Spring 2013

Editor’s Note

2013 has thus far proven to be a confounding year for M&A practitioners, particularly in the middle market sector. The major stock market indexes continue to trade at all-time highs, which taken together with the continued availability of cheap debt, has led to a return of the mega-buyout. The announcement of the pending transactions involving Dell Inc., HJ Heinz Co., and BMC Software have in effect single-handedly raised the value of sponsor-backed transactions beyond anything we have seen since the credit crisis. However, these mega-buyouts and the associated aggregate transaction value numbers are misleading indicators of the overall pace of M&A activity. Notwithstanding the headline-grabbing nature of the pending sponsor-backed buyouts of Dell, Heinz, and BMC, the total number of deals that were announced in Q1 was the lowest we have seen since 2003. This sentiment was shared by those in attendance at the recent ACG Intergrowth conference in Orlando, where most of the bankers and lenders we spoke with confirmed the sparse Q1 deal activity.

On the bright side there has been an uptick in fundraising – after several years of tempered enthusiasm for private equity, it appears that limited partners are ready to get back in the game. Real estate focused funds seem to be particularly in vogue, with the bulge bracket funds (such as TPG and KKR) launching dedicated real estate vehicles for the first time. Despite the additional level of scrutiny that governmental authorities have placed on private equity fund managers, those managers with strong historical track records continue to find success in getting that next fund raised.

To that end, in this edition of our newsletter we endeavor to address a number of the present issues confronting the private equity market today. In particular, we have focused on the following four topics:

- The SEC’s increased scrutiny on the private equity industry
- The SEC’s broad interpretation of the definition of “security” to encompass debt, which could expose debt traders to insider trading and market manipulation claims
- The implications on private equity funds of the final FATCA regulations recently issued by the IRS
- The DOJ’s recent complaint against Bazaarvoice, Inc.’s acquisition of PowerReviews, Inc., which serves as a cautionary tale for parties contemplating a transaction that does not meet the traditional size and reporting thresholds of the HSR Act

In this Issue:

- Private Equity Funds Face Increased Scrutiny from the SEC .......................... 2
- Debt Traders Beware: the SEC is Watching.................................................. 4
- FATCA .............................................................................................................. 5
- DOJ’s Bazaarvoice Complaint: A Risk to All Transactions Despite HSR Reporting Thresholds........................................... 8
Private Equity Funds Face Increased Scrutiny from the SEC

The SEC has increased its focus on the private equity industry over the last few years. In 2010, the SEC formed the Asset Management Unit in order to better understand and analyze private equity issues and practices. In 2012, the SEC’s Office of Compliance Inspections and Examinations ("OCIE") established an initiative to conduct focused, risk-based examinations of investment advisers to private funds that recently registered with the SEC ("Presence Exams"). While speaking at a private equity conference in January 2013, Bruce Karpati, Chief of the SEC’s Asset Management Unit, noted that the SEC has specific concerns about the risk of fraud in the private equity space due to the difficult fundraising environment, the need for steady private equity returns, conflicting interests between investors and management companies, and a lack of transparency in valuing illiquid assets. Mr. Karpati also predicted that the increased attention being paid to the private equity space will almost certainly lead the SEC’s enforcement division to bring more enforcement actions against private equity fund managers. Moreover, most recently, while speaking at the ABA meeting in April 2013, David Blass, Chief Counsel of the SEC’s Division of Trading and Markets, noted that the SEC also has specific concerns about private equity fund managers engaging in activities that raise broker-dealer issues.

Going forward, investment advisers to private equity funds should prepare for possible Presence Exams (if they have not already had one), and should examine their internal policies and procedures and work to improve areas that may trigger SEC scrutiny. This article summarizes OCIE’s examination priorities for Presence Exams that are applicable to investment advisers, as well as certain other areas of concern for the SEC.

SEC’s Areas of Focus

OCIE Report

On February 21, 2013, OCIE published a report identifying its examination priorities for 2013, some of which are specific to private equity investment advisers. In its report, OCIE identified four market-wide examination priorities that apply to nearly all registrants: (i) enhanced use of quantitative and qualitative tools, tips, and complaints to identify fraud and unethical behavior; (ii) assessment of registrants’ overall risk management and regulatory compliance through meetings with senior management and boards of advisers; (iii) conflicts of interest, including steps registrants have taken to mitigate such conflicts, the sufficiency of disclosure to investors regarding such conflicts, and the overall risk governance policies in place; and (iv) examination of information technology controls, including operational capability, market access, information security, system outage risks, and data integrity compromises.

Additionally, OCIE identified certain areas relevant to private equity investment advisers:

- **Conflicts of Interest: Compensation Arrangements and Allocation Investments Opportunities.** OCIE seeks to identify undisclosed compensation arrangements and the conflicts of interest they present to ensure that such conflicts of interest are fully and clearly disclosed to investors. OCIE also seeks to confirm that advisers have controls in place to monitor conflicts of interest arising from the side-by-side management of incentive-based fee accounts and accounts that do not pay performance-based fees with similar investment objectives, particularly where the same portfolio manager is responsible for the investment decisions for both kinds of accounts.

- **Accuracy of Advertised Performance.** OCIE considers performance advertising to be an inherently high-risk area and will focus on the accuracy of advertised performance, including hypothetical and back-tested performance, the assumptions or methodology utilized, and related disclosures and compliance with record keeping requirements.

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• **Fund Governance.** OCIE will confirm that advisers are making full and accurate disclosures to fund boards and that fund directors are conducting adequate reviews of such information in connection with the governance of funds.

• **Payments for Distribution in Guise.** OCIE will assess whether payments made by funds to distributors and intermediaries are made in compliance with regulations, or whether they are instead payments for distribution and preferential treatment. OCIE will also examine the adequacy of disclosure made to boards about these payments and board oversight of the same.

Advisers should also note that Presence Exams may be conducted on items not listed in the OCIE report. For example, on March 19, 2013, the Wall Street Journal reported that the SEC will be scrutinizing fees and expenses charged to investors as part of the Presence Exams to ensure advisers are acting in the best interests of investors.

“an initiative to conduct focused, risk-based examinations of investment advisers to private funds that recently registered with the SEC”

**Custody Rule Compliance**

Another area of concern not specifically addressed in OCIE’s report relates to the compliance requirements of the Advisers Act Rule 204(4)-2 (the “Custody Rule”), which is intended to ensure the safety of client assets. On March 4, 2013, OCIE issued a risk alert notifying investment advisers to private funds of significant deficiencies uncovered during Presence Exams involving compliance with the Custody Rule requirements in the following areas: (i) the failure of advisers to recognize they have custody over client assets and thus the failure to comply with the Custody Rule requirements; (ii) non-compliance with the surprise examination requirement, either because the examinations were conducted at the same time each year rather than on a surprise basis, or because advisers neglected to file a Form ADV-E within 120 days after the surprise examination; (iii) non-compliance with the qualified custodian requirement where advisers held client assets rather than arranging for a custodian to hold the assets, or where advisers did not have a reasonable basis to believe the qualified custodian was sending quarterly account statements to the client; and (iv) non-compliance with the audit approach requirements where the accountant was not independent, or audited financial statements were not prepared in accordance with GAAP or timely sent to investors.

**Broker Dealer Issues**

In his speech to the ABA, Mr. Blass highlighted the SEC’s concern related to private equity fund managers’ engagement in broker-dealer activities. In particular, the SEC is concerned primarily with two activities: (i) private fund managers or employees marketing interests in a fund or soliciting or negotiating transactions with respect to fund interests, particularly where there is compensation that depends on the outcome or size of the securities transaction, and (ii) private equity managers taking transaction fees in connection with their advisory services for the sale and purchase of portfolio companies because such fees can be viewed as compensation for negotiating securities transactions.

**Implications for Private Equity Fund Managers**

Newly registered investment advisers should consider OCIE’s priorities and other SEC concerns when preparing for SEC examinations. In doing so, we recommend the following:

• Test compliance policies and procedures with OCIE’s priorities in mind.

• Ensure policies are in place that are functional and that consistently and accurately identify potential conflicts of interest (Mr. Karpati noted that using advisory boards and ensuring that CCOs and CFOs are included in important decisions are effective ways to address potential conflicts of interest).

• Review disclosures made to investors for consistency and transparency, and address as appropriate.
• Review activities and compensation arrangements related to the sale of interests in a fund and the purchase and/or sale of portfolio companies to determine whether they raise broker-dealer concerns.

Because examinations may be conducted on issues not listed in the report, it is imperative for advisers to be prepared for examination inquiries, be flexible enough to take necessary corrective steps, and be cooperative with the examination staff. As always, we are available to assist you with the preemptive review of your firm’s policies and programs and any other initiatives that your firm would like to undertake in anticipation of SEC examinations.

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Debt Traders Beware: the SEC is Watching

There is a vibrant market in selling all forms of debt, including bank debt, bond debt, and even trade claims. Many believe that the trading of debt, particularly among sophisticated financial institutions that enter into “big boy agreements,” where both parties acknowledge that the other party may have access to information that the other party does not possess, is free from claims of insider trading. However, the SEC’s broad interpretation of “security” to encompass debt claims exposes debt traders to insider trading and market manipulation claims. In addition, various equitable remedies have been employed in bankruptcy cases to penalize debt trading by those possessing material nonpublic information.

Bank Debt As A “Security”

Market participants often assume that debt instruments are not “securities” within the meaning of the federal securities laws, and therefore trading in such instruments is not subject to securities regulation. While most recent cases agree with this assumption, the SEC has not conceded the issue. Indeed, the SEC’s interpretation of what constitutes a security remains boundless, claiming that “Section 10(b) ‘does not confine its coverage to deception of a purchaser or seller of securities . . . .'” Rather, it also includes any deception related to such sales.

If bank debt is a “security,” traders must comply with section 10(b) of the Exchange Act, which prohibits “any manipulative or deceptive device or contrivance” in connection with the “purchase or sale of any security,” and Rule 10b-5, which forbids traders from using a “device, scheme or artifice” to defraud, such as insider trading.

The misappropriation theory of insider trading has been adopted by the Supreme Court to apply to “outsiders” who are fiduciaries in possession of material nonpublic information. Specifically, application of this theory prohibits trading on the basis of material nonpublic information by a corporate “outsider” in breach of a duty owed to the information’s source. Thus, holders of bank debt who participate in confidential discussions with a borrower may violate insider trading laws if they engage in trades using material nonpublic information.

“exposes debt traders to insider trading and market manipulation claims”

To counter insider trading claims, parties used “big boy” letters containing acknowledgements that each party relied solely on its own investigations, while acknowledging that the other party may possess material nonpublic information. However, in a recent action against Barclays Bank, the SEC refused to consider these letters as a valid defense to insider trading charges because the defendants did not disclose the material nonpublic information to their trading counterparties. Thus, even the use of these “big boy” letters may not insulate debt traders from insider trading liability.

Other Insider Trading Liabilities

In addition to SEC claims for insider trading violations, insider trading claims could be made under applicable state laws, regardless of whether the debt instrument is considered to be a security. Parties may also have causes of action for breach of contract, breach of fiduciary duty, or misrepresentation based on confidentiality or nondisclosure agreements. And,
significantly, trading of debt claims based on material nonpublic information in bankruptcy cases may result in the equitable disallowance of those claims. Such remedies could, in addition to equitable disallowance, include equitable subordination or the elimination of the right to vote (often referred to as the designation of votes) on a plan of reorganization.

Protection From Liability

Holders of debt in bankruptcy cases are not without some methods to insulate themselves from liability. Methods of protection against insider trading allegations include constructing “ethical walls” pursuant to Exchange Act Rule 14e-3 and obtaining so-called “trading orders,” which are orders of the bankruptcy court allowing trading of debt if the financial institution has set up an ethical information wall between the traders and the analysts receiving the material nonpublic information. In addition, the debt holder may potentially share material nonpublic information to the buyer if the buyer signs the same type of confidentiality agreement the debt holder was required to sign, known in the trade as agreeing to become “restricted” and therefore not trade to anyone who is “unrestricted,” although there is some speculation that any such agreement must be approved by the bankruptcy court in order to be truly effective.

Recent Actions Against Debt Traders

An example of an action against a bank for insider trading violations is found in the Galey & Lord bankruptcy case. Barclays was sued by a creditors committee and the U.S. Trustee for trading in bank debt based on confidential information it obtained while serving on the creditors’ committee. Barclays settled with the committee and Trustee without admitting liability, and was subsequently sued by the SEC, where Barclays reportedly paid a significant sum as part of a settlement.

More recently, in the bankruptcy case of In re Washington Mutual, Inc., the Delaware bankruptcy court granted a committee of equity holders standing to pursue their claims for equitable disallowance against four hedge funds holding bond debt for alleged insider trading violations. The bankruptcy court noted there was a colorable claim that the hedge funds owed a fiduciary duty to the classes in which they had intentionally acquired a blocking position. The bankruptcy court also interpreted the meaning of material nonpublic information broadly, finding that the occurrence of the settlement discussions themselves and the positions taken in those discussions constituted material nonpublic information. Moreover, the bankruptcy court found that the debtor’s public disclosure of material nonpublic information by filing 8-Ks at various times to “cleanse” debt holders and allow for trading among those that it had previously provided information to on a confidential basis was not a sufficient remedy and not one that had been pre-approved by the bankruptcy court. Although after a settlement agreement was reached between equity holders and debt holders the bankruptcy court sought to limit the precedential value of its ruling, the ruling has changed the landscape with respect to debtors that wish to share material non-public information with their creditors in the hopes of reaching a consensual plan of reorganization. Moreover, the bankruptcy court’s rule has dramatically changed the willingness of funds to engage in reorganization discussions with debtors, particularly those funds that insist on holding only unrestricted debt so as to maintain their ability to quickly trade that debt.

Conclusion

Holders of bond debt, bank debt, and trade claims need to pay close attention to compliance with securities trading laws and should be wary of other remedies when trading.

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FATCA

Introduction

On January 17, 2013, the Internal Revenue Service (“IRS”) issued the long awaited final regulations under the Foreign Account Tax Compliance Act contained in Sections 1471-1474 of the Internal Revenue Code of 1986, as amended (“FATCA”). The U.S. has also entered into several intergovernmental agreements governing FATCA (“IGAs”) with foreign sovereigns to provide
U.S. tax authorities the tools to identify U.S. persons who fail to report their non-U.S. assets and income.

FATCA Background

FATCA generally provides that foreign financial institutions (called “FFIs”) (which generally include non-U.S. private equity funds) need to become participating FFIs (“PFFIs”) in order to avoid U.S. withholding tax of 30% on certain income. A FFI becomes a PFFI by entering into an agreement with the Treasury.

Core Elements of FATCA Final Regulations

The final U.S. Treasury regulations under FATCA are over five hundred pages and include extremely detailed rules to implement the FATCA statute. Given the breadth of the regulations, a detailed analysis is beyond the scope of this article. However, these regulations include several highlights for private equity funds.

- Any foreign entity that primarily engages in trading, portfolio management, investing, administering, or managing financial assets or money on behalf of other persons, regardless of whether the entity has custody over financial assets, can be classified as a FFI. As a result, a non-U.S. fund manager is considered a FFI. In contrast, certain family offices and personal investment corporations would not be expected to constitute a FFI.

- Funds that target primarily non-U.S. investors and comply with certain other requirements (i.e., “restricted funds”) will generally not be required to enter into FFI agreements.

- Certain fund managers may enter into agreements with, and report to, the IRS for their FFIs and comply on an aggregate basis for the entities they control or “sponsor.”

- Non-U.S. holding companies or alternative investment vehicles may be FFIs, even where they only hold shares in operating portfolio companies.

- The final Regulations suggest (although it is not entirely clear) that foreign investment advisors who lack the discretion to invest funds and merely provide investment advice may still be considered a FFI. However, further guidance is needed on this point.

- Foreign governments, pension plans established by foreign governments, and international organizations are generally exempt from FATCA withholding, so long as they are not engaged in commercial activity that relates to the payments or accounts in question.

- Non-U.S. fund investors and non-U.S. portfolio companies may be subject to withholding even though they are exempt from entering into FFI agreements.

- Certain securities that a fund has invested in may be exempt from FATCA under the grandfather rule. For example, revolvers with fixed terms (e.g., a maturity date) and swaps subject to a binding legal agreement (and any collateral posted to secure those swaps) issued prior to January 1, 2014 are considered grandfathered obligations (so long as they are not significantly modified after 2013).

"Funds should keep abreast of the availability of IGAs in [their] jurisdictions"

Model IGAs

The U.S. government has signed several IGAs with other governmental entities regarding the disclosure of FATCA information. The U.S. government expects to enter into several more of these agreements imminently, including an IGA with the Cayman Islands.

The IGAs follow two models ("Model 1" and "Model 2"). Countries with IGAs that have followed the Model 1 form include the United Kingdom and Mexico. The Cayman Islands has announced that it will follow a Model 1 form. Switzerland has executed a Model 2 IGA, and Japan has announced its intent to adopt a similar approach.
Basics of a Model 1 IGA

The basics of a Model 1 IGA are as follows:

• FFIs within these jurisdictions report FATCA information to their home country revenue authority, which will then forward the information to the IRS. Local registration requirements may apply.

• Consent of account holders is not required because information is automatically reported to the IRS by the home country.

• FFIs within these jurisdictions do not need to enter into a FFI Agreement, but would still need to perform certain diligence procedures to identify U.S. accounts and report information regarding such accounts to their government.

• The non-U.S. jurisdiction will apply its domestic law (including applicable penalties) to address non-compliance with the IGA. If the U.S. identifies significant non-compliance by a FFI under the IGA and such non-compliance is not resolved within 18 months, the FFI will be identified by the IRS as a non-PFFI and U.S. FATCA withholding will apply.

Basics of a Model 2 IGA

The basics of a Model 2 IGA are as follows:

• FFIs within these jurisdictions will need to register with the IRS, enter into and comply with the requirements of a FFI agreement, and report FATCA information directly to the IRS.

• There will be supplemental reporting under an applicable tax treaty or tax information exchange agreement between the U.S. and the foreign sovereign with respect to persons who fail to report, so-called “recalcitrant” account holders and non-PFFIs.

• FFIs within a Model 2 jurisdiction will need to request certain information regarding the non-PFFIs and the recalcitrant U.S. account holders (such as U.S. taxpayer identification numbers) and obtain consent from the account holders in order to report the information to the IRS.

• FFIs within these jurisdictions must inform U.S. account holders (and FFIs that are not PFFIs) that, if consent is not obtained, aggregate information with respect to such accounts will be reported to the IRS and the IRS may subsequently request specific information about the accounts; in such cases, the FFI will be required to forward specific information to its country of residence for the exchange of such information with the IRS.

• If the U.S. identifies significant non-compliance by a FFI under its FFI Agreement or the IGA and such non-compliance is not resolved within 12 months, the FFI will be identified by the IRS as a non-PFFI and U.S. FATCA withholding will apply.

Some Remaining Questions/Issues

Many questions regarding the FATCA regime remain. A few of the FATCA related issues that could relate to private equity funds include:

• Additional clarity is needed regarding whether a purchaser of a fund interest from a non-FATCA compliant fund owner is required to withhold on the gross proceeds of such a sale.

• The IRS has not formulated certain definitions regarding “passthru payments” that will affect how payments to, or for the benefit of, blockers will be treated under FATCA.

• Further guidance is required to determine how information is shared when a fund and its fund manager are organized in different jurisdictions. An IRS representative has stated publicly that, where a fund and its fund manager are organized in different jurisdictions, information would not need to be disclosed twice and the fund manager/sponsor would likely control the disclosure of...
FATCA information. However, further guidance is required on this point.

Conclusion

FATCA can have broad implications for all private equity funds and not only at the fund level, but rather throughout the investment structure of a fund, from fund investment vehicles to portfolio companies. Funds should keep abreast of the availability of IGAs in the jurisdictions in which they are organized, invest, or do business. Private equity funds (both U.S. and non-U.S.) may obtain some relief from the FATCA compliance burden where the relevant fund vehicle is located in a Model 1 country, as the expense of complying with information requests and due diligence procedures will likely fall more heavily on the Model 1 non-U.S. government, as opposed to the FFI. The prompt attention of both U.S. and non-U.S. funds is prudent in order to promptly formulate a comprehensive approach to FATCA compliance.

IRS Circular 230 Disclosure

To ensure compliance with the requirements imposed by the IRS in Circular 230, we note that any tax advice contained in this article is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, of 1986, as amended, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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DOJ’s Bazaarvoice Complaint:
A Risk to All Transactions Despite HSR Reporting Thresholds

A recent complaint filed by the Department of Justice (“DOJ”) challenging the acquisition of PowerReviews, Inc. by Bazaarvoice, Inc. should serve as a cautionary tale for all parties contemplating a transaction, regardless of the size of the transaction and the reporting thresholds set in the Hart-Scott-Rodino Antitrust Improvements Act (“HSR”).

United States v. Bazaarvoice

On January 10, 2013, the DOJ filed a civil antitrust lawsuit against Bazaarvoice, a social media marketing company. The lawsuit challenges Bazaarvoice’s acquisition of its competitor, PowerReviews, which supplies product ratings and reviews platforms, as an anticompetitive transaction under Section 7 of the Clayton Act. Bazaarvoice did not report the June 2012 transaction to the government because the transaction did not satisfy HSR reporting thresholds.

The DOJ’s lawsuit alleges that the transaction substantially reduced competition in the ratings and reviews platform industry in the U.S., raising prices and reducing innovation. The DOJ seeks to divest Bazaarvoice of sufficient assets to create another competitive business to replace PowerReviews in the market for social media. Bazaarvoice claims that it investigated the social media market extensively before entering into the transaction, and found that the relevant market is bigger and more varied than the DOJ assumes and could therefore sustain the acquisition. The trial in this case has been scheduled for September 2013.

4 Complaint at 111 130, 32-41; 11 63(b), Bazaarvoice, Inc., supra note 1.
Merger Reporting Requirements Under the Clayton Act

Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly.” HSR amended the Clayton Act in 1976 and requires all persons contemplating certain mergers or acquisitions that meet or exceed certain thresholds to file notifications with the Federal Trade Commission (“FTC”) and the DOJ. Specifically, the government must be notified of any pending transaction where the parties meet the “size-of-person” test and the transaction itself meets the “size of transaction” test, if no exemptions are applicable. The thresholds for the tests are adjusted annually, based on changes to the gross national product.

Effective February 11, 2013, the “size of transaction” threshold was increased to $70.9 million. Thus, except in very unique circumstances, any transactions valued below $70.9 million need not be reported to the government. For transactions between $70.9 million and $283.6 million, the “size of person” test further determines whether a filing need be made. For an HSR filing to be required in this range, one party to the transaction must have annual net sales or total assets of at least $141.8 million and another party must have annual net sales or total assets of at least $14.2 million (note that PowerReviews’ revenues were below those levels). If the transaction is valued above $283.6 million, there is no “size of person” test, and it must be reported to the government before closing unless an exemption applies.

Practical Implications

The DOJ’s recent lawsuit against Bazaarvoice demonstrates a risk that should be considered by those seeking to enter transactions below the reporting thresholds required by HSR. HSR is mainly a logistical statute designed to facilitate review of larger transactions prior to consummation. The DOJ and the FTC have recently confirmed that below-threshold transactions may be scrutinized as a matter of policy.

There are other recent examples of transactions falling below the HSR thresholds that are being challenged. In 2009, Election Systems & Software acquired Premier Election Services at a transaction valued at $5 million. The DOJ filed suit later that same year, claiming that the deal combined the two largest companies that tallied votes in U.S. elections, thereby substantially reducing competition. In 2010, Election Systems & Software was ordered to divest the majority of the assets of the acquisition.

The FTC has also challenged non-HSR reportable transactions in the last few years, particularly in the area of healthcare. In 2010, ProMedica Health Systems, Inc. purchased St. Luke’s Hospital in a transaction


that fell below HSR reporting thresholds. In 2011, the FTC challenged the transaction, alleging that the merger created a company with a disproportionate market share. In March 2012, the FTC held that the merger violated the Clayton Act and ordered ProMedica to divest the hospital.15

Seeking out government scrutiny of a proposed transaction that is not HSR-reportable seems counterintuitive, and we are by no means suggesting it as a blanket approach.


Firm Overview

Winston & Strawn LLP is a full-service, international law firm with offices in North America, Europe and Asia. The firm’s depth and geographic reach enable it to manage virtually every type of business related legal issue. Winston & Strawn serves the needs of enterprises of all types and sizes, in both the private and the public sector.

Private Equity Practice

Winston & Strawn’s Private Equity Team provides strategic advice and legal counsel to private equity, distressed and venture capital funds, hedge funds, portfolio companies, and institutional investors. We focus on middle market transactions, understand the dynamics of deals in this space, and have a firm grasp on where the market is at any point in time.

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