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SENT BY E-MAIL

rule-comments@sec.gov

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street
NE, Washington DC
20546-1090

Dear Ms. Countryman,

Re: File Number S7-03-22

Reinhart provides legal representation to numerous pension funds and other institutional investors with respect to their investment activities. We write with respect to Proposed Rule 211(h)(2)-1's clawback provisions, which our clients generally support.

First, we respond to the request for comment:

Would the proposed Clawback provision result in more whole-fund waterfalls (commonly referred to as European waterfalls in the private funds industry), which generally delay payments of performance-based compensation until investors receive a return of all capital contributions? What other effects would this aspect of the proposed rule have on the industry, including with respect to adviser's ability to attract, retain, and develop investment professionals?

Page 147-148. It is inevitable that some GP's take carried interest distributions without being confident in their ability to keep those distributions once the clawback calculation is made. We believe that under the Proposed Rule, those GP's would be incentivized to delay such carried interest distributions, to avoid the risk of having to come out of pocket for tax payments if the clawback becomes required. In effect, it would stop gambling with investor funds. Any delay in distribution of performance-based compensation represents a move toward the European waterfall, although we doubt that the proposal would cause funds to rewrite their constituent documents to mandate the full European waterfall – as there will be situations where investments have appreciated sufficiently, even though all contributed capital may not yet have been returned, that carried interest can be distributed without risk of having to return it.

You also asked about the rule's impact on retaining investment professionals. On many occasions, we have heard the GP express a desire to compensate personnel on an expedited basis, in order to retain talent. However, if the rule change is effective across the board, then no competing manager would be able to offer a more advantageous carry payout schedule. Leveling the playing field for talent should benefit those GP's that already take a conservative / European position with respect to carried interest distributions.

Second, we respond to the comment:

Instead of the proposed Clawback provision, should we prohibit deal-by-deal waterfall arrangements (commonly referred to as American waterfalls)?

Page 148. We believe that the proposal to require full payment of clawback amounts (not reduced by taxes), coupled with a mandatory clawback (so funds don't eliminate the clawback entirely) and a mandatory interim clawback calculation (at year 5 and again at year 10) would protect investors from the worst case scenarios that deal-by-deal waterfalls can produce. Prohibiting deal-by-deal waterfalls would be another avenue to reach the same result, although GP's could employ workarounds (e.g., moving from a multi-investment fund model to forming a separate investment vehicle for each investment).

Third, we respond to the comment:

We recognize that Clawback mechanisms are more common for closed-end funds and less common for open-end funds. Should the rule separately address performance-based compensation for open-end private funds? If so, how should we address those funds?

Page 148. Open-end private funds could benefit from a clawback, although since they don't have an end-date, they don't typically utilize a similar clawback. One might envision a 2-5 year look-forward period, and if the aggregate returns to investors in that look-forward period are below a benchmark, some forfeit of previous performance-based distributions may be appropriate. This type of formula is not currently utilized in the industry, but would be a welcome development from the investor's perspective.

Fourth, we respond to the comment:

Is the proposed definition of "performance-based compensation" clear? Is it too narrow or too broad? [We propose to define "performance-based compensation" as allocations, payments, or distributions of capital based on the private fund's (or its portfolio investments') capital gains and/or capital appreciation]

Page 148, Page 144. We would propose that “allocations” be dropped from the definition, because allocations are non-cash book-keeping representations of profit, rather than actual payouts of cash or securities. Allocations typically follow distributions in pooled investment funds; they are a tax/bookkeeping item that does not represent cash flows. Only distributions are typically clawed back (in partnerships and LLC’s). The corporate equivalent might be dividends or other payments.

Fifth, we raise several related topics that the SEC did not raise.

(1) Collectibility of Clawbacks. Often when there is a clawback situation, the ability of the investment manager to honor that clawback is uncertain. This is because it is the unsecured obligation of the persons who received those payments. We believe that collectibility would be significantly enhanced by the following methods:

(A) Guarantees should be issued by clawback recipients.

(B) Such guarantees should be made jointly and severally. (This provides significant additional protection, as the management team would not distribute the clawback before they are certain that it would not need to be returned, to avoid the possibility of some management team members needing to backstop others.)

(C) Any management company or other entity that guarantees or otherwise becomes obligated to on the GP clawback should be required to maintain insurance or segregated reserves in sufficient amount to be able to honor its obligations even in the event of insolvency. If that entity distributes the proceeds to individuals, those individuals should also issue guarantees (unless the management company has sufficient reserves / resources).

(2) Interim Clawbacks. Because dissolution (and final clawback) can often be meaningfully delayed (e.g., 12-15 years, or even more, from fund inception), we support an interim clawback at year five and again at year ten. This protects investors from a scenario where the first investment was successfully realized early in a fund’s life, leading to a significant carried interest distribution that ends up being subject to a clawback ... but investors need to wait until the fund’s dissolution (12-15 years) to collect the clawback.

(3) Mandatory Clawbacks. We believe that it is important to recognize the protections that clawbacks provide. We hope that the rule does not discourage managers from incorporating clawback terms into fund agreements.

Finally, we respond to the comment asking whether the proposed new regulation accomplishes its purposes:

Would this aspect of the proposed prohibited activities rule have our intended effect of ensuring that investors receive their full share of profits generated by the fund? Is there an alternative approach that would better produce this intended effect? For example, should we require advisers to return the entire amount of any adviser Clawback, rather than only prohibiting advisers from reducing the Clawback amount by actual, potential, or hypothetical taxes? Would this approach ensure that investors receive their full share of fund profits?

Page 147. We suggest that Section § 275.211(h)(2)-1 be modified as follows, to take our comments into account:

- (a) An investment adviser to a private fund may not, directly or indirectly, do the following with respect to the private fund, or any investor in that private fund:

* * * * *

- (4) Reduce the amount of any adviser Clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders, **or fail to provide both an interim Clawback (at the end of the fifth year and end of the tenth year after the fund's initial investment) and a Clawback upon dissolution that requires the advisor, its related persons, and each of their respective owners or interest holders, on a joint and several basis, to return previously received performance-based compensation until (a) each investor has received the full amount of preferred return that it is entitled to pursuant to the entity's governing documents, and (b) none of the advisor, its related persons, and their respective owners or interest holders has received distributions of performance-based compensation that exceeds the amount specified in the entity's governing documents.**

Yours very truly,

Jussi P. Snellman