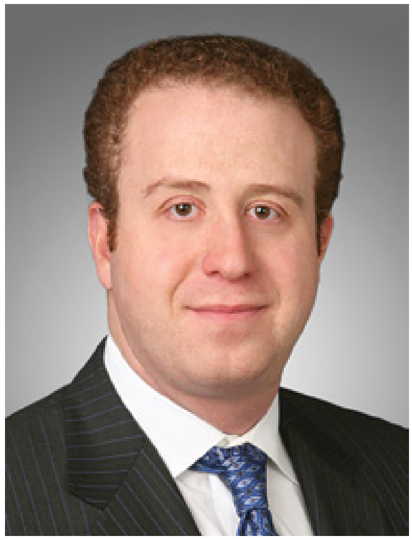
CHECKLIST

A top 10 guide for secondaries buyers

With an increasingly crowded transactions market, the competitive edge is shifting to buyers with efficient transaction processes. Fadi G Samman offers his tips for what investors should consider



Fadi G Samman is a partner in the investment management practice at US law firm Akin Gump, and is based in Washington DC

1 Staffing: Have a detailed discussion with your outside counsel about appropriate staffing levels and how they plan to manage the usual heavy quarter-end closing push. From a cost perspective, consider what tasks can be directed to other service providers or in-house. While the lawyers can do almost everything, they don't always need to.

2 Joint and several: More general partners are insisting that sellers and buyers provide joint and several indemnification for liabilities related to the transfer. Many institutional sellers may have an internal policy or accounting issues prohibiting such agreements. Make sure your purchase agreement provides for an equitable allocation of such joint and several liabilities.

3 GP clawbacks: Is the general partner in a clawback position? Many are requiring a waiver of the clawback as a condition to their consent. Identifying these issues early will help a buyer make an informed bid.

4 Stagger closings: It may be too difficult to transfer all the interests at one closing. Group the closings by NAV, targeting the largest positions first.

5 GP legal fees part 1: See if you can group the funds being sold by who their outside counsel is. Then co-ordinate with that outside counsel as early possible so that they understand the timing of the transaction and volume of transfers. Suggest that they assign a specific team to handle all of your transfers which will improve efficiency and save money.

6 GP legal fees part 2: Will the general partner condition its consent on payment of its counsel's legal fees? Survey general partners as early as possible on this issue and confirm with seller how the fees will be handled.

7 Do I really need all those reps and indemnities? More and more sellers are looking for limited or no carry over liability post-closing. The closer you can get to an "as-is" bid, the more attractive your bid will be even if you are not the highest bidder. Look at the seller representations and warranties and indemnity clauses as well as the LP giveback risk. Can you get comfortable through diligence on these issues (especially if you are an existing investor in a fund) rather than asking the seller to backstop them?

8 Get ahead of transfer issues: Nothing is more annoying than finding out that a particularly attractive asset in the portfolio can't be transferred because of limited PTP or 3(c)(1) slots or because a credit facility lender consent is needed. There are often solutions to these issues, but time, money and angst can be saved by identifying them early.

9 It's never too early to talk tax: At the bid stage inquire about the tax status of the seller (eg, US taxable, tax-exempt, non-US) and how they typically invest in funds. The use of AIVs and blockers may have a material impact on the expected returns. In a large auction you may not be able to diligence every fund in the portfolio for these issues prior to signing the purchase agreement, so focus on the larger/prized assets.

10 Get organised: A large secondary transaction is an exercise in project management. Spend time upfront developing a standardised tracking chart of all the key information for each fund being purchased (eg, commitments, unfunded commitments, NAV, primary business and legal contacts, and summary of transfer restrictions and notice periods), which will allow everyone to work off a consistent set of data points. ■