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**COMMENTARY**

## ILPA's GP-led guidance comes with implementation challenges

Disclosure, the role of the LPAC and status quo options may make some GP-led restructurings unaligned with the industry body's guidelines, according to Cleary Gottlieb

The guidelines recently issued by ILPA on GP-led secondaries fund restructurings provide market participants with a useful framework for considering the process and structure of GP-led restructurings.

The broad themes of disclosure, informed consent, efficiency and fairness underpinning the guidelines should form the foundation of any well-executed restructuring. However, as ILPA acknowledges, GP-led restructurings are complex, bespoke transactions that vary widely in terms and structure. In our experience, practical challenges and tradeoffs frequently arise as secondaries market participants seek to structure GP-led transactions in a manner consistent with these principles.

For instance, several of the ILPA guidelines focus on engaging and empowering the LPAC as a key participant in designing and pursuing GP-led restructurings. While most LPACs are charged primarily with considering



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conflicts arising from a proposed transaction, ILPA sees the role of the LPAC in GP-led restructurings extending beyond conflicts.

The guidelines recommend, for example, that GPs provide the LPAC with sufficient information to test the rationale of the proposed transaction, advise on the selection and terms of engagement of a financial advisor, consider other options that may be available to the GP, and determine if the process surrounding the proposed transaction has been sufficient to ensure a fair price. In order to fulfill these obligations,



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the guidelines suggest that LPACs may consider hiring their own counsel and financial advisors.

In our experience, some LPACs are reluctant to take on the proactive role that ILPA ascribes to them in the guidelines. Whether motivated by concerns relating to their own internal procedures and authorisations, or concerns that the broader LP base is the more appropriate body to consider and approve a particular issue, LPAC members are often disinclined to assume a role beyond conflict evaluation. If GPs begin framing LPAC approvals more broadly,

including considering the fairness of the process and economic terms of GP-led restructurings, in some cases they may be less likely to obtain LPAC approval because the LPACs is not comfortable playing that enhanced role.

### Tackling disclosure and status quo

Another key theme running throughout the guidelines is the need for GPs to provide robust disclosure to LPs on the process and proposed transaction terms. Certainly, clear, accurate disclosure is necessary in order for the LPAC to provide informed approval of a conflict. Equally, clear disclosure on pricing and terms is necessary for LPs to make an investment decision with respect to any roll option. ILPA's recommendation of parity of information is also a helpful reminder to GPs of the risks associated with sharing with potential secondaries buyers material information they wouldn't be willing to share with their LPs more generally.

But difficult questions can arise in providing disclosure to LPs. For instance, a GP may feel less comfortable sharing projections for a portfolio with a broad group of LPs than it would with a secondaries buyer in the context of a bilateral negotiation. If the GP shares those same projections with LPs so as to maintain information parity, what assurances should the GP receive with respect to potential future claims if the projections do not hold? In some cases, GPs will work with secondaries buyers during negotiation sessions to assist the potential secondaries buyer in preparing projections that reflect the particular assumptions that the buyer has factored into its investment thesis. Should these projections also be shared with LPs? What if the GP doesn't agree with the assumptions the secondaries buyer has introduced to the projections?

Another recommendation in the guidelines that can present implementation challenges is that GPs offer their LPs a "status quo" option. Many GP-led restructurings will provide LPs an opportunity to retain their core economic rights with respect to the portfolio by rolling into a continuation fund. However, maintaining a pure status quo will not be possible in many transactions. Most obviously,

as ILPA acknowledges, the term of the LP's commitment will be extended. In addition, the rolling LP's ownership in the portfolio will often be diluted in a GP-led restructuring by follow-on capital committed by a secondaries buyer.

From a governance perspective, secondaries investors will often expect an outsized role in governance matters at the continuation vehicle and as a result the relative voting power and influence of rolling LPs will likely be diluted. Other features particular to a transaction may further distance the rolling option from a status quo. For instance, if the restructuring transaction relates to a sub-set of the original fund's portfolio, such as a single asset transaction, rolling LPs will likely lose the benefit of cross-collateralisation with the assets excluded from that deal that likely existed under the original fund's distribution waterfall. In transactions where the "status quo" option in fact deviates materially from the terms of the original fund, GPs might also consider offering LPs a third alternative of investing in the continuation fund on the same terms as the secondaries investor.

As with prior guidance issued by ILPA on matters relating to private fund terms and transactions, the guidelines are likely to become

a key point of reference in discussions between LPs and GPs engaged in GP-led restructurings. Participants will need to bear in mind that while the framework raises important considerations for these deals, each deal is unique in terms of objectives, structure and dynamics. The issues discussed above demonstrate only a few ways in which some GP-led restructurings may not align neatly with the principles contained in the guidelines. GPs and LPs will need to work closely with counsel and advisors as they pursue these transactions to determine the appropriate structure and terms in each case.

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