

INVESTMENT FUND LEGAL DOCUMENTS

Documents And Filings Needed To Form A Fund

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To effectively start an investment fund, the sponsor must safely navigate the complex regulatory structures that govern the fund's operations. Unintentionally deviating from regulatory disclosure requirements can result in serious consequences for the issuer and its directors, officers, and managers. Experienced legal counsel plays a vital role in guiding managers through their various responsibilities and can help managers avoid devastating mistakes as they launch a new fund.

This white paper lays out some of the key documents and filings that legal counsel will prepare for either an open-ended fund (hedge fund) or closed-ended fund (private equity/real estate fund). When properly prepared, the offering documents and regulatory filings set forth the framework to enable the fund to:

- properly structure the fund in a tax efficient way;
- meet the appropriate statutory requirements and exemptions;
- set market-appropriate investment terms;
- make the proper securities disclosures to avoid potential liability; and
- raise and deploy capital in compliance with regulatory structures.

WHAT DOCUMENTS MUST BE PREPARED?

There are four categories of documents that the investment fund attorney will prepare to launch a fund:

(i) formation documents; (ii) offering documents; (iii) internal documents; and (iv) certain regulatory filings.

Formation documents are the documents filed with the appropriate government authority to establish the existence of the entities, including the fund, the general partner and investment management company. These include certificates and articles. The formation documents are among the most basic of the fund documents.

Because of the simplicity of filing formation documents, some clients make the mistake of forming entities before consulting with legal counsel. Formation documents should be filed only after thoroughly considering the appropriate legal structure of the fund.

Fund Structural Considerations

The structure for an investment fund is dependent on a number of tax, regulatory, and financial considerations. Fund structure is driven in large part by the fund's strategy and the type of investments that the fund will pursue. The fund structure should be based on careful and thorough analysis with the assistance of an experienced fund attorney. Among the decisions that should be made in structuring the fund include whether to:

- structure the fund as a closed-end or open-end fund;
- rely on Section 3(c)(1) or 3(c)(7) as an exemption from the Investment Company Act--real estate funds typically rely on Section 3(c)(5)(C); and
- establish an offshore fund or a domestic only fund.

These issues and others have bearing on what entities should be formed, how many entities are needed, and in what jurisdiction the formation documents should be filed. For a more detailed discussion of structural issues, please refer to the following white papers: For hedge funds: [Hedge Fund Structural Considerations](#). For real estate funds: [Forming a Real Estate Fund--Strategy, Structure and Investment Terms](#).

(ii) The Offering Documents

The offering documents are the documents that are provided to a prospective investor prior to the investor making an investment in the fund. These documents include:

- (i) a fund disclosure document in the form of a private placement memorandum;
- (ii) the governing documents of the fund, in the form of a limited partnership agreement or operating agreement (depending on whether the fund is formed as a limited partnership or LLC); and
- (iii) investment purchase documents, in the form of a subscription agreement, which includes an investor questionnaire to determine investor qualification.

"A thoroughly prepared private placement memorandum should protect a fund sponsor from investor claims of lack of disclosure."

Private Placement Memorandum

A private placement memorandum (PPM) is a securities disclosure document that provides investors with material information about the fund to enable an investor to make an informed investment decision.

Similar to a prospectus in a public offering, a PPM provides potential investors with specific information about the terms of the fund, the structure of the investment, background of the managers and other disclosure issues. The private placement memorandum contains risk factors that an investor should consider prior to making an investment in the fund. A thoroughly prepared private placement memorandum should protect a fund sponsor from investor claims of lack of disclosure. For examples of the contents and level of thoroughness that a private placement memorandum should have, refer to our [PPM sample excerpts](#).

Limited Partnership Agreement

The limited partnership agreement (or in the case of an LLC-based fund, an operating agreement) is the legal governing document of the fund. The limited partnership agreement outlines the terms of the fund and the rights of an investor and fund manager. In contrast with the private placement memorandum, which is written in plain English (accessible to non-legally trained readers), the fund's limited partnership agreement is a lengthy and complex legal document. Among the terms of the limited partnership agreement are:

- the powers and activities of the general partner;
- fees and expenses, including management, performance or other potential fees as well as legal startup costs, brokerage, administration, and audit expenses;
- allocations and distributions of profits to all partners, including how profits are calculated and the timing of distributions;
- withdrawal provisions, including minimum and maximum withdrawal amounts, lock-up periods, gates, and distribution dates; and
- a designation of power of attorney, which authorizes the fund manager to act on the limited partner's behalf for such purposes as voting the fund's securities, buying and selling fund securities, admissions of new limited partners, and amendments to fund formation documents and other documents necessary for continued fund activity.

To become a limited partner of a fund, an investor must sign a countersignature page to the limited partnership agreement, in which he or she agrees to be bound by its terms.

Subscription Agreement/Investor Questionnaire

A subscription agreement provides investors with a description of the steps necessary to purchase limited partnership interests (or for an LLC-based fund, membership interests) in a fund and provides fund managers with eligibility information about the investor. This is the investor's contract with the fund, which specifies the subscription amount and outlines the terms under which the investment is being made. For fund managers, this document requires investors to attest that they meet certain eligibility standards, such as being an "accredited investor" or "qualified client," as required by SEC regulations and state law.

(iii) The Internal Documents

Some fund documents, vital to the fund's operations, are neither filed with the government nor provided to investors, but kept on file with the fund. These internal agreements set forth the rights and responsibilities among the individuals sponsoring the fund and between the fund and investment manager. These include the operating agreements of the general partner and management company, as well as the investment management agreement.

Operating Agreements

The fund manager and general partner operating agreements are the legal governing documents that provide for the rights of the founders of the fund. These documents specify how ownership of the fund is divided among the principals of the fund, how voting is decided, how the company will wind up upon dissolution and other important internal provisions. The management company and general partner operating agreements and their contents are generally not disclosed to investors.

Investment Management Agreement

The investment management agreement is an agreement between the fund and the investment management company (often the same entity as the general partner). It defines the services that a fund manager will provide. It also delegates to the fund manager authority over the fund's assets, and gives the fund manager the broad discretionary authority to manage such investor funds and securities in a manner that the fund manager believes is consistent with the investment strategy of the fund.

Since the fund manager and the fund are controlled by the same individuals, the investment management agreement is typically signed by the same individuals on both sides.

(iv) The Regulatory Filings

Regulatory filings are documents that need to be filed with the federal and state jurisdictions (in addition to formation documents) that are needed to satisfy certain securities law structures, registration exemptions and rules applicable to the investment instruments traded.

Among these filings are:

- The SEC and state Form D filings (which are required whenever there is a US investor);
- Investment advisor registration (depending on the state in which the fund managers are located, the amount of assets under management and the type of investment); and
- Registration with the Commodities Futures Trading Commission (CFTC) (applicable to certain hedge funds that invest in commodities, futures, swaps, currencies and similar instruments).

John S. Lore, Esq. is the managing partner of Capital Fund Law Group, a boutique law firm providing expertise focused on the alternative investment industry. Call **212.203.4300** or email us to schedule a consultation to discuss your fund.
