Current Complex Investment Issues:
Part I of Outline

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I. General Overview

A. Statutory and Regulatory History

1. Statutory History. The Bipartisan Budget Act (BBA) of 2015 (HR 1314, P.L. 114-74) changed the rules applicable to IRS audits of partnerships. These BBA provisions were amended by the Protecting Americans from Tax Hikes Act of 2015 (P.L. 114-113) and the Technical Corrections Act of 2018 (TTCA).

   i. These enactments replaced the rules under the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”), which generally required the IRS to pass audit adjustments to partnership items through to the ultimate taxpayers.

2. Regulatory History.

   i. On June 13, 2017, the IRS released proposed regulations providing guidance on the BBA (82 FR 27334) (the “June 2017 NPRM”). In addition, the IRS released proposed regulations on various specified topics in separate releases. November 2017, 82 FR 56765 (international issues), December 2017, 82 FR 27071 (tiered structures), and February 2018, 83 FR 4868 (adjustment of tax attributes).

   ii. Final regulations under IRC 6221(b) (election out) were issued on January 2, 2018 (TD 9829). Final regulations with respect to partnership representatives were issued on August 6, 2018 (TD 9839).

   iii. Treasury withdrew and re-proposed the regulations (to extent not previously finalized) on August 17, 2018 (83 FR 41954).

B. Statutory Mechanics


   i. The BBA makes it easier for the IRS to assess and collect tax attributable to partners at the partnership level. It provides that audits of partnerships and partners are conducted at the partnership level (rather than at the partner level).

   ii. By default, tax resulting from an adjustment is assessed at the partnership level in the adjustment year. The partnership can elect to “push out” this income to the partners from the reviewed year (such tax payable, with interest, in the adjustment year).
iii. Note: This outline focuses on selected provisions of interest to exempt organizations and is not intended as a comprehensive summary of the BBA regulations.


i. Determination at Partnership Level

(a) In general, in the absence of the elections below, any adjustment for a partnership is determined, assessed and collected at the partnership level. IRC 6221(a). The highest individual rate applies. IRC 6225(b)(1)(A).

(b) Note that under this framework, the liability is borne economically by the partners in the year of adjustment (and not by the reviewed year partners.) The partnership may decide how to allocate the economic burden among the partners. See below for further discussion.

ii. Imputed Underpayment.

(a) IRC 6225 lays out the method of calculation that the IRS uses to determine an imputed underpayment.

(b) Generally, this is computed by netting all adjustments during the audit and multiplying by the highest individual or corporate rate in effect for the year of the audit. IRC 6225(b).

(c) IRC 6225(c) enumerates a number of ways that the partnership can modify the imputed underpayment, including, as relevant here, by determining the imputed underpayment without regard to the portion thereof that the partnership demonstrates is allocable to a partner that would not owe tax by reason of its status as a tax exempt entity. IRC 6225(c)(3).

(1) Prop. Reg. 301.6225-2(d)(3) addresses modification with respect to tax exempt partners.

(i) The partnership must demonstrate to the satisfaction of the IRS that income is allocable to a partner that would not owe tax by reason of its status as a tax-exempt entity. Prop. Reg. 301.6225-2(d)(3)(i).

(ii) A tax-exempt entity is defined as a person or entity defined in IRC 168(h)(2)(A), (C) or (D) (which section generally relates to depreciation). Prop. Reg. 301.6225-2(d)(3)(ii).
(A) As relevant here, IRC 168(h)(2)(A) includes an organization (other than a cooperative) exempt from tax under Chapter 1 of the Internal Revenue Code, relating to the income tax.

(iii) Only the tax-exempt portion of the adjustments is exempt from tax. This is the portion of the partnership adjustments properly allocated to a tax-exempt partner with respect to which the partner would not be subject to tax for the reviewed year. Prop. Reg. 301.6225-2(d)(3)(iii).

(iv) A modification will not be approved by the IRS unless the partnership provides documentation to support the tax-exempt partner’s status and the tax-exempt portion of the partnership adjustment. Prop. Reg. 301.6225-2(d)(3)(iii). This documentation may vary based on the facts and circumstances and may include information with respect to the partner. Prop. Reg. 301.6225-2(c)(2).

(v) Prop. Reg. 301.6225-2(f), Ex. 3, 4, 5 and 6 provides an examples of the application of these rules to exempt entities.

(A) In Ex. 3, all of the partnership income of the tax-exempt partner (holding through an upper-tier partnership), is exempt from tax, and the imputed underpayment of the lower tier partnership is reduced accordingly.

(B) In Ex. 4, the same facts apply. A portion of the income allocated to the exempt partner is debt-financed income and the adjustment is revised accordingly.

(C) Ex. 5, follows the same facts as Ex. 3. An adjustment is made to reflect an amended return filed by the upper tier partnership.

(D) Ex. 6 also follows the same facts as Ex. 3. An adjustment is made with respect to an amended return filed by the other partner in the upper tier partnership.
(2) The preamble to the June 2017 NPRM notes key issues related to the modification in the context of tax-exempt partners:

A partnership’s decision either to request or not to request modification in the course of an audit under these proposed regulations may raise issues concerning whether and to what extent any benefit that might result from its request or failure to request modification could be considered to have been provided to any person in lieu of to a tax-exempt partner (whether a current or former partner, and at any “tier” of the partnership). For example, such a transfer of benefit may raise issues for one or more partners with respect to: (1) the status of a tax-exempt partner because of private inurement or private benefit under section 501(c); (2) excise taxes under chapter 42 of subtitle D of the Code or under sections 4975, 4976, or 4980; or (3) requirements under title I of the Employee Retirement Income Security Act of 1974, Public Law No. 93-406 (88 Stat. 829 (1974)) as amended (ERISA), such as the fiduciary responsibility rules under part 4 thereof. Some of these issues may be addressed by including appropriate provisions in the partnership agreement. However, the Treasury Department and the IRS request comments from the public on whether guidance is needed to address these potential issues and, if so, on possible ways to resolve such issues. 82 FR 27355.

(3) Prop. Reg. 301.6225-4 addresses adjustments to tax attributes such as basis and book value of partnership property and partners’ basis and capital accounts to reflect partnership adjustments as set forth above. In order to give effect to the adjustment, notional items of income, gain, expense or loss, may be created. Prop. Reg. 301.6225-4(b)(3). Generally, these notional items generate adjustments to tax attributes. Prop. Reg. 301.6225-4(b)(6)(i).

(4) Prop. Reg. 301.6225-4(e), Ex. 2 illustrates application of these rules to a partnership with an exempt partner. In this example, the notional adjustment increases the capital accounts and basis of the exempt partner in the same manner as the non-exempt partner. However, the modification affects the allocation of the imputed underpayment. This results in appropriate adjustment to the capital account and basis of the exempt partner,
reflecting the fact that no imputed underpayment is borne by such partner.

(5) In addition, the proposed rules specify that basis is not adjusted for notional items allocated to a partner that is not a tax-exempt entity which is a successor to a reviewed year tax exempt partner to the extent that a modification under Prop. Reg. 301.6225-2 (above) applied because the tax-exempt partner was not subject to tax. Prop. Reg. 301.6225-4(b)(6)(iii)(B)(1).

(6) Prop. Reg. 301.6233(a)-1(c)(3), Ex. 5 illustrates the effect of IRC 6225 adjustments in respect to exempt partners with respect to computation of interest and penalties.

iii. *Push-Out Election.*

(a) If a “push-out” election is made under IRC 6226, the rules outlined above do not apply to the underpayment, and each reviewed year partner is instead required to take the adjustment into account. IRC 6226(b). Increased taxes are paid on adjustment (current) year returns at an interest rate that is equal to the underpayment rate plus 2%. IRC 6226(c).

(1) The proposed regulations under IRC 6226 do not specifically address exempt organizations.

(b) The preamble to the June 2017 NPRM states as follows with respect to the push-out election:

The Treasury Department and the IRS request comments from the public on whether guidance is needed on how to address potential issues arising with respect to tax-exempt entities as a result of an election under section 6226 and, if so, on possible ways to resolve such issues. For instance, if a tax exempt entity’s share of the amounts under section 6226 is investment income, issues may arise regarding how a section 6226 election might affect the entity’s public support calculation (if the entity is a publicly-supported organization) or the applicable net investment income tax (if the entity is a private foundation).

iv. *Administrative Adjustment Requests.*

(a) IRC 6227 allows partnerships to file a request for an administrative adjustment to income for any partnership tax year. IRC 6227(a).
(b) The partnership can pay adjustments requested in the AAR by a
either using the rules of IRC 6225 (imputed underpayment) or IRC
6226 (push out election) as described above.

(1) With respect to the imputed underpayment, the provisions
related to tax-exempt partners can be utilized. Prop. Reg.
301.6227-2(a)(2).

(i) The partnership is not required to seek approval
from the IRS for modification. Prop. Reg.
301.6227-2(a)(2)(i). As part of the administrative
adjustment request, the partnership must (1)
describe the effect of the modification on the
imputed underpayment amount; (2) provide an
explanation of the basis for the modification; and
(3) providing documentation to support the
partnership’s eligibility for the modification. Prop.

v. Partnership Representative.

(a) New IRC Section 6223 replaces the concept of a “Tax Matters
Partner” with the concept of “Partnership Representative.” All
partnerships must designate a partnership representative each
taxable year as the individual or entity with the sole authority to act
on behalf of the partnership. The partnership representative has
sole authority to act on behalf of the partnership with respect to
partnership audit. IRC 6223(a), Treas. Reg. 301.6223-2. The
partnership representative does not need to be a partner. Treas.
Reg. 301.6223-1(b). See below for discussion of limitations that
investors may wish to impose on the partnership representative.

(1) A tax-exempt partner can serve as the partnership
representative. 82 FR 27343.

(b) Partners do not have statutory rights to receive notices related to
audits. Rather, only the partnership and partnership representative
generally receive such notices. See IRC Section 6231; Prop. Reg.
301.6231-1. Information rights can be negotiated contractually.

vi. Election.

(a) A partnership may elect out of the BBA for the taxable year if it
furnishes 100 or fewer partner statements and each partner is an
individual, C Corporation (including exempt organizations), S
corporation, or estate of a deceased partner. IRC 6221(b).
(b) Note that an election cannot be made if any of the partners is itself a partner. See Treas. Reg. § 301.6221(b)–1(b)(3)(ii).

II. Application to Investments

A. Fund Investments: Provisions addressing the BBA will be present in the limited partnership agreements for fund investments in various forms, however they may not appropriately address the interests of exempt investors. It is often necessary to supplement these provisions in a side letter. Exempt investors may want to consider developing a standard checklist of BBA provisions and/or a model side letter to address the below. The below provide examples of common LPA language or potential side letter requests. Before each example, we have summarized the purpose of the provision.

1. Partnership representative
   i. Requires notification.

   Sample Language: In the event the Partnership becomes the subject of an income tax audit by any Federal, state or local authority, the General Partner shall promptly notify the Investor in writing and shall keep the Investor informed of all matters in respect thereof as if the Investor were a “notice partner” (within the meaning of section 6231(a)(8) of the Code as in effect for tax years beginning prior to 2018).

2. Imputed underpayment (IRC 6225)
   i. Requires commercially reasonable efforts to consider exempt status in request to IRS for adjustment.

   Sample Language: With respect to any U.S. tax audit of the Partnership, the General Partner shall exercise its commercially reasonable efforts to minimize the financial burden of any audit adjustment to the Partnership and the Investor and, to the extent applicable, take into account the status of the Investor as a tax-exempt entity (within the meaning of section 168(h)(2) of the Code), including, as part of its exercise of its commercially reasonable efforts, to request a modification of the imputed underpayment amount under Code Section 6225 based upon the tax-exempt status of Investor to the extent not previously taken into account in determining the imputed underpayment amount.

   ii. Ensures that tax attributes of exempt partner are modified to reflect adjustment based on exempt status so that tax costs are not borne by exempt partner.

   Sample Language: The General Partner shall, or shall cause the Partnership to, use commercially reasonable efforts to take any actions to allocate the financial burden of any imputed underpayment to the Limited Partner(s) to
whom such amounts are specifically attributable, taking into account each Partner’s interest in the Fund in the reviewed year, a Partner’s timely provision of information necessary to reduce the amount of imputed underpayment amount, the tax status of the Partner, and other applicable facts and circumstances.

iii. Establishes general indemnity/reimbursement from reviewed year partners for imputed underpayment.

Sample Language: If the Partnership is obligated to pay any amount to a governmental agency or body or to any other Person (or otherwise makes a payment) because of a Partner’s status or otherwise specifically attributable to a Partner (including non-U.S. taxes, U.S. federal withholding taxes with respect to non-U.S. partners, U.S. state withholding taxes, U.S. state unincorporated business taxes and any taxes arising under the Partnership Tax Audit Rules), then such Partner (the “Reimbursing Partner”) shall reimburse the Partnership in full for the entire amount paid (including any interest, penalties and expenses associated with such payment). Each Partner agrees (i) to pay such amount to the Partnership within fifteen (15) days following the General Partner’s request for payment (and any failure to pay such amount shall result in interest on such amount calculated at the prime rate plus two percent (2%)) and (ii) that any amounts otherwise distributable to such Partner may be applied in satisfaction of such obligations.

iv. Provides carveouts to indemnity of Partnership Representative.

Sample Language: Each Partner hereby severally indemnifies and holds the Partnership, the General Partner and the Partnership Representative (the “Indemnified Parties”) harmless for such Partner’s respective portion of the financial burden of an Imputed Underpayment, provided, however, that this indemnity shall not extend to (i) conduct of an Indemnified Party that is in breach of the Partnership Agreement or (ii) conduct of an Indemnified Party which constitutes negligence, reckless of international wrongdoing.

3. Push Out Election

i. Allows the Partnership Representative to make the push out election.

Sample Language: Each Partner (A) expressly authorizes the Partnership Representative and the Partnership to take any and all action that is reasonably necessary under applicable federal income tax law (as such law may be revised from time to time) to cause the Partnership to make the election set forth in Section 6226(a) of the Code if the Partnership Representative decides to make such election, and (B) expressly agrees to take any action, and furnish the Partnership Representative with any information necessary, to give effect to such election.
ii. Requires that GP obtain necessary information from lower-tier entities making a push out election.

*Sample Language:* The General Partner shall use commercially reasonable efforts to cause any entity to which Section 6225 or 6226 of the Code applies in which the Partnership owns a partnership interest, a membership interest or similar interest (a “Lower-Tier Entity”), to provide the Partnership in a timely manner with the information required to allow the Partnership to make an timely election under Section 6226 of the Code with respect to any imputed underpayment amount with respect to such Lower-Tier Entity.

B. *Other Partnership Investments.* In connection with partnership investments outside the fund context, the BBA audit rules will also need to be addressed. Depending on the nature of the investment, there may be less developed market practice, as well as greater freedom to customize these provisions.

1. An election out may be possible if criteria outlined above are met (i.e. under 100 partners, no partnership owners.)
2. Where appropriate, the model LPA/side letter provisions above can be utilized.
3. If appropriate based on the circumstances, provisions that are more protective of the rights of the exempt organization could be utilized than are typical market practice in the fund context.
   i. For example, depending on the circumstances, the exempt partner could request consent rights to various actions; specific requirements could be spelled out with respect to consideration of exempt partner’s status (as opposed to “commercially reasonable efforts” standard); push out election could be required; exempt investors could have remedies against the partnership representative for failing to consider exempt status properly, etc.
4. Consideration of the BBA provisions may also be necessary in circumstances involving equity PRIs in a partnership.

C. *Secondary market purchases/sales*

1. Side letter/LPA provisions should address transfer.

*Sample Language:* The General Partner will not consent to the transfer of interest of any Limited Partner unless the transferee receiving such interest agrees that in the event the transferor of such interest does not fulfill its obligation to pay imputed underpayment amounts allocated to the transferor within twenty (20) business days following written demand by the General Partner, such transferee shall be jointly and severally liable with such transferor for such obligation and the General Partner may thereafter treat the transferee as the relevant Partner to pay such amounts.
2. Appropriate indemnifications/information rights should be considered in transfer documents where exempt organization is a participant in secondary market purchase/sale.

3. **Sample Language:** Seller agrees to defend, indemnify and hold harmless Buyer and its affiliates from and against any losses, damages, claims, suits, proceedings, liabilities, fees, costs and expenses which may be imposed, sustained, incurred or suffered or asserted as a result of, relating to or arising out of any taxes attributable to the ownership or disposition of the Interests on or prior to the Closing Date, (including, for the avoidance of doubt, any such taxes imposed upon the Partnership and attributable to the ownership or disposition of the Interests on or prior to the Closing Date).

   *Note:* This language is intended to clarify that Buyer (as an “adjustment year partner”) is indemnified for pre-closing taxes attributable to Seller (the “reviewed year partner”) that may be imposed on the Partnership under the BBA.

**D. Tax Exempt Issues**

1. Potential private benefit concerns present a theoretical risk if economic adjustments not made to reflect reduced imputed underpayment resulting from partner’s tax-exempt status.

   *Example:* A fund (the “Fund”) is the subject of a potential imputed underpayment in respect of which the Fund’s Partnership Representative requests a modification based, in part, on a foundation partner’s exempt status. The IRS ultimately accepts the proposed modification, thereby lowering the imputed underpayment amount. In such a case, the foundation partner’s economics and tax attributes should be appropriately adjusted to reflect the fact that its exempt status resulted in the reduced imputed underpayment. If these adjustments are not made, and the reduced imputed underpayment is shared economically among all of the partners, the foundation partner could potentially be deemed to be subsidizing the other investors as a result of the foundation partner’s tax exempt status.

   *Note:* In our experience, explanation of this scenario can be utilized to request side letter language above from fund counsel. If this perspective is not ultimately adopted by the fund, circumstances may still exist such that an exempt investor could take a position that there was no impermissible private benefit.

   *Sample Language (Illustrating of approach of treating adjustments as distributions):* Except to the extent actually reimbursed in cash by a Reimbursing Partner pursuant to this Section, (i) any Income Taxes paid by the Partnership (or by any fiscally transparent entity in which the Partnership holds an interest), (ii) any other taxes paid or withheld by the Partnership (or any Intermediate Entity) and (iii) any withholding or similar
taxes imposed on amounts payable to the Partnership (or any Intermediate Entity) shall in each case be treated for purposes of this Agreement as an amount actually distributed to the applicable Partners pursuant to [the distribution waterfall] at the time paid or withheld (and the amount of any such tax shall be deemed to have been distributed to such Partners as the General Partner, in its reasonable discretion, may determine).

Sample Language (Illustrating recapture from former partners): Regarding the potential obligation of a former Partner under this paragraph, the following shall apply: (A) eachPartner agrees that notwithstanding any other provision in this Agreement if it is no longer a Partner it shall nevertheless be obligated for any responsibilities under this paragraph as if it were a Partner at the time of demand hereunder; (B) the General Partner will use commercially reasonable efforts to collect any amounts owed by any such former Partner;

2. Other Exempt Concerns

   i. Private inurement/self-dealing concerns in connection with co-investments with disqualified persons.

   ii. Potential adjustments to UBIT/net investment income/public support.

     (a) Conceptually, changes in income could affect each of these.

     (b) It is unclear if regulations as drafted mechanically generate this result.
Complex Investment Issues
ABA Panel Outline

I. Practical Application to Investments

The information below is structured to provide an outline of issues that the MacArthur’s legal department frequently encounters in negotiating tax and other legal issues with various funds and other investment vehicles. The positions listed below have evolved over time and continue to be shaped by a multitude of factors, including business considerations and leverage, perceived market standards, risk tolerance, policies, cultural approach and the historical experience of the applicable parties in the transaction. As such, the guidelines below are meant to be illustrative of one playbook containing positions that an exempt organization may consider, recognizing that different organizations may approach issues differently and there are a multitude of factors, circumstances and perspectives which may yield a different result.

A. Unrelated Business Taxable Income

Preferred Approach: The General Partner agrees to use “best efforts” to avoid UBTI or at least take the potential for Unrelated Business Taxable Income (UBTI) into account when evaluating an investment. “Commercially reasonable” standard is also acceptable.

Alternative Approaches: Increasingly, the LPA will state that the General Partner will take UBTI into consideration with the caveat that the General Partner’s formation of a blocker for any UBTI-generating investments will be deemed to satisfy this requirement. Many investors are not UBTI allergic and therefore make an economic decision as to whether to invest in a blocker corporation entity given the tax the blocker corporation may be required to pay.

Sample Side Letter Language. The General Partner recognizes that the Investor is exempt from tax pursuant to Section 501(a) of the Code, and, accordingly, agrees to consider the effect of “unrelated business taxable income” or “unrelated debt-financed income” on the overall yield to the Investor when considering an investment. The General Partner agrees that if any investment by the Partnership earns income that the General Partner considers it likely under the Code to be considered “unrelated business taxable income” or “unrelated debt financed income” to a Limited Partner that is exempt from tax pursuant to Section 501(a) of the Code, the General Partner shall timely notify the Investor of such fact and provide sufficient information to the Investor for United States tax reporting purposes.

B. Excess Business Holdings

Preferred Approach: The General Partner agrees to notify the foundation partner if its ownership in the fund exceeds the permitted amounts under Code Section 4943 and in such event, the fund agrees to redeem the
foundation partner’s interest for an amount equal to the cost basis or fair market value of the interests.

**Alternative Approaches:** Often the General Partner will push back on required redemption, in which case, a foundation partner may instead request a two-tiered approach where redemption is only required following a period during which the foundation partner is permitted to locate a third party purchaser.

*Sample Side Letter Language.* The Foundation may elect to withdraw from the Partnership if the Foundation shall obtain an opinion of counsel (which counsel shall be reasonably acceptable to the General Partner) to the effect that such withdrawal is necessary in order for the Foundation to avoid (i) excise taxes imposed by Subchapter A of Chapter 42 of the Code (other than sections 4940 and 4942 thereof), or Subchapter F of Chapter 42  or (ii) a material breach of the fiduciary duties of its trustees under any federal or state law applicable to private foundations or any rule or regulation adopted thereunder by any agency, commission, or authority having jurisdiction. In the event of the issuance of the opinion of counsel referred to in the preceding sentence, the Foundation shall use commercially reasonable efforts to sell the interests giving rise to the excess business holdings. If the Foundation is unable to find a buyer within sixty days, the General Partner agrees to purchase such interest at the cost basis for such interests and, at its election, may do so through the issuance of a promissory note with a maturity not to extend beyond three years and a market interest rate.

**Other Considerations:** ERISA investors are increasingly afforded a robust withdrawal right in the LPA. Consider requesting that foundation partners, as a regulated partner, also be afforded a similar right under the LPA. Moreover, if ERISA investors are afforded a withdrawal right, it is possible that a foundation partner’s ownership stake could increase substantially in the event such right is exercised. Although unlikely, in the event of such a scenario, the foundation partner would have significant exposure if it is not also afforded such withdrawal right. The amount of the foundation’s percentage ownership interest is also a factor in how hard to push.

**C. Role of Advisory Board and Conflicts of Interest**

**Preferred Approach:** The Advisory Board approves all conflicts of interests of the General Partner (as opposed to Advisory Board oversight be purely advisory as it relates to conflicts). The Limited Partners continue to have approval rights over a variety of key business decisions (increasing thresholds on various investment limitations, lifting suspension periods, approving an early formation of a successor fund, approving a replacement key person, etc.)
Alternative Approaches: Even if the Fund does not agree to Advisory Board approval being binding on all conflicts, consider requesting a side letter provision that sets a specific standard for transactions where a conflict may be present such as requiring all such transactions to be at arms-length or commercially reasonable and require that all such transactions be reported to the Advisory Board.

**Sample Side Letter Language.** The General Partner represents and warrants that any transaction with an affiliate will be on an arms-length basis on terms substantially similar as would be negotiated with an unrelated party. The General Partner further agrees that in allocating investment opportunities among funds in which the General Partner or its affiliates have an interest, it will use its good faith efforts to ensure that the Fund has access to and participates in, to the largest degree possible, those opportunities that are within the investment strategy of the Fund as described in the Offering Memo.

The General Partner may assert that the Advisory Board serves to provide representation of the Limited Partners while also allowing the fund to expedite certain actions which may be burdensome to request from Limited Partners. In such case, an alternative approach is a two-tiered method whereby the Advisory Board approves waivers of limitations or other provisions up to a certain threshold, after which, any additional amounts or waivers would require approval of the Limited Partners.

**Example:** The Fund is not permitted to invest more than 15% of the Fund’s commitments in one portfolio company without the approval of the Advisory Committee and not more than 20% of commitments shall be so invested without the approval of a majority-in-interest of the Limited Partners.

**D. Indemnification and Exculpation**

Preferred Approach: The fund is not obligated to indemnify the General Partner (and the General Partner remains liable for) breaches of the LPA, breaches of fiduciary duties, breaches of securities laws, fraud, gross negligence and willful misconduct. In addition, the following language is in the LPA or in a side letter with the fund: the term “willful misconduct” shall include workplace misconduct such as egregious sexual harassment.

Other Considerations: Some funds push back on the longer list of carveouts to the indemnification and exculpation provisions but arguably this is a risk allocation issue and the ability to control whether or not specific conduct warrants the right to be exculpated or indemnified is within the control of the General Partner.

**E. Misc. Issues (time permitting)**
- Time commitment of Key Persons
- Standard of adjudication with respect to removal for “cause” (final vs. initial adjudication)
- Confidentiality relating to 990 disclosures
- Management Fee step down
- Term extensions