

SEC Proposes Rules Impacting Widely Held Portfolio Companies

PENpoints

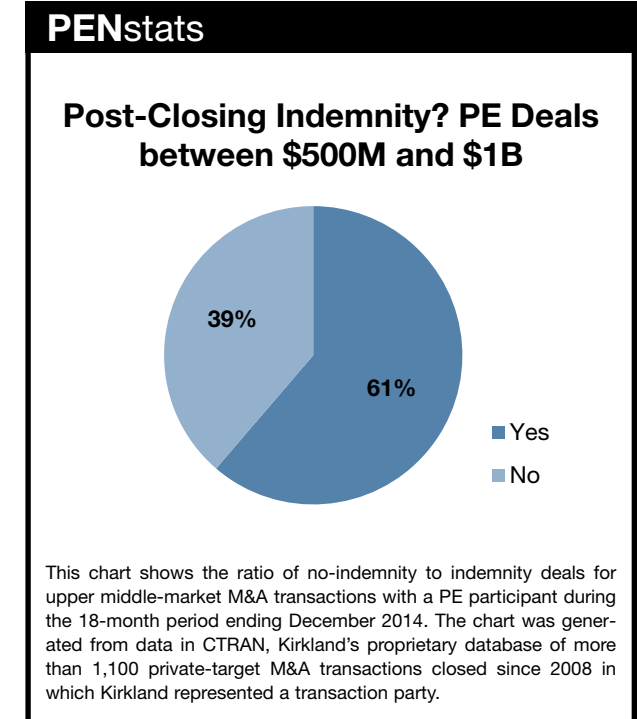
The SEC recently proposed generally favorable rules governing when a widely held portfolio company may become subject to periodic SEC reporting.

On December 17, 2014, the SEC proposed rules to implement portions of the Jumpstart Our Business Startups Act (the "JOBS Act"). The proposed rules impact private equity sponsors by further delineating the thresholds under which widely held portfolio companies can become subject to SEC registration and periodic reporting requirements.

Before the JOBS Act, under Section 12(g) of the Exchange Act of 1934 a company would become subject to SEC ongoing periodic reporting requirements if, at the end of its fiscal year, the company's securities were held by 500 or more persons and the company had total assets in excess of \$1 million. The JOBS Act increased these thresholds, requiring a company to register a class of equity securities and become subject to SEC reporting once the company had a class of equity securities held by more than (1) 2,000 persons or (2) 500 non-accredited investors and in each case more than \$10 million of assets. The JOBS Act also indicated that persons who received shares pursuant to certain employee compensation plans could be excluded from the shareholder thresholds.

The SEC's proposed rules implement these JOBS Act revisions, and create a non-exclusive safe harbor for determining whether shares issued under employee compensation plans may be excluded from the thresholds.

The proposed rules are generally favorable to companies, allowing exclusion from the shareholder count



securities issued under a written compensatory benefit plan for employees, directors, officers or certain consultants (as well as their family members who acquire such securities through gifts or domestic relations orders).

The safe-harbor is anticipated to become effective in 2015 largely as proposed, and may be particularly relevant to portfolio companies with a large employee stockholder base.

If you have any questions about the matters addressed in this KirklandPEN, please contact the following Kirkland authors or your regular Kirkland contact.

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Revised Hart-Scott-Rodino Act Thresholds Announced

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The new HSR filing thresholds are higher than last year's thresholds.

The Federal Trade Commission recently announced its annual revisions to the Hart-Scott-Rodino (“HSR”) Act filing thresholds, each of which is higher than the 2014 levels.

Parties to an acquisition that closes on or after February 20, 2015, must — subject to certain exemptions — file HSR forms when, as a result of such acquisition, the buyer will hold assets, voting securities, and/or non-corporate interests valued in excess of \$76.3 million and the transaction involves parties with annual net sales of \$15.3 million or more or total assets valued at \$152.5 million or more. If the value of the assets, voting securities, and/or non-corporate interests exceeds \$305.1 million, then — subject to certain exemptions — the size of the parties is irrelevant, and HSR forms must be submitted.

The chart below summarizes the 2014 and the new HSR thresholds.

HSR Jurisdictional Test	2014 Thresholds	New Thresholds
Size-of-Transaction	\$75.9 million (and meet size-of-person test) \$303.4 million (size-of-person irrelevant)	\$76.3 million (and meet size-of-person test) \$305.1 million (size-of-person irrelevant)
Size-of-Person	\$15.2 million net sales \$151.7 million total assets	\$15.3 million net sales \$152.5 million total assets

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

Transaction Value	Filing Fee
Greater than \$76.3 million but less than \$152.5 million	\$45,000
Greater than or equal to \$152.5 million but less than \$762.7 million	\$125,000
\$762.7 million or more	\$280,000

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Jurisdiction Shifting – Creative Structuring Opportunities

When a target is organized outside of the Delaware comfort zone, transaction parties often confront unexpected structuring issues unique to entities organized in or deals undertaken in that non-Delaware jurisdiction. A recent decision by the Virginia Supreme Court is a reminder that, on occasion, these issues can be managed using resourceful and creative structuring to shift jurisdictions. To learn more, see our recent [Update](#).

Avoiding Underfunded Spin-Offs

When considering a corporate spin-off transaction that has the effect of shielding a parent company from liabilities transferred to the spun-off company, directors and managers should note that under certain circumstances an underfunded spin-off may be economically unwound in a later bankruptcy proceeding. To learn more, see our recent [Update](#).

PENnotes

Harvard Business School's 21st Annual Venture Capital and Private Equity Conference
Boston, Massachusetts
February 1, 2015

Kirkland will sponsor Harvard Business School's 21st Annual Venture Capital and Private Equity Conference. The conference will bring together industry professionals, students, alumni and faculty to share their knowledge and experiences on today's private equity and venture capital environment. Kirkland partners Douglas Ryder, Armand Della Monica and Robert Blaustein will participate in the "State of the Private Equity Industry," "Healthcare Investing," and "Fundraising & Limited Partners" panels, respectively. Click [here](#) for more information.

Drafting and Negotiating Corporate Agreements 2015
Chicago, Illinois
February 5, 2015

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 partner Kevin Morris will chair the seminar, which will also feature a presentation by partner Keith Crow. Click [here](#) for more information.

14th Annual Becken Petty O'Keefe & Company Private Equity Conference
Chicago, Illinois
February 20, 2015

The Chicago Booth Private Equity Conference (PEC) is 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 "Return Realization: Positioning and Timing the Ideal Exit," and Kirkland partner Bruce Ettelson will moderate a panel. Click [here](#) for more information.

10th Annual Stern Private Equity Conference
New York, New York
February 27, 2015

Kirkland is a sponsor of New York University's 10th 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 partners Andrew Calder, Chris Torrente and Jennifer Morgan will participate in the "Shifting GP/LP Dynamics: an Evolving Landscape," "Leveraged Buyout" and "Real Estate" panels, respectively. Click [here](#) for more information.

Columbia Business School's 21st Annual Private Equity and Venture Capital Club Conference
New York, New York
March 6, 2015

Kirkland is a sponsor of Columbia Business School's 21st Annual Private Equity & Venture Capital Conference. The conference will focus on the emerging challenges and opportunities facing the private equity and venture capital industries in the coming year. Kirkland partner Douglas Ryder will participate in the panel "LBOs: Managing Cycles and the Road Ahead," and partners Andrew Wright and John O'Neil will be leading a lunchtime discussion titled "State of the Market: Fundraising." 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 and 2014 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 and 2014, 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 and 2014*, 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" every year since 2008, 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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