Real Estate JV Buy/Sell Agreements: A Brief Review And Critique

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A buy/sell is a relatively common means to allow the partners in a real estate partnership to part ways. This article explains the buy/sell and identifies some of the problems that may be encountered when a buy/sell is utilized. For simplicity, this article will use partnership terminology, but the discussion applies equally to limited liability companies and, to some extent, other real estate ventures. It also will assume that there are only two partners.

The ''buy/sell'' that is the subject of this article is a sale by one partner to the other partner of its interest in the partnership using the following procedure:

- A partner starts the process by giving notice and establishing the pricing of the interests in the partnership (which must be relative pricing under which both partners are given consistent and relative values for their respective interests); and
- The other partner decides whether to buy or sell.

Although buy/sell provisions tend to be more complex today, the following provision from a 1988 California CEB Book on Partnerships will be a useful starting point:

> ''Basic Right. Each [partner] shall have the right . . . to require the other [partner] to purchase its interest in the [partnership] or to purchase the [partnership] interest of the other [partner]. The [partner] initiating [this buy/sell process] shall be referred to as the ''First Party,'' and the other [partner] shall be referred to as the ''Second Party.''
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> ''Initiation. The First Party shall initiate the [buy/sell] by giving notice to the Second Party. The notice . . . shall state the exact terms of the proposed sale, which sale must be concluded at a designated time no sooner than 60 and no later than 90 days after the notice.''
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> ''Response. The Second Party shall have 30 days after receiving the [notice] in which to elect either (a) to purchase the First Party's interest at the stated terms and price or (b) to sell to the First Party the Second Party's interest at the stated terms and price, adjusted according to the [partner's] percentage interest . . . .''

To illustrate how this provision operates, consider the following example:

Example: Assume one partner has an 80 percent interest and the other partner has a 20 percent interest in a straight-up 80/20 partnership, and the 80 percent partner triggers the buy/sell and names an $8,000,000 price for its interest. Under these facts (and the sample provisions quoted above), the 20 percent partner has a choice: it must either purchase the 80 percent partner's interest for $8,000,000 or sell its interest for $2,000,000.

Why Have A Buy/Sell?

A buy/sell is an attractive exit strategy for many real estate professionals who see value in allowing one of the partners to continue the business of the partnership and who think a buy/sell is expeditious and fair.

It is considered *expeditious* because it may not be necessary to involve third parties like appraisers, brokers or third party buyers. It is considered *fair*

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because the partner who wants to end the relationship may do so, but takes the risk of a pricing error. It is sometimes viewed very much like dividing a pie by allowing one person to slice the pie and letting the other person choose the better piece.

In this author's experience, many people:

- do not think much about buy/sells;
- are relatively cavalier about inserting a buy/sell in a deal;
- often fail to negotiate buy/sell provisions thinking that everyone is effectively in the same position, namely on both sides of the deal (not knowing whether they will be a buyer or a seller); and
- assume that a buy/sell is expeditious and fair.

Although it may be possible in theory to construct a joint venture in which the buy/sell will operate in an expeditious and fair manner, that assumption is a dangerous one. Instead, the levels of expeditiousness and fairness in a buy/sell tend to be inversely proportional. Generally one does not get both, as this article will attempt to explain.

Note on Terminology

There may be considerable confusion when researching, writing about or discussing a ''buy/sell.''

In general usage, ''buy/sell'' is a much broader concept than what is discussed in this article. In fact, it may mean virtually any purchase and sale transaction. Indeed, there are cases referring to ''buy/sell agreements'' for the sale of all sorts of property, including real estate, precious metals and securities. Also, in the world of real estate finance, a ''buy/sell agreement'' may mean a three-party agreement among a borrower, construction lender and permanent lender under which the permanent lender agrees to buy (and effectively take out) the construction loan. In addition, in the world of close corporations, the ''buy/sell agreement'' may mean an agreement under which the interest of a retired, deceased or disabled shareholder is purchased by the corporation or the other shareholders.

However, in each of these examples, when the buy/sell comes into play, there is no uncertainty as to who is selling. It is the party who wants to sell the real estate, precious metals or securities, the construction lender, or the shareholder who has retired, died or become disabled. Moreover, the price under these examples is established by agreement (whether by formula, appraisal, fixed amount or otherwise); it is not dictated by one of the parties in the sale.

To further confuse matters, the buy/sell that is the subject of this article goes by many names:

- ''Chinese or Phoenician Option.''
- ''Chinese Wall Clause.''
- ''Cut Throat Provision.''
- ''Dynamite or Candy Bar Method.''
- ''Joint Venture Roulette.''
- ''Put/Call.'' (A ''put'' generally means an option to sell and a ''call'' means an option to buy; when the term ''put/call'' is used in this article, it refers to an agreement where the parties know in advance who will be the seller and who will be the buyer, but where either the seller may exercise the put or the buyer may exercise the call.)
- ''Russian Roulette.''
- ''Shotgun.''
- ''Slice of the Pie Procedure/Clause.''
- ''Solomon's Option'' or ''Solomon's Choice Procedure.''
- ''Texas Draw.''

Consequently, when reading, writing or talking about a buy/sell, caution should be exercised to make sure there is a common understanding of the subject matter.

When Is A Buy/Sell Available?

Blackout. There is typically a blackout period during which the buy/sell is not available. The threat of a buy/sell may be an unnecessary or undesirable distraction at certain times, especially at the inception of the partnership when the partners are trying to establish a working relationship. The blackout is particularly important in development deals where the expertise of the developer during the development period may be key to the success of the project.

Triggers. There are a number of triggers that may give rise to a buy/sell right.

- Deadlocks. One of the most common circumstances in which a buy/sell is made available is a disagreement over certain major decisions.
- Override Rights. A related circumstance in which a buy/sell may be made available is the exercise of an override right (where one partner imposes his decision over the objection of the other). When control is an essential element for the partner with the override right, this may be limited to certain fundamental decisions, such as the acquisition of a new project, which makes the partnership untenable for the other partner.
- Defaults. The partner who is not in default may have the right to trigger the buy/sell in the event of a default by the other partner.
- Failure of Performance Standards Regardless of Faults. The buy/sell may be available in the case of delays, overruns, operating deficits, failure to achieve certain returns or other performance stan-

dards, where it is not required to establish the cause of failure.

- Changes in Ownership or Control. If one partner requires the continued ownership, control and involvement of certain key individuals or entities in the other partner, then a failure to meet that requirement may give rise to a buy/sell right.
- Time. Sometimes simply the passage of time will trigger a buy/sell right, but this is becoming less and less common in this author's experience.

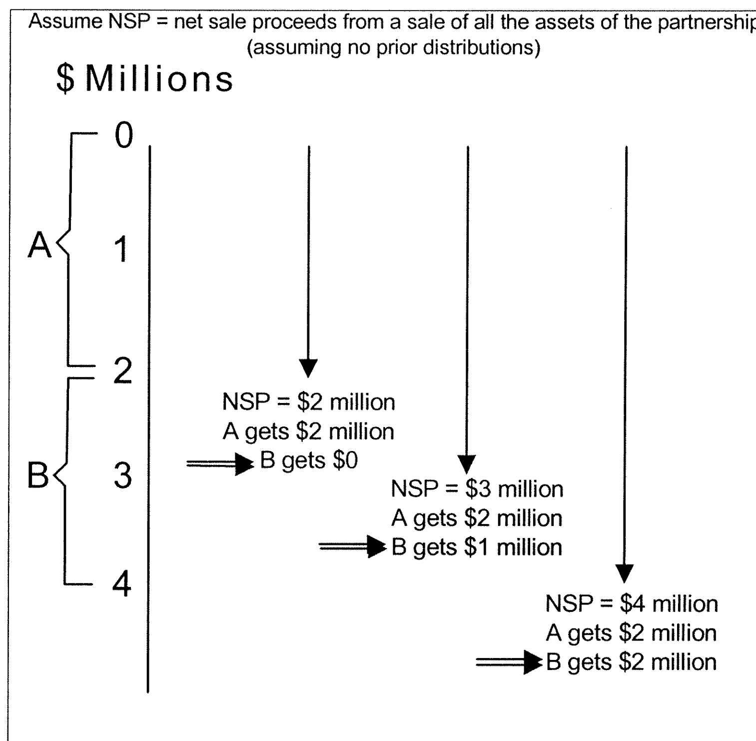
Pricing: What Does The Initiating Partner Price?

When the buy/sell right is available, it is generally exercised by sending a notice establishing the pricing.

Pricing Partnership Interests. In older forms, such as the 1988 provision quoted earlier, pricing is sometimes established by merely stating a price for the initiating partner's interest and then there is an adjustment (often stated as a ''proportionate'' adjustment) if the responding partner's interest is sold instead. This may work in a simple deal that is ''straight up,'' where (as in the example above) everything is proportionate in accordance with a single ratio (in the example, 4:1). However, in many transactions, that is not the case because of preferences, promotes and the like.

Although a simple ''proportionate'' adjustment may not work in deals that are not straight up, one may ask whether it is possible to back into a total asset price (i.e., a price for all the assets of the partnership) from the price of a partner's interest and then find a corresponding price for the other partner's interest. In many cases, it is possible. As long as the price of each partner's interest continues to increase with each increase of the total asset price, there will be one-to-one correspondence between each total asset price and each price for a partner's interest (and therefore, under such circumstances, it should be possible to determine the price of one partner's interest from the price of the other). However, this will not work for all partnerships.

For example, assume that partnership distributions are structured so that one (preferred) partner (who is called ''A'') gets the first two million dollars of distributions and the other (subordinated) partner (who is called ''B'') gets the next two million dollars of distributions. Look at the accompanying chart and see what happens when the net sale proceeds are between $2 million and $4 million (assuming there are no other distributions):



As can be seen, A gets $2 million dollars if the net sale proceeds are anywhere between $2 million dollars and $4 million dollars, and within that range, B may get anything from $0 dollars to $2 million dollars. Thus, if A triggers the buy/sell and names a $2 million dollar price for its interest, B's interest could be anything from $0 dollars to $2 million dollars. It is not known.

Even in what seems to be a straight-up partnership, one might face a similar problem if, for example, one of the partners advances money on behalf of a defaulting partner, and the advance is treated as a loan to the partnership or preferred equity (effectively creating a priority level distribution).

Pricing Assets Of Partnership. Most recent partnership agreements require the triggering partner to name a price for the assets of the partnership. Then the proceeds of a hypothetical sale at the asset price are run through the distribution waterfall to determine the price of the interest of each partner.

May Pricing Be Arbitrary?

How can the buy/sell be made as simple and expeditious as possible? Perhaps a good way to eliminate any second guessing is to permit the buy/sell amount to be determined arbitrarily with no required relationship to the value of the assets of the partnership. Is this a good idea? Maybe it is in a perfect world where the two partners are in exactly the same position. In theory, the adverse consequences of not slicing the pie evenly—not pinpointing the value exactly—may seem to be adequate to ensure at least an attempt to approximate value. But, it does not necessarily work that way in practice. Disparities between the partners' resources, tax positions, expertise, information and other matters may make a sale or a purchase the more likely choice for a particular partner (and the triggering partner may be able to take advantage of that fact) or may make a particular partner reluctant to trigger the buy/sell.

Fairness: Disparities Between Partners

Such disparities between the partners may make the buy/sell unbalanced and may lead to manipulation, especially if a partner is more likely to buy or more likely to sell:

Capital Resources. The most commonly mentioned concern with buy/sells is that a partner with good cash resources may take advantage of a partner with poor cash resources by naming a low-ball buy/sell amount. Indeed, if a particular partner does not have sufficient capital to make a purchase, then it may be forced to sell. There are many possible solutions to the capital issue. The most common solution is to allow sufficient time to obtain financing or other capital before responding to the buy/sell. Other solutions (e.g., seller financing) are frequently rejected (because, for example, they prolong the relationship the buy/sell is designed to end). The bottom line is that a cash strapped partner is usually more likely to sell.

Tax Positions. A partner may have a disincentive to sell if a sale would result in the recognition of significant gain to that partner (e.g., when one of the partners contributed the property to the partnership with substantial built-in gain). Such a partner may be more inclined to purchase rather than to sell.

Access to Information. Although the financial partner may sometimes have greater access to capital, the service partner often has greater access to information. The service partner may be better equipped to pinpoint the value. This disparity may give the service partner an unfair advantage and make the financial partner less inclined to trigger the buy/sell in the first place.

Expertise and Experience. The partnership's assets may have less value without the service partner and therefore less value to the financial partner (due to the difficulty, time and cost of getting an equally qualified developer/operator to achieve the value of the project). Under these circumstances, the service partner may have an advantage and the financial partner may be more likely to be a seller.

Disparate Relationships with Partnership Creditors. Credit enhancements (such as loan guaranties and letters of credit) and other arrangements with partnership creditors (or other third parties) may be provided, and even required, from only one of the partners. This may make it difficult for that partner to sell or for the other partner to buy. Unless there is a way to disentangle and replace such relationships (or provide adequate indemnification), the buy/sell may not prevent meaningful choices.

Diversification Goals. Look at the alternatives under the buy/sell: cashing out of, or doubling-down on, one's investment (without testing the market). This may not be an attractive set of options, especially if a partner entered into the partnership in order to diversify and share risks. Indeed, one of the oddities of the buy/sell as an exit strategy is that it potentially requires a partner to make a bigger investment in order to stop its investment. This may make a partner less inclined to trigger the buy/sell at all.

Differing Economic Obligations. Many partnerships impose substantially different economic obligations on the partners, which may skew things. For example, the partnership agreement might impose a clawback on one partner. Under these circumstances, it is possible that a sale of the partnership's assets at the buy/sell price could result in a subordination of such partner's capital, which, as will be seen later, may lead to strange results.

Differing Economic Interests—Unequal Ownership. What if, as is frequently the case, one partner owns a majority of the partnership and the other partner has only a minority interest? This may lead to different consequences depending on who sells: when the majority partner buys, the price (and any proportionate deposit) may be less burdensome (than when the minority partner buys), so a purchase may be easier for the majority partner; and when the majority partner sells, there may be a reassessment (e.g., in California), an IRC § 708 tax termination, a transfer tax (e.g., in California) or a loan default that might not occur when the minority partner sells, so a sale by a majority partner may leave a mess behind. In this case, the buy/

sell may favor the majority partner and may make the minority partner more inclined to sell.

Differing Economic Interests - Preferences/Subordinations. Even if the partners have roughly equal interests, there may be problems if there are subordinations or preferences. Consider the following example:

First Level:	$2,000,000 to Partner A
Second Level:	$2,000,000 to Partner B
Third Level:	50/50

If the value of the partnership's assets is $3,000,000, then (assuming, for simplicity, that the partnership has no costs or liabilities or prior distributions), the value of A's interest is $2,000,000 and the value of B's interest is $1,000,000. However:

- If A triggers the buy/sell with a $2,000,000 buy/sell amount, then B will not want to sell. The price for B's interest would be zero ($1,000,000 less than it is worth)!
- If B triggers the buy/sell with a $4,000,000 buy/sell amount, then A will not want to buy. The price for B's interest would be $2,000,000 ($1,000,000 more than it is worth)!

In either case, A is likely to sell, and B is likely to buy.

Because A gets nothing in the Second Level, the value of A's interest does not change for buy/sell amounts between $2,000,000 and $4,000,000. Within that range, only the price of B's interest is affected. Whenever this occurs (i.e., when the distributions of the buy/sell amount stop within a distribution level that goes 100 percent to one partner), the partner who is receiving 100 percent of the distributions within the applicable level is more likely to be a buyer and the partner receiving 0 percent of the distributions in that level is more likely to be a seller.

If factors exist that make a partner predisposed to buy rather than sell, or to sell rather than buy, or not to exercise the buy/sell at all, then such partner should consider whether a buy/sell is the appropriate mechanism in the first place. A put/call may make more sense.

Pricing Adjustments

In addition to the inequities mentioned above, there are numerous complications in the buy/sell pricing that may lead to surprises if not addressed, and even then, there may be room for manipulation.

Hypothetical Closing Costs. If the assets of the partnership were actually sold, a number of costs would be incurred before any distributions were made, so that the ultimate distributions to the partners would be less. Should the selling partner get more from a hypothetical sale under a buy/sell than an actual sale of the partnership assets? What are the costs?

- Transfer Taxes.
- Brokerage Fees.
- Title Insurance.
- Escrow Charges.
- Legal Fees.
- Prepayment/Defeasance Costs. (What if there is a lockout? Should it be assumed that they apply? Should one-time transfer fees be used?)

How are the costs to be taken into account?

- Some forms use a fixed percentage discount off the stated buy/sell amount for closing costs (e.g., two or three percent), recognizing that the percentage may vary depending on the jurisdiction; and
- Another possibility is to start with a net number and put the burden on the initiating partner to make the appropriate adjustments in advance. This makes a lot of sense, as long as the initiating partner remembers and takes the time to underwrite accordingly.

Hypothetical Liquidation Costs. What about liquidation costs? If the sale is of all the assets of the partnership, it would most likely dissolve and liquidate. Should the selling partner share in the dissolution costs? To address this point, many partnership agreements say the pricing is based on what the partners receive after a sale of the assets of the partnership for the buy/sell amount and the liquidation of the partnership.

(Be careful with this provision. If the partnership agreement requires liquidation in accordance with capital accounts (which may occur, for example, when there is a tax-exempt partner who is trying to avoid unrelated business taxable income from a leveraged investment), then that is how a hypothetical calculation may work; and the pricing may be different than expected. It is important to consider whether that is necessary or appropriate and, if not, state that the liquidation is not occurring in accordance with capital accounts for purposes of the buy/sell calculation.)

What are the potential liquidation costs?

- Cost of preparing and filing dissolution documents, and final tax returns (which means filing fees, attorneys' fees and accounting fees).
- In addition, there may be remaining actual and contingent liabilities of the partnership?

How are these taken into account?

- It is possible to assume a fixed dollar amount for filing, legal and accounting fees because they may not vary proportionately based on size of deal.
- It is also possible to start with a net number as discussed above. However, this may not work for contingent liabilities. For example, what if there is a $1 million litigation claim where the outcome is not clear? What if the initiating partner deducts

$1 million in calculating the buy/sell amount and the claim turns out to be worthless? What if the initiating partner does not deduct anything on account of the claim and it results in a $1 million judgment? What if the claim is not made until after the buy/sell is triggered?

- To address changes in liabilities, should the partnership agreement allow the partners to restart the buy/sell process with a new buy/sell amount if there are new claims or new facts? For example, if there is a material adverse change in connection with third party liabilities of the partnership (such as a new claim or the discovery of facts that materially affect the valuation of an existing claim), should a partner who may be adversely affected be able to restart the buy/sell process by naming a new buy/sell amount? Will this raise too many issues of its own (e.g., materiality and causation)?
- Finally, the partnership agreement may let the partnership's accountants make the determination (and in particular, value the contingent liabilities).

Prorations. The buy/sell amount may also be adjusted by closing prorations as in a sale of the partnership's assets. For example, if real estate taxes are payable in arrears and there are significant accrued but unpaid real estate taxes that will not be paid until after the buy/sell closing, the selling partner may not bear its share of those real estate taxes (unless there are reserves or prorations). Again, it is also possible to start with a net number, but this may require a lot of work in advance and may create a temptation to manipulate the interim operations of the partnership.

Contributions. How can one account for contributions occurring after the buy/sell is exercised and prior to the buy/sell closing?

- Increasing Buy/Sell Amount. Sometimes the buy/sell amount is increased by interim contributions, on the theory that the assets of the partnership have been increased. Does this always make sense? What if a contribution is for operating deficits? Will such deficits be addressed in the prorations? What about a contribution for a principal payment on project financing? This generally increases the equity but not the value of the assets of the partnership. What about cost overruns? How they are shared?
- Prohibiting Contributions. Some partnership agreements prohibit contributions during the buy/sell period. However, prohibiting contributions may not be fair to the purchasing partner to the extent that the partnership requires capital to operate or protect its assets (e.g., leasing costs for a favorable lease that may not wait until the buy/sell is concluded). Somehow, the purchasing partner needs the ability to capitalize the partnership, whether through preferred contributions, loans or otherwise.

Interim Distributions. How can one account for interim distributions?

- Decreasing Buy/Sell Amount. Sometimes the buy/sell amount is decreased by interim distributions on the theory that the assets of the partnership have been depleted and therefore the value has been reduced. Does this make sense for operating cash flow distributions? What about financing proceed distributions, where there is a corresponding liability so the asset value doesn't change?
- Prohibiting Distributions. Another approach is to prohibit distributions but it may not be an attractive solution to sit on cash (especially while preferred returns and IRR hurdles continue to accrue) and may not be fair to the selling partner unless there is an increase in the buy/sell amount so that it gets its appropriate share of operating cash flow distributions.

Closing Calculation. In any case, a recalculation at closing may be desired to take into account interim events (e.g., the further accrual of any preferred return or IRR hurdle, or a squeezedown) that could affect how the hypothetical distribution would be made.

Sale Of Assets Versus Interest In Partnership: What Is Being Sold?

The buy/sell typically involves the sale of one partner's interest in the partnership to the other partner. However, this is not always the case. Some buy/sell provisions provide that the purchasing partner acquires the partnership's assets from the partnership. Generally, this is not a good idea. Below are six problems one is less likely to encounter in a partnership interest sale and then one problem that may be less likely to appear in a sale of partnership assets.

- Transfer Taxes. Depending on the facts (including the jurisdiction and, in some cases, the size of the selling partner's interest), transfer taxes may be avoided in the case of a sale of a partner's interest.
- Reassessment. Depending on the facts (including the jurisdiction, and, in some cases, whether there will be a change of control), a reassessment may be avoided in the case of a sale of a partner's interest.
- Loss of Title Insurance. The loss of title insurance may be avoided because of applicable law or a Fairway endorsement in the case of a sale of a partner's interest.
- Violation of Financing Restrictions. Depending on the terms of the partnership's loan documents, acceleration of, or default under, the loan may be easier to avoid in some transactions by a sale of the selling partner's interest.
- Loss of Non-Assignable Partnership Rights. The

partnership may have non-assignable contracts, entitlements, permits or other rights.

- Income Taxes. The sale of the partnership's assets may trigger recognition of built-in gain including the portion allocable to the purchaser's interest. If the purchasing partner has a majority interest, the income from the sale may be ordinary income (e.g., to the extent the assets are depreciable).
- Enforceability? On the other hand, the purchase of real estate assets may be more enforceable than a purchase of a partner's interest, because the interest is personal property. (But if the partnership has only two owners so that the buy/sell effectively gives one partner 100 percent indirect ownership of the real estate, should that be treated differently than a direct acquisition of the real estate? Are damages an adequate remedy if the partners have irreconcilable differences?) Moreover, if there is a bankrupt partner, it might be preferable to buy from the partnership. Finally, if the real estate is acquired, the purchasing partner will not be subject to liens or other encumbrances on the seller's partnership interest.

What Happens To The Selling Partner During And After Buy/Sell Process?

Once the partner who is selling has been established, the relationship of the partners changes significantly. What should happen to the selling partner's role in the partnership at that point in time?

Management Rights. Should the selling partner have voting rights? Should the selling partner give up any management or administrative roles? There are no set answers. If the selling partner is a general partner, then after the buy/sell closing, the selling partner's authority to bind the partnership should be cut off by filing statements of dissociation and similar documents.

Liabilities. During the buy/sell process, the selling partner will not want to be obligated to incur liabilities in favor of third parties (e.g., a non-recourse carve-out guaranty). In addition, after the buy/sell closing, the selling partner will want:

- any indemnification by the partnership to continue in its favor (and, if the selling partner is a general partner, to cut off future partnership liabilities to third parties by filing a statement of dissociation or similar documents);
- to be released from liability to the other partners for obligations accruing under the partnership agreement after the closing; and
- to be released from direct liabilities to third parties (including loan guaranties, bond guaranties and the like) and, if that is not possible, to be indemnified by a creditworthy indemnitor.

Taking Into Account Other Contractual Obligations

One should not do a buy/sell in isolation. Instead, it is important to take into account many other matters, including the other contractual obligations of the partners and the partnership.

Loans Among Partnership and Partners. There may be: (x) loans by the selling partner to the purchasing partner or the partnership; (y) loans by the purchasing partner to the selling partner or the partnership; or (z) loans by the partnership to the purchasing partner or the selling partner. The hypothetical sale and distribution may take into account these loans, but the hypothetical proceeds available to the partnership (to the extent it is a borrower) and the hypothetical distributions to each partner (to the extent it is a borrower) may not be sufficient to satisfy these loans. The parties should consider whether these loans should be satisfied at the time of the buy/sell closing.

Service Agreements with the Selling Partner and its Affiliates. The partners may not both want to terminate all service relationships between themselves. The service relationship may not be as complicated as the partnership relationship: it may not involve the same issues (such as how and when to finance or sell) that can make a partnership so difficult. Either partner may be happy to retain a favorable service agreement at the expense of the other. The ongoing fee revenues may be more important to the service provider than the fact that it may be dealing with an unhappy owner. The partners should consider at the outset whether any such service agreement should be terminable upon closing of the buy/sell.

Exclusive/Non-Compete. When should exclusives and non-competes terminate? If the purpose of the buy/sell is to end the relationship, then any further opportunity to participate through an exclusive may no longer make sense. (But what if the buy/sell does not close?) The same logic may not apply for a non-compete, especially in connection with a new project where the non-compete was designed to give the project a chance to establish itself. There may be circumstances in which the parties may need the non-compete even more when they part ways.

Partnership Contracts with Third Parties. Is a buy/sell permitted under the partnership's agreements with third parties? What if the partnership is subject to third party agreements (e.g., a ground lease or loan documents) that do not permit a buy/sell?

Internal Organizational Documents. Does the buy/sell work at all levels of the partnership's ownership structure? Each of the partners should check its internal organizational documents. For example, if one of the partners is a closed-end fund, it may not be able to make capital calls to fund the purchase under a buy/sell after a certain point in time. The parties should consider whether this can be resolved by allowing an

assignment of the right to purchase to an affiliate. A similar problem arises in tiered partnerships when there may not be adequate time to respond in another tier.

Other Terms of Partnership Agreement. What about other exit strategies? Are they consistent? For example, if there is a unilateral right to cause a sale subject to a ROFO/ROFR, will a partner be able to trigger the buy/sell while the unilateral sale right is being exercised?

Conclusion

The perceived benefits of the buy/sell, expeditiousness and fairness, rarely both appear in practice. There are simply too many differences between any two parties; and efforts to accommodate those differences, to make the process fairer, tend to result in a less efficient and less certain process. For example, it may be very expeditious to place no restrictions on the buy/sell amount that may be named by the initiating partner (to avoid second-guessing and fights over pricing); but a partner who is not likely to buy (whether because of a lack of capital, diversification issues, or otherwise) may find it unfair if the other partner is allowed to low-ball.

This author has never seen a buy/sell carried out in accordance with its terms. Perhaps this is due to the disparities, the lack of alignment from being on opposite sides of the table (as buyer and seller), and the fact that the initiating party must be prepared to buy or sell. In any case, this author suspects it is more likely than not that when a buy/sell is triggered, there will be discussions and disagreements and eventually a consensual or judicially-mandated resolution. Of course, the terms of the buy/sell may play an important part in the process and it is better to be armed with thoughtfully crafted provisions than something off the shelf.

When using a buy/sell, do so with caution and only after considering the potential for manipulation and the available alternatives.