

Initial Public Offerings of Sponsor-Backed U.S. Corporations: 18-Month Survey Through December 31, 2015

PENpoints

A private equity sponsor's controlling interest in a company before and after its IPO often results in a corporate governance profile different from other public companies.

The IPO market provided liquidity for many private equity firms during the 18 months ended December 31, 2015, notwithstanding 2015's decrease in IPO activity compared to 2014. We reviewed the 32 PE sponsor-backed IPOs of U.S. corporations during this period generating \$100 million or more in gross proceeds to identify trends in corporate governance and defensive measures adopted by these newly public companies.

The corporate governance profile of sponsor-backed public companies differs in many respects from those of both public companies generally and of venture-backed public companies. The PE sponsor's controlling interest before and after the IPO allows the PE sponsor to adopt (1) board structures and nominating policies that ensure a large degree of control throughout the sponsor's investment and (2) charter and bylaw provisions tailored to a controlled company, such as provisions permitting action by written consent and allowing stockholders to call special meetings.

The survey — the full text of which can be found by clicking the link at the end of this article — identified the following key trends:

- **Board Structure.** In the sponsor-backed IPOs reviewed, 94% of the companies adopted a staggered board and 97% of the companies provided for directors to be elected by plurality voting.
- **Nomination Rights.** Approximately 66% of the PE sponsors retained the right to nominate directors following the IPO pursuant to contractual nomination agreements. Further, 57% of those nominating agreements did not require the PE sponsor's nominees to resign once the PE sponsor's ownership level in the company declined below specified thresholds.
- **Monitoring Agreements.** Of companies with monitoring agreements in place prior to the IPO, 67% paid a fee to the PE sponsor in connection with termination of the agreement upon the IPO, with fees ranging

from \$1 million to \$78 million. The average size of the termination fee was approximately \$19.4 million and the median was approximately \$12.9 million.

Termination fees and accelerated payments under monitoring agreements with portfolio companies have recently come under increased scrutiny from the SEC, and an October 2015 SEC enforcement case resulted in the PE sponsor disgorging accelerated monitoring fees to the funds and paying a significant fine. Many PE sponsors are reviewing their practices regarding termination fees and accelerated payments in light of this increased regulatory focus. Because there have been very few IPOs completed since the October 2015 SEC enforcement case, it is difficult to draw any conclusions on the impact of this case on market practice. For more information regarding this SEC enforcement case, please see *KirklandPEN*, October 13, 2015, "[Private Fund Manager Settles SEC Enforcement Case for Accelerated Monitoring Fees and Service Provider Discounts.](#)"

- **Dual Class Stock and "Up-C" Structure.** Approximately 19% of the IPOs reviewed utilized dual class stock to facilitate what is often referred to as an "Up-C" structure. With this structure, certain pre-IPO investors own their economic interests in a pass-through entity partially owned by the public corporation and partially by the pre-IPO investors, thereby retaining more favorable tax treatment for the pre-IPO investors.
- **EGC Financial Statement Presentation.** Approximately 60% of the companies surveyed qualified as "emerging growth companies." More than half of these companies presented only two years of audited

INSIDE KIRKLANDPEN

<i>Revised Hart-Scott-Rodino Act Thresholds Announced</i>	2
<i>PENbriefs</i>	3
<i>Upcoming Events</i>	5

financial statements and approximately 74% presented less than five years of selected financial data.

For more key trends relating to controlled-company status, director nomination rights, sponsor veto rights, defensive measures, monitoring agreements, dual class stock and board independence, we invite you to read the full text of our survey.

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Revised Hart-Scott-Rodino Act Thresholds Announced

The Federal Trade Commission recently announced revisions to the Hart-Scott-Rodino (“HSR”) Act filing thresholds, each of which is higher than the 2015 levels.

Parties to an acquisition that closes on or after February 25, 2016, must, subject to certain exemptions, file HSR forms when, as a result of an acquisition, the buyer will hold assets, voting securities, and/or non-corporate interests valued in excess of \$78.2 million (the “Size-of-Transaction” test), and the transaction involves a buyer or seller with annual net sales or total assets of \$15.6 million or more, and the other party has annual net sales or total assets of \$156.3 million or more (the “Size-of-Person” test). If the “Size of Transaction” exceeds \$312.6 million, the “Size of Person” is, subject to certain exceptions, irrelevant, and HSR forms must be submitted.

The chart below summarizes the 2015 and the new HSR thresholds.

HSR Jurisdictional Test	2015 Thresholds	New 2016 Thresholds
Size-of-Transaction	\$76.3 million \$305.1 million	\$78.2 million \$312.6 million
Size-of-Person	\$15.3 million \$152.5 million	\$15.6 million \$156.3 million

Filing fees have not changed and apply to the new thresholds as follows:

Transaction Value	Filing Fee
Greater than \$78.2 million but less than \$156.3 million	\$45,000
Greater than or equal to \$156.3 million but less than \$781.5 million	\$125,000
\$781.5 million or more	\$280,000

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PENbriefs

Antitrust Update: EU Antitrust v. U.S. Companies

From time to time the European Commission is accused of unfairly targeting U.S. companies in its antitrust scrutiny. Our review of recent EC cases involving U.S. companies reveals a nuanced picture. To learn more, see our recent [Alert](#).

Iran Sanctions: A New Era Announced

The United States and European Union recently announced that a number of sanctions on Iran have been lifted following verification that Iran has met its initial commitments to scale back key aspects of its nuclear program. The U.S. regulatory changes primarily affect non-U.S. companies and non-U.S. subsidiaries “owned and controlled” by U.S. persons, whose activities with Iran previously were subject to U.S. sanctions. With very limited exceptions (and some modest changes), U.S. persons remain subject to broad U.S. sanctions prohibiting business dealings with Iran and Iranian parties. EU economic and financial sanctions on Iran’s nuclear program have been broadly lifted. To learn more, see our recent [Alert](#).

NYSE 2016 Compliance Guidance

The New York Stock Exchange recently released its annual memo outlining new or potential developments affecting companies listed on its exchange relating to, for example, the timing of material news releases and related trading halts, changes to earnings release dates, and shareholder approval policies for early stage companies. To learn more, see our recent [Alert](#).

PENbriefs

Recent Penalty Decisions Signal Major Trends in China's Enforcement of Its Anti-Monopoly Law

China's National Development and Reform Commission recently imposed fines against eight international shipping companies after a long investigation into alleged price-fixing and market sharing agreements. These enforcement actions, the first by a Chinese regulator against the shipping industry, signal major trends in China's anti-monopoly enforcement priorities and raise concerns for multinational companies doing business in China. To learn more, see our recent [Alert](#).

IRS Issues Proposed Regulations on Country-by-Country Reporting

In a highly anticipated move, U.S. Treasury and the IRS issued proposed regulations imposing new reporting requirements on U.S.-based multinational enterprises with annual revenue of at least \$850 million. The proposed rules arise out of an international political effort to address concerns about multinational companies shifting profits to low or no-tax locations where they have little or no economic activity. The new reporting rules, when implemented, will provide tax authorities with a breakdown of where multinational groups allocate profits on a global basis. A typical U.S.-based private equity fund is not expected to be subject to the new reporting requirements, although a U.S. portfolio company of the fund may be subject to reporting if it has annual revenue of at least \$850 million. To learn more, see our recent [Alert](#).

AIM Update

Recently in our *KirklandAIM* newsletter, which is directed toward Chief Compliance Officers and other compliance professionals, we discussed the SEC's examination priorities for 2016 (click [here](#) to access this edition of *KirklandAIM*), and highlighted key 2016 SEC filing deadlines for private fund managers (click [here](#) to access this edition of *KirklandAIM*).

PENnotes

Drafting and Negotiating Corporate Agreements 2016**Chicago, Illinois, February 4, 2016**

This PLI seminar will teach the basics of drafting and negotiating corporate agreements — from how the provisions of an agreement fit together, to the fundamental drafting and negotiating principles common to all corporate agreements. Kirkland partners Kevin Morris and Keith Crow will be panelists at the Chicago event, of which Kevin is also co-chair. Click [here](#) for more information.

15th Annual Beecken Petty O’Keefe & Company Private Equity Conference**Chicago, Illinois, February 19, 2016**

Kirkland is a sponsor of the Chicago Booth Private Equity Conference (PEC), an annual event that brings together financiers, students and entrepreneurs to network and share insights into the dynamics of investing in a constantly changing economy. This year’s conference is themed “Navigating Industry Cycles: Investing in an Evolving Market.” Kirkland partner Bruce Ettelson will moderate a panel on “The State of Fundraising: Current Trends and Strategies.” Click [here](#) for more information.

Columbia Business School’s 22nd Annual Private Equity & Venture Capital Conference**New York, New York, February 19, 2016**

Kirkland will sponsor Columbia Business School’s 22nd Annual Private Equity & Venture Capital Conference, which will focus on the emerging challenges and opportunities facing the private equity and venture capital industries in the coming year. The event will bring together industry professionals, students, alumni and faculty to share their knowledge and experiences. Kirkland partner Michael Movsoich will speak on the Leveraged Buyout panel, and partners Daniel Lavon-Krein, Paul Watt and Sean Rodgers will give a lunchtime presentation on sales of minority interests. Click [here](#) for more information.

11th Annual Stern Private Equity Conference**New York, New York, March 4, 2016**

Kirkland will sponsor New York University’s Stern School of Business’ 11th Annual Stern Private Equity Conference. The conference will provide a forum for industry leaders to discuss the opportunities and risks of today’s private equity and venture capital environment. Kirkland partner Stephen Tomlinson will moderate the Real Estate panel, partner Christopher Torrente will speak on the LBO panel and partner Andrew Calder will be on the Energy panel. Click [here](#) for more information.

22nd Annual Harvard Business School Venture Capital and Private Equity Conference**Boston, Massachusetts, March 5, 2016**

Kirkland will sponsor Harvard Business School’s 22nd Annual Venture Capital and Private Equity Conference, held on the Harvard campus. The panels will address a range of today’s most relevant topics, from growth equity investing and fundraising to geography-specific investment opportunities. Kirkland partner Jeffrey Kaplan will speak on the Fundraising panel, partner Nicole Washington will speak on the Diversity in Private Equity panel and partner Armand Della Monica will speak on the State of the Private Equity Industry panel. Click [here](#) for more information.

17th Annual IBA International Conference on Private Investment Funds**London, England, March 6-8, 2016**

Kirkland is a sponsor of the International Bar Association’s International Conference on Private Investment Funds, which brings together top legal, business and fund professionals from around the globe to analyze the current market and future of private investment funds, among other topics. Partner Daniel Lavon-Krein is on the planning committee for the event. Click [here](#) for more information.

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Kirkland & Ellis' nearly 400 private equity attorneys have handled leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 400 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" in 2012, 2013, 2014 and 2015 by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. Kirkland & Ellis was named "Law Firm of the Year" in Mergers and Acquisitions Law by U.S. News Media Group and Best Lawyers in their 2014 "Best Law Firms" rankings. The Firm was named "Best M&A Firm" at *World Finance's* 2014 Legal Awards, "Law Firm of the Year in North America: Fund Formation" at Private Equity International's 2013 Private Equity International Awards and "Private Equity Deal of the Year" at the 2014 IFLR Americas Awards.

In 2012, 2013, 2014 and 2015, Chambers and Partners ranked Kirkland as a Tier 1 law firm for Investment Funds in the United States, United Kingdom, Asia-Pacific and globally. The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011, 2012, 2013, 2014 and 2015*, and has consistently received top rankings among law firms in Private Equity by The Legal 500, the Practical Law Company and IFLR, among others.

The Lawyer magazine has recognized Kirkland as one of its "Transatlantic Elite," having noted that the Firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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