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Investment Funds Group Focus

Winter 2006

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Paul, Weiss Investment Funds Group
The Investment Funds Group is a dedicated investment management practice that focuses on a wide variety of private investment funds. The Group participates in the organization, fund raising and maintenance of private investment funds of every type, including buyout funds, venture capital funds, hybrid funds, distressed funds, mezzanine funds, sponsorship funds, infrastructure funds, co-investment funds, funds of funds and hedge funds. The Group is involved in acquiring, merging and advising investment management businesses. In addition, the Group represents a diverse group of domestic and foreign investors in connection with their investments in private investment funds.

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Antitrust Issues for Private Equity Funds

Daniel J. Leffell

As has been widely reported over the last two months, the United States Department of Justice has begun an inquiry into allegedly anticompetitive behavior among certain private equity funds. Although the Justice Department has not disclosed publicly what transactions or practices it is exploring, it is not hard to identify the types of activities that might interest the Antitrust Division of the Justice Department. Section 1 of the Sherman Antitrust Act prohibits contracts, combinations and conspiracies "in restraint of trade," which is interpreted to mean those that unreasonably restrain competition. Thus, antitrust issues are most likely to arise from coordination or collusion among competing (or potentially competing) bidders. Such coordination could range from communications between competing bidders about pricing, joint bids (either initially or by previously competing bidders), or agreements by a bidder to withdraw from an auction as part of a formal or informal deal with a competing bidder.[1]

In the overwhelming majority of instances, the particular facts of the case will determine whether a potential antitrust violation has occurred. For example, joint bidding by two parties is not likely to violate the antitrust laws if the evidence shows that the joint action was undertaken because neither of the joint bidders would have submitted a bid alone, perhaps due to lack of either the financial resources needed to meet the clearing price or the appetite for risk at the level required. In such a case, the joint bid could have the effect of enhancing the competitiveness of an auction by introducing an additional bidder who otherwise would not participate. In addition, certain joint bidding activities, particularly those conducted by tender offer, have been held to be exempt from the antitrust laws.

In general, the touchstone for antitrust risks governing most joint activity that is likely in the private equity arena is whether the seller would be harmed by the joint activity as opposed to independent conduct. Thus, for example, so-called "naked" agreements between actual bidders that eliminate competition between them — such as a payment by one bidder to another to drop out of the bidding — are the most likely to raise concern on the part of the antitrust authorities.

1 Antitrust issues are not the only legal issues arising from coordination among bidders for a corporation. Such activities often raise other issues as well, such as under a nondisclosure agreement between a bidder and a target, which may prohibit or restrict the sharing of confidential information or even prohibit or restrict joint bidding.

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It is not clear how widespread the Justice Department's inquiry will be, and it may well be limited to a few transactions. What we know is that the New York office of the Justice Department's Antitrust Division has issued informal letter requests to at least five well-known private equity firms, asking them voluntarily to provide documents relating to certain transactions and business practices since 2003. There are no reports indicating that the Justice Department has issued any formal Civil Investigative Demands under the authority of the Attorney General, as it does in many cases.

Nevertheless, the initial reports of the Justice Department's inquiry were followed within only a few weeks by a class action complaint alleging widespread collusion among private equity firms to suppress prices paid in going-private transactions. The class action, *L.A. Murphy* v. *Kohlberg Kravis Roberts & Company et al.*, was filed in the United States District Court for the Southern District of New York on November 7, 2006. The complaint names 13 private equity firms as defendants and alleges that every transaction involving a private equity firm taking a public company private since 2003 has been the product of bid rigging – quite sweeping allegations considering they are based on what may be a very limited number of transactions subject to the Justice Department's inquiry – which the class action complaint itself describes as being "focused on *whether* private equity players . . . communicate about prices and the value of bids in order to reach secret agreements that keep the target's price low." (Emphasis added.)

The class action complaint bears a number of telltale weaknesses, consistent with the fact that the Justice Department's informal inquiry is just beginning and is most likely quite far from reaching any conclusions. Among other things, the complaint focuses on joint bids but does not allege any of the facts or circumstances that would make a particular joint bid anticompetitive. From all appearances, this is purely a "place-holder" complaint, designed to enable the lawyers who filed it to claim priority over other plaintiffs' counsel who may file additional class actions, *if* and when the Justice Department finds any wrongdoing. As such, the case may not be pursued assiduously for some time to come.

In the meantime, as these developments continue to unfold, prudence counsels that managers of private equity funds should bear in mind the types of activities that might attract the interest of the antitrust authorities and avoid coordinated activities with the intent or effect of impairing competition in bidding for acquisition targets.

Avoiding the Group: A Small Victory for Investment Funds

Raphael M. Russo and Ellen Yu

The perception that multiple investors are acting in concert as a "group" can have serious consequences for those investors. A shareholder who acquires more than 5% of a class of equity securities of a public company must file a Schedule 13D with the Securities and Exchange Commission within 10 days of acquiring beneficial ownership. Section 13(d) of the Securities Exchange Act of 1934 also states that when two or more persons act as a group for the purpose of acquiring, holding or disposing of securities of a public company, such group will be deemed a "person" for purposes of Section 13(d). Section 16 subjects beneficial owners of more than 10% of a class of equity security to short-swing profit liability. The result is that if two or more investors are found to have acted as a group and they collectively hold over 10% of a public company's equity securities, any investor in the group can be required to disgorge all profits made from any non-exempt purchase and sale or non-exempt sale and purchase made within a six-month period.

No bright-line test exists for what constitutes a group – a group can be formed by a written agreement or by less obvious ways through conduct and communications with other investors. A recent decision in the Southern District of New York provides some narrow guidance on the issue. The Court in *Litzler* v. *CC Investments LDC*, 411 F. Supp.2d 411 (S.D.N.Y. Jan. 26, 2006), held that a group was not formed when three separate hedge funds purchased a series of convertible preferred stock of Data Race, Inc. in a private placement where the main evidence of group activity was that the three funds had appointed one of their counsel, at the company's request, to negotiate and draft an agreement on behalf of all three funds.

A Recent Ruling Provides Narrow Guidance on What Constitutes a Group

Careless drafting referred to the lead lawyer as "investors' counsel" and all of the investors as his "clients," but the Court found that these drafting matters were insufficient to establish a group. In addition to the "one counsel" argument, the plaintiff argued that the three hedge funds formed a group because each fund decided to convert its preferred shares into common stock and not to purchase shares in the second tranche.

The Court noted that each of the investment funds made their own decisions regarding converting their preferred shares to common stock and that none of the three funds was interested in gaining control of the company. The three investment funds were each represented by separate counsel and they conducted due diligence and made their decisions to purchase and to sell separately. Although the investment funds had appointed one common counsel, the common counsel took instructions from his own client and, through the other two lawyers, from their clients.

Investment funds should always use separate counsel when they do not intend to form a group. If a common counsel must be used, it is important to clarify that the counsel represents only one investor. Each investment fund should also be careful in its communications with the issuer and with other funds to avoid implying that its investment decision or the process leading to its investment decision is not independent of those of other investors.

ERISA Investors in Private Investment Funds: A Summary Guide

Robert C. Fleder and Michael J. Segal

This article provides an overview of certain issues faced by investment managers who deal with ERISA benefit plans, and briefly describes how ERISA's fiduciary rules may apply to private investment funds that accept ERISA investors. Some ERISA rules became easier to work with because of changes to the "QPAM" rules in August 2005. More importantly, Congress liberalized the so-called "25% Test" in August 2006 — a change that will allow some investment funds (including hedge funds) to accept more ERISA clients without accepting any ERISA fiduciary responsibilities.

Duties of ERISA Fiduciaries

Core ERISA Duties. ERISA, the U.S. federal pension law, imposes strict requirements on persons who directly manage money for pension and other benefit plans subject to that law:

(i) Fiduciary Standard of Care. The investment manager must use the highest standard of care, diligence and expertise, and must diversify investments (unless inappropriate to do so).

(ii) No Prohibited Transactions. Absent an exemption, the investment manager is absolutely forbidden to use the plan assets in transactions involving the manager itself or its affiliates (no self-dealing) or in transactions with certain other persons having a close relationship to the plan (like the employer sponsoring the plan or service providers to the plan). For example, a plan generally may not buy property from, or hold debt of, the plan sponsor. For these purposes, holding a debt instrument is regarded as a continuing loan transaction. The rules can be extremely complicated, particularly in the financial services industry, for example, where a fiduciary money manager wants to use its affiliates for brokerage and/or other additional services.

(iii) Employer Securities (and Real Estate). An ERISA plan is subject to strict limits on the type and amount of "employer" securities that it can hold. For this purpose, "employer" means any employer whose employees participate in the plan and the affiliates of that employer. Similar rules apply to "employer real property," such as real property owned by a plan and leased to the sponsoring employer.

(iv) Fiduciary Bond. ERISA money managers are required to carry a small fidelity bond.

(v) Indicia of Ownership. ERISA money managers must not maintain the indicia of ownership of plan assets outside the United States. Many regulatory exceptions are available.

(vi) Annual Filings. ERISA money managers sometimes file a special annual ERISA report with the Department of Labor, listing the fund's holdings.

Non-Negotiable Standard of Care. ERISA investors cannot waive the care duties and standards — a "gross negligence" standard is not allowed — and ERISA investors cannot indemnify the money manager if the ERISA standard of care is breached. However, an investment fund's partnership agreement can include the typical reduced standard of care and indemnification provisions, so long as they are binding only on the non-ERISA investors.

Applicability. Benefit plans maintained by governments and foreign companies are not subject to ERISA. The ERISA restrictions generally apply to plans maintained by most non-governmental U.S. employers, and some key restrictions apply to individual retirement accounts (IRAs).

Operating Outside ERISA — Special Types of Investment Funds

The ERISA rules apply both to separately managed accounts and to certain types of pooled funds:

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Registered Mutual Funds. The rules do not apply to publicly-traded mutual funds and their managers.

Private Funds. The ERISA rules generally *do* apply to pooled investment vehicles (other than registered mutual funds) and their managers. However, three important exemptions can allow managers of some private money pools to accept ERISA clients without having to comply with any of the ERISA rules governing fiduciary conduct:

(i) VCOCs. The typical leveraged buyout or venture capital fund is organized as a "venture capital operating company" or "VCOC." At least once a year, 50% or more of the VCOC's invested assets (at cost) must be in operating businesses primarily engaged in making products or providing services, and the VCOC must obtain special "management rights" in connection with those investments (director seat or special access to information). The typical hedge fund could not be a VCOC because of the management rights requirement.

(ii) REOCs. A "real estate operating company" or "REOC" is an investment fund that invests in real estate that is being managed or developed, where the REOC has the right to participate meaningfully in the management or development activities. Once a year, at least 50% of the REOC's invested assets (at cost) must meet these requirements.

(iii) 25% Funds. The ERISA rules do not apply to investment funds that have less than 25% of their outside investments from ERISA-regulated benefit plans (including IRAs). Many hedge funds are designed to comply with this 25% rule. Under an important change in law made by the Pension Protection Act of 2006, foreign and government benefit plans will not count against this 25% limit. Under the prior law, foreign and government benefit plans *did* count against this 25% limit, even though they are not subject to ERISA. So, under the old rules, if 10% came from ERISA plans and 20% from foreign and government benefit plans, the investment fund would have failed the old "25% Test," and the fund manager would have had to comply with ERISA for its ERISA investors unless the fund qualified as a VCOC or REOC. Under the 2006 law, the investment fund in this example would pass the new 25% Test and would be exempt from the ERISA requirements.

The manager of a fund which complies with one of these exceptions is free of all ERISA restrictions. For example, ERISA plans which invest in a VCOC fund can be bound by the fund's reduced standard of care and indemnification requirements.

More about the 25% Test. For many investment funds, meeting the 25% Test is the preferred way to avoid the ERISA rules. Despite the 2006 change in law, however, some old uncertainties remain about how to apply the 25% Test. For example, except for ERISA plan money, the numerator and denominator of the testing fraction exclude investments in the fund by the money manager itself (or related persons), and also exclude, apparently, investments with money that the manager (or related persons) control, perhaps in separately managed accounts or in other funds — but the scope of this control rule has never been completely clear.

The 25% Test applies separately to each class of equity interest in the fund; in other words, even under the new 25% Test, if 25% or more of *any* class of equity interest in the fund is held by ERISA plans or IRAs, the entire fund will be subject to ERISA. Still unresolved are the familiar questions of whether certain distinctions among investors must be treated as separate classes of equity for purposes of this class-testing rule, for example, where the distinctions relate only to different fee structures or the ability to participate in "new issues" (or previously, "hot issues").

Where the manager is stuck with ERISA plan assets — for example, because the plan has 25% or more ERISA money and is not a VCOC or REOC — the 2006 law applies a rule of proportionality. This can be quite important to a fund of funds. For example, if 32% of the assets of a fund of funds is from ERISA clients, then only 32% of its assets count as "ERISA plans" when the underlying funds into which it invests run their own 25% Test. This is more liberal for fund managers than the old law, under which, if 25% or more of a fund was comprised of "benefit plan investors," then 100% of the money the fund of

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funds invested into an underlying fund counted as benefit plan investor money for purposes of the underlying fund's 25% Test.

Over 25%? If a fund has 25% or more ERISA money, it can still (i) use the VCOC and REOC rules to avoid ERISA altogether, if it is making the right kind of operating company or real estate investments, or (ii) register as a QPAM ("qualified plan asset manager") to get a lower level of ERISA responsibility, an approach increasingly used by some hedge funds.

Operating Inside ERISA: QPAMs and Other Direct Managers

What QPAM Does for the Manager. Where a manager is required to follow ERISA standards — for example, a hedge fund with 30% ERISA investors — a special rule relaxes some but not all of the prohibited transaction requirements if the manager qualifies as a "qualified professional asset manager" or "QPAM." Ordinarily, the prohibited transaction rules result in an ERISA plan's money manager being forbidden to deal with a very long list of persons; the QPAM rules can shorten that list radically.

What QPAM Doesn't Do. The QPAM exemption relates only to ERISA's prohibited transaction rules and does not relax ERISA's general fiduciary requirements of care, diligence, etc. The QPAM exemption does not waive the rule which bars ERISA clients from indemnifying a money manager for conduct which falls short of ERISA's stringent fiduciary standards. Moreover, the QPAM exemption does nothing to alleviate the restrictions imposed on ERISA plans regarding the type and amount of employer securities they may hold – these restrictions may be difficult to manage in a pooled fund.

Specific Application. For QPAMs which manage money in a pooled fund, if no one employer's benefit plans account for 10% or more of the QPAM's pooled fund assets, the QPAM manager does not have to comply with any of ERISA's prohibited transaction rules other than the rules against self-dealing (*i.e.*, no dealing with the QPAM or affiliated persons). For QPAMs which manage separate accounts, or which manage a pooled fund in which any one employer's benefit plans account for 10% or more of the pooled fund's assets, the QPAM is barred from self-dealing, and also cannot deal with any person, or the affiliate of any person, who has the power to appoint or terminate the QPAM or negotiate its management contract. The definition of "affiliate" is very broad. The failure to qualify in a particular situation for QPAM exemptive relief is by itself not an ERISA violation.

What's a QPAM? Of most relevance to the private investment fund business, a "QPAM" is a registered investment adviser under the Investment Advisers Act of 1940 that has at least $85 million under management, and that has at least $1 million in shareholders' or partners' equity. The QPAM exemption will not apply to a transaction if the involved plan's assets (and assets of other plans from the same employer and certain affiliates) account for more than 20% of the QPAM's total client assets. The QPAM exemption is not available if the QPAM or an affiliate has been convicted within the preceding 10 years of a broad range of felonies involving misuse of money (or been released from prison during that 10-year period for that type of crime). Also, the exemption is not available for certain types of transactions for which there are specific Department of Labor exemption rules, for example, securities lending, acquisitions of mortgage pool interests or certain other mortgage financing arrangements.

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SUMMARY OF ERISA OBLIGATIONS

ERISA Rule	VCOC/ REOC/ <25% Funds	Separately Managed ERISA Accounts	QPAMs
Highest standard of care?	No	Yes	Yes
Do the prohibited transactions rules apply?	No	Yes	Yes, but only to bar self-dealing by the QPAM and dealing with a person who can appoint or terminate the QPAM or negotiate its contract. In a QPAM-managed fund where the 10% rule is satisfied, only the self-dealing prohibitions apply.
Bonding required?	No	Yes	Yes
Can the client indemnify if the investment manager's care falls below ERISA standards?	Yes	No	No
Can the investment manager deal with itself or related persons?	Yes	No	No
Are permitted holdings of employer securities and real estate limited?	No	Yes	Yes
Must ownership indicia be in U.S.?	No	Yes	Yes

Other Rules Added by the 2006 Law

The Pension Protection Act of 2006 included many other provisions affecting benefit plans, plan sponsors and plan money managers. For money managers, apart from the new 25% Test, many of the changes are probably of greatest interest to broker-dealers and financial institutions that deliver support services to ERISA plans:

- The 2006 law added some highly technical new rules easing the application of ERISA to agency cross trading, securities transactions conducted by electronic communication networks ("ECNs") and certain block trading practices.
- The 2006 law relaxed the prohibited transaction rules to allow an ERISA plan to transact business with a party related to the plan solely on account of providing services to it, so long as (i) the compensation paid or received by the ERISA plan in the transaction is not more (if the plan is paying) or less (if the plan is receiving) than "adequate consideration" and (ii) the service provider is not managing the ERISA plan money involved in the transaction and does not have certain specified relationships with the person who is managing the ERISA plan money involved in the transaction.
- The 2006 law added a special rule, possibly of greatest interest to institutional managers selling retail 401(k) plan products, which will allow investment advisory services to be offered to participants in conjunction with investment product offerings, so long as (among other requirements) either the fees paid for the advice do not vary depending on the investment selected or the advice is provided through an unbiased computer model, and an independent fiduciary authorizes the advisory program.
- The required bond for ERISA fiduciaries will no longer be required of most broker/dealers and, where required, the bond amount has been raised to a maximum of $1 million (from $500,000).
- In certain circumstances, some prohibited transactions can now be corrected within 14 days after discovery (or when discovery could have reasonably been made) without penalty taxes being imposed.

In Focus

Accredited Investor Proposed Rule

To address its concern with the "retailization" of the hedge fund industry, on December 13, 2006, the U.S. Securities and Exchange Commission announced that it is proposing changes to the "accredited investor" standard under the U.S. Securities Act of 1933. Sponsors of private investment funds generally sell fund interests in the United States without registration by relying on the Regulation D private placement exemption. Regulation D allows, among other things, an issuer to sell an unlimited amount of its securities to an unlimited number of "accredited investors." Under the Commission's proposed rule, for an individual to qualify as an "accredited investor," the individual will not only have to satisfy Regulation D's existing net worth test or income test but will also have to satisfy a new test which will require that the individual own at least $2.5 million in investments. The Commission has not yet published the detailed release concerning this proposed rule, though it has announced that once the release is published there will be a 60-day comment period. Sponsors of private investment funds should prepare for the rule to be adopted soon after the 60-day comment period ends.

Anti-Fraud Proposed Rule

In another effort to protect hedge fund investors in the wake of the U.S. Court of Appeals' *Goldstein* decision which invalidated the U.S. Securities and Exchange Commission's 2004 hedge fund adviser registration rule, the Commission also announced on December 13, 2006 that it is proposing a new rule under the Investment Advisers Act of 1940 which will in effect require an investment adviser, including an unregistered investment adviser, to "look through" an investment fund to its investors for purposes of complying with the investment adviser's statutory anti-fraud obligations. Under the proposed rule, all investment advisers of 3(c)(1) or 3(c)(7) investment funds will be prohibited from making false or misleading statements to their investors or prospective investors. The Commission has not yet published the detailed release concerning this proposed rule.

Recent Amendments to Cayman Islands Mutual Funds Law

The Cayman Islands Mutual Funds Law (the "Law") was amended on November 14, 2006. The amendments to the Law reflect several of the recommendations made in the past year to the Cayman Islands Monetary Authority ("CIMA") by a working group comprised of government officials and representatives of the private sector. The minimum subscription by an investor for a fund registered under Section 4(3) of the Law has been increased from US$50,000 to US$100,000. This new minimum threshold does not apply to existing funds. Non-Cayman funds that use an administrator or custodian based in the Cayman Islands no longer need to be registered with CIMA so long as they are not offering fund interests to the public in the Cayman Islands. Once CIMA's electronic reporting initiative is officially launched (which is expected to occur in early 2007), Cayman registered funds will be required to file their audited accounts with CIMA in an electronic format, rather than hard copy. The duties of auditors of a Cayman registered fund or administrator have been expanded to include an obligation on the part of the auditor to notify CIMA about certain matters, including information or suspicions that the auditor has about a fund or administrator becoming insolvent, not keeping adequate accounting records, carrying on business in a criminal or fraudulent manner or failing to comply with the Law. Funds domiciled or administered in the Cayman Islands should take note of the changes described above, as well as the other recent amendments to the Law.

Profile of a Private Equity Client

General Atlantic LLC

Paul, Weiss client General Atlantic LLC is a leading global private equity firm providing capital for growth for companies driven by information technology or intellectual property. General Atlantic manages approximately $10 billion, investing between $800 million and $1 billion per year in growth, recapitalization and buyout opportunities worldwide. General Atlantic has invested in more than 150 companies, with current holdings in 50 portfolio companies of which about half are based outside the United States. General Atlantic has more than 70 global investment professionals among 150 employees worldwide with offices in Greenwich, New York City, Palo Alto, London, Düsseldorf, Hong Kong and Mumbai.

Paul, Weiss' long-standing ties to General Atlantic date back to 1980 when then-partner Matthew Nimetz helped with the establishment of General Atlantic. Matt served as General Atlantic's primary outside counsel until he left Paul, Weiss in 2000 to become General Atlantic's chief operating officer. At that time, corporate partner Doug Cifu took over as its principal outside counsel. Over the years, Paul, Weiss has advised General Atlantic on many deals throughout the globe, including its recent purchase of a 52% stake in Emdeon Corp.'s health care payments technology unit for approximately $1.2 billion, its late-stage growth funding investment in Beijing-based start-up Oak Pacific Interactive and its partnership with Oak Hill Capital Partners II, L.P. for a 60% stake in Genpact, General Electric Co.'s India-based business services outsourcing unit.

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