

# Structuring Fund Liquidations with Pass-Through Notes

By Pang Lee, Partner, Cooley LLP  
Shimeng Cheng, Special Counsel, Cooley LLP  
Joyce Wang, Counsel, Cooley LLP

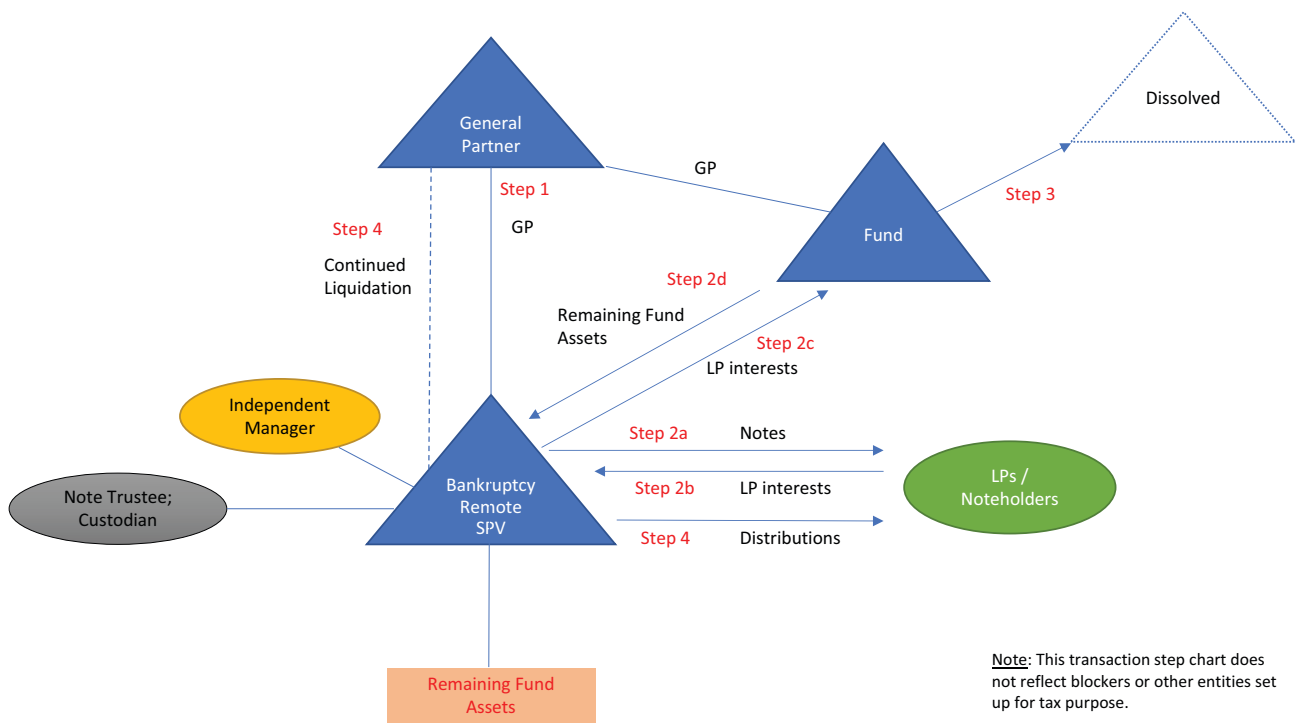
Private equity and venture capital fund sponsors often face challenges in dealing with remaining illiquid fund assets at the end of the life of the fund. In this article, we examine the application of pass-through notes in fund liquidations. This alternative structure provides additional liquidity options and flexibility for limited partners looking to preserve value and will minimize transition costs in the interim.





**Transaction Steps**

**ILLUSTRATIVE STEP CHART**



The following illustrates the key transaction steps in a consensual fund liquidation structured using pass-through notes:

**Step 1:** The general partner of the fund forms a special purpose vehicle (the “SPV”) as the liquidation vehicle.

**Step 2:** The following steps will occur simultaneously:

- a. The SPV issues notes to the limited partners which, from time to time, distribute to the limited partners

(noteholders) their proportional share of the liquidation proceeds from the remaining fund assets (the “Remaining Fund Assets”).

- b. The limited partners contribute their respective limited partnership interests to the SPV in kind, in exchange for notes issued by the SPV.
- c. The SPV contributes such limited partnership interests to the fund.
- d. The fund contributes the Remaining Fund Assets to the SPV in exchange

for such limited partnership interests.

**Step 3:** The general partner dissolves the fund with requisite consent of the limited partners.

**Step 4:** During the term of the notes, the general partner or its affiliate continues to liquidate the Remaining Fund Assets now held by the SPV, and the noteholders (i.e., former limited partners of the fund) receive from the SPV their prorated share of liquidation proceeds, net of fees and expenses.

## Strategic Benefits for Using a Note: A Comparison

<p><b>Dissolving the Fund after Term Expiration</b></p>	<p><i>Pros:</i></p> <ul style="list-style-type: none"> <li>• No more ongoing expenses to be paid by the Fund</li> <li>• LPs can close their books after holding on to the LP interest for 10+ years</li> <li>• The terms of the distribution waterfall set in the Fund's LPA will be fixed for determining any GP clawback liabilities</li> </ul>	<p><i>Cons:</i></p> <ul style="list-style-type: none"> <li>• "Flash sale" of Fund assets may fail to maximize the potential value of the Remaining Fund Assets</li> <li>• Certain LPs may be prohibited from holding illiquid assets due to internal policy reason</li> <li>• In the event of distributions in kind, LPs may lack the requisite expertise or resources to sell an illiquid asset on their own</li> <li>• If the Fund's LPA does not specify a timeline for the liquidation process after expiration of the Fund's term and there is no statutory limit, the GP may not be able to sell the remaining illiquid assets for a long time, which means that the LPs may never see any cash distributions</li> </ul>
<p><b>Use of Pass-Through Notes in Fund Liquidation</b></p>	<p><i>Pros:</i></p> <ul style="list-style-type: none"> <li>• LPs are offered a second opportunity to rely on the GP (or a liquidator) to dispose of the Fund's remaining illiquid assets after the GP's first attempt</li> <li>• Incentive terms may be offered to the GP (or other liquidators) in order to capture the upside of the Remaining Fund Assets, and to facilitate the conversion of illiquid assets into cash proceeds for distribution to the noteholders</li> <li>• LPs become creditors and may sell their notes (i.e., a debt instrument rather than limited partnership interests) to a third party without the need for GP consent, if the terms are structured accordingly</li> </ul>	<p><i>Cons:</i></p> <ul style="list-style-type: none"> <li>• Ongoing SPV expenses will occur during the extended liquidation period</li> <li>• Prolonged period of holding on the underlying investment portfolio</li> <li>• Challenging to determine the optimal terms of the pass-through notes (i.e., the principal amount, distribution waterfall setup and maturity)</li> </ul>



### Key characteristics of pass-through notes for Fund Liquidation

1. **Cashless Issuance.** The notes are issued on a cashless basis to the noteholders in exchange for their contribution of limited partnership interests in kind to the SPV. The noteholders do not pay any cash consideration for the notes. Each noteholder will receive a number of notes proportionate to its ownership percentage of limited partnership interests in the fund, typically determined by capital commitments.
2. **Principal Amount and Interest.** The principal amount of the notes is set at fair market value of the Remaining Fund Assets, with an agreed liquidation discount. Interests will



accrue during the term of the note and be due at maturity. Zero-interest notes may also be issued if there is no tax or accounting concerns in the relevant jurisdiction.

3. **Distributions to Noteholders.** During the term of the notes, the general partner will continue to liquidate the Remaining Fund Assets. Periodically, the note trustee will distribute proceeds from the liquidation of the Remaining Fund Assets in accordance with a pre-agreed waterfall, with each noteholder (former limited partner) receiving a portion of the liquidation proceeds of the Remaining Fund Assets, net of fees and expenses (the “Distributions”). The notes are structured to have no withholding or deduction of taxes for passing through such liquidation proceeds to the noteholders. Any Distributions received by the noteholders shall reduce the outstanding principal amount and accrued interest of the notes. The notes will terminate once the aggregate Distributions paid to the noteholders reach the principal amount plus the accrued interest.
4. **In-Kind Redemption at Maturity.** If, at maturity of the notes, the unpaid principal and interest of the notes have not been reduced to zero through the periodical payment of the Distributions to the noteholders, the note issuer shall be obligated to redeem the notes “in kind” by assigning, participating or otherwise transferring to each noteholder a portion of the then Remaining Fund Assets.
5. **Bankruptcy Remote SPV.** The SPV is structured as a bankruptcy remote entity for a variety of reasons. From the noteholder’s perspective, such structure will prevent the general partner from filing a strategic bankruptcy for the SPV. The general partner will also benefit from using a bankruptcy remote entity as the notes can be structured as non-recourse to the general partner; and the balance sheet of the SPV will not be consolidated with that of the general partner. Bankruptcy



counsel in the relevant jurisdiction should be consulted for setting up the bankruptcy remote SPV and the non-recourse notes. This is critical, as in the worst-case scenario that the fair market value of the Remaining Fund Assets is lower than the outstanding principal amount of the notes (i.e. the SPV becomes insolvent), the GP will need to rely on the non-recourse nature of the note to be shielded from liability exposure.

6. **Collateral.** For the benefit of the noteholders, all liquidation proceeds from the Remaining Fund Assets will be deposited into a collateral account established with a third-party custodian. The Remaining Fund Assets and any liquidation proceeds thereof are pledged as security for the benefit of the noteholders.

### Structuring Considerations

1. **Accounting and Tax Concerns.** The principal amount and the maturity of the pass-through notes will need to be properly structured to balance the noteholders’ interests to maximize liquidation payouts from the Remaining Fund Assets and their accounting needs to crystalize and eventually write off such investment from their balance sheet. Proper tax structuring is also required to ensure that each step in the note issuance and the pass-through of liquidation proceeds are not subject to withholding

taxes in the applicable jurisdictions. Tax and accounting advisors should be consulted to properly determine the note principal amount and maturity, and to ensure that holders do not face additional tax burdens due to mismatches of income and deduction or timing considerations.

2. **Procedural Requirements.** In the case of typical Delaware bankruptcy remote SPVs, an independent manager’s consent is required for disposition of substantial SPV assets. Local bankruptcy counsel should be consulted for the necessity of involvement of such independent manager (or similar third party) and other procedural requirements in the liquidation process.
3. **Limited Partner Consents.** The proposed transaction structure involving the Fund, its limited partners and a liquidation SPV managed by the GP or its affiliates gives rise to conflicts of interest concerns. Such limited partners’ consents are typically required to use this alternative liquidation strategy. It is advisable to maintain regular communications with respect to the status of liquidation to keep the noteholders (i.e., former limited partners) properly informed and to disclose risks associated with the timeline of Distributions and the value of the Remaining Fund Assets.

# 利用票據進行基金清算交易的新構架

作者：科律律師事務所合夥人 李鵬  
科律律師事務所資深顧問律師 程詩萌  
科律律師事務所顧問律師 王欣

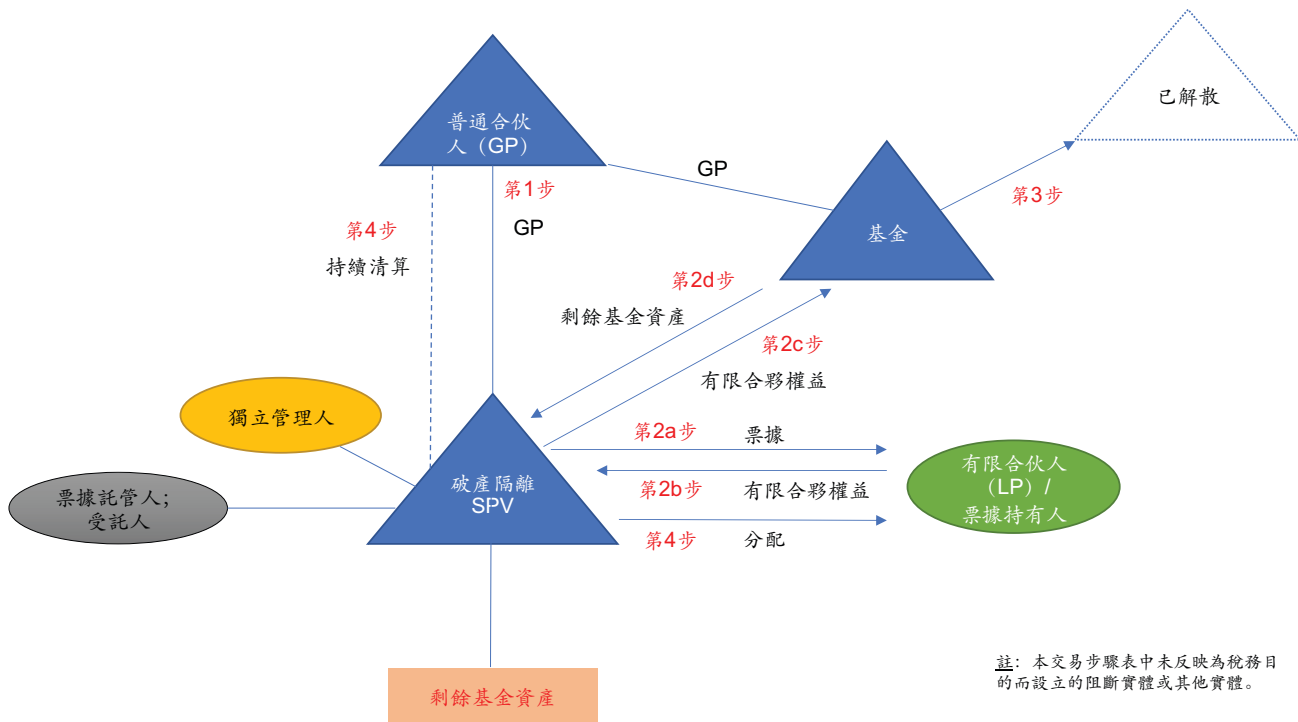
私募股權基金和風險投資基金的發起人在處理基金末期剩餘的非流動性基金資產時經常面臨挑戰。在本文中，我們將探討一種利用票據進行基金清算的新構架。這種新構架即為尋求保值的有限合夥人提供了更多流動性選擇和靈活性，也同時降低了基金清算期的過渡成本。





交易步驟

示例步驟圖



註：本交易步驟表中未反映為稅務目的而設立的阻斷實體或其他實體。

利用票據進行基金清算交易的關鍵步驟：

**第1步**：基金的普通合夥人（下稱“GP”）成立一個特殊目的實體（下稱“SPV”）作為清算機構。

**第2步**：以下步驟將同時進行：

a. SPV向有限合夥人（下稱“LP”）發行票據。該票據在發行後會向

LP（即票據持有人）分配其在剩餘基金資產的清算收益中所佔的比例份額。

b. LP將其各自的有限合夥權益交回SPV，以換取SPV發行的票據。

c. SPV將該等有限合夥權益注入基金。

d. 基金將剩餘基金資產注入SPV，

以換取該等有限合夥權益。

**第3步**：GP在獲得必要的LP同意後解散基金。

**第4步**：在票據有效期內，GP或其關聯方繼續對SPV目前持有的剩餘基金資產進行清算，而票據持有人（即基金解散前的LP）從SPV處獲得其按比例應得的清算收益份額（扣除費用和開支）。



## 利用票據進行基金清算的利弊對比

<p><b>基金期滿後解散</b></p>	<p>利：</p> <ul style="list-style-type: none"> <li>基金不再需要支付持續性費用</li> <li>LP 可在持有 LP 權益超過 10 年後結清帳目</li> <li>基金《有限合夥協定》（LPA）中設定的瀑布式收益分配條款將被固定下來，用於確定任何 GP 回撥責任</li> </ul>	<p>弊：</p> <ul style="list-style-type: none"> <li>基金資產的「限時促銷」可能無法使剩餘基金資產的潛在價值最大化</li> <li>由於內部政策原因，某些 LP 可能被禁止持有非流動性資產</li> <li>在實物分配的情況下，LP 可能缺乏必要的專業知識或資源來自行出售非流動性資產</li> <li>如果基金的 LPA 中未規定基金期滿後清算程序的時程表，也不存在法定限制，GP 可能在很長一段時間內無法出售剩餘的非流動性資產，這意味著 LP 可能永遠無法獲得任何現金分配</li> </ul>
<p><b>基金清算中使用票據</b></p>	<p>利：</p> <ul style="list-style-type: none"> <li>LP 可獲得第二次機會依靠 GP（或清算人）處置基金的剩餘非流動資產</li> <li>新架構可以向 GP（或其他清算人）提供激勵條款，以把握剩餘基金資產的升值空間，並促進將非流動性資產轉化為現金收益分配給票據持有人</li> <li>新架構中可以制定相應條款使 LP 在無需獲得 GP 同意的情況下將其票據（即債務工具而非有限合夥權益）出售給第三方</li> </ul>	<p>弊：</p> <ul style="list-style-type: none"> <li>在延長的清算期內將產生持續性的 SPV 費用</li> <li>相關投資組合的持有期延長</li> <li>確定票據的最優條款（即本金金額、瀑布式收益分配模式和到期日）具有挑戰</li> </ul>

### 基金清算中使用的票據的主要特點

- 無現金發行。** 票據以無現金方式發行給票據持有人，以換取其將有限合夥權益交回 SPV。票據持有人無需為票據支付任何現金對價。各票據持有人將獲得與其在基金有限合夥權益中的擁有權比例相對應數量的票據，通常由認繳資本額確定。
- 本金和利息。** 票據的本金金額按剩餘基金資產的公允市值確定，並考慮各方商定的清算折扣。票據在有效期內計息，並於到期時付息。如果相關司法管轄區不存在相應的稅務或會計問題，也可發行零息票據。



3. **向票據持有人分配。** 在票據有效期內，普通合夥人將繼續清算剩餘基金資產。票據受託管理人將定期按照事先商定的瀑布式收益分配模式分配剩餘基金資產的清算收益，各票據持有人（即前有限合夥人）將從扣除費用和開支後的剩餘基金資產的清算收益中獲得相應比例的部分（下稱“分配”）。根據票據的結構安排，在將該等清算收益轉手給票據持有人時，不會代扣或扣除稅款。票據持有人獲得任何分配，都將相應減少票據的未償還本金和應計利息金額。一旦支付給票據持有人的分配總額達到本金加應計利息之和，票據將終止。
4. **到期時實物贖回。** 如果在票據到期時，尚未通過定期向票據持有人支付分配的方式使票據的未償還本息總額降為零，則票據發行人有義務通過向每位票據持有人轉讓、參與或以其他方式讓與屆時剩餘基金資產的一部分來“以實物形式”贖回票據。
5. **破產隔離 SPV。** 出於多種原因，SPV 將被設計為一個破產隔離實體。從票據持有人的角度來看，這種結構將防止普通合夥人為 SPV 申請戰略破產。普通合夥人也將從使用破產隔離實體中受益，因為這樣的票據結構可以對

普通合夥人不具有追索權；而且 SPV 的資產負債表不會與普通合夥人的資產負債表合併。在設立破產隔離 SPV 和無追索權票據時，應諮詢相關司法管轄區的破產法律顧問。這一點至關重要，因為在最壞情況下，如果剩餘基金資產的公允市值低於票據的未償還本金金額（即 SPV 資不抵債），普通合夥人將需要依賴票據的無追索權性質來免於承擔責任。

6. **擔保物。** 出於票據持有人的利益，剩餘基金資產的所有清算收益將存入在第三方託管人處設立的擔保帳戶。將對剩餘基金資產及其任何清算收益設定質押，作為對票據持有人利益的擔保。

#### 結構安排的考量因素

1. **會計和稅務問題。** 票據的本金金額和到期日需要適當安排，以平衡票據持有人能最大限度地從剩餘基金資產中獲得清算款項的利

益，以及將此類投資從資產負債表中剝離並最終沖銷的會計需求。此外，還需要進行適當的稅務結構設計，以確保票據發行的各個步驟和清算收益的轉手在適用司法管轄區無需繳納代扣稅。應諮詢稅務和會計顧問意見，以適當確定票據的本金金額和到期日，並確保其持有人不會因收入與扣減不匹配或由於時間因素而面臨額外的稅負。

2. **程式要求。** 就典型的特拉華州破產隔離 SPV 而言，處置大量 SPV 資產需要獲得獨立管理人的同意。在清算過程中，應就此類獨立管理人（或類似第三方）參與的必要性及其他程序要求諮詢當地破產法律顧問。
3. **有限合夥人同意。** 擬議的交易結構涉及基金、其有限合夥人以及一個由普通合夥人或其關聯方管理的清算 SPV，這會引起利益衝突問題。採用這種新清算策略通常需要獲得有限合夥人的同意。普通合夥人就清算的進展應保持定期溝通，使票據持有人（即前有限合夥人）充分了解情況，並披露與分配時程表和剩餘基金資產價值相關的風險。■

