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Q & A Most Fund Managers Avoiding General Solicitation, Says Schulte Roth's Breslow

Stephanie Breslow, a partner at Schulte Roth & Zabel LLP, says most general partners are not using general solicitation to raise funds and niche strategies like bitcoin funds are attracting investor interest. She spoke with Sabrina Wilmer.

Q: Do GPs again have the upper hand in fund negotiations given the improving fundraising environment?

A: It's always going to be the case that some GPs have more power than others because they are well established and oversubscribed. In general, however, LPs still have quite a lot of power, and are getting more favorable terms overall. Certainly there has been a move to 100 percent transaction fee offset and there has been regulatory impetus for this to avoid potentially being treated as a broker-dealer. The move towards European-style waterfall (which return all invested capital plus a preferred return to investors before the GP gets carry) continues. If you are launching a first-time fund it is quite likely you have to use a European-style waterfall. Some other changes are happening around the edges of fund terms. For example, there are nuances to indemnity and exculpation provisions such as not covering disputes among GPs and not advancing expenses when a significant portion of LPs challenge an indemnity claim. Side letters are also getting longer and more investors request them.

Q: Are you seeing any changes made to fund documents in light of the SEC's focus on disclosure?

A: There is more disclosure of how co-investment opportunities will be allocated. There is also more detailed disclosure of which regulatory expenses are charged to a fund versus the GP. GPs are experiencing some of these regulatory expenses for the first time such as those relating to the Foreign Account Tax Compliance Act and AIFMD. There is more disclosure around fees and which ones don't offset the management fee. Enhanced disclosures typi-

cally appear in the fund's offering memo, but some also affect the LPA. For funds that have already launched, enhanced disclosures can appear in letters to investors or financial statements.

Q: How else are you advising clients in response to the SEC scrutiny?

A: Now GPs are having to be more formal about a lot of things such as making sure marketing pieces are vetted by lawyers so they match up more accurately with marketing memos and tracking compliance with side letters. The CFTC just now amended their rules to harmonize with the SEC rules, which is helpful.

Q: The SEC hasn't provided clear guidance on how co-investments should be treated. What are your clients doing?

A: At the moment, we are treating allocation of co-investment opportunities as a disclosure issue. Given there has been interest in it, GPs are tending to write more robustly about whether all investors get co-investments or just some, as well as the fees charged to co-investors.

Q: What other regulations are a focus for clients?

A: AIFMD definitely. There is no uniformity among European countries as to how the rules are implemented. Many funds are relying on reverse solicitation rather than registering. GPs often already have relationships with European investors

and those investors likely want to come into the next fund. It is trickier to rely on reverse solicitation for new relationships.

Q: Have clients taken advantage of general solicitation?

A: It is something very few GPs in the PE space are taking advantage of. It doesn't mesh well with other rules, and the regulatory consequences of using this approach have not been fully developed. For example, if you have a fund with commodities and futures exposure, there is no relief from the U.S. Commodity Futures Trading Commission about marketing this way without moving to a more restrictive regulatory regime.

Q: What types of strategies are attracting the most interest from investors?

A: Constructive activist funds and distressed strategies leap to mind. Energy has also been very hot, including mining. In general, I have seen people succeeding in raising niche PE funds in unusual sectors such as litigation finance and venture investing in bitcoin. We worked on a North Dakota-focused real estate fund that is taking advantage of the oil boom that is driving demand for housing. Midmarket real estate is also a popular strategy. One other notable trend is the move on the part of large investors to concentrate their investments across fewer funds. This gives an advantage to large, established GPs.

AT A GLANCE



Grew Up: Englewood, New Jersey

Education: Harvard University (BA); Columbia Law School (JD)

Recommended Book: *The Moral Animal* by Robert Wright

Favorite Recent Movie: *Boyhood*

Favorite Restaurant: 508 Gastro Pub, Soho (NYC)

If you had another career, it would be: Figurative painter

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