

The Journal

2008 ACG CHICAGO CORPORATE NETWORK SUMMIT

Building Value Through Volatile Times & Global Growth

John Edwardson
Chairman & CEO, CDW Corp



Preminent business leaders will provide first hand insight into building corporate value at the 2008 Corporate Network Summit on September 9th. Over 20 well known corporate leaders will gather to explore best practices and share strategies for leading organizations through the minefields of this uncertain economy. Jim Vargo, CFO and Senior Vice President, HomeDirect and Co-Chair of the Corporate Network, pointed out that, “there is a great deal of growth still happening in the collar counties as well as in Chicago. ACG Chicago wanted to highlight this growth with a conference that was centrally located to those firms and that featured inspiring and insightful panelists from throughout the area.”

Two key speakers are John Edwardson, Chairman and CEO of CDW Corp who will present a morning keynote, “Leading Organizational Change: From

(continued on page 10)

No better way
to build value

McLAUGHLIN GROUP TO LAUNCH 6TH ANNUAL CAPITAL CONNECTION

It's All About Deal Flow!

The 2008 ACG Midwest Capital Connection will start off louder than ever this year as the entire McLaughlin Group will begin the day's activities with their raucous analysis of current events, providing ample fodder for discussions all day long. The activity will only accelerate from there as over 130 private equity firms, up to 60 investment banks and over 1000 attendees will gather for the Midwest's premier deal-making event.

McLaughlin Group as seen on PBS



Conference chair Lou Kenter, Principal of Prospect Partners, defines the reason this event draws so well. “Chicago is all about networking and dealmaking. No distractions. An extensive and diverse base of private equity firms and a strong mix of investment bankers and others with deal opportunities. You can do more networking in a single day than you can in a year and a half on your own.”

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Jim McNair, Corinthian Capital



President's Column

For the better part of the decade, ACG Chicago has been focused on building a quality organization, of which you can be proud, and which will provide you with unparalleled opportunities for networking, deal making, personal growth, and professional development. We greatly expanded our market reach last year by embracing our core M&A focus and by adding committees to increase the networking, content, and access to international growth, organic corporate growth, and venture growth – all key areas for Chicago and our members.

The quality of these efforts and the increase in volunteers, staff, and programming has been recognized by ACG Global, which gave us the Large Chapter of the Year award. More importantly, professionals in our Chicago networks have continued to join ACG Chicago, even in these uncertain times, allowing us to surpass 1,000 members. At 40 years old, ACG Chicago is still growing and reaching out for new opportunities.

One of the key benefits of our organization is the relationships and networking; consequently we are building programs that are tailored to specific interests. Throughout this Journal, you will read about some of our nationally recognized events and our small targeted programs – all developed to bring talented audiences together, who have the expertise and common interests to get deals done and help grow our businesses.

In 2008, we will exceed the 116 speakers presented in 2007, continue to extend our collaboration with universities on conferences and fellowships, add social programs like the Arlington Racetrack Celebration, expand the new Authors Series, add new conferences in the Corporate Network and Cleantech, expand media awareness about ACG Chicago, and continue to find new ways to build our corporate growth and dealmaking networks.

Thank you to the strong support of our board and committee members, who make being a part of this organization a very worthwhile and enjoyable endeavor.

Jim McNair

Craig Miller, ACG Chicago



CEO's Update

Chicago has certainly been working diligently to build greater and deeper networks to support broad corporate growth and transactions. Jim has covered much of our work, focus and staffing to achieve more networking and opportunities for our membership in Chicago. I thank you and the board for the opportunity to be a part of this growth.

We have also been working hard from the global perspective to improve the value of your ACG membership. As an ACG Global board member, I have had the honor of chairing a task force to implement the Essential Network.

This was the key strategic initiative approved last summer for the organization and we have been working consistently since then to achieve that goal. Hopefully you have heard of this over the last year but if not let me point out a couple of key value points.

The complete Essential Network is a toolbox for members and chapters to bring 21st century communications to ACG. We will be able to bring you greater combination of news, white papers, and web or podcasts of some previous events, thought leadership from our members, academic fellowships, or the business community at large. Also key is that your member profile will be the base for an ACG internal network that brings you together with other professionals of similar interests, whether an industry, practice, school, or other interest to increase your targeting and relationships within the ACG.

For even more direct deal targeting, we introduced CapitalLinkSM in April of this year. If you haven't found this jewel yet, see page 18 for more information on this great free member benefit.

There are major forces competing for your time and we want to make sure that your ACG experience makes that cost worthwhile. We are of course proud of the programs and network and look forward to continually improving them for you. Please feel free to call me with any other thoughts or comments on building an even better network of leading authorities on corporate growth.

Craig Miller



In development for 2009 to build more ACG connections

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From the Front: Successful Management for Private Equity Firms

ACG Chicago's Mergers and Acquisitions/Private Equity Network, headed by Tom Turmell, Principal at Golub Capital and Bill Harlan, Partner at Prism Mezzanine Fund, continues to build the ACG private equity network throughout the Midwest.

Challenged by the highly successful Annual Market Trends program from this spring that drew over 300 people, and the in depth look at intermediary perspectives earlier in the year, the committee has planned a September 16th luncheon and panel discussion, which will explore successful management for private equity firms. Chaired by Michael Gray, Partner at Neal, Gerber, Eisenberg and M&A/PE Network member, this event promises to be just as successful. "We often seek best practices in management portfolio companies and transactions. This is a rare chance to understand how successful private equity funds manage their firms," said Gray. Bruce Ettleson, Partner at Kirkland & Ellis will moderate with the distinguished panel including John Canning, Chairman of Madison Dearborn and Lee Mitchell, Managing Partner, Chicago at Thoma Cressy Bravo.

Panelists will put the current PE environment into perspective according to the principles of short and long-term management of private equity. Registrations are already strong so sign up soon at www.ACGChicago.com.

Committee chairs Turmell and Harlan are working with Jason Apple, Senior Vice President at Houlihan Lokey Howard and Zukin, and the ACG Chicago Membership Committee to recruit key players in the mergers & acquisitions field. ACG Chicago boasts a strong contingent of private equity and investment banking members and continues through these efforts and your referrals to expand this networking base.

This program, along with the Capital Connection, the upcoming International Committee's inbound investment focus and regular Chicago programs, continues to build great deal making here in Chicago and the Midwest.

Any additional ideas for programming or network development, should be forwarded to Tom Turmell at tturmell@golubcapital.com or Bill Harlan at bill@prismfund.com.

2008 CORPORATE NETWORK SUMMIT

(See front page)

September 9, 2008
7:30 am - 5:00 pm
with reception following

Stonegate Convention Center

Hoffman Estates
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at the intersection of
Higgins and I-90)

Registration

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\$200 for non-members

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IT'S ALL ABOUT DEAL FLOW (CONTINUED FROM PAGE 1)

This 6th annual gathering will provide the same outstanding deal making opportunities as previous years and will once again be the premier gathering of middle-market M&A professionals from around the United States. Last year over 1400 people came to hear former Chairman of the Federal Reserve Board Alan Greenspan speak about turbulent economic times. The attendance broke set a new record for the event. The depth and diversity of dealmakers already committed to the 2008 Midwest Capital Connection promises to draw a similar crowd. The professional community attending includes executives from leading private equity sponsors, preeminent investment banks and intermediaries, senior and mezzanine lenders, other service providers and limited partner and even stock exchange professionals. Private equity exhibitors will present a full range of criteria, from early to late stage, manufacturing to high tech and more.

This year's conference will take place in the same outstanding McCormick Place West facility where the event was staged last year. Clear signage, side meeting areas and an improved table layout and room arrangement that will facilitate better traffic flow, allowing attendees to conduct more networking in less time. Over \$130 billion in investment funds present will make these improvements especially valuable.

In the afternoon, the DealSource will provide pre-arranged networking opportunities for private equity investors and intermediaries. It employs a "speed dating" format, which allows for optimal coverage for making connections with sources for exhibitors and DealSource investment banks.

The Capital Connection is a golden opportunity to get connections you will need for the future. Don't miss out - register today!

**2008
MIDWEST
ACG
CAPITAL
CONNECTION**
(See front page)

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Skyline Ballroom**

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Business Deals in 2009 Anything But Business As Usual



By William Spizman
Managing Director, RSM McGladrey

Thanks to a recently issued standard by the Financial Accounting Standards Board (FASB) – FASB Statement No. 141 (revised 2007), Business Combinations – a number of changes may give acquiring businesses more than they bargained for if they close the deal in 2009 or later. While the modifications to business combination accounting are signs of the industry’s move toward increasing the usage of a fair value model as well as further alignment with International Financial Reporting Standards, some of the revisions are significant and considered by some to be controversial.

Recognition of all assets and liabilities now required

One of the more noteworthy changes in FASB Statement No. 141 (revised 2007), also called Statement 141R, is the requirement that all assets and liabilities of the target be recognized and measured – even those in a partial acquisition. Regardless of whether 51 percent or 100 percent of the target’s business is purchased, the target’s assets acquired and liabilities assumed must be recognized as a whole by the buyer. That means the goodwill attributable to the part of the target that was not acquired must also be recognized, representing a conceptually different model from the pre-existing guidance.

Another fundamental change is the use of a “fair value” model rather than a “cost allocation” model to measure the assets acquired and liabilities assumed. The prior guidance relied only partially on fair value measurements and only to allocate the cost of the acquisition to the assets acquired and liabilities assumed. Further, Statement 141R uses the fair value model rather than a “carryover basis” or “book value” model to determine the non-acquired (or non-controlling) interest in the target. The prior guidance used the book value of the net assets acquired in measuring the non-controlling interest in the target.

Also, deal costs incurred by the buyer are no longer included in the purchase price of the target when accounting for a business combination. Under Statement 141R they are expensed as incurred and as the related services are rendered except for those costs incurred by the buyer to issue debt or equity securities. These issuance costs are accounted for under other generally accepted accounting principles (GAAP).

Additional pre-acquisition contingencies acknowledged

The new guidance distinguishes between contingencies of the target that are contractual and non-contractual. Those that are contractual are recognized at their fair value at the acquisition date, while those that are non-contractual are only

recognized if it is more likely than not that the contingency meets the definition of a liability or an asset in FASB Concepts Statement No. 6, Elements of Financial Statements. If that threshold is met, the contingency is recognized and measured at its acquisition-date fair value; if it's not, the contingency is not recognized in the accounting for the business combination. The pre-existing guidance relies on a model based predominantly on FASB Statement No. 5, Accounting for Contingencies, which uses a "probable" threshold for recognition and a "best estimate" approach for measurement.

Other fundamental changes affecting how an entity will account for a business combination include:

- The recognition of the fair value of earn-outs (i.e., contingent consideration) in the initial accounting for the acquisition; formerly the nature of the contingency determined whether its resolution affected purchase accounting
- The elimination of the recognition of liabilities for restructuring costs expected to be incurred since they do not represent a liability as defined in Concepts Statement 6; instead, such costs are recognized when they become obligations as defined in other existing GAAP
- The reduction of the valuation allowance in income tax expense, if a buyer determines some or all of its previously recognized valuation allowance is no longer needed as a result of the business combination – the pre-existing guidance would have reflected the effect of reducing the valuation allowance in purchase accounting, perhaps affecting the amount of goodwill or certain non-current assets recognized
- The recognition of a gain from a bargain purchase – if applying Statement 141R results in negative goodwill, the buyer is required to perform a review of the factors; if negative goodwill still exists, the buyer recognizes a gain from a bargain purchase

These are a few of the more significant changes created by Statement 141R, but the standard's many revisions will affect business combinations in different ways.

The new standard is effective for business combinations with acquisition dates that occur on or after the beginning of the first annual reporting period of the fiscal year beginning on or after Dec. 15, 2008. For calendar-year companies, the standard is applicable to business combinations with acquisition dates of Jan. 1, 2009, or later. Early adoption of Statement 141R is prohibited.

This article is one in a series of contributions by ACG Chicago's Platinum Sponsors. We appreciate their support.

About RSM McGladrey

RSM McGladrey is the fifth largest accounting and consulting firm in the United States and the largest focused on companies on the move. Through our national Private Equity Practice, RSM McGladrey provided due diligence on more than 150 engagements for more than 60 funds nationwide in the past year. We also audited more than 50 private equity funds and many private equity fund portfolio companies.

RSM McGladrey is the largest member firm of RSM International (RSMi), the world's seventh largest organization of accounting, tax and business consulting firms, according to the International Accounting Bulletin. RSMi has 25,000 professional staff members in 662 offices in more than 60 countries and combined revenues in excess of \$3 billion.

About the Author

Bill Spizman is a managing director at RSM McGladrey and leads the national transaction support services practice in the Great Lakes region. He specializes in transaction support and advisory services for private equity funds, private investors and business enterprises and has significant experience with midsized companies.
www.rsmmcgladrey.com

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Challenges in Defending Indemnification Claims



By Brian E. Krob
Partner, Ungaretti & Harris

In today's market post-closing disputes between the buyer and seller are increasingly common. Unfortunately, when a seller is negotiating the purchase agreement with the buyer, the seller will frequently focus exclusively on the Fundamental economic issues in indemnification (e.g., the size of the basket and the cap and the expiration period of the representations and warranties) but will not focus on other important issues that only become apparent when a dispute arises.

Months or even years after selling his business, the seller may receive without any warning a tersely worded notice of indemnification from the buyer demanding indemnification. Often accompanying the notice of indemnification is a notice to an escrow agent demanding the release of escrow funds, a notice of set-off against a note issued to a seller at the closing or even a notice of foreclosure against equity held by the seller. From the seller's point of view, these actions represent buyer's remorse and are merely the first step in re-trading a previously agreed-upon transaction.

However, these actions frequently have the effect of pressuring the seller into negotiating a quick settlement of the indemnification claim. A seller must be cautious about commencing settlement negotiations with the buyer early in the indemnification process unless the seller is able to overcome the informational asymmetry that exists between the parties.

Prior to the closing the c-level executives of the seller are intimately familiar with every aspect of the business. That situation is almost completely reversed after the closing. At the closing the seller generally turns over all books and records to the buyer and often is no longer an employee of (or even a consultant to) the business. This puts the buyer in complete control of the information regarding the indemnification claim. It also leaves the seller in a precarious position of being drawn into settlement negotiations without having complete information about the nature and strength of the buyer's indemnification claim. Overcoming this challenge requires the seller to negotiate carefully in the purchase agreement and take decisive actions after the indemnification claim is brought.

Purchase Agreement Issues

Unlike claims involving third parties, purchase agreements generally deal with claims made directly by the buyer against the seller in a remarkably cursory manner. In some cases, the purchase agreement merely requires the buyer to

notify the seller of the existence of the claim. This type of provision encourages the buyer to do the bare minimum in notifying the seller of the existence of a claim and to provide less than meaningful information about the claim. To address this issue the seller should include the following provisions in the purchase agreement:

- Require that any notice of indemnification include detailed back-up information regarding the claim
- Permit the seller to retain copies of financial and other documentation relating to periods prior to closing
- Permit the seller (and its attorneys and agents) to have access to books and records of the buyer in order to evaluate the claim, and
- Permit the seller (and its attorneys and agents) to interview key management personnel of the buyer in order to evaluate the claim

The purchase agreement should include specific penalties for failure to comply with these procedures, such as:

- Prohibiting the buyer from setting-off against any deferred purchase price (including any note or earn-out payment) until the procedures have been complied with
- Requiring the buyer to pay the seller's attorneys' fees in defending the indemnification claims if the procedures have not been complied with on a timely basis, or
- Barring the buyer from bringing the claim if the procedures have been willfully disregarded

If the purchase agreement includes these types of protections, the buyer will be incentivized to cooperate with the seller in gathering information about the indemnification claim.

After Receiving the Indemnification Notice

After the seller receives a notice of indemnification, he should immediately contact his counsel to review the claims made. The seller should also send a letter to the buyer requiring the buyer to fulfill its information-sharing obligations under the purchase agreement and to retain all documentation relating to the indemnification claim (especially e-mail and related materials).

Once the seller has received the information relating to the claim, the seller should review all the documentation with counsel and any experts necessary to evaluate the strength of the claim. If additional documentation is required requests for that information should be made through counsel. Only after the seller believes it is fully apprised of the nature of the claim should formal negotiations begin. It is frequently helpful at this point to go through mediation in order to gain a neutral party's insight into the strength or weakness of the buyer's claim. These steps will enable the seller to objectively determine if a settlement is appropriate or if it is necessary to go through formal litigation or arbitration.

In almost every indemnification situation the seller is playing catch-up with the buyer. The steps outlined here should help the seller to catch up faster and create circumstances where settlement may be reached earlier in the process.

This article is one in a series of contributions by ACG Chicago's Platinum Sponsors. We appreciate their support.

About Ungaretti & Harris

Ungaretti & Harris LLP was founded in 1974 and has grown to more than 100 attorneys who practice in three basic areas. These groups are business (M&A for private equity funds and privately-held and public companies, corporate finance, corporate governance, real estate, financial services, tax and benefits), litigation (commercial litigation, labor, insolvency and anti-trust) and healthcare/regulatory. U&H has offices in Chicago and Springfield, Illinois, Grand Rapids, Michigan and in Washington, D.C.

About the Author

Brian E. Krob is a partner in the Corporate, Securities & Finance Department of Ungaretti & Harris LLP. He specializes in mergers and acquisitions, with a focus on private equity transactions as well as corporate finance, and general corporate representation. www.uhlaw.com

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2008 CORPORATE NETWORK SUMMIT (CONTINUED FROM PAGE 1)

Entrepreneurship to Fortune 500 Status to Private Ownership”, and George H. Cook, Vice President of Finance & Chief Financial Officer for MacLean-Fogg presenting an afternoon keynote on, “The CFO perspective of corporate growth in our markets”. Dustin Weinberger, Vice President, GE Commercial Finance and Secretary of ACG Chicago notes, “ACG Chicago always works to provide access to successful leaders and we are proud to present leaders from two of Chicago’s most influential companies at this conference. Mr. Edwardson and Mr. Cook represent the best of what the Chicago business community has to offer.”

The luncheon keynote will be presented by Professor Steve Kaplan, 2007 ACG Fellow and Neubauer Family Professor of Entrepreneurship & Finance at the University of Chicago. Frequently relied upon and quoted in the world press including the Wall Street Journal, he will present his nationally recognized findings of the most valuable characteristics of executive leaders. Another well known academic, Mark Frigo, Director, Center for Strategy, Execution, and Valuation, DePaul University will join a panel delving into adding value through risk factors. Professor Frigo is an expert in strategy, execution, strategic performance measurement systems and strategic valuation at high performance companies.

Jumping into the market development side of the equation, over \$42 billion in global growth opportunities will be represented by an international growth panel, which will feature representatives from the Illinois Global Partnership, the World Bank, the Inter-American Development Bank and the International Finance Corporation. They will discuss how companies can partner with these institutions to find new customers, secure grants and additional financing and mitigate risk in emerging markets.

Some breakout panels will feature senior business advisors from the Chicago Manufacturing Center who will explain their strategic planning system for small & medium sized businesses to achieve rapid and profitable growth. They also will host an afternoon panel with Chicago area business owners who are successfully growing their businesses with the system.

And in a truly unique opportunity, owners of leading family-owned businesses in the Chicago area will share their most valuable lessons and insights on growth and management strategies. Panelists will address specific issues including succession planning, use of outside capital to facilitate growth and/or liquidity, and how the family and business can work together to create and maintain a culture over multiple generations. Moderator Drew Mendoza, Managing Principal of the Family Business Consulting Group will be joined by Jeff Jeffery, the President and CEO of IRMCO, Dave Juday, Chairman of the Board of Ideal Industries, and Bruce Taylor, Chairman and CEO of TaylorCapital Group.

All of the day’s ideas and opportunities obviously will generate the need for investment. Many of Chicago’s senior banking executives will gather for the final session of the day as they take an inside look at Chicago’s middle market lending and discuss how to access credit in the current tight market. Roger Stelle, Partner at Meltzer, Purtill & Stelle will moderate the distinguished panel which will include: Jeffrey Boundy, President of Cornerstone National Bank and Trust

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Company; Mark Hoppe, President & CEO of Cole Taylor Bank, Daniel Miller, President & CEO, American Chartered Bank, Brogan Ptacin, Executive Vice President of Midwest Bank & Trust, Mark Sander, Commercial Banking Executive, Midwest Region at Bank of America, Illinois, and Matthew Tilton, President of Archer Bank.

Bill Durkin, Vice President Business Development, Synergy Companies, and corporate network committee member summed up the reason to spend a day in Hoffman Estates, “Volatile times offer the opportunity to identify new opportunities, markets that need more focus, and competitive advantages that will drive new stages of corporate growth. This conference offers in one day the opportunity to gather the collective wisdom of key leaders and a network of leading authorities that will allow our members and attendees to be a part of that growth.”

Tales of Success: Corporate Author Series

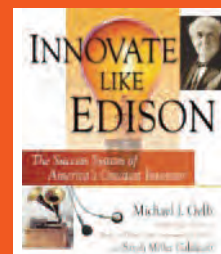
Current authors exploring business success models are meeting with ACG Chicago members on a regular basis. The newly launched Corporate Network Author Series brings together members and corporate executives for breakfast in Oakbrook every other month or so to network and tune in.

The great grandniece of Thomas Edison, Sarah Miller Caldicott, presented her new book in July. *Innovate Like Edison: The Success System of America’s Greatest Inventor* described in detail the “five competencies of innovation” – which spurred her senior relative to generate nearly 1,100 U.S. patents in 62 years.

Leading discussion on his book *No Man’s Land: What to Do When Your Company is TOO Big to Be Small and TOO SMALL to be Big*, author Doug Tatum presided over the May meeting. Tatum is founding partner and Chairman Emeritus of Tatum LLC, a preeminent financial and technology executive services firm launched in 1993. His book garnered four national best business book awards in 2007 and is slated for publication in China.

Keith McFarland joined the breakfast group in March and discussed his book, *The Breakthrough Company: How Everyday Companies Become Extraordinary Performers*, before a large ACG gathering. In preparation, McFarland spent five years analyzing the world’s largest growth companies and interviewing 1,500 executives worldwide to identify the drivers that enable companies to push past entrepreneurial phases to long-term success.

The next event will take place November 7 in Oak Brook. Watch the ACG Chicago web page for more information!



New Investments Vetted at 2nd Annual Midwest Alternative Energy Forum

Clean technology investment is already driving the economic engine of the Midwest's next major growth platform, and ACG Chicago is collaborating with leading institutions and businesses from throughout the region to identify opportunities to facilitate investment and growth in this critical area.

The Midwest Alternative Energy Venture Forum will take place November 6th at the University of Chicago Gleacher Center and will feature about a dozen companies presenting investment plans and panels on clean coal, biofuels and solar. These panels are being chaired by Jim Greenberger, Co-Chair of the ACG Chicago Venture Committee and Partner at Reed Smith, Craig Miller, CEO of ACG Chicago and Shez Bandukwala, Venture Committee member and Partner at ThinkEquity, respectively.

“Building on our sold-out success last year, this event is all about collaboration with other organizations and institutions, including the University of Chicago, Argonne Labs and the Illinois Department of Commerce and Economic Opportunity.” said Greenberger. He also pointed out that, “ACG Chicago strives to bring the major players in business together with thought leaders and cutting edge research to create unparalleled opportunities for corporate growth. This conference accomplishes exactly that.”



The day of opportunity will be opened by Michael Polsky, President and CEO, Invenegy LLC and Jack Lavin, Director, Illinois Department of Commerce & Economic Opportunity. Keynote Ira Ehrenpreis, General Partner of Technology Partners, will highlight the massive growth this sector continues to enjoy. Technology Partners is one of the pioneering venture firms focused on cleantech. They serve principally as a lead investor and business advisor and Ira leads the firm's Cleantech investment practice, investing in energy technology, water technology, and materials science opportunities. Closing the day, Sadhu Johnson, Chief Environmental Officer from City of Chicago will discuss the city's strong reputation as a green city.

Investors and companies looking to gain a foothold in these critical areas should learn as much as they can about them now so that they can maximize their potential for growth. Watch www.ACGChicago.com for registration information and a detailed agenda on this November 6 event.

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For more information, please contact Steve Brady, Partner and Midwest Leader of our Transaction Advisory Services practice at 312.602.8556 or Steve.Brady@gt.com.



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Cleantech Investment Summit Grabs Headlines

The interest rang in loud and clear. EVWorld.com, a leading technology website tracking sustainable transportation technology and power sources, blogged about it and posted podcasts. Dozens of other media from The Chicago Tribune to Private Equity Week to leading energy-related sites ran follow-up stories citing many of the 26 speakers and conference chair Jim Greenberger. Colleagues from near and far came to listen to ACG Chicago's first Advanced Automotive Battery Investment Summit in June.

One hundred thirty-five members and visitors -- investment bankers, fund managers and senior corporate executives from West and East Coasts, Europe and elsewhere in the world -- came to hear the speakers from manufacturing, the auto industry, Argonne National Labs and Illinois Institute of Technology (IIT). Battery manufacturers like Altairnano, Ener1, Electrovaya, Electro Energy, Compact Power, American Lithium Energy, Firefly and PowerGenix participated. Twenty-six in all, these market leaders focused on the private equity, venture, and public investment opportunities for investors in the electric propulsion market.

"We were thrilled by the turnout and the media interest," said Michael Sklar, Past President of ACG Chicago, Chair of the Advisory Board, and Partner at Ungaretti and Harris. "The audience of international and national executives heightened the leading edge atmosphere and with the expertise of the panels allowed everyone to dig deeply into this narrow but important sector of new corporate growth."

"With the audience we drew, we know we are riding a wave of global concern. We hope this enthusiasm propels more discussion of how to identify and capitalize the leaders and change agents," said Jim McNair, President of ACG Chicago and Senior Managing Director of Corinthian Capital Group LLC.

Cleantech Growth Panel

ACG leaders presented investment perspectives on venture, private equity and project finance on August 27th at the Tower Club. Business leaders and development professionals from the Chicago Economic Development Council met to hear Ted Brandt, Co-Chair of the Venture Committee and CEO of Marathon Capital, Shez Bandukwala, Venture Committee member and Partner at ThinkPanmure, and Ray Weber, Senior Vice President of GE Energy Finance present Alternative Energy Growth Opportunities in the Midwest. ACG Chicago CEO Craig Miller moderated.

Please contact Venture Network Chairs Greenberger or Brandt, or CEO Craig Miller to help build awareness about the substantial and broad range of investments in the cleantech sector.

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International Committee Focus: Inbound PE Investment

Driven in large part by the rapid growth of sovereign investment funds and weakness in the US dollar, inbound investing in the U.S. has become increasingly important. This issue will drive content for new programs headed by the International Committee this fall and winter. Inbound investments from foreign private equity and sovereign wealth funds will be the focus of the Oct. 3rd breakfast program at the Standard Club.

“We are also adding this as a key issue in other upcoming International Committee offerings, since it is becoming so important to U.S. companies, their investors and their advisors,” said International Committee Co-Chair David Lavery, Partner with InternationalCounsel.

“Taking its cue from the breakfast meeting, the next issue of the International Bulletin will carry related stories – how various regions of the world, including Asia, Europe, the Middle East, and South America – are adapting to this new trend. “We are working with small focus groups to shape and inform the editorial content,” noted Michael Carsella, International Committee Co-Chair and Co-Editor with Chari Aweidah of LJ Soldinger Associates of the International Bulletin.

The Fourth Annual International Conference in February 2009 will further explore global inbound investment as one of a number of key trends affecting corporate growth. The committee is considering inviting foreign capital sources to participate in an international investment networking component modeled on the ACG Capital Connection to occur simultaneously with the conference.

“If any member knows of foreign investors who would like to participate, then please let us know - we are open to working with a broad range of foreign private equity and other firms,” said Lavery. “We intend this to be a thought provoking and highly informative series of events for international investors and advisors.”

Spring International Conference Featured Robert Reich

Last March, the third annual International Conference focused on “Middle Market Growth in Uncertain World Markets.” 26 speakers presented best practices in global growth for private equity firms, advisors and corporations to a national audience. Highlighting the event was a breakfast roundtable moderated by Stephanie Mehta, Fortune Magazine’s Global Editor, as well as the remarks of luncheon speaker Robert Reich, Professor of Public Policy, University of California at Berkley, and former Secretary of Labor under President Clinton.

Reich placed with the next president the responsibility for educating the public about the misconceptions regarding trade and technological innovation, and also emphasized the importance of education, job training and health care.

The International Committee will continue to build informative programs such as this one, by reaching-out to leading experts on timely cross-border growth issues as part of several break-out panels planned for the 2009 conference.

Robert Reich Keynote



Trends Affect Canadian M&A



By
John A. Kolada
Chicago Office Managing Partner
Blake, Cassels & Graydon



and
Paul Singh
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Blake, Cassels & Graydon

Ten noteworthy trends will have an impact on the Canadian mergers and acquisitions landscape in 2008. These are:

1. **Credit Crunch Slowing Deal Activity:** Record-breaking M&A activity in Canada and the U.S. over the last few years was fuelled, in part, by readily available and historically low-priced financing. In the wake of the U.S. subprime mortgage crisis, cracks in the credit market began to appear over the summer of 2007 as concerns over creditworthiness and higher margin lending requirements caused investors to balk at numerous high-yield debt offerings used to finance acquisitions. The Canadian credit market mirrored the U.S. in the following months - effectively bringing leveraged deal-making to a standstill. Acquisitions that were successful in the second half of 2007 were more often completed by strategic buyers, or financial buyers that did not rely (in whole or in significant part) on external funding sources. Blakes expects middle-market deal activity to continue, albeit at a slower pace, while larger transactions that require more significant credit commitments will likely be deferred until credit conditions improve, in all likelihood in 2009 at the earliest.
2. **Focus on Deal Terms:** The credit crunch has buyers and targets' focusing closely on contractual remedies in the event business performance or financing markets take a turn for the worse after the signing of a deal. Blakes has seen a renewed focus on the drafting of material adverse change clauses as well as seller remedies, such as an appropriate quantum of reverse break fees – paid when private equity purchasers fail to complete a deal and there has been no breach by the target. The availability of specific performance as a remedy to force completion of a deal is now discussed in every deal negotiation.

This article is one in a series of contributions by ACG Chicago's Platinum Sponsors. We appreciate their support.

About Blakes

Blakes opened its Chicago office in 2004 to assist U.S.-based clients with Canadian components of cross-border transactions and all other aspects of doing business in Canada. As we do not practice U.S. law, we will work closely with your U.S. law firm to assist with your cross-border legal needs. Blakes is one of Canada's oldest, largest and most respected full service business law firms. Founded in 1856, Blakes has more than 550 lawyers and offices in Canada, the United States, Europe and China.

For further information on Blakes or to learn more about doing business in Canada, please contact:

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3. Focus on Timely Disclosure: Public companies received guidance from the Ontario Securities Commission (OSC) in 2007 regarding their public disclosure obligations in connection with M&A transactions. In its ruling in AiT Advanced Information Technologies Corp., the OSC confirmed that the determination of timing for a required disclosure in an M&A transaction is not a bright-line test and depends on the specific facts and circumstances of each case. However, M&A negotiations must be disclosed when there is sufficient commitment from both parties to the transaction and a substantial likelihood that a proposed transaction will be completed.

While the decision supports general practice in Canada to disclose a transaction once parties have received requisite corporate approvals, executed a definitive agreement and resolved all material issues, it leaves open the possibility that in certain circumstances a disclosure obligation could be triggered at some point during negotiations prior to the parties' executing a definitive agreement. Due to the new secondary market liability regime, Blakes expects to see increased focus by public companies on timely disclosure.

4. New Timing and Standards for Merger Review: In 2007, the Competition Tribunal (Canada's equivalent of a competition court) rejected an application by the Commissioner of Competition seeking more time to review Labatt's take-over bid for rival brewer Lakeport. The decision allowed Labatt to close its acquisition after expiry of the Competition Act's 42-day statutory waiting period. The decision ushered in a new timing paradigm for merger review in Canada, reflecting the market reality that timing and certainty of closing are critically important in public company transactions. There is now a heightened expectation that the bureau will complete reviews within its statutory period or agree to the parties' closing into a hold-separate arrangement.

Separately, Canada's federal government has published new guidelines under the Investment Canada Act that apply to the review of investments in Canadian companies by foreign state-owned enterprises. The government also has indicated that it may introduce guidelines or amend the Investment Canada Act to include a specific national security review clause for foreign investments in Canada, although the news on April 10, 2008, that Canada's Minister of Industry may block Minnesota-based Alliant Techsystems Inc.'s proposed acquisition of MacDonald, Dettwiler and Associates (MDA) may call into question whether such an amendment is needed. MDA operates Radarsat-2, a satellite that is used to observe Canada's Arctic, and is also the developer of the 'Canadarm', the robotic limb used on the space shuttle and International Space Station. This year may also see anticipated new rules addressing foreign ownership restrictions in certain protected industries, such as telecommunications. The Organization for Economic Co-operation and Development (OECD) has urged the Canadian government to scrap ownership restrictions in the telecommunications and transport sectors. The OECD reported Canada's restrictions are among the strictest in the 30-member organization.

5. **Elimination of Withholding Tax:** Proposed amendments to the Canada-U.S. tax treaty and recent amendments to Canada's Income Tax Act eliminating most withholding tax on interest payments to arm's-length lenders should simplify investing in Canada for foreign entities. The change is expected to increase the flow of capital into Canada. However, the amendments to the treaty are expected to adversely affect tax treatment of Canadian hybrid entities, such as unlimited liability companies, commonly used in cross-border M&A transactions.
6. **Focus on Alberta:** While Blakes expects oil and gas projects to continue to generate significant direct investment in production and facilities' upgrading, we also expect there will be spin-offs in related sectors, such as pipelines, that will lead to M&A activity.
7. **Income Trust M&A:** Changes to tax laws affecting income trusts, a type of publicly held flow-through vehicle, have been a major factor affecting recent Canadian M&A activity. Income trusts, which had an aggregate market capitalization of almost C\$200 billion in 2006, had until recently been a significant part of the Canadian capital markets. In late 2006 Canada's Minister of Finance announced significant changes to the taxation of publicly-traded income trusts and partnerships, effectively eliminating the tax advantages such structures have over traditional public companies. As a result, income trusts will start paying the equivalent of the corporate tax rate in 2011. Income trusts have since become attractive acquisition targets, with more than 50 income fund acquisitions having been completed since the government's announcement. In 2008 Blakes expects many more income trusts will be taken private by domestic and international buyers.
8. **Shareholder Activism To Continue:** Hedge funds have become active in influencing corporate policy, engaging in proxy battles and even initiating take-over bids in an effort to put issuers in play. Going forward, Blakes expects to see many potential acquirers negotiating simultaneously with both the boards of targets and key security holders – a recognition of the power of institutional shareholders. Unclear at this stage is whether the slowdown in leveraged M&A transactions will affect the willingness of hedge funds to engage in activist strategies.
9. **Participation by BRIC Plus Entities:** Continuing globalization and strength in commodity prices have resulted in increased involvement in the Canadian M&A landscape by companies from fast-emerging "BRIC Plus" economies, i.e. Brazil, Russia, India, China and the Middle East. Blakes expects that sovereign wealth funds will continue to increase their investments in Canada.
10. **Strong Loonie Leading to U.S. Acquisitions:** Canadian companies, for years the targets of take-overs by foreign entities, will likely take advantage of the strong Canadian dollar and acquire U.S. businesses at prices already driven down by credit market turmoil.

ACG Chicago Celebrates Major Milestones at Arlington

ACG Chicago has a lot to Celebrate! About 150 joined the members only Arlington Racetrack Celebration of ACG Chicago's long term success. The third race was named the "ACG Celebration" and honored adding our 1000th member on the July 17th celebration day, our 40 years of corporate growth leadership and the ACG Global Large Chapter of the Year Award presented in April. We look forward to celebrating our members and their leadership in the future.



Werner Rosenthal, an ACG Chicago member for 39 out of 40 years awards the trophy to the winning jockey of the ACG Celebration race.

Major Member Benefit

Capital LinkSM

Launched in April, thousands of members have already run tens of thousands of searches for the perfect deal fit in ACG's CapitalLinkSM. This free member benefit (a \$495 cost bought separately) is an extensive database of private equity, hedge fund, investment bank, mezzanine, and valuation firms covering the

entire US and beyond. You can keyword search portfolio companies or executives in the private equity model, search by states or names in the other modules and where appropriate ACG icons will show who is within the ACG network. Don't miss using this tool to build your network or find that perfect fit. You need to log-in to use this so if you don't remember your

password feel free to call us. Please check out the CapitalLinkSM button at www.ACGChicago.com.



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Award Winning Performance

Oakbrook-based McDonald's Corp. earned the Outstanding Growth title from ACG Chicago this year – for the second time in the 23-year history of the award. The world's largest restaurant chain tuned up sales and reclaimed its front-line brand position by worldwide innovations in its menu, expanded drive-thru operations and hours, and re-imaged restaurants.

The Awards Committee reviews numerous candidates and performance metrics to identify the most appropriate honoree for the year. They presented this Outstanding Growth Award in February of this year. Dan Howell, Awards Committee Chair and Senior Managing Director of Private Equity Investments at Mesirow Financial noted, "McDonald's reinforced this choice and the award recently by beating market expectations in their August 8th financial reports and setting 43 year record share prices."

The Emerging Growth category is also key to the ACG markets and Middleby Corp., earned this ACG Chicago Emerging Growth Award for its meteoric rise to global industry leader in commercial cooking, packaging and processing. Under leadership of Chairman and CEO Selim A. Bassoul, sales since 2000 quadrupled, and stock rose 1600 percent.

The Elgin-based concern so impressed ACG Global that they named Middleby the Emerging Growth Company for the entire ACG global network. Middleby also reinforced ACG's recognition recently by beating market predictions with record second quarter sales and earnings.

In addition to honoring pure corporate growth, ACG Chicago honors those who have truly been instrumental in building our community. ACG Chicago was proud to present the Lifetime Achievement Award to James C. Tyree, Chairman and CEO of Mesirow Financial. During his lifetime career at Mesirow and 15+-year tenure as CEO, this well-respected and successful business leader led the diversified financial services firm headquartered in Chicago to exceptional levels of growth, both organic and by acquiring more than 50 companies. Ray Daly, Treasurer for ACG Chicago and Senior Vice President Business Development at Sovereign Bank Asset Based Group pointed out that, "Jim Tyree's strong leadership in social service organizations related to healthcare, education and children's wellbeing was another clear leadership attribute befitting this award."

BB Billow Butler & Company, L.L.C.

BBC is a middle market investment bank specializing in the sale, acquisition and growth financing of businesses valued up to \$100 million.

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Finally, this year of award winning performance honored ACG Chicago's 40 years of corporate growth leadership with the distinction of receiving the ACG Global Large Chapter of the Year 2008 Award. The honor is even more noteworthy when considering the high caliber of the other 52 ACG chapters and the rich programming they offer their members. Each member of ACG Chicago should be proud to be a part of this extremely active and strong network of leaders.

Special Issues in Healthcare Transactions

Deborah Gordon, Partner
Seyfarth Shaw LLP

In 2007 Americans spent \$2.3 trillion on healthcare, representing 16% of the United States' gross domestic product (the "GDP"). Healthcare spending has increased over 6% annually since 2001 and the Centers for Medicare and Medicaid Services ("CMS") forecast that Americans will spend \$4.3 trillion on healthcare by 2017, which represents nearly 20% of projected GDP. Part of this forecasted growth is due to the aging of 78 million baby boomers. According to the U.S. Census Bureau, the population aged 65 and over is projected to grow 36% between 2010 and 2020 compared with an overall population growth rate of 9%.

As a result, the healthcare industry's need for capital is growing dramatically and will likely continue to do so in the coming decades. As noted above, the demand for medical services will increase sharply as baby boomers reach ages at which they require increased medical care. As demand for healthcare products and services increases without a corresponding increase in supply, a commensurate rise in prices will occur unless sufficient capital investment is made to allow for increased supply. Not only is the number of older Americans increasing, but older Americans are living longer. Naturally this allows consumers more time to consume healthcare products and services

A recent report by the federal Institute of Medicine predicts that the existing U.S. healthcare workforce is insufficiently trained in geriatric care for the baby boomer generation. With more money and more patients demanding the services of roughly the same number of service providers, labor costs are predicted to rise sharply in the coming decades. Some analysts project that by 2025 there may be a shortage of as many as 500,000 nurses in the United States, which would create a vacancy rate of around 40%.

Increased demand is also evident with advances in medicine and technology, particularly advances that result in new or safer procedures and products. Scientific advances require capital investment in research and development. Finally, hospital and health facility construction and capital improvement costs are rising. In addition to aging and outdated facilities, construction and capital improvement needs arise from the shift to outpatient care, increased patient volume, technological advances and increased competition. Nursing homes, in particular, are in need of outside capital. The median age of nursing homes is 29 years and nearly 33% of skilled nursing facilities are in need of improvement. With respect to hospitals, a 2006 Healthcare Financial Management Association study showed that 72% of hospital and healthcare system CFOs project that their capital spending will increase by an average of 14% within the next five years. Similarly, 85% of hospital CFOs indicated that it will become more difficult to fund capital expenditures in the future.

The healthcare industry's demand for capital paired with its cash flow and growth creates an active landscape for transactions and financing in the healthcare industry. In fact, many dealmakers see many significant portions of the healthcare industry relatively immune from the same market forces that drive the deal market generally. For example, the June 2008 publication of Mergers & Acquisitions highlights the continued strength of the pharmaceutical M&A. The healthcare industry is seeing increased deal flow and investment and financing opportunities. While the credit market has seen considerable tightening, many healthcare transactions are concentrated in the middle market or private market. Accordingly, there are many specialized investors and lenders open to transactions. A growing number of finance companies, banks and investors also have fully specialized healthcare units and are embracing the customized nature of a specialized healthcare group.

Many economists also consider the healthcare industry to be recession-resistant under the theory that medically necessary services are in demand regardless of economic circumstances. Pharmaceutical or biotechnology companies with critical-care products may be less vulnerable to economic slowdowns. Many hospitals are undertaking various transactions, acquisitions and affiliations despite a slower economy. On the other hand, there are other segments of the healthcare industry that may be impacted by a slow economy. For instance, preventive care and health maintenance services are often negatively affected with increased unemployment, loss of medical coverage, and higher co-pays and deductibles. Also, elective procedures may decline along with reduced consumer confidence and increased unemployment rates.

There also are some instances in which negative economic news may benefit certain healthcare sectors and damage others. A drop in the housing market, for example, could result in fewer senior citizens entering into independent living or assisted living communities because they cannot sell their residences. The loss to

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the independent living and assisted living communities, however, could prove to be a benefit for home health providers.

A fundamental understanding of these economic and socio-political issues is important for all parties to any healthcare transaction and their respective lawyers. Any transaction, whether a merger, acquisition, investment or financing, in the healthcare industry is by its nature specialized. The vast regulatory landscape affecting healthcare entities is essential to understand before undertaking a healthcare transaction. Any transaction involving the pharmaceutical industry often requires knowledge with respect to FDA and intellectual property issues. Similarly, fraud and abuse prohibitions, corporate practice of medicine restrictions and Medicare reimbursement issues often dictate the structure of transactions involving healthcare providers. Healthcare transactions also have special antitrust considerations. The federal government has blocked certain healthcare mergers on the theory that such mergers would result in diminished competition and thus lead to higher prices. The FTC and the DOJ have issued joint policy statements governing specific aspects of healthcare industry.

These complicated regulatory matters have caused many investors and lenders to reluctantly embrace the healthcare industry. However, for many investors and financiers, the growth in healthcare demand seems to outweigh the regulatory complexities and pressures to reduce healthcare spending. Most healthcare investments and financings require specialized underwriting, often involving market feasibility studies, demographic information, in-depth knowledge of reimbursement rates and trends, and actuarial studies. To account for increased regulatory risk and due diligence costs, investors and lenders often require additional assurances in the form of escrows, credit support, collateral or guarantees. The healthcare facilities industry combines characteristics of any traditional asset or real estate-based investment and service industry-based investment, relying on accounts receivables as well as asset or property values for a significant portion of collateral support. In addition, investment or lending risks cannot be properly assessed without an understanding of the reimbursement aspects of the industry and regulatory requirements.

In addition, numerous federal and state laws impact the structure of any healthcare investment, sale or financing. The following highlights some of the major legal issues impacting healthcare transactions.

Fraud and Abuse Laws. Federal and state laws prohibit the provision of any incentives for the referral of any healthcare items or services. The federal Anti-Kickback Statute prohibits the knowing and willful payment or solicitation of remuneration to induce a referral of a patient for items or services for which payment may be made by the Medicare or Medicaid programs. Violation of the Anti-Kickback Statutes is a felony, subject to civil and criminal penalties as well as exclusion from the Medicare and Medicaid programs.

The Office of the Inspector General of the Department of Health and Human Services (“OIG”) has promulgated certain “safe harbors” protecting certain activities and relationships from being deemed to violate the Anti-Kickback Statute. Safe harbors include the ownership of investment interests in public companies, certain space and equipment leases, personal services contracts, and other invest-

ment interests, provided that any investor in a position to refer or generate referrals for the entity may not own, control or receive any remuneration from the entity in excess of 40% of the interests in the aggregate.

The OIG has also issued various “Fraud Alerts” targeting various types of practices in the healthcare industry as particular areas of concern. For example, the OIG has targeted hospital incentives provided to physicians and the pharmaceutical industry with respect to its marketing and sales practices.

The OIG will opine through its advisory process on whether an activity in question falls within the scope of the Anti-Kickback Statute. These advisory opinions are often useful in determining whether analogous activities would incur potential liability under the Anti-Kickback Statute. Similarly, the OIG has issued various form compliance plans for various types of healthcare providers. The adoption of these compliance plans can mitigate potential liability under the Anti-Kickback Statute. Accordingly, many investors and lenders will require healthcare entities to adopt compliance plans if they have not already done so. Stark Amendment. The Ethics in Patients Act (commonly referred to as the Stark Amendment) prohibits a physician from making any referral for any “designated health services” payable under the Medicare or Medicaid programs to any entity in which the physician has an ownership or compensation arrangement. Unlike the Anti-Kickback Statute, the Stark Amendment provides for a per se violation, i.e., no intent is required. The Stark Amendment also provides for criminal and civil penalties.

The “designated health services” subject to the Stark Amendment include clinical laboratory services, physical therapy services, occupational therapy services, radiology services, radiation therapy services, durable medical equipment, parenteral and enteral nutrients, equipment and supplies, home health services, outpatient prescription drugs, and inpatient and outpatient hospital services. The Stark Amendment provides for certain exceptions, such as the rental of office space and equipment and personal services contracts, provided certain requirements are met.

Similar to the Anti-Kickback Statute, CMS will provide an advisory opinion as to whether or not a certain arrangement or practice falls within the scope of the Stark Amendment.

Licensing Requirements. Virtually every healthcare provider, including hospitals, physicians and healthcare practitioners, must be licensed in order to operate. Generally, this licensure takes place at the state level. These licenses are generally not transferable, and any change of ownership of a licensed healthcare provider is generally subject to prior approval. Accordingly, a buyer of assets may be forced to reapply for licenses in its own name and based on its own qualifications in order to use a seller’s assets. The process can be slow, cumbersome and uncertain. As a result, many healthcare transactions are structured as stock sales as opposed to asset sales since the primary “asset” of the healthcare entity is its licenses, and such licenses could not be sold in an asset sale. As a result, many investors are reluctant to fund or invest in stock sales due to concerns regarding the assumption of pre-closing liabilities. Similarly, many payer contracts contain restrictions on assignability, which also affects whether a transaction is structured

ACG Chicago Adds Marketing Manager



Rob King has joined ACG Chicago as Marketing Manager. This newly created

staff position will be devoted to producing, sustaining and enhancing all communication efforts of the chapter. Rob comes to the ACG from the American Bar Association, where he developed electronic newsletters, web content, event promotions and member recruitment efforts since 1998. He is a graduate of Loyola University Chicago, and a native of Dayton, Ohio.

as an asset sale or stock sale. If a target company's primary cash flow results from contracts that are not assignable, instead of seeking consent to assignment from each contract party, the acquirer may instead elect to purchase the stock of the target, which may fundamentally change the economics and allocation of risk in the transaction.

In addition, many states also have prohibitions on the corporate practice of medicine and on fee splitting. The corporate practice of medicine prohibition provides that a business cannot conduct medical activities or employ licensed medical personnel to provide licensed healthcare services. For example, the corporate practice of medicine prohibition affected the structure and nature of physician practice management companies in the 1990s. Instead of investors directly investing in physician practices, investors established separate practice management companies that entered into long-term management agreements with physician practices. These management agreements also received scrutiny due to some states' prohibition on fee splitting. Some states prohibit physicians from dividing any fee or compensation for professional services rendered with any person or entity (other than another physician). Notably, an Illinois Appellate Court recently ruled that the Illinois Medical Practice Act's fee-splitting prohibition prohibits physicians from paying billing companies a percentage of revenue collected. The court found that the contract between the physician group and the billing company was unenforceable under the fee-splitting prohibition since the payment methodology to the billing company involved a percentage of collected revenue. Given the common nature of percentage recovery arrangements between physicians and third party billing companies, this ruling has wide-ranging implications for the validity of billing arrangements in Illinois.

Anti-Assignment Provisions. Congress passed various laws preventing healthcare providers from selling or "assigning" their receivables to others or allowing any other party other than the provider to directly receive such money from the government. Accordingly, it is not possible to enter into a normal security arrangement in which a borrower gives the lender the right to stand in a borrower's shoes when it comes to receiving payments directly from the government. As a result, financing healthcare transactions may be more difficult to structure than industries where obtaining control over a major aspect of collateral is not so restricted. Transaction lawyers devise ways to legally overcome the anti-assignment laws. One involves a "double-lock box" device that allows the government to make payments to an account controlled by the provider/borrower. Amounts are then routinely swept out of that account into another account controlled by the lender. Because payments are first made to an account controlled by the provider, the government is technically not making payment to a third party other than the provider, and the anti-assignment provisions are not violated. When Medicare and Medicaid receivables are involved in a transaction special care needs to be given to issues involving collateralizing these receivables.

Privacy Issues

In any healthcare transaction, parties need to be aware of confidentiality issues relating to protected health information. A party's customary due diligence may expose it to protected health information. Both state and federal laws restrict a healthcare provider's use and disclosure of a patient's protected health information. A healthcare provider's general consent form may be sufficiently broad to permit disclosures related to the healthcare provider's general business purposes.

Similarly, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) allows a healthcare provider to disclose protected health information for “healthcare operations.” Healthcare operations include quality assurance, credentialing and general administrative activities. Healthcare providers may disclose protected health information to a “business associate” so long as a business associate agreement is in place. Accordingly, healthcare providers may require a potential business partner to sign a business associate agreement as a result of any disclosures related to protected health information.

As a general matter, the means by which a healthcare provider is structured is highly dependent upon the regulatory framework within which the healthcare provider operates. It is imperative for parties to a healthcare transaction and their counsel to grasp the healthcare industry and healthcare regulatory matters in order to understand the healthcare entity’s revenue and assets as collateral. Many healthcare entities have bifurcated structures in which a separate licensed operating entity receives all or a majority of the revenues from operations. These revenues are then often distributed to affiliated and non-affiliated entities through management fees, lease payments, consulting fees, preferred returns and other distributions. Many life science companies have offshore operations, or hold intellectual property offshore. Accordingly, potential investors, acquirers or lenders must carefully “follow the money” and understand the underlying regulatory environment and the proper operating entity as the borrower. Similarly, management fees and fees paid to affiliated parties should be carefully reviewed.

In acquisition transactions, the parties and their counsel must understand how to structure the financing in light of various change-of-ownership requirements. As discussed above, the FTC and DOJ may get involved in the event of any antitrust concerns, and the parties could risk divestiture. Also, a change of ownership may require state licensing agency approval, potentially a new certificate of need or a certificate of exemption, and CMS approval with respect to Medicare and Medicaid provider numbers. Due to the difficulty in obtaining all approvals and finalizing transitional matters, many sales transactions are accomplished with the seller or prior operator involved with operations post closing. For example, a buyer may purchase the underlying real estate and lease the facility back to the licensed operator during such time as the new operator is awaiting all necessary licenses and approvals. The prior operator continues to operate the facility, including billing and collecting revenues. Similarly, if an acquirer assumes the seller’s Medicare/Medicaid provider number, the acquirer also assumes the risk that the government can come back to the purchaser for any overpayment liability or false claims submitted by the seller. Accordingly, the transaction may involve extensive due diligence, complicated indemnities, escrows, and additional provisions with respect to any acquisition financing. The same structure may be used in sales of life science companies or other types of licensed healthcare entities. Accordingly, it is imperative that the parties’ counsel analyze these aspects of the transaction to properly structure any healthcare transaction.

As discussed, the healthcare industry is capital intensive, dynamic and highly regulated. Lending to and investing in healthcare entities requires specialized industry knowledge and often complex structuring with respect to underwriting and documenting the transaction. By understanding the healthcare industry and by carefully structuring transactions, savvy lenders and investors will be in a good position to benefit from increasing demand for healthcare capital.

ACG Chicago Calendar

September 9, 2008

Corporate Network Summit
Stonegate Conference Center
Hoffman Estates

September 16, 2008

From the Front:
Successful Management for
Private Equity Firms Luncheon
Standard Club

October 3, 2008

International Growth Breakfast
Standard Club

October 21, 2008

2008 Midwest
ACG Capital Connection
McCormick Place, West Building,
Skyline Ballroom

November 6, 2008

Midwest Alternative Energy
Venture Forum
University of Chicago
Gleacher Center

November 7, 2008

Authors Series Breakfast
The LodgeOakbrook

November 18, 2008

Luncheon Meeting
Standard Club

December 9, 2008

M&A/Private Equity Luncheon
Standard Club



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