

**UNIVERSITY OF DENVER
STURM COLLEGE OF LAW**

**PRIVATE EQUITY SEMINAR
L4707**

**COURSE SYLLABUS
SPRING 2016**

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Course Description:

In this course students will learn legal doctrine and practical skills through the examination of various aspects of private equity groups. The class will focus on legal issues arising in private equity investment cycles, including raising a fund, investing the fund, managing the investment, and exiting the investment. Students will consider the legal foundations of fund formation, business law, and structuring investments, including state and federal laws affecting business associations and corporate transactions. The class will also highlight tax and regulatory considerations of private equity groups and their investments. The class will have a heavy emphasis on practical skills, including critical thinking, and best practices for beginning lawyers, including structuring transactions, drafting transactional documents, and negotiating deals.

Course Hours:

9:00 – 10:15 AM, Tuesdays and Thursdays

Office Hours:

Office hours are by appointment. Students should schedule appointments by contacting the instructor.

Evaluation:

Course grades will be based on effort and quality of work. The method of evaluation will align with the overarching course goals of obtaining substantive legal knowledge and learning practical skills.

More specifically, individual grades for the course will be calculated as follows:

Preparedness for class, class attendance, and participation: 25%

Short periodic assignments: 25%

Final exam: 50%

Course Materials:

Required readings for the course will be a mixture of practice materials provided by the instructor, statutes and related case law, a casebook, and news media. The casebook will provide business background for topics covered in class. Students interested in relatively interesting reading for course background should read Bryan Burrough & John Helyar, Barbarians at the Gate: The Fall of RJR Nabisco (1989). This book is not required, but only suggested, reading.

Required readings include the following:

Practice Materials Provided by the Instructor:

- As noted in week-by-week descriptions below

Statutes (students may review and reference these via LexisNexis, Westlaw, or free online databases):

- Colorado Revised Statutes, title 7, article 80 (2012) (“Colorado LLC Act”)
- Colorado Revised Statutes, title 7, articles 90 and 101-117 (2012) (“Colorado Corporations Act”)
- Delaware Code, title 8, chapter 1 (2012) (“DGCL”)
- Delaware Code, title 6, chapter 17 (2012) (“Delaware LP Act”)
- Delaware Code, title 6, chapter 18 (2012) (“Delaware LLC Act”)

Casebook:

- Josh Lerner, Felda Hardymon & Ann Leamon, Venture Capital and Private Equity: A Casebook (5th ed. 2012) (“Lerner Casebook”)

News Media:

- As noted in week-by-week descriptions below
- Students should regularly skim business news in national publications, such as The Wall Street Journal or The New York Times

Topics and Readings:

INTRODUCTION

Week 1: January 12 and 14 **Introduction to Private Equity**

Topics:

- What is private equity?
- A brief history of private equity and financing
- Overview of legal issues arising in the context of private equity and financing
- The evolution of the law of private equity and investing
- Overview of what private equity lawyers do

Readings:

1. Lerner Casebook: “Private Equity Today and Tomorrow” (pp. 1-12)
2. David Snow, “Private Equity: A Brief Overview” (provided by the Instructor)
3. ACC Newsstand, DLA Piper LLP, “What is Micro-Venture Capital?” (provided by the Instructor)
4. CB Insights, “Micro VC Rising: Analyzing Trends and the Top Investors in the Micro VC Ecosystem” (provided by the Instructor)

FUNDRAISING

Week 2: January 19 and 21 **Fundraising (Part 1)**

NOTE: there will be no class on January 21. A short writing assignment will be assigned on January 14 and will be due on January 21.

Topics:

- Formation of private equity groups
- General fund structure
 - Investment funds
 - General partners/managers
 - Management companies/investment advisors
 - Related fund vehicles
 - Parallel funds
 - Alternative investment vehicles
 - Feeder funds
 - Co-investment vehicles
- Private equity funds fundraising background
 - Fund economics
 - Capital commitments
 - Recycling of capital commitments

- Fundraising and fund closing
 - Fund marketing
 - Placement agents
 - Fund closings
- Fund terms
 - Investment period
 - Divestment period
 - Early termination events
- Private placement memoranda and confidential information memoranda
- Fund term sheets
- Subscription agreements and investor questionnaires

Readings:

1. Lerner Casebook: “Fund-Raising” (pp. 28-32)
2. Lerner Casebook: “Yale University Investments Office: August 2006” (pp. 33-57)
3. PLI, Example Term Sheet (Summary of Principal Terms) (provided by the Instructor)

Week 3: January 26 and 28
Fundraising (Part 2)

Topics:

- Private equity partnership agreements and other governing documents
- Investment management agreements

Readings:

1. Excerpts from the Delaware LP Act (provided by the Instructor)
2. Excerpts from the Delaware LLC Act (provided by the Instructor)
3. Lerner Casebook: “Note on Private Equity Partnership Agreements” (pp. 66-76)
4. Lerner Casebook: “Note on the Private Equity Fund-Raising Process” (pp. 98-104)
5. Form N-2, Registration Statement of CPG Carlyle Private Equity Fund, LLC, available at: http://www.sec.gov/Archives/edgar/data/1560916/000089968113000029/cpgcpef-posami_010813.htm
6. Wall Street Journal, “Carlyle Group Lowers Velvet Rope,” March 12, 2013, available at: <http://www.wsj.com/news/articles/SB10001424127887324096404578356700271878018> (or free via Westlaw or Lexis)

Week 4: February 2 and 4
Fundraising (Part 3)

Topics:

- Regulation of private equity
 - Dodd-Frank Act / Form ADV
 - Investment Company Act
 - Investment Advisors Act
 - Securities Act
 - Form D

- Securities Exchange Act
 - ERISA
 - SEC Enforcement
 - Fee misallocation and other actions
 - Insider trading actions
1. Debevoise & Plimpton Client Update, “Reminder – Periodic Filing, Notice and Reporting Requirements for Private Equity Funds”
 2. Andrew Bowden, “Spreading Sunshine in Private Equity,” available at: <http://www.sec.gov/News/Speech/Detail/Speech/1370541735361#.VKQs4SvF9Lg>
 3. Bruce Karpati, “Private Equity Enforcement Concerns,” available at: <http://www.sec.gov/news/speech/2013/spch012313bk.htm>
 4. Mary Jo White, “Five Years On: Regulation of Private Fund Advisers After Dodd-Frank,” available at: <http://www.sec.gov/news/speech/white-regulation-of-private-fund-advisers-after-dodd-frank.html>
 5. Ropes and Gray, “SEC Brings First Action Against a Private Equity Fund Advisor for Misallocation of Portfolio Company Expenses” (provided by the Instructor)
 6. SEC v. Gowrish, et al.
 - a. SEC Litigation Release 21339, available at: <http://www.sec.gov/litigation/litreleases/2009/lr21339.htm>
 - b. Complaint, available at: <http://www.sec.gov/litigation/complaints/2009/comp21339.pdf>
 - c. SEC Litigation Release 21838, available at: <http://www.sec.gov/litigation/litreleases/2011/lr21838.htm>
 - d. SEC Litigation Release 22039, available at: <http://www.sec.gov/litigation/litreleases/2011/lr22039.htm>

INVESTING

Week 5: February 11 Investing (Part 1)

Note: there will be no class on February 9.

Topics:

- Choosing investments and the deal process
 - Auctions
 - The Book
 - Management presentations
- Types of investments
 - Management buy-outs (MBOs)
 - Leveraged buy-outs (LBOs)
 - Private Investments in Public Equity (PIPEs)
 - De-listing/Going dark
 - Club deals
- Investor Relations

- Managing Conflicts
 - Competing funds
 - Transactions with affiliates
 - Exclusivity
 - Investor advisory committee

Readings:

1. Lerner Casebook: “Investing” (pp. 130-134)
2. Lerner Casebook: “Firm Strategy Vignettes” (pp. 135-140)
3. Lerner Casebook: “Hardina Smythe and the Healthcare Investment Conundrum” (pp. 141-153)
4. CommScope, Inc. Form 8-K (January 14, 2011), available at: <http://www.sec.gov/Archives/edgar/data/1035884/000119312511008250/d8k.htm>
5. CommScope, Inc. Form 8-K, Exhibit 99.1 (January 14, 2011), available at: <http://www.sec.gov/Archives/edgar/data/1035884/000119312511008250/dex991.htm>

Week 6: February 16 and 18
Investing (Part 2)

Topics:

- Deal structure
 - Structuring issues
 - Mergers (forward, reverse, triangular)
 - Stock (and other equity) acquisitions
 - Asset acquisitions
 - Tax considerations
- Confidentiality Agreements
- Term Sheets and Letters of Intent
- Non-securities-related regulatory concerns arising in transactions
 - Anti-trust (HSR)
 - Environmental regulations
 - Labor laws
 - WARN Act

Readings:

1. Excerpts from the Colorado Corporations Act (primarily related to mergers) (provided by the Instructor)
2. Excerpts from the DGCL (primarily related to mergers) (provided by the Instructor)
3. Steven M. Davidoff, The Contractual Structure of Private Equity, The New York Times Deal Book (June 7, 2010), available at: <http://dealbook.nytimes.com/2010/06/07/the-contractual-structure-of-private-equity/>
4. Thomas P. Ward, Key Tax Considerations for Private Equity Acquisitions, The National Law Review (June 25, 2012), available at: <http://www.natlawreview.com/article/key-tax-considerations-private-equity-acquisitions>

5. Are Private Equity Funds Liable as “Employers” Under Federal Employment Laws?, Nixon Peabody LLP Venture & Technology Alert (July 15, 2004), available at: http://www.nixonpeabody.com/files/VTA_07152004.pdf

Week 7: February 23 and 25
Investing (Part 3)

Topics:

- Valuation
- Acquisition due diligence
- Datarooms

Readings:

1. Sample Letter of Intent (provided by the Instructor)
2. Lerner Casebook: “Note on Valuation in Private Equity Settings” (pp. 181-200)
3. Lerner Casebook: “Note on Private Equity Securities” (pp. 305-312)
4. Example due diligent request list (provided by the Instructor)

Week 8: March 1 and 3
Investing (Part 4)

Topics:

- Definitive acquisition agreements
- Debt funding for acquisitions; leveraged buy-outs
- Signing and closing the deal
 - Representations and warranties / disclosure schedules
 - Closing conditions
 - MAC clauses
 - Post-closing conditions

Readings:

1. Agreement and Plan of Merger among CommScope, Inc., Cedar I Holding Company, Inc., and Cedar I Merger Sub, Inc. dated October 26, 2010, available at: <https://www.sec.gov/Archives/edgar/data/1035884/000119312510239013/dex21.htm>

Week 9: March 8 and 10
Investing (Part 5)

Topics:

- Signing and closing the deal (continued)
- Market terms
- Post-closing matters
 - Indemnification
 - Escrows
 - Earn-outs

Readings:

1. Sample earn-out agreement (provided by the Instructor)
2. Schulte, Roth & Zable, Private Equity Buyer/Public Target M&A Deal Study (2011), available at: http://www.srz.com/files/News/07205317-b75f-41cd-8090-10de62e96bd7/Presentation/NewsAttachment/77d4330c-761c-478a-9ef6-137d668d1ffb/SRZ_PE_Buyer_Public_Target_M%26A_Deal_Study_2011_Yr_End_Review.pdf
3. MoneySoft, Earn-Out Agreements: Part 1 – An Overview, available at: <http://moneysoft.com/earn-out-agreements-part-1-an-overview/>
4. MoneySoft, Earn-Out Agreements: Part 2 – Possible Outcomes, available at: <http://moneysoft.com/earn-outs-agreements-part-2-possible-outcomes/>
5. MoneySoft, Earn-Out Agreements: Part 3 – Buy-Side Considerations, available at: <http://moneysoft.com/earn-out-agreements-part-3-buy-side-considerations/>
6. MoneySoft, Earn-Out Agreements: Part 4 – Sell-Side Considerations, available at: <http://moneysoft.com/earn-out-agreements-part-4-sell-side-considerations/>
7. MoneySoft, Earn-Out Agreements: Part 5 – Key Negotiating Points, available at: <http://moneysoft.com/earn-out-agreements-part-5-key-negotiating-points/>

NOTE: No class on March 15 and 17 (Spring Break).

MANAGING THE INVESTMENT

Week 10: March 22 and 24 Managing the Investment (Part 1)

Topics:

- Corporate governance
- Aligning incentives
- Rights and treatment of majority and minority shareholders and other stakeholders
- Role and responsibilities of the board
- Directors, officers, and fiduciary duties
- Disclosure and transparency

Readings:

1. Excerpts from the Delaware LLC Act (primarily related to manager and officer responsibilities) (provided by the Instructor)
2. Sample LLC agreement (provided by the Instructor)

Week 11: March 29 and 31 Managing the Investment (Part 2)

Topics:

- Incentivizing management/key employees
- Equity rollovers
- Options
- Non-competition agreements and other restrictive covenant agreements

- Employment agreements and offer letters
- Negotiation of management employment terms

Readings:

1. Sample profits interests award letter and terms and conditions (provided by the Instructor)
2. Akin Gump Deal Diary, “Why Am I Taxed Now on My Future Receipts” (provided by the Instructor)
3. Cooley, “Are We Aligning Pay to the Wrong Performance Metrics?,” available at: <http://cooleypubco.com/2014/12/15/are-we-aligning-pay-to-the-wrong-performance-metrics/>

Week 12: April 5 and 7
Managing the Investment (Part 3)

Topics:

- Management considerations for portfolio companies
- Add-on/tuck-in acquisitions
- Divestitures/spin-outs
- Consolidation of investments

Readings:

1. Practice materials (provided by the Instructor)

EXITING THE INVESTMENT

Week 13: April 12 and 14
Exiting the investment

Topics:

- Exit strategies and legal considerations
- Sales to strategic buyers
- Sales to financial buyers
- Initial public offerings
- Bankruptcy and distressed sales

Readings:

1. Lerner Casebook: “Exiting” (pp. 313-317)
2. Lerner Casebook: “Warburg Pincus and emgs: The IPO Decision (A)” (pp. 318-337)
3. Lerner Casebook: “Note on the Initial Public Offering Process” (pp. 359-365)
4. Lerner Casebook: “Between a Rock and a Hard Place: Valuation and Distribution in Private Equity” (pp. 366-394)
5. PLI, Chapter 10, An Overview of the IPO Process (provided by the Instructor)
6. Joel Rubinstein and Evan Konstantinou, “IPO Market Offers Attractive Exit Alternative for Sponsor-backed Companies” (provided by the Instructor)

7. Christopher Betts and Will Cai, “Hong Kong v. New York: The Competition for Chinese Tech IPOs” (provided by the Instructor)

CONCLUSION

Week 14: April 19 and 21 Conclusion

Topics:

- The future of private equity
 - Mega deals
 - IPOs of Private Equity Groups
 - Regulations
- Course review

Readings:

1. Lerner Casebook: “New Frontiers” (pp. 395-400)
2. Lerner Casebook: “The Blackstone Group’s IPO” (pp. 500-526)
3. Steven M. Davidoff, The Failure of Private Equity, 82 Southern California Law Review 481 (2009), available at:
<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3298&context=facpubs>
(or free via Westlaw or Lexis)

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