

**March 11, 2013**

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**Seminar Takeaways**

On March 6, 2013, Skadden held our 2013 Insights: Global M&A Seminar at our New York office. The seminar, led by several of the firm's M&A partners, explored recent developments and what we view as key trends in the M&A space in 2013. Their focus was on deal structures and terms, the private equity landscape, global M&A trends and the regulatory environment.

The global M&A environment presents a broad range of issues and opportunities for 2013. The speakers, or any of your usual contacts at Skadden, would welcome the opportunity to discuss these topics in a more specific way at your convenience. [In addition, upon your request, we will send you a copy of the seminar slides.](#)

**2013 Trends in Deal Process**

**Eileen Nugent** led off the seminar by expressing "cautious optimism" about M&A activity in 2013. She spoke about the increase in shareholder activism so far in 2013, noting that activists are targeting larger companies and using more direct and sophisticated techniques to influence the strategic direction of companies. She discussed the very specific challenges to capital allocations, business strategy and composition of a company's business units being posed by activists and explained how such focus is increasingly a catalyst for M&A activity. Eileen described steps that companies can take to address potential activism, including, most importantly, continuing to engage in candid and credible communications with stockholders while being mindful of the company's governance and shareholder profile, board composition and tenure, and anticipating potential activist pressure points.

**Stephen Arcano** discussed 2013 trends in the public company sale process. Steve explained that identifying and assessing potential conflicts of interest on the part of directors, management and advisors should be an area of early focus in a deal. He suggested that boards implement appropriate measures to address material conflicts and ensure disclosure of such conflicts in tender or proxy materials. Steve indicated that use and disclosure of projections has been an issue for years and that boards should assess the underlying assumptions, inputs and outputs of their projections as well as their achievability, reliability and intended use. Steve concluded with a discussion of deal protection, noting that in certain recent transactions options to purchase shares and forms of "crown jewel" lock-ups had been used. He also discussed recent judicial focus on the interrelationship between standstill provisions and no-solicitation covenants in merger agreements.

In connection with a discussion of the remedies for breach of merger agreements, **Howard Ellin** explained that, since the end of the 2008-2010 credit crunch, remedies trends have included a narrowing of private equity "outs" and the inclusion of private equity-style remedies in certain strategic M&A deals in the form of reverse breakup fees, damage caps and limits on special performance. Howard noted that in deals requiring financing, the dollar spread between reverse and forward breakup fees has narrowed and discussed contrasting

provisions where a seller can force a buyer to sue its banks to enforce the financing for a deal. By way of highlighting the variation in approaches, Howard discussed contractual limitations on specific performance in the context of two recent deals — the pending buyouts of Dell and Heinz.

### Private Equity Outlook

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**Allison Schneirov** voiced similar “cautious optimism” concerning private equity activity in 2013 in light of continued confidence, credit availability and a large amount of “dry powder” for investment, but noted that significant concern over high stock prices, a mixed fundraising outlook and some exit difficulties remain. She noted that experience from prior years shows “mega” deals require extraordinary amounts of capital and are complicated by the demands of collaboration and shared vision among the acquired company’s ownership group and noted that the unique circumstances of the Dell and Heinz transactions would make them difficult to replicate. Allison discussed fundraising in 2013, specifically the increased concessions demanded by LPs and the substantially decreased levels of fundraising from peak years. Allison noted that certain of the largest mega funds are diversifying beyond private equity and becoming global asset managers, while other funds are expanding by raising geography- or industry-specific funds. Allison concluded that private equity funds appear to view the U.S. as the most attractive place to invest, particularly in energy/natural resources, health care and technology, and seem to have adopted a wait-and-see mode with respect to Europe.

### Outlook for Europe

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**Scott Simpson** discussed M&A in Europe, specifically focusing on deal and regulatory trends and changes to takeover rules in the U.K. and in Continental Europe. Scott explained that deal activity has been hampered by the European economic crisis but that there was still an emphasis on strategic deals that consolidate companies within certain sectors or that have North American or Asian buyers. He noted the prospects for “troubled company” M&A as well as potential for M&A to achieve cross-border tax optimization. Scott talked about regulatory trends that exhibited a bias against hostile M&A transactions as reflected in changes to the U.K. takeover regime, including elimination of deal protections, required disclosure of bidders and greater financing disclosure, and institution of a strict 28-day “put-up or shut-up” rule following a bidder’s identification. In Scott’s view, in Continental Europe, the mandatory bid rule — set at 30 percent — has contributed to creeping acquisitions, and the lack of a common framework to manage contested or hostile bids has created marketplace confusion.

### Outlook for Asia

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**Ken King** talked about what to expect from and in China and Japan. He noted that macro-economic trends — a declining and aging population in Japan, 15 years of deflation and an all-time high valuation of the Japanese yen — had led to Japan’s having become the third-most active outbound acquirer by deal value around the world and the most active inbound acquirer in the U.S. According to Ken, these trends also led to a steady increase overall in outbound deals from Japan since 2009, reaching an all-time record level of activity this past year. Ken discussed key questions for the future, including whether “Abenomics” (the economic plan of Prime Minister Shinzo Abe) would end deflation, whether the recent depreciation of the yen would dampen outbound M&A activity and whether structural

changes within Japan could lead to greater private equity fund opportunities in the Japanese market. On China, Ken discussed the prospects for U.S. receptivity to Chinese investment, which he noted was only the fifth-most active inbound acquirer in the U.S. in 2012 with an overall share of less than 7 percent of the overall value, impacts of the Anti-Monopoly Law in China, the continued viability of the so-called variable interest entity (VIE) structure for investments in China and the prospects for greater inbound M&A opportunities in China.

### Outlook for Latin America

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With respect to M&A in Latin America, **Paul Schnell** discussed the continued attractiveness of the region, particularly Brazil, which has seen significant growth in the types and volume of M&A transactions — in-bound investment from the U.S., Europe, Asia and the Middle East, transactions across borders within Latin America and outbound investment by leading Latin American companies. Paul discussed the favorable conditions for further development of M&A in the region, including strong economic prospects, as well as the increased global strategic, private equity and investor interest in the region. Paul cautioned that acquisitions in the region were still viewed as high-risk, high-reward opportunities, with numerous challenges, including overvalued currencies and asset values, concerns about governmental interference with the economy, and deal hurdles such as cultural differences; departures from international practice in the sale process and transaction documents; occasional advantages for local competing bidders; local law challenges in tax, labor, anti-corruption and other areas; and difficulties created by international anti-corruption laws such as the FCPA, U.K. Bribery Act and OFAC. Paul discussed various ways to try to address these issues.

### CFIUS, Antitrust and Competition

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**Ivan Schlager** spoke about the increased importance of CFIUS in structuring M&A transactions and the need for early planning and a coordinated legal and public relations strategy. He noted that physical location, the existence of sensitive contracts or critical technologies, and foreign-government ownership of a buyer are key issues to consider when evaluating deals from a CFIUS perspective. Ivan provided some examples of controversial investments from China that CFIUS recently cleared and contrasted how the issues in each were addressed.

**Cliff Aronson** and **Steven Sunshine** concluded with a brief discussion of antitrust and competition. They discussed the new leadership at U.S. antitrust agencies, predicting that the aggressive enforcement platform started by President Obama in his first term would continue, but emphasized, with proper planning and a strategic approach, even challenging deals can get done. Accordingly, they recommended that dealmakers assess antitrust risk (and allocation thereof) upfront and that considerable effort be spent on advance economic analysis, communications planning and potential strategy for dealing with requested divestitures or other remedies. In addition, a significant focus should be placed on the antitrust regimes of the EU, China, India and Brazil in planning global transactions. We intend to have a seminar focused on the integration of M&A and antitrust in the near future. [Please let us know if you'd be interested in attending.](#)