Barnes

Private Market Liquidity in 2026

Secondaries, continuation vehicles and tender offer strategies

Dallas Bar Association Securities Section · November 2, 2026 · Jason T. Barnes

ASK FIRST

Who is on both sides of this price?

The answer locates the conflict, defines the disclosure owed, and tells you whether someone at the table needs a lawyer of their own.

01 Three channels, one question

CHANNEL	WHAT HAPPENS	ON BOTH SIDES OF THE PRICE	PRIMARY REGIME
GP-led secondaries and continuation vehicles	The existing fund sells an asset; a new vehicle managed by the same sponsor buys it. Investors elect to sell or roll.	The sponsor	Advisers Act fiduciary duty and Rule 206(4)-8; the fund agreement; ILPA guidance
LP-led transfers and fund-level liquidity	An investor sells its fund interest to another investor, or a semi-liquid fund buys back its own shares.	The fund, which sets the NAV and buys at it	Resale exemptions; Investment Company Act investor tests; Rules 13e-4 and 23c-3
Company-level liquidity	Employees and early investors sell private company stock, often to the company itself.	The company, which knows more than any seller	Regulation 14E; Rule 10b-5; Rule 701; Section 12(g)

02 The sponsor on both sides: what governs now

What was vacated

The SEC's 2023 Private Fund Adviser Rules, including the mandatory fairness or valuation opinion for adviser-led secondaries, the quarterly statement rule and the audit rule.

Nat'l Ass'n of Private Fund Managers v. SEC, 103 F.4th 1097 (5th Cir. June 5, 2024): vacated in full.

What still governs

- **Advisers Act §206:** a non-waivable fiduciary duty of care and loyalty; full and fair disclosure; informed consent.
- **Rule 206(4)-8:** antifraud protection for investors in pooled vehicles.
- **The fund agreement:** advisory committee consent mechanics and conflict provisions.
- **Delaware law:** the agreement can shape fiduciary duties, but the implied covenant survives (6 Del. C. §17-1101(d)).

Losing the rule did not lose the duty. Process now does the work a regulation would have done, and counsel designs the process.

03 ILPA's final continuation vehicle guidance

- **Published October 20, 2026** as *Continuation Vehicles: Advancing Alignment Through Best Practices*; supersedes the 2023 guidance. Builds on the January 27, 2026 disclosure template and the June 24, 2026 draft.
- **Principles-based:** described as designed to guide, not dictate. Not law, but the yardstick committees, arbitrators and examiners will use.
- **Election period:** generally no fewer than 20 clear business days after the final election package, longer for complex or multi-asset deals.
- **Economic test:** rolling investors, on the whole, no worse off than if the continuation vehicle had not occurred.
- **Departures:** explain each one in writing, before the deal.

04 Where it goes wrong: process, not paperwork

Abu Dhabi Inv. Council v. Energy & Minerals Grp., C.A. No. 2025-1389-NAC (Del. Ch. filed Dec. 3, 2025). By published accounts the sponsor ran a competitive process, sought committee approval, obtained a fairness opinion and offered cash and roll options. The complaint alleges thin notice and information before the committee vote, unanswered requests for delay and a session without the sponsor, different information for the committee than for buyers, and no process for an IPO alternative. Allegations only; the transaction was paused pending arbitration.

General information for educational purposes, current as of November 2026. Not legal advice; does not create an attorney-client relationship.

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Process, transfers, tenders and your own seat

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05 A defensible continuation vehicle process

1 Evidenced rationale
Why a continuation vehicle rather than a sale, IPO, strip sale or distribution in kind, with alternatives actually tested.

2 Real price discovery
A process a stranger would call competitive, plus a fairness opinion and an anonymized summary of final bids.

3 An informed committee
Early engagement, independent advisers paid by the fund, and a session without the sponsor.

4 Time and information parity
One data room and one narrative for investors and buyers; the election clock runs from a complete package.

5 Real choices
Sell, roll, roll with top-up or split. A status-quo option on existing terms is the benchmark; explain if not offered.

6 Sponsor alignment
Full carry rollover absent a stated reason; disclose any de-risking; costs follow the parties who benefit.

06 Selling a fund interest: five gates

Transfer provisions	GP consent, rights of first refusal, transfer windows, legal opinions. Build the timeline around the GP's consent.
Who may buy	Accredited investor; qualified purchaser for a 3(c)(7) fund; each transferee counts toward the 3(c)(1) 100-owner limit (250 for qualifying venture funds).
Resale exemption	The seller is not the issuer: Section 4(a)(1) on "4(a)(1½)" principles, or Section 4(a)(7) where its conditions are met.
Tax and ERISA	Publicly traded partnership safe harbors (IRC §7704; Treas. Reg. §1.7704-1); the 25 percent plan asset test.
Pricing mechanics	Reference-date NAV, a discount or premium, and often deferred payment.

07 Company tender offers

1. **Is it a tender offer?** No statutory definition. Courts weigh the *Wellman v. Dickinson* factors or the *Hanson Trust* totality approach. A company-wide employee program almost always qualifies.
2. **Regulation 14E applies** even to non-reporting companies: minimum offering period, Rule 14e-3 trading limits, and Section 14(e) antifraud. Rule 13e-4 applies only to reporting issuers.
3. **The April 16, 2026 exemptive order** permits a 10-business-day minimum period for a non-reporting company's own self-tender (by the company or a wholly owned subsidiary). Offers by outside buyers still run 20 business days. Decide the structure first and the calendar second.

When the company buys from its own employees, the offer document is the whole of their protection: how the price was set, recent 409A value and financing terms, preferences, material developments, risks and tax consequences.

08 Five professional responsibility checkpoints

QUESTION	WHAT TO DO	RULES
Who is my client?	Name each one: fund, sponsor, continuation vehicle, company, founders. The organization is the client, not its investors.	TDRPC 1.12 · MR 1.13
Are my clients on opposite sides of this price?	Related-party sales need a reasonable belief and informed consent; some conflicts cannot be consented to.	TDRPC 1.06 · MR 1.7
Who in this transaction has no lawyer?	Selling investors and employees: no implied disinterest; correct misunderstandings; no advice beyond getting counsel.	TDRPC 4.03 · MR 4.3
Is what I am drafting true and consistent?	Committee deck against buyer deck; tender memorandum against financing materials.	TDRPC 4.01, 8.04(a)(3), 1.02(c)
What must I protect and not use?	Committee information, material nonpublic information, tender plans.	TDRPC 1.05 · Rules 10b-5, 14e-3

Find the party on both sides of the price.
The sponsor, the fund in its own repurchase, the company in its own tender. Conflict, disclosure and client map follow.

After the vacatur, process is the protection.
ILPA guidance, the Advisers Act and Delaware litigation now measure the process counsel designs.

Your own seat is part of the analysis.
Who you represent and who has no lawyer are securities and ethics questions at once.

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