. The Special Limited Partner is generally used to receive Promote or other carried interest distributions and typically has no Capital Commitment to the private equity Fund and limited obligations under the Fund's constituent documents.

**Subscription Agreement** is the document pursuant to which an Investor makes a Capital Commitment to a private equity Fund in exchange for an interest in the Fund. The Subscription Agreement sets forth the amount of an Investor's proposed Capital Commitment that is accepted by the General Partner on behalf of the Fund. The Subscription Agreement includes various representations made by the Investor that enable the Fund to comply with applicable securities laws.

**Subscription-backed Credit Facility** means a loan or line of credit made by a bank or other credit institution to a private equity Fund that

is secured by (i) the unfunded commitments of the Investors to make Capital Contributions to the Fund when called from time to time by the Fund or the Fund's General Partner, (ii) the rights of the Fund or its General Partner to make Capital Calls upon the commitments of the Investors and the right to enforce payment of the same and (iii) the account into which Investors fund Capital Contributions in response to a Capital Call.

**Tax-Exempt Investors** means an Investor, or any Investor that is a flow-through entity for US federal income tax purposes that has a partner or member, that is exempt from US federal income taxation under Section 501(c) of the Internal Revenue Code of 1986, as amended. Tax-Exempt Investors are generally not subject to US taxation, but they may be required to pay taxes on UBTI. Examples of Tax-Exempt Investors are pension plans, universities, private foundations and charitable endowments.

**UBTI or "unrelated business taxable income"** is generally defined under the Internal Revenue Code of 1986, as amended, as income earned or derived from a trade or business that is unrelated to an Investor's tax-exempt purpose, which income is subject to US taxation as UBTI. Money earned from dividends, capital gains and interest income is not treated as UBTI, however, income derived from assets that are subject to certain types of indebtedness will be included in UBTI. Investors will often require a Fund to covenant in its partnership agreement that the Fund will not incur, or will minimize, UBTI, which may impact the overall Fund structure and the use of indebtedness by the Fund.

**Uncalled Capital Commitment** of an Investor, is the portion of such Investor's Capital Commitment that is unfunded and may be subject to a Capital Call, excluding any amounts subject to a pending Capital Call that have not yet been funded as a Capital Contribution. The Borrowing Base in a Subscription-Backed Credit Facility is determined by reference to the Uncalled Capital Commitments of the included Investors.

**VCOC or "venture capital operating company"** is a term used in the context of a private equity Fund that is relying on the operating company exception to holding "plan assets" under ERISA. A VCOC is a private equity Fund that is primarily invested in operating companies with respect to which the entity has the right to participate substantially in management decisions. To maintain such exception, a private equity Fund must qualify as a VCOC as of the date of its first investment and each year thereafter by satisfying annual tests that measure its ownership and management with respect to qualifying assets.

**Waterfall** means, when used with reference to a loan agreement, the priority of payment of amounts received from or on account of the borrower among creditors to the borrower; when used with reference to a Fund, it means the economic agreement between the Investors and the General Partner as to the priority of payment of distributions of Fund assets as between the Investors and the General Partner (often called a "distributions waterfall").

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## Endnotes

- <sup>1</sup> Kristin Rylko is a partner in Mayer Brown's Banking & Finance practice. Mark Dempsey is a partner in Mayer Brown's Banking & Finance and Fund Formation & Investment Management practices.

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