Private Equity Report

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"Yes, I do make things, son. I make things called deals."

Private Equity Fund Restructurings: When End-of-Term Isn't the End

Over $200 billion in aggregate value is currently held in portfolios of private equity funds that were raised over 10 years ago. How funds should approach these end-of-fund-term situations has become a hot topic for the industry, with fund restructurings emerging as one potential solution. Based on our experience and discussions with other market participants, we expect a significant increase in the number of these transactions.

Executed properly, a fund restructuring can provide existing investors seeking liquidity with a more attractive valuation than would be available to them on the traditional secondary sale market, while offering interested investors the opportunity to continue to benefit from the potential upside in the portfolio and properly aligning the interests of sponsors and investors. But potential landmines abound. A poorly implemented process can result in a failed transaction, significant expenses, angry investors and regulatory scrutiny. Market practice for fund restructurings is still developing, in part because the

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nature of a fund restructuring does not lend itself to a one-size-fits-all approach. A great deal of creativity, consideration and careful analysis is essential to achieving optimal results.

What is a Fund Restructuring?

A fund restructuring is a transaction in which new money investors agree to make a significant cash investment to provide a liquidity opportunity to the existing investors in a fund that is approaching the end of its term. The cash is provided to a new fund vehicle, managed by the existing sponsor, that acquires substantially all of the portfolio from the existing fund. Investors in the existing fund are generally given the option either to cash out or roll their interest into the new fund. The terms of the new fund are designed to provide more time for the sponsor to manage the portfolio and to align the sponsor's interests more closely with those of the investors going forward.

Why are Fund Restructurings Becoming Increasingly Popular?

When a fund has reached the end of its term and still holds a significant portfolio, the opinions of the existing investors (and the sponsor) may differ as to how the portfolio should be managed. Some investors may prefer a short-term liquidation strategy with the goal of near-term distributions and dissolution of the fund. Other investors may believe a longer-term approach, possibly with additional follow-on investments, is a better course for maximizing value.

"Over $200 billion in aggregate value is currently held in portfolios of private equity funds that were raised over 10 years ago. How funds should approach these end-of-fund-term situations has become a hot topic for the industry...."

In addition, the sponsor's economic incentives—including the calculation of management fees and whether carried interest is achievable—may no longer provide effective alignment of interest between the sponsor and the investors. A fund restructuring provides a solution for each group of investors and can also re-align the economic incentives of the sponsor to promote the maximization of value of the portfolio.

The substantial increase in fund restructurings is being driven by several phenomena, including:

- sophisticated secondary investors with substantial amounts of capital looking for attractive deals;
- funds raised during boom times that are now (or will soon be) over 10 years old with billions of dollars in value remaining in their portfolios; and
- the difficulty faced by some sponsors in raising new funds.

When to Consider a Fund Restructuring

Not all funds at the end of their terms are well-suited to a fund restructuring. If the desire for liquidity by certain investors can be addressed through one-off limited partner transfers and the wind down of the portfolio can be achieved with ordinary course term extensions, a fund restructuring may not be necessary. It is when traditional remedies are not sufficient to address systemic issues relating to the fund that a restructuring may be worth exploring. Even in those cases, sponsors should examine a number of threshold issues prior to embarking on a restructuring transaction.

The Portfolio. The portfolio should be large enough to attract the interest of secondary investors. Secondary investors will actively diligence the portfolio and must believe in the potential for long-term value creation. A portfolio with a clear path to liquidity may not be appropriate for a restructuring transaction, as existing investors may prefer that the sponsor pursue a short-term liquidation rather than seeking to restructure.

The Investors. The existing investors will need to be convinced that a fund restructuring presents an effective solution to their concerns. Because of the potential conflicts of interest

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Incident Response Plans for Private Equity Firms: Build, Test, Update

"It appears U.S. firms are reacting slowly to the growing threat of cyber attacks, despite the very real business risks and despite guidance from the SEC that failure to mitigate these threats through policies and procedures could be deemed a violation of [U.S. securities laws]."

Despite the growing data security threats facing private equity firms, many firms remain underprepared to respond to evidence of a data breach. In a recent survey of almost 100 U.S. private equity firms, 66% reported they have only a "partially implemented" cybersecurity program and 10% said they have no plan in place or have not implemented the plan in any way. It appears U.S. firms are reacting slowly to the growing threat of cyber attacks, despite the very real business risks and despite guidance from the SEC that failure to mitigate these threats through policies and procedures could be deemed a violation of the U.S. Investment Advisers Act of 1940 and the U.S. Investment Company Act of 1940.[1]

In the Fall 2015 issue of *The Debevoise & Plimpton Private Equity Report*, we provided guidance on steps private equity firms can take to protect themselves and their portfolio companies from cyber threats.[2] Among those steps are identifying and locating where the firm has vulnerable assets, making careful consideration of third-party vendors granted access to firm systems, and developing written procedures to prepare for a potential incident. In this issue, we discuss how firms can develop an incident response plan ("IRP") for responding to a cyber-incident, including the structure of the plan, how to test the plan, and the importance of regularly updating the plan based on emerging threats.

Structure of the IRP

No "one size fits all" plan can be used as a private equity firm's IRP, though characteristics similar to all IRPs can help guide the development of the plan. What are those characteristics? How do you develop an IRP that is appropriate for your firm?

Identify Potential Incidents. Different kinds of incidents require different responses. In beginning to develop your IRP, you should consider the types of incidents that could affect your firm and its funds in order to ensure that appropriate responses are formulated. Cybersecurity incidents that disrupt business operations may well merit very different responses than data breaches in which personal health or financial information is exposed.

Create an Incident Response Team. An IRP sets out who will respond to an incident. For many firms, it will make sense to assemble a small, standing group that constitutes a core incident response team ("IRT"). Depending on the nature of the incident, employees from various different functions might

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1. *See* "SEC Issues Cybersecurity Guidance for Registered Investment Advisers and Funds," Debevoise & Plimpton Client Update, May 7, 2015, http://www.debevoise.com/insights/publications/2015/05/sec-issues-cybersecurity-guidance.

2. *See* "Mitigating Cyber Threats to Private Equity Firms and Their Portfolio Companies," *The Debevoise & Plimpton Private Equity Report*, Fall 2015, http://privateequityreport.debevoise.com/the-private-equity-report-fall-2015-vol-15-no-2/mitigating-cyber-threats-to-private-equity-firms.

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be included in the response to that incident, and can be added to the core IRT on an as-needed basis. For example, you may consider adding particular subject matter experts within the firm whose inclusion on the IRT is logical given the nature of the breach, *e.g.*, someone from investor relations to respond to a phony communication to investors; someone from accounting to help resolve a funds transfer incident; a human resources professional for an insider breach; a deal team member when material nonpublic information on a pending transaction has been exposed; or the employee responsible for a vendor relationship, should a breach occur involving such a vendor (*e.g.*, a vendor with access to the firm's network or that stores critical firm data).

Identifying your outside service providers in advance of an incident also can help round out the appropriate membership of an IRT. We recommend that you consider adding to the IRT three outside service providers: an external cyber-forensics expert who will assist in the technical aspects of the investigation; outside counsel to advise on a range of issues from consulting with law enforcement and regulators to breach notification laws; and a PR firm that can help message the response to an incident. By establishing these relationships in advance of an incident (and getting the engagement paperwork in order), you will have the time to select advisors that are the best fit for your firm and you will almost certainly increase your ability to respond more quickly to a cybersecurity event when it occurs. An added benefit to engaging service providers early, in times of peace, may be that they will come on-site to meet your core IRT and become familiar with your systems before an event. This advanced knowledge can help pave the way for a smooth breach response.

Specify Incident Response Tasks and Responsibilities. A firm should use the IRP to define the relevant tasks to be completed by the IRT and those persons who are responsible for each of those tasks. Many of the tasks likely will center on the investigation of the cyber-incident itself and setting the schedule for updates to be delivered to senior management at the firm. Other tasks include breach notification to potentially affected individuals and to law enforcement; these are among the tasks that, if handled properly, are more likely to insure that your firm responds successfully to a breach.

> "Even the best IRP may prove less useful if not pressure-tested before an actual incident occurs."

Testing the IRP

Even the best IRP may prove less useful if not pressure-tested before an actual incident occurs. Rather than waiting for a potential incident to test whether and how efficiently the IRP works, firms should consider running "tabletop" simulations of an incident response. These simulations typically present several scenarios to members of the core IRT (and, if feasible, extended members of the team, including outside service providers) and ask the team members how they would respond to each scenario. Participants in the tests may be asked to consider not just the facts potentially signaling a breach, but how they would react upon learning of the breach at different times and places. For example, a team member might be asked how the plan should be executed if news of a potential incident breaks when IRT members are away on business or on vacation, on the eve of a deal or fund closing, or just prior to an advisory committee or annual investor meeting.

Keeping the IRP Current

An IRP is not a static document. Any response to an incident will provide lessons on the strength of the IRP. As you begin to execute the plan, whether in response to testing or actual incidents, the plan can be modified in light of the lessons learned. Responsibility for particular tasks may need to change, new tasks may be found necessary to respond effectively to a breach, and

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A "Liter" Europe

"Deal statistics suggest that 2015 was the year in which covenant-lite become a significant feature on the European leveraged loan landscape...."

The European leveraged loans market has traditionally required a borrower group to comply with three maintenance covenants—interest cover, leverage and cashflow cover—and these covenants generally are tested quarterly. These three covenants have nearly always been coupled with annual capital expenditure limitations. In recent years, this sturdy four-legged structure has come under increasing threat from the arrival of covenant-lite loan terms from the United States.

As early as Spring 2012, we discussed the return of "covenant-lite" in the United States after its scarcity during the financial crisis (see "Springtime: The Return of "Covenant-Lite" Financings," *The Debevoise & Plimpton Private Equity Report*, Spring 2012). Since that time there has been a continued trend toward covenant-lite loans in the United States. With the increased influence of U.S. practices on European loan markets since the financial crisis, it was never going to be long before covenant-lite loans came to Europe.

Covenant-Lite Breaks Through in Europe

Deal statistics suggest that 2015 was the year in which covenant-lite become a significant feature on the European leveraged loan landscape, with nearly a quarter of deals and just over half of institutional issuances in the leveraged loan market being covenant-lite. Covenant-lite in the European context involves incurrence style covenants, often coupled with a single financial covenant (usually leverage) being tested only at times when the revolving facility is utilized in excess of a specified threshold (usually between 30% to 40% of commitments and, in 2015, most commonly 35%). This combination of incurrence style covenants and springing financial covenants gives European borrowers a flexibility they have never previously been able to access in the European syndicated loan market.

It's not just the financial covenants that are getting lighter. European covenant-lite deals now rarely contain a revolver clean down, *i.e.*, a requirement to repay all revolver borrowings and maintain a zero balance for a set number of consecutive days each year or half-year. The equity cure, which allows the sponsor to contribute equity to cure financial covenant breaches, is also changing to the U.S. approach of allowing the cure amount to be added to EBITDA rather than subtracted from debt. With this change, the requirement to apply cure amounts to repay debt has also all but disappeared.

Covenant Loose Rises Too

"Covenant-loose," where regular testing of maintenance covenants is retained but fewer financial covenants are tested, also increased in popularity during

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2015. When covenant-loose first re-emerged in Europe after the financial crisis, it generally involved testing of both leverage and interest cover covenants. In 2015 this shifted, with nearly a third of covenant-loose deals only testing leverage. Deal statistics show that fewer than 10% of deals in 2015 retained the three traditional financial maintenance covenants. Capital expenditure limitations are now also very frequently omitted from European loan agreements.

But all of this is not without some compromise.

Europe As Compared to the United States

A European borrower should not necessarily expect the same flexibility to incur secured indebtedness as is available to its U.S. counterparts. Without the benefit of Chapter 11 in Europe, we have seen some arrangers require that secured indebtedness, whether incurred as ratio debt or through another exception to the indebtedness covenant, be required to be made subject to intercreditor arrangements to ensure that the original senior lenders' position on insolvency is preserved. In our experience, however, market practice on this varies widely among deals, with some arrangers being more focused on the point than others. From a borrower's perspective the point is important, as requirements to make future secured indebtedness subject to pre-agreed intercreditor arrangements may materially impair flexibility to incur that indebtedness as arrangers may be unwilling to provide the financing on the basis of the previously agreed intercreditor terms.

> "Covenant-lite has never been a permanent or ubiquitous feature of the U.S. leveraged loan market, where lending conditions and lender appetite frequently change."

Some arrangers are also questioning relatively settled U.S.-style EBITDA add-backs and calculations (such as the ability to take account of projected synergies for an extended period of time) as European lenders confront the fact that it is not just the testing of the financial covenants but also the underlying definitions that borrowers want Americanised.

Covenant-lite has never been a permanent or ubiquitous feature of the U.S. leveraged loan market, where lending conditions and lender appetite frequently change. We should not expect anything different in Europe. Therefore, and given its relatively recent arrival in Europe, it would be foolish at this stage to say that the covenant-lite tide will not recede. Given its increased prevalence in the leveraged loan market recently, however, covenant-lite is likely to be given significant consideration for years to come, particularly in larger transactions.

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How Preferred Is Your Preferred? Cautionary Tales for Preferred Stock Investors

"[The] alloyed nature [of preferred stock] can lead to unexpected results for private equity investors."

Preferred stock—whether straight or convertible, perpetual or mandatorily redeemable—is a hybrid, having features both of equity and of debt. This alloyed nature can lead to unexpected results from the point of view of an investor. Understanding precisely when preferred stock is treated like equity and when it is treated like debt—and how to protect one's interests in light of that treatment—is critical for any private equity firm that includes preferred stock in its repertoire of investment tools.

Preferred Stock Is Not Always Treated Like Equity

While preferred stock is technically equity, its particular terms may lead it to be treated more like debt for regulatory capital or tax purposes. For example, rating agencies often decline to give full equity credit for preferred stock that is mandatorily redeemable or the dividend obligation of which is cumulative. Similarly, preferred stock with accumulating dividends will often be currently taxable to the holder (similar to PIK interest on debt) unless the preferred stock *(1)* is not redeemable by the holder or *(2)* otherwise "participates" in the growth of the business by sharing in common dividends (to the extent in excess of the preferred coupon) and in the value attributable to the common stock upon liquidation (to the extent in excess of the preferred liquidation preference).

Holders of Preferred Have Only Equity, Not Creditor, Rights

On the other hand, despite often having debt-like features, a holder of preferred stock is in a fundamentally different position than a lender when it comes to enforcing the specific terms of the preferred instrument. Put simply, preferred stockholders have only equity, not creditor, rights.

Mandatory Redemption. Consider, for example, mandatory redemption requirements. Under Delaware law, equity cannot be redeemed if it would impair the capital of the company. A board's determination as to whether a redemption would result in an impairment will be respected by the Delaware courts so long as that decision is made in good faith and is not so off the mark as to constitute constructive fraud. Where an issuer fails to honor a redemption right on the grounds that the redemption would leave the issuer with insufficient funds, the preferred holder has very limited recourse. It can't attach the issuer's assets, can't force the issuer into bankruptcy, and—unless it can show that the board's decision was not made in good faith—probably can't get a court to specifically enforce the issuer's redemption obligation.

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Dividends. Similarly, while preferred stock investors bargain hard over the applicable dividend rate, they can do little to guarantee that the issuer will in fact pay those dividends. Whether preferred or common, dividends are payable "if, as and when" declared by the board. In most cases, the investor's only remedy for the issuer's failure to pay preferred dividends is the right to additional board seats. For example, holders of publicly traded preferred stock are typically entitled to elect two directors (who would be additive to the existing board, and would not replace existing directors) if quarterly dividends on the preferred have not been paid for six quarterly dividend periods. Moreover, although the preferred terms invariably provide that no dividends may be paid on the common stock while preferred dividends are in arrears, unless unpaid preferred dividends accumulate the issuer only has to pay the current preferred dividend, and not make up dividends unpaid in prior periods, in order to pay common stock dividends.

Protective Covenants. It is often no easier for a holder to enforce protective covenants. Privately placed preferred stock in particular often contains prohibitions on the taking of certain actions without the consent of the preferred holders. These covenants look similar to, and are often modeled on, covenants that appear in loan agreements. However, the remedies available to a preferred stockholder for the breach of those covenants are significantly more limited than those available to debt-holders.

The difficulty in enforcing preferred stock protective covenants can be seen in a recent Delaware case involving a financially-challenged preferred stock issuer. The terms of the preferred stock issued by Abbey Financial LLC prohibited the company from selling certain assets without the consent of the preferred stockholder. Abbey Financial solicited such consent, the preferred holder refused to give it, and the company proceeded to sell the assets regardless. When the preferred stockholder brought suit following the consummation of the sale, the court dismissed the claim on the ground that the preferred holder could not demonstrate that it suffered any injury as a result of the sale of the property. Had the preferred holder owned subordinated debt rather than equity, the breach of covenant would have undoubtedly given it the right to accelerate its debt claim. The Abbey preferred holder sought a similar remedy, asserting that its damages could be measured by its redemption right. The court rejected that position, holding that to give a preferred holder the right to force redemption in these circumstances would improperly elevate an equity claim to a debt claim.

The Primary Duty of Directors Is to Common Stockholders

Despite the fact that preferred stockholders have—in respect of the dividend rights, redemption rights and protective covenants—equity rights rather than creditor rights, directors do not owe preferred stockholders fiduciary duties in respect of those rights. Delaware courts have consistently held that directors owe fiduciary duties to preferred stockholders only to the extent that their interests overlap the interests of the common stockholders. Where the interests of the preferred stockholders and the common stockholders diverge, the primary duty of the directors is to the common. Because the terms of the preferred stock—fixed dividend rights, liquidation preference, conversion rights, etc.—that create that divergence are by nature contractual, the board owes only contractual, and not fiduciary, duties to the preferred holders in respect of those terms.

The primacy of the directors' duties to the common stockholders may lead the board to determine that there are better uses for the company's funds than paying dividends on the preferred, or to take actions that risk diluting the ability of the company to pay the liquidation value of the preferred or to be able to redeem the preferred upon maturity. Indeed, directors—including those directors elected by the preferred stockholders—

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Key Issues in U.S. Going Private Transactions

"A sponsor engaging in a going private transaction should carefully consider its tactics and approach, weigh the risk of premature disclosure, prepare for the likelihood of a drawn-out process and steel itself against probable litigation."

From time to time, a private equity firm or other financial sponsor (directly or through a fund that it manages) may find itself owning a significant stake, perhaps even a controlling stake, in a publicly traded company. For instance, the sponsor might have bought shares of the company in the open market, invested privately in a "PIPE" transaction, or simply retained shares in a portfolio company that it has taken public.

A sponsor that wishes to acquire the outstanding public float of a company in which it already owns a meaningful stake is said to engage in a "going private" transaction. A U.S. going private transaction is accomplished through a one-step merger or a tender offer followed by a back-end merger, just like any other public deal. However, two bodies of law—the U.S. federal securities laws and state fiduciary duty law—create additional layers of process, disclosure and timing challenges. A sponsor engaging in a going private transaction should carefully consider its tactics and approach, weigh the risk of premature disclosure, prepare for the likelihood of a drawn-out process and steel itself against probable litigation. If the sponsor is a *controlling* stockholder, the going private process presents additional challenges.

Premature Disclosure

In most cases, a financial sponsor that holds more than 5% of the shares of a public company will have already filed a Schedule 13D describing any "plans or proposals [the firm] may have which relate to or would result in… an extraordinary corporate transaction, such as a merger…." Any material changes to the disclosure in the Schedule 13D require the "prompt" filing of an amendment.

When must a sponsor amend its Schedule 13D disclosure to tell the world of its plans to take the target private? Ideally, not until the parties are ready to announce the deal. Premature disclosure may put the target "in play" or cause the stock price to rise, putting pressure on the deal negotiations.

The general practice has been to include generic disclosure in the Schedule 13D, indicating that the sponsor may in the future consider a going private transaction. Then, when the sponsor actually makes a proposal to the target, it would amend its disclosure to provide more detail about the sponsor's plan. Steps taken prior to the formal submission of an offer typically did not trigger an amendment. Some buyers have taken the position that they have not formulated a plan or proposal until they have become comfortable with diligence and are prepared to enter into definitive agreements—until then, they are simply exploring the possibility of taking the target private.

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The SEC may be less likely these days to accept this latter position. In March 2015, the SEC announced three settlements in which various insiders, including a major stockholder, were charged with 13D violations, became subject to cease and desist orders, and agreed to pay civil penalties to the SEC. The steps taken by those shareholders that the SEC viewed as indications that they planned to effect going-private transactions (and thus should have promptly amended their 13Ds) included:

- informing target company management of their intention to take the company private;
- forming a consortium of shareholders to participate in the going private;
- determining the structure of the transaction to take the company private; and
- obtaining waivers from preferred shareholders to facilitate the going private.

The SEC's position in these cases seems to be not only that buyers may have formulated plans that require a 13D amendment *before* any proposal is made to the target, but also that a shareholder that has taken significant steps toward effecting a going private has an obligation to amend its 13D *even before* it has formulated a going private plan, let alone made a formal proposal to a target. There is no bright line test. Sponsors should carefully consider with counsel the implications of *(1)* discussing potential terms with financing sources, bankers or consortium partners, *(2)* undertaking feasibility studies and *(3)* other steps taken in advance of a formal offer. Sponsors must be sensitive to the 13D rules and the SEC's views on disclosure, and should recognize before embarking on a going private transaction that they may be required to disclose their plans before any transaction is actually announced.

> "Sponsors should carefully consider with counsel the implications of *(1)* discussing potential terms with financing sources, bankers or consortium partners, *(2)* undertaking feasibility studies and *(3)* other steps taken in advance of a formal offer."

Some sponsors who are truly passive investors or who acquired their shares prior to the initial public offering ("IPO") of the company may have filed the simpler Schedule 13G in lieu of a Schedule 13D. Nevertheless, except in the case of a Schedule 13G filed upon an IPO, the same facts and circumstances that would trigger the filing of an amendment to a Schedule 13D would also cause the Schedule 13G filer to convert its Schedule 13G to a Schedule 13D, creating the same premature disclosure issue. The sponsor who acquired shares before an IPO has an advantage in that it will not need to convert or promptly amend its 13G to reflect the formulation of a going private plan.

Even a sponsor who is not a current 13D or 13G filer with respect to the target company should be mindful of these considerations, as taking significant steps with an existing 13D filer of a company could trigger the same premature disclosure concerns on the part of that shareholder, if, for instance, it is a member of management holding a 5% or more stake or a large shareholder.

Standard of Care

The law of the state in which the target company is organized governs the standard of fiduciary care to which the board or a controlling stockholder will be held. In Delaware, as in most states, courts will generally defer to the business judgment of directors, and there is a (rebuttable) presumption that directors acted in good faith and in the best interests of the corporation. In the context of a change of control, including a going private transaction, instead of the business judgment rule, Delaware courts will apply the higher *Revlon* standard, which requires that directors seek the best price reasonably available for the company. A court applying the *Revlon* standard

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Tax Roundup: Keeping Pace with UK Tax Changes

“Disguised investment management fees are subject to 45% income tax plus 2% national insurance charges, a material increase from the 28% rate levied on capital gains.”

The UK tax reform juggernaut continues its rampage through long-established UK private equity funds tax practice. For those struggling to keep up with the ever-changing UK tax landscape, this article provides a short blow-by-blow account of the changes leading to the brave new world in which private equity professionals working in the UK now operate.[1]

April 2015—Disguised Investment Management Fee Rules

The first change, which laid the foundation for the new UK tax regime, was introduced with effect from 6 April 2015. The stated purpose behind these rules was to catch a common UK structuring technique whereby, under certain conditions, investment professionals were able to receive a proportion of what otherwise would have been management fees as capital gains and pay tax only on a deferred basis, essentially allowing them to co-invest on a tax free basis.

Despite this fairly narrow aim, the Disguised Investment Management Fee rules (“DIMF”) have fundamentally changed the approach that the UK tax authorities take to distributions made by funds to their investment teams.

The DIMF rules establish a taxonomy for all amounts arising to investment professionals from a fund with, broadly, every amount needing to be classified as either:

- management fee taxed to income tax;
- disguised investment management fee;
- carried interest; or
- co-invest.

The default classification is disguised investment management fee. Therefore, an amount that is not management fee taxed to income tax, carried interest or co-invest, is deemed to be disguised investment management fee, irrespective of the real-world commercial position. The scope of the rules therefore extends beyond the management fee planning technique mentioned above and catches all sorts of payments that don’t fall naturally into the statutory definition of carried interest or co-invest.

Disguised investment management fees are subject to 45% income tax plus 2% national insurance charges, a material increase from the 28% rate levied on capital gains. Further, disguised investment management fees are deemed to have a UK source, meaning that UK resident non-domiciled individuals are subject to UK tax on such amounts, irrespective of whether the amounts are remitted to the UK or not.

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1. For recent tax developments in the United States, see page 13.

July 2015—Carried Interest Rules

The change in UK government in May of last year gave the government a second bite of the tax apple in this area. Ostensibly this second set of changes was brought in to counteract a quirk of the UK tax rules on partnerships which (by long-standing practice of the UK's tax authorities) means that in a fund scenario, the investment team is taxed on an amount that is less than the distribution that they actually receive.

The simple way to think about this long-standing practice is that some of the third-party investors' base cost in the fund is transferred to the investment team. Technically, what actually happens is that there is a profit shift from the investors to the investment team when a fund moves into carry. This profit shift is commonly referred to as a "base cost shift." By way of example, on an investment of $100 ($99.99 invested by LPs and $0.01 invested by the carry recipients), if a $150 gain is made and distributed on an 80:20 split:

- for UK tax purposes, the investment team is treated as receiving a distribution of $30 which is reduced by $20 representing "their" base cost (rather than the $0.01 of actual base cost); and
- assuming that the fund operates a typical buyout strategy, the investment team will be liable to UK capital gains tax at 28% on $10 rather than on $29.99. This brings the effective rate of tax down, in this example, to just over 9%.

Given that the highest rate of UK income tax is currently 45%, this treatment makes an already attractive capital gains tax rate even more desirable.

When the legislation relating to carried interest was published there was a further, unexpected, twist; carried interest arising from and after 8 July 2015 is deemed to have a UK source to the extent that investment management services are performed in the UK. This impacts UK resident non-domiciled individuals as it means that such people will be taxable in the UK irrespective of whether they remit their carried interest returns to the UK in relation to non-UK investments.

HMRC rather enigmatically states that the split between UK services and non-UK services will be made "on a just and reasonable basis… [which] will depend on the facts or circumstances of each particular instance." HMRC accepts that carry paid in a particular year doesn't always relate to services provided in that same year and that it may be necessary to look back over a longer period.

We recommend that UK resident, non-domiciled individuals receiving carried interest consider having their distributions split at least as between UK source and non-UK source carry and having these distributions paid into separate bank accounts. Depending on the fund's strategy and structure it may be desirable to split out distributions even further into UK source income and UK source gains and then the same for non-UK source income and gains.

October 2015—Deemed Arising Rules

In October additional rules were published affecting both the carried interest rules and the DIMF rules. Under these supplementary rules, amounts may be deemed to be taxable to an investment professional where they are paid to persons connected to the investment professional or to unconnected persons or companies where certain, easily satisfied, enjoyment conditions are met. This expands the scope of both sets of rules and brings many trust arrangements into question. The result could be that individuals face a UK tax charge even though they do not receive the distribution that gives rise to the tax liability.

December 2015—Income Based Carried Interest Rules

2015 was closed out with one final set of changes: draft legislation that seeks to disrupt the taxation of carried interest even further. From 6 April 2016 all carried interest amounts will be classified as good or bad carried interest. Good carried interest will be taxable in the same way that carried interest has always been taxed. So, if it derives from a capital transaction, like the sale of a company, it will be eligible to be taxed as capital gains. Bad carry on the other hand, irrespective of the source of a distribution, will be taxable as if it were a disguised investment management fee and subject to UK income tax and national insurance.

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Tax Roundup: End of 2015 Brings Significant U.S. Developments

"The CAA provides that certain qualified foreign pension funds are now exempt from the tax that would otherwise be imposed under FIRPTA on the sale or other disposition of U.S. real property interests."

The end of 2015 brought with it a number of notable U.S. tax developments for the private equity community, including two significant changes in the areas of foreign investment in U.S. real property and partnership audits.[1] Below is a brief discussion of these two noteworthy developments.[2]

Tax Break Makes U.S. Real Property Investment More Attractive for Foreign Pension Funds

What Happened. Since the enactment of the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA"), non-U.S. investors have grappled with the U.S. federal income tax burden imposed on foreign investment in U.S. real property. Generally, under FIRPTA, non-U.S. investors that invest in U.S. real property interests, whether directly or indirectly through a partnership or other tax transparent vehicle, are subject to U.S. federal income tax (and, in certain cases, an additional branch profits tax) upon the sale or other disposition of such U.S. real property interests. For this purpose, "U.S. real property interests" include real property located in the United States as well as stock of domestic corporations that hold U.S. real property as a majority of their worldwide real property and business assets.

In December, the application of FIRPTA to non-U.S. pension fund investors changed dramatically when President Obama signed into law the Consolidated Appropriations Act, 2016 (the "CAA"). The CAA provides that certain qualified foreign pension funds are now exempt from the tax that would otherwise be imposed under FIRPTA on the sale or other disposition of U.S. real property interests. As a result, such qualified foreign pension funds generally may now dispose of U.S. real property interests without incurring any U.S. federal income tax (provided that such U.S. real property interests are not otherwise held in connection with a U.S. trade or business). Under the CAA, a "qualified foreign pension fund" is generally any trust, corporation or other organization or arrangement that *(1)* is organized under the laws of a country other than the United States, *(2)* is established to provide retirement or pension benefits to current or former employees, *(3)* does not have a single beneficiary entitled to more than 5% of its assets or income, *(4)* is subject to government regulation, including information reporting, and *(5)* is entitled to certain tax benefits under the laws of the country in which it is organized.

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1. For recent tax developments in the UK, see page 11.
2. For additional detail regarding these topics, as well as other notable legislative tax developments for private equity funds and their investors, see these Debevoise & Plimpton Client Updates: *New Legislation Relating to the Taxation of REITs and Foreign Investment in U.S. Real Property* (December 22, 2015) and *Bipartisan Budget Act of 2015 Revamps Partnership Tax Audit and Collection Procedures* (November 3, 2015).

What This Means. This new FIRPTA exemption for qualified foreign pension funds is much broader than the exemption currently afforded to non-U.S. governments under Section 892 of the Internal Revenue Code. As a result of this expansive and straightforward exemption, real estate-focused funds and certain other funds with significant investment allocations to passive investment in U.S. real property interests may see increased interest from non-U.S. pension plan investors.

New Legislation Enhances IRS's Ability to Audit Large Partnerships

What Happened. The U.S. Internal Revenue Service (the "IRS") has for some time publicly discussed the challenges it has faced in effectively auditing, and assessing deficiencies against, large partnerships under the existing partnership tax audit rules. Under the existing rules, the IRS generally conducts an audit at the partnership level, but any adjustments arising in connection with such audit are required to be assessed and collected by the IRS on a partner-by-partner basis. Further complications arise where, as is the case with many investment partnerships such as private equity funds, the partners of the partnership under audit include other partnerships to which these same audit rules apply.

In November, President Obama signed into law the Bipartisan Budget Act of 2015 for partnership tax years beginning after 2017, that Act substantially changes the manner in which the IRS makes audit adjustments with respect to partnerships and limited liability companies that are treated as partnerships for U.S. tax purposes. Under the new rules, tax adjustments from IRS audits of partnerships generally will be determined and collected at the partnership level, notwithstanding the fact that partnerships are not otherwise subject to income taxes and the partners are the relevant taxpayers. A partnership may elect, under the new rules, to implement an alternative adjustment procedure pursuant to which the partnership would send an amended Schedule K-1 to each of the individuals and entities that was a partner during the year under audit (irrespective of whether those persons still hold an interest in the partnership). Each individual and entity receiving an amended Schedule K-1 would then be required to pay any additional tax, interest and penalties in the current tax year, rather than being required to amend tax returns for prior years. If the partnership does not elect this alternative procedure, then the cost of any tax adjustments generally will be borne, absent any provision to the contrary in the partnership agreement, by the individuals and entities that are partners of the partnership at the time of the audit.

The new rules provide an exception for partnerships with 100 or fewer partners. However, this exception does not currently apply to a partnership in which another partnership is a partner, which includes many investment partnerships.

Steps to Take. Prior to the effectiveness of the new rules, partnerships and limited liability companies that are treated as partnerships for U.S. tax purposes should review their partnership agreements or operating agreements, as the case may be, in light of the new rules and, in particular, review the ability under these agreements to *(1)* elect the alternative Schedule K-1 adjustment procedure should such election be desirable in connection with an audit, *(2)* specially allocate the cost of any tax adjustments at the partnership level among the partners and *(3)* clawback the cost of any audit adjustments at the partnership level from former partners. Buyers of partnership and limited liability company interests should also be mindful of the potential application of these new rules when acquiring an interest in a partnership or limited liability company.

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Solvency II: How Will It Impact Private Funds?

"Solvency II will impact private funds with (or hoping to attract) investment from European insurance companies by changing *(1)* the way the capital impact of private fund investments is determined and *(2)* the way data on those investments is reflected in reports to insurance supervisors and the markets."

Solvency II, the new regime for the prudential regulation of European insurers, came into force throughout the European Union ("EU") on January 1, 2016. Solvency II will impact private funds with (or hoping to attract) investment from European insurance companies by changing *(1)* the way the capital impact of private fund investments is determined and *(2)* the way data on those investments is reflected in reports to insurance supervisors and the markets. Furthermore, by favouring investments in European funds, as well as in specified classes of assets (such as debt and infrastructure) acquired by those funds, Solvency II might also have an impact on the attractiveness to European insurers of certain types of funds over others.

Practical Impact on Fund Sponsors

As discussed in detail below, the Solvency II requirements applicable to investments made by European insurance companies are likely to lead to higher compliance burdens on fund sponsors, because insurance company investors will need help from fund sponsors to satisfy the new regulatory requirements.

Insurers Investing In Funds From January 1, 2016. Given the importance to European insurers of calculating the amount of their prudential capital, it is likely that a European insurer will request a private fund in which it invests from and after January 1, 2016 to provide the insurer with the very granular data that the insurer must report under Solvency II. The amount of information required, and the timing for the provision of that information, are likely to impose significant administrative burdens on fund sponsors. In addition, a European insurer may even request modification of a fund's investment criteria, creation of special fund vehicles with investment limitations, or excuse rights *(1)* that enable the European insurer to qualify for the lower capital charge applicable to certain infrastructure investments or *(2)* so that the insurer is not otherwise overweighted in a particular asset class.

Insurers That Invested in Funds Before January 1, 2016. Fund managers are likely to receive similar detailed data requests from their existing European insurance company investors, since the data reporting obligations under Solvency II will apply whenever the investment was made. In the absence of specific contractual provisions that might have been negotiated previously with these existing investors, fund sponsors will need to decide whether, and to what extent, they are willing to comply with such detailed data requests.

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The amount and type of information requested by new and existing European insurance company investors is likely to vary amongst insurers, requiring close ongoing interaction among fund sponsors and their European insurance company investors as the new requirements roll out.

If a fund sponsor is unwilling or unable to assist a European insurer investor in complying with the burdens imposed by Solvency II, the European insurer may be unwilling or unable to invest in funds managed by that fund sponsor.

Capital Charges

Solvency II makes fundamental changes to the regulatory mix of restrictions and incentives that affect a European insurance company's decision to invest in particular classes of assets, including private funds. Solvency II removes most of the old rules that restricted the assets that insurers were permitted to hold, including the percentage limitations that applied to particular investments. Instead, Solvency II applies a "prudent person principle" and permits insurers to invest in whatever assets they believe are appropriate to their businesses. While this may give European insurers more freedom to invest in different asset classes, including private funds, Solvency II also adds new risk weightings (capital charges) that insurers must apply when calculating their Solvency Capital Requirement ("SCR"), *i.e.*, the amount of prudential capital they must hold. The risk weightings effectively act as an incentive for insurers to invest in certain asset classes rather than others—applying, for instance, particularly high capital charges to investments in unlisted equity investments, with more favourable capital charges to highly-rated debt investments.

The following table sets out some of the market risk weightings that apply to the calculation of the SCR under the so-called Standard Model (the basic way European insurers are allowed to calculate the prudential capital they must hold):[1]

Asset Class	Capital charge
EEA/OECD listed/MTF traded equities ("type 1 equities")	39% of market value
Other equities ("type 2 equities")	49% of market value
Property / Real Estate	25% of market value
1-year AAA corporate debt	0.90% of market value
1-year BBB corporate debt	2.5% of market value
5-year AAA corporate debt	4.5% of market value
5-year BBB corporate debt	12.5% of market value
10-year sovereign debt	0.0% of market value

It is worth noting that the equity capital charges are subject to a seven-year transitional period for equities purchased on or before January 1, 2016. In addition, Solvency II also potentially requires other risk charges to be added with regard to the investment, for instance to account for interest rate, currency and concentration risks.

Fund Investments: The "Look-Through Approach"

Where a European insurance company invests in a fund, Solvency II generally applies a "look-through approach" that requires insurers to calculate their SCR on the basis of their proportionate share of the market value of the underlying assets of the fund. The appropriate capital charge applies to the relevant category of the underlying assets. For example, a five-year corporate debt investment held by a mezzanine or debt fund would attract a 4.5% capital charge for the fund's European insurance company investors.

Although unlisted investments held by the fund generally would be considered "type 2 equities" and attract a 49% risk weighting, at a late stage in the Solvency II implementation process the European Commission ruled (due in part to lobbying by the European Private Equity and Venture Capital Association, now known as Invest Europe) that all equities held by certain types of closed-ended and unleveraged funds will be treated as type 1 equities, subject to a lower 39% risk weighting. Interests in closed-

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1. Subject to approval by their insurance supervisors, insurers are also allowed to use either full or partial internal models to calculate SCR, which may provide for different levels of capital charges.

Guest Column (Maples and Calder):

Cayman Islands to Introduce a Limited Liability Company Vehicle

"The LLC's flexibility will satisfy a range of legal and regulatory structuring issues and an LLC will be able to efficiently mirror many onshore products."

The Cayman Islands Government, in response to requests from the financial services industry, recently published a bill (the "LLC Bill") that provides for a new Cayman Islands vehicle: the limited liability company ("LLC"). It is anticipated that the LLC Bill will be enacted and come into effect during the first half of 2016.

We believe that the LLC, once implemented, will be a welcome additional product that further enhances the Cayman Islands' reputation and attractiveness as a financial services jurisdiction. The LLC's flexibility will satisfy a range of legal and regulatory structuring issues and an LLC will be able to efficiently mirror many onshore products. Most notably, the LLC Bill further harmonizes Cayman products with Delaware equivalent products. One principal benefit is that the LLC Bill, in conjunction with revisions to the exempted limited partnership regime in 2014, will enable a Cayman Islands private equity structure to replicate any Delaware parallel structure. Below we discuss the new LLC in detail.

Cayman LLC Overview and Potential Uses

The Cayman LLC will have many of the same features as a Delaware limited liability company and will be familiar to onshore sponsors, institutional investors and practitioners.

In summary, the key features of a Cayman LLC are that it will be a legal entity with separate legal personality (like a company), and limited liability of its members, while also providing flexible governance arrangements and capital account mechanics in a manner similar to a limited partnership. Members will be able to agree how assets, liabilities, profits and losses are allocated amongst themselves and distributions made by the LLC.

It is not expected that LLCs will impact the manner in which Cayman primary private equity fund vehicles are structured, which are typically formed as exempted limited partnerships.

The LLC's flexibility, however, is likely to make it an attractive structuring option for other purposes within a private equity structure, in addition to exempted limited partnerships and exempted companies which regularly feature. By way of example, subject to onshore tax, legal and regulatory considerations, an LLC could be employed as a general partner, manager, blocker or downstream transactional vehicle. It may also prove popular as a joint venture vehicle, given that managers of an LLC will be able to act in the interests of their appointing members, unlike a director of an exempted company who must always act in that company's best interests.

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We understand that an LLC will be able to obtain pass-through tax treatment in the United States. Tax treatment may differ in other key onshore jurisdictions. In most instances, it is likely to be treated in the same manner as other hybrid vehicles such as Delaware limited liability companies.

Cayman LLCs v Delaware LLCs

The Cayman LLC regime will be substantially similar, although not identical, to the Delaware LLC regime.

An LLC will be formed by one or more persons who will be required to file a registration statement, pay a registration fee and adopt an LLC agreement.

The LLC Bill provides a standard regime of rules as to how an LLC is managed and operated that will apply unless varied by the LLC agreement. This regime is similar to Delaware although, as with a Delaware limited liability company, parties will have contractual freedom to legislate their own arrangements. Cayman legislation will defer to the express or implied provisions of an LLC agreement that override or disapply the standard rules, subject to certain statutory safeguards.

Some requirements differ from those of Delaware law. This is because the LLC Bill has been drafted to *(1)* provide symmetry and consistency, where appropriate, with existing Cayman limited partnership and company regimes, *(2)* leverage off existing Cayman jurisprudence and *(3)* address OECD and other international obligations to which the Cayman Islands Government adheres.

There are also some Delaware concepts not replicated in the LLC Bill, namely series LLCs and conversions of an exempted limited partnership to an LLC (although a conversion could be achieved by other indirect means).

Cayman LLC's Principal Features

The principal features of an LLC are as follows:

Legal Status and Capacity. An LLC is a body corporate with separate legal personality. An LLC may undertake any lawful activity (whether for profit or otherwise).

Governance. There is great flexibility in how LLCs are governed. It is possible to appoint one or more managing members or managers to assume responsibility for managing an LLC. In the absence of such arrangements, an LLC will be managed by members acting by a majority in number.

Management Duty of Care. A person managing an LLC has a statutory duty to act in good faith. This standard of care may be expanded or restricted, but not eliminated, by the express provisions of the LLC agreement.

Members. Generally, an LLC must have at least one member. No member need have a Cayman nexus. An LLC may admit additional members from time to time.

Members do not owe any duties to an LLC, or any other member, subject to the express provisions of an LLC agreement.

Members' Limited Liability. Members are not liable for the debts of an LLC. A member's liability to an LLC is limited to the amount a member has contractually agreed to contribute to an LLC (whether in cash, in kind or by way of other services). There is a statutory clawback where a member receives a distribution when the LLC is insolvent (*i.e.*, it is unable to pay its debts as they fall due in the ordinary course of business), but only to the extent the member has actual knowledge of the LLC's insolvency at the time such distribution is made.

Membership Interests. Each member's interest represents rights (including economic and voting rights) and obligations as set out in the LLC agreement, and has a corresponding capital account to reflect allocations of profits and losses, contributions and distributions.

An LLC may authorise the assignment of the whole or any portion of a member's interest or approve the granting of a security interest over the whole or any portion of a member's interest.

LLC Agreement. An LLC agreement must be in writing and governed by Cayman law. The registration statement may serve as an LLC agreement. In such instances, an LLC will be managed and operated in accordance with the statutory default rules.

A member is deemed bound from the date of such member's admission. An LLC is bound by the terms of its LLC agreement. We expect it

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Update: HSR Notification Thresholds Increase

"On January 21, 2016 the FTC announced the annual revision of the [HSR] notification thresholds. The revised thresholds apply to all covered transactions that close on or after February 25, 2016."

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") requires that filings be made with the Federal Trade Commission (the "FTC") and the Antitrust Division of the Department of Justice in connection with acquisitions, mergers and joint venture formations that exceed certain thresholds. Where a filing is required, a waiting period (usually 30 days, unless terminated earlier by the agencies) must be observed before the transaction can be consummated. The filing thresholds are subject to annual indexing based on changes in the U.S. gross national product. On January 21, 2016 the FTC announced the annual revision of the notification thresholds. The revised thresholds apply to all covered transactions that close on or after February 25, 2016.

The revisions increase the "size of transaction" and "size of persons" tests for premerger notification under the HSR Act. The lowest size of transaction threshold under the HSR Act is increased from $76.3 million to $78.2 million. An acquisition that results in the acquiring person holding an aggregate total amount of voting securities, non-corporate interests and/or assets of the acquired person in excess of $78.2 million may be subject to HSR notification. The size of persons test, which will apply only if the size of transaction does not exceed $312.6 million, will now be satisfied if either the acquiring or acquired person has at least $156.3 million in annual net sales or total assets, and the other party has at least $15.6 million.

The notification thresholds for incremental acquisitions of voting securities of the same issuer have also been increased, such that notifications may be required for acquisitions resulting in the acquiring person's holdings crossing any of the following thresholds: $78.2 million, $156.3 million, $781.5 million, 25% of the voting securities if valued greater than $1,563.0 million, and 50% of the voting securities.

The filing fees for HSR notifications have not changed, but the thresholds underlying the fee structure have similarly been increased. A filing fee of $45,000 will be required for transactions valued above $78.2 million but less than $156.3 million, $125,000 for transactions valued at or above $156.3 million but less than $781.5 million and $280,000 for transactions valued at or above $781.5 million. The statutory obligation to pay the filing fee remains on the acquiring person, but the ultimate burden may be shifted contractually to the seller.

The dollar amounts that determine applicability of certain HSR Act exemptions (for example, the foreign target exemptions under Sections 802.50 and 802.51 of the HSR rules) have also been revised upward.

Application of the HSR thresholds and the numerous exemptions potentially available under the HSR Act depend on the structure of the specific transaction and the type of entities and businesses involved.

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present in these transactions, the sponsor must have established a level of trust with its investor base and the investors must believe the sponsor is best positioned to continue to manage the portfolio. After all, at the end of the day investor approval will be necessary to complete the transaction.

The Sponsor. A fund restructuring may provide a means for the sponsor to achieve certain objectives relating to the fund, such as re-aligning the fund economics (carried interest and/or management fee) or accessing additional capital, either for the existing portfolio or for new investments. These sponsor concerns may be particularly acute if the sponsor is unable to raise a successor fund and is worried about its ability to retain its investment professionals to manage the existing fund portfolio. A fund restructuring can provide an opportunity for the sponsor to re-energize the firm and its employees and ensure that appropriate personnel are actively incentivized to focus on the portfolio. However, in pursuing its own objectives, a sponsor must ensure it is transparent with its investors about the potential conflicts of interests they may present.

Pursuing a Fund Restructuring

Taking Stock of the Current Portfolio. Early diligence on the portfolio can save significant time and expense later in the process. Even though a restructuring transaction typically is structured as a transfer to an affiliate, regulatory or contractual consents may be required. In addition, sponsors should consider whether certain investments should be carved out from the overall transaction, for example because those investments are close to liquidity or are difficult to value. Finally, if the sponsor has received carried interest, or will receive carried interest as a result of the transaction, the potential of a clawback must be taken into account.

Communication with the Investor Base. Transparency and open communication between the sponsor and the investors throughout the process is essential. The fund's advisory committee often (though not always) is an effective forum for such communication. Investors may be skeptical, at least initially, of the sponsor's objectives. The sponsor will need to maintain the investors' trust, including by being open about the potential benefits the sponsor will receive from the transaction. Investors seeking liquidity will be focused on price maximization and the auction process. Investors planning to roll over will be focused on long-term value maximization and the new fund's terms. A sponsor will need to be responsive to both groups of investors to achieve a successful transaction.

Fiduciary Duties. As the general partner of the fund, the sponsor generally has a duty to act in the best interests of the fund. The scope of this duty depends upon the jurisdiction of the fund and can typically be modified by contract. However, it can be difficult to translate the sponsor's duty into practice in circumstances where there are diverging views in the investor base as to how best to manage the portfolio. As such, full disclosure regarding the transaction, including the conflicts and potential benefits to the sponsor (such as stapled subscriptions to successor funds or a carry reset), is important. With full and fair disclosure, the approval of the transaction by a majority (or super majority) of disinterested investors can provide important protection to

"Because of the potential conflicts of interest present in these transactions, the sponsor must have established a level of trust with its investor base and the investors must believe the sponsor is best positioned to continue to manage the portfolio."

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the sponsor. Careful consultation with experienced counsel in the initial planning stages is critical to ensure the process is designed to minimize the risk of disputes and regulatory scrutiny.

Regulatory Scrutiny. The SEC has made clear that it is closely monitoring the fund restructuring space "to make sure that those creative approaches don't cross the line and violate federal securities laws." Potential conflicts of interest the SEC is concerned about include stapled commitments to successor vehicles and other potential sponsor benefits. The presence of potential regulatory scrutiny further reinforces the importance of active dialogue with investors, full transparency regarding conflicts of interest and the creation of a transaction framework that addresses the concerns of each of the various stakeholders.

Auction Process. An agent generally should conduct an auction process to find potential buyers for the portfolio. Investors seeking liquidity will be focused on the auction process and may be concerned about any aspect of the overall transaction that could hinder price maximization. A sponsor may also consider obtaining a fairness opinion from a third-party firm once the price has been negotiated.

Negotiation with the New Investors. Once one or more new investors have been identified in the auction process, other terms of the transaction will be negotiated. These terms include the scope of representations and warranties to be provided, the survival period for claims, the existence of holdbacks or escrows (if any), the conditions to closing and other transactional terms. Typically the terms of the new fund will also be negotiated at this time (more on this below).

> "The sponsor should seek to provide fair options that address the concerns of the existing investors—both those desiring liquidity and those desiring to roll over."

Options for Existing Investors. The sponsor should seek to provide fair options that address the concerns of the existing investors—both those desiring liquidity and those desiring to roll over. An SEC official has stated a concern regarding transactions that provide investors with a choice between two bad options. The sponsor should carefully consider the options and seek to avoid any coercive element to the process.

One common request from rollover investors is that they be provided with a "status quo" option. By status quo, rollover investors generally mean no change to their fund economics (management fees and carried interest) and no change to their funding obligations. Whether a sponsor can accommodate this request largely depends on the facts and circumstances of the particular fund, although most recent fund restructurings offer some form of status quo approach. If as part of a status quo approach the rollover investors are not obligated to fund follow-on investments (and such investments are made solely by the new investors), then appropriate valuation and dilution mechanisms will need to be built into the fund agreement.

New Fund Terms

While the starting point for the new fund's partnership agreement is generally the existing fund agreement, the new fund agreement may differ from a traditional private equity fund in a number of respects. These include:

Distribution Waterfall. The distribution waterfall for the new investors is often one of the more heavily negotiated terms. The new fund's waterfall may be more complex than a traditional private

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equity waterfall, including multiple tiers of carried interest based upon achievement of specified multiples or IRR thresholds. As mentioned above, rollover investors may push for a "status quo" waterfall option, and in some cases sponsors may offer the rollover investors a menu of various waterfall options to select from.

Additional Capital. The amount of uncalled capital available from new investors and rollover investors, and limits on the new fund's ability to make follow-on investments, are frequently negotiated points that are generally dependent on the facts and circumstances of the particular fund. Provisions permitting the recycling of distributions are one tool that can be used to address the potential need for capital while also limiting the obligation of investors to contribute additional capital to the new fund.

New Investments. Fund restructuring transactions may also include an obligation for new investors to commit capital for new investments, either through the new vehicle or as a stapled commitment to a successor fund. An SEC official has expressed concern about transactions that involve stapled commitments to new funds. While these features have been included in some recent transactions, we recommend proceeding with caution and consulting with counsel during the planning stages when a staple may be a component of a restructuring.

Governance, Reporting, Voting. The governance, reporting and voting provisions of the new fund agreement may also be a point of negotiation with the new investors as well as the rollover investors. A significant new investor may seek additional reporting or other rights as a result of its large commitment. On the other hand, depending upon the makeup of the new fund's investors, a sponsor may wish to revisit the standard voting thresholds for amendments, GP removal and other matters to avoid a single investor having too much control over such determinations.

> "We expect the private equity fund restructuring trend to accelerate in the coming years. End-of-term need not always mean the end of a fund's life."

Conclusion

We expect the private equity fund restructuring trend to accelerate in the coming years. End-of-term need not always mean the end of a fund's life. When properly conceived and implemented, and in the right situation, a restructuring can provide a better solution to end of term concerns than the traditional remedies.

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adjustments to IRT membership may be needed in light of your assessment of tests and past incidents.

A periodic schedule for updating the IRP should be put in place. Further, firms should consider empowering key personnel to drive updates to the plan outside the normal update schedule when justified by new threat information or material changes in the firm's business, assets or architecture. Firms may also reconsider the plan and retest it after a risk assessment of cybersecurity defenses (*e.g.*, the results of an annual penetration test).

The Importance of Having an IRP

Increasing threats of cyber attacks and increased regulatory scrutiny make it unwise for firms to go without a carefully developed IRP. The same survey mentioned at the beginning of this article, in which most respondents saw themselves as lacking a fully implemented cybersecurity program, also revealed that more than 60% of the respondents felt they would be the target of hackers in 2016. Further, the SEC's public statements and last year's SEC enforcement action against an investment adviser for failing to maintain adequate cybersecurity policies and procedures show that the SEC expects more from private equity firms and other investment advisers than merely having an IRP in place. The questions today are: How robust is the IRP? How well has it been tailored to the firm's specific business, assets and architecture? Has the plan been tested? Is the firm organized to periodically update the plan based on emerging threats?

This article is the third in a series of articles in The Debevoise & Plimpton Private Equity Report *concerning emerging cybersecurity concerns relevant to private equity firms and their portfolio companies.*

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Awards and Recognitions

March 1, 2016
Debevoise Named "Law Firm of the Year in North America (Transactions)," 2015 *Private Equity International* Awards

February 25, 2016
Debevoise Partner Sally Gibson Named to *Financial News*' "40 Under 40" List

January 25, 2016
Debevoise Partner Sally Gibson Named to *The Lawyer*'s "Hot 100, 2016"

January 21, 2016
Turnarounds & Workouts Recognizes Debevoise in One of the Top Restructurings of 2015

January 6, 2016
Debevoise Financing Transaction Wins *Project Finance International* 2015 "Power Deal of the Year of the Americas"

December 22, 2015
Debevoise Restructuring & Workouts, Healthcare, Intellectual Property and Mergers & Acquisitions Groups Named Among *Law360*'s "Practice Groups of the Year."

December 22, 2015
M. Natasha Labovitz Named "Outstanding Restructuring Lawyer 2015"

November 9, 2015
Debevoise Partners Michael A. Diz, Jeremy Feigelson, Peter A. Furci and M. Natasha Labovitz Recognized as "MVPs" by *Law360*

November 8, 2015
Debevoise Advises On "Fundraising of the Year Large Cap," *AVCJ* Private Equity and Ventures Capital Awards

October 1, 2015
Debevoise Partners Jonathan Adler and Sally Gibson Named Among the "Most Influential Private Equity Lawyers Under 40" by *Private Funds Management*

September 11, 2015
Debevoise Named "Investment Funds Law Firm of the Year" in the *Asian Legal Business* Hong Kong Law Awards

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risk liability if they fail to manage the company to maximize long-term value for the benefit of the common stockholders.

The 2005 sale of Trados Inc. illustrates the difficult position in which directors may find themselves if they focus their attention on the preferred rather than the common stockholders. Trados had been funded by venture capital investors who held typical venture capital-style preferred stock and the principals of which constituted three of the seven members of the company's board. The company was sold at a price that left nothing for the common stockholders. In the suit by the common stockholders that inevitably followed, the court found that the board breached their fiduciary duties to the common by failing to take the interests of the common stockholders into account in designing and managing the sales process. The board did not form a special committee; it apparently never considered the interests of the common stock holders as distinct from the interests of the preferred holders; it adopted a management incentive plan that detracted from the value of the common stock at any deal price above the liquidation preference of the preferred; it made no effort to negotiate a merger price that would result in a payment to the common stockholders; it did not obtain a fairness opinion; and it never considered conditioning the merger on the vote of the disinterested common stockholders. Although the court in the Trados case declined to award damages—finding that the common stock was in fact worthless at the time of the sale and thus that the price was ultimately fair to the common stockholders despite the board's process failures—the decision is a cautionary note for any directors appointed by preferred stockholders.

> "Delaware courts have consistently held that directors owe fiduciary duties to preferred stockholders only to the extent their interests overlap the interests of the common stockholders."

The conflict between preferred and common stockholders becomes most acute where the issuer is neither a rousing success nor a complete failure. In those circumstances, the preferred stock issuer may find that the liquidation preference of its preferred stock exceeds not only the preferred stock's conversion value but the entire equity value of the company. If a buyer proposes a merger in which the common stockholders receive value and the preferred holders are either left in place or are cashed out at a price less than their liquidation preference, maximizing the value of the common at the expense of the preferred, it would be entirely consistent with the fiduciary duty of the board to accept that offer. The preferred stockholders may exercise appraisal rights, but that will not necessarily provide them with much satisfaction.

Holders of convertible preferred stock should keep in mind that a merger that cashes out the common stock but leaves the convertible preferred stock in place can deprive the preferred stockholders of a significant portion of the value of their investment. That is because most convertible instruments provide that following a merger, the instrument becomes convertible into the consideration—whether stock, cash or other property—that would have been received if the holder had converted immediately prior to the merger. Thus, where that consideration is cash, the merger eliminated any further option value inherent in the instrument. In the case of convertible preferred stock the conversion right of which is out of the money, that scenario leaves the holder with the Hobson's choice of converting, continuing to hold the less-valuable preferred stock, or seeking appraisal.

The potential weakness of the appraisal remedy in these circumstances was demonstrated in the 2009 appraisal case involving the preferred stock of Metromedia International Group Inc.

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Metromedia was acquired in a merger in which all of its common stock was cashed out and its publicly-traded preferred stock left outstanding. The per share consideration to the common holders was a fraction of the conversion price of the preferred shares and the aggregate amount paid to the common was significantly less than the preferred stock liquidation preference. The preferred stockholders sought appraisal claiming, among other things, that they were entitled to receive at least their liquidation preference. The Delaware Chancery Court, in a case subsequently affirmed by the Delaware Supreme Court, disagreed. The court held that the ability of the preferred holders to access the liquidation value of the preferred stock was speculative and that the proper measure of the preferred stock for appraisal purposes was its as-converted value.

How Can a Preferred Stockholder Improve Its Position?

It may seem from the perspective of a preferred stock investor that the terms of the preferred are treated as equity precisely when you want them to be treated like debt, and treated like debt precisely when you want them to be treated as equity. Nonetheless, there are a number of things that a preferred stockholder can do to improve its position when its rights are most vulnerable. These include:

- Make sure that the preferred stock has a voice in mergers, ideally by a class vote. While a veto over all mergers may in many cases not be commercially achievable, at the least the preferred should be able to block a transaction that cashes out the preferred at less than its liquidation preference or that impairs the economic rights of the preferred stock where it remains outstanding.
- Alternatively, provide that the preferred stock must be paid at least its liquidation preference upon any change of control. Without either the right to get liquidation value or the right to approve the merger, a preferred stockholder in a company whose common stock is acquired for cash at a price less than both the conversion price and liquidation value risks finding itself in the same position as the holders of the Metromedia preferred stock.
- Ensure that the issuer remains properly incentivized to pay dividends. This is typically done by providing that unpaid dividends accumulate and compound. However, where regulatory requirements make cumulative dividends unavailable, a preferred stockholder may still be able to provide that forgone dividends are taken into account at the time of conversion. Rating agencies and financial regulators tend to care less about how the total common equity pie is divided between common and preferred stockholders upon conversion than they do about contingent obligations of the regulated company to pay funds to its preferred stockholders.
- Provide remedies for breach other than the right to seek redemption. For example, failure to comply with protective covenants could give the preferred holder additional governance rights, such as the right to appoint additional directors or the right to compel the company to pursue a sale process (keeping in mind that the ultimate decision as to whether to sell the company must remain with the directors). Other remedies could include adjustments to the conversion price (thus diluting the common stockholders) or an obligation to put in place a sinking fund to which free cash flow would be deposited for use solely to redeem (or make dividend payments on) the preferred stock.

Preferred stock is a highly flexible tool that can provide significant benefits to both issuers and investors. However, investors that lose sight of the fundamental fact that—despite the debt-like features of many preferred stock instruments—they remain equity investors, risk getting less than they think they have bargained for, particularly when the issuer is facing economic distress.

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will examine the reasonableness of the directors' conduct, an inquiry that necessarily involves a certain amount of discovery and, thus, means that litigation will survive a motion to dismiss.

If the sponsor controls the target, a very high standard called *entire fairness* will apply, on the theory that in these sorts of transactions the minority stockholders require special protection. The "entire fairness" standard permits a court to examine both the fairness of the price and of the process. Delaware courts have, however, recently decided that even in these circumstances the business judgment rule can apply, *provided* that:

- the transaction is negotiated by an independent and disinterested special committee of the board, authorized to retain its own advisors, negotiate and reject or recommend a deal; and
- the transaction is conditioned on a non-waivable condition that it be approved by a majority of the minority stockholders or, in the case of a tender offer, that a majority of the minority stockholders tender into the offer (the so-called "MoM" condition).

To be effective, these conditions should be included in the buyer's initial going private proposal. They should not be first discussed midway through negotiations or traded out during a price negotiation. A sponsor that controls a Delaware target should be thoughtful about its initial approaches to the portfolio company's board, as it is easy to omit or misstate these critical conditions at the outset, providing disgruntled stockholders and others a basis for complaining that the transaction was not entirely fair. A controlling sponsor should also avoid involvement in the establishment of the special committee and the selection of its advisors. Finally, if a sponsor is a buyer only (and clearly not a seller), it should make this position clear in its initial overture to the target company board.

> "To be effective, these conditions [Special Committee and MoM approvals] should be included in the buyer's initial going private proposal. They should not be first discussed midway through negotiations or traded out during a price negotiation."

For these purposes, a "controlling" stockholder either holds a majority of the target's shares or actually *controls* the target, through some combination of equity ownership, participation on the board, and management or contractual governance rights. Sponsors are likely to have some of these non-equity influences on their portfolio companies, so it is always good to check with counsel to determine whether the sponsor should consider itself a controlling stockholder for these purposes.

Disclosure Issues

Going private transactions may implicate the enhanced disclosure requirements under Rule 13e-3 of the federal securities laws. The rule applies when an "affiliate" of the issuer engages in an acquisition transaction that has a reasonable likelihood or purpose of taking the issuer private. An "affiliate" of the issuer includes a sponsor that controls the issuer, but control under the securities laws is based on a lower threshold than under Delaware law: a common rule of thumb is that a party that owns 10% of a company and has a seat on the board is presumed to control the company.

If Rule 13e-3 applies, the sponsor must file a Schedule 13E-3 together with the normal proxy statement or tender offer documents. Preparing the disclosure can be somewhat time-consuming, but is generally not difficult to do. The most challenging task is to explain why the buyer believes that the transaction is fair to the *minority stockholders*. This somewhat counterintuitive disclosure requirement is often addressed by focusing on process rather than valuation.

In addition, a copy of every report, opinion or appraisal must be filed

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(typically without confidentiality protection) with the SEC as an exhibit to the Schedule 13E-3. The SEC takes an especially broad view of what this obligation encompasses and, for instance, often expects every board book, including preliminary decks, presentations and other materials relating to valuation—whether or not prepared specifically for the transaction—to be filed. It is possible that this could pick up materials (including projections) prepared by or for the sponsor. Sponsors should talk with counsel in advance about what they plan to prepare or have prepared.

Projections and Access to Management

A sponsor preparing for a going private should also be aware that any projections prepared in connection with the transaction may not only be disclosed but may also be examined for their conformity to past forecasting practices of the target company. In the Delaware litigation arising out of the Dole Food Company going private, the court was highly critical of the attempt by the controlling shareholder to change the manner in which updated forecasts were prepared for the special committee, which the court found resulted in misleading and artificially depressed projections.

A sponsor will often have enjoyed a close relationship with company management during the period of its investment. Indeed, such close relations and the "hands on" approach taken by sponsors is often cited as a hallmark of the added value that sponsors bring to their investments. What a sponsor may rightly view as conscientious monitoring of an investment during the ordinary course operations of a company can be characterized as preferential access in the context of a going private transaction. After the *Dole* decision, a sponsor should also expect that the special committee will seek to exert some measure of control over the sponsor's access to management, not to prevent such access but rather to ensure that it occurs with the knowledge and participation of the special committee and its advisors.

Timing

Sponsors seeking to engage in going private transactions should steel themselves for a potentially frustrating timetable. The company's special committee will take particular care to create a record demonstrating how hard it has negotiated on behalf of the unaffiliated stockholders and the tangible improvements in the transaction terms it has obtained. One negotiating technique is delay itself. Moreover, *both* the company's and the special committee's advisors often participate in the process, generating further holdups.

Moreover, the SEC intensely scrutinizes transactions subject to Rule 13e-3 and often comments heavily on the disclosure, which can prolong the process, sometimes for several weeks. A sponsor should also realize that if it owns a significant equity stake in the target but concludes that it is nevertheless not an affiliate and that Rule 13e-3 does not apply, it is almost certain to get a comment from the SEC asking it to defend its position. This could result in back and forth that could take some time to resolve.

Finally, of course, there is litigation. The inherent conflicts perceived in going private transactions ensure that they are likely to attract shareholder litigation. Litigation takes time and can interfere with the closing schedule for the transaction.

* * *

Going private transactions can be challenging, complicated and frustrating. But they are eminently doable. The trick is to understand the pitfalls and prepare for them in advance. Take nothing for granted; actions taken early on could well have consequences as the process unfolds and will always be viewed by courts and the SEC with the benefit of hindsight. Having experienced counsel on board from the beginning is the right call.

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Whether an amount is good or bad carried interest depends on the average holding period of the fund's investments. Currently the magic switch from bad to good carry happens when the fund's average holding period is four years, with a partial switch happening from three years. The calculation of a fund's average holding period is weighted by reference to the amount invested by the fund into each investment, so for example, a high-value, short-term investment will skew the fund's overall average holding period.

Each time carried interest arises the average holding period has to be established, and investments held at the point of such calculation are deemed to have been disposed of on the date of calculation. Therefore, while the fund still holds investments it is likely to be difficult to satisfy the four year test. Further difficulties arise with this legislation when you take into account follow on investments, partial disposals or restructurings.

Some of these issues are dealt with, to a certain extent, in the draft legislation but largely these fixes are deficient. Further, any fund that does not operate a standard buy-out strategy faces additional, particularly knotty problems under the draft legislation. We expect that some of these wrinkles will be ironed out in the next draft of the legislation, which should be published in late March. It is also possible that the four-year period will be reduced. That said, any fund operating with UK carried interest recipients should expect to have to engage with this legislation. Given the short lead time between final draft legislation's being published and implementation, we suggest engaging sooner rather than later.

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ended and unleveraged funds where the look-through approach is not possible (because, for example, adequate information on the fund's underlying investments is not available) will also be treated as type 1 equities.

This was welcome news for the private equity industry, not least because it recognised the distinction (in terms of market risk) between traditional private equity funds and other (*i.e.*, open-ended or leveraged) funds. However, the favourable capital charge only applies to a closed-ended and unleveraged fund that is established in the EU and managed by a European authorised alternative investment fund manager or marketed in the EU under the passport available under the Alternative Investment Fund Managers Directive[2] (the "AIFMD passport"). The European Commission has not yet adopted legislation extending the AIFMD passport to funds and fund managers established outside the EU, which means that interests in non-EU private funds or interests in funds managed by non-European fund managers do not currently benefit from the favourable capital charge for type 1 equities.

If insurers are unable to apply a look-through approach to fund investments for the purpose of their SCR calculation and do not benefit from the type 1 equities capital charge described above, their fund interests as a whole will be treated as "type 2 equities" subject to a 49% risk weighting; and, therefore, they may have to hold higher levels of capital in respect of those fund investments. To reduce these capital requirements, some European insurance companies will want to apply the look-through approach—particularly where the fund that is invested in is a non-EU fund or is managed by a non-EU fund manager. See "Data Reporting" below.

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2. Directive 2011/61/EU of 8 June 2011.

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Infrastructure Funds

Solvency II did not originally recognise infrastructure investments as a distinct asset class for the purposes of calculating capital charges. However, in order to provide an incentive to insurance companies to invest in infrastructure, on September 30, 2015 the European Commission proposed amendments to the Solvency II regulations that included introducing a new asset category: "qualifying infrastructure investments." The risk weighting allocated to infrastructure investments (including infrastructure investments held through a fund) would be, broadly, 30% of their value, compared to 49% for unlisted equities, into which category most infrastructure project equities would otherwise fall.

Which infrastructure investments qualify for the new asset class will be decided on a broad range of criteria, in order to ensure that innovative projects are not unfairly excluded. The criteria include the requirement that infrastructure projects are able to generate predictable cash flow, withstand stressed conditions and have a contractual framework that offers a high level of protection to investors. Qualifying infrastructure investments also require enhanced due diligence on the part of investors before investment, and active performance monitoring following investment. Assuming the amendments to the regulations are approved by the European Parliament, they are due to come into force in March 2016.

It is important to note that while it is up to the European insurance company itself to confirm that the criteria for making qualifying infrastructure investments are met, infrastructure funds that have European insurance company investors may be asked by those investors to carry out much of the diligence on their behalf. It is also conceivable that European insurers may seek to participate only in infrastructure investments that meet the Solvency II criteria. If any of those obligations are assumed by a fund sponsor, the fund sponsor will need to create a framework for collecting and reporting enough information to their insurance company investors for them to confirm that the criteria have been satisfied. Under Solvency II this information must be subject to validation by the insurance companies—implying that a statement provided by the fund simply confirming compliance with the Solvency II requirements may not be enough, but that underlying data and materials will also need to be provided. As there is no specified framework for how an insurance company will reach its own conclusions on compliance with these rules, the information to be requested of an infrastructure fund manager may be differ from European insurer to European insurer.

Funds of Funds

Where a European insurer invests in a fund of funds and that insurer applies the look-through approach, information on the underlying investments of the underlying funds will be required. This will inevitably give rise to significant practical issues for insurers and their fund of funds managers, particularly in terms of agreeing and coordinating data transfers from multiple funds.

Data Reporting

Solvency II's "prudent person principle" requires that insurers only invest in assets and instruments whose risks they can properly identify, measure, monitor, manage, control and report. As mentioned above, generally the Solvency II approach to European insurers' investments in private funds is to apply a look-through approach to the valuation of the underlying assets of the funds, both for the purposes of calculating their SCR and for quarterly and annual reporting purposes.

Although data is only required to be reported by a European insurance company to its insurance supervisors on a quarterly basis (or an annual basis if the insurer holds less than 30% of its assets in funds), insurers are likely to require access to underlying investment data on a real-time basis in order to satisfy their ongoing risk management and governance requirements under Solvency II. In practical terms, this means that fund managers may find themselves on the receiving end of frequent requests from insurance company investors for underlying investment data to be provided to them on an automated basis.

Data reporting is a key component of Solvency II, and the information required by insurance companies is extensive. The reporting template that insurers are required to submit to their

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national regulators requires information on, among other things, asset category, geographical exposure and currency exposure of the underlying assets. In order to assist fund managers in the provision of accurate, consistent and good quality asset data for Solvency II reporting purposes, BVI in Germany, club AMPÈRE (sponsored by the French Asset Management Association) and The Investment Association in the UK have established a draft template, designed to be reported at the share class level. The current version of the template (version 3.0) was published on October 13, 2015.

The Solvency II regulations and associated guidance make it clear that insurers are expected to report data regarding their investments on a look-through basis, subject only to a general materiality standard; if information is not available to be reported on a look-through basis, insurers will need to discuss any exception with their insurance supervisors. In the UK, the Prudential Regulation Authority has issued guidance on what "best available data" and approximations might be acceptable, and has indicated that in some situations—such as when the fund is listed and subject to market disclosure rules limiting the information that can be disclosed to a shareholder—a failure to report on a look-through basis should not result in an insurance company breaching its reporting requirements.

Conclusion

As summarized at the beginning of this article, the Solvency II requirements applicable to investments in private funds by European insurance companies are likely to lead to higher information reporting and other compliance burdens on fund sponsors and might reduce the appeal to European insurers of investment in certain private funds.

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Guest Column (Maples and Calder): Cayman Islands to Introduce a Limited Liability Company Vehicle

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to be reasonably easy to adapt and mirror operating agreements used for Delaware limited liability companies to comply with Cayman Islands law.

Inward and Outward Migrations. Non-Cayman LLCs, and other foreign entities, may be re-registered and continue as an LLC in the Cayman Islands. An LLC may migrate out and continue as a foreign entity in another jurisdiction.

Statutory Registers. Consistent with the Cayman Islands' OECD commitments, an LLC will be required to maintain certain statutory registers, notably a register of members, "managers" and mortgages and charges. The register of managers will be filed with the Registrar of LLCs in the Cayman Islands although the register's contents will not be publicly available. The statutory definition of "manager" under the LLC Bill encompasses any member or manager who is responsible for management of an LLC.

Cayman Islands Tax Status. There are no direct corporate taxes in the Cayman Islands. An LLC will also be able to obtain a tax undertaking from the Cayman Islands Government that will provide a 50-year exemption from any such direct corporate taxes if subsequently introduced. Such tax undertaking is identical to those currently available for exempted limited partnerships and exempted companies.

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Recent and Upcoming Events

May 19, 2016
Alternative Sources of Liquidity: New Opportunities in the Sponsor-Led Restructuring Space
Katherine Ashton
5th Annual Private Equity Secondaries Conference
C5
London

May 12, 2016
Fund Terms and Structuring
Peter A. Furci, Geoffrey Kittredge, Matthew W. Howard
Fundraising Masterclass
EMPEA
Washington, D.C.

May 10, 2016
The SEC's Evolving Enforcement Focus
Robert B. Kaplan, Julie M. Riewe
Private Equity CFOs and CCOs Forum
Debevoise & Plimpton LLP
New York

May 5, 2016
Cybersecurity and Private Equity: What Your Firm Should Do Now
Luke Dembosky, Jim Pastore, Julie M. Riewe
Debevoise Seminar
Debevoise & Plimpton LLP
New York

April 25 and 26, 2016
Plan Formulation and Negotiation
My Chi To
Bankruptcy & Reorganizations 2016: Current Developments
Practicing Law Institute
New York

April 19, 2016
Workshop on Cross-Border Investigations
Dr. Thomas Schürrle
Seventh Anti-Corruption & Compliance Summit 2016
DKN Networks
Munich

April 18 and 19, 2016
How to Face and Confront Complex Challenges; Main Challenges Operating Energy Projects
David W. Rivkin, Sarah A.W. Fitts
Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law
International Bar Association
New York

April 16, 2016
Public Securities and the Bankruptcy Plan Process: What Not to Do
Jasmine Ball
34th Annual Spring Meeting
American Bankruptcy Institute
Washington, D.C.

April 13, 2016
Emerging SEC Enforcement and Exam Priorities
Kenneth J. Berman, Michael P. Harrell, Robert B. Kaplan, Julie M. Riewe
Debevoise Seminar
Debevoise & Plimpton LLP
New York

April 12, 2016
SEC "Hot Button" Issues
Robert B. Kaplan, Julie M. Riewe
Private Equity GC's Forum
Debevoise & Plimpton LLP
New York

April 6, 2016
AIFMD Developments
Sally Gibson, John Rife
Debevoise Seminar
Debevoise & Plimpton LLP
New York

March 25, 2016
Opportunities & Challenges of Investing in PE
William Y. Chua
China International Investment Summit 2016
Duxes Events
Hong Kong

March 16, 2016
Policies, Procedures and Training
Satish M. Kini
2016 Annual Legal and Compliance Conference
Securities Industry and Financial Markets Association
Orlando

March 14, 2016
Across the Board: A Discussion of Hot Topics Affecting Fund Boards
Woodrow W. Campbell, Jr.
2016 Mutual Funds and Investment Management Conference
Investment Company Institute
Orlando

March 11 and 12, 2016
CIAs: What You Need to Consider; Navigating the Global Marketplace
Maurizio Levi-Minzi
Fifteenth Advanced Forum on Fraud & Abuse in the Sales and Marketing of Medical Devices
ACI
Boston

March 10, 2016
Living in Interesting Times: How to Find the Opportunities While Avoiding the Pitfalls
Maurizio Levi-Minzi
Biennial Latin American Regional Forum
International Bar Association
Rio de Janeiro

March 9, 2016
International Trends and Regulators' Priorities
Frederick T. Davis
Conference Against Corruption and in Support of Compliance
Organisation for Economic Co-operation and Development
Paris

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Current Trends in Manager Mergers and Acquisitions: Seed and Strategic Deals
Jordan C. Murray
Seventh Annual International Conference on Private Investment Funds
International Bar Association
Frankfurt

March 8, 2016
M&A Transaction Process and Preliminary Agreements
Dr. Thomas Schürrle
Corporate Law in Legal Consultancy Practice
Institute for Law and Finance of Goethe University Frankfurt
Frankfurt

March 7 and 8, 2016
Update on European Regulation and Fund Terms
Geoffrey Kittredge
European Private Equity Forums: The U.S. Investor Roadshow 2015
BVCA
Boston and New York

March 7 and 8, 2016
Separately Managed Accounts and Single Investor Funds
Jonathan Adler, Erica Berthou
Seventh Annual International Conference on Private Investment Funds
International Bar Association
London

March 7, 2016
Women in Asian Private Equity
Katherine Ashton
Debevoise Seminar
Debevoise & Plimpton LLP
Hong Kong

March 2, 2016
Best Practices in Addressing Corruption Risk
William Y. Chua, Mark Johnson
IFLR Asia M&A Forum 2016
International Financial Law Review
Hong Kong

March 1 and 3, 2016
The End of Iran Sanctions: Challenges and Opportunities
Satish M. Kini, Carl Micarelli, Matthew Howard Getz
Debevoise Seminar
Debevoise & Plimpton LLP
New York and London

February 26, 2016
Panel: Private Equity Year in Review and Looking Forward
Erica Berthou
Investment Funds Forum
Maples and Calder
Grand Cayman

February 24, 2016
Next Steps to Fighting Cyber Threats: Implementing Cyber Information Sharing
Jeewon Kim Serrato
Cyber Threats Forum
Financial Services Roundtable/BITS
Washington, DC

February 22 and 23, 2016
Legal Agreements in Private Equity
David Innes
Legal Agreements Course
BVCA
London

February 22, 2016
Panel—Renewable Energy
Sarah A.W. Fitts
Environmental Law Society Symposium
Columbia Law School
New York

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Key Developments in Leveraged Finance
Alan J. Davies, Pierre Maugüé
Debevoise Seminar
Debevoise & Plimpton LLP
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February 18, 2016
The Decision to Separate
My Chi To
Spin-offs 2016
Practicing Law Institute
New York

February 10, 2016
Regulatory Considerations for FinTech Companies and Investors
Lee A. Schneider
LaunchTalks: Top Five Regulatory Issues FinTech Should Care About
Launch Warrior
New York

February 9, 2016
Hot Topics
Andrew M. Ahern
PE Working Group
IAA
Washington, D.C.

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The Alignment of LP-GP Interest in the Sales Process
Katherine Ashton
Alternative Fund Strategies: Secondaries Forum
British Private Equity and Venture Capital Association
London

February 1, 2016
Cyber Prosecution
Jim Pastore
Computer Crimes
Fordham Law School
New York

January 29, 2016
Tail End Solutions: It Ain't Over Till It's Over
John W. Rife III
Annual Conference
Private Equity Lawyers Forum (PELF)
London

January 29, 2016
Regulatory Spotlight on Private Equity
Geoffrey Kittredge
Annual Conference
Private Equity Lawyers Forum (PELF)
London

January 21, 2016
Legal Strategies: Protecting GP Interests and Maintaining Competitive and Marketable Positioning to LPs
Andrew M. Ostrognai, Gavin Anderson
Fundraising Masterclass
EMPEA
Hong Kong

January 15, 2016
Disclosure Matters and Other SEC Considerations
William D. Regner
Mergers & Acquisitions 2016: Trends and Developments
Practising Law Institute
New York

January 8, 2016
Internet Panel Roundtable: Privacy and Cybersecurity
Jim Pastore
Annual National CLE Conference
Law Education Institute; ABA Section of Intellectual Property Law; International Trademark Association
Vail

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Florida Court Dismisses Data Breach Lawsuit for Lack of Standing
Jeremy Feigelson
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Maura Kathleen Monaghan
Elliot Greenfield
David Sarratt

February 26, 2016
U.S. Federal Court Denies Immunity to Sovereign Wealth Funds
Mark W. Friedman
Floriane Lavaud
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February 24, 2016
SEC Final Cross-Border Rules on "Arranging, Negotiating, or Executing" Security-Based Swaps and the De Minimis Exception
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Federal Law on Jurisdictional Immunities Adopted
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February 4, 2016
EU-U.S. "Privacy Shield" Greeted Cautiously
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SEC Proposes New Limits on Registered Funds' and BDCs' Use of Derivatives
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FDA Publishes Guidance on Postmarket Cybersecurity Risk Management for Medical Device Manufacturers
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Implementation Day— Iran Sanctions Relief Now Effective
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