Simpson Thacher

Registered Funds Alert

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The latest edition of Simpson Thacher's Registered Funds Alert focuses on a recent and long-anticipated trend in the asset management space: mergers and acquisitions. This edition summarizes recent M&A activity in asset management, provides a high-level overview of typical asset management deal structures, discusses certain key considerations in evaluating an asset management deal, reviews certain protections against deal jumping in the asset management context and summarizes the portability of performance in asset management transactions.

Recent M&A Activity in Asset Management

The asset management industry[1] experienced a notable increase in M&A activity in the past few years. According to industry publications, 2015, 2016 and 2017 have shown a sustained increase in the number of publicly announced asset management M&A deals. [PwC's Deal Insights for 2017] reported that there were 50 asset management deals announced in each of 2015 and 2016, and 48 in 2017 (up from 34 in 2013). Additionally, M&A activity in the wealth management sector, often with larger asset managers as the buyers, has surged, with 83 deals announced in 2015, 69 announced in 2016 and 80 announced in 2017 (compared to 41 in 2013).

A variety of factors contribute to the elevated levels of asset management M&A in recent years. One key driver of deal activity is the economic recovery in the wake of the 2008/2009 financial crisis. As markets recover, valuations increase. Those increasing valuations create favorable conditions for private equity owners to sell positions in their asset manager portfolio companies and may prompt other managers to consider seeking an outside investor or sale.

Another important driver has been the fee pressure felt by traditional registered active fund managers due to regulatory incentives and other factors that have promoted passive management. Many of these active fund managers may be motivated to seek economies of scale—either as buyers or as sellers—to reduce costs. The importance of scale is also a significant reason for the dramatic increase in transactions involving smaller wealth managers.

Yet another driver is the desire by alternative asset managers to establish footholds with retail investors. Some of those managers have found partners with retail distribution connections and have either launched joint ventures or entered into adviser/subadviser relationships, both of which often involve or lead to an M&A-type transaction.

In this edition of our Registered Fund Alert, we take a deep-dive into the legal issues surrounding M&A activity in asset management. We first discuss typical asset management deal structures. We then turn to some of the most important considerations for evaluating an asset management deal. Next we review how parties to the transaction can protect against deal jumping. Finally, we analyze the ever-important topic of preserving the portability of performance track records for asset managers.

1. Including investment managers in the retail, private equity, BDC and institutional spaces.

Asset Management M&A Transaction Structures

The underlying motivation for an M&A deal often dictates how the parties will structure the deal. Broadly speaking, M&A deals in the asset management space generally involve one of the following five structures:

1. An acquisition of a minority, non-controlling stake in an asset manager;
2. An acquisition of a majority or controlling stake in an asset manager by a financial buyer;
3. An acquisition of a majority or controlling stake in an asset manager by a strategic buyer;
4. Fund adoption; and
5. A joint venture.

Each of these structures is designed to accomplish a specific goal, which we discuss in more detail below.

Acquisition of a minority, non-controlling stake

Many investors find value in acquiring a minority, non-controlling stake in an asset manager. Generally, that type of acquisition does not affect the day-to-day operations of the asset manager or the services provided to its clients. In these deals, the investor acquires less than 25% of the voting securities of the asset manager. As discussed in more detail later in this Alert, the 25% threshold is important because the Investment Company Act of 1940, Investment Advisers Act of 1940 and related guidance from the Securities and Exchange Commission and its staff, have established a presumption that an investor "controls" an asset manager when its ownership of that manager exceeds the 25% voting securities threshold.

Minority deals can be completed quickly, largely because they do not result in a new control person of the asset manager. As a result, minority stake deals typically do not require consent from the manager's clients (*i.e.*, investors in private funds, registered funds or owners of separately managed accounts). Nor do they require any formal action by a board of directors of a registered fund advised by the asset manager. That manager, however, normally would inform the fund's board of the transaction, particularly where the acquisition is approaching the 25% threshold.

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Acquisition of a majority or controlling stake acquisition by a financial buyer

A financial buyer, such as a private equity firm or a conglomerate, may have an interest in aquiring a controlling (greater than 25%) or majority stake of an asset manager. A transfer of a controlling block of an asset manager raises special considerations related to obtaining client consents for assignments of advisory contracts. We discuss those considerations in more detail later in this Alert.

A financial buyer frequently will not seek to change the day-to-day operations of an asset manager. The buyer, however, usually obtains significant governance rights designed to allow the buyer to protect its economic investment. The most common protective rights are consent rights and/or representation on the board of the asset manager (or its parent).

Acquisition of majority or controlling stake acquisition by a strategic buyer

A strategic buyer may be another asset management firm looking to gain scale or complementary expertise. Strategic investors, unlike financial buyers, are likely to take an active role in day-to-day operations of the acquired asset manager.

An acquisition by a strategic buyer of a majority or controlling stake, like that of a financial buyer, raises special considerations regarding client consent for assignments of advisory contracts.

Fund adoption

In a fund adoption, two asset managers may reach an agreement pursuant to which one agrees to transfer the management of a fund to the other. Fund adoptions typically involve registered funds, but occasionally a private fund may be the subject of a fund adoption (and may even be converted to a registered fund in the process).

Joint ventures

Finally, two parties may establish a joint venture to launch a particular fund (or series of funds). The joint venture is in essence a structured form of subadvisory relationship—the joint venture entity generally acts as the adviser to the fund, with one partner providing the investment management and the other partner providing other functions, such as compliance, administrative or distribution support to the endeavor.

Key Considerations in Evaluating Asset Management Deals

Below is an overview of some key considerations for buyers and sellers in an asset management M&A transaction, including critical regulatory considerations. Many outside advisers will aid in assessing these considerations. Legal specialists focus on aspects of deal structure such as tax, employee benefits and intellectual property. It is critical in the asset management space to also involve regulatory specialists who focus on 1940 Act and Advisers Act issues. Certain deals also involve regulatory specialists from other areas, such as antitrust or banking regulations.

Identifying a counterparty

An obvious first step is identifying a seller or buyer. This does not necessarily need to be a formal process. Some transactions will be privately negotiated after one party approaches another with a potential deal in mind. In those instances the target company and the prospective buyer may reach agreement in principle on the key terms of the deal before beginning the process of due diligence, disclosure and drafting the merger agreement. It is common practice for the parties to have legal counsel record these terms in writing as a term sheet, which is also sometimes referred to as a memorandum of understanding or a letter of intent.

In other circumstances, the seller may opt to engage in an auction process to identify a buyer or investor. A public company looking to maximize the value of the asset or business being sold may use an auction process. Here, the seller is firmly in control the auction and will often engage legal counsel and an investment bank to quarterback the auction before any level of negotiations with a potential counterparty begin.[2] An auction could be publicly announced, which allows interested parties to approach the seller, or an auction could be private, in which case the investment bank would approach potential buyers directly.

An auction begins with the solicitation of initial indications of interest (IOI) from potential buyers. Sellers often provide a two-to-five page summary, known as a "teaser," that describes the target, its business and the potential transaction. The IOI typically is a simple letter outlining a bidder's intention to pursue a purchase and often includes

2. Both buyers and sellers often engage investment banks in other contexts as well.

an initial, non-binding proposed purchase price and other key terms and conditions.

The seller typically requires a potential bidder that submits an IOI to sign a non-disclosure agreement (NDA). After obtaining a bidder's NDA, the seller provides a confidential information memorandum (CIM) and a bid process letter to the bidder. The CIM contains more detailed information about the target company[3] than the teaser and is intended to elicit meaningful, well-informed bids. The bid process letter lays the groundwork for the auction process and explains the rules and procedures of the auction.

The seller's investment banker ensures that no bidder becomes aware of the existence or identity of any other bidder or the terms of any other bid. In the absence of information about other bidders, each bidder must balance its desire to win the bid with its need for favorable terms.

After providing an initial indication of interest, the seller will invite some bidders to participate in the next stage of the process. The next stage could involve bidders meeting with management of the seller, conducting initial diligence on the seller and discussing a term sheet. This stage could go so far as to involve bidders reviewing and commenting on a draft of the transaction agreement provided by the seller. A seller typically will then choose one bidder and enter into an exclusivity agreement with that bidder. At this point, robust due diligence and negotiation of definitive transaction documents will commence.

Defining the scope of a transaction

Once the parties decide to pursue an M&A transaction, the next step is to clearly identify what is being bought, sold or otherwise bargained for. This is relatively straightforward for a sale of a minority, non-controlling stake, a joint venture or a fund

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adoption. The buyer alternatively may consider an acquisition of a stake in one or more general partners affiliated with the adviser, which typically house an adviser's carried interest in private funds. These types of transactions are referred to as GP-stakes deals, and have grown in number in recent years.

3. Note that non-public information about registered funds managed by an adviser generally cannot be disclosed without permission from the boards of the funds.

For other deal structures, this process can be more complicated.

A majority or controlling stake acquisition—by a financial or strategic buyer—generally will use one of two structures: a stock deal or an asset deal. In a stock deal, a buyer acquires one or more legal entities outright, including all of the associated assets and liabilities. In an asset deal, a buyer only acquires certain assets and usually does not take on some or all of the liabilities associated with the business being sold.

Whether a deal will involve a stock or asset sale depends on a number of factors. A stock sale is generally simpler and quicker to accomplish. This can be attractive to parties wishing to move quickly, with little complication. An asset deal may be more appealing to a buyer if a seller has pending litigation or regulatory issues. This is because the liabilities stay with the seller. It is possible to apportion certain of these liabilities in a stock deal to some extent through indemnification provisions, but indemnities are typically limited in scope and dollar amount.

Due diligence

The goal of due diligence is to give a buyer comfort that it has the key information needed to fully evaluate and negotiate a transaction. In certain types of M&A transactions, both parties may engage in due diligence. This would be the case with a merger of equals, a joint venture, a minority stake deal or a majority stake deal if the seller will maintain an interest in the company.

Where the merging parties are significant competitors of one another, there may also be antitrust-related diligence. Before one party shares sensitive information with the other, often the parties will put particularly sensitive data into a "clean" room available only to certain screened personnel of the other party. For particularly sensitive information, such as documents related to an ongoing regulatory examination or investigation, an exclusivity agreement also may be a prerequisite.

Parties typically provide and review due diligence information using electronic data rooms. In addition to, or in lieu of, an electronic data room, a party with particular security concerns may require that sensitive documents be reviewed on-site/in-person in a physical data room. Knowledgeable personnel, such as a portfolio manager or a chief compliance officer, may be made available to the other party to participate in detailed diligence discussions and answer questions.

Naturally, there are limitations on the diligence process. Time, cost and other commercial considerations require the parties to prioritize some types of information over others, and may leave one party feeling unsatisfied with the information it has received on certain topics. One way to address this issue is for the transaction documents to include representations and indemnities that serve to provide the unsatisfied party with some comfort on the topic(s) in question. However, not every transaction has indemnities for breaches of representations and warranties.

Negotiating consent rights

In a minority stake deal, an economic investor typically will seek consent rights over certain material transactions or decisions that might impact the value of their economic investment. Partners in a joint venture, to the extent the governance of the joint venture is not split equally between the parties, may agree to give a minority partner similar consent rights over significant actions. In majority or controlling stake deals, a buyer usually seeks similar consent rights over important decisions for the duration of the post-signing/pre-closing period (*i.e.*, while seeking approvals/consents from funds/investors and/or any required governmental approvals).

In any scenario, consent rights should not go so far as to give the consenting party extensive control over an investment adviser and its day-to-day operations. If consent rights go too far, those rights could be deemed to create "control," resulting in an inadvertent assignment of an investment adviser's advisory contracts without the requisite approvals/consents having been obtained (see discussion below for assignments of advisory contracts).

The SEC Staff has issued guidance related to the types of facts and circumstances that would or would not be deemed to result in such an assignment. The most well-known guidance, a no-action letter issued to American Century Companies, Inc. in 1997, outlined a number of consent rights that the SEC Staff blessed as not amounting to control for purposes of determining whether an M&A deal triggered an assignment. The *American Century* consent rights are primarily related to protecting a party's economic investment—including consent rights over material transactions such as mergers, significant sales of assets, incurring additional debt, issuing additional equity, initiating bankruptcy, or other material events outside the ordinary course of business, such as terminating key senior executives. Having experienced counsel review the proposed consent rights in any transaction is critical to avoid a premature pre-closing assignment or if the parties are trying to avoid triggering an assignment and the related approval/consent process altogether.

Assignments and client consent requirements under the 1940 Act and Advisers Act

The 1940 Act and Advisers Act impose certain requirements for investment advisory clients to approve or consent when an M&A transaction will result in an "assignment" of an investment adviser's advisory contracts. These client consent requirements are particularly important for a majority or control stake transaction.

The definition of an "assignment" is similar under the 1940 Act and Advisers Act, and includes a direct or indirect transfer of a contract, or of a controlling block of the assignor's outstanding voting securities of the assignor. Under the 1940 Act definition of "control" and related SEC guidance, there is a presumption that transferring more than 25% of an adviser's voting securities constitutes a transfer of a controlling block and would result in an assignment.[4] Under the Advisers Act, many practitioners take the view that the threshold is slightly lower, and that a transfer of exactly 25% of the adviser's voting securities is sufficient to trigger an assignment, based on the definition of "control" in Form ADV. These definitions and interpretations mean that an assignment could occur under the 1940 Act or Advisers Act even if there is no transfer of an advisory contract to an assignee. Again, there is a substantial body of SEC guidance regarding whether a given set of facts results in an assignment, but the 25% thresholds are significant guideposts.

Registered Funds

Under the 1940 Act, a registered fund's contract with its investment adviser is required to terminate automatically upon its assignment. This requirement makes it technically impossible for an investment adviser to transfer an advisory contract for a registered fund. Therefore, instead of a buyer acquiring the existing contract for a registered fund, the buyer pays a seller for their efforts in obtaining approval from the fund's board and shareholders for a new advisory contract.

A registered fund's board must fulfill its obligations under Section 15 of the 1940 Act in connection with its consideration of a new advisory contract, which include requesting information from the buyer (and

4. This presumption can be rebutted. For example, SEC guidance has permitted a merger of two widely held public company advisers to proceed without deeming it to be an assignment as, among other factors, no person controlled either adviser before the transaction and no person would control the combined adviser after the transaction.

seller) as may reasonably be necessary to evaluate the terms of a new advisory contract. Typically, a board's independent legal counsel assists in the preparation of an information request letter and reviews the adviser's responses with the board. Information request letters typically focus on the potential impact of the transaction on the services provided to the registered fund, and may inquire about possible changes in personnel, resources, compliance infrastructure and other day-to-day implications of the M&A deal.

Section 15(c) of the 1940 Act also requires that the board meet in person to approve the new contract, and that the independent board members separately approve the new contract. The board also needs to call a meeting of the registered fund's shareholders and approve the filing of a proxy statement. The default 1940 Act voting standard requires that a "majority of the outstanding voting securities" of a fund approve the new advisory contract, which means the lesser of (a) 67% of shares present at the shareholder meeting if more than 50% of the shares are voted or (b) more than 50% of all outstanding shares. This standard essentially imposes a quorum requirement of 50% of shares for a shareholder meeting to vote on a new advisory contract. It is possible for a particular fund's organizational documents to impose a higher quorum or voting requirement.

Non-Registered Funds

For advisory clients other than registered funds, the Advisers Act requires that an advisory contract include a provision that the investment adviser cannot assign the contract without the consent of the client. The Advisers Act does not specify the form of consent that an investment adviser is required to seek from clients. As a result, there are two ways in which a client could consent to an assignment of an advisory contract, affirmative consent or "negative" consent.

Affirmative consent may be required depending on how the assignment provision of an advisory contract is worded. An example of where affirmative consent from a client would be required is if an agreement requires the client's prior written consent to an assignment. Many advisory contracts, however, are silent as to the form of consent required for an assignment. If that is the case, the investment adviser typically will provide a client with notice of an assignment and state that if the client does not object, the client will be viewed as having consented to the assignment.

As a result of the 1940 Act and Advisers Act assignment requirements, asset management M&A deals (other than non-controlling minority stakes deals) are unable to sign and close on the same day. Instead, there is a post-signing/pre-closing period in which the required approvals and consents are sought.[5] For further discussion regarding consents, a recent article written by our practitioners can be found here.

Section 15(f) of the 1940 Act—a critical safe harbor for sellers

Under common law, it is illegal for a person to sell a fiduciary office for compensation (*e.g.*, a trustee of a trust cannot sell their position to another person). Because an investment adviser is a fiduciary to its clients, this prohibition poses an issue for an adviser seeking to sell its business for a profit. Congress addressed this problem for advisers to registered funds when it adopted Section 15(f) of the 1940 Act as part of the 1975 amendments to the statute, but imposed certain conditions. Compliance with these conditions is critical because failure to do so opens up the possibility that compensation received by an adviser for selling its business could be clawed back by a registered fund.

Section 15(f) imposes two requirements:

1. For a period of three years from the date of an assignment, at least 75% of the board members for a registered fund must not be "interested persons" (*i.e.*, independent) of either the prior or then-current investment adviser, and

2. There is no "unfair burden" imposed on a registered fund as a result of the assignment.

Compliance with these conditions requires cooperation from a buyer, and usually requires a

5. In addition to client approvals/consents, governmental filings may be required for an M&A transaction. These could include seeking approval from the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act or filing a Continuing Membership Application with the Financial Industry Regulatory Authority if a transaction involves a broker-dealer.

buyer to provide assurances that it will not take any action to cause non-compliance with these conditions.

A word on unfair burdens—the 1940 Act does not provide a definitive definition of the term "unfair burden," but it does state that that term includes any arrangement during the two-year period after an assignment that results in the new or old investment adviser receiving compensation other than bona fide underwriting or advisory fees. Many practitioners take the view that this means that the registered fund should not bear the costs of any proxy solicitations resulting from an M&A transaction by the investment adviser and that, notwithstanding the express language of 15 (f), advisory fees for the registered fund should not increase for two years after an assignment occurs.

Protections Against Deal Jumping For Registered Funds

As M&A activity in the asset management space continues to grow and evolve, so too does the concern that third-party interlopers will make a play for the funds involved in a deal after a definitive agreement has been agreed to and announced, but before the transaction can be completed. While this so-called "deal jumping" is a concern in M&A transactions generally, it is of particular concern with respect to control and majority stake transactions involving asset managers because the regulatory requirements discussed above necessitate the approval or consent of advisory clients. The nature of the adviser-fund relationship creates a unique opportunity for interlopers and heightened risk for the selling adviser because an interloper can approach the board of a registered fund directly with an alternate proposal (*e.g.*, they will manage the fund for a lower advisory fee) and could cause litigation or cut out the parties to the M&A deal entirely.

In a prior Alert, we provided a detailed breakdown of an M&A deal gone awry when the adviser to TICC Capital Corp., a publicly traded BDC, announced that it had reached a deal to be acquired by Benefit Street Partners (BSP), and two other parties attempted to jump the deal. First, NexPoint Advisors (NexPoint) submitted a rival management proposal to the board of TICC, offering to reduce the BDC's current base management fee for the next three years. Although NexPoint's offer was rejected by TICC, BSP lowered its proposed management fee to be comparable to what NexPoint had offered. Shortly after the NexPoint proposal, another interested party, TPG Specialty Lending (TSLX), offered to buy TICC in a stock-for-stock transaction at a 20% premium and offering similar reductions in management fees going forward. TICC rejected that deal as well.

Ultimately, when the BSP agreement was put to a shareholder vote at a special meeting, despite having the full support of management and the BDC's largest shareholder, the agreement did not receive the requisite approval required by the 1940 Act and thus BSP's acquisition of the TICC adviser was never consummated. Since the TICC deal, several other M&A transactions have involved deal jumping attempts, and negotiating protections against interlopers has become an increasingly important point in negotiation of M&A transactions.

> *"So how can the parties to an M&A transaction limit the impact of deal jumpers?"*

So how can the parties to an M&A transaction limit the impact of deal jumpers? As with other types of acquisitions, the acquirer can negotiate the inclusion of certain protections in the merger documents, which are specifically included to deter competing bidders and/or make it costly for the target to walk away from the original deal. While this fundamental component of M&A practice is too nuanced and complex to completely survey in this article, some common deal protections include:

- some variation of "no-shop" provisions, which may grant the buyer the right to be notified of superior proposals that the seller receives and the ability to make a matching offer;
- break-up fee provisions, which provide for a payment to a buyer should the agreed upon transaction fail;
- voting agreements with significant owners of the target adviser (or fund shareholders who will vote on advisory contract approvals that would be triggered by the transaction), although the amount of stock subject to the voting agreement may be limited to an amount that does not prevent another suitor from winning; and
- carefully structuring a registered fund's proxy so that the proposal shareholders vote on is contingent upon the M&A deal closing.

Another way to avoid deal jumpers involves structuring transactions in such ways that they do not immediately trigger an assignment under the 1940 Act and the associated shareholder votes. A buyer looking to acquire control of an investment adviser *eventually*, for example, may structure its initial investment such that it is acquiring only a minority non-controlling (*i.e.*, less than 25%) share of the target's outstanding voting securities, together with the right to receive a higher proportion of the profits from the seller's investment advisory business. If structured properly, such a transaction would not be subject to approval by the seller's advisory clients and sponsored registered funds, and thus would be not be vulnerable to deal jumping. Later, the buyer can move to take a controlling stake in the adviser when conditions are more favorable.

The Portability of Performance in Asset Management Transactions

When investment advisers pursue an M&A transaction, or an adviser seeks to hire new portfolio managers, the portability of advisory performance, or the "track record," is a key topic for the adviser and/or portfolio managers to consider. "Portability" of performance refers to the ability of an investment adviser to reference its own historical performance record in its investment performance presentation once it has combined with another investment adviser or the ability of individual portfolio managers to use and access their performance record achieved while at another firm. In this portion of the Alert, we explore the regulatory considerations related to the portability of an investment adviser's and portfolio manager's track record as they relate to M&A transactions, particularly with respect to common diligence issues and negotiation of an individual's ability to use their track record.

Legal background regarding use of performance track records

All investment advisers are subject to Section 206 of the Advisers Act, which is generally referred to as the "anti-fraud" provision of the statute, and provides that it is unlawful for an investment adviser "to engage in any act, practice or course of business which is fraudulent, deceptive, or manipulative." In the context of advertising performance, what investment advisers include in their advertising is just as important as what they do not include, and they must ensure that all of the relevant facts concerning performance are included in an advertisement.

For decades after Congress enacted the Advisers Act, the SEC Staff treated advertisements of past performance as fraudulent by default. The SEC's position evolved in the late 1970s to a facts and circumstances test. The general guidelines for when the SEC Staff would deem an advertisement to be misleading have been developed through multiple pieces of SEC guidance. In this guidance, the SEC Staff has stated that determining whether a communication is misleading is a facts and circumstances analysis, and includes evaluation of: (i) the form and content of the communication; (ii) the implications or inferences arising out of the content of a communication; and (iii) the sophistication of the prospective client.[6]

Specific due diligence issues involving the use of performance track records

Generally, a thorough review of an adviser's advertisements is not high on the priority list for M&A diligence. A buyer can usually take significant comfort from representations that a seller makes on this point and, if the seller has been examined recently by the SEC, from the regulator not raising any issues regarding the advertisements it reviewed. There are, however, some issues that a buyer should keep in mind as it reviews a seller's advertising materials.

- "Cherry picking" accounts to be used in advertisements in order to portray higher performance is prohibited—all accounts that have substantially the same investment strategy should be included in any prior performance presented.
- Advertising accounts where the individuals responsible for achieving the prior performance have changed could be construed to be materially misleading.
- While SEC guidance has permitted the use of hypothetical or "model" performance if a strategy had been utilized over a given time

6. *See, e.g.*, Anametrics Investment Management, SEC No-Action Letter (May 5, 1977).

period in advertisements (as opposed to actual performance of client accounts), it is critical to evaluate the disclosure that accompanies such performance advertisements—extra diligence should be done regarding any advertisements that show model performance.[7]

- The portability of performance history in fund adoptions turns on the same factors as in investment advisory firm combinations, therefore managers should examine the similarity of the accounts and continuity of management.
- As discussed in more detail below, a buyer should make sure that a seller has all of the supporting information needed regarding the seller's performance history to meet the requirements of the Advisers Act and related SEC guidance.

Specific negotiation considerations related to use of performance track records

To use a seller's track record, the investment personnel managing accounts post-closing should also be those primarily responsible for achieving the prior performance results before the M&A deal. Advertising accounts where the managers responsible for achieving the prior performance have changed or did not join the lift out could be construed as materially misleading. Accordingly, negotiation of retention arrangements with key investment personnel is a critical point in structuring an M&A transaction, as a loss of key personnel could result in the inability to use a performance record in advertisements.

The Advisers Act also requires that advisers maintain "all accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return." Accordingly, a buyer seeking to use a seller's track record should ensure that it has negotiated to receive all necessary documentation to utilize the track record, such as advisory business financial and accounting records, including newsletters, articles, and computational worksheets demonstrating performance returns, records that document the adviser's authority to conduct business in client accounts, client account statements, and other relevant records.

7. The SEC has been particularly focused on use of model performance in advertisements, especially in light of an enforcement action against a quantitative investment manager, F-Squared, in 2014. Buyers should beware of deficiencies related to advertisements that include model performance, as an SEC enforcement action in this area can pose heightened business and reputational risks (e.g., F-Squared has since filed for bankruptcy).

Some firms seek to comply with the Global Investment Performance Standards (GIPS), which is akin to a "gold star" certification for performance advertisements and indicates that an adviser adheres to a certain methodology for calculating its performance record. GIPS allows investors to compare more easily the performance of two GIPS-compliant advisers. GIPS has different requirements regarding calculation, presentation and recordkeeping, which should be separately evaluated in the event that a buyer/seller seek to claim GIPS compliance.

Performance track record of individuals

In some M&A deals, an individual portfolio manager employed by the seller (or a founder) may leave the firm in connection with the transaction. Similarly, sometimes individual portfolio managers or their teams are "lifted out" of an adviser by a rival adviser. When an individual (or team) leaves an investment adviser, the portability of their track record is a critical consideration.

All of the individuals who played a primary role in achieving the performance results shown in a track record should continue to be part of that team in order to use it in advertisements at their new advisory firm. To compare two scenarios, when a portfolio manager was the sole decision maker for a fund, the analysis of whether that individual's track record is portable is fairly straightforward. When additional variables are added to the mix, such as co-portfolio managers, analyst teams or investment committees, it is a "facts and circumstances" analysis that likely requires input from experienced counsel.

The ability of an individual (or team) to continue to use a track record if they leave an adviser in connection with an M&A transaction can be a tricky point of negotiation in an M&A deal, as a buyer is usually interested in retaining the exclusive right to use a track record. If a departing individual or team is granted the ability to use their track record, it is advisable for the parties to carefully define access rights regarding the records and materials that from the basis of the track record.

In many M&A deals, diligence and negotiations around the use of an adviser's track record are uneventful. However, it is useful to keep in mind some traps for the unwary so that parties and their counsel are able to spot potential advertising issues to avoid future limitations on use of prior performance or, in worst case scenarios, an SEC enforcement action.

M&A Transactions

Acquiror	Acquired or Target Company	Type of Transaction and Status
BlackRock, Inc., with $5.977 trillion AUM	**Citibanamex**, a subsidiary of Citigroup Inc.	Acquisition of the asset management business of Citibanamex (terms not disclosed).
Brookfield Investment Management Inc., the public securities platform of Brookfield Asset Management Inc., with $15 billion AUM	**Center Coast Capital Holdings, LLC**, a Houston-based SEC-registered investment adviser focusing on energy infrastructure investments, including master limited partnerships, with over $4 billion in AUM	Acquisition (terms not disclosed).
First Eagle Investment Management, an independent, privately-owned investment management firm headquartered in New York with approximately $116 billion AUM	**NewStar Financial Inc.**, an internally-managed, commercial finance company with $7.3 billion AUM	Acquisition. First Eagle to pay $11.44 per NewStar share in cash plus contingent value rights worth up to an estimated additional $0.88-1.00 per share. NewStar to concurrently sell portfolio of investment assets, including approximately $2.4 billion in middle-market loans and other credit investments, to a fund sponsored by GSO Capital Partners.
Stifel Financial Corp., a financial services holding company	**Ziegler Wealth Management**, the wealth management business of B.C. Ziegler & Company, with $4.8 billion AUM	Acquisition (terms not disclosed).
Tiedemann Wealth Management, a New York-based independent national wealth advisor with approximately $12 billion AUM	**Threshold Group**, a wealth-advisory firm and family office with $3.4 billion AUM	Acquisition (terms not disclosed).
WisdomTree Investments, Inc., an exchange-traded fund and exchange-traded product sponsor and asset manager with $48.4 billion	**ETF Securities**, the largest provider of commodity exchange-traded products (“ETPs”) in Europe, with $17.6 billion AUM	Acquisition. WisdomTree will exchange $253 million of cash and stock consideration of 30 million WisdomTree shares for the acquisition of the European exchange-traded commodity, currency and short-and-leveraged business of ETF Securities.

4th Quarter 2017
Closed-End Fund Initial Public Offerings

Dreyfus Alcentra Global Credit Income 2024 Target Term Fund, Inc.

Amount raised:	$140 million (July 26, 2017)
Investment Objectives/Policies:	The Fund's investment objectives are to seek high current income and to return at least $9.835 per common share (the public offering price per common share after deducting a sales load of $0.165 per common share but before deducting offering costs of $0.02 per common share) to holders of record of common shares on or about December 1, 2024 (subject to certain extensions described in the prospectus). Under normal market conditions, the Fund will invest at least 80% of its managed assets in credit instruments and other investments with similar economic characteristics. Such credit instruments include: first lien secured floating rate loans, as well as investments in participations and assignments of such loans; second lien, senior unsecured, mezzanine and other collateralized and uncollateralized subordinated loans; corporate debt obligations other than loans; and structured products, including collateralized bond, loan and other debt obligations, structured notes and credit-linked notes.
Manager:	The Dreyfus Corporation is the Fund's investment manager, and has engaged its affiliate, Alcentra NY, LLC, to serve as the Fund's sub-investment adviser
Book-runners:	Wells Fargo Securities, LLC, Morgan Stanley & Co. LLC, UBS Securities LLC

Simpson Thacher's dynamic, long-standing Registered Funds Practice encompasses all aspects of the investment management business. Our practice focuses on alternative asset managers seeking to access retail investor channels, asset management mergers and acquisitions, and advising on cutting-edge regulatory policy and strategy matters.

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David Blass is a Partner in Simpson Thacher & Bartlett LLP's Investment Funds Practice. David is a leading regulatory lawyer in the funds industry and has advised on matters involving innovative registered funds products, Investment Advisers Act compliance, SEC examination and enforcement matters, and broker-dealer regulatory compliance. Prior to joining Simpson Thacher, David served as General Counsel of the Investment Company Institute (ICI), where he was responsible for the full range of legal and regulatory matters affecting the asset management industry, including investment company, capital markets, pension and tax issues. He also previously was Chief Counsel of the SEC's Division of Trading and Markets.

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Rajib Chanda is a Partner in the Washington, D.C. and New York offices of Simpson Thacher & Bartlett LLP, and is the Head of the Firm's Registered Funds Practice. Rajib's practice focuses on all aspects of issues facing registered investment advisers and sponsors of registered funds. Rajib has particular experience working with alternative asset managers seeking to access retail investor channels through mutual funds, business development companies, closed-end funds, exchange-traded funds and permanent capital vehicles. He also works extensively with more traditional registered fund sponsors and works closely with the firm's asset management M&A group on transactions involving registered advisers and funds. In addition, Rajib provides counsel to boards of registered funds, and has substantial experience advising companies on issues relating to social media and cybersecurity.

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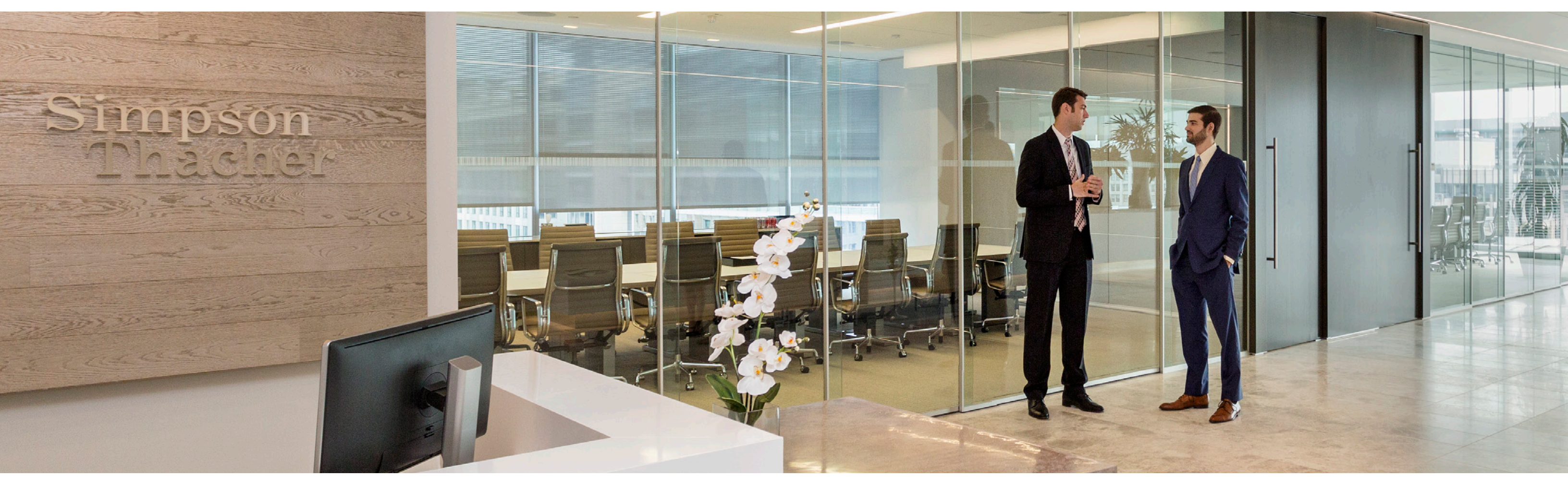
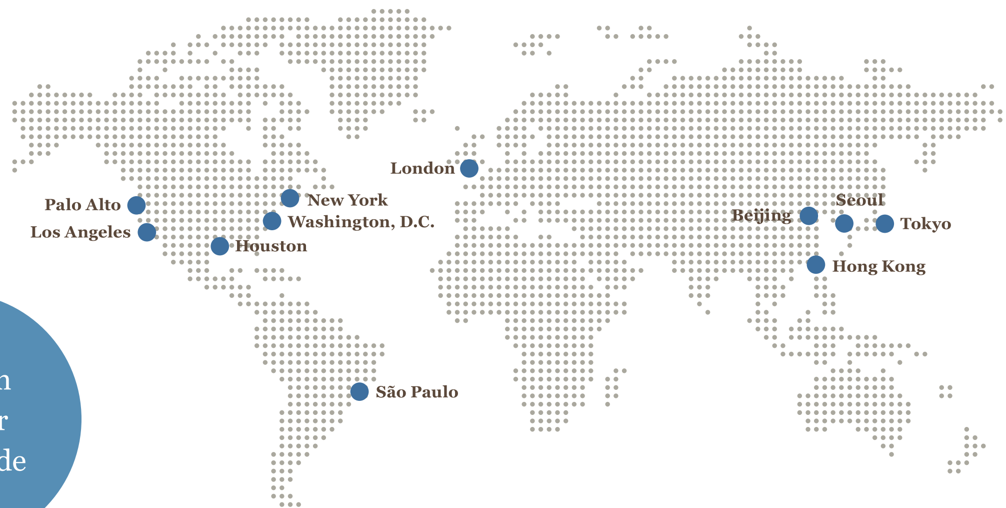
Sarah Cogan is a Partner in the New York office of Simpson Thacher & Bartlett LLP. Sarah's practice encompasses all aspects of the registered funds industry and she represents closed-end investment companies, open-end mutual funds, investment advisers and independent directors of investment companies. She has a particular expertise in advising underwriters and sponsors in offerings by closed-end funds and business development companies. In addition, Sarah advises fund clients on corporate and securities law, including investment management, regulatory, compliance and M&A matters.





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