

private equity developments

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Impact of Proposed CFIUS Regulations on Foreign Investment in U.S. Private Equity

By Benjamin M. Polk, Christian H. Mittweg and Martin Q. Ruhaak

ON MAY 16, 2008, Booz Allen Hamilton Inc. announced that it would be selling a majority stake in its U.S. government consulting business to the Carlyle Group (“Carlyle”). Several months before the announcement, rumors of a possible deal caused the Service Employees International Union (“SEIU”) to charge that the deal would raise national security concerns.¹ The same concerns have now been voiced again by SEIU, which demanded immediate congressional attention “to examine any national security implications and to clarify present and future control issues before the deal receives regulatory approval.”² Cause for such concerns is Carlyle’s September 2007 announcement that it had sold a 7.5% ownership stake to an affiliate of Mubadala Development Company (“Mubadala”), a sovereign wealth fund (“SWF”) wholly owned by the government of Abu Dhabi. Similar investments by SWFs in U.S. private equity firms, such as The Blackstone Group LP and Apollo Investment Management LP, have been announced over the last year. Such SWF investments in U.S. private equity firms, along with a shift generally in the investment strategy of SWFs into “alternative assets,” such as private equity funds, have resulted in demands for greater transparency and disclosure by U.S. private equity funds and their SWF investors.³

SEIU, in its report released on April 23, 2008, entitled “Sovereign Wealth Funds and Private Equity: Increased Access, Decreased Transparency” released on (the “SEIU Report”)⁴, proposed, among other things, that private equity funds should be required to disclose the ownership structure of their general partners and management companies as well as the identity of their limited partners. SEIU further proposed that investigations by the Committee on Foreign Investment in the United States (“CFIUS”) of all proposed acquisitions involving U.S. private equity firms and SWFs be mandatory. It is likely that SEIU will make similar proposals as part of the comments it is expected to submit to the U.S. Treasury Department’s proposed “Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons,” published on April, 21, 2008, two days before the release of the SEIU Report.

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The proposed regulations will implement amendments made by the Foreign Investment and National Security Act of 2007 (“FINSA”)⁵ to Section 721 of the Defense Production Act of 1950, as amended by what is commonly known as the “Exon-Florio Amendment,”⁶ and would supersede procedures governing CFIUS since enactment of the Exon-Florio Amendment. FINSA provides statutory authority for CFIUS to review acquisitions of U.S. businesses by entities controlled by foreign governments or other foreign persons to determine the impact of such transactions on the national security of the United States, and codifies certain aspects of the committee’s structure, process and responsibilities, including the role of certain executive branch departments, agencies and offices, in the review process.

Consistent with existing practice, the proposed regulations do not require mandatory CFIUS filings for transactions that could result in control of a U.S. business by a foreign person. Instead, reviews of such transactions are based on voluntary notices to CFIUS. However, since CFIUS has the authority to review all transactions, CFIUS filings are effectively required for transactions that impact our national security or critical infrastructure.

1 Press Release, SEIU, January 17, 2008, available at www.commondreams.org.

2 Press Release, SEIU, May 16, 2008, available at www.seiu.org/media/pressreleases.cfm

3 Foreign Investment and Sovereign Wealth Funds, September 25, 2007, by Douglas Rediker and Heidi Crebo-Rediker, New America Foundation, Global Strategic Finance Initiative.

4 Press Release, SEIU, New SEIU Report on Sovereign Wealth Funds and Private Equity Calls for More Transparency of SWF Investments in U.S. Buyout Funds (April 23, 2008), available at <http://www.seiu.org/media/pressreleases.cfm>

5 Pub. L. 110-49, 121 Stat. 246 (2007).

6 50 U.S.C. App. § 2170 (1988).

Additionally, the proposed regulations make explicit CFIUS's current practice of encouraging parties to contact and engage with CFIUS before submitting a formal filing for review, including providing a draft notice where appropriate. In a departure from existing practice, the proposed regulations significantly expand the mandatory disclosure requirements, increasing both the type and amount of information required in a CFIUS filing, including personal identifier information to allow background checks. Consistent with existing practice, information submitted to CFIUS with a voluntary filing is entitled to confidentiality and exempt from disclosure under the Freedom of Information Act. The proposed regulations require that the chief executive or another duly authorized designee of a party filing a notice with CFIUS sign a certification as to the accuracy and completeness of the notice and the information provided. The proposed regulations implement the FINSA requirement for civil penalties and give CFIUS the authority to impose civil penalties of up to \$250,000 per violation.

In defining control, all relevant factors, such as equity ownership, board representation and contractual rights, are considered.

The proposed regulations, following a long-standing approach, define "control" in functional terms as the ability to exercise important matters affecting a U.S. business. The definition of control "eschews bright lines"⁷ based on a specified ownership interest or number of board seats. Instead, all relevant factors, such as equity ownership, board representation and contractual rights, are considered in light of their potential impact on the ability of a foreign person or government to determine, direct or decide important matters affecting a U.S. business. The proposed regulations describe in some detail minority shareholder protection rights that do not by themselves confer control over a U.S. entity.

In addition, the proposed regulations provide that a transaction is not subject to CFIUS review if the transaction results in a foreign person holding 10% or less of the voting interests in a U.S. business "solely for the purpose of investment." We would expect that these regulations, if finalized as proposed, will provide guidance to parties in structuring transactions involving investments of SWFs

in private equity firms or funds being formed to acquire U.S. government contractors or other U.S. businesses with national security implications.

At a public hearing on the proposed regulations held by the U.S. Treasury Department, many comments focused on the manner in which the proposed regulations may affect investments by SWFs in U.S. private equity firms.⁸ Specifically, comments were made that the proposed regulations were unclear on whether a U.S. private equity fund would have to submit acquisitions for CFIUS review simply because a SWF is one of its limited partners.⁹

Background of the Proposed Regulations

FINSA, which President George W. Bush signed into law on July 26, 2007 and which became effective on Oct. 24, 2007, formalizes the process by which CFIUS conducts national security reviews of acquisitions of U.S. businesses by foreign persons. FINSA provides for a 30-day CFIUS review of a covered transaction to determine its impact on national security and address any threat. In certain cases, including where the transaction is a foreign government-controlled transaction, FINSA requires an additional 45-day investigation. Where a transaction with a foreign person raises national security concerns, FINSA provides statutory authority for CFIUS to enter into a mitigation agreement with parties to the transaction or to impose conditions on the closing of the transaction to address such concerns. This authority allows CFIUS to mitigate the national security risks posed by a transaction, rather than simply recommending to the President that the transaction be prohibited because it could impair U.S. national security.

Details of Certain Proposed Regulations

1. Covered Transactions

The term "covered transaction" was introduced by FINSA to identify the types of transactions that are subject to CFIUS review. The proposed regulations define "covered transaction" as any merger, acquisition or takeover "that is proposed or pending after the effective date by or with any foreign person, which could result in control of a U.S. business by a foreign person."¹⁰

Examples of transactions that constitute covered transactions for purposes of CFIUS review include the following:

- a transaction which, irrespective of the actual arrangements for control provided in the terms of the transaction, could result in control of a U.S. business by a foreign person;
- a transaction in which a foreign person conveys its control of a U.S. business to another foreign person;
- a transaction that results or could result in control by a foreign person of assets that constitute a U.S. business; and
- a joint venture in which the parties enter into a contractual arrangement, including an agreement on the establishment of a new entity, but only if one of the parties constitutes a U.S. business and a foreign person gains control over that U.S. business by means of the joint venture.¹¹

7 Regulations Pertaining to Merger, Acquisitions and Takeovers by Foreign Persons, 73 Fed. Reg. 21,864 (April 23, 2008) (to be codified at 31 C.F.R. part 800).

8 Ron Orol, *Merger Lawyers Question Treasury's CFIUS Revisions*, THE DEAL, May 5, 2008, available at <http://www.thedeal.com>.

9 *Id.*

10 73 Fed. Reg. 21,870 (to be codified at 31 C.F.R. part 800.206).

11 73 Fed. Reg. 21,872 (to be codified at 31 C.F.R. part 800.301).

Transactions that *do not* constitute covered transactions include, among other things:

- a stock split or pro rata stock dividend that does not involve a change of control;
- an acquisition of a convertible voting instrument that does not involve control;
- a transaction that results in a foreign person holding 10% or less of the outstanding voting interests in a U.S. business, but only if the transaction is solely for the purpose of investment; and
- an acquisition of securities by a person acting as a securities underwriter, in the ordinary course of business and in the course of underwriting.¹²

2. Control

The proposed regulations define “control” as the “power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine direct, or decide important matters affecting an entity” and provide a number of examples of such power.¹³

The definition strikes an important, but delicate, balance between protecting national security interests and promoting foreign investment in U.S. businesses. The proposed regulations are intended to clarify that control can be exercised in a number of ways besides traditional equity ownership. The proposed regulations recognize that certain types of rights that are intended only to protect the investment-backed expectations of minority shareholders, and that do not affect strategic decisions on business policy or other important matters affecting the U.S. entity, do not constitute control. Such minority shareholder rights cited in the proposed regulations include the following:

- the power to prevent the sale or pledge of all or substantially all of the assets of an entity;
- the power to prevent an entity from entering into contracts with majority investors or their affiliates;
- the power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates;
- the power to purchase additional shares to prevent dilution of an investor’s pro rata interest in an entity in the event that the entity issues additional interest; and
- the power to prevent the amendment of the organizational documents of an entity with respect to the foregoing matters.

3. Prefiling Procedures

The parties to a covered transaction are encouraged to

consult with CFIUS in advance of filing a notice of a covered transaction and, in appropriate cases, to file with CFIUS a draft notice to aid CFIUS’s understanding of the transaction and to provide an opportunity for CFIUS to request additional information for inclusion in the notice.¹⁴ This prefiling communication is designed to assist CFIUS and the parties to each covered transaction to identify and resolve national security issues as efficiently as possible. Information provided to CFIUS as part of a prefiling consultation becomes part of the formal notice and is considered confidential.

4. Required Disclosures in Formal Notification

The proposed regulations specify the information relating to the transaction that must be included in a voluntary notice.¹⁵ Much of the required information is consistent with past practice. However, the proposed regulations also require disclosure of certain information not previously required, including:

- the name, address and nationality or place of incorporation of the immediate parent, the ultimate parent and each intermediate parent of the foreign person that is a party to a transaction;
- where the ultimate parent is a private company, the ultimate owners of such parent;
- where the ultimate parent is a public company, any shareholder with an interest of greater than 5% in such parent;
- the price paid for the interest in the U.S. business in U.S. dollars and the financial institutions involved in the transaction, including as advisors, underwriters, or a source of financing for the transaction;
- any contracts between the U.S. business and U.S. government agencies in effect within the past three years;
- any products or services supplied by the U.S. business to any agency of the U.S. government; and
- biographical information for members of the board of directors, senior management and the ultimate beneficial owner of 5% or more of the foreign acquirer and its immediate and ultimate parent entities.¹⁶

5. Penalties

The proposed regulations give CFIUS the authority to impose civil penalties, up to a maximum of \$250,000 per violation, upon any person who, intentionally or through gross negligence, submits a material misstatement or omission in a notice filed with CFIUS, or violates a material agreement or condition entered into with CFIUS.¹⁷ Additionally, a mitigation agreement between CFIUS and the parties to a covered transaction may include a provision providing for liquidated damages, as a reasonable assessment of the harm to national security that could result from a breach of the mitigation agreement.¹⁸ ■

12 73 Fed. Reg. 21,873 (to be codified at 31 C.F.R. part 800.302).

13 73 Fed. Reg. 21,869 (to be codified at 31 C.F.R. part 800.203).

14 73 Fed. Reg. 21,874 (to be codified at 31 C.F.R. part 800.401(f)).

15 73 Fed. Reg. 21,874-85 (to be codified at 31 C.F.R. parts 800.402(c)(1)-(5)).

16 73 Fed. Reg. 21,874 (to be codified at 31 C.F.R. part 800.402(c)).

17 73 Fed. Reg. 21,880 (to be codified at 31 C.F.R. parts 800.801(a) and (b)).

18 73 Fed. Reg. 21,880 (to be codified at 31 C.F.R. part 800.801(c)).

Time to Add SPACs to Your Repertoire?

By Michael R. Littenberg

THE PREVIOUSLY red-hot market for special purpose acquisition companies, or SPACs, succumbed to the general market malaise in the second quarter of 2008. This was in sharp contrast to the first quarter, which saw 12 SPACs successfully raise over \$3 billion and approximately 30 new SPACs filed with the SEC.

In the few weeks prior to presstime, however, there have been encouraging signs that some life may be returning to the SPAC market. A new SPAC—formed by a promoter with significant experience in that SPAC's target industry—priced during late June 2008 and raised \$220 million. Three other new SPACs filed registration statements during that month. In addition, the last few months saw announcements of several initial business combinations that the SPAC sponsors hope will have sufficiently attractive economics to win shareholder approval. Industry watchers expect that a string of successful initial business combinations will help to break the logjam in new SPAC issuances.

In anticipation of a turnaround in the SPAC new-issuance market, many of our institutional manager clients are using the current market lull to get up to speed on the product and build the necessary infrastructure to add a SPAC to their product platform once the market rebounds. Institutional managers must be sensitive to several important structural considerations not faced by, or of secondary importance to, other SPAC promoters.

Determining the Focus

Notwithstanding the flexibility built into the product structure, many SPACs, whether or not institutionally sponsored, opt to focus on a specific industry or geographic area of the world. By adopting a targeted approach, the SPAC is able to leverage the promoter's particular expertise and contact base. A SPAC that capitalizes on the promoter's strengths is substantially more likely to get done, as prospective SPAC investors in recent transactions have become much more focused on the sponsor's ability to source and evaluate a quality initial business combination.

The institutional promoter must be especially sensitive to the SPAC's investment mandate. To the extent possible, it will want the SPAC to dovetail with its other activities without raising investor consent issues or potential conflicts. If the promoter has expertise in multiple industries or geographic areas of the world, it also may wish to give the SPAC a fairly narrow focus to enable the promoter potentially to have more than one SPAC in the market at the same time.

Building the Management Team

As the number of SPACs and their size has increased, investors have become more discerning. There has been a movement to proven management teams with relevant industry and deal experience. SPAC investors have become focused on the ability of the promoter to complete an initial business combination. Furthermore, once an initial business combination has been announced, before buying the SPAC equity, fundamental investors will require a management team that they believe can continue to grow the target and enhance equity value.

Hedge fund promoters in particular often need to round out the SPAC deal team prior to launch. In many cases, the fund has industry or geographic experience, but lacks private equity experience. There are two approaches to building the SPAC team. One approach is to partner with an external team with acquisition experience. The team is not employed by the promoter, but instead participates in a piece of the promote and the promoter investment, with some agreement between

the parties regarding the amount of time and resources that each will devote to the SPAC. The second approach is to hire additional management company personnel. Compensation arrangements vary widely in terms of both equity and cash, as well as other retention terms. With either approach, however, this tends to be a significant lead-time item.

In addition, as a public company, a SPAC is subject to periodic public company reporting. Although the reporting regimen is not as complicated as for an operating company, many institutional promoters need to build out their financial reporting and/or legal compliance function to adequately handle both the initial offering and ongoing public company compliance for the SPAC.

Addressing Potential Conflicts

SPACs are structured to mitigate some conflicts. The SPAC usually may not enter into an initial business combination with a target in which any of its affiliates has a financial interest. In addition, prior to the completion of the SPAC's initial business combination, the promoter generally must give the SPAC the first opportunity to pursue any acquisition opportunities that meet the SPAC's investment parameters.

In the case of institutionally sponsored SPACs, greater sensitivity to conflicts of interest is required due to the possibility that one or more of the promoter's other vehicles may overlap with the SPAC. For example, the promoter may have an existing private equity fund, own an operating business that may seek similar acquisition opportunities, manage a business development company and/or make illiquid investments through a hedge fund-type vehicle. There also may be potential conflicts with future activities.

Some promoters seek to minimize conflicts with existing vehicles by giving the SPAC a different focus. For example, the SPAC may pursue deals that are significantly larger than those done through the promoter's other vehicles. However, even where there is little overlap, a promoter with an existing fund business may, depending upon the contractual rights of its existing investors, need to obtain investor consent to create the SPAC. Even where consent is not required, disclosure to existing investors still may be prudent. In some cases, to eliminate conflicts, the promoter may opt to make the SPAC investment through an existing investment vehicle or to offer existing investors the opportunity to participate in the SPAC.

To the extent that the promoter establishes other vehicles after the SPAC IPO, it also must be sensitive to the need to disclose SPAC-related conflicts to potential investors in those vehicles, as well as the allocation of investment opportunities.

The Promoter's Equity Investment

The promoter's equity investment takes the form of promote shares and privately placed securities.

The promote shares are purchased for a nominal purchase price. Until recently, a 20% promote was the market standard. The most recent deal to price featured a 20% promote. However, one recent deal that did not price went to market with a 7.5% promote. Another deal that had not gone to market by press time filed with a 10% promote. Many SPAC watchers expect that there will be significant downward pressure on the historical 20% promote in many future deals.

The privately placed securities purchased by the promoter take the form of either privately placed units or warrants. The size of the private placement investment depends on the size of the SPAC, but it is usually between 2% and 5% of the size of the public offering and can therefore be several million

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dollars or more. This investment helps to fund the trust account, while also giving the promoter the opportunity for additional upside.

An institutional promoter must decide how it wants to hold and fund its SPAC investment at inception, before it makes its nominal promote equity purchase. It may hold the promote and private placement investment directly, including in one or more of its funds, or through a pass-through holding company, which typically is structured as a limited liability company. In many cases, institutional promoters opt for a holding company structure, since it affords them more flexibility as well as the ability to control the monetization of the promote shares and privately placed equity to the extent that the promoter has co-investors.

Another consideration for institutional promoters, given their often significant cash resources, is whether to include a Rule 10b5-1 repurchase component as part of the SPAC. This feature requires the promoter to place limit orders for up to a specified amount of common stock during a buyback period that commences after the filing of the preliminary proxy statement for the SPAC's initial business combination. The limit order requires the promoter to purchase any shares of common stock offered for sale at or below a price equal to the per share amount held in the trust account, to the extent not purchased by another investor. From the promoter's standpoint, Rule 10b5-1 repurchases may help to stabilize the share price and increase the likelihood of completing the initial business combination.

Completing an Acquisition

The acquisition approval process is the single biggest drawback to the SPAC structure for most institutional promoters.

A SPAC is nowhere near as nimble as a private equity or hedge fund. To complete its initial business combination, the SPAC must receive shareholder approval via a proxy solicitation. Two other significant requirements also must be satisfied.

First, the target business must have an aggregate fair market value equal to a stated percentage of the balance in the trust account, typically 80%.

Second, public stockholders owning not more than a stated percentage of the shares sold in the IPO, typically between 30% and 40%, must not have voted against the initial business combination and exercised the right to convert their shares to cash, which entitles them to a pro rata share of the trust account. In order to reduce conversion risk, recent SPACs have capped the conversion right of a stockholder or

group at 10% of the IPO shares. As discussed above, some recent institutional promoters also have incorporated Rule 10b5-1 repurchase components into their SPACs.

In addition, the SPAC has a fixed amount of time following the IPO to complete an initial business combination, typically two years, although some recent deals provide for an extension to 30 or even 36 months under certain circumstances. If the SPAC does not complete an initial business combination within the requisite time frame, it liquidates and the trust proceeds are paid to the public investors. However, institutional SPAC promoters tend to be more concerned about the uncertainty of obtaining shareholder approval than with their ability to source deals on a timely basis, given their infrastructure and experience.

The Road Forward

Notwithstanding current market conditions, most SPAC watchers believe that the institutionally sponsored SPAC is here to stay and is likely to capture an expanding portion of new issuances. Even with the recent pressure on promoter economics, the conventional wisdom is that in a larger SPAC the return profile will remain attractive to many institutional promoters, especially those requiring little additional infrastructure to launch a SPAC.

For many managers, a SPAC will fit nicely within the manager's existing product platform. The SPAC may enable the manager to pursue opportunities that are not appropriate for its existing funds or to develop a nascent private equity strategy. A SPAC also may enable the manager to capitalize on acquisition opportunities that are not as well-suited to its existing private equity vehicles. For example, as a publicly traded vehicle, a SPAC may be a more attractive merger candidate for a seller that wishes to retain a significant equity stake or a target seeking to become a public company. A SPAC also may be more advantageous for pursuing a roll-up strategy.

On the investor side, anecdotal evidence indicates that hedge funds still have substantial interest in SPACs as a product, although the market has been migrating to more experienced promoters. As SPACs have become larger and the promoters more well-known, underwriters also have begun to actively court fundamental investors, although with limited success thus far. Both of these trends favor institutional managers.

From initial consideration until completion of a SPAC IPO, an institutional manager is looking at a process that usually takes from four to six months and, in some cases, longer. Therefore, now is the time to consider whether a SPAC should be part of your platform. ■

in the news

Castle Harlan Acquires Anchor Drilling

On April 16, Castle Harlan Partners IV LP, a private equity limited partnership organized and managed by SRZ client Castle Harlan Inc., a leading New York-based private equity investment firm, completed the acquisition of Tulsa, Okla.-based Anchor Drilling Fluids USA Inc., the largest independent drilling fluids company in the United States, from private equity firm American Capital Strategies Ltd., for \$250 million.

Acquisition of CBS Stations Completed

On Jan. 10, SRZ client Cerberus Capital Management LP completed the acquisition of television stations from CBS Corporation. Cerberus had signed a definitive agreement 11 months earlier to acquire the stations for \$185 million in cash, but the transaction was subject to FCC approval and other customer closing conditions. The stations are: KEYE-TV in Austin, Texas; KUTV-TV in Salt Lake City; KUSG-TV in St. George, Utah; WLWC-TV in Providence, R.I.; WTVX-TV in West Palm Beach, Fla.; and WTCN-CA and WWHB-CA in the West Palm Beach DMA (designated market area). ■

authors



Michael R. Littenberg, a partner in the Business Transactions Group, is actively involved in representing alternative asset manager issuers, underwriters, promoters and investors in SPAC transactions, and has represented parties in capital markets transactions and ongoing securities law matters for almost 20 years.

+1 212.756.2524 | michael.littenberg@srz.com



Benjamin M. Polk, a partner in the Business Transactions Group, specializes in private equity, mergers and acquisitions, leveraged buyouts, corporate finance and securities regulation.

+1 212.756.2476 | benjamin.polk@srz.com

Christian H. Mittweg and **Martin Q. Ruhaak** are attorneys in the Business Transactions Group.

Private Equity Partners

Stuart D. Freedman	+1 212.756.2407	stuart.freedman@srz.com
Robert Goldstein	+1 212.756.2519	robert.goldstein@srz.com
Peter J. Halasz	+1 212.756.2238	peter.halasz@srz.com
Eleazer N. Klein	+1 212.756.2376	eleazer.klein@srz.com
Michael R. Littenberg	+1 212.756.2524	michael.littenberg@srz.com
Robert B. Loper	+1 212.756.2138	robert.loper@srz.com
Benjamin M. Polk	+1 212.756.2476	benjamin.polk@srz.com
John M. Pollack	+1 212.756.2372	john.pollack@srz.com
Richard A. Presutti	+1 212.756.2063	richard.presutti@srz.com
David E. Rosewater	+1 212.756.2208	david.rosewater@srz.com
Marc Weingarten	+1 212.756.2280	marc.weingarten@srz.com
André Weiss	+1 212.756.2431	andre.weiss@srz.com

SchulteRoth&Zabel LLP

New York
919 Third Avenue
New York, NY 10022
+1 212.756.2000 tel
www.srz.com

Washington, DC
1152 Fifteenth Street, NW, Suite 850
Washington, DC 20005
+1 202.729.7470 tel

London
Heathcoat House
20 Savile Row, London W1S 3PR
+44 (0) 20 7081 8000 tel

SchulteRoth&Zabel LLP

919 Third Avenue, New York, NY 10022

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