WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

John Suydam

General Counsel
Apollo Global Management, LLC

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THE SPEAKERS

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(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, www.directorsroundtable.com.)

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished Guest of Honor's personal accomplishments in his career and his leadership in the profession, we are honoring John Suydam, General Counsel of Apollo Global Management, with the leading global honor for General Counsel. Apollo is a prominent global alternative investment manager. His address will focus on key issues facing General Counsel of major international investment firms. The panelists' additional topics include dealmaking; investment strategy in the United States and emerging markets; and going private transactions and regulation of large, public alternative asset managers. The transcript of this event will be made available worldwide in electronic copy.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel.

Jack Friedman
Directors Roundtable
Chairman & Moderator

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John Suydam

Chief Legal Officer and
Chief Compliance Officer,
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APOLLO

Mr. Suydam joined Apollo in 2006. From 2002–2006, Mr. Suydam was a partner at O'Melveny & Myers LLP, where he served as head of Mergers & Acquisitions and co-head of the Corporate Department.

Prior to that time, Mr. Suydam served as chairman of the law firm O'Sullivan, LLP, which specialized in representing private equity investors.

Mr. Suydam serves on the board of directors of the Big Apple Circus and Environmental Solutions Worldwide, Inc. and is a member of the Department of Medicine Advisory Board of the Mount Sinai Medical Center.

Mr. Suydam received his JD from New York University and graduated *magna cum laude* with a BA in History from the State University of New York at Albany.

Apollo Global Management, LLC

Since its founding in 1990, Apollo has grown to become one of the world's largest alternative investment managers. As of September 30, 2013, we had total assets under management of $113 billion, with a team of 691 employees located in ten offices around the world.

We attribute our success to our key competitive strengths:

- our investment process and approach to investing, which incorporates our flexibility to invest throughout market cycles and across the capital structure, our deep industry expertise and focus on complex transactions, our investment edge which creates proprietary investment opportunities, and our collaboration with portfolio company management teams;
- our integrated business model, which combines the strength of our private equity, credit, and real estate platforms;
- our strong management team and reputation; and
- our long-standing investor relationships, which include many of the world's most prominent pension and endowment funds, financial institutions and individuals;
- our long-term capital base;
- our alignment of interests with investors in our funds and shareholders.

We operate our businesses in an integrated manner, which we believe distinguishes us from other alternative investment managers. Our investment professionals frequently collaborate and share information across disciplines, including market insight, management, banking and consultant contacts, as well as potential investment opportunities, which contributes to our library of industry knowledge and enables us to invest successfully across a company's capital structure. The integrated Apollo platform and the experience of our investment team have enabled us to deliver strong long-term investment performance in our funds throughout a range of economic cycles.

Our investment approach is value-oriented, focusing on industries in which we have considerable knowledge, and emphasizing downside protection and the preservation of capital. We are frequently contrarian in our investment approach, which is reflected in a number of ways, including:

- our willingness to invest in industries that our competitors typically avoid;
- the often complex structures we employ in some of our investments, including our willingness to pursue difficult corporate carve-out transactions;
- our experience investing during periods of uncertainty or distress in the economy or financial markets;
- our orientation towards sole-sponsored transactions; and
- our willingness to undertake transactions that have substantial business, regulatory or legal complexity.

We have successfully applied this investment philosophy since Apollo's founding, allowing us to identify what we believe to be attractive investment opportunities, deploy capital across the balance sheet of industry-leading businesses, and create value for our investors throughout economic cycles.

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JACK FRIEDMAN: Good morning. I'm Jack Friedman, Chairman of the Directors Roundtable. We are a civic group which organizes programming for Boards of Directors and their advisors globally.

Before we move ahead, I just wanted to relate a point in history, because of the significance of this day as the anniversary of 9/11. On the original 9/11, we were organizing one of our events for late September in this room with Goldman Sachs and AIG as guest speakers. We couldn't communicate with their downtown offices due to the damage. We already had a huge number of people registered. So, I just assumed it was going to be rescheduled. About a week and a half later, the very first day that Goldman and AIG were back in their offices, we contacted them. I said, "I assume you want to reschedule the program." They said, "We're totally busy now, but we don't want to give the world the impression that we or New Yorkers or America feels defeated. We'll go ahead and provide a very senior speaker as originally scheduled."

It turned out that this Roundtable was virtually the first major event that was scheduled in New York after 9/11. There are many ways in which New Yorkers bite the bullet to move ahead and not be defeated. That was a proud moment for us.

This event is part of a series that we have been doing with leaders, on the General Counsel and the business side. Directors have told us that they feel that corporations do not get any meaningful credit for the good that they do. We have had the privilege of creating this series to address these issues and having as guests many important people. The full-color transcript of this event will be going out to about 150,000 leaders nationally and globally, which makes it the leading world honor for General Counsel.

Our Guest of Honor, John Suydam, is the General Counsel of Apollo Global Management, which is among the handful of the most elite and important private

equity firms and private investment management firms in the world. Mitt Romney made the industry a subject of attention. What's fascinating is you rarely hear stories about the successes and the jobs that are saved, and all the good things that are created by this industry.

John has a very distinguished career. He's a graduate of NYU Law School. He was a partner at O'Melveny & Myers, and has been, for several years, the General Counsel of Apollo. We will begin with his opening remarks, and later, introduce the Distinguished Panelists, who will each have opening remarks about their area of specialty. Following that will be a Roundtable discussion with some questions from the audience.

I would like to thank John very much for enabling us to do this world recognition.

JOHN SUYDAM: Thank you, Jack, and thank you, everybody who got here this morning. For those of us who have worked in the city for a long time, this date [September 11] is always a tough morning to get up and get out, with what happened twelve years ago. But, we keep on going.

I wanted to start by explaining what Apollo Global is, and give you a look into what we do for a living. I'm going to just walk you through a bit of our presentation that we would give to investors in Apollo Global Management, which is a publicly listed company on the New York Stock Exchange.

Before starting with the presentation, what we do is actually fairly simple: we manage money for what are largely institutional investors. They are pension funds, sovereign wealth funds, money that is being put aside for the retirement benefits and other needs of workers, many of which are public employee workers, firemen, teachers, and policemen. We generally invest those funds or invest that money through a number of different funds in what is now a number of different products, private equity being probably the most well-known of them, but certainly not the only thing. We actually invest more dollars, at this point, into the credit markets in the United States and Europe than we do into private equity transactions.

The presentation is hard to read, but as most of us practice law for a living, please be aware that this presentation may contain forward-looking statements.

As I said, Apollo Global Management's ticker symbol is APO, our market cap is a little bit over $10 billion, so it's still a fairly small company. We manage about $113 billion in assets. We've been growing our assets under management (AUM), which are the assets we get from

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investors and limited partners, at about 30% a year, and we've been paying a dividend on our shares of about 13%.

Now I'll take you through first the overview, and then we'll go through some of the business segments. We were founded in 1990. We have, as I said, $113 billion of assets under management. We employ about 660 people in nine offices, at this point, around the world. As the firm has grown, it's become more complex, managing money not only in the U.S., but in Europe and in Asia, as well.

Our business breaks down into three segments: private equity — once again, the business that got a lot of press during the last presidential election — where we manage about $40 billion; credit, which is mostly buying performing credit, although also some non-performing loans — we manage over $60 billion; and then we manage about $9 billion in the real estate area, much of which is credit assets, as well, but are real estate-focused.

We have what we believe to be a fairly distinct approach to investing. We are value-oriented. We quite often move against the current, looking for what we think are attractive entrance prices, both on the debt and equity side, into opportunities. We operate our firm on an integrated basis, and what I mean by that is unlike many investment firms — and I'm not sure this will stay forever — we have our people talk to each other across the businesses, and we organize ourselves by industry specialty around nine core industries where we believe we have a lot of expertise, from years of studying and investing in that industry. That causes us to have to deal with regulatory and compliance issues in a certain way, basically restricting our whole firm, once we are in possession of material non-public information in any part of our firm. But we believe, and as we explain to our investors, we think that's the best value-added approach, that the opportunities that may get lost in some areas, due to the fact that you get restricted, are outweighed by the expertise that you can bring to bear on the investments that you look at.

The next slide basically walks through that we integrate our businesses and we use our expertise in areas across our business segments. The nine core industries that we work in, we've identified chemicals, consumer, distribution, transportation, financial business services, manufacturing, media, packaging, satellites, and commodities.

Our track record: over the last 20 or so years, we've returned about 39% gross and 26% net over that time period to our investors on the private equity side. On the credit side, some statistics, we've generally beaten industry averages in the areas in which we have invested. It's probably because of those first two slides that we get to the next one, which is the growth in our assets under management, which before, it was growing at about a 30% clip, has continued to grow with, frankly, more growth on the credit side than on the private equity side. We believe that's largely attributable to the disruptions in the credit markets that have occurred since the financial crisis. Opportunities have been created for investors such as us, who will buy and hold debt instruments for a longer period of time.

Our view going forward is to continue to scale our business basically through performance, delivering returns to the people who are most important to our business, which is our investors — the people who trust us with their money. If we continue to deliver for them and provide them with appropriate risk-adjusted returns, we believe we'll continue to be able to grow our business. We also think that industry trends, at this point, are on our side, given some of the consolidation within the asset management industry with branded scale investment managers. We also believe that there have been, in many ways, some barriers to entry that have been erected over the last four or five years through the regulatory landscape. For people who have been able to deal with the issues you need to deal with to be engaged in this business, it makes it a little bit harder for others to just jump in.

We have demonstrated the ability to raise capital globally, and continue to do so, both through 2012 and into 2013, where we have been able to close on a new private equity fund. It's still fundraising, but we've had our first two or three closings on it.

Since the IPO — the company went public and was listed on the New York Stock Exchange in 2011 — we have continued to deliver for not only the investors, but also for our stockholders at Apollo Global, and frankly, the two are really one and the same. If we invest well, perform well, we get paid well. Most of our compensation is aligned with our investors. A share of the profits that are created in the investing activities that we engage in goes to our investors. If we create those profits and realize investments, our company does well and we have cash to distribute to our stockholders.

I'll spend a couple of minutes just walking you through the business segments, starting with the private equity overview. As I mentioned before, the investment returns have been about 26% net back to investors historically. Some of the investments that we have made over the years, such as Realogy, are listed down there, and these are companies that have gone public. Norwegian Cruise Lines, Constellium, Rexnord — you can see on the left Berry. A lot of these companies have done quite well.

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We continue to have a good bit of capital to invest at this point for the funds we manage, and particularly with a new fund coming online, continue to invest on the private equity side.

I'll take you a little bit through each of the private equity funds. They are done serially. They are raised; you invest the capital; you then exit the investments; you distribute cash out; the fund life ends. They are limited-life funds. So walking you through our last three funds — Fund V, Fund VI and Fund VII — we have now closed on VIII, although not made any investments out of VIII. Fund V was a 2001 vintage fund with just under $4 billion that was raised. An important distinguisher, we believe, going back to what I said earlier, as a value investor, contrarian investor, we generally try to enter companies at a multiple that is below what we believe to be industry comparables. So during the period of time that Fund V was invested, general indices would have suggested that people were making investments at a 7.7x multiple, and we invested that fund at a 6.6x. I'll get into the rationale for that in a moment.

Fund VI, once again, 9.6x was the general trend. This was during some of the boom years for transactions, and we invested that fund at 7.7x multiple. Fund VII, which was invested a little bit more during a distressed period, industry multiples were at about 8.9x, and we invested at 6.2x. How do we try to do that? Let me see if the next slide — if you look at the bottom, you can see the composition of the portfolio. We invest, really, in three ways: Typical buyouts that you would read about, and that were discussed a lot during the last presidential election, but we also do a large part of our investing in distressed investing. In distressed investing, we are basically looking at a company, looking at its capital structure. Generally it's what we believe to be a fairly good company that has hit a bump in the road, or has a capital structure that's not appropriate for the company. We buy a debt position in the company, hoping to be able to convert that debt position into equity. It doesn't always happen. When it doesn't happen, it's normally because somebody else has restructured the company, or the company has done better and instead the debt has traded back up to par or near par. So the consolation prize is the debt that you bought cheaply becomes more valuable. What we would rather do, though, is to take that debt, turn it into equity, work with the company to improve operations, and then eventually sell that company.

> "...[W]hat we do is actually fairly simple: we manage money for what are largely institutional investors. They are pension funds, sovereign wealth funds, money that is being put aside for the retirement benefits and other needs of workers, many of which are public employee workers, firemen, teachers, and policemen."
>
> *– John Suydam*

The other distinguishing factor is we do a lot of what are called "corporate carve-outs." There are quite often, within larger companies, assets or divisions that may not have gotten the attention of senior management or the assets allocated to them to grow their businesses. We will spend a lot of time figuring out how to carve out very complex businesses from sometimes fairly integrated operating processes with another business, to buy that business. We believe that helps us to buy things at a little bit lower cost, because of the complexity associated with those types of transactions.

So it's really that focus on distressed investing, focus on corporate carve-outs, and price discipline on buyouts that we try to buy things at what we believe to be attractive investment prices.

Turning to our credit business, we manage a little over $60 billion of credit assets. You'll see, through the mix of the products, that U.S.-performing debt is the largest piece of it. Structured credit, money managed for insurance companies, opportunistic credit investments, and also portfolios where we're buying non-performing loans, largely in Europe off of European banks, are part of our strategy.

We have the same approach — it's value-oriented, but typically looking at buying what we believe to be undervalued debt investments, and leveraging the industry expertise across the platform to enable us to do that.

Now, one of the things to mention: we manage a lot of money for a company called Athene, which is an insurance company. Athene was formed in 2009 by one of the funds that we manage. It's had significant growth over the years since that. It currently has about $16 billion and has signed an agreement to acquire another large insurance company, Aviva, and that has not yet closed, but is in the process of. We, at Apollo, manage a portion of that money — through our performing credit accounts, largely.

With the real estate business, we have a similar value approach. We have real estate funds that invest in actual ownership of property and hotels, and also a lot of investment into CMBS, RMBS and other debt securities related to the real estate markets.

Financial overview of how we make our money: We get a management fee for managing the different funds, both the private equity, real estate and credit funds, and that's a fairly consistent fee. I'll take you through some metrics on that in a moment. We also get carried interest, which is basically performance fees. When our investors do well and we achieve certain hurdles for investors, we get paid more, anywhere from 5% to 20% of the profits that are generated.

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You'll see there's a chart there of the management revenues as they've grown over the years. We've been scaling up pretty much each year. As a percentage on the private equity side, if you took it as a percentage of AUM, it's generally a little bit less than 1% of the assets that we receive as a management fee, and in the credit side, it's about 75 BPS. You'll see there's a little bit of a breakdown there — about 50% of our management fee comes from credit funds, 39% from private equity, and 8% from real estate.

That's about it. We manage, at this point, 60 to 70 funds for different investors, most of which are commingled funds — six of which are public funds, where the fund itself can be bought by retail investors — but the overwhelming majority of the investors in the funds are large institutional investors.

What I do at Apollo: I'm the Chief Legal Officer and Chief Compliance Officer. I started with the company in 2006. Actually, April 1, 2006. The company has grown dramatically since I started. Private equity, which I have been working in as an industry since I graduated from law school in 1985, had been a cottage industry for a long, long time. It was like investment banking probably at the same time — a small group of partners that would own a firm, would invest, would make money, and run the firm like any other professional services firm — as a small, almost family-owned business. As the world has changed, we have begun to manage far more assets, similar to investment banking and similar to all professional services firms — accounting firms and the rest — they have become quite large, more difficult to manage, and over the last four or five years, regulated far more dramatically than they had been before. Years ago, when you represented private equity, in particular, you needed to do your work to make sure that they didn't come within the regulations, didn't become an investment company. Your investment manager didn't have to register as an investment advisor. That's no longer the case; you're going to be subject to regulations in the United States, in Europe, in Asia, and you just have to bring that in as part of the culture of the firm. We've done that; we've really focused on delivering results for our investors, and doing so in a way that is appropriate, ethical and with a very strong culture on looking ahead and trying to comply not only with the laws and regulations as they exist now, but what we believe to be the best practices for moving forward.

JACK FRIEDMAN: Thank you, John. One of the classic areas for the private equity industry has obviously been M&A, which is part of your special practice area. Could you tell us a bit about how your company is organized internally; brings in consultants to help decide; and goes from industry to industry looking for M&A opportunities? Also, could you talk about how you go about evaluating businesses to purchase?

JOHN SUYDAM: Sure. As I mentioned before, there are core industry teams within Apollo. They are typically one, two or three partners, and then a group of younger folks, who focus for long periods of time on that industry. They build relationships within that industry with executives at companies. They tend to, or try to have their pulse on what impacts, or what's affecting that industry. Is the industry coming under stress? Is it in a cyclical business, where they're going to be going through a down cycle? If it is, are there companies within that industry whose capital structure may come under stress during that period? The team then begins to try to generate ideas for transactions through that knowledge, either through contacts within the industry — for a company that is repositioning itself or wants to sell assets.

There's been a movement over the last three or four years in the oil and gas industry, where a lot of the very large players in that industry have been selling off certain types of assets in order to redeploy capital into other types of assets. Understanding that trend, and then being able to look at the different companies to see who has the type of assets that they may be wanting to dispose of, in order to reinvest into higher yielding assets, and reaching out to those companies to begin a dialog around a potential transaction, is what our industry specialists are doing.

So it's knowing an industry very well, understanding what's going on, the trends in the industry, what the competitive landscape is within that industry, what the capital structures of the different companies are, and then, either through proactive outreach or just being within the circle of people, find out that something might be going on.

People may bring us deals, as well. But most of the deals we do are proprietary to us, where we generate the idea, as opposed to react to a sales process.

JACK FRIEDMAN: Maybe we'll later discuss a case example of where you are not only restructuring the finances of the company you buy, but also bringing in new management to make the operations more profitable.

Adam Weinstein is the next speaker. He is a partner at Akin Gump and he will introduce his topic. Thank you.

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ADAM WEINSTEIN: Hopefully I'll be able to wake you all up. First, I would like to honor John. I first started working with John 17 years ago at O'Sullivan on M&A and public company take-outs. At that point in time, the first project we worked on was two simultaneous take-outs of public companies. So what I'm going to focus on is some of the history in how public company take-outs have changed over the years. The intensity, the integrity of John in those transactions, has continued to this day. Instead of the small group of really smart investors managing private equity funds, today he's managing legal compliance for a massive organization with increasing complexity both on the acquisition side, as well as on the fund management side. The conflict issues and other issues that he faces and manages is quite extraordinary. It is definitely an honor to be on this panel with John.

So, what has changed over the last 20 or more years is when you look at the research and what's happened, when you did public company take-outs years ago, you told clients that they would probably get sued. Today, it's a foregone conclusion. In the last public take-out I did, we announced the deal at 7:00 a.m. Before the markets opened, there were multiple plaintiff law firms on the Internet advertising to seek clients to bring those lawsuits. Within days, there were over eleven lawsuits filed. It doesn't matter what the price is; it doesn't matter what the Board did; it doesn't matter what the reason is. Those lawsuits, invariably, today will be filed. Multiple jurisdictions — they're in the area where the company is located; they're in Delaware; they're in federal court; they're in state court. The plaintiff law firms are hitting the ground very, very quickly, to try to earn their fees. Recently, with the case that was decided in June of this year, the forum selection clauses that some companies are starting to put into their charter documents have been upheld by the Delaware courts. That should bring most of that litigation back into Delaware; we'll see how that transpires over the future time.

What has changed? Delaware law has increased its clarity over the years; it still has a long way to go. The security laws have been adaptive over an extended period of time. It's gotten better and better, but there are still some very complex issues in taking companies private.

The first thing is, how do you take a company private? I'll focus a little bit on board issues. I'm going to start on structure, then address the closing, building to the executory period, and then talk about some board duties which will be relevant to this group.

There are two ways to take a company private. A one-step merger transaction — you go out for a shareholder vote. The Delaware transaction shows some of the issues surrounding that vote. The other way is a two-step transaction with a tender offer. The primary advantage of a tender offer is it can be done very quickly. You could essentially complete the transaction from execution of a definitive agreement to closing in a 30-day period — 20 business days. The tender offer documents are not reviewed, prior to distribution, by the Commission. The Commission will comment on many tender offer documents, but they do that timely; you could respond without extending your period, and you could close out the deal very quickly. We'll get to that in a second, because what changed last month was Delaware enacted a Statute: Section 251(h), adding to the Merger statute. 251(h) changes the picture dramatically for the timing of a transaction, and should push more transactions into a tender offer structure.

First, let me give you some historical background about two-step transactions. Years ago, companies would come to the finish of a tender offer; they'd have a majority of the stock tendered into the offer but not enough to complete a short-form merger. They would need to go to shareholders for a vote that was ensured, but there are SEC compliance and timing issues with the second step of the transaction, as well as financing issues in leveraged transactions. Companies would come to the end of the tender and they'd extend the offer. Hopefully, they'd get up to 90% and would be able to do a short form. Not always, but very often, they did not.

Then the SEC enacted a rule to facilitate tender offers, which allowed a company to do a subsequent offering period, to bring the shares tendered into the offer, to allow a short-form merger.

People have been trying to get rid of this back end time period for many, many years. 251(h) has done that. 251(h) says, from the time you complete — if you deal with this tender offer structure, essentially, you could complete the merger if you have enough shares to ensure the vote without going for a shareholder vote, and allow you to complete the merger almost immediately after completion of the tender offer.

It should be a game-changer even though there are procedural requirements. It doesn't mean that every transaction is advantaged by tender offers; there are other factors to consider — you can't always complete a deal in 30 days. There are regulatory issues and other issues.

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Statute 251(h) was a response by the Delaware legislature to an unfairness that they've seen over the last couple of years, where companies started doing, or buyers started demanding what's called a "top up option." If you got the 50%, they'd grant the buyer, at the time of the signing of the definitive agreement, an option to acquire a number of shares that would bring them from the number needed for the vote to the 90% to complete the short-form merger. If a company had sufficient authorized shares, they did this, or they were able to do this. This created an unfair playing field, because some companies just did not have enough authorized shares; they would need to go out to a vote to increase the authorized shares under the charter.

Delaware's action was primarily a response to that issue, not to facilitate the back-end merger. It was a technical issue that brought this to their attention. Other companies have done what people call the "Burger King Structure," which is to flip to a one-step buy, if you didn't get a sufficient vote.

The point is, 251(h) is a game-changer and should bring most transactions back into the tender offer structure.

That covers some fundamental changes recently. The other thing I would say that hasn't changed a lot, but has changed in some of the details over the years, is deal protection devices. This is the focus of every attorney and the board at the time of approving a transaction. Every seller and buyer want deal certainty, but you can't lock up a shareholder vote. You need to go out to the shareholders, either by a tender offer or by a vote; you can't buy a public company without going to the shareholders.

So how do you protect the deal? There is a package of items. The most fundamental one that is negotiated heavily in transactions is the termination fee. If somebody comes in with a higher offer during a period of time following execution of the agreement, the board needs, in the exercise of its fiduciary duties, to terminate that agreement and do a better deal. Some other deal protection devices include the change of recommendation, often only permissible if an intervening event occurs requiring a board to exercise its fiduciary duties to terminate that agreement; termination for breach; and no vote. You also see a tail period to cover situations in which the target starts negotiating with a third party, the deal blows up and they complete a deal following the termination of the agreement.

The point is that there's no real fine blueprint for this. It's the package of the deal protection devices that the board will have to consider at the applicable time.

I'm going to move quicker, because we have more things to cover. The other thing you see now in the market is reverse breakup fees. This applies particularly to institutions like John's, private equity funds who are using debt to finance the transaction. That creates deal certainty issues for the board that you're advising. It used to be that the buyer, a private equity fund, would have a financing condition; that creates deal uncertainty for the target board. The markets have evolved. The private equity sponsors generally now often agree to pay a reverse termination fee — if the financing doesn't close, they'll pay a fee to the target company. The fundamental point, from a fiduciary perspective, is that there's no fiduciary duty issue facing the buyer. It's fundamentally different than when you're advising a board of directors or a target corporation, where you can't lock up the deal because the shareholders need to approve a transaction.

What are the fiduciary duties that this group needs to consider, either because you're a director or you're a GC advising the board? The primary ones are duty of loyalty and duty of care. The duty of loyalty is the subject of extensive litigation over many years in Delaware courts; it is really about conflicts. When is a board conflicted? You could read today's *Wall Street Journal* article on Dish TV and the special committee they set up, and what the conflict was. That article doesn't go into enough detail about the conflict, but Michael Dell and the Dell transaction — obviously he was on the buy side and the sell side as a stockholder; a very clear conflict. The Dell board needed to jump through hoops to comply with its fiduciary duties.

At the end of the day, what are those fiduciary duties? It really comes down to what standard the Delaware courts will consider: are you under a business judgment rule, are you under entire fairness? When you have a conflict, the goal of every plaintiff's lawyer, when they file a lawsuit, is to bring the case out of business judgment and into entire fairness. The standard is often one of enhanced scrutiny, whether that would be a Revlon standard for maximizing shareholder value, or entire fairness.

Entire fairness has been the subject of some significant recent litigation. In a nutshell, the transaction has to be fair. The question is, who has the burden of proof? The statute is drafted in a way that's not clear on its face, but when you look at the case law, a company, a target — entire fairness is really about fair process and fair dealing. You set up a special committee and at the end of the day you still have to have a fair price. The question is, if you have a fair process, do you shift who has the burden of proof?

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If you've received proper approval by a properly functioning committee for a transaction, or by a majority of the disinterested shareholders, that burden of proof should be shifted to a plaintiff. Under recent case law, Delaware courts have said, "When this gets pled to the courts, you don't really know if you have a proper special committee," so they defer that decision, under the *Southern Brew* case, to trial.

If people have questions on fiduciary duties or M&A, I can answer them now, or we can answer them later.

MEMBER OF AUDIENCE: Do you think it makes any difference if the target is in California?

ADAM WEINSTEIN: You're not under Delaware law. Well, it depends. Do you mean incorporated in California, or do you mean located in California?

MEMBER OF AUDIENCE: The company is located in California, with the California courts applying California law, and they may, for example, find a merger binding and it can't be stopped. I was wondering if you've run into that.

ADAM WEINSTEIN: I practice more in Delaware, and most of the public companies are operating under Delaware law. The biggest issue is California doesn't really have the same body of takeover law that Delaware has. Everybody looks to Delaware. I don't know if California is a jurisdiction that looks to Delaware, but most jurisdictions do, at least from an incorporation perspective.

JACK FRIEDMAN: It's very interesting. Thank you.

Just one quick question and then we'll continue. I'm asking John, but this can be for the whole Panel. When a private equity firm comes in and says, "We'd like to discuss buying a division of your company," is there a perceived difference in the marketplace if it is a financial buyer versus the operating company-type buyer?

> "We have what we believe to be a fairly distinct approach to investing. We are value-oriented. We quite often move against the current, looking for what we think are attractive entrance prices, both on the debt and equity side, into opportunities. We operate our firm on an integrated basis … and we organize ourselves by industry specialty around nine core industries where we believe we have a lot of expertise, from years of studying and investing in that industry."
>
> *– John Suydam*

JOHN SUYDAM: There is probably a perceived difference between a financial buyer and a strategic buyer. As a matter of fact, there are probably many perceived differences. They cut both ways. If there's a mid-sized, publicly traded company, what the strategic buyer, somebody who's in the same industry — looking to come in, you could imagine a situation where management of that company may feel a little bit in jeopardy.

JACK FRIEDMAN: Because they think the buyer doesn't need them as much?

JOHN SUYDAM: The buyer does the same thing they do. They have their own management team, and of course, depending on the situation, that may or may not be an issue. In that situation a financial buyer might be potentially more attractive to management, because the financial buyer doesn't come in, generally, with the management team. Now, that can change, because financial buyers may have a reputation of changing out management more quickly than others, as well. So I don't think there's one set of glasses through which people would look at those perceptions, but they do change from transaction to transaction. There certainly are differences, and I think the general view of strategic buyers may very well be willing to, and able to pay more, because they are able to create synergies in the business through reduction of redundant costs, and the reduced redundant costs, when you put a multiple on it, whatever the PE multiple of that combined business is, they may be able to pay more in the transaction than a private equity or financial buyer. So there are a lot of issues that would need to be considered; it could change.

HARVEY EISENBERG: Particularly in different geographies — in Europe, for example — employees and the general public are a little more skeptical of private equity, and they're concerned that a private equity firm might do more layoffs and do more things that aren't as good for the community as a strategic company that is part of the community. It's really more a difference between American business style and European business style, but Europeans are exposed to private equity more than anything else.

JOHN SUYDAM: That's a general perception that financial and private equity buyers are more apt to cut and lay people off. That has not been demonstrated through empirical evidence; the empirical evidence suggests that when a private equity or financial buyer comes in to a company, there is generally a slightly more aggressive attrition in the first year, and maybe the first two years after ownership, and then it generally catches up. There is no measurable difference between employment and growth within a company over a five-year period.

JACK FRIEDMAN: Next is Harvey Eisenberg of Weil, Gotshal & Manges.

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HARVEY EISENBERG: I'm Harvey Eisenberg; I'm a partner at Weil, Gotshal. My practice area is principally doing deals for private equity firms; I also do fund formation work. I've had the privilege of working with John for probably 20 years, first as a partner in the practice of law for about twelve, and for the last eight years, with him in his role as General Counsel of Apollo.

One of the things that I've worked with John on in the last eight years is making sure that Apollo is market leading in its practices to avoid conflicts of interest and to comply with the many laws that affect it. The laws that I'm going to focus on are not the ones that relate to doing deals or necessarily forming their funds, but day-to-day management of the business and conflicts.

The real issue for representing a big, diverse public alternative asset manager is to recognize that it is more complicated, and that it's highly interconnected. You have to actively manage conflicts and anticipate them. The goal is always to be the first to identify potential problems and deal with them before they become a problem, rather than deal with them after the regulators are focused on them and perceive them as an issue.

Public asset management has been around for a long time. The banks and the investment banks have been doing it for decades. Probably a good ten years before Apollo went public, BlackRock and American Capital and other firms of their like have gone public; but beginning in 2007, there was a new breed created. Fortress was the first, but I've listed the group, and this group of firms went public, and I call them "PAAMs," or Public Alternative Asset Managers. These firms really had their roots in private equity and hedge fund investment, and they've grown up together.

They're diversifying, and pretty rapidly, and you saw from John's presentation that a decade ago this was principally a private equity firm. If you look at some of the others, like Och-Ziff, it was principally a hedge fund. But over time, they have all started converging, and although many of them still are identified with their roots, as you saw from John's presentation, credit is a bigger part of Apollo than private equity. We're seeing real estate, commodities and natural resources. Retail, which means mutual funds that are registered investment companies, and fund-to-funds, and then some of them are even getting into investment banking and financially restructuring, like Blackstone. Private placements, like KKR, Apollo, as you saw, has an insurance-related party, Athene, and that means insurance holding company regulation.

Private equity firms all face growing regulation. Until recently, most of them were not registered as investment advisors. The regulation was relatively light. The fundraising environment was relatively unregulated, other than SEC private placement rules. Now there are many state rules about pension plans and how to raise money and pay-to-play.

I'm not going to talk about the issues that face all private equity firms; I'm going to talk about the ones that are unique to the large, diversified public ones. What makes them different is the extensive diversification, the laws affecting public companies, and just sheer size. Unfortunately, in this case, size matters.

Diversification really is a topic that affects conflicts, and there are a lot of conflicts that come up when you're managing fifty-some-odd funds. Not all of them are actively investing, but they all hold investments, and many of them are. The first topic is how do you allocate investments? It's nice to say, "Bright-line rules," but it's very hard to finely dice the market up when you have that many different funds.

Even though it's subjective, you have to have a fair way to allocate deals. It has to be well-articulated; it has to be followed. Things like what fund has the better mandate, what fund has the proper amount of capital, what fund has the right time horizon. There are a whole bunch of factors that you can find. It is important to, one, apply them consistently, and two, make sure that you're very sensitive to outcomes that favor the sponsor, the public firm, or that favor a favored client.

You also have the same type of issues when you have multiple funds investing in the same portfolio company. Again, a typical private equity firm might have one fund investing

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at a time, and this issue doesn't come up. But when you have dozens of funds and lots of knowledge across industries, you will find that there are times that you will allow multiple funds to invest. It requires very careful planning to make sure that their interests are aligned, because they can often have divergent interests, especially with things like holding period, liquidity needs, and coming in at different prices, which would mean that they'd want to exit at different times.

John mentioned Chinese walls; Apollo has very few of them. That was unusual five or six years ago. More and more of the large firms are bringing down some of their Chinese walls. If anything, Apollo could put up a few more. Investment banks have historically always had tons of Chinese walls. They ran each unit very distinctly, and avoided conflicts and problems. They've gotten themselves in trouble when they didn't follow them closely, particularly on the buy and sell side.

But these firms really do want to share data, and they do really have specialists across the credit side and across industry sectors that work very closely together. At a typical meeting, you will find people from different backgrounds, focusing on different things, coming together to talk about a particular deal or industry. The walls are not as extensive, and that does create restricted lists that run across the entire firm, and that prevents people from investing in companies when you have non-public information. It also prohibits you from selling.

There are many fundraising issues. In a typical fund, you're talking about things like what sector do we have an exclusive in; how much time do we get of the key managers; what geographies are we in — when you're at multiple funds, you have to lay these all together and be very careful about how you word that.

MFNs — most favored nations clauses — are particularly troublesome. Most LPs want a most favored nations clause. When you have multiple products, some of them are asking for those clauses, based upon their investment across many funds. You have to jive that with the ones who are asking for one based upon their being the largest investor in a particular fund.

> "In distressed investing, we are basically looking at a company, looking at its capital structure. Generally it's what we believe to be a fairly good company that has hit a bump in the road, or has a capital structure that's not appropriate for the company. We buy a debt position in the company, hoping to be able to convert that debt position into equity."
>
> *– John Suydam*

The next topic is broker-dealer registration, and we'll touch upon this more during the discussion topics, but most private equity firms must rely on the issuer exemption. The issuer exemption basically says that if you're in the market infrequently — once every few years — and that the people who are fundraising for you have a lot of other primary duties, and fundraising is just a part-time thing or a temporary thing, and they're not compensated based upon how much money they raise — then you can rely on the issuer exemption. If you can't, you have to register as a broker-dealer. Because of the number of funds that these big firms have, they all have registered as broker-dealers. Most private equity and hedge funds have not, and we'll talk about it later, but the SEC has indicated that they're not happy about that, and they think that many more should.

Geographic diversity — the regulations inside the U.S. used to be a lot easier to comply with, but particularly in the EU, there's the Alternative Investment Fund Managers Directive, which went effective earlier this year and, if anything, it's a more substantive regulation than what you see in the U.S., including regulating such things as communicating with the employees of portfolio companies, and how you compensate your own employees.

Allocating costs across funds is probably one of the biggest conflicts. The SEC has brought numerous enforcement actions in this area, and there are situations where you might allocate costs away from yourself, the sponsor, or away from a favorite client, or you might bail out a troubled investment with money from a good one.

The next topic is really talking about how being public is different, and how it challenges you, and obviously, it's the disclosure burden. For most private equity firms, even as a registered investment advisor, the disclosure in that form is pretty limited. The disclosure under the 34 Act, on a 10Q and K, is pretty extensive. FD issues come up all the time, where you have to think about promptly disclosing things that come up. It's added complexity, because many firms like Apollo — and I've listed them here — have a number of public funds that they operate, like AP Alternative Assets is a public fund in Europe; Apollo Investment Corp. is a BDC. There are some Apollo REITs and some mutual funds out there. But they're on a schedule to release information, and they have to release information promptly, according to the regulations they are bound by. It is sometimes different regulators and different time zones, and it's a really interesting coordination when something material comes up, to make sure you get into all the right markets at the same time.

Private equity public sponsors like Apollo are exempt from the 40 Act, and that's important to them. Obviously, being registered would be virtually impossible to comply with,

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but maintaining your exemption is difficult. When the SEC first looked at these companies, they weren't sure whether they should call them "investment companies," no matter what. There's a series of subjective tests that I've listed out here. Ultimately, they were convinced that the business of managing other people's money is different than the business of investing your own money. Nonetheless, even if you satisfy these subjective tests, there's some quantitative tests that you have to meet, and you have to test on a regular basis; Apollo tests quarterly. Any time you do a new transaction at the sponsor firm, or raise a new fund, you really do have to run the test and make sure that you don't get out of compliance. It's a law that you have to comply with continuously, and there's limited exemptive relief.

Consolidation issues are very important. To understand the numbers of a public sponsor, they need to basically show you what you want to know, which is management fees and carried interest return on investment. If you have to consolidate those numbers with the performance of their funds, or other businesses that they might invest in, the numbers get much more complex and hard to understand. The rules for consolidation are in constant flux, so if you're doing deals for a public sponsor, you're in constant contact with their internal accountants and are constantly monitoring what's going on there.

Tax issues are the same thing. Most of these public sponsors are taxed as partnerships, and most public entities have to be taxed as corporations. To be taxed as a partnership, you have to meet certain rules — basically, 90% of your income has to be qualifying, carries good, dividends good. But a lot of income is bad, and you have to block that income through a corporation. Again, when structuring deals, you have to make sure that you don't blow that.

Reputational issues obviously affect public companies in a much greater way than private companies, and you have to really be on top of them.

Finally, size really does matter. The big firms get the early attention of regulators. They come first to learn about the industry; they come first to look for problems with the big firms. They demand a lot of information from the big firms, and those demands can sometimes be very cumbersome.

John mentioned that there's consolidation in the industry that favors firms like Apollo. On the other hand, as public pension plans consolidate their investments with just a handful of firms, they expect a lot more from them. Politicians get involved, and they are scrutinizing how that money is managed very closely, and there is a lot to deal with at the state level — particularly the state pension plans.

Finally, in the U.S., as an outcome of the financial crisis, we've created the Financial Stability Oversight Council, and it's responsible for monitoring systemic risk. They require annual disclosures from almost all firms, but far more extensive disclosures from large firms. If a firm is large enough — and that means at least $50 billion of consolidated assets, and other features — it could be designated as a systemically important financial institution. They are regulated by the Fed, not quite like a bank, but pretty heavily regulated.

JACK FRIEDMAN: Just a quick question. How granular are the disclosures that you have to make? For example, how do you decide how to talk about the value of a portfolio of a fund? Is it every individual asset that's material, or every group?

HARVEY EISENBERG: When you're talking about reporting to your LPs, you're giving them valuations of virtually every investment position. But that's private information to your LPs. The problem with that is that it creates a market imbalance, so you end up having to report a lot of that information publicly. There are materiality standards in the public securities laws, and for periodic reports, like 10Ks and Qs, and the rule of thumb is something that's five

percent of assets is material and you have to talk about it. So a very large portfolio investment would be material. On the other hand — and I think it was a bad decision — but Blackstone recently settled securities litigation against it relating to its IPO, and the litigation was that they didn't disclose enough information about two particular portfolio companies that had some issues. One was Freescale and was at risk of losing a major customer, and they said, "Why didn't you disclose that?" Their response was, "It is so immaterial." By any quantitative measure, it was tiny compared to Blackstone as a whole. Yet they settled; they settled for a fraction of what was being asked, but the courts didn't give them summary judgment.

JOHN SUYDAM: A little bit finer piece on that: The largest and most significant accounting risk in any publicly traded alternative asset management firm is valuation of assets. Many of the assets on the credit side are valued based upon market prices, because they're trading in debt securities where there are readily ascertainable market prices. However, on the private equity side of the business, depending upon the maturity of a portfolio, you may have a public mark

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because an IPOs been done. But quite often, you don't; you have private securities. You are basing your financial statements every quarter, and on an annual basis, based upon the marks of those portfolio companies. So the process that you have to go through to see where those portfolio companies are, how they should be valued, is probably the single most important accounting process that you go through in the business. Then the issue becomes at what materiality threshold do you provide an insight into what the hold positions are within that portfolio? If the portfolio is valued at $10 billion, what's the threshold where you'll give to call out individual investment? There's not a science to that; it's more of an art; it's based upon a materiality analysis.

JACK FRIEDMAN: We're doing a series with Nobel Laureates in Economics beginning at Harvard Business School. Harry Markowitz, who won the Nobel Prize for modern portfolio theory, discussed whether his theory and other financial theories such as Black-Scholes work in a crisis.

JOHN SUYDAM: That theory of investing — the portfolio theory — is what gave rise to the venture capital and private equity industry, because most money that comes into this industry comes from fiduciaries that manage pension assets. Investments directly into private equity and venture capital funds were deemed to be too risky on an individual basis, for a fiduciary to make the decision to make that investment. So until there was a prevalence of an overall portfolio allocation, where you could put seven, eight, nine percent into it, within a balanced portfolio, and that overall allocation being a proper decision for a fiduciary, you had angel investors; you didn't have an industry.

HARVEY EISENBERG: Final thoughts. I just scratched the surface touching on these issues, but there are so many things you can do while representing one of these public sponsors that can trip any one of these issues, as well as all the issues that affect all private equity and hedge funds generally. It's important to have an outside counsel that knows the client well and can add consistency and help them spot these issues. The other thing is that no one firm or one lawyer can do this all; it's a real collaborative effort. One of the things that John and his legal department do so well is require many law firms to collaborate well. All the people on this panel represent Apollo, and I've had the chance to work with them for many years, and we do have to work as a team, even though we are part of different firms.

JACK FRIEDMAN: Thank you. Marty Dunn at O'Melveny & Myers used to be the Deputy Director of Corporate Finance at the SEC.

MARTIN DUNN: Thank you. I was going to go back to Adam's eleven slides on fiduciary duties, because I have a question. No, I'm just kidding. I'm going to forego slides, because we're running a little long here, and I have a fairly straightforward story to tell. But I did want to follow up on Harvey's last slide there, which says no one firm can do it all, but at the same time every General Counsel is responsible for it all. That's an unenviable task. When I was coming up here to decide what to say, I asked everybody what they would recommend I would say about John, and everybody had a discussion of his breadth of skills. It shows in the work you do at Apollo. Every conversation I've ever had with John on the phone, he seems to understand the topic and really be all over it, so we're going to give you credit for that. It's a great talent to know all those things.

I'm going to tell a basic story about the 1933 Act. I have a small area of expertise on this panel, which is what corporation finance does, which is the public company side of things: offers and sales of securities. As we were looking through Harvey's slides, there were page after page of things, and *one* of them is offers or sales of securities, which shows how many difficult topics there are here.

I was at the SEC for 19 years before I came to O'Melveny & Myers, and I did training for about 15 years, and when you describe the registration of offers and sales and securities in the U.S., you can really break it down to one sentence: Every offer or sale of securities in the U.S. is registered, exempt, or illegal. It's that simple, right? You want to avoid the illegal side. You also knew three basic things about that: In a registered deal, you can't make any kind of offer until you file a registration statement. In an exempt private placement, you can't do any general solicitation.

The other thing I can tell you from my years at the SEC: up until about two, three years ago, when somebody said, "What do private equity firms do?" they'd say, "I don't know." You had this world where lines were very simple. Registered deals were done this way; private deals were done this way; private equity funds were fairly, as you mentioned before, less regulated. You've seen all of these things fundamentally change in the last three years.

For registered deals, under the Jobs Act, you now have testing the waters for IPOs, where you can go to big potential investors and say, "Should we do a public offering or not?" It was never even thought about before. And now, September 23rd is a huge day in our world, because on that day — September 23, going forward — when I do a private offering, I can actually generally solicit, so long

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as I take reasonable steps to make sure only accredited investors buy. That's a huge change. It's a huge change in a lot of ways; I don't know that it's going to affect the world we're talking about today, because there are pools of investors there that are known; general solicitation isn't necessary in a lot of ways. But we are actually living in a world where somebody can fly a blimp outside that says, "Make $200 grand a year? Call me at 212-555-1212 and buy stock." That's going to be perfectly legal, so long as they take steps to vet the fact that you make $200 grand a year. That is very different.

JACK FRIEDMAN: What is vetting?

MARTIN DUNN: Reasonable steps to verify. The SEC has not defined that yet.

JACK FRIEDMAN: Practical ways, like your tax returns?

MARTIN DUNN: They have a non-exhaustive list; one of them is a tax return. If you have a great relationship with the person and you already know them, it lessens what you have to do. There's a lot that goes on there. If they've invested many times, you know who they are; all that.

What you're seeing now is a complete change in how things are regulated. Remember, the Securities Act of 1933 is 80 years old, and we spent 80 years solving a lot of the thornier problems of the '33 Act: What is integration? Who can do offerings? How do you do them? Now, on September 23rd, we're going to be in a world where people are doing these kinds of offerings, and we've had one day to figure out how to solve all the problems. That's, one, a great challenge — it gets lawyers money; it's a good thing. But two, it's going to cause a lot of folks to violate the law. They're not going to know what they're doing; they're going to run afoul of things; they're going to do it wrong.

John mentioned before, that as you go along, the goal is best practices and industry leadership. You've seen, since 2010, increased transparency and regulation of private equity

funds. As all of this comes along and everything changes, my discussion today is very simple, and that is, for the private equity fund, there's no way you can go back to the period of time in which it was sleepy, it was not regulated, things were quieter. You're in a very wide open world; everybody's looking at things; the nature of offerings is fundamentally changed starting September 23rd. The industry really needs, instead of shrinking from that, to rise to that. You need industry groups — because the SEC can't solve every interpretive question, because they only see the ones that come up in front of them to step up and say, "Here's the reason we are going to do this, and here is why, and we think it's consistent with investor protection and the rules, and we think it's the best approach; let's all get behind this." You need people in the industry and in the legal profession to lead that.

This is a great time in the next month. I've already fielded questions along the lines of, "Starting September 23rd, how are we going to vet folks?" "How are we going to go about this?" "What can we do in private — in general solicitations?" "What do we *want* to do? "How is the SEC going to change?" All of those are new questions. To the extent people get behind things and industry leaders like John, like Apollo, like the law firms up here, can get together and move this forward in a reasonable way, it'll be very successful. Where it won't be successful is if people say, "We're doing this because it's how we've always done this, but we don't have a good reason." It doesn't work. You need people to step up, embrace the challenge and go forward. This is a great group to talk to about that, and this is a great group up here to move forward with that. I encourage *all* of you who are in this profession — read everything you can about the changed Rule 506 and the use of general solicitation as we go forward in private offerings, because it's really going to change everything we do.

Any questions, we can go forward with that during the Q&A. I'm trying to catch up and let Brad get some time — he has these fantastic slides on a great topic. I haven't read them; I just made that up. But at any rate, truly, if you have any questions on this topic, it's a great group to ask about it, and it is a fundamental change in what we do going forward, so please do pay attention to it, and try to lead as we go. With that, go, Brad.

JACK FRIEDMAN: Thank you.

BRAD KARP: You oversold my slides, I'll tell you that! It's always challenging to bat clean up. In the case of John Suydam, let me begin by noting that I was never a partner at O'Sullivan Graev and I never was a partner at O'Melveny. I first met John about twelve years ago — I'm sure John doesn't remember this — when we were selected as two of the "45 Under 45" leading lawyers in America by *The American Lawyer*. We were young; looked young; we had more energy. But here we are today!

After meeting John at the "45 Under 45" event, I tried to recruit him to Paul, Weiss. That's how impressed I was with John. That recruiting effort failed. About five years ago, I had the privilege and opportunity to work with John at Apollo, and this professional relationship has been one of

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the highest pleasures and privileges of my career. As you've heard from everyone who preceded me, John is unique. For starters, John knows everything about everything. He is an expert in litigation and regulatory defense, even though he has no training in those areas. John knows everything there is to know about corporate matters. He is a leader; he's ethical; he has created a culture of compliance, a culture of capability and competence. John runs a wonderful legal function at Apollo and uses outside counsel wisely. John Suydam is an extraordinary lawyer, counselor and General Counsel.

What you haven't heard yet about John is even more important. John is an extraordinary person, with exceptional values and a wonderful family. John has a wonderful wife, Mary, and five wonderful children. John is actively involved in their lives. For someone who has as much responsibility as John has and who is under as much pressure as he is, John balances work and family better than anyone I know, and is present fully in both. From my perspective, as someone who runs a law firm, John's sense of balance and perspective is unique and is something that I aspire to, but fall woefully short of.

So I salute John. He is a wonderful person, an exceptional leader, an extraordinary lawyer, and a tremendously deserving recipient of this recognition today.

JOHN SUYDAM: Thank you.

BRAD KARP: Those will be the last positive and happy things you will hear from me this morning, because I'm a litigator and as such, generally a harbinger of bad news. I chair the Paul, Weiss law firm, and I've spent 30 years litigating.

The regulatory and litigation environment has become poisonous and toxic for most public company/financial institution/moneyed institutions. Private equity recently has fallen prey to this toxicity. There have been several recent negative developments and decisions I could talk about, but I am going to focus my attention this morning on the *Sun Capital* decision, which was issued by the First Circuit six weeks ago, on July 24, 2013.

The *Sun Capital* decision was a groundbreaking decision. It rocked and shocked the private equity world. The issue addressed by the court was whether ERISA withdrawal liability, the obligation to pay a bankrupt company's unfunded pension obligations, can be extended in certain circumstances to a private equity fund. The decision was one of first impression. No court had ever before squarely addressed the issue. If you judge how big a deal an event is by the number of law firm alerts that are issued within 24 hours of an event, this was a cataclysmic event, because there were more than 25 law firm alerts issued within 24 hours.

The First Circuit in *Sun Capital* ruled that, in certain circumstances, a private equity fund may be held liable for a portfolio company's unfunded pension obligations. That had never been held before. The ruling surprised industry observers, and it poses a number of potentially significant implications for the private equity industry.

Let me try to explain in the next five minutes how and why the First Circuit resolved the issue the way it did. Let me discuss the underlying ERISA regulations that helped drive the decision. Let me try to clarify what the ruling means, what it holds; more importantly, perhaps, what it does not hold. Let me discuss whether other courts are likely to follow the First Circuit's ruling in *Sun Capital*, and whether the ruling is likely to extend beyond ERISA to the tax realm and other areas of the law. Let me finally try to offer some quick and practical observations for how a private equity firm might avoid being "Sun Capitaled."

Sun Capital, as I mentioned, turns on ERISA regulations. I am the last person in the world to tell you anything about what the ERISA regulations mean, but let me try to dumb it down for myself and see if I can communicate it effectively to you. Some context: In 1980, Congress enacted legislation to try to protect the viability of defined pension plans; first, by creating disincentives for employers withdrawing from multi-employer pension plans, and second, by providing a means of recouping a fund's unfunded liabilities. To accomplish both goals, the legislation provides that a contributing employer that withdraws from a multi-employer pension plan is liable for its allocable share of the plan's unfunded pension liability at the time of withdrawal. ERISA regulations extend withdrawal liability on a joint and several basis to the contributing employer and all "trades and businesses" in a "control group" with the withdrawing employer.

There are two problems here. ERISA doesn't define "trade" or "business," and "control group" is very loosely defined, to the point that no one quite knows what it means. Which brings us to *Sun Capital*: let me describe the Sun Capital structure, because that ultimately drives the First Circuit's ruling.

In 2006, three private equity funds, parallel funds managed by the same general partner, acquired an indirect ownership interest in Scott Brass, Inc., which was a manufacturer of high-quality brass, copper and other metal products. Let me try to

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simplify the structural analysis for purposes of this morning's discussion. Sun Fund III and Sun Fund IV owned 30% and 70%, respectively, of Sun Scott Brass, LLC, which wholly owned Scott Brass Holding Company, which held all of the stock in Scott Brass, Inc., the portfolio company. The funds acknowledged that the 70%-30% division of ownership was in part designed to avoid an 80% control group situation.

In 2008, due to the financial economic crisis, Scott Brass, Inc. withdrew from its multi-employer pension plan. It went bankrupt. The multi-employer pension plan determined that Scott Brass' withdrawal liability was approximately $4.5 million, and then sought payment from Scott Brass. The lawsuit was going to be brought against Sun Fund III and IV. Rather than defend against the inevitable lawsuit, Sun Capital's litigators decided to take the offensive and bring a declaratory judgment action on behalf of Sun Capital III and IV in Massachusetts District Court, seeking a declaration that the private equity funds were not liable for Scott Brass' unfunded pension obligations because neither fund was engaged as a trade or business, and the funds did not satisfy the 80% control group standard.

The Sun Capital Funds prevailed in Massachusetts federal district court. The district court granted their motion for summary judgment, finding that the funds were not, in fact, engaged in a trade or business – a result that I think most industry observers would have expected – and thus, could not be liable for Scott Brass' unfunded pension liabilities.

Having held that the funds were not trades or business, the district court never needed to reach and, in fact, did not reach the issue of whether the funds satisfied the 80% control group test. The pension plan then appealed to the First Circuit. On appeal, the First Circuit grappled with the fact, as I mentioned a moment ago, that there is no real definition of what is a trade or business. The First Circuit breezed through a couple of 50- and 60-year-old Supreme Court tax decisions, *Higgins* and *Whipple*, finding them inapplicable, and ultimately settled upon what it described as an "investment plus approach," which was being advocated by the PBGC. The PBGC looked to whether funds were engaged in activities that, first, had the primary purpose of generating income or profit, and second, did so with continuity or regularity.

> "Being able to look at the different companies to see who has the type of assets that they may be wanting to dispose of, in order to reinvest into higher yielding assets, and reaching out to those companies to begin a dialog around a potential transaction, is what our industry specialists are doing."
>
> – *John Suydam*

So the First Circuit determined that the "investment plus approach" should guide its determination here, and it announced that the "investment plus approach," as you might gather, is a "facts and circumstances" test. Unfortunately, the First Circuit failed to provide any real guidelines or guidance as to what would satisfy the "plus" factor. We're now dealing with the uncertainty and fog that envelops this issue, because the First Circuit did not address it head-on. The First Circuit went out of its way to distinguish the two older Supreme Court tax decisions; it distinguished the *Higgins* decision, where an investor only managed his investments and hadn't participated in the management of the company in which he invested, on the basis that the Sun Capital funds here, through their general partners, had the authority to manage the portfolio company. Then, the First Circuit distinguished the *Whipple* decision, where the individual received only an investor's return, because here, the Court indicated that Sun Capital Fund IV received an additional economic benefit in the form of a management fee offset.

So what is the operative "investment plus" test, according to the First Circuit? Well, it's a seven-factor test. The seven factors are indicated here. If I had time, which I don't, I'd go through them. But let me try to synthesize them, as follows: The First Circuit found that the seven factors, as applied to Fund IV, were sufficient, because Fund IV was engaged in a trade or business. The First Circuit remanded the issue of whether the seven factors would be sufficient as applied to Fund III, because it could not determine whether Fund III received a management fee offset to satisfy the seventh factor. So while the First Circuit went out of its way to indicate that no single factor is dispositive or controlling, the fact that it distinguished between Fund III and Fund IV, and did so explicitly on the basis of whether or not there was a management fee offset, sure suggests that that is an awfully important, if not dispositive, factor.

A critical part of the First Circuit's analysis, and we've heard a little bit about Delaware law earlier, was its attribution of the management activities of the general partner to the private equity funds. That is a very significant holding, a very big deal in the private equity world. The First Circuit found the authority to do so within Delaware partnership law; both funds were limited partnerships formed in Delaware. In *Sun Capital*, the limited partnership agreements provided the Sun Capital Fund general partners with the exclusive authority to manage and supervise their investments, and the partnership agreements in *Sun Capital* further provided the general partners with the actual authority to provide management services to the portfolio companies. That was enough for the First Circuit to deem them to be trades or business, and stick them with unfunded pension liability exposure.

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Now, the issue that everyone is focused on is whether the First Circuit's decision is the final word in this area. It's highly questionable, from my perspective, whether other courts are going to follow the First Circuit's analysis, given that treating a private equity fund as a trade or business runs contrary not only to decades of practical experience in the private equity world, but also those series of Supreme Court decisions that would seem to suggest that the outcome should have been otherwise. Other courts may be more receptive to the argument that a private equity fund, in fact, does not provide management services. Other courts may not view the management fee offset as an economic benefit relating to the provision of management services, but instead as a reduction of an expense that prevents double payment of fees to a fund's general partner.

We were hopeful — at least those in the industry — that the entire First Circuit, sitting *en banc*, would hear the case and reverse the panel decision's ruling. Unfortunately, the rehearing *en banc* request was denied. It's possible that this issue will be resolved and clarified through rule-making or legislation. But there are going to be issues decided on remand if the case isn't settled by the district court, such as whether Sun Capital actually satisfies the control group test, since neither Sun Capital Fund III nor IV individually has an 80% interest in Scott Brass. It's possible that the pension fund's claims will be dismissed for failure to satisfy the control group test. The pension plans are going to argue, and it's unclear how the district court is going to interpret the First Circuit's decision, that you should aggregate the 70% and 30% to reach the 80% threshold. So it remains to be seen how the district court is going to deal with this issue on remand.

There are a host of potential implications for private equity. One hopeful point is that the First Circuit, in its decision, did go out of its way to indicate that its ruling was expressly limited to the ERISA context. So we do know that if a private equity fund is deemed to own 80% or more of a portfolio company, and is deemed to actively participate — either itself or through a general partner — in the management of a portfolio company, and receives an economic benefit attributable to such management activities, it is at risk under the First Circuit's ruling in *Sun Capital* of being held jointly and severally liable for a portfolio company's unfunded pension obligations.

Private equity funds are going to need to evaluate closely whether they are exposed to such pension risks and consider such risks carefully before making future investments. If a private equity fund deems itself exposed to unfunded pension liability risk, it will need to deal with this new development in disclosures. Also, if you read the *New York Times*, there was a pretty dramatic, breathless *DealBook* story the week following the *Sun Capital* ruling, indicating that there's no reason why the same analysis ought not to apply to the tax realm. The *New York Times DealBook* author paraded a host of horrible implications in the tax context. Four of them are listed here; we don't have time to go through them, but a lot of tax experts are spending a great deal of time and burning a lot of brain cells trying to determine whether you can shift the *Sun Capital* analysis from ERISA into the tax area. Also, is there any reason, necessarily, why *Sun Capital* might not impose environmental liability onto private equity firms or liabilities more generally under an "alter ego" theory?

You've started down a slippery slope, and how far can you go down that slope before the entire private equity industry is at risk and needs to be restructured in terms of how it conducts its business affairs?

There are a host of practical suggestions for trying to mitigate the risks posed by the *Sun Capital* decision. Let me try to offer just a couple very quickly, in closing.

Obviously, you need to review the marketing and offering materials with an eye towards the issues that the First Circuit focused on in *Sun Capital*. The deal documents in *Sun Capital* went out of their way to indicate that the funds were going to be actively

involved in the management and operation of the portfolio company. You need to be careful if you're going to say such things, because there are attendant risks that now follow such statements. Marketing and offering materials ought to be drafted very carefully, with an eye towards avoiding this liability. You need to beef up disclosures of potential liabilities that have been raised as a result of the First Circuit's decision.

In the wake of *Sun Capital*, private equity firms and their counsel are going to need to perform very careful due diligence to identify pension-related exposures of potential portfolio companies being acquired. There are ways of trying to change the structuring of private equity funds to avoid the *Sun Capital* issue. You can accomplish this in different ways; you could bring in third-party investors to control 21% of the fund, to avoid the 80% trigger. It is better to do so through a shareholders' agreement than through a holding company, LLC agreement. You can consider bringing in independent outside investors to put some more distance between the private equity fund and the actual operation and control and management of the portfolio company.

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This is going to be an issue that dominates the private equity landscape over the next year. There may be other court decisions that address these issues. It will be interesting to see whether they adopt the First Circuit's approach or rely on the more traditional approach that most industry observers expected.

AUDIENCE MEMBER: Is there any reason why it didn't go to the Supreme Court?

BRAD KARP: Well, there are a couple of reasons. One, of the mounds of cert petitions the Supreme Court receives every year, the Court takes about 80 cases. Second, the matter has not finally been decided, because, as I mentioned, there is the remand issue on whether the control group test is going to apply. Third, you would need a Circuit split to give the Supreme Court a reason to take the case.

If it did go to the Supreme Court, the odds of reversal are substantial because business interests generally fare exceptionally well before the Roberts Court. The odds are vanishingly small that this issue will wind up before the Court, but if it did, the odds are quite strong that the Supreme Court would adopt an approach quite different from the First Circuit, and the conservatives on the Court, led by Scalia, would hearken back to the *Whipple* and *Higgins* decisions from the '40s and '50s, and say, "They had it right; why are we upsetting the apple cart here? There's nothing unique about private equity that would cause us to deviate from our prior Supreme Court precedent."

JACK FRIEDMAN: Thank you. I'd like to focus our discussion on two case examples of deals that Apollo has been involved with, and invite John to start. They are Realogy and Lyondell. Anybody can join in. These are huge deals that have gone through the entire cycle from beginning to end. I would like to talk about the many things that the private equity firm did in order to get a good result for their investors. Can you tell us what actions Apollo took?

> "The private equity industry — it's not just management of portfolio companies; it's the industry itself and how the industry participants are compensated, and they push the same theory down to management of portfolio companies and it has a very good alignment." – *John Suydam*

JOHN SUYDAM: They are two very different deals. Realogy, which has been in the paper a good bit over the last couple of years, was an investment that really was a bet on the real estate market. The business is engaged in brokerage of home sales. An Apollo-managed fund invested in an acquisition of the company with some other investors, at a time when the real estate industry was going into a downturn. That downturn tended to be longer and deeper than what the investors had expected, and probably longer and deeper than what most anybody expected at the time — not only real estate, but car sales and any other big-ticket items.

The company struggled and reinvented itself in many ways during the period where sales were down dramatically, through both acquisitions and fine-tuning of its network.

JACK FRIEDMAN: It's like a Century 21; a big, big name.

JOHN SUYDAM: Yes, Coldwell-Banker and Sotheby's is another big name. Then the view from a number of people had been, "Maybe the company doesn't make it." The company was aggressive in restructuring its balance sheet as opportunities opened up to do that. Apollo supported the company through acquisitions of debt and advising the company on debt exchanges. The company was able to get through a difficult period. It had been preparing itself for an upswing; the upswing finally came. The company was able to dramatically increase its revenue and cash flow, and went public. At the time it was going public, it was really one of the only vehicles through which retail investors could invest on the uptick in the housing market; it was a direct housing market play. The company did very well with its public offering, and subsequently has done very well after it. The investors that invested in the company, although there were certainly dark days and teams had worked long and hard on the investment, it ended up working out to be a nice investment, where the investors generally doubled the money that they had put into the company.

Lyondell, which is another investment that Apollo made, was the other side of the coin. That was made a little bit later in the financial downturn, and that was a company that already had significant problems. As I mentioned before, our funds often do investments in companies that are not performing; Apollo's funds bought large positions in the debt securities of Lyondell, which is a very large chemical company, and helped take that company through a reorganization process and bankruptcy, led a group that provided debtor-in-possession financing, and then ended up with the largest equity stake in the company after the reorganization. That investment — a company that our industry experts would spend a lot of time with — although it fundamentally had significant value in it; it just was going through a difficult time in the cycle, and its capitalization structure wasn't appropriate for the period of the cycle it was in. It cycled back and has done well since. It's ended up being a very good investment, and a very good company that has great operations and does very good things.

JACK FRIEDMAN: Each situation can involve a different type of management challenge. Tell us about whether prior management was involved in the bankruptcy and what Apollo decided to do in terms of entrusting the operations to certain people.

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JOHN SUYDAM: Well, with Realogy, although there was a tremendous amount of work that was done with the company, it was a very strong management team. They saw the company through the difficult times and through the better times.

At Lyondell, our funds were not control stockholder, where we could replace management, but we had a number of people serving on the board, and they were helpful in working with the company to address needs.

JACK FRIEDMAN: Brad has some important responsibilities elsewhere soon, so we will invite him to make some comments, and then we'll wish him well.

BRAD KARP: It's a court argument; otherwise, I would not leave. I have to be there at 11:00.

The big change is that courts and regulators are becoming increasingly skeptical across a whole range of issues, and you heard a little bit earlier in the presentation about the new regulatory requirements and the challenging regulatory environment. You're seeing the SEC becoming much more involved in an area where it traditionally had not been involved. You're seeing the New York State Attorney General and other state attorneys general getting involved. Pension funds are becoming more aggressive. The Department of Financial Services in New York, led by Ben Lawsky, is becoming more aggressive. So the entire regulatory environment is becoming aggressive, politicized, and challenging. Firms like Apollo, with state-of-the-art control functions and compliance functions, will do just fine. I'm worried more broadly about the private equity industry, the hedge fund industry — which traditionally have been unregulated — dealing with the new wave of inquiries and challenges. It's going to be a very difficult environment in the coming years.

JACK FRIEDMAN: Will you give the judge our regards? Thank you very much, you have to get to court on time.

BRAD KARP: Thank you very much.

JACK FRIEDMAN: One of the big debates has been whether private equity has a different philosophy about how you compensate management for successful performance versus public companies. Could the Panelists give us your thoughts on this matter? It doesn't have to involve just Apollo; it could be other situations.

JOHN SUYDAM: There's been a significant move, and frankly, coming out of the financial crisis, you've seen both the SEC and others looking at compensation generally, with a view towards alignment. What I mean by that is there was a perception and probably a reality that people would get compensation on movements in stock, on performance, which may not hold up at the end of the day. That performance, because the company stock would go down; positions that they held, that were marked at a certain price, would later on trade at a different price.

The private equity industry — it's not just management of portfolio companies; it's the industry itself and how the industry participants are compensated, and they push the same theory down to management of portfolio companies and it has a very good alignment. It pretty much always has had a very good alignment. The reason for that is that alignment continues to be fine-tuned through industry groups and negotiations.

JACK FRIEDMAN: This is like stock options and things of that nature?

JOHN SUYDAM: No, actually not. When you form a fund to make investments, you generally get a management fee. Which, by the way, isn't necessarily a fee that's on top of a performance fee, because you have to actually return the management fee to investors before you get your performance fee, so it's probably more akin to a loan than it is to an actual fee. But the way the industry works is you invest dollars into companies, and then when you exit the companies and get dollars back, so the game's over; you actually have realized gains or realized losses at that point in time. You then sit there and say, "All right, 80% goes to the investors and 20% goes to the sponsor of the fund." As you do that, going on, if there's ever a need to true up because one deal was better than the other deal, you true it all up so

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that at the end of the day, everyone's got the deal that they said they would have, and it's only done based upon the actual realizations, cash in your pocket, not somebody's view of value at a specific point in time.

It's similar with management teams. The management teams in most private equity transactions are rewarded for equity value creation, through stock grants, stock options plans, bonus plans that are tied to the performance of the company's cash flow, and metrics for valuing the company. The real difference is, they typically don't get to sell out of that until everybody else is selling out of it. So everybody's aligned in getting the performance to where it needs to get, getting the realization on the investment. Everybody generally comes in and out at the same time, so that there's no misalignment among the investors. The management teams of the company are highly incentivized to get to the same point the investors want to get to, which is a profitable investment.

JACK FRIEDMAN: I would like to invite the audience to ask some questions in the few minutes left. Yes?

AUDIENCE MEMBER: [A question on perception of the regulatory environment.]

JOHN SUYDAM: Yes, it's actually positive. I don't have a negative bias towards the increased regulatory environment; I actually think it's appropriate. I wouldn't say that every individual regulation is perfect, because I clearly don't think that, but the overall movement on the regulatory front is beneficial, both to investors and to the funds and people who are in the business, as well, because the increased transparency and alignment are appropriate. There is a difficult period to go through when new regulations come in, where the regulators don't know exactly what they're looking for or want to be looking for, and the regulated don't know exactly how to interpret everything that's in the regulations. That period is still ongoing, but as a whole, it's a positive development.

MARTIN DUNN: I would like to follow up on that. I come from a slightly different side of the coin, but you always find that with increased disclosure, the companies that succeed are the ones that are best organized and best equipped to handle it, because they're not afraid to be transparent at all. What you then have is "best in class" folks, particularly in the industry and in private equity here, you're going to have the "best in class" folks attracting the money, and people will follow that. If disclosure and regulation are done right, and are geared towards transparency and the right way to let people in to what's going on and not telling you how to do something, and then letting people choose, it's a great race to the top. You will see a number of folks in any industry, whenever it's more regulated, who, once the light shines on them, they've got to scurry away. That's not a bad thing. It encourages confidence, and it leads to a higher ground. You can always argue about individual pieces, and even from the corporate side, some of the things that came out of Dodd-Frank are just plain silly. But at the same time, the broader picture of "what is the benefit of opening the curtain a little bit more" is good.

One of the downsides I see from all this, and I don't know if these guys want to weigh in on it or not, is we were talking earlier a little bit about independent directors and their role and what they do. In the state courts, you still see the same role of independent directors, but what I don't like is regulation that seems to discredit the role of independent directors. When the SEC adopted "say on pay" and was pushing proxy access a number of years ago, one of the Commissioners got up and said, "We seem to have gone from a role where directors are viewed as fiduciaries to folks who can't be trusted in a weird way." I don't like regulation that seems to encourage and push that. To the extent you see regulation that pushes towards "we can't trust directors" and we have to have disclosures and let shareholders vote in some fashion, is a bizarre notion. But general transparency that brings you forward could only have a good effect.

HARVEY EISENBERG: Some of the regulators take a very constructive approach. The SEC really tackled private equity starting in 2010, and in the last year, several senior members of the SEC have given speeches where they've outlined things that they perceive as issues. They've welcomed the industry to come to them and talk

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to them and explain things to them, and fashion rules that make sense — even rules that are specific to private equity. That's a great working environment. On the other hand, we have seen some regulators make this highly politicized. Some of the recent campaigns in New York City, where people tout their ability to crush Wall Street, are examples. There is political gain sometimes that has nothing to do with good regulation.

JACK FRIEDMAN: A comedian once said that politicians need Wall Street because they need to have someone to run against. The politicians would have to invent Wall Street if it didn't already exist.

I will take one more question. Go ahead.

AUDIENCE MEMBER: [Question on best practices for funds.]

HARVEY EISENBERG: It is a good question. It happens all the time. Of note, the SEC is very much aware of this situation, and Bruce Karpati, before he left for Prudential, gave a speech about and touched on this very point. I've done this many times and the best thing you can do is set up a process where you identify people who are going to be independent and act on behalf of the funds such as an LP advisory committee, especially one that has sophisticated LPs. At times, we've encouraged them to not only make the decision, but to hire their own financial advisor, and even their own law firm. We want to make sure that we run a process and replicate as much arm's-length attributes as you can, by having people designated to look after it.

I also find that full disclosure and that process gets people comfortable. Then what you're doing is in everyone's best interest, and everyone wins.

The reverse, which is doing it quickly and under the radar, is often disastrous. The very fact that you do it without disclosure is often enough to bury you in litigation.

JACK FRIEDMAN: Let me close by asking John the following question: In the five minutes a month that you have free, what do you like to do?

JOHN SUYDAM: I spend as much time as I can with my kids, and I like basketball. We enjoy watching basketball.

JACK FRIEDMAN: Do you have a favorite team?

JOHN SUYDAM: My favorite basketball team is the Knicks. Growing up in New York, it's my favorite basketball team — other than the ones my son plays on!

JACK FRIEDMAN: Let me thank all the Panelists for sharing their expertise and thank John for participating in this discussion. Although we are honoring him, we feel that he is also honoring us by the giving of his time and wisdom. Also, the Roundtable is ultimately about the audience, so let me thank the audience as well for their participation.

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Adam K. Weinstein represents large-cap and middle-market private equity funds and their portfolio companies in leveraged acquisitions, mergers, strategic investments, growth financings and similar transactions. For the last fifteen-plus years, Mr. Weinstein has served as lead counsel to a mega-cap private equity fund and its affiliates and portfolio companies in many of its complex, global leveraged buyout carve-out transactions and public company acquisitions.

Practice & Background

Mr. Weinstein is also actively involved in advising private equity investors in the management of their portfolio companies, including:

- liquidity events, including private sales and public offerings, add-on acquisitions and investments, divestitures, strategic joint ventures and alliances;
- liquidity rights, including drag along rights, forced sale arrangements, tag-along rights, put and call rights, rights of first refusal and rights of first offer;
- corporate governance rights, including board election rights, board and board committee composition and board and shareholder voting rights, including minority and other shareholder protections;
- day-to-day executive compensation, labor and employment, environmental, tax, intellectual property and litigation matters.

Mr. Weinstein received his B.S. in 1988 from Cornell University and his J.D. *cum laude* in 1994 from Fordham University, where he is a member of the Dean's Strategic Planning Commission. Mr. Weinstein was recognized by *The International Who's Who of Business Professionals* as a leader in his field.

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Martin Dunn is a partner in O'Melveny's Washington, D.C. office and a member of the Capital Markets Practice. Prior to joining O'Melveny, he spent 20 years in various positions at the U.S. Securities and Exchange Commission (SEC), most recently as Deputy Director, and former Acting Director, of the Division of Corporation Finance. As Deputy Director, he supervised that Division's Offices of Chief Counsel, Chief Accountant, Mergers and Acquisitions, International Corporate Finance, Rulemaking, Small Business, and Enforcement Liaison.

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- Provided guidance on securities law compliance to newly formed, publicly traded companies.
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- Provided guidance on corporate governance best practices to publicly traded companies.
- Counseled a Nasdaq company through "option backdating" and restatement issues.
- Counseled a Fortune 500 company through a proxy contest with significant shareholder.
- Provides ongoing corporate/securities counsel to a number of large and medium-sized publicly traded companies.
- Provides ongoing equity derivatives advice

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American University, Washington College of Law, J.D., 1988

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Brad Karp

Chairman, Paul, Weiss, Rifkind, Wharton & Garrison LLP

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Chair of the firm since 2008, Brad Karp is one of the country's leading litigators and corporate advisers. Brad has extensive experience successfully defending financial institutions and other companies in "bet the company" litigations and regulatory matters. Prior to being named chair of Paul, Weiss, Brad chaired the firm's Litigation Department.

Experience
Significant representations include:

- Apollo in several litigations, advisory and regulatory matters;
- Bank of America in several matters, including the litigations and regulatory matters arising out of Bank of America's 2008 merger with Merrill Lynch;
- Bank of New York Mellon in several matters, including the litigations and regulatory matters arising out of the bank's foreign exchange standing instruction orders;
- Citigroup in multiple matters, including:
    - its arbitral victory defeating multi-billion-dollar claims brought by the Abu Dhabi Investment Authority (ADIA), arising out of its December 2007 $7.5 billion investment in Citigroup;
    - its Southern District of New York jury trial victory defeating multi-billion-dollar claims by London-based private equity firm Terra Firma, which claimed it was defrauded in connection with its 2007 purchase of EMI;
    - its New Jersey state court jury trial victory defeating a multi-billion-dollar lawsuit brought by Parmalat;
    - its arbitral victory defeating a billion-dollar claim by a WorldCom investor who claimed he was defrauded by Citigroup and Jack Grubman, as a result of allegedly fraudulent research.

Brad currently represents Citigroup, JPMorgan, Bank of America, Wells Fargo, Morgan Stanley, Standard Chartered, HSBC, Bank of New York Mellon, UBS, Apollo Global Management, Deloitte, the National Football League, MacAndrews & Forbes, ING, Bloomberg, Citco, Ericsson, SQM, Newmont Mining, Merck, Zilkha, SICPA, BB&T, Eton Park, OneWest Bank, CIM Group, Fortress, Zurich Capital, Aurora Bank and KKR, among others, in significant securities, commercial and regulatory matters.

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Harvey Eisenberg is a Corporate partner in the New York office of Weil, Gotshal & Manges LLP and a member of the Firm's Private Equity practice group. Since he began his career in 1985, Mr. Eisenberg's practice has focused on representing alternative asset managers, particularly private equity firms and their portfolio companies. He has been recognized by *International Who's Who* as one of the leading lawyers in his field.

Mr. Eisenberg's recent professional experience includes:

- **Private Equity Investments:** Leveraged buy-outs, going private transactions, distressed investments, growth investments, PIPES, mezzanine capital, and co-investments. Clients have included CCMP Capital, Apollo Global Management, Guggenheim Partners, Irving Place Capital, Goldman Sachs PIA, JPMorgan Partners, and Thomas H. Lee Partners. Transactions range in size from the middle market to over $10B.
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Weil's premier position in the legal industry is recognized both by peers and by the press. The firm's four departments and over two dozen practice groups are consistently recognized as leaders in their respective fields. Weil and its attorneys have been consistently top-ranked by the most authoritative legal and financial industry directories, including those published by Chambers & Partners, Euromoney, and The Lawyer Group. Most recently, the firm was named among the "Transatlantic Elite" of international law firms for the fifth consecutive year by *The Lawyer* magazine. The latest *International Financial Law Review* recognized Weil with a multitude of IFLR America awards. Furthermore, Chambers & Partners ranked more than 100 Weil attorneys in 50 practice categories. Additionally, Weil has been included on *The American Lawyer's* A-List of top 20 U.S. law firms for eight consecutive years.

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