

The ILPA Model Limited Partnership Agreement (Whole of Fund Version)

Background:

A standard Model Limited Partnership Agreement (“LPA”) has been a persistent need in the private equity asset class given the cost, time and complexity of negotiating the terms of investment. General Partners (“GPs”) have an interest in reducing the length of side letter agreements, providing fundraising certainty, and lowering their fund formation costs. Similarly, Limited Partners (“LPs”) wish to have fair and transparent terms that explain rights and obligations, while also lowering their legal negotiation costs.

The Model LPA is a comprehensive, Delaware-law based “whole of fund” waterfall limited partnership agreement that can be used in its entirety to structure investments into a traditional private equity buyout fund. Additional versions of the Model LPA, including one based on a “deal-by-deal” waterfall, will be released imminently.

The Model LPA is part of ILPA’s broader LPA Simplification Initiative and began in early 2018, with a group of approximately 20 attorneys representing both GPs and LPs in the global marketplace. Through an extensive process of drafting and negotiation, these attorneys, along with the ILPA team, drafted a Model LPA for private equity. ***The original version of the ILPA Model LPA “Whole of Fund” (WOF) version was released in fall 2019, with updates released in July 2020. For the updates made to the Model LPA, please see the section at the bottom of this document.***

The Model LPA Delivers Value to the Private Equity Industry:

- **Complimentary, Public Document:** There is significant value to the private equity marketplace to have a publicly available, complimentary template LPA for all to reference. Bespoke versions of private equity LPAs are currently covered by non-disclosure agreements and not available to the public for comparison or adoption.

The Model LPA Delivers Value to LPs:

- **Core LP Negotiation Tool:** The Model LPA is useful for negotiation by LPs and LP Counsel with established managers that have an existing LPA they are putting forth. Individual provisions in this document can be easily negotiated or adopted, with draft language that LPs know will be acceptable to them, and familiar to GP counsel.
- **ILPA Benchmarking Tool:** The Model LPA will be useful to LPs as a benchmarking tool to compare against existing LPAs they have signed, and funds they are evaluating, allowing them to have actual Principles 3.0 verified legal language which they can compare against terms in the marketplace.
- **LP Emerging Manager Program Utilization:** The Model LPA is an excellent starting point for programs that seek to seed or provide capital to new managers as part of a designed program. These programs can adopt the ILPA Model LPA and encourage the GPs applying for seed capital in the program to use the document for raising their funds.
- **LP Education:** ILPA plans to use the Model LPA to educate LPs about reasonable terms, and LPs can also use this document in their own internal training programs to share which terms are fair to LPs and which are problematic.

The Model LPA Delivers Value to GPs:

- **Starting Point for LP-friendly Fundraise:** All GPs who are interested in putting forth a fair, equitable LPA for their fund can use this document as a starting point to ensure they will be attractive from a terms perspective to the LP community.
- **Emerging Manager Roadmap for LP Capital/Terms:** New and emerging managers or managers in the emerging markets, who wish to attract LP capital and establish best practices for their fund, can adopt this document with reduced legal costs, lower the organization expenses of the fund, and send a signal to LPs about the importance of a strong partnership between the GP and the LP.

The Model LPA Delivers Value to GPs (continued):

- **Market Signaling to Established Managers and their Counsel:** GPs and GP counsel can use this document as a baseline to what terms are important to LPs and what they believe is reasonable in the negotiation.
- **Reduction of Side Letter Negotiation Costs and Time:** GPs and GP counsel can seek to implement provisions from the ILPA Model LPA into their own form for forthcoming funds to minimize the number and scope of side letter agreements with their LPs and the cost of negotiation.

Participating Attorneys and Firms on the LPA Task Force:

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Key Terms in the ILPA Model LPA (WOF Version):

The following is a summary of the relevant terms included in the ILPA Model LPA. These provisions apply the positions taken in ILPA Principles 3.0:

Fund Economics in the ILPA Model LPA

- Includes a “whole of fund” waterfall to limit the possibility of a clawback and ensure long-term alignment of interest. (*Note, ILPA intends to release a deal by deal waterfall at a later stage.*)
- Includes a GP catchup and preferred return to drive alignment between GP and LP and focus on investment performance;
- Includes an optional escrow provision to ensure LP protection;
- Includes a GP clawback to ensure LP protection;
- Includes an LP giveback to ensure fairness for the GP;
- Allows flexibility to modify the economic arrangements of the investment opportunity based on the particular GP and strategy;

Standard of Care and Exculpation & Indemnification

- Recognizes a fiduciary duty of the GP and manager and includes an appropriate standard of care to ensure trust in the long-term GP/LP relationship;
- Includes GP exculpation to protect the GP in certain circumstances, but excludes GP indemnification in the case of a breach of the LPA to make the terms of the agreement meaningful;
- Includes a provision for Removal of the GP for material breach of the LPA.
- Does not allow the GP to “pre-clear” of conflicts of interest in order to ensure LP consent;

Co-Investments

- Specifies that a co-investor should bear its pro-rata share of fees, expenses, and liabilities of a portfolio investment for fairness to the other LPs in the fund.

Governance, Control & LPAC Provisions

- Provides for expanded rights and tools for the LPAC to provide improved governance for the fund including:
 - the ability to meet *in camera* without the GP or its affiliates present;
 - the ability to appoint advisers at the expense of the fund to provide expertise in decision-making;
 - the ability to be covered by insurance as a fund expense to protect LPAC members;
- Requires that the LPAC approve all affiliate transactions, even if they are at “arm’s length” to ensure informed consent to conflicts of interest;
- Includes a limit on the amount of reserves a GP can hold to ensure all capital is being deployed to maximize performance and returns;
- Includes the LP right, upon a sufficient vote threshold, to terminate or suspend the commitment period of the fund;
- Requires consent of a significant majority of LPs for a change of control of the GP or management company to ensure alignment of interest;

Key Person and Removal Provisions

- Includes a No-fault Removal provision without payment of additional management fees to the GP, upon a LP vote threshold;
- Includes the option to impose a haircut on carried interest to the GP upon the vote of a supermajority of LPs;
- Provides for the reduction of carried interest to the GP by 100% upon a vote of the LP to Remove a GP for cause;
- Provides for the automatic suspension of the investment period upon a Key-Person event occurrence;
- Includes an automatic termination of the investment period of the fund after an optional period of time if LPs do not approve a remediation plan for a Key Person Event.

Information & Communication Access for LPs

- Includes specific disclosures that can be made by LPs without prior GP approval;
- Explicitly permits LPs in the fund to communicate with one another about fund related issues in order to exercise their governance obligations;
- Requires GPs to furnish LPs with a list of all other LPs in the fund on a quarterly basis to ensure that the partners are aware of who their peers are and can adequately exercise their governance rights if necessary.

Updates Made to the ILPA Model LPA “Whole of Fund” (WOF) Version in July 2020:

Since the ILPA Model LPA WOF Version was released in Fall 2019, ILPA had received feedback from the marketplace on the document. We also, while crafting the Deal-by-Deal version of the LPA, realized that certain sections of both documents, including particular definitions, had to be added or updated to align both documents. Some of the industry feedback received also suggested a Term Sheet explaining the document would be helpful to the market, which we have now included.

To improve transparency, governance and alignment of interests, the updates to ILPA Model LPA WOF Version generally provide additional clarity on several issues, as well as some fine-tuning and other clean-up edits.

Transparency:

- **Valuation (Section 1.1):** A specific valuation methodology is identified in the Agreement.
- **Capital Call and Distribution Notices (Sections 6.2.1 and 14.1.3):** Capital call notices and distribution notices are required to be consistent with the ILPA Capital Call and Distribution Notice Template.

Governance:

- **Investment Limitations** (Section 7.1.4): Commitment-based limits on investments have been adjusted to take into account Fund borrowing.
- **Listed Transactions and Prohibited Tax Shelter Transactions** (Section 15.5): Typical side letter language regarding “listed transactions” and “prohibited tax shelter transactions” has been added.
- **Fiduciary Duty** (Section 20.5): Language has been added to clarify, for the avoidance of doubt, that, in exercising its discretion under the Agreement, the General Partner may not place its interests ahead of the interests of the Fund or the Limited Partners.

Alignment of Interest:

- **Preferred Return** (Section 1.1): Revisions have been made to clarify that the preferred return continues to accrue until all contributed capital is returned, and unpaid preferred return is paid, to the Limited Partners.
- **Management Fee** (Section 8.3.2.2): Reduction in the management fee payable after the step-down date has been clarified to take into account any realizations (in whole or in part) of portfolio investments.
- **Haircut on Carried Interest on Termination of the Fund** (Sections 10.2 and 10.4): Haircut on carried interest distributions applicable on a removal of the General Partner for cause or without cause will also apply to a termination of the Fund on the same basis.
- **Clawback - Escrow** (Section 14.7.2): Percentage of carried interest distributions to be deposited into carried interest escrow has been suggested at 30%, consistent with ILPA Principles 3.0.
- **Clawback - Personal Guarantee** (Section 14.7.3): General Partner is required to provide personal guarantees (optionally on a joint and several basis) from the ultimate carried interest recipients.

For more information on the Model LPA, please contact Chris Hayes, Senior Policy Counsel, ILPA, at chayes@ilpa.org.