ACG® Cleveland

CORPORATE GROWTH AND M&A

SPECIAL ADVERTISING SECTION

Earn-Outs in M&A Deals

8 Negotiate with care to minimize post-closing disputes

SaaS is Red Hot

20 Companies rewarded with robust valuation multiples

Representations and Warranties Insurance

4 An alternative to customary indemnity terms

Crain's Cleveland Business Custom Publishing

PRESIDENT'S LETTER

Let's grow together

BY KAREN TULETA

Last year, my predecessor chose to focus his president's letter in this special section on what the name "Association for Corporate Growth" (ACG) actually means, and exactly whose growth is being referenced. This year, I want to further this discussion by challenging you, as a resident of Northeast Ohio (NEO), to focus on NEO growth, in addition to your individual corporate and/or personal growth.

The ACG Cleveland Chapter comprises approximately 500 NEO members, including corporate C-level and M&A officers, investment bankers, attorneys, tax and accounting professionals, and private equity, senior and mezzanine lenders. For more than 30 years, ACG Cleveland has been promoting the region's economic vibrancy and providing resources for financial growth and guidance. Throughout this period, the Cleveland chapter has been nationally recognized for its efforts, leadership and professional accomplishments in corporate finance and M&A transactions.

As current president, my goal is to increase awareness of ACG Cleveland by NEO companies and corporate officers. Why? Because they can benefit greatly from participating with other NEO professionals in our quality networking events, programs and workshops. When NEO corporations flourish, we all benefit. It's no secret that our members are considered top financial transaction professionals in the markets they serve. As a testament, ACG Cleveland will hold its 18th Annual Deal Maker Awards on January 30 at the Cleveland Convention Center, where we will host nearly 1,000 financial and corporate professionals from across the region and nation.


TULETA

This year, we've taken a step back to evaluate what it is our members are looking to achieve from their association with ACG Cleveland. We've engaged a third-party research firm to conduct a survey, with the goal of tailoring our programs to satisfy those needs.

Another initiative we're undertaking this year is to offer our programs to more non-member NEO companies. The underlying theme of our events is to promote networking opportunities with access to senior leaders from NEO and beyond. ACG Cleveland holds approximately 30 events annually, and in recent years has expanded to include niche programs for specific groups, including Women in Transactions, ACG Young Professionals and an ACG Akron initiative. Learn more about our past events and speakers at www.acgcleveland.org.

Additionally, we're developing small roundtable forums to specifically address challenges being faced by NEO middle-market businesses. The forums will be facilitated by an ACG Cleveland member and enable local company executives to share insights regarding various topics, such as managing rising healthcare costs, operations improvements, financing, human capital development, recruiting and globalization.

ACG Cleveland has long maintained a significant presence in NEO and is often sought out as a partner for other programs and events. This year, we've implemented a process for developing a better-targeted approach at our strategic alliances, including peer financial, affinity and trade organizations and several regional, growth-focused associations. We will continue seeking out strategic alliances that provide valuable networking and program opportunities to our members.

I'd like to close with a call for action. I ask that, this year, all ACG Cleveland members reach out to one corporate executive with an invitation to attend an ACG Cleveland program and/or networking event. Additionally, I urge NEO business owners and/or financial executives of middle-market corporations to contact ACG Cleveland or one of its board or chapter members to learn more about our upcoming events and membership opportunities. Every single month since I joined the organization I have reached out to someone in my ACG network for an introduction, advice or counsel. NEO has a very special resource in ACG Cleveland. I hope you will all take advantage of it and let others know about its countless benefits. ■

Karen Tuleta is president of ACG Cleveland and a partner with Morgenthaler Private Equity.

TABLEOFCONTENTS

BUYERS

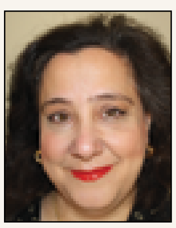
The deal structure continuum

Borrower friendly environment expected to continue in 2014

BY JACQUELINE HOPKINS AND JOSEPH KWASNY

When considering an acquisition, choosing the best structure for capitalizing your plans is paramount. The good news is that whether asset-based lending (ABL) or cash-flow lending suits your growth needs, indicators point to a positive outlook for borrowers in 2014.

For asset-rich businesses, particularly with working capital assets, an asset-based approach could be the right solution. ABL transactions may allow a company to keep its borrowing costs low and may also have few or no covenants as long as certain collateral availability thresholds are met. A company reports regularly and tracks its availability to ensure appropriate levels of liquidity, but the management team has the flexibility to pursue growth strategies rather than focus on debt reduction.


HOPKINS


KWANSY

Cash-flow lending offers an alternative for businesses that are less asset-intensive and require less frequent monitoring than an asset-based deal. In these situations, lenders look for businesses with sustainable levels of EBITDA (earnings before interest, tax, depreciation and amortization) and healthy margins (typically 10% or greater). These loans are governed by financial covenants instead of availability, and lenders expect to see loan repayment via scheduled amortization.

It was a good time to be a borrower in 2013 and borrower-friendly conditions should continue in 2014.

Some businesses benefit from an "asset stretch" solution that uses the ABL structure and provides credit beyond standard advance ratios to "stretch" availability. Lenders prefer to retire the stretch portion of the debt quickly, usually within two years, and price this part of the loan between the cash

See **STRUCTURE** Page S-16

Best practices in due diligence

BY MARK BOBER


BOBER

A quality of earnings due diligence engagement is all about risk assessment. While there are a myriad of areas and procedures that can be applied in diligence, they should all be tailored to the target company's operations, financial position, and industry. Buyers need to understand the normalized performance and financial position of the target as a basis for structuring terms and conditions, validation of price, and go-forward post-acquisition planning. Best practices include the following:

- Assessment of management team and scalability of team to handle growth
- Customer and vendor analysis
  - Assess customer and vendor concentrations
  - Margins and trends
- Sustainability of revenues and earnings
- EBITDA bridge
  - Analysis of year-over-year changes in revenue and EBITDA
  - What is driving EBITDA enhancement — top-line volume, margin improvements, change in mix, production efficiencies, fixed cost reductions, etc.?
  - Need to understand these issues to get comfort on the sustainability of the revenue and earnings stream
- Legitimacy of seller EBITDA adjustments
  - Owner discretionary expenses (i.e., perks or excess compensation)
  - One-time or non-recurring items
  - Pro forma or synergistic adjustments
- Projections/budgets and underlying assumptions
  - Analyze bottom-up detail to support revenue, margin, and operating expense assumptions

See **DILIGENCE** Page S-16

TRENDS

Trends in representations and warranties insurance usage

BY JEFF PHILLIPS

Market awareness and use of transaction insurance has increased significantly in the United States over the last five years. The most common form of transaction insurance is Representations and Warranties (R&W) Insurance, which protects against financial loss arising from breaches of warranties regarding the target entity or assets given by sellers in transaction documents. Users of R&W Insurance have found the final, fully negotiated policy terms to be equal, and often superior, to the indemnity terms customarily negotiated between buyers and sellers.

PHILLIPS

Use in smaller deals

One recent trend is the use of R&W Insurance in smaller deals. Increased competition among insurers and added efficiencies in the process have resulted in attractive terms for insuring deals below $10 million in purchase price. In November, one insurer in the R&W space went so far as to introduce a new product specifically tailored for smaller deals.

Lender benefits

Another recent trend is the growing acknowledgment by lenders of the benefits of their borrowers using R&W Insurance in acquisitions and divestitures. R&W Insurance can ease a lender's concerns about a buying borrower's indemnification protection by increasing the amount and duration of a borrower's indemnification package via a buyers-side policy. This is especially true in any distressed sale. Further, it can protect the value of assets purchased by a borrower that are also being pledged as collateral for the lender. Conversely, it can protect the value of a selling borrower's proceeds when the borrower is disposing of a portion of its assets (i.e. the lender's existing collateral). Additionally, where appropriate, assignment/payment rights can be provided to lenders under R&W Insurance policies, similar to loss-payee status.

Transaction Insurance products can deliver significant value and be the impetus for closing a deal.

Tax liability coverage

A third trend is the expanding acceptance of Tax Liability coverage. This type of policy can work to reduce or eliminate contingent

tax exposure when the application of tax laws is uncertain. A specific example is where an investor is concerned about losing tax credit status in a real estate investment. This coverage can enhance a developer or syndicator's risk profile and enable an investor to enter a new tax credit market with reduced exposure and volatility. It can also backstop the developer's indemnification obligation for re-capture of tax credits. Tax Liability coverage is commonly used in low-income housing developments, new market tax credit transactions and renewable energy tax credit scenarios.

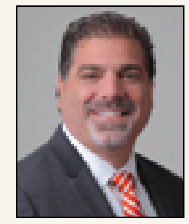
Transaction Insurance products can deliver significant value, and in some cases, be the impetus for closing a deal. Since these policies are, by their nature, custom tailored to the transaction at issue, it requires knowledgeable parties negotiating the terms of coverage to ensure the right outcome.

Jeff Phillips is a principal with Transactional Risk Advisors. Contact him at (440) 336-1940 or jphillips@transactionalrisk.com.

R&W insurance in lieu of seller indemnification gains ground in private equity

BY RONALD A. STEPANOVIC

The issue of post-closing liability of private equity sellers is always one that garners the most attention in sale transactions. Because of the very nature of private equity funds, private equity sellers seek to limit to the greatest extent possible any post-closing liability from sales transactions.



STEPANOVIC

Historically, private equity sellers have used escrows and fought tooth and nail on the scope and duration of post-closing indemnification obligations in order to limit exposure to post-closing liabilities. More recently, many private equity firms are using representations and warranties insurance policies in lieu of seller indemnification in order to exit investments with little or no post-closing indemnification obligations for breaches of representations and warranties. Additionally, a growing number of private equity buyers are using such insurance policies as a way to set themselves apart in auction transactions. As more U.S. insurers enter the market and transaction participants become more familiar with the coverage offered by representations and warranties policies, such policies will become a more valuable device used in structuring M&A transactions.

Typical structures

Policies can be structured as either seller or buyer policies. Policy premiums typically range from 1.5% to 4% of the policy amount, and who pays the premium is a matter of negotiation. The retention or deductible is negotiable — although insurers like to see both the buyer and seller responsible for a portion of the retention so the insurer knows each party has some "skin" in the game and negotiated the purchase agreement at arms' length. The coverage has limitations and the parties must review the policy carefully to ensure they understand the exclusions. In particular, most policies carve-out from coverage fraud, willful misrepresentations and items known to the buyer's deal team. The definition of loss in many policies excludes items such as fines,

penalties, punitive damages and consequential damages or damages based on a multiplier. Underwriters are willing to negotiate the exclusions to coverage, but any change to the exclusions may impact the pricing of the policy.

Properly structured, representations and warranties policies can give private equity sellers the peace of mind they are seeking in sales transactions and can give buyers a leg up in auction transactions.

Ronald Stepanovic is National Co-Chair of BakerHostetler's M&A Transactions Team and National Chair of its Private Equity Practice. Contact him at (216) 861-7397 or rstepanovic@bakerlaw.com.

TRENDS

Will 2014 bring a wave of going private transactions?

BY PAUL SCHNEIR AND ANDREW VOLLMER

Equity markets are scoring record highs and the Dow is stronger than ever. Conventional wisdom suggests that when the stock market is up, fewer companies go private. But in the first three quarters of 2013, there were 20 percent more transactions taking companies private, compared to the same time in 2012. With a strong stock market, why are so many companies choosing privatization?

The short answer is that some companies are not benefiting as much as their peers or their industry sector from the strength in the equity markets. Smaller companies, and those needing to adjust their business model and long-term growth strategies, are not all experiencing valuation multiples that match their potential. In many cases, these companies lack adequate equity research support and subsequently institutional investor interest. In those cases, going private can create immediate shareholder value while facilitating the long-term growth potential of the company.

SCHNEIR

VOLLMER

But leaving the public markets is not the best choice for every company. For privatization to make sense, private equity buyers generally focus on three criteria: strong debt capital markets, a reasonable valuation, and a promise of hidden value. Currently, debt capital such as institutional term loans and high yield bonds is readily available to experienced buyers. This availability has created strong interest from private equity in going private transactions. Therefore, privatization viability comes down to valuation and determining if a company has a compelling story that just isn't being heard by public market investors.

Firms seeking to take a company private typically must offer a significant premium over the current share price. And while M&A valuations may be lofty compared to the last few years, financial sponsors, given the hard lessons recently learned, are less likely to offer the enormous share premiums and valuations that were typical in going private transactions before the financial crisis. Between the two, there lies a narrow field of win-win pricing, where we find strong candidates for privatization – even in a robust stock market environment.

We're seeing an increase in privatizations among small-cap industrial and consumer companies due to their tendency toward slow-but-steady growth. The frequency of going private transactions reflects this trend. In the first three quarters of 2013, activity grew by 28 percent for companies with valuations less than $1 billion compared to 21 percent for the market overall for the same time period in 2012.

When assessing whether a company is a candidate for privatization, consider the following:

- Is the stock well-researched and actively traded?
- Is the company fairly valued vis-à-vis its peers?
- Does the company have a compelling long-term growth story that does not translate well to predictable quarterly performance in the medium term?
- Could privatization support investment in a more comprehensive growth story, such as major business model realignments, strategic acquisitions or international expansion?

Given that many small and mid-cap public companies share one or more of these attributes, and forecasts for a continued slow-growth economic climate, we expect many will strongly consider going private in 2014.

Paul Schneir is Head of M&A, KeyBanc Capital Markets, Inc. Contact him at (216) 689-4005 or pschneir@key.com. Andy Vollmer is Managing Director and Group Head, Consumer & Retail Group / Financial Sponsors, KeyBanc Capital Markets, Inc. Contact him at (216) 689-4556 or avollmer@key.com.

GLOBAL MANAGEMENT

Truly international firms capture best opportunities

BY STEWART KOHL

The world isn't small and flat anymore. It's a world of instantaneous communication, minimal language barriers, common expectations, and simplified logistics. Globalism is as real and paradigm shifting as the telegraph and railroad that knitted together the United States in the 19th century. As a private equity firm, The Riverside Company embraces this new reality because it's great for us, our investors, and our portfolio companies.

When Riverside opened its first international office in Europe in 1989, we knew some exceptional expansion opportunities were beyond our borders. The Iron Curtain had just fallen, and Eastern Europe presented a fertile growth environment for firms willing to take a risk.

Since then, we've raised four funds in Europe and two in the Asia-Pacific region to complement our busy investment pace in North America, growing and succeeding along the way. As a Cleveland-based firm, we're not alone in our global approach. Most private equity firms in our region are doing important international work on some level for compelling reasons.

KOHL

Today, everything we do is interconnected, and our global presence boosts results for our entire portfolio. That's because being international today means much more than having offices and making investments around the world. Several years ago, Riverside formalized our global effort under the "One Riverside" banner, which compels deal teams to cooperate with one another, share origination and operating resources and knowledge, and open new markets for companies regardless of where they are headquartered. That cooperation drives powerful results.

In 2013, Riverside enjoyed a successful exit from Capol, a German manufacturer of polishing, anti-sticking and release agents used by pharmaceutical and confectionary companies. Riverside used its global resources to acquire Capol's North American distributor in a deal that further strengthened an outstanding investment. Cross-pollination between our various regions is a regular occurrence.

Additionally, Riverside's Hong Kong office plays a key role in many of the firm's investments. Hong Kong houses our Asia Sourcing team, which adds value through every phase of the investment. From evaluating potential investments' production facilities to helping portfolio companies access Asian customers and everything in between, this office plays a vital role.

The world has never been more interconnected, and the best private equity firms have followed suit, which is rewarding and exciting to see. It's no longer enough to have a presence and commitment to local markets around the world. Those offices must work together for firms to thrive.

Stewart Kohl is co-CEO of The Riverside Co., a global private equity firm focused on acquiring growing enterprises valued at up to $250 million. Contact him at (216) 344-1040 or skohl@riversidecompany.com.

SELLERS

Perfect storm for sellers

BY ANDREW K. PETRYK

The old adage "a rising tide lifts all boats" certainly applies to the current elevated pricing environment, as a perfect storm of pent up demand, cheap financing, and surplus capital is driving up valuations, making today's window particularly advantageous for sellers contemplating exits. Competitive dynamics suggest it is a seller's market, particularly for high-quality businesses.

Investors have considerable buying power, with $1.2 trillion in cash sitting on corporate balance sheets[1] and $328 billion in private equity's war chest[2], and are responding in kind because they need acquisitions to meet growth targets. Corporates will be looking to M&A over organic expansion in 2014, reported Thomson Reuters in its *Fifth Annual Survey of Corporate Decision Makers*, with executives citing increased pressure to match acquisitive competitors, despite rising purchase prices. Financial buyers are now bidding at comparable levels to strategics, as continued pressure to put dollars to work forces private equity groups to be aggressive in auctions and bid up purchase multiples for the right assets.

PETRYK

The debt markets remain aggressive as capital providers compete for financing opportunities, with all indicators pointing to higher leverage levels, lower pricing, and looser structures absent a material increase in M&A activity. In the low interest rate environment, buyers can afford to pay more and are with higher leverage (up a half to nearly a full turn of EBITDA [earnings before interest, tax, depreciation, and amortization] in 2013) pushing up purchase price multiples.

The frothy market is fueling a stair-step increase in valuation multiples, equating to a full multiple of EBITDA or more depending on asset quality. While the range in purchase price multiples still remains wide, dictated by industry, financial profile, and financing structure, premium valuations can be garnered irrespective of company size, with growth being rewarded across all industries. By the numbers, private equity research firm PitchBook reported in its *2H 2013 Middle Market Report* that the middle market median enterprise value (EV) to EBITDA multiple reached 10.5x in June 2013, supported by a median debt multiple of 6.1x — both decade highs. According to November data reported by Standard & Poors Leveraged Commentary & Data, purchase price multiples (EV/EBITDA) for strategic and financial buyers reached their highest level since the market peak in 2007.[3]

In the M&A market, timing is everything. Companies that weren't ready to go to market in 2013 because they needed another year of seasoning may now be primed to take advantage of favorable conditions. For certain cyclical businesses, the current industrial investment cycle points to a closing window for peak valuation. Those that are playing the waiting game may lose some of their advantage if the opening to today's seller's market closes.

[1] S&P 500 cash and marketable securities (excluding financials) as of September 30, 2013, S&P Capital IQ.

[2] Private equity capital overhang data as of September 30, 2013, PitchBook.

[3] Middle market enterprise values between $25 million and $500 million.

Andrew K. Petryk is Managing Director and Principal of Brown Gibbons Lang & Co. LLC, an investment bank serving the middle market. Contact him at (216) 920-6613 or apetryk@bglco.com.

SELLERS

Advice for selling a family-held business

BY MICHAEL R. TUCCI, JENNIFER E. HORN AND DAVID W. HILDEBRANDT


TUCCI


HORN


HILDEBRANDT

Whether you are preparing for retirement or simply want to explore other opportunities, the decision to sell a family-held business is not an easy one. What should you consider before you travel down the path of putting your company up for sale?

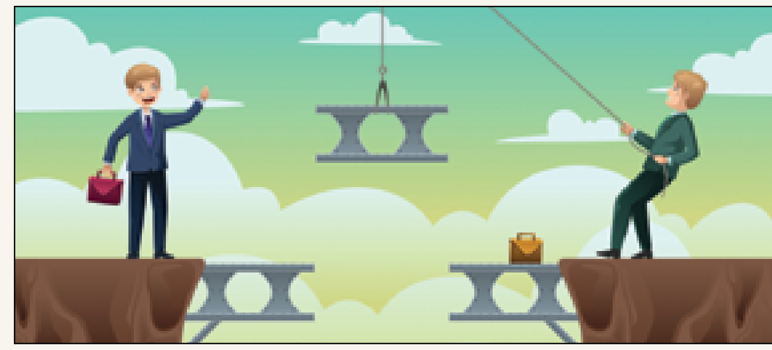
■ **Review your financial records and establish the company's current market value.** Have an outside party audit your financials and address the company's valuation. Their assessments will give you some range in valuation based on many factors, such as a multiple of earnings valuation, current trends in the market and other related financial models. Being able to present a buyer with solid financial information not only increases your credibility with the buyer, but it also helps maximize what a potential buyer is willing to pay for your business.

■ **Anticipate questions that will come up in due diligence.** All too often, sellers are unprepared to answer questions from a buyer that may relate to business contracts, financial statements, or intellectual property, to name a few. Work on organizing your agreements, determining where relevant information is located, and documenting any informal arrangements.

■ **Consider employment issues.** Be ready to discuss whether you would be willing to sign a non-compete agreement, and think about when and how you will inform your employees of an impending sale. Another important factor to address is whether the buyer will want key employees to remain with the company. Particularly in a family-held business, family members who are no longer needed may find this difficult to accept.

■ **Act as a unit.** If multiple family members will be involved in the sale, ensure that everyone is on the same page as to the company's value, how decisions will be made or what terms will be deal breakers. Allowing emotions or disagreements to affect negotiations will

See **SELLING** Page S-16



Earn-outs in M&A deals

Negotiate with care to minimize potential for post-closing disputes

BY CHRISTOPHER P. REUSCHER AND SARAH BAKER

When a buyer and seller cannot agree on a purchase price in an M&A deal, what happens? If neither side is willing to walk away, the parties might consider an earn-out to "bridge the gap." In an earn-out structure, the buyer will pay part of the purchase price up front, and then pay an additional amount (the earn-out) afterward if the acquired company hits certain performance targets or benchmarks. Although an earn-out can be a useful tool in getting the deal closed, a poorly written earn-out provision can cause nightmares (and a lot of hard feelings) for the seller and the buyer.

Important factors to consider when negotiating an earn-out are:

■ **Performance benchmarks.** The earn-out benchmark can be based on financial metrics (such as revenue, net income or EBITDA), or it can be based on non-financial metrics, such as product development, customer growth (or retention), or obtaining special governmental licenses. In any event, the benchmark must be precisely defined in a written agreement.

■ **Post-closing operations.** The seller will want to maintain some oversight or control over the company after closing to make sure the buyer is maximizing efforts toward reaching the benchmark. On the other hand, the buyer's objective will be to operate the company without any restrictions or involvement by the seller. In addition, the seller will likely insist on an acceleration of the earn-out payment in the event of a change of control or bankruptcy of the company, termination of the seller (if employed) without cause, or a number of other triggering events. Such triggering events and the parties' rights, obligations and limitations must be specifically delineated in the earn-out provision.

■ **Accounting.** If the seller's business will be merged or integrated into the buyer's business, then segregated financials or special accounting allocations may be necessary to determine whether the business hits the earn-out benchmarks. In addition, if the seller will stay on as an employee of the business, the earn-out payment may be considered a compensation expense, which will have accounting consequences for both the seller and the buyer.

REUSCHER

BAKER

■ **Disputes and resolution.** Typically, the buyer will provide a written calculation of the earn-out to the seller at the end of the earn-out period. The seller will want the right to review and, if necessary, challenge the calculation. Such dispute and review procedures, including any arbitration procedures, must be clearly described in the earn-out language.

If neither side is willing to walk away, the parties might consider an earn-out to "bridge the gap."

Overall, an acquisition should be the beginning of a mutually beneficial relationship for both the buyer and seller. However, with an earn-out in place, the parties' interests and intentions are not always aligned from day one. The seller's motivation will be to get paid the full amount of the earn-out, and the buyer's motivation will be to avoid paying to seller any additional consideration. These conflicting motives can cause frustration, and frustration can lead to litigation. Therefore, the earn-out provision must be carefully negotiated and drafted to reduce the potential for any post-closing dispute between the parties. ■

Christopher P. Reuscher is a Partner with Roetzel & Andress. Contact him at (330) 762-7994 or creuscher@ralaw.com. Sarah Baker is an associate with Roetzel & Andress. Contact her at (330) 762-7985 or sbaker@ralaw.com.

SELLERS

Are privileged communications protected?

Ramifications of the Great Hill case

BY JENNIFER L. VERGILII

On Nov. 15, 2013, the Delaware Court of Chancery, in *Great Hill Equity Partners IV, LP et. al. v. SIG Growth Equity Fund I, LLLP et. al.*, held that unless a merger agreement specifically excludes pre-merger attorney-client communications from the assets that transfer to the surviving company, Section 259 of the Delaware General Corporation Law includes them. In this decision, the Delaware court declined to follow a 1996 decision of the New York Court of Appeals, Tekni-Plex, Inc. v. Meyner & Landis, which held that the selling party retains control of pre-merger attorney-client privileged communications.

VERGILII

As a practical matter, what does this mean? First, the choice of governing law for the merger agreement matters. For agreements governed by Delaware law, this means that if the merger agreement is silent on this issue, the minute after closing, the surviving corporation could request that all emails and other communications between the target, its owners and officers, on the one hand, and its counsel, on the other hand, be sent to it (if not already in its possession). In other words, a buyer can get access to all "skeletons in the closet" that may or may not have been disclosed in the schedules to the merger agreement. At best, this may provide a clear roadmap for buyers to indemnity claims, and at worst, a basis for potential claims of fraud and bad faith. In addition, counsel for seller may be subject to a malpractice claim if the issue was not specifically addressed with the seller-client — after all, items may have been discussed under the presumption of continued attorney-client privilege after the transaction.

This case involved a claim by Great Hill Equity Partners IV, LP that the defendants, including former shareholders and representatives of Plimus, Inc., fraudulently induced the buyer to acquire Plimus. Buyer's claim was based, in part, on information that it collected from pre-transaction communications between the sellers and Plimus' then-legal counsel, Perkins Coie, regarding the transaction. It was undisputed that the merger agreement did not include any provision expressly addressing pre-merger attorney-client communications and Plimus had not taken any steps to segregate these communications before the merger or to otherwise eliminate them from the assets that were transferred to the buyer.

Section 259 of the Delaware General Corporation Law provides

See **PRIVILEGED** Page S-19

Be proactive, cautious with IT

BY PAT BERRY

The ruling in *Great Hill Equity Partners IV, LP v. Sig Growth Equity Fund I, LLP* provides guidance to sellers regarding the protection of pre-transaction attorney-client communications stored on a computer system that will be under the control of a buyer after the transaction.

BERRY

The case involved a suit by a buyer against the former shareholders of a company acquired in a merger transaction. After the suit was brought, the buyer discovered certain communications on the company's computer system between the seller and its counsel regarding the transaction. The seller apparently never took any steps to segregate or otherwise remove these communications from the computer system before closing or to retrieve these computer records after the closing. The merger agreement did not address these communications. Nonetheless, the seller asserted attorney-client privilege over these communications.

In its decision, the Court ruled that, in this case, the privilege over all pre-merger communications passed to the surviving corporation controlled by the buyer. The Court noted that the Delaware merger statute provides that all property, rights and privileges of the merged companies become the property of the surviving corporation following a merger. As a result of its ruling, the Court never had to address a question of whether any privilege that may have been retained by the seller was waived by not taking reasonable steps to ensure the buyer did not have access to these communications following the merger.

An interesting aspect of this ruling is that the Court indicates that the seller could have protected these communications from being transferred to the buyer by negotiating a provision into the merger agreement carving out any pre-merger attorney-client communications from the assets to be transferred to the surviving corporation.

In an effort to protect its pre-transaction attorney-client communications, a seller should (1) address ownership of these communications in the acquisition contract and (2) take steps (e.g., using home emails) to ensure that these communications will not reside on the computer system that will be controlled by the buyer following the transaction. Using non-work emails may also prevent the seller's IT and other employees from inadvertently learning about the transaction before the seller is prepared to announce the transaction to its employees.

Pat Berry is Co-Chair of the Mergers and Acquisitions Practice at McDonald Hopkins LLC. Contact him at (216) 348-5409 or pberry@mcdonaldhopkins.com.

SELLERS

Use sell-side and IT due diligence to your advantage

BY MARK BRANDT

Say the phrase "due diligence," and the buy side comes to mind. Yet, sell-side due diligence is increasingly benefiting sellers. What's more, buyers who overcome their hesitancy to perform IT due diligence are realizing significant advantages.

BRANDT

Benefits of sell-side due diligence

Broken deals have littered the marketplace in recent years as buyers have uncovered issues with middle-market companies during due diligence. Sellers' investment bankers, in turn, are pushing their clients to perform due diligence to uncover issues in advance to protect deals.

IT due diligence can uncover issues that delay buyers from reaching their desired return on investment.

Smart sellers have taken advantage of this trend.

"The amount of sell-side due diligence we have performed has increased nearly 60 percent in 2013 over 2012," says Andy Jenkins, director of transaction advisory services in the Cleveland office of McGladrey LLP. "Sellers and investment bankers realize that due diligence mitigates the risk of a broken deal, unexpected negotiations and potentially fewer interested buyers."

Sell-side diligence presents many benefits. Identifying issues up front minimizes negotiations after the letter of intent has been signed. It gives sellers time to accurately and realistically set terms, defer or shorten exclusivity periods and mitigate escrow enhancers and re-trading due to increased confidence and credibility in the financials and investment thesis.

Benefits of IT due diligence

According to the McGladrey 2013 Private Equity Survey, nearly half of respondents — all of whom are recent buyers of companies — said they "always or usually" encounter issues with a purchased company's outdated business applications and infrastructure limitations. Yet, buyers still choose to forego IT due diligence to minimize deal costs or because they believe that they already understand the target's IT environment.

"Never take a list of IT inventory at face value," says Mark Brandt, a director in McGladrey's Cleveland office. "All hard assets should be visited to see exactly what is

See IT DUE DILIGENCE Page S-20

Desired value and needed value don't always match

BY ROSS VOZAR

As small business owners near retirement age, many start looking to sell their businesses. More often than not, the owner has a desired sale value in the back of their mind. This value could be based on numerous factors … perhaps what his neighbor or friend at the club boasted about selling his business for, or maybe it includes a large intangible for emotional attachment to the business. Generally, these factors are not indications of the true market value of a business. There should be a separate discussion about the "desired" versus the "needed" value.

VOZAR

As a preliminary step to proceeding with a sale process, we often recommend a business owner obtain financial advice from both his accountant and wealth adviser to determine a needed value, which is the value that

will support the business owner's post-sale lifestyle. This type of analysis was seldom done in the years leading up to the economic downturn because business valuations generally were higher, sellers generally were getting what they wanted for their businesses, and, if the offer was not high enough in the seller's eyes, they held out for another offer.

As a result of several recent reviews of different business owners' assets and evaluations of their future desired lifestyles, we have seen significant gaps in desired versus needed values of these owners' businesses. In some cases, after including our wealth advisers and tax structuring experts, we have determined a business owner needs far less from the proceeds of

See VALUE Page S-19

SELLERS

Does the new 3.8% Medicare tax apply to the sale of my business?

BY NICHOLAS FANOUS

The Medicare tax rules are complex and proper planning should be considered when contemplating or in advance of a transaction.

The ever-changing tax landscape can provide a challenge and add additional expenses when contemplating a transaction. Starting in 2013, the 3.8% Medicare tax on Net Investment Income (NII) is levied to the extent that a taxpayer's modified adjusted gross income exceeds certain thresholds ($250,000 in 2013 for joint filers). NII is generally comprised of portfolio income (interest, dividends, annuities, royalties and rents), all income derived from a passive trade or business and capital gain unless the property is held in a non-passive trade or business.

FANOUS

Under the final regulations (issued November 2013), the sale of interest in a partnership or S corporation would generate NII only to the extent of the transferor's share of gain/loss from the entity's passive activities held in an active trade or business.

Sale of business interest

Since the tax generally applies to NII from passive activities, the gain from disposition of interests in an active trade or business where the partners or shareholders are considered to be "material participants" should not generate NII. However, partners or shareholders who do not meet the participation rules may generate NII on the gain from a sale. The regulations use the passive activity rules under IRC Section 469 to determine material participation in a trade or business and inclusion of such income as NII.

Planning opportunities limited partners or minority shareholders may consider prior to or during a transaction include:

- Arrange business activities to meet the material participation standard (e.g. 500 or more hours of participation, material participation in 5 of past 10 years, etc.) and document activities
- Grouping of activities to meet the material participation requirements; the final regulations offer a one-time "fresh start" to regroup activities
- Combine parts of a business to allocate more of the value and thus capital gain to the business unit they materially participate in
- Request a "gross-up" from the buyer for Medicare taxes resulting from the sale

The final regulations also provide a simplified method that would generally allow taxpayers to assign gain from a disposition of a partnership or S corporation interest to NII in the same

See **MEDICARE** Page S-22

Don't forget where you hid the cash

Rid balance sheet of excess working capital or non-essential assets before selling

BY LLOYD BELL

In a recent news story, a Connecticut man purchased a desk on Craigslist for $150. When he took the desk apart to move it into his office, he found nearly $100,000 of cash inside, which he then returned to the seller.

All too often, owners sell their businesses with the equivalent of cash hidden in the desk in the form of excess working capital or non-essential assets on the balance sheet. Unfortunately, the buyers don't tend to be as generous and return the cash. Compounding the situation, this excess working capital may be supported by short-term debt which, in most situations, will need to be paid off by the seller.

Last-minute changes between the date of the letter of intent and the closing of the transaction could result in a working capital adjustment, therefore it is important to right-size the balance sheet before beginning the sale process.

How can you make sure that the desk is emptied out before the sale?

Manage your accounts receivable. It's common that a company will have a certain amount of trade receivables that are extended beyond the normal terms. If still collectable, these receivables represent excess cash that will accrue to the buyer if receivables are part of the acquisition. In preparation of a sale, you must work to collect as many of these slow-paying receivables as possible and work to keep current sales collectable within your normal credit terms.

BELL

Be disciplined about inventory. If a business carries inventory, have as little as possible going into a sale. Try to let the buyer purchase as much of the raw materials and/or produce the finished goods for sales that take place after closing.

Machinery and equipment. It's fairly common for manufacturers to own equipment that is no longer being used to produce inventory. If the equipment has a ready market, sell it before the company is sold. If the equipment is obsolete, it may have significant scrap value.

All too often, owners sell their businesses with the equivalent of cash hidden in the desk in the form of excess working capital or non-essential assets on the balance sheet.

Take advantage of trade credit. Your vendors love you for paying in two weeks, but their credit terms likely give you four. Extending your total payable portfolio will increase the amount of cash on hand that you will keep in a sale.

Lloyd W.W. Bell III is Director of the Corporate Finance Group at Meaden & Moore. He has over 20 years' experience in financial management. Contact him at (216) 241-3272 or lbell@meadenmoore.com.

SELLERS

Understanding working capital

BY JAMES M. HORKEY

When selling a business, the transaction price usually represents some multiple of the income and cash flow of the company. In exchange for this consideration, the buyer expects to receive three classes of assets:

- Fixed assets needed to generate future cash flows
- Intangible assets (such as trade name, trained workforce and goodwill)
- Working capital

While it can be fairly straightforward to understand fixed assets and intangible assets, working capital is a more nuanced concept and something of a moving target.


HORKEY

Strictly defined, working capital is the current assets of the company netted against its current liabilities.

Buyers generally want to ensure that enough working capital is being left behind to maintain the company's operations. An immediate shortfall in working capital can damage banking relationships and unsettle investor confidence. Sellers, on the other hand, want to minimize the amount of working capital delivered.

The following steps taken by a seller will save both the buyer and seller significant time and effort:

Understand what makes up your working capital

One of the most common guidelines is to make sure that each item you consider as a current liability is offset by a current asset. If you believe you have excess working capital, be ready to explain why it was not distributed. Be aware that for purposes of an M&A transaction, cash, credit lines and the current portion of longterm debts are often excluded.

Get benchmarks

The buyer is surely doing research on a target for working capital as part of due diligence. Beat him to it by doing your own research to see how your company measures up.

Identify trends

What is your monthly average for working capital for the past year? Look also at several years back. What is the trend in working capital? Consider the future, too — compute a forecast of working capital so that you can reasonably judge the validity of what your buyer calculates. Study historical current ratios and the ratio of your working capital to sales.

Anticipate obstacles at closing

Has your reported level of inventory been accurate in the past? Do you have slow moving inventory or inventory that fluctuates in value? Will a detailed analysis of your accounts receivables reveal bad-debt issues? As the seller, you need to put yourself in the buyer's shoes and anticipate possible objections.

James M. Horkey, CPA/ABV, CFF, CM&AA, is Principal at HW&Co. and leads the firm's Business Valuation and Merger & Acquisition practice areas. Contact him at (216) 378-7214 or horkey@hwco.com.

GLOBAL MANAGEMENT

Africa: Doing successful deals in a new frontier

PwC describes the factors providing significant opportunity for investment

BY HARRY G. BROADMAN

Despite a two-decade record of strong growth and increasing economic resiliency, the continent of Africa remains an enigma to many investors. In the last several years, interest in Africa has grown — first and foremost from private equity firms, and more recently from multinationals, who've recognized significant opportunities for investment.


BROADMAN


KELLY


MATTESON

The average African country registered annual increases in GDP of about 5 percent in real terms since the mid-1990s, a significant uptick in economic performance over earlier decades. While it may not be enough to overcome the continent's development challenges, it's an enviable record. There also has been a transformation in the continent's resilience to business cycles. Although sudden and deep economic crises can still derail growth in Africa (as elsewhere), no longer is the continent lurching from economic crisis to economic crisis as in the last century. In fact, the typical African economy proved more resilient during the recent global financial and economic crisis, taking into account initial conditions, than other regions of the world. In many emerging and advanced economies, policy makers responded to the crisis with price controls and protectionist measures to try to alleviate the pain from the crisis. However, most African policy makers, having implemented hard-won economic reforms for two decades, held the line despite intense political pressure.

Now, a growing number of African countries have reached significant inflection points. Like China and Russia at the end of the last century, these inflection points reflect opportunities for significant investment. Many African economies are still based on commodities, but there are now more with industries that are climbing the value chain, producing value-added products and services and engaging in new forms of international trade. This has spurred the rise of the middle class and entrepreneurship. The pace of change is much more rapid, taking two or three years to engender a change of tastes, instead of five, and fundamental inventions are increasingly originating from Africa. One example, mobile money, was invented in Kenya and has replaced the need for cash or credit cards — and is still not available in the United States or European Union.

While there are significant risks of doing business in Africa, as in other emerging markets, these tend to be overstated while the investment opportunities have been understated. ■

For a discussion on doing deals in Africa and in other emerging markets, contact Harry Broadman at (202) 756-1756 or harry.g.broadman@us.pwc.com. Alternatively, contact local PwC partners Brian Kelly at (216) 875-3121 or brian.kelly@us.pwc.com, or Thorne Matteson at (216) 875-3441 or thorne.matteson@us.pwc.com to discuss deal considerations domestically or abroad. Visit www.pwc.com/US/deals to register for our webcast on this topic on January 29, 2014.

PwC refers to the US member firm, and may sometimes refer to the PwC network. Each member firm is a separate legal entity. Please see www.pwc.com/structure for further details. This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.

Diligence is all about risk assessment

continued from **Page S-3**

• Assess reasonableness in light of historical performance

■ GAAP compliance

■ Adequacy of reserves for A/R, inventory as well as activity within such reserves and impact on income, including out of period activity within expense recognition and/or release of reserves

■ Working capital and capital expenditure requirements

• Analysis of trends and assessment of appropriate threshold for guaranteed net working capital

• Analysis of projected capital expenditures, including sufficiency to support management's represented revenue growth. ■

Mark B. Bober, CPA/ABV, CVA, CFF, is Partner and Practice Leader - Transaction Advisory Services for Bober Markey Fedorovich. Contact him at (330) 255-2425 or mbober@bobermarkey.com.

Selling has many considerations and details

continued from **Page S-8**

drive away qualified buyers.

■ **Think about the transition.** Develop a solid transition plan regarding all aspects of the company, including how involved you will be and when certain responsibilities will transition to the buyer. If a transition plan is not properly carried out, even the smoothest closing can turn into a difficult situation for everyone involved.

■ **Build your transaction team.** The sale of your business may be the most significant financial transaction in your life, so it is important to assemble a team of experienced professionals — brokers, attorneys and accountants — early in the decision-making process to assist in making the sale as problem free and profitable as possible. ■

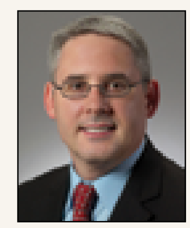
Michael R. Tucci is an attorney with Mansour, Gavin Gerlack & Manos Co., LPA and counsels his clients on business and intellectual property matters. Contact him at mtucci@mggmlpa.com. Jennifer E. Horn is an attorney and counsels her clients on general corporate and communications matters. Contact her at jhorn@mggmlpa.com. David W. Hildebrandt is an attorney and a member of the firm's Corporate and Business Services Group. Contact him at dhildebrandt@mggmlpa.com. More information is available at www.mggmlpa.com.

TRENDS

2013 marked by slow volume of deals as demand outpaced supply

BY JONATHAN IVES

In the middle market for merger and acquisition transactions, 2013 was a year characterized by a short supply of deals and a tremendous demand from both private equity investors and strategic buyers. After a very strong end of 2012 (by motivation from sellers to avoid higher capital gains taxes), the first half of 2013 was markedly slower than the first half of 2012. Third quarter 2013 continued to disappoint with aggregate transaction volume falling 3.9% from the second quarter of 2013 and capital invested decreasing 12.5%, from $43 billion to $37.6 billion.



IVES

In terms of valuations, however, prices paid by buyers have reached record levels supported by strong buyer demand and low supply of quality transactions. High levels of debt going into transactions, given relatively easy access to the debt capital markets and historically low interest rates, have been a driver of premium valuations. In addition, valuations are being driven higher by private equity firms that have funds that were raised at the height of the last cycle in 2007 and 2008. The time horizon for required equity investment is coming to an end, which means many investors are feeling pressure to put capital to work despite historically high purchase multiples.

In 2013, the market also saw more aggressive activity from corporate strategic buyers. The balance sheets of U.S. corporations are at very healthy levels. During the severe downturn of 2008, corporations cut costs and have operated with greater efficiency since the recovery. This has allowed for margin expansion, record operating cash flows, and significant debt reduction. At the same time, banks and finance companies are aggressive and capital markets are favorable for acquisition financing. Corporate buyers are often acquiring companies at a premium compared to prior peak periods to drive revenue expansion in the face of slowing organic growth opportunities.

There is reason to believe that transaction volume may increase in the fourth quarter as signs point to continuing economic recovery and the improving overall M&A environment. Buyers are expected to continue to raise debt capital while rates remain low, covenant packages continue to remain issuer friendly, and debt capital providers are eager to lend. Private equity firms continue to feed to each other's deal pipeline through secondary buyouts of current private equity portfolio companies as larger PE firms purchase targets from smaller PE firms. Corporate and financial buyers are eager to see entrepreneur-owned middle market companies return to the market. Hopefully private company shareholders may be more motivated to sell as improving economic fundamentals remove uncertainty that has delayed many transactions that would have otherwise come to market. ■

Jonathan Ives is Managing Director, Fifth Third Securities. Contact him at (216) 274-5045 or Jonathan.ives@53.com.

Structure needs to be strategic

continued from **Page S-3**

flow and ABL costs. These loans often have financial covenants — like those in cash-flow transactions — generally effective until the stretch portion is repaid.

It's important to consider your strategic objectives when selecting a loan structure. If planning for expansion and acquisition, the loan structure needs to accommodate your vision. And a lender needs to understand your objectives and business to be a strong financial partner.

It was a good time to be a borrower in 2013 and, absent an exogenous shock, borrower-friendly conditions should continue in 2014. ■

Jacqueline Hopkins is Managing Director and Head, Sponsor Finance, of FirstMerit Bank. Contact her at 312-429-3618 or Jacqueline.Hopkins@firstmerit.com. Joseph Kwasny is Senior Vice President and Business Development Manager, Asset-Based Lending, FirstMerit Bank. Contact him at 330-849-8736 or Joe.Kwasny@firstmerit.com.

BEST PRACTICES

Accessing capital markets for high-growth companies

BY SEAN DORSEY

The Northeast Ohio business environment is changing. An increasing number of high-growth companies, particularly in the fields of health care and technology, are making an ever-greater impact on our business landscape. Companies like Edgepark Surgical, LexiComp, Pre-Emptive Solutions, CSS, Hyland Software, and TMW are critical contributors to our local economy. These companies, as well as many lesser known high growth companies in our area, are requiring sophisticated investment banking expertise. Over the last 25 years, our investment bankers have supported the growth plans and liquidity needs of high growth companies by accessing global capital sources. From our vantage point, companies that successfully access capital markets possess most, if not all, of the following attributes.

DORSEY

■ **Rapid growth.** Growth rates must be at least 15 to 20 percent for larger growth companies and much greater for smaller ones. Showing historical growth is often necessary; but it is most important to develop a convincing story about future growth. And remember, investors will discount your forecasts. Forecasts should be aggressive, yet realistic.

■ **Unique positioning.** Patents, trademarks, copyrights, trade secrets, and other protected intellectual property will definitely attract investors' undivided attention, but are not always necessary and are seldom sufficient for success. Being a "first mover" or having a "secret sauce" will generate keen interest from investors if other key attributes are present.

■ **Smart business model.** Few early stage growth companies are profitable. No one expects them to be. However, they must have business strategies or assets that over time or working with others will derive meaningful profits, or in the case of companies like Amazon or Facebook, exciting shareholder value. Articulating one's value proposition in these terms is critical.

■ **All-in management.** Business always comes down to people, and this is especially true with high-growth companies. Capital will seek out leaders who are completely and passionately dedicated to their business, whether in Silicon Valley or Cleveland.

As our local economy transitions to a greater mix of health care and technology firms, these attributes will become as important as EBITDA in business valuations. Advisors and clients would be wise to pay close attention to these value indicators. ■

Sean Dorsey is the founder and CEO of League Park Advisors. Contact him at (216) 455-9990 or sdorsey@leaguepark.com.

TMA Ohio Chapter announces 2013 award winners!

We congratulate Harry Greenfield, partner at Buckley King, winner of the 2013 Lifetime Achievement Award.

We thank Harry for his leadership and the contributions that he has made both in the turnaround industry and in our community.

We congratulate the winners of the first annual Turnaround/Transaction of the Year Award (from left to right) Jeffrey Addison, Kenneth Latz, Charles Deutchman, Jay Moroscak, Glenn Pollack, Patti Missal, and Steven Rosen (not pictured-Michael Cavanaugh).

We are proud of the achievements of these members and celebrate their specific accomplishments with this year's awards. Thank you for your contributions to the Turnaround Management Association.

PORTFOLIO MANAGEMENT

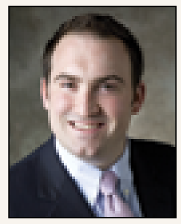
Private equity funds may be responsible for withdrawal liabilities

Limiting ownership interest in portfolio companies can mitigate "controlled group" liability

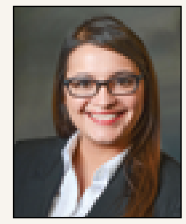
BY SHAYLOR STEELE, PATRICK EGAN AND PRISCILA ROCHA

The First Circuit Court of Appeals recently held that a private equity fund can be liable for the withdrawal liabilities of its portfolio companies. In *Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, the critical question addressed was whether a private equity fund could be a member of its portfolio companies' "controlled group." Generally, under the federal pension law known as ERISA, all members of a controlled group are jointly and severally liable for the pension liabilities incurred by any member of the controlled group, including withdrawal liability related to multiemployer defined benefit pension arrangements.

Sun Capital argued that it was not part of the portfolio company's controlled group because it was a passive investment vehicle and not a "trade or business," which is one of the requirements to be a member of any controlled group. The court rejected Sun Capital's argument because: (1) Sun Capital played an active role in the management and operation of the portfolio company; and (2) Sun Capital received management fees paid by the portfolio company. The court acknowledged that simply investing in a business to make a profit is not enough to be treated as a trade or business. However, based upon the totality of the relationship between Sun Capital and the portfolio company, the court concluded that Sun Capital could not avoid liability by claiming to be a passive investor.


STEELE


EGAN


ROCHA

While the Sun Capital case is far from over and will likely experience more twists and turns, private equity funds should be concerned about the decision. On its face, the decision has laid the groundwork for private equity funds to be held liable for the withdrawal liabilities of their portfolio companies. That alone is cause for significant concern, but the Sun Capital decision could have a farther-reaching impact. If private equity funds could be members of controlled groups, they could also be liable for the unfunded benefits of single employer defined benefit plans. Moreover, brother-sister portfolio companies may now be liable for each other's ERISA debts.

So, is the sky falling? Not necessarily. Private equity funds can still exclude themselves from controlled group liability by limiting their ownership interest in a company. Additionally, funds can address ERISA liabilities at the time of the sale. Careful planning can significantly mitigate the impact of Sun Capital on private equity funds. Without question, though, the landscape has changed.

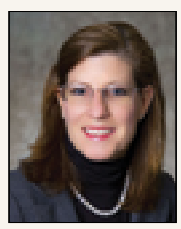
Shaylor Steele, Patrick Egan and Priscila Rocha are attorneys with Benesch, Friedlander, Coplan & Aronoff LLP. Contact Mr. Steele at (216) 363-4495 or ssteele@beneschlaw.com; Mr. Egan at (216) 363-4433 or pegan@beneschlaw.com; and Ms. Rocha at (216) 363-4407 or procha@beneschlaw.com.

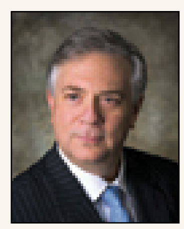
Equity incentives for management of portfolio companies

BY MEGAN L. MEHALKO AND IRA C. KAPLAN

Management as owners is a fundamental premise of private equity investing. Equity-based compensation aligns interests between owners and management. It is a component of motivating management to increase profitability, grow a company and enhance equity value — the primary focus of a private equity owner. This article will review why equity incentives continue to be important, current practices, and the terms of incentive equity plans we most commonly see in today's middle market private equity transactions.

Equity incentives include stock options, restricted stock, profits interests and various types of phantom equity. With increased use of limited liability companies as acquisition vehicles in private equity transactions, profits interests are more frequently used as incentives.


MEHALKO


KAPLAN

Limited liability companies can be more flexible than corporations, including allowing management to receive profits interests without contributing capital or recognizing taxable income. Use of profits interests may also permit a management recipient to receive capital gains treatment in the event of a sale of the company.

Equity pools for management of 10 to 15 percent are common. CEOs generally receive the largest allocation from these pools, followed by other C-level management and the CFO.

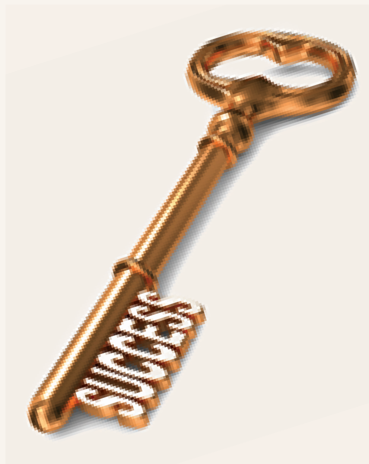
Equity incentives are subject to vesting requirements. Negotiable, and dependent on a particular private equity fund's practice, vesting terms vary. Vesting can be either time-based or a combination of time- and performance-based. If time-based, three to five years is most common, with vesting being ratable over the period. Common performance-based metrics are return on invested capital (ROIC) or a fund's internal rate of return (IRR), although industry and other considerations may merit another basis. Vesting is typically

See **INCENTIVES** Page S-19

BEST PRACTICES

Hiring counsel with good judgment is key to dealmaking success

BY CHRISTOPHER J. HEWITT



A client once asked me, "How would you choose transaction counsel?" I responded that I would hire someone with whom I thought I would connect on a personal level — someone I liked and that I could trust. Let's face it, there are many M&A law firms and lawyers with the technical skills to close a deal. Possessing that core competency is the ante to play the game. What sets one attorney apart from another is the ability to connect with the client on both a professional and personal level. When you spend every waking hour with your attorney for days or weeks on end to close a deal, you want to work with someone you like almost as much as your family.

HEWITT

Upon further reflection, I identified another equally important criterion. If I were hiring M&A counsel, I would also want someone who understands my business, knows my motivation for buying or selling a particular asset, appreciates how the deal fits into my corporate strategy, and can discern which issues are important—and more importantly, which are not—to close my deal. In short, someone who demonstrates good judgment.

Too often, I encounter opposing counsel who, while technically proficient at grinding transaction documents, lose sight of the bigger picture. These "checklist attorneys" catalogue every possible issue that may arise and/or every document that may be needed to complete a deal. Over time, this approach leads them to believe that every issue on the checklist needs to be addressed and/or every document on the checklist needs to be used in every deal. They tend to use the same documents with the same provisions for every deal, regardless of whether that document or that provision applies to the deal at hand. This mentality leads to ineffective transaction documents and, more importantly, higher legal fees.

In a deal we recently closed, opposing counsel insisted on a provision that was inappropriate for the business our client was selling. In trying to resolve the issue, opposing counsel said he didn't need to understand our client's business—he included this provision in every transaction. When the issue was escalated to his client, who did understand our client's business, he immediately conceded the point. This attorney's unwillingness to understand the business his client was buying led to inefficient and expensive negotiations.

I would hire counsel with better judgment.

Christopher J. Hewitt is a Partner with Tucker Ellis LLP. Contact him at (216) 696-2691 or christopher.hewitt@tuckerellis.com.

Incentives integral to success

continued from **Page S-18**

accelerated in the event of a sale or change of control of the company.

Rights on termination of employment also are negotiable, although it is common for the company to have a right to "call" or purchase vested equity on termination of employment, especially in situations where the employee is terminated for cause or quits without good reason. Unvested equity is usually forfeited, regardless of the reason for termination. A terminated employee's right to cause the company to repurchase his vested equity after termination of employment (a "put") occurs less frequently. The repurchase price is often tied to the reason for termination. If terminated for cause or a quit without good reason, the price might be the lesser of cost or fair market value.

Equity incentives for management of portfolio companies will continue to be integral to successful investing. Practices fluctuate, and terms can be complicated. Consult an experienced advisor on how best to structure an effective incentive equity plan and to determine whether proposed incentives are in line with what a manager should expect.

Megan L. Mehalko, is Chair, Corporate and Securities Practice Group. Contact her at (216) 363-4487 or mmehalko@beneschlaw.com. Ira C. Kaplan is Managing Partner. Contact him at (216) 363-4567 or ikaplan@beneschlaw.com

Privileged communications need parameters

continued from **Page S-10**

that following a merger, "all property, rights, privileges, powers and franchises, and all and every other interest shall thereafter ... be the property of the surviving corporation." The sellers in the Great Hill Equity suit contended that the statutory term "all ... privileges" was intended to only include certain property rights and that it did not extend to privileges established by a rule of evidence. The Chancery Court disagreed and stated that Section 259 was "not ambiguous" and that "all means all."

For sellers and their counsel, the path is clear. Be specific in the transaction document and expressly exclude from the assets being transferred in a merger transaction any pre-merger attorney-client privileged communications. In addition, make sure parameters are set at the outset of any transaction regarding how communications are made so that the privileged communications can be removed from, or better yet, are not part of, computers and email accounts that are otherwise being transferred to the buyer. Careful drafting, good legal counsel and practical implementation of steps necessary to exclude privileged assets will prevent the unintended consequences of the Great Hill case.

Jennifer L. Vergilii is a Partner in Calfee, Halter & Griswold LLP's M&A practice group. Contact her 216-622-8568 or jvergilii@calfee.com.

Value should be based on need and not desire

continued from **Page S-11**

a sale than what was thought, and anything above that needed value is a bonus. In other instances, we have determined the needed value exceeds the desired value and have, therefore, concluded the timing may not be right for a sale. This leads to a separate discussion on how to achieve the needed value over the next several years.

Once comfortable with a needed value, a more mentally prepared business owner can proceed with the various other aspects of proper preparation for a sales process.

Ross Vozar is Associate Director of Transaction Advisory Services, for SS&G. Contact him at SS&G's downtown Cleveland office at (216) 325-1700 or rvozar@ssandg.com.

TRENDS

Software-as-a-Service (Saas) market is red hot

BY CHRISTOPHER MCKENNA

The $20 billion Software-as-a-Service (SaaS) business model is growing rapidly within the $300 billion global software market, and public markets are rewarding SaaS companies with robust valuation multiples.

MCKENNA

In with the new. SaaS refers to a new model of how software is delivered in which the software and associated data is centrally hosted on the "cloud" instead of being resident on a user's servers or computers. Customers pay a monthly fee for use of the software, which for many customers is scalable, dynamic, configurable and economical. Due to its single-instance design, SaaS distributes major IT costs over many clients and improves the vendor's ability to seamlessly and rapidly deliver upgrades and updates. In contrast, the old installed software model requires significant computing capital and operational expenditures to install, support and update.

Key performance indicators. New metrics to measure current and future business value are needed with SaaS, such as net monthly recurring revenue (NMRR), cost to acquire a customer (CAC), and customer losses (churn). One fundamental measure of SaaS economics is how quickly there is a payback on a company's CAC. The payback period can be calculated by dividing the CAC for the prior quarter by the NMRR added during that quarter. Ideally, this CAC payback is less than 12 months for companies experiencing modest churn, but can be longer for those with high customer retention and upsell opportunities. These new metrics can help managers and advisors understand if a company should be adjusting strategies, such as increasing sales and marketing spend if the payback is favorable.

Heady SaaS saluations. SaaS companies typically transact based on revenue multiples (many public SaaS companies traded between 5x and 9x in 3Q13) since they experience volatile earnings due to scale-up spending. Investors award the highest valuations to SaaS companies demonstrating strong revenue growth and healthy gross margins. One example includes fast-growing Marketo, which trades at 15x revenue despite operating losses. Even the well-established Salesforce.com trades at 6x revenue. While

published multiples are useful benchmarks, valuation depends on SaaS metrics and such factors as addressable market size, product functionality, competitive position, and team.

Local spotlight. The local economy is alive with emerging SaaS companies, such as COMS, OnShift, SparkBase, Decision-Desk, SpearFysh, and StreamLink Software, among others. National investors are taking notice as evidenced by Summit Partners' recent $21 million investment in COMS or Technology Crossover Ventures' $66 million investment in TOA Technologies.

Christopher McKenna is Managing Director for Carleton McKenna. Contact him at (216) 523-1962 or cjm@carletonmckenna.com.

IT due diligence has advantages

continued from **Page S-11**

running the company. If IT investments are required, the buyer then has leverage to negotiate a lower purchase price."

IT due diligence poses other advantages as well. Buyers can steer clear of unexpected capital outlays and negotiate to have issues rectified at the seller's cost prior to close. It can identify reporting or personnel weaknesses, as well as upgrades and improvements that may be suitable for the current business but insufficient for a post-sale business planning significant growth. Overall, IT due diligence can uncover issues that delay buyers from reaching their desired return on investment.

Mark Brandt is a Director in McGladrey's Cleveland Office. Contact him at (216) 522-1124 or Mark.Brandt@mcgladrey.com

BEST PRACTICES

Noncorrelated investments: Narwhal or Unicorn?

BY LINDA M. OLEJKO

Both the narwhal and the unicorn are fantastical creatures — one real and one mythical. In the case of noncorrelated investments, one must ask the question, "Is it possible to find that rare investment with returns independent of the factors that move publicly traded debt, equity and real estate markets?"

OLEJKO

The answer is yes … and no.

Most publicly traded investments are in some way dependent on economic conditions. Equity returns are contingent on a business's prospects and profitability, and real estate values depend on such factors as employment levels and the buildup of available inventory. From time to time, some investments are negatively correlated with economic conditions. In a recessionary environment, for instance, an investment with a fixed payment, such as Treasury bonds, may increase in value as the values of equity securities decline. This inverse correlation, however, may not persist as market conditions change – for example, if the economy improves.

When flipping a coin and calling heads or tails, the result is obviously unrelated to the factors that drive financial markets. With noncorrelated investments, the risks for which investors are compensated are dissimilar to elsewhere in their portfolios. Examples of noncorrelated investments include reinsurance, water rights, film rights, pharmaceutical co-development and intellectual property. There are other options, but the markets for many of them are too immature or the risks too difficult to quantify.

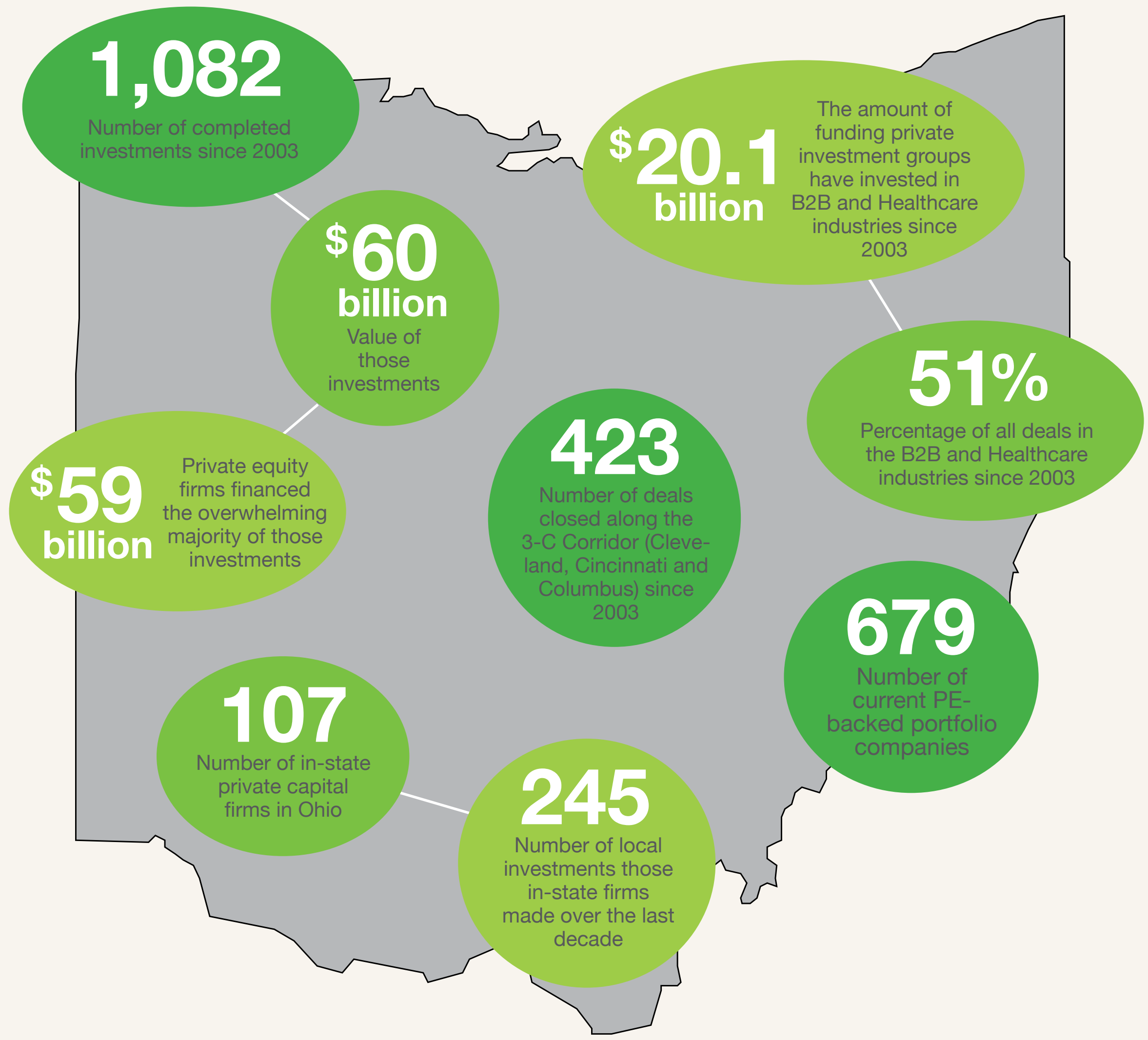
There are numerous reasons to seek noncorrelated investments, even if, like fantastical creatures, they are hard to find. These investments can be highly beneficial to portfolios since they provide a great deal of diversification for the dollar. An academic using the risk/return profile of these investments in a portfolio optimization program may wish to take an extra helping.

Noncorrelated investments have earned a place in sophisticated investment portfolios, but as in the cases of the fantastical narwhal and unicorn, careful study is required to separate the real from the mythological.

Ms. Olejko, CFP® is a Managing Director of Glenmede. Please contact her at (216) 514-7876 or Linda.Olejko@glenmede.com.

Ohio and Private Capital: By the Numbers

The Buckeye State is a leading recipient of private capital financing in the Great Lakes region and the United States as a whole. Take a look, by the numbers:

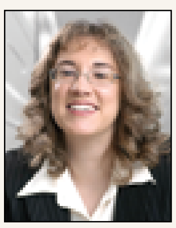


BEST PRACTICES

Managing fees in M&A transactions

BY MARIE C. KUBAN AND DOUGLAS K. SESNOWITZ

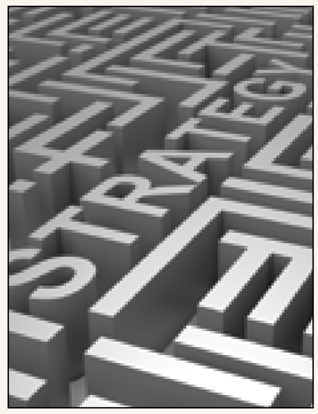
Nothing makes a deal team happier than when an M&A transaction closes on time and on budget. Often easier said than done, but after negotiating and closing hundreds of transactions, we have identified the following culprits that inevitably show up when transaction fees have skyrocketed.



KUBAN

SESNOWITZ

■ **Not hiring the right professionals.** M&A is a specialty, just like tax or ERISA, so having professionals in your corner that have negotiated and closed, or provided professional services for, a significant number of M&A transactions is crucial. This is especially true for the other side. If they have engaged professionals who are ill-equipped to handle the transaction, this can lead to delays, potentially small issues turning into complicated issues, and your professional team having to do more of the work (and your pocketbook covering more of the expenses). While fee caps and fixed fee arrangements can help manage costs, they sometimes get triggered well before the closing, which can result in a party incurring unexpected responsibility and expense.



■ **Structure changes.** Changing the structure of the transaction is a killer when it comes to managing fees. The interests of buyers and sellers are rarely aligned with respect to the accounting and tax treatment of a deal, so the party that changes the structure should do so with the expectation of picking up some (if not all) of the other side's additional costs.

■ **Disorganization.** Disorganization can take many forms but inevitably leads to delay and increased costs: not compiling, disseminating or reviewing due diligence materials in a timely or efficient manner; not engaging service professionals quickly; not keeping the deal team informed of what other team members are doing or have uncovered; and not identifying material lead-time items until late in the transaction.

■ **Unreasonable deadlines.** Delays cost money, but setting unreasonable deadlines rarely results in lower transaction costs. Hurried work product results in multiple revisions to get it right. Throwing more resources at an issue to complete it faster does not come cheap. And rather than take you more seriously, people start to disengage when they feel a deadline is arbitrary or unattainable.

While controlling M&A transaction costs may at times seem to be more art than science, we have found that when the parties go into the process with the right professionals, have an organized game plan, and have set reasonable expectations, it is less likely that there will be significant sticker shock at the closing. ■

Marie C. Kuban, Esq., is a Partner with Ulmer & Berne LLP. Contact her at (216) 583-7434 or mkuban@ulmer.com. Douglas K. Sesnowitz is Partner and Chair of the firm's Mid-Market Services Group. Contact him at (216) 583-7144 or dsesnowitz@ulmer.com.

Medicare rules need planning

continued from **Page S-12**

proportion as their historic pass-through income. To qualify, the gain recognized from the sale must be less than $250,000 or less than $5 million and separately stated income, gain or loss from the business accounts for 5% or less of NII in the year of the sale and the two previous years.

The Medicare tax rules are complex and proper planning should be considered when contemplating or in advance of a transaction. ■

Nicholas Fanous is Tax Manager, M&A Tax Services Group, of Grant Thornton LLP. Contact him at (216) 858-3545 or nick.fanous@us.gt.com.

Disclaimer

Crain's Cleveland Business Custom Publishing staff

Advertising Sales Manager: Nicole Mastrangelo (nmastrangelo@crain.com)

Copy Editor: Cheryl Higley

Page Designer: Kristen Wilson

Cover Design: Kristen Wilson

For more information about custom publishing opportunities, please contact Nicole Mastrangelo.

TRENDS

Northeast Ohio's top deal makers to be honored at ACG Cleveland's 18th annual Deal Maker Awards

ACG Cleveland, Northeast Ohio's preeminent organization for merger and acquisition and corporate growth professionals, will recognize the winners of its 18th Annual ACG Cleveland Deal Maker Awards on Thursday, Jan. 30, 2014, at 5:30 p.m. at the Cleveland Convention Center.

The Deal Maker Awards honor Northeast Ohio's top corporate deal makers for demonstrated success in using acquisitions, divestitures, financings and other transactions to fuel sustainable growth. The 2014 Deal Maker Awards winners are:

The Riverside Company is one of the largest and oldest global private equity firms focused on the smaller end of the middle market, investing in growing enterprises valued at up to $250 million. The firm's global portfolio includes more than 75 companies. As The Riverside Company marked its 25th anniversary in 2013, it has grown to manage more than $4.2 billion in four fund families and currently employs approximately 220 professionals worldwide. The firm has completed 325 deals throughout its history, including 56 acquisitions and 21 divestitures during the past two years. Its largest-ever fund was closed in 2013.

PolyOne Corporation is a premier global provider of specialized polymer materials, services and solutions with fiscal 2012 revenues of $2.9 billion. During the past two years, PolyOne has made three significant acquisitions – including Spartech Corporation, which had annual revenues of $1.1 billion, and ColorMatrix, a leader in liquid colorants and high performance additive technologies. As the company has transformed from a focus on commodity applications to one of specialty, high-value solutions, it has also divested its non-core assets. This included the May 2013 sale of its vinyl dispersion, blending and suspension resin business for $250 million. As a result of executing the company's proven strategy, PolyOne has delivered a remarkable 16 consecutive quarters of double-digit adjusted EPS growth.

Evolution Capital Partners is a private equity fund that invests in second-stage companies. The firm specializes in helping entrepreneurial businesses transform and scale their organization by providing capital, management, infrastructure and resources. Evolution has provided excellent returns to its limited partners through four exit events in its first fund, including the distribution of 3.1 times capital as of September 30, 2013. Within the past 15 months, Evolution has invested approximately 45 percent of its committed capital for Fund II in three portfolio companies: Lewellyn Technology, Budco Financial Services, and Axiom Sales Force Development. It has also exited two others: The Accurate Group and American Eagle Mortgage.

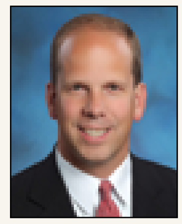
American Greetings Corporation is one of the world's largest creators, manufacturers and distributors of innovative social expression products generating annual revenues of approximately $1.9 billion. In August 2013, the Weiss Family completed its acquisition of American Greetings for $19 per share – a transaction valued at approximately $870 million – with plans to return the company to its roots as a family-owned business. American Greetings continues to be a leading player in the $6 billion retail market for greeting cards, holding an estimated 40- to 45-percent share of the U.S. greeting card market.

TRENDS

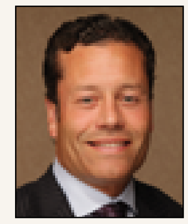
ACG board members weigh in with their 2014 forecasts

BY TOM FREEMAN, TOM ZUCKER, JOHN M. SAADA JR., DAVID DUNSTAN AND JAMES HILL


FREEMAN


ZUCKER


SAADA


DUNSTAN


HILL

Money is burning a hole in the pocket of private equity firms, waiting for sellers to come to the table. Promising economic numbers, an aging portfolio of businesses and favorable market conditions all point to the potential for a robust M&A landscape in 2014, but there are road bumps to watch for. ACG board members have their fingers on the pulse of the industry and weigh in on how they see 2014 shaping up.

Reasons for optimism heading into 2014

Corporations continue to sit on record levels of cash, private equity firms have dry powder and anxious investors, interest rates continue to sit at historically low levels and little-to-no GDP growth for the last half decade has executives searching for ways to show their shareholders growth. These factors all point to a robust M&A market in the next year given the number of willing and able buyers.

The question that remains to be answered is, will we see just as many sellers come to the table? All the indicators outlined above existed in 2013, but — whether it is an understandable caution that was engrained in business owners' minds during the Great Recession or a desire to demonstrate year-over-year growth to substantiate projections — it seems as though potential sellers may still be hesitant to take their businesses to market. However, given the number of potentially interested investors and slow but steady improvement in economic confidence, there is every reason to believe that sellers could be enticed this year, and 2014 could be the most active M&A market in years.

Tom Freeman, Office Managing Partner, Grant Thornton LLP

Higher business valuations are expected

Business owners are approaching 2014 with increased confidence resulting from several years of stronger profits and a stable business environment. The confidence is also evidencing itself in the manufacturing industry with a growing purchase manager's index for the seventh consecutive month, and record order backlogs. These conditions are driving increased interest from business owners to evaluate selling their companies in 2014.

The low interest rates and reasonably low capital gains rates continue to fuel a healthy M&A market. Favorable rates, complemented by an increasing aggressive lending marketplace, are expected to drive higher business valuations. Business buyers continue to outpace companies available for sale by a growing margin. The expected growth in buyer demand in 2014 will be driven by the significant committed capital that remains unspent in private equity funds, the growing acquisition interest from family offices and the excess cash on middle market corporate balance sheets.

Tom Zucker, President, EdgePoint Capital Advisors

Changing and challenging legal landscape

While it should come as no surprise to most fund managers, 2014 promises more government oversight of (some would say interference with) private equity. Legislative, regulatory, rulemaking and litigation-driven issues will impact the management of private equity funds. As laid out in its 2013 yearly goals, the SEC plans to turn up the heat on private equity fund managers, which it has already demonstrated by clamping down on practices for marketing funds and performance. In addition, private equity controlled companies are increasingly facing many of the same corporate governance pitfalls once reserved almost exclusively for public companies.

Fund managers will need to be more focused than ever to minimize risks to their funds. With changes on multiple fronts in 2014, fund managers need to consider at least the following three aspects of their business: marketing and selling fund securities in light of SEC scrutiny; structuring their funds to reduce potential ERISA exposure; and implementing and adhering to effective compliance programs. Firms that are unprepared risk being caught off guard and exposed to unexpected liabilities.

John M. Saada Jr., Partner, Jones Day

Moving toward equilibrium

There has been a dearth of quality companies for sale since the rush to market in 2012 to beat the capital gains increase of 2013. At the same time, corporate and financial buyers are sitting on record amounts of cash and uninvested capital, which they are eager to deploy. This supply/demand imbalance very much favors the seller. My partners and I believe that the market will move toward equilibrium this year as more and more sellers look to capitalize on this imbalance.

Given the nearly 80 million baby boomers nearing retirement and desiring liquidity and diversification, the aging portfolio companies of the more than 3,000 private equity groups that must be sold, and the access to inexpensive bank capital and aggressive private equity dollars, we expect the supply side of the equation to ramp up significantly in 2014.

Whether you are considering a complete sale of your business, a recapitalization or a minority sale, there is a window of opportunity that shouldn't be missed to generate historic valuations and favorable transaction terms and conditions.

All signals point to a strong M&A market for 2014. However, despite more than 20 years of providing M&A advice, if I could accurately predict the behavior of business owners, I would be on the beach in the Caribbean rather than in my office waiting for the next "polar vortex" to hit the Midwest.

David Dunstan, Managing Director, Western Reserve Partners

A glance at the private equity landscape

- North American private equity funds raised $266 billion last year, the best year since 2007, and exceeded 2012 by $66 billion.

- North American corporate balance sheets are estimated to have over $2 trillion in excess cash.

- U.S. GDP is picking up a bit, but the name of the game for most businesses is acquisitive, not organic growth.

- Many nonsponsored private companies have had a bit of an earnings uptick, and baby boomers are still selling into the market. A study by Bain found that 70% of the portfolio companies of the 3,200 private equity firms in North America have been held for over seven years and the limited partners are putting pressure on the fund principals to sell. Corporate carveouts, which slowed in the first half of 2013, have quickened. Buyers need to stay close to the corporate development teams in those corporations, as the focus on core assets — not just those that produce cash flow — is back in vogue.

- The capital markets are highly efficient. Even $5 million EBITDA businesses have an investment banker. Buyers will have to work harder; keep close to corporate development teams; find compatible companies that are not "for sale" but might be; hire buy-side investment bankers; become more active in knowing the smaller investment banks around the country; and network hard in the industries in which they focus.

- We will see more activity in 2014, but the "good" to "great" companies will be costly.

James M. Hill, Chairman of Private Equity Practice and Executive Chairman, Benesch, Friedlander, Coplan & Aronoff LLP