# Table of Contents

**About the Authors** .......................................................................................... vii  
**Table of Chapters** ....................................................................................... ix  
**Acknowledgments** .................................................................................... xxxiii  
**Introduction** ................................................................................................... xxxv

## Chapter 1  Introduction to Private Equity Funds

§ 1:1 A Brief History of Private Equity ......................................................... 1-3  
  § 1:1.1 Post World War II: American Research and Development......................... 1-3  
  § 1:1.2 Small Business Administration .......................................................... 1-4  
  § 1:1.3 The Seventies: Favorable Legislation .............................................. 1-6  
  § 1:1.4 The Eighties: Leveraged Buyouts ................................................. 1-7  
  § 1:1.5 The Nineties: Technology Industry .............................................. 1-8  
  § 1:1.6 The New Millennium: Securitization Market ................................... 1-10  
  § 1:1.7 The Subprime Mortgage Crisis ...................................................... 1-11  
  § 1:1.8 The European Sovereign Debt Crisis ........................................... 1-13  
  § 1:1.9 The Investment Climate ................................................................. 1-14  

§ 1:2 What Is a Private Equity Fund? ............................................................. 1-15  
  § 1:2.1 Overview .......................................................................................... 1-15  
  § 1:2.2 Typical Investments ......................................................................... 1-15  
       [A] Diversified Portfolio .................................................................. 1-15  
       [B] Deal Structures ......................................................................... 1-16  
       [C] Types of Investments ............................................................ 1-17  
  § 1:2.3 Organizational Structure ................................................................. 1-17  
  § 1:2.4 Private Placements ........................................................................ 1-18  
  § 1:2.5 Key Players .................................................................................... 1-18  
       [A] Fund Sponsors ........................................................................ 1-18  
       [B] Investors .................................................................................. 1-20  
       [C] Professional Advisors .......................................................... 1-21  
       [D] Placement Agents .................................................................. 1-21  

§ 1:3 Types of Funds ...................................................................................... 1-22  
  § 1:3.1 Buyout Funds ................................................................................. 1-22  
       [A] Typical Investments .................................................................. 1-22  
       [B] Distinguishing Organizational Features .................................... 1-22  
       [C] Activist Funds .......................................................................... 1-23
§ 1:3.2 Venture Capital Funds ............................................ 1-23
[A] Typical Investments ................................................ 1-23
[B] Distinguishing Organizational Features.................. 1-24
§ 1:3.3 Mezzanine and Credit Opportunity Funds .......... 1-25
[A] Typical Investments ................................................ 1-25
[A][1] Mezzanine Funds ................................................. 1-25
[A][2] Credit Opportunity Funds ................................. 1-26
[B] Distinguishing Organizational Features.................. 1-26
§ 1:3.4 Distressed Debt Funds ............................................ 1-27
[A] Typical Investments ................................................ 1-27
[B] Distinguishing Organizational Features.................. 1-27
§ 1:3.5 Real Estate Funds.................................................... 1-28
[A] Typical Investments ................................................ 1-28
[B] Distinguishing Organizational Features.................. 1-28
§ 1:3.6 Funds of Funds ....................................................... 1-29
[A] Typical Investments ................................................ 1-29
[B] Distinguishing Organizational Features.................. 1-29
§ 1:3.7 Structured Product Funds ....................................... 1-30
[A] Typical Investments ................................................ 1-30
[B] Distinguishing Organizational Features.................. 1-30
§ 1:3.8 “Club” or “Pledge” Funds ....................................... 1-32
[A] Typical Investments ................................................ 1-32
§ 1:4 Other Investment Strategies in Private Equity ............. 1-33
§ 1:4.1 Private Investments in Public Equity (PIPEs) ......... 1-33
§ 1:4.2 Special Purpose Acquisition Company (SPAC) ....... 1-34
[A] Investment Advantages ........................................... 1-34
[B] Structural Considerations ....................................... 1-35
[C] Investment Risks .................................................... 1-36
§ 1:4.3 Mezzanine and Credit Opportunity Funds ............. 1-36
§ 1:4.4 Sovereign Wealth Funds (SWFs).............................. 1-37
[A] Foreign Policy Concerns with SWFs ....................... 1-38
§ 1:4.5 Secondaries ............................................................. 1-39
§ 1:4.6 Distressed Funds..................................................... 1-41
§ 1:4.7 Seed Capital Funds ................................................. 1-42
§ 1:4.8 Permanent Capital.................................................. 1-42
§ 1:4.9 Status of Existing and New Deals Post Financial Crisis........................................................................ 1-43
[A] Existing Deals ......................................................... 1-43
[B] New Deals .............................................................. 1-43
§ 1:5 Current Trends in Fundraising ..................................... 1-44
§ 1:5.1 Overview ................................................................. 1-44
§ 1:5.2 Other Sources of Capital; Co-Investors ................. 1-45
§ 1:5.3 Fund Terms—Bargaining Power of Limited Partners ........................................................................ 1-46
§ 1:5.4 Fundraising Periods................................................. 1-48
§ 1:6 Industry Convergence .......................................................... 1-49
  § 1:6.1 Blurring the Line Between Private Equity and Hedge Funds .......................................................... 1-49
     [A] Strategic Differences .................................................... 1-50
     [B] Erosion of Differences Between Private Equity and Hedge Funds ..................................................... 1-50
     [C] Advantages of Convergence ........................................... 1-51
     [D] Convergence Concerns ................................................... 1-52
     [D][1] Valuation of Fund Assets and Computation of Compensation .................................................. 1-52
     [D][2] Cultural Clash .......................................................... 1-53
     [D][3] Marketing Issues ...................................................... 1-53
     [D][4] Investor Expectations ................................................ 1-53
  § 1:6.2 Hybrid Funds ............................................................... 1-55
  § 1:6.3 Private Equity Funds Versus Mutual Funds ................. 1-57

Chapter 2 Terms of Private Equity Funds

§ 2:1 Overview .......................................................................... 2-6
  § 2:1.1 Fund Size ...................................................................... 2-7
  § 2:1.2 Fund Investment Strategy ............................................. 2-8
  § 2:1.3 Fund Maturity.............................................................. 2-8
  § 2:1.4 Single Fund or Cluster of Parallel Funds ...................... 2-9
  § 2:1.5 Fund Jurisdiction ......................................................... 2-9
  § 2:1.6 Fund Manager Experience .......................................... 2-9
  § 2:1.7 Investor Fund Term Negotiation Objectives ................... 2-10
§ 2:2 Fund Size ...................................................................... 2-12
  § 2:2.1 Excessively Small Funds ............................................. 2-12
  § 2:2.2 Excessively Large Funds ............................................. 2-13
  § 2:2.3 Fund Size Caps or Floors ............................................ 2-13
§ 2:3 Investment Programs ..................................................... 2-14
  § 2:3.1 Fund Investment Approach Stated in Offering Memorandum .................................................. 2-15
  § 2:3.2 Investment Guidelines and Restrictions ....................... 2-17
§ 2:4 Life of a Fund .................................................................. 2-19
  § 2:4.1 Marketing Period ........................................................ 2-20
     [A] First-Time Funds .......................................................... 2-20
     [B] Development of Fund Terms and Initial Offering Materials .................................................. 2-21
     [C] Warehousing Investments ............................................. 2-22
     [D] Closings ..................................................................... 2-23
     [E] Admission of Subsequent Investors .............................. 2-24
  § 2:4.2 Investment Period ....................................................... 2-25
     [A] Recall of Capital .......................................................... 2-26
     [B] Management Fees and Expenses ................................. 2-26
PRIVATE EQUITY FUNDS

[C] Post-Investment Period Investments ...............................................2-27
[D] Investment Period Extensions.........................................................2-27
§ 2:4.3 Holding Period ..............................................................................2-28
§ 2:5 Capital Commitments and Capital Contributions .......................2-28
  § 2:5.1 Capital Commitments ...............................................................2-28
  § 2:5.2 Capital Contributions ...............................................................2-29
  § 2:5.3 General Partner Commitment ...................................................2-29
    [A] Incremental Liability Exposure ..................................................2-30
    [B] Sponsor Commitments .................................................................2-30
  § 2:5.4 Drawdowns and Notices ...........................................................2-31
    [A] Draw Period .................................................................................2-31
    [B] Capital Call Notice ........................................................................2-32
    [C] Capital Contribution Notice .........................................................2-32
  § 2:5.5 Minimum Commitment ..............................................................2-33
  § 2:5.6 Defaults on Capital Contributions .............................................2-34
    [A] Remedies ......................................................................................2-34
    [B] Defaulting Partner’s Interest ........................................................2-35
    [C] Investor Default Due to Loss of Confidence in Fund Sponsor ..........2-36
    [D] Consequences of Investor Default ................................................2-37
    [E] Trends in Investor Defaults ..........................................................2-37
  § 2:5.7 Transfers ....................................................................................2-38
  § 2:5.8 Follow-On and Pending Investments ...........................................2-41
    [A] Follow-On Investments ................................................................2-41
    [B] Pending Investments ....................................................................2-42
    [C] Drawing Capital for Follow-On and Pending Investments ................2-42
  § 2:5.9 Recall and Reinvestment; Limited Partner Clawback ..................2-43
    [A] Reinvestment and Recall of Capital ...............................................2-43
    [B] Limited Partner Clawback .............................................................2-44
  § 2:6 Closings .......................................................................................2-45
  § 2:6.1 Initial Closing; Offering Period ..................................................2-45
  § 2:7 Distributions ................................................................................2-46
  § 2:7.1 Timing of Distributions ...............................................................2-46
  § 2:7.2 Distributions In-Kind .................................................................2-46
    [A] Marketable Securities ....................................................................2-47
    [B] Tax Advantages of Distributions In-Kind .......................................2-48
    [C] Sale of Securities Instead of Distributions In-Kind..........................2-48
      [D] Residual Assets ...........................................................................2-48
  § 2:7.3 Tax Distributions .......................................................................2-49
  § 2:7.4 Tax Withholding .........................................................................2-50
  § 2:8 Fees and Allocations .......................................................................2-51
Table of Contents

§ 2:8.1 Carried Interest ................................................................. 2-51
  [A] Overview .................................................................... 2-51
  [B] Deal-by-Deal Carry ................................................... 2-52
  [C] Deal-by-Deal with Loss Carryforward ....................... 2-52
  [C][1] Principal Issues and Variations ............................. 2-54
  [D] Back-End-Loaded Carry ............................................ 2-58
  [D][1] Delay in Receipt of Carry ..................................... 2-59
  [D][2] Advantages to Investor ......................................... 2-59
  [D][3] Advantages to Fund Sponsor ................................. 2-60
  [D][4] Special Tax Distributions to General Partners ....... 2-61
  [E] Hybrid Carry Arrangements ..................................... 2-61
  [F] Waivers and Reductions of Carry .............................. 2-62
  [G] General Partner Clawback ....................................... 2-63
  [G][1] Calculation of the Clawback ................................. 2-64
  [G][2] When the Clawback Is Payable ............................... 2-66
  [G][4] What Deductions May Be Taken in Calculating the Clawback .................................................. 2-69
  [H] Proposed Carried Interest Tax Legislation ................. 2-72

§ 2:8.2 Management Fees .......................................................... 2-72
  [A] Overview .................................................................... 2-72
  [B] How Management Fees Are Calculated ...................... 2-73
    [B][1] Typical Structure ................................................ 2-73
    [B][2] Deviation from the Typical Market Structure ......... 2-73
    [B][3] Investor Scrutiny of Management Fees ................ 2-74
    [B][4] Net Invested Capital ............................................ 2-74
    [B][5] Different Management Fees for Different Investors .................................................. 2-74
  [C] Timing of Management Fee Payments ......................... 2-75
  [D] Reduction to Management Fees .................................. 2-75
    [D][1] Transaction Fees ................................................ 2-75
    [D][2] Waiver of Management Fees Relating to Payment of Placement Agent Fees .................. 2-78
  [E] Source of Payment for Management Fees ..................... 2-78

§ 2:8.3 Other Fees ................................................................. 2-79
  [A] Break-Up Fees .......................................................... 2-80
  [B] Directors Fees .......................................................... 2-80
  [C] Advisory and Similar Fees ......................................... 2-81
  [D] Acquisition/Disposition Fees ..................................... 2-82
  [E] Affiliate Service Fees ................................................ 2-82

§ 2:9 Expenses ..................................................................... 2-82
  § 2:9.1 Overview ............................................................... 2-82

(Private Equity, Rel. #6, 6/15)
Table of Contents

§ 2:13.2 Indemnification .................................................... 2-107
§ 2:14 Withdrawal of Interests ............................................. 2-108
§ 2:14.1 Mandatory Withdrawals .................................... 2-108
§ 2:14.2 Optional Withdrawals ....................................... 2-109
§ 2:14.3 Rights Upon Withdrawal ................................... 2-109
§ 2:15 Key Person Events ....................................................... 2-110
§ 2:15.1 Nature of Key Person Events ............................... 2-110
§ 2:15.2 Remedies Following Key Person Events ................. 2-111
[A] Termination of Investment Period ............................ 2-111
[B] Dissolution of Fund ........................................... 2-111
[C] Replacement of General Partner and Manager .... 2-111
[D] Required Vote and Treatment of Carry ................. 2-112
§ 2:16 Transferability of Interests .......................................... 2-112
§ 2:16.1 General Restrictions on Transfers ......................... 2-112
§ 2:16.2 Typical Restrictions on Transferability ................. 2-113
[A] General Partner Consent ...................................... 2-113
[B] Transfers Between Unrelated Parties ..................... 2-113
[C] General Partner’s Discretion ................................ 2-114
§ 2:16.3 Permitted Transfers ............................................... 2-115
§ 2:16.4 Rights of First Refusal ........................................ 2-116
§ 2:16.5 Pledges of Interests .......................................... 2-116
§ 2:16.6 Locating Buyers ............................................. 2-117
§ 2:16.7 Legal and Tax Issues ........................................ 2-117
§ 2:17 Valuation of Fund Assets .......................................... 2-119
§ 2:17.1 In General .......................................................... 2-119
§ 2:17.2 Economic Features of Private Equity Funds
    Affected by Valuation of Assets .......................... 2-119
[A] Distribution Calculations .................................. 2-119
[B] Management Fee Calculations ...................... 2-120
[C] Distributions In-Kind ........................................ 2-120
§ 2:17.3 Determination of Values of Investments ............... 2-120
§ 2:17.4 Marketing Based on Valuation ......................... 2-121
§ 2:18 Duration ..................................................................... 2-121
§ 2:18.1 Term of the Fund .................................................. 2-121
§ 2:18.2 Early Dissolution ............................................. 2-121
[A] Overview ........................................................ 2-121
[B] “No Fault” Dissolutions .................................. 2-122
§ 2:18.3 Liquidation and Winding Up of the Fund ............. 2-124
§ 2:19 Side Letters ................................................................. 2-125
§ 2:19.1 In General ............................................................. 2-125
§ 2:19.2 Legal and Regulatory Concerns Raised by Side
    Letters .............................................................. 2-126
§ 2:19.3 Common Types of Side Letter Provisions ............... 2-128
[A] Most Favored Nation Provisions ....................... 2-128
[B] Compensation Provisions ................................. 2-129

(Private Equity, Rel. #6, 6/15) xvii
Chapter 3  Organizational Options for Funds and Their Sponsors

§ 3:1  Introduction........................................................................ 3-2
§ 3:2  Limited Partnerships............................................................ 3-2
   § 3:2.1  Overview...................................................................... 3-2
   § 3:2.2  Limited Liability Protection ........................................... 3-3
   § 3:2.3  Advantages of Limited Partnerships .............................. 3-3
      [A]  Tax Advantages............................................................. 3-3
      [B]  Economic and Management Structural Flexibility ........... 3-5
      [C]  Limited Partnership Agreement .................................... 3-5
   § 3:2.4  Disadvantages of Limited Partnerships ......................... 3-6
      [A]  General Partner’s Unlimited Liability ......................... 3-6
      [B]  Negative Tax Consequences to General Partner ........... 3-6
      [C]  Recharacterization As a General Partner .................... 3-6
   § 3:2.5  Other Issues.................................................................. 3-7
      [A]  General Partner’s Capital Contribution ....................... 3-7
      [B]  Characterization As a Publicly Traded Partnership ....... 3-7
   § 3:2.6  Forming the Limited Partnership ................................... 3-8
      [A]  Certificate of Limited Partnership ............................... 3-8
      [B]  Employer Identification Number ................................... 3-8
      [C]  Written Limited Partnership Agreement ...................... 3-8
§ 3:3  Limited Liability Companies .............................................. 3-9
   § 3:3.1  Overview...................................................................... 3-9
   § 3:3.2  Advantages of the LLC ................................................ 3-9
      [A]  Limited Liability Protection and Tax Advantages .......... 3-9
      [B]  Flexible Management Structure .................................... 3-9
Chapter 4 Ownership and Compensation Arrangements for Fund Sponsors

§ 4:1 Overview ............................................................................... 4-2
§ 4:2 Background on Management Structures ......................... 4-4
  § 4:2.1 Management Company ..................................................... 4-5
  § 4:2.2 General Partner ................................................................. 4-5
  § 4:2.3 Benefits of a Bifurcated Management Structure........ 4-6
§ 4:3 Structuring the General Partner Entity and the
  Management Company ................................................................. 4-7
§ 4:4 Structuring Ownership and Compensation
  Arrangements ............................................................................. 4-8
  § 4:4.1 General Considerations ..................................................... 4-8
  § 4:4.2 Overview of Compensation Options ......................... 4-9
    [A] Salaries and Bonuses ......................................................... 4-9
    [B] Direct Employee Investment in the Fund
        Sponsor’s Funds .................................................................... 4-9
    [C] Employee Funds Investing in the Fund
        Sponsor’s Funds .................................................................... 4-10
    [D] Employee Funds That Invest Side-by-Side with the
        Fund Sponsor’s Funds ............................................................. 4-11
## Table of Contents

C[1] Terms of Departure .............................................. 4-55  
C[2] Sunset Provisions ................................................. 4-57  
D Restrictive Covenants ............................................. 4-58  
§ 4:6 Structuring Ownership and Compensation  
Arrangements for the Management Company .......... 4-58  

### Chapter 5 Employment Matters

§ 5:1 Introduction................................................................. 5-1  
§ 5:2 Recruitment and Interviewing ................................... 5-2  
  § 5:2.1 The Job Application.............................................. 5-2  
  § 5:2.2 The Interviewing Phase ......................................... 5-3  
  § 5:2.3 Background Check ................................................ 5-3  
  § 5:2.4 Properly Classifying Potential Hires ....................... 5-3  
§ 5:2.5 Negotiating Employment Agreements ....................... 5-4  
  [A] Restrictive Covenants .............................................. 5-5  
  [A][1] Non-Competition Clauses ..................................... 5-6  
  [A][2] Non-Solicitation of Investors and Customers .......... 5-8  
  [A][3] Non-Solicitation of Personnel ................................ 5-8  
  [A][4] Non-Disparagement .............................................. 5-9  
  [A][5] Confidentiality .................................................. 5-9  
  [A][6] Protecting Work Product and Prohibiting Track  
    Record Portability .................................................... 5-10  
  [A][7] Enforceability..................................................... 5-10  
§ 5:3 Employment Policies and Procedure ......................... 5-10  
  § 5:3.1 The Employee Handbook ...................................... 5-11  
  § 5:3.2 Employee Training .............................................. 5-11  
§ 5:4 Lift-Outs .................................................................... 5-12  
  § 5:4.1 Defending Against a Lift-Out ............................... 5-12  
  [A] Steps to Deter Lift-Outs.......................................... 5-12  
  § 5:4.2 Dealing with a Lift-Out ....................................... 5-13  
  § 5:4.3 Preserving Fund Sponsor’s Legal Position with  
    Respect to Lift-Outs................................................... 5-15  
  § 5:4.4 Hiring Employees As a Result of a Lift-Out .......... 5-17  

### Chapter 6 Fund Documentation

§ 6:1 Starting the Process: The Preliminary Offering .......... 6-1  
  § 6:1.1 Summary of Terms .............................................. 6-1  
  § 6:1.2 The “Flip Book”.................................................. 6-2  
  § 6:1.3 Due Diligence Questionnaire .................................. 6-3  
§ 6:2 Offering Memorandum.................................................. 6-3  
§ 6:3 Limited Partnership Agreement .................................. 6-4
§ 6:3.1 Terms of the Limited Partnership Agreement .......... 6-4
§ 6:3.2 Reviewing the Limited Partnership Agreement .......... 6-5
§ 6:3.3 Negotiating the Terms of the Limited Partnership Agreement .............................................. 6-5
§ 6:4 Ancillary Documents ...................................................... 6-6
§ 6:4.1 Subscription Agreements .......................................... 6-7
§ 6:4.2 Investment Management Agreements ...................... 6-8
§ 6:4.3 Administration Agreements ...................................... 6-9
§ 6:4.4 Legal Opinions........................................................ 6-10

Chapter 7 Adopting a Compliance Program

§ 7:1 Overview ......................................................................... 7-1
§ 7:2 Establishing a Compliance Program............................... 7-3
§ 7:2.1 Administering a Fund Sponsor’s Compliance Program ...................................................... 7-3
§ 7:2.2 The Compliance Manual .......................................... 7-3
[A] Overview ................................................................... 7-3
[B] General Drafting Considerations ................................ 7-4
§ 7:2.3 Implementing the Firm’s Compliance Program ...... 7-6
§ 7:2.4 Reviewing and Updating the Compliance Manual ................................................................ 7-7

Chapter 8 Securities Act of 1933

§ 8:1 Overview ......................................................................... 8-2
§ 8:2 Raising Capital in the United States .............................. 8-3
§ 8:2.1 Section 4(a)(2) Private Placement Exemption ........... 8-3
§ 8:2.2 Regulation D............................................................. 8-4
[A] The Regulation D Exemption ................................... 8-4
[B] Rule 506(b); Private Offerings Made without General Solicitation or General Advertising .......... 8-5
[B][2] Non-Accredited Investors; Information Requirements ............................................... 8-8
[B][3] Rule 502(c): Prohibition on General Solicitation and Advertising ........................................ 8-9
[B][4] Substantive Pre-Existing Relationship ..................... 8-10
[B][5] Establishing a Substantive Pre-Existing Relationship ...................................................... 8-11
[B][6] Communications with the Press and the Public .... 8-12
[B][7] Internet Communications ........................................... 8-12
[B][8] Consequences of Making a General Solicitation or General Advertisement .............................. 8-13
Chapter 10  Investment Advisers Act of 1940

§ 10:1 Overview....................................................................... 10-2
§ 10:2 Advisers Act Registration.............................................. 10-4
  § 10:2.1 In General [Investment Adviser Registration Requirements] ................................................. 10-4
  § 10:2.2 Registration of Investment Advisory Affiliates...... 10-5
    [A] Fund General Partners, Managing Members, and Similar SPVs ................................................. 10-5
    [B] Investment Advisory Affiliates—Single Registration................................................................. 10-6
  § 10:2.3 Registration Process—Form ADV ................................ 10-7
  § 10:2.4 Consequences of Investment Advisers Act Registration......................................................... 10-9
    [A] Required Policies and Procedures.................................................. 10-9
    [B] SEC Examinations and Enforcement................................................. 10-9
    [C] Performance-Based Compensation......................................... 10-12
    [D] Section 207 of the Advisers Act................................................. 10-15
    [E] Section 208 of the Advisers Act................................................. 10-16
    [F] Form PF ................................................................................. 10-16

§ 10:3 Exemptions from Investment Advisers Act Registration......................................................... 10-19
  § 10:3.1 Exemption for Investment Advisers with Less Than $150 Million Regulatory AUM in the United States ............................................................... 10-20
    [A] Determination of Regulatory AUM in the United States.................................................. 10-21
    [B] Frequency of Calculation of Private Fund Assets................................................................. 10-22
  § 10:3.2 Exemption for Advisers to Venture Capital Funds ................................................................. 10-23
    [A] “Grandfather” Provision .................................................. 10-25
    [B] Application to Non-U.S. Advisers................................................. 10-26
  § 10:3.3 Exemption for Foreign Private Advisers......................................................... 10-26
    [A] Counting Clients .................................................. 10-27
    [B] Counting Investors .................................................. 10-28
Table of Contents

[C] Meaning of “in the United States” .................... 10-29
[D] Meaning of “Place of Business” ..................... 10-30
§ 10:4 Exempt Reporting Advisers .......................... 10-30
§ 10:4.1 Reporting Requirements .......................... 10-31
§ 10:5 Substantive Provisions of the Advisers Act ....... 10-31
§ 10:5.1 Section 206: Anti-Fraud Provisions ............... 10-31
[A] Generally ................................................. 10-31
[B] Potential Conflicts of Interest ........................ 10-36
§ 10:5.2 Code of Ethics ........................................ 10-38
[A] Rule 204A-1 ............................................... 10-38
[B] Personal Trading .......................................... 10-40
[C] Gifts and Entertainment ............................... 10-41
[D] Outside Business Activities ........................... 10-42
§ 10:5.3 Insider Trading ....................................... 10-43
[A] General Overview ....................................... 10-43
§ 10:5.4 Principal Transactions .............................. 10-47
[A] Cross Trading ............................................. 10-48
§ 10:5.5 Advertising Practices .............................. 10-49
[A] Testimonials .............................................. 10-50
[B] Past Specific Recommendations ...................... 10-51
§ 10:5.6 Performance Advertising .......................... 10-53
[C] Performance “Net of Fees” Requirement ............. 10-56
[D] Performance Advertising Record-Keeping Requirement ............................................ 10-58
[E] Performance Presentation Considerations for Private Equity Firms ........................ 10-58
[F] FINRA Rules Concerning Performance Advertising ................................................. 10-60
[F][1] Related Performance ..................................... 10-60
[F][2] Target Returns .......................................... 10-61
[F][3] Projected Returns ...................................... 10-61
[F][4] Hypothetical and Backtested Performance ........ 10-62
[F][5] Risk Factors ............................................ 10-62
[G] Track Record Portability ............................... 10-63
[G][1] Employee Track Record Portability ................. 10-63
[G][2] Adviser Track Record Portability .................. 10-64
§ 10:5.7 Proxy Voting Procedures ......................... 10-65
§ 10:5.8 Custody Rule ...................................... 10-67
§ 10:5.9 Fees and Expenses .............................. 10-68
§ 10:5.10 Adviser Compliance Policies and Procedures ...... 10-69
§ 10:5.11 Business Continuity Planning .................. 10-70
§ 10:6 Offshore Advisers ...................................... 10-70
Chapter 11  Other Regulations Affecting Funds and Sponsors

§ 11:1   Broker-Dealer Regulation  ................................................................. 11-3
§ 11:1.1  Overview ..................................................................................... 11-3
§ 11:1.2  Issuer Exemption ......................................................................... 11-5
§ 11:1.3  Broker Requirements ................................................................. 11-6
§ 11:1.4  Third-Party Marketers ................................................................. 11-7
  [A] Definition of “Third-Party Marketer” ............................................. 11-7
  [B] Payment of Third-Party Marketers ................................................ 11-7
  [C] Third-Party Marketers As Broker-Dealers ................................... 11-7
  [C][1] Securities Act and Investment Company Act Registration Exemptions ............................................. 11-8
  [C][2] Anti-Money Laundering Compliance Obligation .......................... 11-9
§ 11:2   Pay-to-Play Restrictions ................................................................. 11-9
§ 11:3   Section 13(d) and Section 13(g) Filings ........................................ 11-12
  § 11:3.1  Schedule 13D ............................................................................. 11-13
  § 11:3.2  Schedule 13G ............................................................................. 11-14
  § 11:3.3  Section 13(d) Groups ................................................................. 11-15
§ 11:4   Section 16 ..................................................................................... 11-16
  § 11:4.1  Section 16(a) Reporting .............................................................. 11-17
  § 11:4.2  Section 16(b) Short-Swing Trades Liability .............................. 11-20
  § 11:4.3  Section 16(c) Short Sales Against the Box ............................... 11-21
§ 11:5   Rule 13(h) .................................................................................... 11-21
  § 11:5.1  Overview .................................................................................... 11-21
  § 11:5.2  Large Trader Defined ................................................................. 11-22
  § 11:5.3  Threshold for Filing Form 13H .................................................. 11-24
  § 11:5.4  Disclosure Required by Form 13H ............................................ 11-25
  § 11:5.5  Large Trader Identification Number ....................................... 11-26
  § 11:5.6  Recordkeeping, Reporting, and Monitoring by Broker-Dealers ............................................. 11-26
  § 11:5.7  Unidentified Large Traders ....................................................... 11-26
  § 11:5.8  Foreign Entities ......................................................................... 11-27
  § 11:5.9  Confidentiality ......................................................................... 11-27
§ 11:6   Section 13(f) .................................................................................. 11-27
§ 11:7   The Hart-Scott-Rodino Act ............................................................. 11-29
  § 11:7.1  Overview .................................................................................... 11-29
  § 11:7.2  Exemptions ................................................................................ 11-30
    [A] Transactions Solely for Investment Purposes ......................... 11-30
    [B] Acquisition of Non-Voting Securities ......................................... 11-32
    [C] Certain Acquisitions of Voting Securities by Institutional Investors .................................................. 11-32
    [D] Acquisitions of Voting Securities of Foreign Issuers .................... 11-32
  § 11:7.3  Aggregation of Funds Under Common Control .......................... 11-32
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 11:8</td>
<td>Resales of Privately Placed Securities</td>
<td>11-33</td>
</tr>
<tr>
<td>§ 11:8.1</td>
<td>Overview</td>
<td>11-33</td>
</tr>
<tr>
<td>§ 11:8.2</td>
<td>Exemptions from Registration</td>
<td>11-34</td>
</tr>
<tr>
<td>[A]</td>
<td>Section 4(1) Exemption</td>
<td>11-34</td>
</tr>
<tr>
<td>[B]</td>
<td>Rule 144</td>
<td>11-35</td>
</tr>
<tr>
<td>[C]</td>
<td>Rule 144A</td>
<td>11-36</td>
</tr>
<tr>
<td>[D]</td>
<td>Section 4(1-1/2) Exemption</td>
<td>11-37</td>
</tr>
<tr>
<td>§ 11:9</td>
<td>Allocation of New Issues</td>
<td>11-38</td>
</tr>
<tr>
<td>§ 11:9.1</td>
<td>FINRA Rule 5130</td>
<td>11-38</td>
</tr>
<tr>
<td>[A]</td>
<td>Overview</td>
<td>11-38</td>
</tr>
<tr>
<td>[B]</td>
<td>Exemptions</td>
<td>11-39</td>
</tr>
<tr>
<td>§ 11:9.2</td>
<td>FINRA Rule 5131</td>
<td>11-40</td>
</tr>
<tr>
<td>[A]</td>
<td>Overview</td>
<td>11-40</td>
</tr>
<tr>
<td>[B]</td>
<td>Spinning Prohibition</td>
<td>11-40</td>
</tr>
<tr>
<td>[C]</td>
<td>Exceptions</td>
<td>11-41</td>
</tr>
<tr>
<td>§ 11:9.3</td>
<td>Applicability to Private Equity Firms and Funds</td>
<td>11-41</td>
</tr>
<tr>
<td>§ 11:9.4</td>
<td>New Issue Certifications</td>
<td>11-42</td>
</tr>
<tr>
<td>§ 11:9.5</td>
<td>Allocating Profits and Losses</td>
<td>11-42</td>
</tr>
<tr>
<td>§ 11:10</td>
<td>Rule 105 Under Regulation M</td>
<td>11-43</td>
</tr>
<tr>
<td>§ 11:11</td>
<td>Short Sale Regulation</td>
<td>11-44</td>
</tr>
<tr>
<td>§ 11:11.1</td>
<td>U.S. Regulation</td>
<td>11-44</td>
</tr>
<tr>
<td>[A]</td>
<td>Regulation SHO</td>
<td>11-44</td>
</tr>
<tr>
<td>[B]</td>
<td>Dodd-Frank Act</td>
<td>11-45</td>
</tr>
<tr>
<td>§ 11:11.2</td>
<td>International Regulation of Short Sales</td>
<td>11-46</td>
</tr>
<tr>
<td>§ 11:12</td>
<td>Ownership Levels in Highly Sensitive Industries</td>
<td>11-46</td>
</tr>
<tr>
<td>§ 11:13</td>
<td>Regulation of Commodity Pool Operators and</td>
<td>11-48</td>
</tr>
<tr>
<td></td>
<td>Commodity Trading Advisors</td>
<td></td>
</tr>
<tr>
<td>§ 11:13.1</td>
<td>Overview</td>
<td>11-48</td>
</tr>
<tr>
<td>§ 11:13.2</td>
<td>Exclusions and Exemptions from CFTC Regulation</td>
<td>11-50</td>
</tr>
<tr>
<td>[A]</td>
<td>CFTC Rule 4.7</td>
<td>11-50</td>
</tr>
<tr>
<td>[B]</td>
<td>Other Exemptions for CPOs and CTAs</td>
<td>11-50</td>
</tr>
<tr>
<td>[B][1]</td>
<td>Exemptions for CPOs</td>
<td>11-50</td>
</tr>
<tr>
<td>[B][2]</td>
<td>Exemptions for CTAs</td>
<td>11-52</td>
</tr>
<tr>
<td>§ 11:14</td>
<td>Privacy Regulation</td>
<td>11-53</td>
</tr>
<tr>
<td>§ 11:14.1</td>
<td>Overview</td>
<td>11-53</td>
</tr>
<tr>
<td>§ 11:14.2</td>
<td>CFPB and FTC Regulation</td>
<td>11-56</td>
</tr>
<tr>
<td>[A]</td>
<td>Financial Privacy Rule</td>
<td>11-56</td>
</tr>
<tr>
<td>[B]</td>
<td>Safeguards Rule</td>
<td>11-58</td>
</tr>
<tr>
<td>§ 11:14.3</td>
<td>Regulation S-P</td>
<td>11-59</td>
</tr>
<tr>
<td>[A]</td>
<td>Practical Guidance</td>
<td>11-61</td>
</tr>
<tr>
<td>§ 11:14.4</td>
<td>Other Privacy Regulations</td>
<td>11-61</td>
</tr>
<tr>
<td>§ 11:14.5</td>
<td>Identity Theft Prevention Program</td>
<td>11-63</td>
</tr>
<tr>
<td>§ 11:15</td>
<td>Foreign Corrupt Practices Act</td>
<td>11-68</td>
</tr>
</tbody>
</table>
§ 11:16 Bank Regulations ........................................................ 11-72
§ 11:16.1 Volcker Rule .......................................................... 11-72
§ 11:16.2 Developments Regarding Private Equity Investments in U.S. Banks .................................................................................................................. 11-76
§ 11:17 Derivatives Regulation ................................................ 11-78

Chapter 12 ERISA

§ 12:1 Overview ....................................................................... 12-2
§ 12:1.1 Substantive Requirements Under ERISA and the Internal Revenue Code .......................................................... 12-3
§ 12:1.2 Exemptions .................................................................. 12-3
[B] Operating Company Exemptions ........................................................................................................ 12-4
[C] Other Plan Asset Rule Exemptions .................................................................................................. 12-4
[D] Qualified Professional Asset Manager Exemption ...................................................................... 12-5

§ 12:2 ERISA Requirements ..................................................... 12-7
§ 12:2.1 Plans Covered by ERISA and the Plan Asset Regulation ........................................................................ 12-7
§ 12:2.2 Section 404—Fiduciary Duties .................................................................................................. 12-8
[A] Interpretational Issues .................................................................................................................. 12-9
§ 12:2.3 Section 406(a): Prohibited Transactions with Parties-in-Interest .................................................. 12-10
§ 12:2.4 Section 406(b): Prohibited Transactions Involving Self-Dealing .................................................. 12-11
§ 12:2.5 ERISA Liability ................................................................ 12-12

§ 12:3 Exemptions from ERISA's Plan Asset Rules .............. 12-12
§ 12:3.1 Limitation on Ownership by Benefit Plan Investors: Twenty-Five Percent Ownership Test.... 12-12
[A] Twenty-Five Percent Ownership Limit .......................................................... 12-12
[B] Determination of Twenty-Five Percent Ownership .................................................................................................................. 12-13
[C] Fund of Funds Investing in Private Funds ............................................................................... 12-14
§ 12:3.2 Operating Companies .................................................. 12-15
[A] Venture Capital Operating Companies .................................................................................. 12-15
[B] Real Estate Operating Companies .......................................................................................... 12-20
[C] VCOC Status During a “Distribution Period” ........................................................................ 12-21
[D] Practical Considerations .................................................................................................. 12-22
[D][1] Opinions and Certificates .................................................................................................. 12-22
[D][2] Fund Manager Representations .................................................................................. 12-22
[D][3] Tracking Ownership by Benefit Plan Investors ................................................................ 12-23
Table of Contents

[D][4] Valuation Difficulties................................................... 12-23
[D][5] Other Disclosures and Representations ..................... 12-24
[D][6] Special Considerations for Private Equity Funds of Funds................................................... 12-24

Chapter 13  Anti-Money Laundering

§ 13:1 Overview........................................................................ 13-1
§ 13:2 AML Regulation of Financial Institutions .................. 13-3
  § 13:2.1 The PATRIOT Act ................................................... 13-3
  § 13:2.2 Proposed AML Program Requirements for
Unregistered Investment Companies............................. 13-3
  § 13:2.3 Proposed AML Program Requirements for
Investment Advisers ....................................................... 13-6
  § 13:2.4 OFAC Regulations ................................................ 13-7
  § 13:2.5 Practical Suggestions for AML Compliance .......... 13-8
  [A] Know Your Investor Procedures .................................. 13-8
  [B] High Risk Investors ................................................... 13-9
  [C] Non-U.S. Shell Banks ............................................ 13-10
  [D] Suspicious Activity Monitoring and Reporting ....... 13-10
  [E] Delegation of AML Responsibilities ......................... 13-12
  § 13:2.6 Other Regulations ............................................. 13-12
§ 13:4 Conclusion .............................................................. 13-14

Chapter 14  Seed Investors and Other Strategic Investors

§ 14:1 Overview...................................................................... 14-2
§ 14:2 Seed Capital Transactions........................................... 14-3
  § 14:2.1 The Benefits of the Seed Deal ......................... 14-4
  § 14:2.2 Structural Components of a Seed Deal .............. 14-5
    [A] The Nature of the Seed Investment ....................... 14-6
    [A][1] Investment in a Managed Account .................... 14-6
    [A][2] Investment in an Investment Fund ................. 14-7
    [A][3] Investment in a Satellite Fund ....................... 14-7
    [A][4] Other Strategic Relationships ....................... 14-8
    [A][5] Providing Operating Capital or Operational
Support to the Fund Manager ...................................... 14-9
    [B] Economic Participation in the Fund Manager’s
Business ......................................................................... 14-10
    [C] Management Rights of Seed Investors ................. 14-12
    [D] Investor Rights of Seed Investors ..................... 14-14
    [E] Covenants and Representations in Seed
Arrangements ........................................................................ 14-14
[E][1] Arrangements That Benefit the Fund
Sponsor............................................................... 14-15
[E][2] Arrangements That Benefit the Seed Investor......14-15
[F] Regulatory Issues .................................................. 14-16
[F][1] Conflicts of Interest ........................................... 14-16
[F][2] Securities Exchange Act Requirements............. 14-17
§ 14:2.3 Information Sharing ............................................. 14-18
§ 14:2.4 Parties Subject to Registration and Regulation .... 14-18
§ 14:3 Later-Stage Strategic Acquisitions ...................... 14-19
§ 14:3.1 Overview ............................................................... 14-19
§ 14:3.2 Key Features of Strategic Acquisitions ............. 14-19
[A] The Purchase Price ............................................... 14-20
[B] Earnouts................................................................ 14-20
[C] Control Issues....................................................... 14-21
[D] Platform Issues ..................................................... 14-22
[E] Employees Who Are Not Selling Equity Owners.... 14-23

Appendices ...............................................................App.-1

Appendix A Limited Partnership Agreement ............ App. A-1
Appendix B Investment Management Agreement ...... App. B-1
Appendix C Guarantee..................................................App. C-1
Appendix D Corporate Law: Fund Counsel’s Opinion
Letter to Fund Limited Partners...............App. D-1
Appendix E Securities Law: Fund Counsel’s Opinion
Letter to Fund Limited Partners............. App. E-1
Appendix F Tax Law: Fund Counsel’s Opinion Letter
to Fund Limited Partners..................... App. F-1
Appendix G Certificate of General Partner in
Connection with Tax Law Opinion
Letter from Fund’s Counsel.........................App. G-1
Appendix H Delaware Limited Liability Company,
Certificate of Formation......................App. H-1
Appendix I Delaware Limited Partnership,
Certificate of Limited Partnership............. App. I-1
Appendix K Transfer Agreement .......................... App. K-1
Appendix L Term Sheet...........................................App. L-1
Appendix M Sample Amendment Procedure............ App. M-1
Appendix N Subsequent Closings Language............ App. N-1
Table of Contents

Appendix O  Miscellaneous Covenants for Partners of (General Partner/Manager) .........................App. O-1
Appendix P  Excerpts from a Subscription Agreement .... App. P-1
Appendix Q  Comparison of Hedge Fund and Private Equity Terms ...........................................App. Q-1
Appendix R  Institutional Limited Partners Association—Private Equity Principles...... App. R-1

Table of Authorities........................................................................................................T-1
Index.....................................................................................................................................I-1