Session 5: Perspectives of Venture Capitalists
6:25 - 6:55 p.m. EDT

Discussion Leader: Sabrina Conyers, Partner at Nelson Mullins Riley & Scarborough, Charlotte, North Carolina

Presenters: Ollen Douglass, Managing Director at Motley Fool Ventures; Ayana Parsons, Senior Partner, Board and CEO Inclusion at Korn Ferry and Co-Founder, Fearless Fund; and Sabastian V. Niles, Partner at Wachtell, Lipton, Rosen & Katz

Event Co-Chairs:

Samuel C. Thompson Jr.
Professor and Arthur Weiss Distinguished Faculty Scholar
at Penn State Law

Sabrina Conyers
Partner at Nelson Mullins Riley & Scarborough

pennstatelaw.psu.edu/events/mbd-perspectives
MATERIALS FOR: SESSION 5: PERSPECTIVES OF VENTURE CAPITALISTS

DISCUSSION LEADER: SABRINA CONYERS, PARTNER AT NELSON MULLINS, CHARLOTTE, NORTH CAROLINA

PRESENTERS: OLLEN DOUGLASS, MANAGING DIRECTOR AT MOTLEY FOOL VENTURES; AYANA PARSONS, SENIOR PARTNER, BOARD AND CEO INCLUSION AT KORN FERRY AND CO-FOUNDER, FEARLESS FUND; AND SABASTIAN V. NILES, PARTNER AT WACHTELL, LIPTON, ROSEN & KATZ, NEW YORK CITY

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Private Equity, Venture Capital, and Hedge Funds

LAST UPDATED OCT 9, 2020  Lisa Lilliott Rydin | Email

• Getting Started
• Private Equity (PE)
• Venture Capital (VC)
• Hedge Funds (HF)
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• Getting Help

GETTING STARTED

Introduction
Private equity, venture capital, and hedge funds are examples of alternative investments that have become increasingly popular since the mid-1990s. Compared to more traditional investments (e.g., stocks, bonds, cash, and mutual funds), alternative investments tend to be less liquid (i.e., more difficult to convert back to cash), more complicated, subject to fewer regulations, and often produce higher returns for investors.

Please see the individual sections of this Guide for more information.

PRIVATE EQUITY (PE)

Introduction
Private equity (PE) is ownership of (or an interest in) an entity that is not publicly traded. Often, it is high net worth individuals and/or firms that purchase shares of privately-held companies or acquire control of publicly-traded companies (and possibly take a public company private). The aim is to invest in companies that have growth potential and then use the private
equity investment to turnaround or expand the business. The company can then be sold for a profit.

Private equity firms (also known as private equity funds) offer investment opportunities to a limited number of accredited investors (limited partners) who are better able to understand and financially handle the risks of such investments. These limited partners often consist of university endowment funds, pension funds, wealthy people, and other companies. (Private equity firms typically serve as the general partner.)

Primary Law
In the U.S., private equity (PE) funds are typically formed as limited partnerships in the State of Delaware, pursuant to the Delaware Revised Uniform Limited Partnership Act (DRULPA) (though the laws of other states may be used instead). Private equity funds are typically based on individual (private) contractual arrangements and therefore are exempt from the disclosure and other requirements applicable to publicly traded companies or investments, such as:

• **US Investment Advisers Act of 1940 (Advisers Act)** — Regarding the registration of fund managers with the SEC.

• **Investment Company Act of 1940** — Regarding the management and operation of a "fund."


• **Securities Act** — Regarding the issuance of securities to the public.

• **"Blue Sky Laws"** — A common term for state securities laws.

Unless exempt, PE funds may be subject to regulation by the following agencies:

• **Securities and Exchange Commission (SEC)**
• Financial Industry Regulatory Authority (FINRA)

• US Commodity Futures Trading Commission (CFTC)

The tradition of light regulation for PE funds changed in 2010 with the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. § 5301 et seq.). More PE fund advisors are required to register with either the SEC or at the state level, resulting in increased recordkeeping obligations and the possibility of regulatory inspections.

Secondary Sources

U.S. Resources:

• Private Equity Funds: Formation and Operation, by Phyllis Schwartz and Stephanie R. Breslow (available online)

The book provides guidance on every decision that has to be made in creating a new fund (including PIPEs, SPACs, mezzanine funds, and credit opportunity funds), It is designed to provide a comprehensive understanding of how private equity funds work and are regulated.

• Structuring Venture Capital, Private Equity, and Entrepreneurial Transactions, edited by Jack S. Levin, et al. (KF1428 .S77; available on Reserve)

Focuses on a series of typical transactions carried out with venture capital/private equity money (e.g., a new business start-up, a growth equity investment in an existing business, a leveraged buyout of a private or public company, a leveraged recapitalization, an equity-based executive compensation program, a restructuring or workout for an over-leveraged enterprise, devising an exit scenario for the successful venture financed company, and forming a private equity fund). With respect to each transaction, the tax, corporate law, partnership law, LLC law, securities regulation, bankruptcy, accounting, and other legal and practical issues typically encountered are explored, along with a myriad of potential solutions and practical structuring alternatives (e.g., the use of common and
preferred stock, convertible debentures, convertible preferred, warrants, and options).

• **Drafting Tax Provisions for Private M&A and Investment Funds, by Ivan Mitev** *(available via Wolters Kluwer's Cheetah database)*

  Provides a comprehensive catalog of the standard terms and conditions in investment fund and private M&A documents. It interprets common tax language and provides examples of different drafting techniques. The publication also outlines precedents related to the private M&A and investment fund industry and identifies numerous negotiation points.

• **Advising Private Funds: A Comprehensive Guide to Representing Hedge Funds, Private Equity Funds, and Their Advisers, by Nora M. Jordan, Leor Landa, Gregory S. Rowland, and Michael S. Hong** *(available via Westlaw)*

  This reader-friendly guide offers practical guidance on a wide spectrum of issues that confront fund managers. It addresses manager compensation and exit strategies, including the sale or public offering by an investment adviser. Chapters cover structuring funds in a tax-efficient manner and in compliance with the U.S. federal securities laws.

• **Advanced Private Equity Term Sheets and Series A Documents, edited by Joseph W. Bartlett, Ross P. Barrett, and Michael Butler** *(available via Lexis Advance)*

  Examines all of the deal terms you may encounter: anti-dilution protection, warrant coverage, liquidation preferences, and others. It provides clause-by-clause discussion of the Stock Purchase Agreement and model documents, opinion letters and a due diligence checklist contributed by a Big 4 accounting firm. There is current data from an industry-wide survey of West Coast and East Coast deal terms and trends, so you'll know whether a given provision is "market" or "industry standard".

• **Private Equity in the Age of Regulatory Scrutiny (Securities Practice Portfolio Series, No. 325)** *(available via Bloomberg Law)*
This portfolio discusses the regulatory provisions that now apply to the private equity industry, including oversight and regulation of conflicts of interest, record-keeping requirements, rules governing offering materials, public disclosure obligations, and requirements to establish and maintain a strong compliance program headed by a chief compliance officer.

- **Introduction to Private Equity Fund Formation (Securities Practice Portfolio Series, No. 326) (available via Bloomberg Law)**

  This portfolio provides an overview of the legal and economic issues surrounding the formation of private equity funds.

- **Private Equity Funds (U.S. Income Portfolio Series, No. 735) (available via Bloomberg Law)**

  This portfolio offers an in-depth analysis of the U.S. federal income tax issues that arise in the representation of private equity funds (including venture capital) and their investors. Its purpose is to provide a source of guidance to tax practitioners who regularly practice in this area. By way of introduction, the Portfolio begins with a brief overview of the nature of these funds and how they differ from other types of investment partnerships. It then describes the general regulatory environment in which they operate.

**International Resources:**

- **Private Equity: Jurisdictional Comparisons, edited by Charles Martin & Simon Perry (K1116 .P75 2014)**

  Each jurisdictional chapter offers comprehensive details of the regulatory principles, legal structures and restrictions, and common business solutions for funds, debt finance, equity structures, exits and tax.

- **Getting the Deal Through (Lexology)**
The Getting the Deal Through (GTDT) module of Lexology lets you quickly compare laws across different countries and includes such Topics as "Private Equity (Fund Formation)" and "Private Equity (Transactions)."

- **Private Equity International (articles available electronically via Factiva)**

  Monthly magazine providing global news, features, comment, and analysis on PE and its practitioners. Hardcopies available in the East End of the Stamps Reading Room at HBS's Baker Library.

**Current Awareness**
Below are some resources for private equity news and developments:

- **American Investment Council**

  The American Investment Council (AIC) is an advocacy and resource organization established to develop and provide information about the private investment industry and its contributions to the long-term growth of the U.S. economy and retirement security of American workers. The website includes research reports, legislative & regulatory recommendations, and industry news.

- **Law360 - Private Equity**

  See the specific "Private Equity" newsletter. Law360 may also be accessed through a Lexis Advance account.

- **Harvard Law School Forum on Corporate Governance and Financial Regulation -- Private Equity**

- **Nixon Peabody's Private Equity Blog ("Hot Topics in the Middle Market")**

- **Olshan's Securities Law Blog**

  Provides commentary and news on the latest securities law developments impacting established and emerging growth publicly-traded issuers and
investment banks, as well as entrepreneurs and venture-backed private entities.

- **The Journal of Private Equity (available online)**
- **Private Equity International. The Annual Review**


**Databases and Other Resources**

- **Capital IQ (Harvard affiliation required)**

  Under the "Screening" tab, select "Transactions." Under "General Transaction Details," select "Primary Features." You can then add relevant Transaction Feature (listed under "Available Items"). You can also include other Transaction Details (or other listed Criteria) in your screening.

- **FactSet**

  To use FactSet you first need to create an individual account (follow the instructions on the Baker Library webpage, then go to my.factset.com to access the database). Use FactSet's "Idea Screening" tab to find PE/VC transactions and investors.

- **Pitchbook**

  Information on companies, deals, funds, investors and service providers across the private investment lifecycle.

- **Preqin (Harvard affiliation required)**

  Information on private equity and venture capital companies, funds and deals. Subscription includes access to the following modules: Fund Manager Profiles, Funds In Market, Performance Analyst, Buyout Deals Analyst, Venture Deals Analyst, Investor Intelligence, Fund Terms Advisor, Hedge Funds, Infrastructure Online, and Real Estate Online.
VENTURE CAPITAL (VC)

**Introduction**

Venture capital (VC) is an important source of funding for new businesses (e.g., start-ups) that do not have access to other sources, such as business loans from banks or capital markets, but do have potential for long-term growth. Although these investments often involve high risk, they can also offer above-average returns. The VC investors often negotiate to obtain equity ownership, representation on the company’s board of directors, and/or an active role in managing the company’s operations.

**Primary Law**

Venture capital is a type of private equity investment (see "Private Equity," above) and historically, private equity investments have been lightly regulated. This changed in 2010 with the [Dodd-Frank Wall Street Reform and Consumer Protection Act](https://www.govinfo.gov/content/pkg/USCODE-2018-title12-chap64-subchapI-sec5301/pdf/USCODE-2018-title12-chap64-subchapI-sec5301.pdf) (12 U.S.C. § 5301 et seq.). The Dodd-Frank Act:

- Prohibited banks from using their own money (as opposed to customer deposits) to make certain investments, including private equity (known...
as the Volker Rule). This restriction generally prevents banks from serving as venture capital investment firms.

- Required hedge fund managers and private equity fund managers to register their funds with the Securities and Exchange Commission (SEC), but not venture capital managers, provided at least 80% of their fund holdings are in "qualifying investments" (generally shares in private companies).

In 2012, the Jumpstart Our Business Startups Act (JOBS Act) (Pub. L. 112-06) relaxed many existing securities law requirements, including the advertising prohibition on venture capitalists and companies seeking private equity investments.

Secondary Sources

- **Structuring Venture Capital, Private Equity, and Entrepreneurial Transactions, edited by Jack S. Levin, et al. (KF1428 .S77; available on Reserve)**

  Focuses on a series of typical transactions carried out with venture capital/private equity money (e.g., a new business start-up, a growth equity investment in an existing business, a leveraged buyout of a private or public company, a leveraged recapitalization, an equity-based executive compensation program, a restructuring or workout for an over-leveraged enterprise, devising an exit scenario for the successful venture financed company, and forming a private equity fund). With respect to each transaction, the tax, corporate law, partnership law, LLC law, securities regulation, bankruptcy, accounting, and other legal and practical issues typically encountered are explored, along with a myriad of potential solutions and practical structuring alternatives (e.g., the use of common and preferred stock, convertible debentures, convertible preferred, warrants, and options).

- **Venture Capital: Forms and Analysis (available via Lexis Advance)**
Provides a step-by-step framework for structuring, drafting and closing a venture capital deal, with a complete annotated set of the documents needed. It also features in-depth analysis from the perspective of both the company and the investor, as well as the latest guidance on best practices in venture transactions.

- Advanced Private Equity Term Sheets and Series A Documents, edited by Joseph W. Bartlett, Ross P. Barrett, and Michael Butler (available via Lexis Advance)

Examines all of the deal terms you may encounter: anti-dilution protection, warrant coverage, liquidation preferences, and others. It provides clause-by-clause discussion of the Stock Purchase Agreement and model documents, opinion letters and a due diligence checklist contributed by a Big 4 accounting firm. There is current data from an industry-wide survey of West Coast and East Coast deal terms and trends, so you'll know whether a given provision is "market" or "industry standard".

- Venture Capital & Public Offering Negotiation, by Michael J. Halloran, et al. (KF1366.V463)

Includes detailed practical information on all the latest developments in the start-up financing and IPO process, including: limited liability company arrangements, technology-based partnering arrangements, IRS "check-the-box" regulations, the latest SEC policies and rule revisions, emerging ERISA issues, federal securities exemptions for venture financing, and more.

- Venture Capital 2019: Nuts and Bolts (available via PLI PLUS)

A Practising Law Institute (PLI) course handbook.

- Advanced Venture Capital 2018 (available via PLI PLUS)

A Practising Law Institute (PLI) course handbook.

- Private Equity Funds (U.S. Income Portfolio Series, No. 735) (available via Bloomberg Law)
This portfolio offers an in-depth analysis of the U.S. federal income tax issues that arise in the representation of private equity funds (including venture capital) and their investors. Its purpose is to provide a source of guidance to tax practitioners who regularly practice in this area. By way of introduction, the Portfolio begins with a brief overview of the nature of these funds and how they differ from other types of investment partnerships. It then describes the general regulatory environment in which they operate.

Current Awareness
Below are some resources for venture capital news and developments:

• **National Venture Capital Association**

  The National Venture Capital Association (NVCA) serves as the preeminent trade association for the venture community. The NVCA advocates for public policy that supports the American entrepreneurial ecosystem and serves as the leading resource for venture capital data, practical education, peer-led initiatives, and networking. Their website includes legislative/regulatory policy recommendations, industry reports, and even some free model legal documents.

• **The CLS Blue Sky Blog**

  Columbia Law School's blog on corporations and the capital markets.

• **Olshan's Securities Law Blog**

  Provides commentary and news on the latest securities law developments impacting established and emerging growth publicly-traded issuers and investment banks, as well as entrepreneurs and venture-backed private entities.

• **The Venture Alley (DLA Piper)**
The Venture Alley is a blog about business and legal issues important to entrepreneurs, startups, venture capitalists and angel investors.

- **Venture Capital Journal**

  Founded in 1961, Venture Capital Journal covers investment trends, financing techniques and news from across the Venture Capital industry.

Databases and Other Resources

- **Capital IQ (Harvard affiliation required)**

  Under the "Screening" tab, select "Transactions." Under "General Transaction Details," select "Primary Features." You can then add relevant Transaction Feature (listed under "Available Items"). You can also include other Transaction Details (or other listed Criteria) in your screening.

- **FactSet**

  To use FactSet you first need to create an individual account (follow the instructions on the Baker Library webpage, then go to my.factset.com to access the database). Use FactSet's "Idea Screening" tab to find PE/VC transactions and investors.

- **Pitchbook**

  Information on companies, deals, funds, investors and service providers across the private investment lifecycle.

- **Preqin (Harvard affiliation required)**

  Information on private equity and venture capital companies, funds and deals. Subscription includes access to the following modules: Fund Manager Profiles, Funds In Market, Performance Analyst, Buyout Deals Analyst, Venture Deals Analyst, Investor Intelligence, Fund Terms Advisor, Hedge Funds, Infrastructure Online, and Real Estate Online.
**Thomson ONE (available only to authorized visitors at HBS's Baker Library)**

Includes information on PE and VC companies and funds, portfolio companies and broad industry data. Emphasis is on the US but has some international coverage.

**VentureXpert (available through SDC Platinum, only at HBS's Baker Library)**

Comprehensive information covering venture, buyouts, funds, private equity, firms, executives, portfolio companies and limited partners.

**Zephyr**

Database of global merger and acquisition (M&A) activity, initial public offerings (IPOs), joint ventures, and private equity deals.

**HEDGE FUNDS (HF)**

**Introduction**

Hedge funds (HF) are a type of investment partnership where a number of investors (i.e., the limited partners) pool their funds together to be invested by a professional fund manager (i.e., the general partner) according to the fund's investment strategy — which may be innovative or otherwise nontraditional when compared to more familiar investment options. While structurally similar to a mutual fund, HFs generally invest more aggressively and are limited to "qualified" investors (i.e., those who meet certain net worth requirements, making them better able to tolerate the increased investment risk). Compared to the heavily regulated mutual funds, HFs operate with a wide degree of investment latitude and are often leveraged to maximize their returns.

HFs differ from private equity (PE) firms in that HFs usually focus on short or medium term liquid securities that are more quickly convertible to cash. HFs also do not have direct control over the business or asset in which they are investing. By contrast, PE firms are geared toward longer-term investment
strategies in illiquid assets, where they have more control or influence over operations to influence the long-term returns.

Primary Law
U.S. hedge funds (HFs) have significant freedom in their investment activities because they are designed to be exempt from many of the registration and reporting requirements of the otherwise applicable securities laws, for example:

• **US Investment Advisers Act of 1940 (Advisers Act)** — Regarding the registration of fund managers with the SEC.

• **Investment Company Act of 1940** — Regarding the management and operation of a "fund."


• **Securities Act** — Regarding the issuance of securities to the public.

• **"Blue Sky Laws"** — A common term for state securities laws.

Unless exempt, HFs are subject to regulation by the following agencies:

• **Securities and Exchange Commission (SEC)**

• **Financial Industry Regulatory Authority (FINRA)**

• **US Commodity Futures Trading Commission (CFTC)**

The tradition of light regulation for HFs changed in 2010 with the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. § 5301 et seq.). More HF advisors are required to register with either the SEC or at the state level, resulting in increased recordkeeping obligations and the possibility of regulatory inspections.

For a summary of U.S. hedge fund regulation, see [The History of Hedge Fund Regulation in the United States](#), by Wulf A. Kaal and Dale A. Oesterle.
Secondary Sources

• **Hedge Fund Regulation, by Scott J. Lederman (KF1078 .L432)**

  Designed to provide comprehensive understanding of hedge funds, from their history and investment strategies to the legal and compliance considerations affecting their structuring, management and market activities. It provides a single source that examines all aspects of these innovative investment vehicles and addresses current regulatory concerns that impact hedge funds, their managers and investors.

• **Hedge Fund Regulation, by Scott J. Lederman (available via PLI PLUS)**

  The above volume is also available online to Harvard Affiliates via the PLI PLUS platform.

• **Hedge Funds and the Law, by Dick Frase and Peter Astleford (K1116 .A88 2016)**

  Provides a comprehensive guide to setting up and operating hedge funds, covering all the key legal, regulatory, and tax matters that need to be considered and covered when setting up a fund. The new 2nd edition is fully updated to cover the AIFMD and the Dodd Frank Act in the US.

• **Hedge Funds: Formation, Operation and Regulation, by Stephanie R. Breslow, David J. Efron, Marc E. Elovitz, Steven J. Fredman, David Nissisonbaun, and Paul N. Roth (KF1078 .B74; available on Reserve)**

  Provides an expert look at the state of the industry, including legal and practical insights into taxation, regulation, documentation, and strategic issues. Addresses hedge fund investment strategies and structuring a hedge fund management company, domestic and off-shore hedge fund structures and tax considerations, terms, fees and related considerations, regulatory requirements and fiduciary obligations of investment advisors, and fund documentation. Includes marketing materials, offering memoranda and governing documents.
• **Hedge Funds and Other Private Funds: Regulation and Compliance, by Thomas P. Lemke, Gerald T. Lins, Kathryn L. Hoenig, Patricia S. Rube (available via Westlaw)**

Provides detailed analysis, practical guidance, and primary source materials relating to legal, regulatory, and compliance issues for the formation and operation of hedge, offshore, and other private funds. It is organized in chronological order to follow the life cycle of a mutual fund, and covers registration, choice of vehicle, choice of fund structure and type, tax, insurance, regulatory and administrative issues, trustee selection, and the SEC’s EDGAR database.


This reader-friendly guide offers practical guidance on a wide spectrum of issues that confront fund managers. It addresses manager compensation and exit strategies, including the sale or public offering by an investment adviser. Chapters cover structuring funds in a tax-efficient manner and in compliance with the U.S. federal securities laws.

• **Drafting Tax Provisions for Private M&A and Investment Funds, by Ivan Mitev (available via Wolters Kluwer's Cheetah database)**

Provides a comprehensive catalog of the standard terms and conditions in investment fund and private M&A documents. It interprets common tax language and provides examples of different drafting techniques. The publication also outlines precedents related to the private M&A and investment fund industry and identifies numerous negotiation points.


A concise yet comprehensive guide to the law of hedge funds. Practical and user-friendly, it covers all the relevant legal aspects involved, including choice of jurisdiction and vehicle, service providers, prime brokerage, fund
directors, the regulatory environment in the UK, the EU and the USA, marketing in various different jurisdictions, taxation, employment and the in-house perspective.

• **Hedge Funds (U.S. Income Portfolio Series, No. 736) (available via Bloomberg Law)**

This portfolio addresses the full range of U.S. tax issues that typically arise in the representation of hedge funds. The purpose of this Portfolio is to provide a source of guidance to tax practitioners who regularly advise hedge funds, their portfolio managers and their investors. It also includes descriptions of basic fund prototypes, the relevant regulatory environment, alternative fund structures, and common economic terms and variations thereon.

**Current Awareness**
Below are some resources for hedge fund news and developments:

• **Managed Funds Association**

The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. Website includes legislative/regulatory policy recommendations, industry news and information, and hedge fund educational materials (see the MFA Site Map).

• **Hedge Fund Law Report**

A favored source of actionable intelligence on hedge fund law and regulation. Provides incisive analysis of key developments on topics including rule-making, compliance, case law, regulation, enforcement, taxation, derivatives, marketing, best practices and more.

• **The CLS Blue Sky Blog**

Columbia Law School's blog on corporations and the capital markets.
• **Cole, Frieman & Mallon's Hedge Fund Law Blog**

A blog maintained by Cole-Frieman & Mallon LLP, a boutique investment management law firm.

• **Journal of Alternative Investments**

Articles written for hedge fund managers, portfolio managers, academics, and senior investment officials at corporations and financial institutions.

**Databases and Other Resources**

• **Morningstar Direct (available only to authorized visitors at HBS’s Baker Library)**

Morningstar Direct includes data on closed-end funds, equity ownership, exchange traded funds, hedge funds, market indexes, money market funds, offshore funds, open-end mutual funds, pensions and life insurance, stocks, and 529 plans.

• **Preqin (Harvard affiliation required)**

Information on private equity and venture capital companies, funds and deals. Subscription includes access to the following modules: Fund Manager Profiles, Funds In Market, Performance Analyst, Buyout Deals Analyst, Venture Deals Analyst, Investor Intelligence, Fund Terms Advisor, Hedge Funds, Infrastructure Online, and Real Estate Online.

**ADDITIONAL RESOURCES**

**Additional Resources to Consider**

Some other related resources to consider:

• **Entrepreneurship and Innovation in Evolving Economies: The Role of Law, edited by Megan M. Carpenter (K487 .E3 E58; also available online to Harvard Affiliates)**

• **IPR Journal Platform (formerly known as "Institutional Investor Journals;" available online to Harvard Affiliates) - Online access to a wide range of investment**
management-related journals, including the Journal of Alternative Investments, the Journal of Derivatives, the Journal of Financial Data Science, the Journal of Fixed Income, the Journal of Index Investing, the Journal of Investing, the Journal of Portfolio Management, the Journal of Private Equity, the Journal of Retirement, the Journal of Structured Finance, the Journal of Trading, and the Journal of Wealth Management.

- **Research Handbook on Hedge Funds, Private Equity, and Alternative Investments, edited by Phoebus Athanassiou (Available online to Harvard Affiliates)** - Provides a comprehensive source of analysis and research on alternative investment funds in the EU, the US and other leading jurisdictions. Expert contributors offer an unparalleled perspective on the contemporary alternative funds industry, the main areas of regulatory policy concern surrounding its activities, and the role that alternative funds have played in recent financial crises, as well as an account of the rules governing their operation in selected jurisdictions.

Legal research platforms also contain information on PE, VC, and HF matters. See:

- **Bloomberg Law**: Private Funds Reference Library and the Private Funds section of the Practical Guidance Library.

- **Westlaw**: Practical Law's Corporate and M&A Practice Center contains a Private Equity Topic (that includes VC and HF), containing Practice Notes, Standard Documents, Checklists, Articles, non-U.S. guidance, and more.

- **Lexis Advance**: The Lexis Practice Advisor module contains a Private Equity & Investment Management Practice Area (that includes VC and HF), containing Practice Notes, Forms, Checklists, Articles, Secondary Materials, and more.

- **PLI PLUS (available online to Harvard Affiliates)**: Electronic access to PLI Press publications, including treatises, journals, course handbooks, journals, "answer books," and forms. PLI Press is the publishing division of the
Practising Law Institute (PLI) and focuses on high-quality analysis and practice guidance.

Some resources from Harvard Business School's Baker Library:

- **Venture Capital & Private Equity Research Guide**
- **Hedge Funds Research Guide**
- **"Fast Answers"**:
  - Q: How can I find socially responsible private equity or venture capital funds?
  - Q: How can I screen for private equity or venture capital firms investing in a particular industry, stage of investment, and/or geography?
  - Q: How can I generate a list of private investments in public equity (PIPEs)?
  - Q: How do I screen for hedge funds based on performance, or find descriptions and rankings of hedge funds?
- **Bloomberg Terminal Tips for HBS's Investment Management course**
Structuring Venture Capital, Private Equity, and Entrepreneurial Transactions

2020 Edition

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Georgetown University Law Center

Professor Ginsburg, the finest tax lawyer and human being of all time, passed away on 6/27/10.

This volume is current through October 23, 2020

Wolters Kluwer
Chapter 1. Introduction

Many precedents helpful for an understanding of the principles discussed in this treatise are reproduced in the Appendix, including tax, SEC, bankruptcy, fraudulent conveyance, and Delaware corporate, partnership and LLC statutes, as well as tax and SEC regulations and rulings, a few court decisions, several key articles, and other precedents.

Scattered throughout this treatise as “Appendix References” are citations to those precedents most relevant to the topic being discussed which can be found in the Appendix to this treatise (except that referenced portions of the 5-volume Ginsburg Levin and Rocap, Mergers, Acquisitions, and Buyouts treatise [updated and republished by Wolters Kluwer semi-annually] are not reproduced in the Appendix).

Unless otherwise specifically stated, this treatise assumes that all individuals are either U.S. citizens or residents, that all entities are formed in the U.S., and that all businesses and assets are located in the U.S. (i.e., this treatise generally does not deal with the complexities of cross-border transactions).

102 GENERAL DESCRIPTION OF PRIVATE EQUITY AND VENTURE CAPITAL INVESTING

The PE/VC community, which has grown geometrically since the 1970s, includes (1) thousands of freestanding investment funds formed (generally as partnerships) solely or principally to make PE/VC investments, (2) the PE, VC, and merchant banking subsidiaries (or divisions) of large institutions (such as BHCS, insurance companies, investment banks, or even large industrial companies), (3) the many freestanding specialized investment entities formed solely or principally to make PE/VC investments (such as publicly held or privately held SBICs and publicly held BDCs), and (4) an individual or group of individuals who make multiple PE/VC investments, either as individuals or through an entity formed by them.

A PE/VC fund generally raises its capital from a limited number of sophisticated investors in a private placement (including public and private employee benefit plans, university endowment funds, wealthy families, sovereign wealth funds, bank holding companies, and insurance companies) and splits the profits achieved by the fund between the PE/VC professionals and the capital providers/investors on a pre-negotiated basis (typically with 20% of the net profits allocated to the PE/VC professionals as a carried interest and the remaining 80% of the profits allocated among the PE/VC professionals and the capital providers in proportion to the capital supplied by each). PE/VC professionals generally plan and execute PE/VC transactions, including start-ups, growth-equity investments, leveraged and management buyouts, leveraged recapitalizations, industry consolidations, and troubled-company turn-arounds.

103 DISTINGUISHING PRIVATE EQUITY/ VENTURE CAPITAL INVESTING FROM OTHER TYPES OF INVESTING

The first feature tending to distinguish PE/VC investing is the PE/VC professional’s active involvement in identifying the investment, negotiating and structuring
the transaction, and monitoring and guiding (but not managing on a day-to-day basis) the portfolio company after the investment has been made. Often the PE/VC professional serves as a board member and/or financial adviser to the portfolio company. Hence, PE/VC investing is significantly different from the purchase, holding, and sale of a diversified pool of stock and debt investments by a mutual fund or other money manager.

A second feature tending to distinguish PE/VC investing is that PE/VC investments generally are not intended to be held indefinitely. Rather, they are intended to be held for a limited number of years with the expectation that there will be substantial growth in equity value followed by a sale. For example, a PE/VC fund ordinarily has a limited term, often 10 to 13 years, and hence goes through cycles, with PE/VC investments being made during the first 5 years, value-added monitoring and growth continuing during the several years following each investment, often 1 or several add-on investments made by the original and/or other PE/VC investors, most investments sold within 3 to 7 years after the original investment in the portfolio company, and all investments sold (or occasionally distributed in kind to the investors) within 10 to 13 years after the fund’s formation.

Beginning in the late 2010s a number of PE/VC professionals have begun to form longer-term funds (designed to last perhaps 15 years or more rather than the standard 10 years), asserting 2 supposed advantages:

- A longer-hold period (perhaps 10 to 15 years) will allow greater appreciation as compared to the traditional 3- to 7-year hold period, which can result in a forced sale of a portfolio company when it is still maturing and continues to be an attractive investment.
- The substantial costs of forming a new fund (legal and accounting fees, GP travel expenses, money raiser fees and expenses), which are often borne in substantial part by (i.e., allocated to) the LP investors are reduced when funds are formed less frequently.

The PE/VC investor normally does not intend to maintain long-term control over the portfolio company or to build a career running the portfolio company. Rather, the PE/VC investor generally evaluates alternative exit strategies when making the initial investment in the portfolio company. Often the original investment documents contain the terms, or at least the outline, of the PE/VC investor’s anticipated exit strategy. Hence, PE/VC investing is significantly different from acquiring a company with the intent of managing it for the indefinite future and profiting indefinitely from the operating cash flow produced by the business.

A third feature tending to distinguish PE/VC investing is that the securities purchased are generally privately held by a small group as opposed to publicly traded.

- When a PE/VC investor organizes a new business start-up, the newly formed company ("Newco") is almost always privately held at the outset.
- Where a PE/VC investor makes a growth-equity investment in an existing company ("Oldco"), Oldco is usually privately held.

In those few circumstances where PE/VC makes a growth-equity investment in a publicly held Oldco, PE/VC generally buys a class of Oldco securities that is not publicly traded. For example, where Oldco's common
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Stock is publicly traded, PE/VC may buy Oldco (1) convertible preferred stock or convertible subordinated debentures (convertible into Oldco common stock) or (2) non-convertible preferred stock or non-convertible subordinated debentures together with warrants to purchase Oldco common stock.

And even when PE/VC infrequently buys a class of publicly traded Oldco common stock, PE/VC typically acquires such stock from Oldco in a private placement subject to SEC restrictions and with additional negotiated rights (e.g., registration rights, preemptive rights, warrants to buy additional Oldco stock at a fixed price, 1 or more board seats, etc.) which make PE/VC’s stock different from Oldco’s publicly traded common stock.

- Even where the target company in a buyout is publicly held (before the buyout), the new company formed to effectuate the buyout (“Newco”) is almost always privately held immediately after the buyout, i.e., the buyout transaction takes the target company private.

In sum, a PE/VC investment is normally made in a privately held company, and in the relatively infrequent cases in which the investment is into a publicly held company, the PE/VC investors generally hold non-public securities.

While PE/VC’s exit strategy often involves taking the portfolio company public and ultimately selling PE/VC’s stock into the public market, public trading of the portfolio company’s stock is generally part of the end game, not the opening gambit. Thus, PE/VC investing is considerably different from buying, holding, and selling publicly traded equity securities.

A fourth feature tending to distinguish PE/VC investing is that PE/VC generally undertakes risky investments in order to obtain a very high return on its capital. PE/VC does not purchase debt instruments simply to obtain an interest yield. Rather, the principal goal of a PE/VC transaction is to obtain geometric returns when the portfolio company is successful and its common stock or common equivalents soar in value. Hence, a PE/VC transaction generally involves the purchase of 1 or more of the following:

- Common stock.
- Convertible preferred stock or convertible subordinated debt with a relatively low yield (all or a portion of which may be deferred) but with attractive features allowing conversion into common stock.
- Non-convertible preferred stock or non-convertible subordinated debt with a relatively low yield but accompanied by warrants to purchase common stock.
- Debt instruments that can be purchased at a deep discount to face, generally because the portfolio company is over-leveraged or financially troubled and PE/VC plans to participate in a turn-around transaction.

PE/VC generally purchases a relatively risky slice of the portfolio company’s capital structure (and is frequently structurally or contractually subordinated to a substantial amount of the portfolio company’s leverage, i.e., debt), risks losing most or all of its investment if the portfolio company does not prosper, and expects to be handsomely rewarded if the portfolio company does prosper. PE/VC requires a high return on successful investments to cover losses suffered on port-

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folio companies which fail—i.e., to provide a high compound internal rate of return ("IRR") on its aggregate invested capital as compensation for the high risk of such investments.

This feature—purchasing risky equity-oriented securities and seeking a high compound yield on successful transactions—distinguishes PE/VC transactions from the purchase of debt securities.

One type of transaction which falls just short of the PE/VC transactions featured in this treatise is mezz lending, i.e., a layer of financing which is more risky than senior bank debt but less risky than a typical PE/VC investment, thus placing the mezz investment between PE/VC's common and preferred stock investment and the bank's senior debt investment (as the mezzanine in a theater sits between the ground floor and the balcony). Such a mezz lender (like a PE/VC investor) generally employs active investment professionals who negotiate the purchase of privately placed securities in PE/VC transactions, such as buyouts, but the mezz securities are normally purchased directly from the portfolio company and are predominantly debt securities, generally high-yield subordinated debt (or possibly senior preferred stock), with a relatively small equity kicker, i.e., a slice of common stock, warrants, conversion rights, or contingent additional interest to compensate the mezz lender for the risk of buying subordinated debt.

The senior bank lender generally locks in its entire yield in the form of contractual interest payments (albeit often at rates which fluctuate with market interest indexes) and specified fees, although infrequently the senior lender may take a small equity kicker when financing a buyout. The mezz lender, by contrast, normally takes a portion of its yield in the form of an equity kicker, and thus shares an expectancy (with PE/VC) in the portfolio company's future equity appreciation. However, mezz debt is at least 1 level more senior in the capital structure than PE/VC's investment (in junior subordinated debt, preferred stock, or most likely common stock) and hence is significantly less risky than PE/VC's investment. Moreover, the mezz lender's focus, more like the senior lender's and less like PE/VC's, is on its high interest yield and relative safety of debt principal. The mezz lender's equity kicker is designed to augment its interest yield but does not play the central role that it does with PE/VC.

The PE/VC investor, on the other hand, focuses on common stock or common equivalent securities, with any purchase of subordinated debentures and/or preferred stock generally designed merely to fill a hole in the financing or to provide PE/VC with some priority over management in liquidation or return of capital.

A fifth feature tending to distinguish PE/VC investing is that PE/VC generally invests in a portfolio company only when convinced that the portfolio company has (or that PE/VC has recruited) a superior management team to operate the portfolio company. PE/VC generally cannot be induced to put its money behind a management team in which it does not have confidence, no matter how attractive the portfolio company's product, concept, or business plan. A frequently heard PE/VC maxim is that an attractive portfolio company has 3 key attributes: superior management, superior management, and superior management.

Where PE/VC disregards this maxim and backs weak management, PE/VC too often is soon faced with an unpalatable choice: either continue with suboptimal management and risk the portfolio company's falling behind its busi-
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ness plan or fire management and seek superior replacements, risking significant business disruption during which well-managed competitors often can overcome the portfolio company’s early lead. A second, but less obvious, reason to avoid weak management is that, when management must be replaced mid-stream, PE/VC must devote an inordinate amount of time recruiting and training new management, diverting PE/VC from its other portfolio companies.

A sixth (although not inevitable) feature tending to distinguish PE/VC investing is that PE/VC often seeks control of the portfolio company in the early years or, if control is not obtainable, at least board representation. This is because PE/VC does not view itself as supplying capital alone, but also as providing important advice on financial and strategic planning and oversight for the portfolio company’s management in order to add value to PE/VC’s investment.

A seventh feature of PE/VC investing is that the same group of PE/VC professionals often form multiple funds (i.e., a family of funds) to make investments in different types of portfolio company businesses, different geographical areas, different-sized businesses, etc., e.g., one fund to specialize in high-tech start-up businesses in the U.S., another fund to invest in large retail businesses in Europe, another to invest in Asian middle market real estate, etc.

Where a portfolio company needs more money than the lead PE/VC is willing to commit, the lead PE/VC may bring 1 or more additional PE/VCs into the deal. The lead PE/VC normally plays the principal role in structuring and negotiating the investment, but each PE/VC (at least each PE/VC with a substantial investment) monitors its own investment, and PE/VCs do not inevitably act in concert (except insofar as their interests coincide) on issues involving the portfolio company.

In recent years, hedge funds have begun to invade the PE/VC turf. Hedge funds (like PE/VC funds) are generally private partnerships, composed of wealthy, sophisticated investors, seeking very high returns on capital by using aggressive investment strategies. However, a hedge fund (unlike a PE/VC fund) traditionally:

1. invests principally in publicly traded assets (e.g., stocks, bonds, currency futures, interest rate futures), in which the fund may take both long and short positions, and generally uses substantial leverage (i.e., debt) at the fund level,
2. plans to continue forever, i.e., does not sell investments and return investors’ capital (and profits) by a specified deadline, while a PE/VC fund by contrast generally completes its new investments within 3-to-5 years after formation, thereafter may make some add-on investments into existing portfolio companies (for expansion or occasionally to restructure an over-leveraged balance sheet), completes its sale cycle within 10 years after formation, and then dissolves, so that the PE/VC principals generally form a new PE/VC fund every 3-to-5 years, and
3. allows investors to withdraw capital and/or profits quarterly after an initial (approximately 1-to-2 year) lockup period (or to contribute new capital quarterly).

However, as competition for traditional hedge fund high-yield investments has intensified, resulting in a decline in hedge fund yields, many hedge funds, seeking higher yields, have devoted a portion of their capital to PE/VC-type non-traded
investments, while concomitantly imposing a restriction on the investors' right
to withdraw quarterly the portion of their capital devoted to such long-term
PE/VC investments (so-called side-pocket investments).

¶104  HIGH COST OF PRIVATE EQUITY/VENTURE
CAPITAL MONEY

PE/VC money may not on its face cost the portfolio company as much as a
bank loan, a private placement of senior debt securities, or a public issuance of senior
debt securities. That is, there frequently are few or no fixed interest or debt
service payments on PE/VC money. However, if the portfolio company is successful,
PE/VC money is inevitably more expensive to the portfolio company’s other
common shareholders. This is because PE/VC, as a condition to investing in the
portfolio company, demands a substantial portion of the portfolio company’s
common equivalents—common stock, warrants, and/or conversion privileges—
which will have substantial value if the portfolio company is successful.

Hence, as a general rule, where a portfolio company can obtain traditional debt
financing, it finds this route less expensive to its existing common shareholders
than PE/VC financing. However, the very factors which make a portfolio company
attractive to PE/VC—a speculative situation with substantial opportunity for
value enhancement if (but only if) the business succeeds—often make the portfolio
company too risky to qualify for unsupported bank or other traditional debt
financing. Once the portfolio company obtains PE/VC financing, it usually can
leverage its new-found PE/VC equity by obtaining bank (or subordinated/mezz)
loans senior to the new PE/VC money.

Moreover, obtaining a PE/VC investor generally brings the portfolio company more
than capital. As discussed above, one or more top-flight PE/VC professionals generally
serve on portfolio company’s board, providing the portfolio company with high qual-
ity financial and strategic advice and management oversight. Thus, a PE/VC relation-
ship gives the portfolio company substantial benefit not normally obtainable through
a traditional bank financing or a private or public debt flotation (although strong-willed
portfolio company management not desiring any such PE/VC oversight may not
appreciate the benefit). Such PE/VC advice can, of course, be a double-edged
sword: where PE/VC obtains control but the portfolio company then fails to meet its
business plan, portfolio company’s management may find themselves seeking alter-
native employment.

¶105  TYPICAL PRIVATE EQUITY/VENTURE
CAPITAL TRANSACTIONS

¶105.1  Traditional Start-Up Transaction

The phrase “venture capital” is sometimes used narrowly to refer only to
financing the start-up (or early stage growth) of a new business, a transaction
which generally involves negotiation between 1 or more professional VCs and 1
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or more entrepreneurs seeking to start the business. Such a Newco start-up transaction is discussed in Chapter 2, and the pros and cons of organizing Newco as an S corporation, a partnership, or an LLC, rather than as a traditional C corporation, are discussed in Chapter 3.

Such start-up transactions can be categorized into (1) seed money and (2) early stage. Seed money refers to financing a potential business requiring substantial research, development, and/or other threshold activities before the entrepreneur can begin revenue-generating activities. Early stage venture capital, on the other hand, refers to financing an entrepreneur who has passed the seed-money stage and is ready actually to begin (or has recently begun and now seeks to expand) revenue-generating activities.

Start-up transactions can further be broken down into high-tech, low-tech, and no-tech, depending on the degree of cutting edge technology necessary for the business to succeed. Businesses financed by VC investors can range from a high-tech bio-technical engineering company to a low-tech manufacturing enterprise to a no-tech retail or fast food chain.

Naturally, a VC investor is more likely to supply start-up money where the entrepreneur is a successful inventor and/or executive with a proven track record.

105.2 Growth-Equity Transaction

Frequently, an existing business enterprise needs money for expansion—to build a new plant, to develop a new product, to begin national distribution of a local or regional product, to acquire an add-on business, etc. The enterprise’s capital requirements may exceed the amount it is able to raise from traditional sources, such as a secured loan from a bank lender, a private placement of debt with an insurance company, a private offering of equity to Oldco’s shareholders and their friends and family, or a public offering of debt or equity securities (or, with respect to the last alternative, it may be premature for Oldco to go public).

In these circumstances, a business seeking money for expansion might turn to a PE investor to supply its capital needs, or perhaps to supply enough equity capital to serve as a base for borrowing the remainder of its capital needs from traditional lenders. Such a PE investment in an existing company ("Oldco") is called a growth-equity investment.

Such a business may have been financed during its start-up phase with venture capital, may then have grown by obtaining growth-equity capital, and may thereafter raise 1 or more rounds of mature private equity financing while contemplating a future IPO (frequently called a "crossover" or "pre-IPO" round of financing).

While a PE growth-equity investment is generally into a privately held Oldco, PE may under certain circumstances invest in a publicly traded Oldco. In this case, PE is likely to buy securities of a type not publicly traded (e.g., preferred stock convertible into publicly traded common stock). Less commonly, PE may buy securities (directly from Oldco) of the publicly traded class (typically common stock), but at a substantial discount from the public-market price and/or with other valuable rights (e.g., preemptive rights, options or warrants to buy additional stock at a fixed price, 1 or more board seats, etc.). Although Oldco is publicly traded, such stock acquired in a private transaction (rather than in the public
market) is subject to SEC restrictions on resale, so that PE normally obtains registration rights from Oldco as a condition of making the investment.

Where the investment in Oldco is relatively large, PE may organize a consortium or syndicate of PE investors, who will usually co-invest in the same strip of securities.

While a growth-equity investment is generally designed to provide Oldco with expansion capital, there are cases where Oldco is seeking the new investment in order to redeem (for cash) Oldco stock from existing large shareholders. One or more Oldco shareholders may be seeking such a stock redemption to pay estate tax (where a large shareholder has died) or for liquidity (where the shareholder has recently retired or is engaged in estate planning). Such a growth-equity investment to finance a redemption is called a recapitalization and, when financed primarily with borrowed money, a leveraged recapitalization.

Because Oldco in a growth-equity investment is generally more mature than is Newco in a start-up, a growth-equity transaction is often called a later-stage investment (as compared to a seed-money or early stage growth investment in a start-up or young company). Where the investment is into a more mature Oldco seeking growth-equity money, PE’s investment risks and potential gains are generally lower than in a start-up.

A traditional growth-equity investment into Oldco is examined in Chapter 4.

In many proposed growth-equity investments, PE concludes that the key management executives do not own sufficient Oldco stock to incent their future performance, i.e., that too large a percentage of Oldco’s stock is in the hands of passive shareholders and too small a percentage is in the hands of key managers. In this case, a front-end restructuring of Oldco’s equity ownership is often an essential step to induce PE to invest in Oldco. Chapter 4 discusses several methods for achieving this equity restructuring objective.

¶105.3 Troubled-Company Turn-Around Investment

Occasionally, PE may make a growth-equity investment in a company ("Badco") which is suffering losses, is over-leveraged, and/or is experiencing other financial or business reverses. PE may also purchase Badco distressed debt trading at a deep discount with the goal of obtaining equity in, and even control of, Badco through a bankruptcy or other restructuring of Badco.

PE may make such a "turn-around" investment into an unrelated Badco in which PE has not previously invested. Or PE may have been Badco's original sponsor, i.e., today's Badco may, a few years ago, have been the Newco which, with much optimism and with PE's money, acquired Target in a highly leveraged (but so far unsuccessful) buyout.

Whether or not PE made a prior investment in Badco, PE's new turn-around investment generally presents the same issues, except that, where PE was Badco's original sponsor, there is greater pressure on PE to make the new turn-around investment, to protect both its original Badco investment and its business reputation. Such turn-around financing into a troubled Badco is almost always riskier than traditional growth-equity financing of a sound, well-managed company.

A turn-around investment in an over-leveraged, financially troubled Badco is analyzed in Chapter 8.
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105.4 Leveraged or Management Buyout

When an established business ("Target") is for sale, there are at least 3 classes of potential buyers:

- A **strategic buyer** is a company which already owns a business similar or complementary to Target's and believes that combining the buyer's existing business with Target's business will produce a synergistic increase in value.

- A **long-term investor** is a person or group desiring to enter Target's industry (e.g., a company engaged in other businesses seeking diversification or the former managers of another company in Target's industry seeking a new situs for their talents) which has (or can borrow) the capital necessary to buy Target.

- A **financial buyer** is a PE investor (or group of such investors) able to raise the funds necessary to buy Target, generally with the goal of holding Target for 3 to 7 years, improving Target's business performance, expanding Target's geographical reach and facilities, perhaps making add-on acquisitions, and then reselling Target at a substantial profit.

Where a PE investor (or group) is planning a leveraged buyout (an "LBO"), PE generally forms a new company ("Newco") to buy Target, arranges for Newco or Target to borrow a majority of the necessary funds (hence the use of the term "leveraged" buyout), and contributes a minority of the necessary money as equity capital. In an LBO variation PE does not form Newco but instead invests directly in Target, which borrows additional funds and redeems all or most of its old shareholders with the new equity and debt money, perhaps in a manner designed to avoid push-down purchase accounting (i.e., to avoid restating upward the accounting book value of Target's assets on Target's financial statements and hence to minimize post-buyout depreciation/amortization reductions in Target's accounting earnings).

In any LBO, Newco generally arranges its LBO borrowings in several tranches—from senior lenders, senior subordinated lenders, and junior subordinated lenders. In order to obtain each successively more junior layer of debt financing, Newco must offer a progressively higher interest rate and/or a progressively larger equity kicker (Newco common stock, warrants, a conversion privilege, or contingent additional interest based on Newco's results) to each more subordinated layer.

However, the essence of an LBO is that only Newco and/or Target is liable to the lender for the borrowed money. That is, PE typically does not guarantee any of Newco's debt (other than possibly a guarantee with recourse only to Newco's stock owned by the PE guarantor, which does not expose PE's assets other than its Newco investment).

Typically, as part of the LBO arrangements, PE obtains top management talent (either newly recruited executives or Target's most talented existing executives) to run Newco-Target after the LBO and incents them with cheap common stock or with common equivalents, such as stock options, often subject to complex time and/or performance vesting.

Sometimes, Target's management (rather than PE) originates the deal, and Target's management executives then seek to recruit a PE (or PE group) to provide equity financing for the acquisition. This most often happens where Target's old
owners have offered to sell Target to Target’s existing management team if they can raise the necessary financing. In such case, the transaction is generally called a management buyout (an “MBO”).

Throughout this treatise the term “buyout” is used to include both a traditional PE-led LBO and a management-led MBO.

Buyouts come in at least 3 varieties, with the applicable tax, SEC, accounting, and other legal and practical implications of each varying significantly from the other 2 variations:

- The simplest version of a buyout is the purchase of a Target division or wholly owned subsidiary from a much larger corporation (“Bigco”), often where Bigco had previously acquired Target in an effort to diversify Bigco’s business operations (i.e., when Bigco was seeking to become a conglomerate) but Bigco has since concluded that Target no longer fits Bigco’s long-term—often back to core business—strategy. This type of LBO is often called a spin-out or carve-out (from Bigco) of the Target business.
- A somewhat more complicated buyout variation is presented where Target is privately held by a family or relatively small group of persons, i.e., Target is not a Bigco division or consolidated subsidiary.
- The most complicated buyout variation is presented where Target is itself a publicly traded corporation, often with stock trading at a disappointing price, so that Target’s board of directors decides to maximize shareholder value by selling Target, in which case Newco’s purchase of public Target is called a going-private transaction.

These 3 buyout variations are discussed in Chapter 5.

Chapter 6 discusses the terms and tax ramifications of debt and equity securities frequently used in buyouts, as well as in the other PE transactions described above and below.

105.5 Industry Consolidation

Often PE identifies a fragmented industry, i.e., an industry in which there are many small or relatively small competitors and no or few market leaders have appeared. PE then recruits a top-flight management team with experience in the industry and, together with the management team, forms Newco as a “platform” to assemble a significant, or perhaps even leadership, presence in the fragmented industry by (1) acquiring selected strategically located industry players in a series of buyouts or roll-ups, (2) starting up new businesses in those markets where there is no desirable target business or the existing businesses in such market are overpriced, and (3) amalgamating the buyouts and start-ups into a regionally or nationally important player in the otherwise fragmented industry.

Often the term “platform” is used where the consolidation begins with a reasonably large buyout of an established business, followed by numerous add-on acquisitions, and the term “roll-up” is used where there is no large initial acquisition but only a series of reasonably small acquisitions.
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Chapter 7 discusses industry consolidations, including the advisability of using a holding corporation, holding partnership, or holding LLC as an umbrella entity over the various business enterprises being assembled.

105.6 Exit Strategies

When PE/VC invests in a transaction of the types identified above, its goal is to liquidify the investment at a substantial profit when portfolio company's value has been maximized through astute management supplemented by PE/VC's supervision and advice, add-on acquisitions, and the like (i.e., when portfolio company has matured to the point where its value is no longer growing geometrically), generally 3 to 7 years after PE/VC's initial investment in portfolio company.

When structuring its original investment—in a start-up, growth-equity, buyout, industry consolidation, or troubled company—PE/VC is already planning its ultimate exit strategies. Indeed, contracts signed at the time of the initial investment generally give PE/VC certain future rights to control its exit strategy. This is especially important where PE/VC will not (or may not) control portfolio company at the back end when the exit strategy is executed, perhaps because portfolio company's business expansion was so explosive that capital constrained PE/VC was unable to participate in its subsequent rounds of financing.

Even where PE/VC will control portfolio company at the time of the end game, the actual exit strategy employed (e.g., a sale of portfolio company's stock) may require cooperation from some shareholders who will not (or may not) be in agreement with the timing, price, or other terms as proposed by PE/VC. For these reasons, it is important that PE/VC obtain, at the front end when making its investment, contractual rights to control the back-end exit strategy.

PE/VC's exit scenarios may include:

1. sale of portfolio company stock to the public in an IPO or a post-IPO SEC-registered offering or pursuant to SEC Rule 144 or
2. sale of portfolio company to a large company ("Bigco") in exchange for Bigco stock (in a tax-free reorganization) or partly for Bigco stock and partly for cash, or solely for cash, or partly for cash and partly for Bigco debt instruments on the installment method or
3. sale of PE/VC's securities back to portfolio company, possibly at a fixed time and price (e.g., a scheduled redemption of PE/VC's preferred stock) or possibly at PE/VC's option and possibly for a FV determined by appraisal or by formula (e.g., a common stock variable-price put).

Chapter 9 discusses exit strategies.

105.7 Formation of Private Equity, Venture Capital, or Leveraged Buyout Fund

Where PE/VC professionals are employed by a large institution, such as a bank holding company or an insurance company, they generally invest the institution's money and hence do not form a fund. Frequently, however, a group of individuals...
experienced in PE/VC investing (often former executives of a large institution's PE/VC operation) form a PE, VC, or buyout fund (a "PE/VC fund").

In this case the PE/VC professionals often raise capital from a limited number of sophisticated investors, including public and private employee benefit plans, university endowment funds, wealthy individuals and families (and family investment companies), insurance companies, bank holding companies, sovereign wealth funds, and other non-U.S. investors. Such a PE/VC fund is generally formed as a partnership or LLC (to avoid entity level taxation) and generally splits the fund's profits between the PE/VC professionals and the capital providers/investors on a pre-negotiated basis, typically with 20% of the net profits going to the PE/VC professionals as a carried interest and the remaining 80% to the PE/VC professionals and the capital providers in proportion to the capital supplied, perhaps with the capital providers first entitled to a fixed compound IRR (e.g., 8%) on their net invested capital (calculated from time to time) as a hurdle that must be met before the PE/VC professionals are entitled to their carried interest participation (typically with a carried interest catch-up once the hurdle has been achieved).

A PE/VC fund may be in limited circumstances seek to qualify as an SBIC.

Occasionally a PE/VC fund offers equity interests to the public (rather than only to a limited number of sophisticated investors), in which case the fund generally qualifies as a publicly held BDC.

The PE/VC fund generally makes new investments into portfolio companies for a limited period of time, e.g., 5 years after formation, engages in value-adding monitoring during the several years following each investment, sells each investment as soon as it matures, distributes the proceeds to the fund's partners as sales occur, and completes the sale of virtually all its investments (or occasionally distributes in kind to the investors) within 10 to 13 years after the fund's formation. Hence, approximately 4 to 5 years after a PE/VC fund's formation, the PE/VC professionals, if they have developed (or are able to convince investors that they are developing) a successful track record, generally seek to form a second fund, so that they have money for future investments, with such new future funds to follow every 4 to 5 years or so, as long as their investment record is sufficiently attractive.

Chapter 10 discusses the formation of a PE/VC fund.

106  HISTORY OF PRIVATE EQUITY/VENTURE CAPITAL INVESTING

106.1  Ancient History

While professional PE/VC investing as described above is a fairly recent phenomenon (dating from approximately the 1970s), "private risk capital" investing has existed in 1 form or another in every society that had significant commercial activity. A few examples:

- Marcus Licinius Crassus, reputedly the richest man in Julius Caesar's Rome, financed many enterprises, including a private fire department. Though
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most of Rome's buildings were made of wood in the first century B.C., republican Rome lacked a public fire department. Crassus capitalized on this deficiency: When a building caught fire, his business agents and firefighters would repair swiftly to the scene of the conflagration. If they believed the building (or the adjoining structures) worth saving, the agents would offer to buy it (or them) for cash (at an appropriate discount). If the owner refused, the firefighters would leave without taking remedial action. If the owner agreed to sell, Crassus' agents would close the purchase and his firefighters would then attempt to save the building. While not every such Crassus investment was a success, Crassus apparently did very well on a fully distributed portfolio basis.

- In 1492, Christopher Columbus obtained from Ferdinand and Isabella of Spain the PE/VC capital necessary to finance his exploration of the New World.
- In 16th and 17th century England, aristocrats and other wealthy families financed risky commercial and industrial enterprises—mostly foreign trade, exploration, and privateering, constituting the high-tech of that era—and were known as "adventurers." For example, the Merchant Adventurers, licensed by King Henry VII, played an important part in opening trade with "Muscovy" and served as a model for companies formed later to exploit the New World.

106.2 Industrial Revolution and Merchant Bankers

With the 19th century industrial revolution, banks became the main source of business financing. Business enterprise had become so common that it was no longer viewed as inherently high-risk.

Hence, early versions of PE/VC began to focus on financing a business that lacked access to bank financing, frequently by providing equity capital as the underpinning for a bank loan. As in earlier times, such equity financing was largely provided by amateur venture capitalists—wealthy families, the entrepreneur's friends, local business acquaintances, etc.

However, as the scale of business endeavors, and hence their capital needs, escalated (building transcontinental railways, shipping wheat from the Ukraine or the American West to growing European cities, etc.), PE/VC became more institutionalized. In England, merchant banks emerged as the principal providers of high-risk capital to business enterprises around the world, investing both capital obtained from their partners and capital obtained from other rich individuals and families. While the English aristocracy and other wealthy English families had long invested in risky business enterprises, the merchant banks were more professional and could raise more capital than the amateur investors.

English merchant banks helped to finance the U.S. industrial revolution and provided a model for U.S. merchant banks (such as J.P. Morgan) financing new industries, like steel and oil. However, merchant banks tended to focus more on new enterprises requiring substantial capital from the start than on small businesses. Hence, small businesses continued to rely on family, friends, and wealthy amateurs willing to take a flyer on a new enterprise.
§106.3 U.S. in the 1940s and Thereafter

PE/VC investing in the U.S. today largely reflects the marriage of the 2 traditions discussed above: "professional" merchant banking and "amateur" venture investing by wealthy individuals and families.

Beginning in the 1940s, several very wealthy American families began the move from amateur to professional PE/VC status by developing the continuity of focus and the staffing which enabled them regularly to find, evaluate, consummate, and monitor risk-oriented investments.

Passage of the Small Business Investment Act in 1958 was a critical event, because it gave public recognition—and government financial backing—to professional PE/VC investing as an independent, profitable activity. The Act also permitted banks (and BHCs) to invest in SBICs. The entry of banks into PE/VC investing in the late 1950s, and the growth of these endeavors through the 1960s and 1970s, were key steps in the formation of a professional, institutionalized, PE/VC industry in the U.S. Many of the professionals who helped to found the modern PE/VC industry in the 1970s through 1990s obtained their training at bank SBICs.

Beginning in the late 1970s, private and public employee benefit plans and university endowment funds began investing a small (but steadily increasing) portion of their enormous available funds in PE/VC funds. As this huge pool of previously risk-averse capital began to seek skilled PE/VC professionals to handle a slice of their investment capital, the formation of PE/VC funds—often staffed by experienced former executives from the PE/VC subsidiaries of banks and insurance companies—received a tremendous boost.

Today’s PE/VC industry is an extraordinary mixture of institutional PE/VC subsidiaries (investing money supplied by a parent bank or insurance company), private funds (investing money supplied by sophisticated investors; including public and private employee benefit plans and university endowment funds, wealthy U.S. families and their family investment funds, insurance companies, banks, wealthy foreign families, foreign governments, and overseas sovereign wealth funds), and wealthy individuals and families (angel investors) investing their own money.

These institutional PE/VC subsidiaries and private funds focus on a wide range of risk-oriented investment opportunities from seed money and early stage start-ups to later-stage growth-equity investments, recapitalizations, buyouts, turnarounds, and industry consolidations, while angel investors typically focus on smaller seed money and early stage investments.

PE/VC funds formed in the late 1970s were generally $100 million or less in size and made individual investments ranging from a few hundred thousand dollars to a few million dollars each. Many recent PE/VC funds have capital exceeding $1 billion (and a few exceeding $10 billion), and can make equity investments exceeding a billion dollars each.

Thus, the PE/VC industry has moved from specialty financing into the top ranks of mainstream American (and global) business.
Shifting Sands of Federal Tax Rates

Most of the transactions discussed in this treatise (e.g., a PE/VC fund formation, a Newco start-up, or an LBO), if effectuated now, would produce tax ramifications far into the future. However, predictions as to whether future top individual or corporate tax rates will rise or decline are unfortunately pure guesswork because of the conflicting political and economic philosophies of the U.S.'s 2 principal political parties.

The 2019 corporate income tax rate (for OI or CG) is 21%.

The top 2019 individual income tax rates are 37% for OI and STCG, 20% for qualified dividend income ("QDI"), and 20% for LTCG (with an even lower rate for OI flowing through a partnership, LLC, S corp, or sole proprietorship) held more than 5 years. However, 2 income -based Medicare taxes effectively increase these top individual income tax rates, at least for high income individuals.

These individual rates apply not only to income directly earned by an individual, but also to income flowing through to an individual's equity owner from a partnership, LLC, S corp, or sole proprietorship, with a possible reduction of the 37% top OI rate, perhaps to as low as 29.6% for "qualified business" OI flowing through a partnership, LLC, S corp, or sole proprietorship to a "qualified" individual (achieved by granting such a qualified individual a deduction which may be as large as 20% of his or her "qualified" business OI). ²

Discussion of Individual Tax Rates

Throughout this treatise, unless otherwise specifically stated, discussion of individual income tax rates takes into account only federal income, taxes and does not take into account (a) the capped Medicare taxes on compensation, self-employment income, and net investment income, discussed at §107(5), (b) the special deduction for up to 20% of an individual's qualified business OI, discussed at §302.22, or (c) state, local, and non-U.S. taxes.

Unless otherwise stated, when this treatise discusses the LTCG tax rate for an individual taxpayer, we refer to the regular (20%) LTCG rate, rather than the reduced §1202 rate.

In more detail:

1. Top federal income tax rate for individual's OI, previously 39.6%, was reduced to 37% for 2018 through 2025, but is scheduled to revert to 39.6% beginning in 2026.

2. For this purpose, "individual" generally includes a trust for the benefit of an individual and the estate of an individual.

3. 37% x 80% = 29.6%.
Fearless Fund invests in women of color led businesses seeking pre-seed, seed level or series A financing. Our mission is to bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies.

**FEARLESS FUND TEAM**

**Arian Simone, General Partner**

Arian Simone, President and Chief Executive Officer of Fearless Fund, is a serial entrepreneur, philanthropist, angel investor, author, and PR & marketing specialist. Arian received her MBA from Florida A&M and has over 17 years of entrepreneurial experience: from pioneering and growing a successful PR and marketing firm to founding Fearless Magazine and the Fearless Platform in 2010, with a mission of inspiring millennial entrepreneurial women. Her background has allowed her to foster significant relationships in the entertainment industry with billion-dollar corporate clients such as the Sony Pictures, Universal Pictures, Walt Disney Pictures and more.

**Keshia Knight Pulliam, General Partner**

Keshia Knight Pulliam, Chief Development Officer of Fearless Fund, is the youngest person to ever be nominated for an Emmy Award. Decades after making her debut in entertainment she continues to be among the most loved and respected actresses in the business. After eight seasons of playing the iconic Rudy Huxtable on the groundbreaking Emmy and Golden Globe award winning television show "The Cosby Show", Keshia decided to turn her focus toward education. Keshia graduated with honors from Spelman College in 2001 with a B.A. in
Sociology and a concentration in Film. Upon graduation from Spelman College, Keshia continued acting and won 4 NAACP Image awards for work on “The House of Payne”. In 2010, Keshia started her non-profit The Kamp Kizzy Foundation and, in 2016, expanded her brand to launch her weekly podcast Kandidly Keshia and spice line Keshia’s Kitchen.

Ayana Parsons, General Partner

Ayana Parsons is Chief Operating Officer of Fearless Fund. With nearly 20 years of experience as both a corporate executive and organizational consultant, Ayana leverages her expertise in consumer markets, international business strategy and operations, top team effectiveness, board effectiveness and inclusive talent management to help drive organizational growth and transformation. Previously, Ayana served as the Global Head of Retail, Consumer Goods and Lifestyle Industries at the World Economic Forum. Ayana graduated summa cum laude with a BS in Management and her MBA in Marketing from Florida A&M University.

Rodney Sampson, fund advisor

Rodney Sampson is a serial entrepreneur who cofounded, built and sold Multicast Media Technologies, EFactor (EFCT) and Intellectual Currency, a world class integrated go-to-market, publishing, diversity and advisory firm with clients ranging from major Hollywood film studios, cable networks, tech companies, global corporations, publishers and African heads of state. In 2013, Sampson co-founded Opportunity Hub as a follow up to the highly successful Kingonomics’ book release. Today, as Executive Chairman & CEO of Opportunity Hub, Sampson is focused on scaling its suite of collaborative and interconnected technology products, programs, initiatives and fund globally. Sampson is also a Nonresident Senior Fellow in the Metropolitan Policy Program at the Brooking Institution in Washington, DC and a Professor of Entrepreneurship at Morehouse College in Atlanta, GA. Sampson previously served as the 1st Head of Diversity at Mark Burnett Productions, executive producers of the hit ABC show, ABC’s Shark Tank.

Tracy Gray, fund advisor

Tracy Gray is currently the Founder and Managing Partner of The 22 Fund, a growth venture capital and advisory firm focused on increasing the export capacity of Southern California companies, positioning these companies to accelerate growth and scale via international sales. She is also an Executive in Residence at the Los Angeles Cleantech Incubator (LACI) and chairs LACI’s Diversity in Entrepreneurship Advisory Council. In addition, Ms. Gray is the founder of the non-profit We Are Enough (WAE). WAE’s only mission is to educate ALL women on how and why to invest in women-owned, for-profit businesses or with a “gender lens.” Ms. Gray was formerly Senior Advisor to the LA Mayor, an investment professional at a venture capital fund and a systems engineer on the Space Shuttle program. Ms. Gray holds a B.S. in Mathematical Science with an aeronautics emphasis from the UC Santa Barbara and dual MBAs from Columbia University and UC, Berkeley.
Sequoia Taylor, venture partner

Sequoia Taylor is the Managing Partner of SPRY VC, a liquidity advisory firm based in San Francisco. SPRY has completed over $200 million in private placement transactions since 2016. Ms. Taylor has over 10 years of experience as an investment banker and operator. Since then, she has spent time at UBS, Raymond James, and other venture backed startups. Notably, she served as a founding employee at a SaaS company backed by Y-combinator, Andreessen Horowitz, and NEA. Prior to this experience, Ms. Taylor worked as interim Chief of Staff to the CEO of a leading ad tech startup that was acquired by Acxiom for $300mm. Ms. Taylor holds a B.A. from Wellesley College.

If you are an accredited investor interested in investing with Fearless Fund, please reach out to hello@fearless.fund

Mission

Fearless Fund invests in women of color led businesses seeking pre-seed, seed level or series A financing. Our mission is to bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies. Fearless Fund is built by women of color for women of color.

The Fearless Foundation, is a 501c3 organization with a mission to educate entrepreneurs through training, reduce racial inequities, and empower African-Americans to gain access to capital. You can make a contribution towards the advancement of this class of entrepreneurs and have massive social impact.
OUR PROGRAMS

MASTERCARD IMPACT FUND COVID RELIEF GRANT PROGRAM

The Fearless Fund is disbursing 10 business grants to 10 women of color entrepreneurs in the amount of $10,000 each for Covid relief.

According to ABC News, "COVID-19 pandemic has disproportionately impacted African Americans, both physically and financially leaving black Americans to experience the economic brunt of the pandemic" (2020).

Experts have shown the number of Black owned businesses fell from 1.1 million in February to 640,000 in April, showing a 41% decline compared to an overall decline of 35%. Black small businesses also tend to have smaller payrolls and total sales; nearly 70% of them only have one to four employees, and 45% have annual revenues of $100,000 or less.

Eligibility criteria

- Must have a woman of color leadership with at least one woman of color co-founder that will hold significant equity in the company.
- Comprised of a quality, resilient management team with a least one full time founder.
- Demonstrated deep industry knowledge as well as understanding of their product and the competitive landscape.
• Enthusiasm and confidence in their ability to execute.
• Founding stage company that may have proof of concept and/or a minimum viable product.

GVR AND GVR JR

The Get Ready Venture Program is a 12-month training program for WOC business owners to acquire the needed training, mentorship, knowledge, and skills needed to gain access to capital. This program will provide access to a pipeline of over 1000 WOC entrepreneurs.

Student benefits include:

• Monthly Masterclasses taught by leading industry experts
• Monthly calls with Fearless Fund General Partner(s)
• Facebook Community for contained networking, learning and resource sharing
• Quarterly pitch workshops designed to help tailor participants pitches to grab investors’ attention

Topics covered in program (list not inclusive of all topics):

• Product-Market-Fit • How to Raise Capital
• Marketing- General/Digital
• Preparing for Exit/Acquisition
• Setting up a Pitch Deck
• Pitch Coaching
• How to Build Your MVP (Min/Most Viable Product)
• Diligence Procedures
• Corporate Governance & Legal Set Up
HBCU PROGRAM

Our Why: Historically Black Colleges and Universities are entrenched in important history that is reflective of both our culture and identity. We feel it is important to reach emerging collegiate students and propel them into entrepreneurship, and give them tools that will allow them to gain access to capital.

Description: The Fearless Foundation Historically Black Colleges and University initiative is a track of our Get Ready Venture program were we seek emerging high school graduates to acquire the needed training, mentorship, skills and knowledge to matriculate into collegiate life through the advancement of entrepreneurship.
Sabrina Conyers, partner at Nelson Mullins Riley & Scarborough, Charlotte, North Carolina

Sabrina Conyers is a partnership and corporate tax attorney with more than 15 years of experience providing domestic and international tax planning, general corporate, corporate governance, private equity, and real estate finance planning and advisory services to clients. She has served as lead counsel, negotiator, and facilitator for transactions ranging in value up to $2 billion. Her clients include corporations, investment banks, private equity funds, and private companies (including partnerships, S Corporations and real estate developers). Ms. Conyers represents clients in structuring, negotiating, and documenting the tax consequences of their partnerships and joint ventures, mergers and acquisitions (M&A), real estate and REIT transactions, domestic and cross-border financings and other corporate combinations and reorganizations. Ms. Conyers advises clients on transactions involving limited partnerships, limited liability companies, joint ventures, and other strategic alliances.

Ollen Douglass, Managing Director at Motley Fool Ventures

Ollen Douglass Prior to joining the Fund, Ollen was CFO of The Motley Fool Holdings, Inc. for 14 years. During that time, he was responsible for the overall financial health of The Fool and helped guide the company through periods of major growth, contraction, and market volatility. Ollen’s oversight duties included The Fool’s finance and accounting groups as well as legal, benefits, sales, business development, real estate, business intelligence, international and asset management. His financing experience spans the full spectrum from bank financing to venture financing. During Ollen’s management of the pilot program, Motley Venture Partners, he and the team compiled a portfolio of private companies that will be contributed to the Fund. Today, Ollen serves on the board of Eyrus, InHerSight, and Young Artists of America. He has been a recipient of the Motley Fool Founders’ award and Favorite Fool award. He was twice nominated for Greater Washington CFO of the Year and is a member of the 2019 class of Greater Washington Minority Business Leaders. Prior to joining The Fool, Ollen worked in mortgage banking, focusing on mortgage servicing, fair lending and risk management. He was also an auditor for KPMG and is a CPA (inactive). Ollen graduated from the University of Baltimore with a bachelor’s degree in accounting and lives in the Washington area with his wife and three sons.
Sabastian V. Niles is a Partner at Wachtell, Lipton, Rosen & Katz where he focuses on rapid response shareholder and stakeholder activism and preparedness, takeover defense and corporate governance; risk oversight, including as to ESG, cybersecurity and crisis situations; U.S. and cross-border mergers, acquisitions, buyouts, investments, divestitures and strategic partnerships; and other corporate and securities law matters and special situation. Sabastian advises worldwide and across industries, including technology, financial institutions, media, energy and natural resources, healthcare and pharmaceuticals, construction and manufacturing, real estate/REITs and consumer goods and retail. He has counseled boards of directors and management teams on self-assessments, engagement with institutional investors and proxy advisory firms and navigating activist situations involving Barry Rosenstein/JANA Partners, Bill Ackman/Pershing Square, Carl Icahn, Daniel Loeb/Third Point, David Einhorn/Greenlight Capital, Glenn Welling/Engaged Capital, Jeff Smith/Starboard Value, Jeffrey Ubben/ValueAct, Jonathan Litt/Land & Buildings, Keith Meister/Corvex, Mick McGuire/Marcato, Nelson Peltz/Trian, Scott Ferguson/Sachem Head, Paul Singer/Elliott Management, Relational Investors and Tom Sandell/Sandell Asset Management, among many others. In addition to serving as Consulting Editor for the New York Stock Exchange’s Corporate Governance Guide, Sabastian writes frequently on corporate law matters and has been a featured speaker at corporate strategy and investor forums. His speaking engagements have addressed topics such as Shareholder Activism; The New Paradigm of Corporate Governance; Hostile Takeovers; Strategic Transactions and Governance; M&A Trends; Board-Shareholder Engagement; Confidentiality Agreements in M&A Transactions; Negotiating Strategic Alliances with U.S. Companies; Current Issues in Technology M&A; Corporate Governance: Ethics, Transparency and Accountability; and Developments in Cross-Border Deals. Sabastian received his juris doctorate from Harvard Law School, where he co-founded the Harvard Association of Law and Business (and continues to serve on the Advisory Board) and won the U.S. National ABA Negotiation Championship representing the Harvard Program on Negotiation. He received B.S., B.A. and B.S. degrees in Finance, Economics and Decision & Information Sciences, respectively, from the University of Maryland, where he won two National Championships and four Regional Championships in intercollegiate mock trial.
Ayana Parsons, Senior Partner, Board and CEO Inclusion at Korn Ferry and Co-Founder, Fearless Fund

As a core member of Korn Ferry’s Global Consumer Practice, Ayana leads Chief Marketing Officer, President, CEO and Board searches at consumer- and customer-centric organizations of all sizes. Ayana’s international experience, coupled with her cross-industry background and passion for people, gives her a unique vantage point from which to solve her clients’ most pressing recruitment and succession planning challenges. Prior to joining Korn Ferry, Ayana was with another global consulting firm where she placed C-Suite executives at several of the world’s leading companies and led numerous succession planning and talent pipelining engagements for her clients. Before embarking on her career in executive talent and leadership, Ayana served as the Global Head of Retail, Consumer Goods and Lifestyle Industries at the World Economic Forum where she led the preeminent global discussions in Davos, Switzerland on all topics related to her respective industries. With nearly 20 years of experience as both a practitioner and consultant, Ayana leverages her expertise in international business, executive search, top team effectiveness, succession planning, diversity & inclusion, marketing and general management to deliver differentiated value to her clients. A seasoned industry executive, Ayana’s earlier career spanned sales, marketing and general management roles at several of the world’s most admired companies including Philips, Pfizer, Kimberly-Clark and Procter & Gamble. Ayana attended Oral Roberts University on a division I basketball scholarship, completing her studies at Florida A&M University where she holds a master’s degree in business administration. Ayana is based in Atlanta, where she is actively involved in the local community. In her free time, Ayana enjoys working out, attending sporting events, traveling and spending quality time with her husband and two young daughters.