FundsTalk

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We are excited to introduce Kramer Levin's inaugural FundsTalk newsletter. This newsletter is devoted to discussing legal issues facing alternative asset managers and funds. Since 2008, the alternative asset market has seen a broad convergence of previously distinct asset classes and strategies, such as private equity, hedge funds, debt and claims trading, etc., into a single class — alternative assets. Extending that theme of convergence, this newsletter will focus on multi-disciplinary themes that affect all asset managers, with particular attention paid to new developments and changes in the legal landscape in which the industry operates. We hope you find the information contained in this newsletter to be helpful and profitable, and welcome your thoughts and suggestions.

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Editors

If you have any questions or would like more information concerning any of these topics, please contact one of the authors or:

Robert N. Holtzman 212.715.9513
rholtzman@kramerlevin.com

Russell J. Pinilis 212.715.9450
rpinilis@kramerlevin.com

The contents of this FundsTalk are intended for general informational purposes only, and individualized advice should be obtained to address any specific situation.

The SEC Wants To Be Your Valentine

By Gilbert K. S. Liu, Partner
Banking and Finance, Securitization
212.715.9460, gliu@kramerlevin.com

On February 14, 2012, Valentine's Day, certain public and private companies will be required to file newly created Form ABS-15G with the SEC. This new SEC filing requirement is mandated by Rule 15Ga-1 to the Securities Exchange Act of 1934, as amended, which was released by the SEC on January 20, 2011 to implement Section 943 of The Dodd-Frank Wall Street Reform and Consumer Protection Act. Rule 15Ga-1 was enacted in response to a perceived lack of effectiveness of the contractual provisions related to representations and warranties in respect of the assets underlying asset-backed securities transactions and the lack of responsiveness by securitizers to efforts by investors and trustees to undertake enforcement actions and to exercise remedies in respect of breaches of such representations and warranties. Sponsors and issuers of asset-backed securities should closely review Rule 15Ga-1, determine whether and to what extent disclosure is required, and begin to implement any system changes necessary to gather any data required to be disclosed.

Sponsors and issuers of asset-backed securities should closely review Rule 15Ga-1, determine whether and to what extent disclosure is required, and begin to implement any system changes necessary to gather any data required to be disclosed.

In general, Rule 15Ga-1 requires that a **securitizer** of an **asset-backed security**, for which the underlying transaction documents contain a covenant to repurchase or replace assets for breaches of representations or warranties, shall file Form ABS-15G with the SEC detailing, in tabular format, **information**

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Openlane: The Case of a Merger Agreement, a Know-It-All Board and No Fiduciary Out

By Ernest S. Wechsler, Partner, Corporate, Mergers and Acquisitions, Capital Markets
212.715.9211, ewechsler@kramerlevin.com
and Joseph Satorius, Associate, Corporate

Introduction

In a recent opinion issued by the Delaware Court of Chancery, *In re Openlane*, the Court refused to enjoin a transaction in which Openlane's Board of Directors (the "Board") approved a merger without utilizing so-called "customary value-maximization tools" (such as an auction, fairness opinion or a broad market-check) and despite engaging only three strategic buyers. The merger agreement contained a no-shop provision with no fiduciary out, but allowed the company to terminate the agreement with no break-up fee if stockholder consent was not received within 24 hours. Immediately after signing the merger agreement, a majority of stockholders executed written consents. A dissenting stockholder subsequently filed a claim arguing that (i) the Board breached its *Revlon* fiduciary duties by conducting a sale process with only three strategic buyers and without a fairness opinion or adequate market-check, and (ii) the no-shop provision coupled with the lack of a fiduciary out and the 24-hour consent provided by stockholders constituted improper deal defensive measures in violation of *Omnicare*.

Revlon Claim

In finding the Board was adequately informed the Court looked to the Board's "impeccable knowledge" of the business. The Court noted that the company is one of the few that is actually "managed by," rather than "under the direction of," the Board. Most of the directors had a long history with the company, and two directors were affiliated with the company's private equity investors and, according to the Court, likely had knowledge of the company's appeal (or lack thereof) to financial buyers. Further, the Board held regular meetings, received advice from its financial advisor regarding the value of the company, and was actively involved in pursuing two other strategic buyers during the year prior to signing the merger agreement. The Court held that through its "impeccable knowledge," the Board held adequate information to make an informed decision without utilizing traditional value-maximization tools.

> While there is no single path that a board must follow in maximizing stockholder value (and satisfying *Revlon* duties), the Court itself cautioned that the Board process in *Openlane* is "not a model to be followed."

In finding the Board's ultimate action reasonable, the Court noted that the Board's interests were aligned with stockholders through its collective 60% holding of company stock and that "collectively, the Board had more to lose or gain from a change of control transaction than any other stockholder" and was motivated to get the best price reasonably available. The Court also referenced the logical motivation to sell the company before a further deterioration of the business and again cited the Board's "impeccable knowledge" of the company's business.

Omnicare Claim

Like *Omnicare*, the *Openlane* merger agreement contained a no-shop provision with no fiduciary out for the Board to entertain or accept a better offer. Furthermore, a majority

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Recent Trends

By Christopher S. Auguste, Partner
Corporate, Capital Markets
212.715.9265, cauguste@kramerlevin.com
and Marissa Leung, Associate, Corporate, Banking

In recent months, we have seen an increased interest by offshore funds in reaching out to U.S. investors. Offshore funds who seek U.S. investors should consider whether their investors will be only tax-exempt investors or also taxable investors. They should also determine whether their investors will be accredited investors or also qualified purchasers.

Offshore funds should, prior to soliciting U.S. investors, analyze tax and ERISA implications of their offerings as well as blue sky laws to determine if any filings will be necessary in connection with their offerings. Offshore funds should also be careful not to engage in any form of advertising or solicitation which would raise issues under U.S. securities laws. ■

of *Openlane* stockholders provided written consents for the merger immediately after execution of the agreement. The *Openlane* Court nonetheless distinguished the facts from *Omnicare*. The Court noted that there is no requirement for a minimum time period between board authorization of a merger agreement and the necessary stockholder approval. Further, the Court pointed out that unlike *Omnicare* the majority of *Openlane* stockholders were not locked up through voting agreements and were free to provide their written consent as they saw fit. The Court also noted that the no-shop provision was rendered "of little moment" as the Board could terminate the agreement without a breakup fee if stockholder consent was not provided within 24 hours. While the Court does not go into detail on this point, the rationale seems to be that had a better offer presented itself or stockholders otherwise determined that the deal was not the best for the company, the majority stockholders could withhold consent and the agreement could be terminated without penalty. Thus, nothing in the merger agreement forced a transaction on stockholders or precluded superior offers. Finally, the Court observed that no superior offer had emerged and that it does not automatically follow from *Omnicare* that every merger agreement without a fiduciary out should be enjoined.

Principal Takeaways

Below are the principal takeaways from the *Openlane* decision for practitioners shaping change-of-control processes and agreements.

Not a model to be followed. While there is no single path that a board must follow in maximizing stockholder value, the Court cautioned that the Board process in *Openlane* is "not a model to be followed." The Court held that a board with "impeccable knowledge" of the company's business may be able to satisfy *Revlon* duties even if it fails to employ customary value-maximization tools, but also noted that such boards are rare, suggesting that a level of "impeccable knowledge" is a high standard to satisfy. A board should therefore use caution before relying on its own knowledge to satisfy its *Revlon* duty to be adequately informed.

Sign and consent method is permissible. The *Openlane* Court reaffirmed the permissibility of the sign-and-consent structure where majority stockholders provide written consent immediately after execution of the merger agreement. The Court distinguished voting agreements from written consents, and noted that providing written consents shortly following execution of a merger agreement neither forces a deal on stockholders nor precludes the receipt of better offers.

No superior offer. Following the Board's approval of the merger, no superior offer emerged for *Openlane* — a fact which the Court suggests plays a significant role in determining whether or not to grant injunctive relief. The Court noted that, where there was no superior offer on the table, the Court would use caution before "enjoining a transaction with no viable alternative and no ready cure." Indeed, the Court suggested toward the end of the opinion that "sophisticated buyers likely would have understood that, if a materially better offer were to be made, judicial relief might have been available." These comments by the Court should certainly give us pause before replicating the deal process and terms found in *Openlane*. ■

The SEC Wants To Be Your Valentine *continued from page 1*

regarding all assets securitized by such securitizer that were the **subject of a demand** to repurchase or replace for breaches of the representations and warranties for asset-backed securities held by non-affiliates during the applicable **reporting period**.

- "**Securitizer**" is broadly defined and is either (A) an issuer of an asset-backed security or (B) a person who organizes and initiates an asset-backed securities transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuer. Given the definition, there can be more than one securitizer for an asset-backed securities transaction. In general, Rule 15Ga-1 provides that if such securitizers are affiliates, filing by one securitizer excuses reporting by its affiliated securitizers.
- "**Asset-backed security**" is also very broadly defined and includes any fixed income or other security collateralized by any type of self-liquidating financial asset (including a loan, a lease, a mortgage or a secured or unsecured receivable) that allows the holder of the security to receive payments that depend primarily on cash flow from the assets. Of special note, Rule 15Ga-1 makes clear that the term "asset-backed security"

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includes (i) CDOs, CLOs, GSE-issued or guaranteed securities, municipal ABS and any security determined by the SEC by rule to be an asset-backed security; and (ii) registered and unregistered offerings, including those privately placed on the basis of or in reliance on Rule 144A or otherwise exempt from registration.

- The **information** required to be included in tabular format on Form ABS-15G must include (i) asset class, (ii) issuing entity, (iii) whether the asset-backed securities are registered, (iv) names of originators, (v) total assets by originator, (vi) assets subject to demand, (vii) assets repurchased or replaced, (viii) assets pending repurchase or replacement (within cure period), (ix) assets subject to demand that are in dispute, (x) assets subject to demand not repurchased or replaced because demand withdrawn, (xi) assets subject to demand not repurchased or replaced because demand was rejected, and (xii) aggregate data with respect to certain of the above data categories. In most cases, the information must be broken out by number, dollar amount and percentage of pool.

The securitizer is required to provide narrative disclosure (through the use of footnotes) to further explain the information presented in the table, as appropriate.

In general, the securitizer is required to provide narrative disclosure (through the use of footnotes) to further explain the information presented in the table, as appropriate. In certain cases, information can be omitted if the information is unknown or not reasonably available to the securitizer without unreasonable effort or expenses, provided that the securitizer provides narrative disclosure explaining such omission.

- "**subject of a demand**" is not defined; however, (i) the SEC does make it clear that the disclosure should (subject to very limited exceptions) include not only demands made by the trustee (or other party with the right under the transaction documents to make a demand) but also investors; and (ii) given that Rule 15Ga-1 applies only to transactions in which there is a repurchase or replacement provision in the transaction documents, a reasonable interpretation is that a demand requires a clear written request for enforcement of the related repurchase or replacement obligations in accordance with the related transaction documents.
- Rule 15Ga-1 provides for two **reporting periods**, filing dates and the ability to suspend reporting.
- The two reporting periods and related filing dates are (i) an initial three-year look-back reporting period ending December 31, 2011, with the initial Form ABS-15G to be filed no later than February 14, 2012 (the "*Initial Filing Date*"); and (ii) quarterly reporting periods thereafter, with Form ABS-15G to be filed no later than 45 days following the end of the related calendar quarter. It is important to note that the language triggering the initial filing requirement on the Initial Filing Date is different from the language relating to quarterly filing requirements. It is possible that a securitizer that is not obligated to make a filing on the Initial Filing Date would be required to make a quarterly filing. For example, a securitizer that (i) issued asset-backed securities (with repurchase or replacement obligations) prior to 2009, which securities are outstanding and owned by non-affiliates on January 1, 2012 and (ii) did not issue any asset-backed securities during the three-year period ended December 31, 2011, would not be obligated to make the filing on the Initial Filing Date, but would be required to make quarterly filings starting with the calendar quarter ended March 31, 2012.
- Where a securitizer has no repurchase or replacement demands during the three-year look-back period covered by Initial Filing Date filing (if required to be filed) or the prior calendar quarter, it may check a box on Form ABS-15G that permits it to suspend quarterly reporting until a demand is made. If Rule 15Ga-1 filings are suspended, the securitizer will still be required to make an annual Form 15G-1 filing within 45 days of the end the calendar year confirming that there has been no demand activity. ■

FATCA and Borrowing from Foreign Lenders

By Russell J. Pinilis, Partner, Corporate, Tax
212.715.9450, rpinilis@kramerlevin.com
and Jason Tomitz, Law Clerk, Tax

Overview of FATCA

The Foreign Account Tax Compliance Act ("FATCA") was enacted to combat tax evasion by U.S. persons holding investments in offshore accounts. FATCA requires Foreign Financial Institutions ("FFI") to report to the IRS certain information about financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. If an FFI does not report the information to the IRS, the FFI is deemed non-compliant. If a U.S. person makes a payment to a non-compliant FFI, it is required to deduct and withhold 30 percent of the payment and pay such amount to the I.R.S. Although many of the details of FATCA are still being developed, there is one action that investment funds ("Funds") should already be taking: Funds must reevaluate both past and future portfolio company and fund level credit agreements to assess and manage their FATCA exposure.

All loan modifications must be evaluated to ensure that the agreement, as modified, could not constitute a reissuance or a new loan and thus fall within the purview of FATCA and its reporting and withholding requirements.

FATCA & Tax Gross-Up Clauses

Most credit agreements contain provisions that protect the profit that a lender expects to receive from lending to a borrower. Included among these provisions is a tax gross-up clause. A tax gross-up clause provides that if a change in law subjects the borrower's interest or loan repayments to withholding, the borrower is responsible for paying the amount of withholding. Accordingly, the lender will continue to receive full payments from the borrower notwithstanding the change in law. In addition to the tax gross-up clause, most borrowers will also be required to indemnify lenders for any additional tax imposed on the lenders as a result of the borrower's withholding payment. Under such provisions, a subsequent law imposing a 30 percent withholding would increase a borrower's cost substantially.

What to Do as a Borrower: Pre-FATCA Deals

FATCA contains a "grandfather" provision which will not require any amount to be deducted or withheld from any obligation outstanding on March 18, 2012. However, any modifications to a "grandfathered" credit agreement, if significant, could be considered a reissuance or a new loan. Therefore, all loan modifications must be evaluated to ensure that the agreement, as modified, could not constitute a reissuance or a new loan and thus fall within the purview of FATCA and its reporting and withholding requirements.

Private equity funds should review all outstanding credit agreements to determine which agreements are subject to tax gross-up clauses and related indemnity clauses. Borrowers should also contact their lenders to find out which lenders anticipate being FATCA-compliant. In addition, the credit agreements should also be reviewed for any favorable clauses that may require the lender to act in the event of a change in law. Some agreements require the lender to transfer a loan to an affiliate if such an affiliate would not be subject to the effects of the change in law and other agreements may permit the borrower to prepay the loan in the event of a change in law. Taking these steps will allow borrowers to assess which of their outstanding credit agreements are at risk of being subject to FATCA, after which borrowers should formulate a strategy to deal with the risk should a significant loan modification become necessary in the future.

Funds must reevaluate both past and future portfolio company and fund level credit agreements to assess and manage their FATCA exposure.

What to Do as a Borrower: Post-FATCA Deals

After March 18, 2012, borrowers should insist that their credit agreements contain a "FATCA Compliance" clause that requires the lender and its affiliates to be FATCA-compliant by the January 1, 2014 effective date and remain compliant thereafter. Best practice would be to insist on such a clause in all future credit agreements because of the possibility that the agreement could later require a significant modification, as mentioned above. ■

Repos "Deconstructed" — Repos to Maturity

By Fabien Carruzzo, Associate, Corporate, Derivatives
212.715.9203, fcarruzzo@kramerlevin.com
and Matthew A. Weiss, Associate, Corporate, Derivatives

The Mechanics

A repurchase agreement or "repo" is a transaction combining a sale of a security by a seller to a buyer (spot sale), with a simultaneous agreement by the seller to repurchase the security from the buyer (forward purchase) at a later date (the repurchase date), at a specified price equal to the original sale price plus an excess amount. A repo is therefore economically similar to a secured loan, where the proceeds of the spot sale received by the seller (as cash borrower) can be thought of as the principal amount of the loan, the excess amount paid by the seller to repurchase the securities at maturity would effectively represent the interest paid on the loan (also known as the repo rate) and the securities sold under the repo would constitute the collateral held by the buyer (as cash lender) to secure the loan.

> Repos to maturity can be very lucrative, especially if the underlying bond generates income far in excess of the repo rate.

A "reverse repo" is the mirror image of a repo, but viewed from the buyer's perspective, and therefore involves the short-term purchase of a security by the buyer (as cash lender) from the seller (as cash borrower), with a simultaneous agreement by the buyer to resell the securities to the seller on a later date at an agreed-upon price.

In a typical repo, the buyer pays to the seller any income or dividend generated by the underlying security (such as any coupon payment under a bond) in the form of a manufactured dividend during the life of the transaction. Also, to address counterparty credit risk, the underlying securities are typically marked to market on a daily basis and either the seller (if the value of the underlying security increases) or the buyer (if the value of the underlying security decreases) can call for margin in an amount that will reduce its exposure to the other party. In certain cases, parties may also call for additional margin if the other party's creditworthiness is adversely affected (e.g. as a result of a credit rating downgrade).

Uses and Protection

Repos are used by market participants for a variety of reasons. Market participants that have large amounts of securities in inventory may enter into repos to obtain financing at lower rates than in other financing markets. Market participants may also use a repo to refinance securities purchased under another repo (which may enable them to match their books and capture a financing spread). From the perspective of repo buyers, repos enable market participants with surplus liquidity to achieve an attractive yield on a secured transaction that is very liquid. Repos may also be used to simply cover short positions.

Repo participants in the U.S. are protected by certain safe harbor provisions of the U.S. Bankruptcy Code to the extent that the underlying repos satisfy certain criteria. These safe harbor provisions enable repo participants to exercise certain termination and close-out rights that they would otherwise be prohibited from exercising by effect of the automatic stay and preference provisions of the U.S. Bankruptcy Code.

Repos to Maturity, Leverage and Risks

Repos to maturity, such as the ones apparently entered into by MF Global (according to public disclosures), have all the features of traditional repos with the one distinction that the repurchase date under the repos coincides with the maturity of the underlying debt security (e.g., a bond). In other words, the bond matures at the same time as the financing under the repo, with the effect that the money received as principal repayment under the bond will cover (and often exceed) the repurchase price under the repo.

Repos to maturity can also be very lucrative, especially if the underlying bond generates income (in the form of coupon payments) far in excess of the repo rate. In such a case, the repo seller uses such income to pay off the repo (financing) rate due under the repos while retaining the difference (spread) without incurring significant costs. This is all the more true if the repo is leveraged. In a leveraged repo, the seller is not using its own balance sheet to finance the purchase of the underlying debt security. Instead, the seller uses the cash raised from the buyer through the repo to simultaneously finance the purchase of the underlying

> If these risks are not properly managed, potential losses associated with leveraged repos to maturity may be lethal.

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bond in the applicable market and deliver it to the buyer under the repo.

But leverage does not come without risk. While repos to maturity typically eliminate financing risk (i.e. the risk that, at some point in time during the life of the trade, the repo seller would not be able to find alternate financing for the underlying security and would therefore be forced to unwind the repo and sell the security, potentially at a loss), market participants still retain default and liquidity risks.

Default risk materializes if the issuer of the underlying security defaults. In that case, the repo seller would not be paid in full by the issuer and, therefore, would have to pay the repurchase price to the repo buyer from additional resources.

Liquidity risk is the risk that the repo seller may not have financial resources to pay for the ongoing costs of maintaining the repo transaction, such as the ability to meet margin calls in the event that the market value of the underlying security decreases or because the repo seller's creditworthiness deteriorates.

If these risks are not properly managed, potential losses associated with leveraged repos to maturity may be lethal. This is particularly true when the repo seller is a financial institution where perceived riskiness is crucial to maintaining ongoing business relationships with existing customers and a run on the bank is always possible and, in most instances, fatal. ■

WARNing to Investors: WARN Liability Premised on *De Facto* Control of Portfolio Company

By Robert N. Holtzman, Partner, Employment Law
212.715.9513, rholtzman@kramerlevin.com
and Katrina L. Baker, Associate, Employment Law

In a number of recent well-publicized cases, employees have sought to hold alternative asset managers, banks, and other third parties liable for alleged violations of the Worker Adjustment Retraining Notification ("WARN") Act by their employer as it teetered on the brink of or succumbed to insolvency. The costs of settlement and attorneys' fees associated with such claims surely add insult to injury in these distressed situations.

> Investors and lenders must strive to ensure separation from the employer's decision to lay off employees or close facilities. Direct orders or instructions to conduct layoffs or plant closings should be avoided; establishing expense reduction requirements or requiring financial covenant compliance are far less likely to lead to liability.

Third party liability under the WARN Act is analyzed under a five factor test created by the Department of Labor (the "DOL") in 1989. Following years of limited guidance as to how these factors are to be applied, a series of decisions in the past several months have given significant definition to the contours of this issue and guidance regarding those circumstances that will increase the likelihood of WARN liability being imposed upon third party owners and investors for WARN violations by a troubled employer.

The *De Facto* Prong Becomes the *De Facto* Rule

The DOL's five factor test considers: (1) common ownership; (2) common directors or officers; (3) *de facto* exercise of control; (4) unity of personnel policies emanating from a common source; and (5) dependency of operations. Prior to 2011, only a handful of cases applied this test. While these cases revealed that courts placed particular weight on the *de facto* exercise-of-control prong of the DOL's test — especially when the third party made the closure or layoff decision — the significance of the other four factors was unclear.

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NEW YORK
1177 Avenue of the Americas
New York, NY 10036
212.715.9100

SILICON VALLEY
990 Marsh Road
Menlo Park, CA 94025
650.752.1700

PARIS
47, Avenue Hoche
75008 Paris
(33-1) 44.09.46.00

www.kramerlevin.com

WARNing to Investors: WARN Liability Premised on *De Facto* Control of Portfolio Company

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Several recent decisions have explicitly or implicitly acknowledged the primacy of the *de facto* control factor in this analysis. In *D'Amico v. Tweeter Opco, LLC*, Delaware Bankruptcy Judge Mary Walrath stressed the importance of the *de facto* rule, almost to the exclusion of the other factors, in a case involving the imposition of third party liability on the indirect owner of a minority interest in and lender to an employer. Critical to the court's analysis was the fact that the third party was directly involved in all aspects of the decision to terminate the employees. Moreover, its managing member acted as the managing member of the employer and directed the layoffs. Consequently, Judge Walrath ruled that the third party could be held liable for the employer's WARN violations.

While Judge Walrath warned in *Manning v. DHP Holdings II Corp. a/k/a DESA (Cayman) Holding, LLC (In re DHP Holdings II Corp.)* that "[c]ourts may also consider circumstances that tend to demonstrate a lack of arm's length relationship between the company," she focused in that case on the control exercised by the debtor's parent over the layoff decision and determined that the parent could not be held liable under WARN because it had not controlled that decision. Most recently, Judge Colleen McMahon of the Southern District of New York similarly ruled in *Guippone v. BH S&B Holdings, LLC* that a parent holding company could not be held liable because it did not order or dictate the layoffs at issue.

Demonstrating a lack of control over the determination will go a long way toward insulating the third party from liability for any WARN violations by the employer.

Take Care to Ensure Separation from the Decision

Given the primacy of *de facto* control in determining third party liability for WARN violations, investors and lenders must strive to ensure separation from the employer's decision to lay off employees or close facilities. Certainly, this does not require that the third party abstain from all involvement in the employer's financial matters, but specific decisions and determinations should be left to the management and board of directors of the employer. Direct orders or instructions to conduct layoffs or plant closings should be avoided; establishing expense reduction requirements or requiring financial covenant compliance are far less likely to lead to liability. Moreover, appropriate documentation should reflect that the decision was made by the employer's officers or board of directors, not the investor, including through board resolutions, minutes of meetings, and internal memoranda. Demonstrating a lack of control over the determination will go a long way toward insulating the third party from liability for any WARN violations by the employer. ■

Practice Areas

This publication is a collaboration of the following practice areas:

Capital Markets

Claims Trading and Distressed Investment Advice

Corporate

Corporate Restructuring and Bankruptcy

Electronic Discovery

Employment Law

Executive Compensation

Financial Services/Investment Management

Intellectual Property

Litigation

Mergers and Acquisitions/Joint Ventures

Private Equity and Hedge Funds

Securitization

Swaps & Derivatives

Tax