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Private Equity

In this issue

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Transaction Insurance: A Strategic Tool for M&A



by **Mark E. Thierfelder, Jonathan C. Kim** and **Victoria A. Rutwind**[1]

The use of insurance in M&A transactions is gaining popularity among deal professionals who are finding this tool increasingly useful to bridge the gap on one of the most fundamental deal issues in any M&A transaction: the potential post-closing erosion of value (either of the consideration received by the seller or the business acquired by the buyer). This article discusses a few of the popular types of transaction insurance available to private equity and strategic buyers and sellers to help get deals done.

Overview

The issue of post-closing erosion of value (i.e., reconciling the seller's desire to protect its sale price and exit cleanly from its investment vs. the buyer's desire to be made whole if the asset it purchases is not what was bargained for), and how buyers and sellers choose to deal with it, manifests itself in various ways throughout the M&A process. As principals and deal professionals know all too well, post-closing contingencies and credit support mechanisms with respect thereto are significant factors that can impact overall purchase price, distinguish a particular bidder in a hotly contested auction, and even be among the final negotiated business points that can make or break a deal. Today, insurance companies provide a variety of insurance options to assist deal professionals and principals in solving for this issue in a transaction. The costs of obtaining these insurance policies depend on various factors, including the scope of items covered, the survival period, and the amount of the deductible and cap. Generally, however, the

typical premium for obtaining a representation and warranty insurance policy is between 2–3.5% of the liability cap under the policy. The costs for other types of insurance policies vary on a case-by-case basis.

Some of the main types of transactional insurance policies available are the following, each of which is discussed in greater detail below:

- Representations and Warranties ("R&W") Insurance;
- Tax Indemnity Insurance; and
- Contingent Liability Insurance.

R&W Insurance

The most common type of transaction insurance is R&W insurance, which can be obtained by either the buyer or seller. For a seller, a seller-side policy is typically used to backstop the seller's indemnification liabilities. By shifting the potential liability to the insurer at a fixed cost to the seller, the seller can ring-fence its exposure to ensure that the price it receives for its asset will not be eroded by post-closing claims for indemnification. In addition, a seller can often use insurance to better market its asset in a sale by either (i) providing greater indemnification coverage to the buyer than the seller would otherwise be willing or able to give (and backstopping the seller's indemnification exposure with a seller-side policy) or (ii) procuring a buyer-side policy (at seller's cost) directly for the buyer's benefit that provides for such added indemnification coverage.

Under a buyer-side policy, the insurance company pays the buyer directly for losses arising out of a breach of a representation or warranty. The policy can be used by the buyer as its sole source of recourse or can be used to supplement the seller's indemnification by providing coverage beyond the survival period and/or cap under the purchase agreement. In addition, a buyer can use an R&W insurance policy to distinguish its bid in a competitive sale process by reducing or even eliminating completely the need for a seller indemnity.

R&W insurance can also afford a buyer coverage in circumstances where indemnification traditionally has either been unavailable or impractical: for example, a buyer of assets out of bankruptcy; a buyer purchasing an asset from a private equity seller that is looking to wind down its fund or that is restricted under its fund documents from having ongoing indemnification liabilities; a buyer of assets from a distressed seller or from a seller group comprised of a large number of stakeholders; or a buyer of a public company in a going-private transaction.

Set forth below are some of the issues a deal professional who is interested in utilizing R&W insurance should consider when going through the process of obtaining and negotiating the terms of an R&W insurance policy.

Non-covered Items. Buyers and sellers should be aware that, for all of their benefits, R&W insurance policies do have certain limitations. For example, in addition to claims for injunctive, equitable or non-monetary relief, an R&W insurance policy will typically *not* cover claims with respect to:

- Purchase price adjustments;
- Losses arising out of breaches of covenants;
- Losses arising out of known issues, or issues stated on disclosure schedules; or
- Losses that fall within a deductible threshold (insurance deductibles are typically 1–2% of the transaction value).[2]

Description of Indemnifiable Losses. The insured should make sure that the indemnifiable losses under the insurance policy match the scope of the expected indemnification. This is particularly true if the seller is the insured, since any discrepancy between the seller's indemnification liability and the insurance coverage will result in dollar-for-dollar exposure to the seller. Particular drafting points to consider in this context are whether the insurance policy and/or seller's indemnification obligations cover losses arising out of a diminution in value or based on pricing or earnings multiples, or consequential, special, indirect, etc. damages; scrape materiality on a consistent basis; and take into account the same types of indemnification adjustments for taxes, insurance proceeds, etc.

Timing. Obtaining insurance is a process that takes time, so parties need to plan ahead. Parties interested in using insurance policies for their deals should get the broker and the insurer involved as soon as possible in the process. Typically, after engaging a broker and entering into non-disclosure agreements, the broker, on behalf of the applicable insured, will submit certain materials (such as the business description of the target (information memo, if available), the most recent draft of the purchase agreement and schedules and the most recent financial statements of the target) to different insurers to obtain their pricing and coverage quotes, which usually are received within 3–4 days. Once an insurer is selected, the insurer will begin its 7–10 business day underwriting process, during which time the selected insurer will conduct its due diligence (which will typically cost approximately $10,000–$25,000, paid upfront). The due diligence investigation will entail the insurer obtaining access to the data room, reviewing transaction materials and conducting diligence calls. During this process, the policy terms will be negotiated with the applicant and its counsel.

Tax Indemnity Insurance

Another type of insurance product that is available is tax indemnity insurance, which is often designed to protect against losses arising from a historical tax position taken by the target. Even if the likelihood of liabilities arising from a particular tax position is remote, parties frequently have difficulty allocating between themselves exposure to such risk because such liabilities could have significant adverse consequences to the business. A tax indemnity policy helps bridge this gap by shifting the risk of loss to the insurer.

Tax indemnity insurance is sometimes also used to protect against losses if a transaction fails to qualify for an intended tax treatment. These policies can minimize or even eliminate liabilities that may arise from a successful challenge to the intended tax treatment of a transaction. In many deals, the tax treatment of the transaction is critical to structuring the deal and deciding whether to go forward, and in the event that a tax opinion or tax ruling is unavailable, a tax indemnity policy may give the deal participants the necessary comfort to proceed.

Contingent Liability Insurance

As previously noted, R&W insurance typically does not cover known exposures or identified contingent liabilities. Identified risks, however, are often the subject of a specific indemnity under purchase agreements, and in many cases present some of the most difficult issues for buyers and sellers to resolve. In response to these issues, many insurers now provide contingent liability insurance that may cover some or all of the exposure to those types of liabilities, subject to agreed-upon deductibles and limitations under the policy. The costs of these policies vary on a case-by-case basis due to the highly fact-specific nature of the risks being insured. Generally, the policies will be available if the risk is quantifiable, and the probability of the risk can be analyzed.

Conclusion

Private equity and strategic buyers and sellers should be aware of all of the tools available to them in the current highly competitive deal market. Transaction insurance is one such tool that, if carefully crafted and strategically used, may just provide the competitive edge that deal professionals are looking for to get deals done. Deal professionals should discuss the possibility of using insurance in their deals with their legal and financial advisors, and insurance brokers, early on in the process to determine whether insurance is right for them in the context of their deal.

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[1] Craig Schioppo, Esquire, a Managing Director with Marsh USA, Inc.'s Private Equity and M&A Services Group, contributed to this article.

[2] Note that the size of the deductible is often the most important element in the cost of an R&W insurance policy.

Mark E. Thierfelder
+1 212 698 3804
mark.thierfelder@dechert.com

Jonathan C. Kim
+1 212 698 3855
jonathan.kim@dechert.com

Victoria A. Rutwind
+1 212 649 8731
victoria.rutwind@dechert.com

Singled Out: The Rise of Single Asset Structures Selected Key Sponsor and Investor Issues


by **Gus Black** and **Christopher Gardner**

The last 24 months have seen a marked increase in the number of co-investment arrangements that use broader PE fund characteristics (such as management fee and carried interest structures), but involve just a single underlying asset.

For both spin out teams and other newly established sponsors, such structures provide a means of establishing a track record for their investment management and advisory businesses on the back of individual assets before embarking on a wider fundraise. For more established sponsors, they provide a way of harnessing capital which, for whatever reason, is reluctant to commit to blind pool investment.

These structures are, like PE funds, essentially relatively sophisticated joint venture-type co-investment arrangements. They can be documented through either a shareholder agreement or limited partnership agreement, depending on the vehicle used for the chosen structure. Such structures can be established in offshore fund jurisdictions such as the Channel Islands; alternatively, an entity incorporated in a double tax treaty jurisdiction such as Luxembourg (effectively making the co-investment structure and the acquisition vehicle one and the same) may be used.

Some of the key benefits when compared to "fuller" fund structures include:

- offering investors an identified asset in which to invest, thereby avoiding 'scope creep' or other investor concerns around how blind pool capital will be deployed;
- a clearer and shorter path for sponsors to obtaining investor commitments;
- an ability opportunistically to acquire individual assets on an accelerated timetable;
- a more streamlined (and cheaper) structure than would be the case for a full fund; and
- an ability to give key management and other stakeholders a direct interest in the acquisition vehicle.

Many sponsors will, of course, have in their mind both an exit strategy for the asset and a long-term relationship with investors. Frequently, the ultimate goal will be to have investors reinvest into a fuller fund structure, whether that is once the fundraising climate has become more friendly, or a track record through successful management of the asset has been established. Indeed, if investors agree, the asset could in due course be contributed to a fuller fund structure as a seed asset.

Sponsors should consider dealing with this exit strategy and the long-term relationship at the outset.

Some of the key issues to be addressed will include:

- how any re-investment into the follow-on fund is to be structured so that it is tax-efficient for investors (who may not want to have to realise a capital gain if they are effectively recommitting and have a dry tax charge to settle); and
- if the single asset is to form a seed asset for the fund, the basis on which it is to be valued when it is transferred into the fund. Existing investors will want to ensure that incoming investors do not get a 'free ride' and incoming investors will not want the asset to have a value attributed to it that is above its fair market value. Sponsors will also not want to get into a situation where they find themselves with a conflict of interests arising out of this valuation, and may wish to have a fairness opinion or other third party valuation commissioned.

Whilst establishing a single asset structure is less costly and time intensive than a full fund structure, there are still a number of issues that need to be considered. These include agreeing with target investors a holding structure that works from a tax and regulatory perspective for all investors, and coming to commercial terms including fee arrangements and investor rights. If a sponsor is likely to be able to identify a series of separate assets, then any cost advantages may diminish as a new structure and documents will likely be required for each repeat asset.

The signs are that the fundraising climate does appear to be getting more sponsor-friendly, but there is likely to be continuing need in the short and medium term for single asset structures. Such structures fill a funding gap by providing an expedited route to capital sources for completing M&A deals that in turn may form the foundation for coming years' PE fund vintages.

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Gus Black
+44 20 7184 7380
gus.black@dechert.com

Christopher Gardner
+44 20 7184 7460
christopher.gardner@dechert.com

Recent Developments in Acquisition Finance

by **Jeffrey M. Katz** and **Scott M. Zimmerman**

In the last several months, there have been some significant legal developments that could impact acquisition finance. This article will survey some of the more notable ones.

In a case with implications for buyers of assets in a bankruptcy court-ordered sale under section 363(b) of the Bankruptcy Code, the Bankruptcy Court for the Southern District of New York recently issued a decision limiting the ability of manufacturers that are debtors in a bankruptcy case to sell assets free and clear of future liabilities.

In *Olson v. Frederico*,[1] Ms. Frederico, a Federal Express employee, was injured when a truck she was driving crashed into a tree. The truck had been designed and manufactured by a predecessor of Olson, which had purchased the assets of the truck manufacturer in a section 363(b) bankruptcy court sale. The sale order had provided that such sale "shall be free and clear of all . . . claims . . . and other interests . . . whether arising prior to or subsequent to the commencement of this chapter 11 case." When Frederico initially sued Olson in state court on a products liability theory, Olson brought an action in the bankruptcy court to prohibit Ms. Frederico's state court action from proceeding, on the basis that her claim was barred by the bankruptcy court's sale order.

The bankruptcy court held that its prior sale order did not bar Frederico's claim against Olson, because Frederico had had no contact with the original manufacturer, and because Frederico could not have reasonably known, and had never been notified, that any such future claim of hers would be barred by the earlier sale order. The bankruptcy court stressed the concerns of practicality and due process, noting that due process in this situation would have required the court to provide notice reasonably calculated to reach relevant parties whose future claims would be barred, and afford them (or their representatives) opportunity to object.

Prospective purchasers of assets of a manufacturer in a bankruptcy sale will need to factor in to both the proposed purchase and any financing thereof the risk of future products liability claims arising after purchase of the assets in question, and may also wish to consider any related insurance issues.

In June, the Court of Appeals for the Seventh Circuit handed down a decision that created a split between it, on the one hand, and the Third and Fifth Circuit Courts of Appeal, on the other, regarding the ability of a debtor in a bankruptcy case to limit credit bidding by its secured creditors in an auction of its assets constituting collateral. In *River Road Hotel Partners, LLC v. Amalgamated Bank*,[2] the debtors filed chapter 11 plans of reorganization that provided for an auction of substantially all of their assets. The bidding procedures motion submitted by the debtors in connection with the sale would have precluded secured creditors from credit bidding their claims in the auction. In so doing, the debtors relied on a Third Circuit decision, *In re Philadelphia Newspapers*,[3] which had previously ruled that the Bankruptcy Code permits auction bidding procedures that prohibit secured creditors from credit bidding their claims, so long as the secured creditors otherwise receive the "indubitable equivalent" of the value of their collateral. Though the Third Circuit did not calculate the "indubitable equivalent" amount in the case it had decided, it noted that the total value received by the secured creditors, including cash, other compensation and additional collateral security, must generate a value that constitutes such "indubitable equivalent."

The Seventh Circuit disagreed and adopted the view of the dissent in *Philadelphia Newspapers*, ruling that the earlier decision was incorrect, and that "the Code does not appear to contain any provisions that recognize an auction sale where credit bidding is unavailable as a legitimate way to dispose of encumbered assets."

Subsequent to the *Philadelphia Newspapers* decision limiting secured creditors' rights to credit bid, many secured lenders responded by seeking to condition any use of cash collateral by the debtor and debtor-in-possession financing on the debtor's agreement to waive in advance any right to pursue an asset sale in the case that would preclude credit bidding. With the *River Road* decision favoring secured lenders and their right to credit bid, secured lenders now face a split among circuit courts on this important issue. The debtors have appealed the *River Road* decision to the United States Supreme Court.

The Bankruptcy Court for the Southern District of New York recently decided a case addressing the scope of certain exceptions to the avoidance powers of a trustee or debtor-in-possession in a bankruptcy case, addressing the avoidability of payments made to selling shareholders in a leveraged buyout transaction.

Section 546(e) of the Bankruptcy Code exempts from fraudulent transfer avoidance any "settlement payments" received on securities. *In re MacMenamin's Grill Ltd.*[4] involved a small leveraged buyout of a bar and restaurant, which was insolvent at the time of the buyout. The trustee sought to avoid the acquisition financing and the payment of the proceeds to the selling shareholders as fraudulent transfers. The selling shareholders and lender moved for summary judgment, asserting that, as "settlement payments" on securities, the same were exempt from avoidance. The court, after reviewing the legislative history and noting recent judicial trends, held that the exemption was intended only for transactions effectuated through securities markets, where avoidance could prove disruptive to the functioning of such markets. The court held therefore that the exemption was not available in the context of the private transaction at issue in the case at hand, which was not effectuated through a securities market, and thus denied the motion for summary judgment.

Shortly after the *MacMenamin's* decision, the U.S. Court of Appeals for the Second Circuit handed down a decision in *In re Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*[5] In that case, Enron had made a draw under its revolving credit facility to fund the paydown of certain of its commercial paper. The trustee in Enron's bankruptcy case sought to recover the repayments made on the commercial paper. The holders of the commercial paper asserted that the repayments were "settlement payments" on securities, exempt from avoidance under the Bankruptcy Code.

The Second Circuit agreed with the commercial paper holders, ruling that the repayments on the commercial paper were non-avoidable "settlement payments." The Second Circuit took a broad view of the "settlement payment" exemption, stating that it can apply to prepayments on and redemptions of, as well as transfers of title to securities. Further, the court noted in a non-binding dictum that "undoing long-settled leveraged buyouts would have a substantial impact on the stability of the financial markets, even though only private securities were involved. . . ." Thus, in holding that the repayments to the commercial paper holders were not subject to avoidance, the court also hinted that its view of the exemption could be broad enough to potentially cover even payments such as those made to the selling shareholders in *MacMenamin's*.

We look forward to providing further updates on these and other matters in upcoming issues. Please feel free to contact us to discuss any of these items further.

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1 *Olson v. Frederico (in re Grumman Olson Indus., Inc.)*, 445 B.R. 243 (Bankr. S.D.N.Y. 2011).

2 *In re River Road Hotel Partners LLC et al.* and *In re RadLAX Gateway Hotel LLC et al.*, 2011 WL 2547615 (7th Cir. 2011), consolidated into a single proceeding.

3 *In re Philadelphia Newspapers, LLC,* 599 F.3d 298 (3d Cir. 2010).

4 *In re MacMenamin's Grill,* 2011 WL 1549056 (Bankr. S.D.N.Y. April 21, 2011).

5 *In re Enron Creditors Recovery Corp., Case No. 09-5122 (C.A. 2, Jun. 28, 2011).*

Jeffrey M. Katz
+1 212 698 3665
jeffrey.katz@dechert.com

Scott M. Zimmerman
+1 212 698 3613
scott.zimmerman@dechert.com

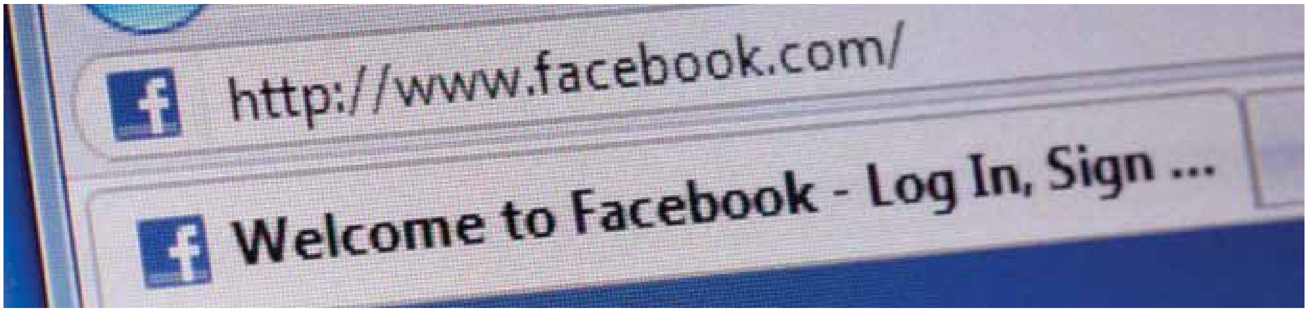
Pre-public Funding of Portfolio Companies: Lessons from Facebook

by **Margaret A. Bancroft** and **Roger Mulvihill**

Recent developments relating to Facebook and its efforts to raise capital privately, while avoiding triggering a requirement to become a SEC public reporting company, have piqued the interest of some private equity funds.

The first development was the much publicized effort by Goldman Sachs to create a fund for investment by its accredited clients in Facebook before a widely expected initial public offering. Because Goldman's private placement generated national media attention that seemed inconsistent with a securities law prohibition on "general solicitations," Goldman limited the offering to foreign investors, although the SEC later disclaimed any role in Goldman's decision (Letter dated April 6 from Commissioner Shapiro).[1] However, in certain situations the Facebook structure would seem to offer some interesting possibilities for non-public portfolio companies who need additional private funding (i.e., are not yet ready for a public offering), but may be constrained by the limited funds left in its sponsor private equity fund. The portfolio company itself may have had a bumpy history, but hold real prospects (as least in the mind of the sponsor). Short of dry powder, the sponsor would probably first look to other funding sources. But, other private equity funds might be reluctant to participate in the necessary amounts and other financing sources (such as banks) might be unavailable. Some of these sponsors may have another potential source of funding based on their extensive contacts with high net worth investors, family offices and other investors who might well be interested in relatively small investments in the portfolio company. A special vehicle fund, ala Facebook, could be an attractive way to "herd" all these investors into one fund controlled by the sponsor and that would subject every investor in the SPV to identical terms. Ideally, this structure would avoid numerous separate negotiations on the terms of the investment, although larger investors in the SPV could still have a lot to say.

There is one other advantage to this approach. A portfolio company that has had some ups and downs



may have had several rounds of financing and a very substantial number of stockholders (including management stockholders) of record. Once a private company has more than 499 stockholders of record (and $10 million or more in assets), it must register with the SEC and provide the quarterly and annual reports mandated by the SEC's periodic reporting system, a definite downer for a private company that is not yet ready in terms of cost and otherwise for a public unveiling. Under current rules, however, the SPV would count as only one stockholder of record, thus not triggering the filing requirement.

But are there legal limitations to this approach? For one thing, all the investors in the SPV must be accredited investors, which after Dodd-Frank means an individual or joint net worth with a spouse of at least $1 million, not counting the primary residence, or $200,000 in annual income ($300,000 with a spouse) for the past two years with a reasonable expectation of reaching the same income level in the current year. This standard would not normally pose too much of an obstacle for a SPV. In addition, the SPV could not have more than one hundred accredited investors or, as an alternative, only qualified purchasers who, if individuals, must have not less than $5 million in investments in order to avoid having to register as an investment company. However, a SPV should permit a substantial fundraising for the portfolio company while permitting the participating investors to make relatively modest investments.

In light of the issue raised by the Goldman offering, where runaway media attention caused Goldman to cancel its offering to U.S. persons, care should be taken to limit a private placement to only those investors who are known to the sponsor and who can be counted on to honor an obligation to keep the offering materials and the fact of the proposed offering confidential. With evidence of rigorous controls, a case could be made to the SEC or to a court that the right approach is to deem the offer private where the sponsor and its associates take meaningful steps to keep the offering out of the press. Speed in closing the offering could also help if it can be shown that the offering was fully subscribed prior to any significant media attention.

While Regulation D does not require that an offering to only accredited investors receive any specific disclosure package, SPV offerings need to meet the requirements of Rule 10b-5 so that a disclosure document in the form of a private placement memorandum is, as a practical matter, prepared. Care would need to be taken to meet the antifraud provisions of the securities laws so that the placement memorandum is a fair description of the portfolio company, although none of these requirements would be unique to normal private placement practice.

A somewhat more challenging question is whether the SPV could in effect be used to avoid forcing the portfolio company to prematurely become a public reporting company, something Facebook has been careful to avoid. An Exchange Act provision requires any domestic issuer that has 500 or more holders of record of a class of equity securities and total assets exceeding $10 million as of the end of the Company's most recent fiscal year to become a full-fledged Exchange Act reporting company within 120 days.

Facebook was careful not to cross that line until after December 31, 2010, because it was not prepared to face up to the reporting requirement prior to April 2012. Although breaching the 499 equity shareholder limit is not a likely occurrence with the vast majority of private equity fund investments, it can be true if the portfolio company has accumulated a large number of stockholders of record through large management holdings (other than through stock options that do not ordinarily count for purposes of the Exchange Act provision) and many rounds of financing, such as follow on investments. It can also be true, as presumable in the case of Facebook, of highly successful companies where there is great interest in the marketplace (even though the company is not yet public) causing employee with shares obtained in the exercise of options to sell to third parties, which can lead to the real possibility that the number of record shareholders rises to 500 or more.

The Exchange Act provision in question that looks to record ownership can lead to unintended results. The SEC itself has recognized this issue by pointing out the anomaly of counting every stockholder of record in a very literal sense under Section 12(g)(1) of the Exchange Act and Rule 12g5-1, so that stock held in street name (which could actually represent thousands of investors in a particular security) only counts as one holder of record. In the same way, the SPV would count as only one holder of record, although there would be a substantial number of actual investors. A SPV set up solely to avoid Rule 12g5-1 would run afoul of SEC anti-circumvision provisions, but there could be other reasons for the SPV, such as the issuers' concern with dealing directly with numerous additional stockholders and the attendant costs, the possibility of creating advantageous voting and control provisions within the SPV, etc. In any event, the anti-circumvention provision under Rule 12g5-1 has been used only "sparingly." Of perhaps more concern is that the SEC has said that it will take another look at the Rule, including the degree to which it permits investment activity without the benefits of the fuller disclosures per the public company Exchange Act reporting requirements would provide.

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1 In a nicely timed article published in the November 2010 issue of *Business Lawyer*, the ABA Committee on Federal Regulation of Securities said that the prohibition against general solicitation found in Regulation D was becoming increasingly unworkable: "In the current environment, it is hard to control faxes, e-mails, and text messaging and, even more, their forwarding. Offerees feed information about private placements to publications that report them." The ABA Committee suggested that absent the involvement of the issuer or, in our case, a fund sponsor — or a person acting on their behalf, the offering should be able to proceed under Regulation D and without registration.

Margaret A. Bancroft
+1 212 698 3590
margaret.bancroft@dechert.com

Roger Mulvihill
+1 212 698 3508
roger.mulvihill@dechert.com

Pay to Play for 2011

by **Edward L. Pittman**

Almost nine months after the effective date of the SEC's pay-to-play rule — Rule 206(4)-5 under the Investment Advisers Act of 1940 — many advisers are first beginning to confront some of the challenges arising from new election cycles. The consequences for making impermissible contributions can be significant. Moreover, in many cases it will not be intuitive to employees of advisers that the political activities they may have engaged in for many years must be carefully considered in light of the new SEC regulation.

The Rule limits the amount of contributions that can be made to a candidate or incumbent who holds an elected office that can influence the selection of the adviser. The influence may be direct, or it may be the result of having the ability to appoint members to the board of a public retirement plan. The restrictions under the Rule apply regardless of whether or not the candidate is successful.

Although not always the case, those candidates most likely to have an influence over the selection of an adviser by virtue of their office are executive positions, such as mayors and governors. In the case of Federal

elections, the office itself, whether Representative, Senator or President — will not be one that has the ability to influence the selection of advisers. Thus, contributions to incumbents are not affected by the SEC's Rule. However, a contribution made to a sitting mayor or governor running for Federal office is subject to the Rule. For example, a contribution to the presidential campaign of Governor Perry of Texas in excess of the limits under the Rule would preclude an adviser from receiving compensation from the Texas Retirement System for two years. In contrast, the same contribution could be made without consequence under the Rule to President Obama's campaign or to other Federal officials seeking the Presidency, and to any former governor running for President.

Questions frequently arise about political volunteer activity. In general, the SEC has stated that the Rule does not prohibit covered associates of an adviser from volunteering or engaging in other political speech in support of a candidate. However, many types of activity on behalf of a candidate, or political action committees ("PACs"), can be considered an impermissible "solicitation" or involve "in kind" contributions and should be carefully considered. Although the SEC has not offered a great deal of guidance on the term "solicitation," activities that may be considered solicitations include direct requests for contributions as well as hosting fundraisers, providing mailing lists of potential contributors, and allowing the covered associates' name to be used in connection with fundraising events or on fundraising literature. Other volunteer-related activity that may be considered a non-cash political contribution by the adviser includes permitting the use of the adviser's office space, personnel or supplies for campaign purposes, as well as reimbursing any expenses that the covered associate may incur in connection with their volunteer work (e.g., travel, meals or lodging).

In addition to the candidates themselves, covered associates may need to exercise care in making contributions to PACs and other organizations that have a political agenda. While the SEC has stated that contributors to independent expenditure committees and broad-based PACs may not be subject to its Rules, it also has indicated that PACs controlled by the adviser or its covered associates, as well as single candidate PACs, are subject to the Rule's limitations. In some cases, the purpose of a political committee may not be clear. In these instances, covered associates should pre-clear the contribution in order to allow the compliance department to conduct some due diligence.

As candidates begin to line up for elections, many covered associates will be confronted with appeals for contributions from friends and neighbors. In most cases, they may be inclined to support a candidate or political organization for reasons having nothing to do with attempting to improperly influence the adviser's selection by a public pension plan. However, regular education and training about the adviser's political activity policies is required to resist impulsive actions. While covered associates need not have a detailed understanding of the Rule, they should have a firm understanding of the adviser's policies — particularly those that may require pre-clearance of contributions. In addition, training should reinforce awareness that employees can bring questions or potential problems to an appropriate contact person.

Edward L. Pittman
+1 202 261 3387
edward.pittman@dechert.com

News from the Group

Upcoming/Recent Seminars and Speaking Engagements

January 24 Dechert will once again be a sponsor of the annual LSE SU Alternative Investments Conference in London. London–based partners **Douglas Getter** and **Gus Black** will participate in a private equity workshop at the conference.

February 3 Dechert will return as a sponsor of the annual Wharton Private Equity & Venture Capital Conference in Philadelphia. **Henry Nassau**, chair of Dechert's global corporate and securities practice, will moderate the Middle Market Private Equity panel.

February 15 **Mark Thierfelder**, chair of Dechert's New York corporate and securities practice, will participate in a DealLawyers.com webinar program titled "Transaction Insurance as a M&A Strategic Tool," where he will discuss why the use of insurance in M&A transactions is gaining popularity, and how it can serve as a tool to bridge the gap on value.

October 20 **David Vaughan**, **Carl de Brito** and **Henry Nassau** participated in a Dechert seminar titled "Private Equity and the SEC: Registration Was Only the Beginning" in our New York office. The panelists provided insight regarding what private equity fund managers should focus on beyond their compliance programs – and how best to position themselves to avoid issues or complications.

To obtain a copy of the related presentation materials, please contact:

Michelle Lappen Vogelhut
+1 212 649 8753
michelle.vogelhut@dechert.com

Private Equity Thought Leadership

Dechert and Preqin co-published a study titled **"Transaction and Monitoring Fees: On the Rebound?"** that examines the effect of the 2008 market and credit crash on the market range of transaction and monitoring fees. The study revealed a notable increase in the mean and median percentage transaction fees across all private equity deal sizes since the recovery began, comparing the 2009–2010 period to the 2005–2008 period. Average monitoring fees have also increased during this period, although these vary more depending on deal size. Dechert conducted similar studies in 2003 and in 2008. Access the complete study at www.dechert.com/petransactionandmonitoringfeestudy. For questions concerning this study, please contact **R. Jeffrey Legath** (+1 215 994 2365; jeffrey.legath@dechert.com) or **Derek M. Winokur** (+1 212 698 3860; derek.winokur@dechert.com).

Our Practice Continues to Expand Worldwide

Charles Malpass will join Dechert's London office as a banking and finance partner in January 2012. He advises national and international clients on structured finance transactions and restructurings.

Bruno Leroy, a tax partner, joined Dechert's Paris office along with a small team of French tax lawyers. He has more than 15 years' experience as a tax consultant advising investment funds, multinational corporations and boards of directors across the spectrum of tax-related matters including financing issues, restructurings, acquisitions, transfer pricing and wealth (patrimonial) tax.

David A. Vaughan, an investment funds partner based in Washington D.C., recently rejoined Dechert after spending two years at the U.S. Securities and Exchange Commission's Division of Investment Management as the senior private fund policy adviser. He reviewed all aspects of legal and regulatory policy related to private funds, including matters related to Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the rules implementing those provisions, the Volcker rule and the European Union Alternative Investment Fund Managers Directive.

About Dechert LLP

With offices throughout the United States, Europe and Asia, Dechert LLP is an international law firm focused on corporate and securities, business restructuring and reorganization, complex litigation and international arbitration, financial services and asset management, intellectual property, labor and employment, real estate finance and tax law.

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