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FUNDamentals

FUNDamentals – June 2025

FUNDamentals is a periodic digest of news and information specifically for private funds and their managers. In this issue, we highlight some fundraising trends, new marketing rule FAQs, fund liquidity trends (limited partners (LPs) acting as lenders, secondaries and continuation funds), tax changes in the One Big Beautiful Bill Act, and new compliance rules for the new year.

PODCASTS

Don't forget to check out our private equity-focused podcast series PE Pathways. Recent episodes explore the evolving landscape for secondary transactions, current trends impacting PE sponsors in the debt and lending markets, and the administration's regulatory impact on PE.

BY THE NUMBERS

Private equity fundraising for primary commitments continues to be slow, matching the decline in realizations and the decrease in size of realizations in private equity. Recent data suggests that the denominator effect is also affecting LP commitments to private funds and will continue to do so in the future. This has led advisers to focus on matching their fund products to available LP capital, with increased interest in dedicated co-investments funds, sector-specific funds, permanent capital funds and continuation funds as well as embracing LPs as lenders to private funds and their portfolios. Fundraising by real estate funds has been slightly better in the first half of 2025 than in prior periods, but deal volume and values have declined due to the uncertainties in the broader economy.

MARKETING

Recent FAQs for marketing gross and net performance

In March 2025, the Securities and Exchange Commission (SEC) updated its FAQs in response to questions from firms and advisers relating to the amendments to the "Marketing Rule" under the Investment Advisers Act.

Portfolio and investment characteristics

The absence of a definition of "performance" within the Marketing Rule has caused great uncertainty as to whether certain portfolio and investment characteristics — including sector or geographic returns, yield, attribution analyses, contribution to return, volatility, coupon rate, the Sharpe ratio, the Sortino ratio, and other similar metrics — constitute performance figures, which would require presentation of those characteristics on a net basis. According to the new FAQs, an adviser may present one or more gross characteristics of a portfolio or investment even if the adviser does not include the corresponding net characteristic(s), subject to the following conditions:

1. the gross characteristic is clearly identified as being calculated without the deduction of fees and expenses;
2. the characteristic is accompanied by a presentation of the total portfolio's gross and net performance consistent with the requirements of the Marketing Rule;

3. the total portfolio's gross and net performance is presented with at least equal prominence to, and in a manner designed to facilitate comparison with, the gross characteristic; and
4. the gross and net performance of the total portfolio is calculated over a period that includes the entire period over which the characteristic is calculated.

Notably, the FAQs do not technically confirm whether certain characteristics qualify as performance. However, the following metrics were expressly carved out from the FAQs guidance, regardless of how they are labeled in the marketing materials: presentations of total return, time-weighted return, return on investment (RoI), internal rate of return (IRR), multiple on invested capital (MOIC), or total value to paid in capital (TVPI). Presumably, the SEC believes these characteristics are indeed performance for purposes of the Marketing Rule and must be presented on a gross and net basis.

Extracted performance

The new FAQs reverse and replace prior FAQ guidance from 2023 in which the SEC stated an adviser may not show gross performance of one investment or a group of investments (e.g., extracted performance) without also showing the net performance of that single investment or group of investments. According to the new FAQs, extracted gross performance may be presented without the corresponding net performance information if the following conditions are met:

1. the extracted performance is clearly identified as gross performance;
2. the extract is accompanied by a presentation of the total portfolio's gross and net performance consistent with the requirements of the Marketing Rule;
3. the gross and net performance of the entire portfolio is presented with at least equal prominence to, and in a manner designed to facilitate comparison with, the extracted performance; and
4. the gross and net performance of the entire portfolio is calculated over a period that includes the period over which the extracted performance is calculated.

Equal prominence

The new FAQs clarify that the gross and net performance of the total portfolio does not need to be presented on the same page of the marketing material as the extracted performance, provided that the presentation facilitates comparison between the gross and net performance of the total portfolio and the extracted performance. The SEC indicated that presenting the gross and net performance of the total portfolio prior to the extracted performance in the marketing materials could satisfy this requirement. Advisers must still ensure gross performance is presented in a manner that is not otherwise materially misleading and appropriate information accompanies the gross performance of the extract.

While the new FAQs provide much need clarity, the SEC also reminded advisers that presentations of portfolio and investment characteristics as well as extracted performance in accordance with the new FAQs remain subject to the general prohibitions of the Marketing Rule and the anti-fraud provisions of the Investment Advisers Act.

Reasonable steps to verify accredited invested status

The recent SEC guidance on what constitutes "reasonable steps" to verify an investor's accredited investor status under Rule 506(c) of Regulation D may offer advisers a more efficient approach to capital

raising under that exemption than in the past. While the SEC created Rule 506(c) in 2012 to ease the burdens on raising capital, advisers have not historically utilized Rule 506(c) as a result of burdensome investor verification requirements that were listed in the non-exclusive safe harbor provisions of the rule (such as reviews of certain investor documentation such as tax filings, brokerage and financial statements and pay checks, or obtaining additional written confirmations from an investor's advisers). Consequently, advisers have generally continued to rely on Rule 506(b), which does not permit general solicitation, since it avoids the intensive (and intrusive) process of verifying each purchaser's accredited investor status under Rule 506(c) by reliance on the purchaser's self-certification.

Under the new guidance, advisers may rely on high minimum investment amounts ($200,000 for individuals and $1,000,000 for legal entities) and written representations from the investor that it is an accredited investor and its minimum investment amount is not financed by any third party for the specific purpose of making its investment. If the adviser has no actual knowledge of any facts that indicate otherwise, then it may reasonably conclude that it has satisfied the "reasonable steps" requirement under Rule 506(c). Without the burdensome process of reviewing investor documentation and third-party certifications to verify an investor's accredited investor status, this new guidance may very well lead to increased use of general solicitation offerings under Rule 506(c) in order to meet the increasing interest in private markets by the growing population of accredited investors in the U.S.

For more detailed information, see SEC Broadens Guidance on Accredited Investor Verification and Recent SEC Corp/Fin Interpretations of Interest.

LIQUIDITY

Existing LPs as lenders to funds

Many LPs are finding that the equity side of their balance sheets are becoming full while the debt side of their balance sheets have excess capacity. This is leading to more and more LPs acting as lenders to the funds in which they are invested, displacing more traditional bank lenders.

Secondaries

Secondary volume remains strong as LPs seek liquidity amid a dearth of realization events and reduced size of realizations. Recent headlines also indicate that a number of university endowments are seeking to monetize their large private equity stakes. Ready buyers include platforms and other private funds with an exclusive focus on secondary transactions, as well as an increasing number of closed-end investment companies. LPs may also obtain liquidity where a continuation vehicle is offered by an adviser.

Continuation Funds

For advisers, continuation funds provide significant flexibility to manage assets for longer periods, potentially maximizing returns. For LPs, continuation funds offer the opportunity to maintain their investment in high-performing assets without the need for new cash commitments. For advisers and LPs, continuation funds may present risks as to potential conflicts of interest, tax structuring, and valuation, while on the other hand providing opportunities to capture additional value from mature assets. You can find more detailed information on continuation funds here.

Recent data shows that the continuation fund space continues to be strong, with single asset deals (vs. multi-asset deals) continuing to represent a majority of transactions and technology being the industry

with the highest amount of continuation fund activity. Buyout assets continue to represent the vast majority of all continuation fund assets, matching the continued strength of GP-led secondaries or "internal" continuation funds, where an adviser lifts out one or more assets into a new vehicle or a later vintage fund vehicle with existing LPs providing all of the lift out capital as well as additional capital to support the assets or future acquisitions. The strong interest of LPs in co-investment has also continued to drive this trend.

TAX ROUND UP

One Big Beautiful Bill

In May 2025, the House of Representatives passed H.R. 1, the budget reconciliation bill known as the One Big Beautiful Bill Act (aka, the Tax Bill). The Tax Bill proposes significant amendments to the Internal Revenue Code that could have significant consequences for both private funds and advisers, including the expansion of certain deductions for non-corporate owners of pass-through entities, the temporary relaxation of certain interest deduction limits, increased taxes on certain U.S. source income for non-U.S. taxpayers, and the permanent repeal of miscellaneous itemized deductions (including those for management fees and other expenses). The Tax Bill notably excludes any changes to the taxation of carried interest. For more detailed information, see The One Big Beautiful Bill: Initial Analysis of Key Provisions for Investment Funds and Sponsors and The One Big Beautiful Bill: Initial Analysis of Key Provisions for Private Equity Funds and Their Portfolio Companies.

The Tax Bill also contains significant amendments to the Internal Revenue Code impacting the real estate industry and real estate funds, including restoring 100% bonus depreciation, increasing expensing limits for depreciable assets, expanding certain deductions for non-corporate owners of pass-through entities, introducing new deductions for qualified production property, extending excess business loss limitations, launching a new round of Qualified Opportunity Zones, enhancing the Low-Income Housing Credit, revising REIT asset tests, and imposing increased taxes on income allocated to foreign investors from certain countries. For more detailed information, see The One Big Beautiful Bill: Initial Analysis of Key Provisions for the Real Estate Industry.

Foreign lenders to U.S. entities

Foreign lenders make thousands of loans to U.S. entities every year. The U.S. withholding tax on the related interest payments has been generally stable since 1984. The general rule is that interest paid under these loans from a U.S. borrower to a foreign lender is subject to a 30% U.S. withholding tax. However, for most of these loans, interest paid to the foreign lenders is not subject to U.S. withholding tax due to (1) the portfolio interest exemption, (2) the application of an income tax treaty, or (3) the foreign lender being engaged in the business of lending in the U.S. That stability may well be upended by the Tax Bill, with proposed Code Section 899. Proposed Section 899 would impose a retaliatory withholding tax of 5% (that can grow to 20%) on interest paid to a foreign bank if the foreign bank is resident in a discriminatory foreign country. A country is a discriminatory foreign country if it imposes identified taxes that have a disproportionately negative impact on U.S. taxpayers. A standard LSTA-style loan agreement entered into prior to Section 899's enactment would provide that the borrower would be obligated to not only pay the withholding tax but pay additional amounts so that the lender receives the same amount of cash it would have received if there was no withholding. For more detailed information,

see The Big Beautiful Bill and the Effects on Bank Lending Into the US and Section 899 Implications for Foreign Banks Lending to US Borrowers through US Lending Offices.

COMPLIANCE / REGULATORY UPDATES

SEC withdraws a slew of proposed rules…

On June 12, 2025, the SEC formally withdrew a number of its proposals for rules issued under Chair Gensler's regime, including proposed rules on Predictive Data Analytics, Safeguarding (aka the new custody rule), Cybersecurity Risk Management; Enhanced Disclosures About Environmental, Social and Governance (ESG) Investment Practices; Outsourcing; Best Ex amendments and more. If the SEC decides to pursue any of these topics in the future, it will issue new proposals or other issuances per the Administrative Procedure Act. For more information, click here.

CTA – Where did it go and where does it still apply?

In March 2025, FinCEN issued an interim final rule that removes the requirement for U.S. companies and U.S. persons to report beneficial ownership information to FinCEN under the Corporate Transparency Act. These changes follow months of legal challenges and extensions in the application of the prior rules and mean that all entities formed in the U.S. are now exempt from the requirement to file beneficial ownership reports.

The updated rule also includes changes for entities formed outside of the U.S., but registered to do business in the U.S. There is a new exemption to the beneficial ownership reporting rules for "foreign pooled investment vehicles," including AIVs or feeder entities organized outside the U.S. Under the exemption for foreign pooled investment vehicles, if an entity is organized outside of the U.S. but is operated or advised by a bank, credit union, broker or dealer in securities, investment company or investment adviser, or venture capital fund adviser, the entity only needs to provide the beneficial ownership information for non-U.S. persons who exercise "substantial control" over the entity. This means that a foreign pooled investment vehicle that is substantially controlled only by U.S. persons is also not required to file beneficial ownership reports.

As to what qualifies as "substantial control," the updated rule does not address positions advanced in the multi-firm white paper regarding the CTA and its specific application to private funds, so this remains a fact-specific analysis.

For more detailed information, see our recent articles and publications including Practical Implications of the Interim Final Rule of BOI Reporting Under the CTA, and CTA Significantly Amended by Interim Final Rule.

AML – Be prepared for the new rule coming into effect in the new year…

Many advisers have adopted internal "know your client" or anti-money laundering policies, often in response to requests from LPs or the depository institutions used by the adviser. Those advisers who have not yet adopted such policies will be required to do so by January 1st. The new rule will impose formal requirements on investment advisers (both registered advisers and exempt reporting advisers) to adopt written risk-based policies, procedures and controls to prevent the adviser from becoming involved with illicit financial activities. These include broad anti-money laundering and countering the financing of

terrorism requirements. Investment advisers with a principal place of business outside the U.S. will need to apply the new rules to their advisory activities that take place within the U.S., or that involve advisory services provided to U.S. persons or to foreign-located private funds with one or more LPs that are U.S. persons. In addition to adopting and implementing new policies, procedures and controls, the rule requires advisers to file currency transaction and suspicious activity reports with FinCEN, and comply with certain diligence, information sharing and recordkeeping requirements. For more information, see FUNDamentals: Navigating FinCEN's New AML Regulations for Investment Advisers.

Form PF

At the end of January 2025, the SEC and the CFTC extended the compliance date for the most recent amendments to Form PF (originally March 12, 2025) to October 1, 2025. As a result of this extension, Form PF filers with a December fiscal year end that only file Form PF on an annual basis were not required to file the amended Form PF in this year's annual update. However, Large Hedge Fund Advisers and Large Liquidity Fund Advisers (which are required to file Form PF on a quarterly basis) will need to use the newest version of Form PF for filings due after October 2025.

Form N-PORT

In April 2025, the SEC announced that it was delaying effective date for the amendments to Form N-PORT, published on September 11, 2024, from November 17, 2025 to November 17, 2027. The amendments to Form N-PORT would require more frequent reporting of monthly portfolio holdings and related information. Following the adoption of the amendments, the Registered Fund Association filed a petition in the Fifth Circuit Court of Appeals seeking review of the amendments to Form N-PORT. This petition has been stayed while the SEC reviews the final amendments.

These amendments also required additional information about certain service providers be reported on Form N-CEN. The compliance effective date for the amendments to Form N-CEN are not affected by the delayed effective date with respect to Form N-PORT, and as such the compliance date remains November 17, 2025 for the Form N-CEN amendments.

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If you have other topics you would like us to explore in future editions, please reach out to our June 2025 FUNDamentals editor Heather Stone at heather.stone@troutman.com