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Private Equity Secondary Transactions

Ellen Kaye Fleishhacker

INTRODUCTION

The recent financial crisis affected not only homeowners and credit card debtors, but also pension plans, endowments, and other investors often worth billions of dollars each. As a result, just as consumers limited their spending so that they could pay their rent or mortgage and keep food on the table, major institutional investors sought ways to improve their liquidity so that they could meet their funding obligations. In many cases, this meant that institutional investors needed to divest themselves of illiquid investments in, and capital commitments to, private equity and related closed-end investment vehicles. Hence, the subject of the private equity secondary market—*i.e.*, the market in which buyers purchase private equity interests from existing investors in those funds rather than directly from fund issuers—suddenly became hot.

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Harvard University's endowment fund of approximately $26 billion made headlines when it sold a portion of its private equity portfolio on the secondary market in 2009. In the same year, the Stanford University endowment fund of approximately $12 billion sought to sell up to $1 billion of its interests in private equity and other illiquid investment partnerships. See *Did Harvard Sell at the Bottom?* (Oct. 26, 2009), http://www.Forbes.com; *Stanford Loads Up Auction with Buyout Funds, Distressed Assets* (Oct. 26, 2009), http://www.Bloomberg.com. However, the market for private equity secondary transactions was not born in 2009, and it will not end when the financial crisis is over. For that reason, it is important for attorneys who work with fund managers or fund investors to have at least a basic understanding of the context of these transactions and the legal issues to which they give rise.

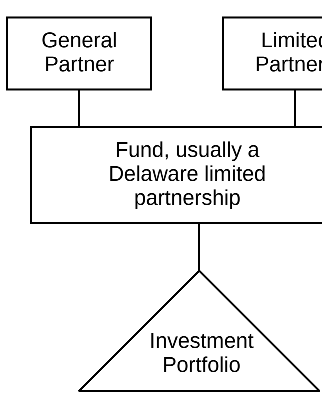
BACKGROUND

To understand the context and legal aspects of private equity secondary transactions, it is essential to be familiar with (1) the basic structure of a private equity fund and how secondary transactions fit into that structure, (2) the logistics of how buyers and sellers in private equity secondary transactions typically find each other, and (3) the basic financial considerations in a private equity secondary transaction.

Private Equity Fund Structures and Secondary Transactions

To understand the mechanics of any particular private equity secondary transaction, the practitioner must understand the structure of the specific private equity fund in question.

The basic domestic private equity fund structure is as depicted below:



In a "primary" transaction for a fund with this structure, the fund issues limited partnership interests in a private offering directly to eligible investors. The "offering period" for these interests often lasts between 12 and 18 months. After the offering period terminates, the fund does not issue any further limited partnership interests to new investors. The existing limited partners do not have the right to withdraw from the fund and remain invested in the fund until the fund finally terminates (typically, anywhere from 8 to 12 years after the initial closing). Moreover, in the typical private equity fund, the investor does not contribute its entire investment when it subscribes to the fund (as would an investor in a typical hedge fund), but rather makes a commitment to contribute a certain amount to the fund over time.

In secondary sales of interests in funds that have this basic structure, the seller is one of the limited partners and is locked into the investment (and the commitment) for a certain term, but may or may not have funded all or a portion of its capital commitment. The buyer acquires the seller's limited partnership interest in the fund, including the seller's existing capital account balance and unfunded capital commitment obligation.

This article covers funds with this basic structure, although most of the same principles and considerations set forth in this article also apply to funds that have more sophisticated structures.

Finding Buyers and Sellers

There are a number of ways in which private equity secondary transactions occur. In some cases, a limited partner in a fund will inform the general partner or investment manager of the fund that it wishes to sell its interest. In these cases, the general partner or investment manager may be happy to help find a buyer for the interest in order to (1) avoid a default situation in which the limited partner would not be able to make a capital call, (2) allow another existing investor to increase its allocation to the fund, or (3) attract a new investor that may also then invest in the manager's future funds.

In other cases, the seller may hire an investment bank, a specialized secondary consulting firm, or a placement agent to help it locate potential buyers. Buyers also often hire consultants to help them locate investments in the secondary market, and there are a number of secondary investment funds that specialize in purchasing secondary interests in private equity funds. Finally, a number of investment banks have active secondary investment programs. These specialized investment firms and the investment banks are major players in the secondary market. (Any practitioner representing an intermediary in these situations should consider the applicable securities laws that may apply (in particular, the broker-dealer rules), the details of which are outside the scope of this article.)

Basic Financial Considerations

A seller's financial motivation to divest itself of a private equity interest may include the need or desire to (1) reduce its allocation to alternative investments in general or certain sectors in particular, (2) rid itself of the capital commitment obligation, (3) generate cash, or (4) reduce its expenses by limiting the number of manager relationships that it needs to monitor. A buyer's financial interest in purchasing a private equity fund interest on the secondary market may arise from a need or desire to (1) increase its allocation to alternative investments in general or certain sectors in particular, (2) take advantage of a seller's need to reduce its capital commitment obligation and generate cash (presumably thus leading to a sale at a discounted price), or (3) get a foot in the door with certain managers.

Pricing the Transaction

Generally, lawyers are not involved in the negotiation of the purchase price for a private equity secondary transaction. (As discussed below, however, lawyers are involved in negotiations about potential adjustments to the purchase price.) Nonetheless, it is important to have at least a general understanding of how sellers and buyers determine the price, because it can affect the terms of the agreement between the parties.

In simplified terms, the purchase price in a private equity secondary transaction is usually a percentage of the "net asset value" (often referred to as the "NAV") of the interest being sold as of a certain cut-off date. The net asset value of the interest refers to that portion of the net value of the fund's assets that is allocable to the interest being sold. The cut-off date is usually the most recent date for which the fund has determined the net asset value of the interests. The parties then agree to (1) increase the purchase price to the extent that the seller funds capital calls between the cut-off date and the closing of the secondary transaction, and (2) decrease the purchase price to the extent that the seller receives distributions between the cut-off date and the closing of the secondary transaction.

Whether the seller is willing to sell for the full net asset value ("par") or at a discount or a premium to the net asset value depends on a variety of factors, including the seller's view of the future appreciation in value of the fund and the seller's need to sell. Likewise, a buyer will assess how much it is willing to pay based on a number of key factors, including the type of asset (*i.e.*, whether the interest is in a buy-out fund, venture fund, real estate fund, or other fund), the funding ratio of the interest (*i.e.*, the funded capital against the total commitment), and the vintage year of the fund. Often, sellers and buyers cannot come to terms about the purchase price, and as a result many potential private equity secondary transactions never get past the price negotiation stage.

Example

Following is a simple example of how an interest in a fund might be priced. Assume a secondary interest in which (1) the seller has already contributed \$13M to the fund; (2) the seller has a remaining commitment of \$7M; and (3) the current NAV of the interest is \$10M. Also assume that the parties have agreed to a purchase price of 95 percent of NAV. In this example, the purchase price would be \$9.5M (\$10M × .95) and the buyer would also assume the remaining capital commitment of \$7M.

SECURITIES LAW AND REGULATORY CONSIDERATIONS

The parties to the private equity secondary transaction—*i.e.*, the fund manager (the general partner or investment manager, depending on the fund's structure), the seller, and the buyer—will need to consider securities laws and other regulatory issues in connection with the transaction. The following is a summary of those considerations.

The Fund Manager

In general, unless the fund manager is brokering a transaction between the seller and the buyer (in which case broker-dealer regulations may apply), its securities law and other regulatory concerns in a secondary transaction will essentially be the same as they were when the fund initially issued the interest or the shares. The fund manager's legal concerns are generally addressed by having the buyer complete a subscription agreement, and, in rare cases, obtaining a legal opinion from the seller's counsel relating to the transaction.

In particular, the fund manager will want to ensure that the transaction will not cause the fund to be required to register under the Investment Company Act of 1940, as amended (Investment Company Act) (15 USC §§80a–1—80a–64). Typically, a private equity fund relies on either the §3(c)(1) or the §3(c)(7) exclusion from the definition of "investment company" under the Investment Company Act (15 USC §80a–3(c)(1), (7)). If the fund relies on the §3(c)(1) exclusion, the fund manager will need to ensure that the secondary transaction will not result in the fund having more than 100 beneficial owners. This involves careful consideration of the "look through" rules. In certain situations, the fund manager will be required to "look through" the buyer to the buyer's beneficial owners as if they were direct investors in the fund in counting to the 100-owner limit. For example, if the buyer is a fund that itself relies on §3(c)(1) or §3(c)(7) of the Investment Company Act *and* owns 10 percent or more of the fund or has more than 40 percent of its assets invested in the fund, the fund manager will have to look through and count the buyer's beneficial owners. In that case, the fund manager may require the buyer and seller to reduce the dollar amount of interests being transferred to ensure that the buyer will not be looked through and the fund will not lose its exclusion under §3(c)(1). If the private equity fund relies on the §3(c)(7) exclusion, the fund manager will need to make sure that the buyer meets the definition of a "qualified purchaser" under the Investment Company Act. See 15 USC §80a–2(a)(51).

In addition, as described below, the fund manager will want to ensure that the securities are sold by the seller to the buyer in such a way that the transaction will not violate the Securities Act of 1933, as amended (Securities Act) (15 USC §§77a–77aa) or any state blue sky laws. Furthermore, depending on the regulatory status of the buyer, the fund may be required to comply with other laws and regulations. For example, if the transferee is an entity regulated by the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001–1461) or is a bank holding company, the fund must comply with the applicable provisions of ERISA or the Bank Holding Company Act of 1956 (12 USC §§1841–1852), as if the transferee were an original investor in the fund. Finally, the fund manager will want to confirm that admitting the buyer will not cause the fund or the fund manager to violate any anti-money-laundering rules by obtaining certain representations from the buyer and by ensuring that the buyer does not appear on the U.S. Treasury's Office of Foreign Assets Control (OFAC) list of "specially designated individuals." See http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.

The Seller

Although many sellers (particularly first-time, distressed sellers) are unaware of it, there are certain securities laws with which they need to comply in the secondary sale of their fund interests. Luckily, for the most part, there are no major landmines in this area for sellers. Nonetheless, the following are some of the matters that the seller should consider when effecting the sale. First, the sale of a private equity partnership interest is a sale of a security that must either be registered under §5 of the Securities Act (15 USC §77e) or qualify for an exemption from registration. The SEC has indicated that private resales of securities may be permitted based on a combination of the requirements of two separate sections of the Securities Act: §4(1) and §4(2) (15 USC §77d(1)–(2)). This hybrid exemption for resales is commonly referred to as the "Section 4(1½) exemption." Under the Section 4(1½) exemption, resales of limited partnership interests will be exempt from the registration requirements of the Securities Act when (1) the limited partnership interest was purchased in a private placement (and thus, the seller is not considered to have purchased the securities with a view toward distributing them, as the §4(1) exemption requires) and (2) the resale occurs in a manner similar to the private placements of securities permitted by the §4(2) exemption from registration for securities sold in "transactions by an issuer not involving any public offering." To comply, the seller should obtain assurance from the buyer that it is an "accredited investor," as defined in Regulation D (17 CFR §§230.501–230.508) under the Securities Act. In addition, the seller should offer the interest only to a limited number of sophisticated prospective investors and not use any public advertising to solicit potential purchasers. Further, the seller should make sure that an exemption for the sale of the interest is available in the buyer's state of residence.

In addition, secondary sales of private equity fund limited partnership interests are subject to Rule 10b–5 (17 CFR §240.10b–5) under the Securities Exchange Act of 1934 (15 USC §§78a–78pp). Rule 10b–5 aims to prevent the use of fraud or other manipulations in the sale of securities. If the seller is aware of material nonpublic information about the fund or the fund manager that has not been publicly announced (for example, that the fund manager is the subject of an SEC investigation or other information of which the buyer should be aware), the seller must disclose this information to prospective buyers.

The Buyer

The buyer in a private equity secondary transaction generally does not face significant securities law or other regulatory issues. The buyer's main obligation related to those laws and regulations is to ensure that the representations and warranties that it makes in the subscription agreement that it submits to the fund manager are accurate and complete. However, the buyer's due diligence should include a review of the applicable fund documents (typically, the offering memorandum, the partnership agreement, and the subscription application) so that it understands what it is acquiring and the associated risks. If the fund manager is registered as an investment adviser with the SEC or a state, the buyer should also review the fund manager's Form ADV for an overview of the fund manager's business.

KEY TAX ISSUES

The most significant tax issue facing the parties to a private equity secondary transaction relates to the publicly traded partnership rules. If the secondary transaction causes the fund to run afoul of these rules, there can be severe tax consequences for the fund and its investors.

General Rule

Virtually all domestic private equity funds intend to be and are treated as partnerships for U.S. federal income tax purposes. This means that the fund is a "pass through," and does not pay federal income tax at the entity level. Instead, the items of income are passed through to the underlying partners.

Publicly Traded Partnership Potentially Taxed as a Corporation

Notwithstanding the general classification as a partnership for tax purposes, if the fund constitutes a "publicly traded partnership," it generally will be treated as a corporation for U.S. tax purposes. IRC §7704(a). A "publicly traded partnership" is a partnership in which interests are either traded on an established securities market or "readily tradable on a secondary market (or the substantial equivalent thereof)" (the Secondary Market Test). IRC §7704(b). Interests in a partnership are readily tradable on a secondary market or the substantial equivalent thereof if, taking into account all of the facts and circumstances, the partners are readily able to buy, sell, or exchange their partnership interests in a manner that is comparable, economically, to trading on an established securities market, *i.e.*, the investors are able to buy and sell in a manner that approximates the liquidity available on a public exchange. Treas Reg §1.7704–1(c)(1).

However, applicable regulations provide a number of safe harbors under which interests in a partnership are not considered readily tradable on a secondary market (or the substantial equivalent thereof), and therefore the partnership is not treated as a publicly traded partnership. Fund managers tend to rely on these safe harbors if possible. The principal safe harbors relevant to private equity funds are (1) the "private placement" safe harbor, which applies when the fund interests are not registered and there are no more than 100 partners at any time, and (2) the "2 percent" safe harbor, which applies when the amount of percentage interests in partnership capital or profits transferred during the year does not exceed 2 percent of the total interests in partnership capital or profits. Treas Reg §1.7704–1(j)(1). (In addition, a partnership is not treated as a publicly traded partnership if 90 percent of its income is from certain passive sources. Fund managers tend not to rely on this safe harbor, however, because the 90-percent test involves certain factual determinations.)

If the IRS were to determine that a private equity secondary transaction caused the fund to meet the Secondary Market Test, and the fund were therefore classified as a corporation for U.S. tax purposes, then the fund would be subject to a 35-percent federal income tax on income and gains, and distributions would be treated as dividends subject to a second tax. For this reason, virtually all fund documents permit the manager to prohibit any transfer that might jeopardize the status of the fund as a partnership for tax purposes, including strict adherence to the 2-percent test. Historically, this has been a low-risk issue because there have not been a lot of transfers. However, with the substantial interest in secondary activity that has arisen in recent years, this issue has taken on a higher profile, and, as a result, fund managers are becoming more conservative in addressing the issue. For example, fund managers often attempt to obtain indemnities from secondary buyers and sellers against all adverse tax consequences of the transfer, including any resulting from application of the publicly traded partnership rules. In reality, however, only the fund manager is in a position to determine whether one of the safe harbors applies. For that reason, buyers and sellers should refuse to provide the requested indemnity, and in fact should seek the manager's assurances that the transaction will not trigger the publicly traded partnership rules.

KEY DOCUMENTS

In general, the agreements discussed below are necessary to document a private equity secondary transaction.

Fund Manager Consent to Provide Information

Virtually all funds require their investors to maintain information about the fund in confidence. As a result, a seller will need to obtain the fund manager's consent to share information about the fund with potential purchasers of the seller's interest. Obtaining the fund manager's consent should be the first step in the secondary transaction legal documentation process, and should occur before the seller contacts any intermediary or potential buyer. The fund manager and the seller are the parties to this agreement.

Nondisclosure Agreement

Typically, the fund manager will require the seller to obtain a nondisclosure agreement from the buyer. The fund manager will either have its own form or will want to review in advance a form that the seller or buyer drafts for this purpose.

Letter of Intent

Some parties to secondary transactions find it useful to enter into a letter of intent before they start working on the transaction documents. A letter of intent may be helpful to enable the parties to be sure that they really have a deal before they go to the expense of drafting and negotiating definitive deal documents. On the other hand, letters of intent themselves can be time-consuming and expensive to draft, and some see them as an unnecessary extra step. The seller and buyer are the parties to a letter of intent.

Purchase and Sale Agreement

The purchase and sale agreement is the primary contract between the buyer and the seller. (The fund manager is not a party.) In most cases, the seller assumes responsibility for initiating the first draft of this document. However, virtually all purchase and sale agreements for private equity secondary transactions seem to be iterations of the same basic form, no matter whether by drafted by the buyer or the seller and no matter which law firms are involved. Even though the draft purchase and sale agreement that the parties start with is usually based on this standard form, there may be important additions or deletions; both parties should therefore review it carefully. In addition, there are aspects of the standard form as it has evolved that make little sense and should be re-worked for clarity.

Transfer Agreement

The transfer agreement is the document by which the fund manager approves the transfer and the transfer is technically effected. It is a good idea to start negotiating the transfer agreement as soon as possible after the buyer and seller believe that they will have a deal. If left to the last minute, the transfer agreement can hold up the entire transaction—particularly because three different parties need to approve it. The fund manager, the seller, and the buyer are the parties to this agreement.

Lender Consent

If the fund has pledged the partners' capital commitments as security for a loan or loans (typically, in a real estate fund), lender consent will usually be required for a secondary transfer. Before entering into the purchase and sale agreement, the parties should make sure that no such consent will be required. If lender consent is required, the parties should confirm that the fund manager is seeking the consent, and also make lender consent a condition to closing in the purchase and sale agreement.

Subscription Application

The fund manager will want the buyer to complete a subscription application. Sometimes this is the same document that original subscribers used, and other times it is incorporated into the transfer agreement.

NEGOTIATING THE DEAL

Most of the negotiations in a private equity secondary transaction occur in connection with the purchase and sale agreement and the transfer agreement. Some key points to consider in negotiating these documents are discussed below.

The Purchase and Sale Agreement

Obligations and Liabilities

The seller will want to transfer all of its obligations and liabilities to the buyer, while the buyer will want the seller to retain them. Obligations that buyers usually want to exclude from the sale include (1) losses that arise from any breach by the seller of the fund agreements; (2) any losses that arise or accrue during, or relate to, the period before the closing date of the secondary transaction and that result from acts or omissions of the seller; (3) any obligation of the seller to disgorge money to the fund arising from a partner clawback obligation relating to a distribution received by the seller before the cut-off date; and (4) any tax liabilities of the seller related to the interests acquired by the buyer. The seller will want the agreement to provide that the buyer assumes all but the excluded obligations.

Indemnity Issues

The seller will usually want the buyer to provide a full indemnity for all liabilities (including the obligation to make capital contributions) that arise after the transfer of the interest. The seller will also want to be released from all obligations to the fund (save, perhaps, certain clawback, confidentiality, and indemnity obligations) after the transfer. The buyer will want the seller to provide a full indemnity for any fund obligations that arose before the transfer (including the seller's obligation to return to the fund any distributions that it may have received in connection with any future limited partner clawback).

Limitations on Indemnification

Often sellers seek to limit their indemnity obligations to the amount of the purchase price. Buyers generally resist that limit, and will seek either no limit or a limit that includes the purchase price and additional capital contributions made by the buyer after the sale. The buyer will also want the indemnity to be unlimited for certain matters, such as the seller's fraud or breach of its representations and warranties.

Representations and Warranties

The buyer will want the purchase and sale agreement and the transfer agreement to include representations and warranties that the seller (1) is not currently and has not in the past been in default under any of the fund documents, (2) has not waived any of its rights under the fund documents, and (3) has good and valid title to the interest being transferred. Obtaining these assurances is important for the buyer, because the buyer is stepping into the seller's shoes and needs to be confident that the seller has not forfeited any of its rights in the fund.

Transfer Expenses

Most fund documents have provisions that lay out what fees and costs the fund manager will charge for transfers of interests. The buyer and seller will not be able to change those terms in the purchase and sale agreement, but they can override them as between each other. Therefore, if the fund documents provide that the seller must pay transfer fees to the fund manager, the buyer and seller can agree between themselves in the purchase and sale agreement that they will split those fees. In fact, it is advisable for the parties to address the issue of transfer expenses, transfer taxes, and similar costs in the purchase and sale agreement in order to avoid disputes later.

Clawback-Related Issues

In most funds, the limited partners are obligated to return to the fund certain fund distributions under certain circumstances. In a secondary transaction, the seller will not want to retain these clawback obligations, but the buyer will not want to assume them. It is therefore important for the parties to address the issue in the purchase and sale agreement. If the agreement is silent on the matter, disputes may arise later if the fund manager issues a clawback notice.

Termination Option

Buyers often require that the purchase and sale agreement contain a provision allowing the buyer to terminate the deal in the event that there is a "material adverse change" in the fund before the transfer has taken place. The seller will generally want to define "material adverse change" narrowly to encompass only an event involving a key principal of the fund manager.

Alternative Investment Vehicles

The buyer will want to make sure that the purchase includes all alternative investment vehicles (AIVs), special purpose (feeder) investment vehicles, blockers, and other similar entities in which the seller has an interest under the fund documents.

Confidentiality

Because of the possible stigma associated with a sale of a secondary interest, sellers often want to ensure the confidentiality of the transaction. Accordingly, they will often want to include a nondisclosure clause in the purchase and sale agreement.

The Transfer Agreement

Representations and Warranties

The buyer will usually want the fund manager to represent and warrant that the seller (1) has not defaulted, (2) has not waived any of its rights, and (3) has good and valid title to the interest being transferred. Some general partners are not willing to provide those kinds of representations and warranties, but others may be willing to make them or to narrow them.

Interplay With the Purchase and Sale Agreement

In many cases, some of the terms of the transfer agreement (*e.g.*, those related to payment of transfer fees) will conflict with those of the purchase and sale agreement. For that reason, it is often a good idea for the seller and buyer to add a provision to the transfer agreement clarifying that, as between buyer and seller only, to the extent of a conflict between the transfer agreement and the purchase and sale agreement, the terms of the purchase and sale agreement will prevail.

Tax Representations

As discussed above, both the seller and the buyer will want to resist making any representations concerning publicly traded partnership tax matters, and in fact may seek assurances on that point from the fund manager in the transfer agreement.

Side Letter Benefits

Buyers typically try to add a provision to the transfer agreement to obtain the benefits of any side letters to which the seller was a party. The buyer may also want to negotiate a new side letter to deal with any particular regulatory or other concerns it may have.

"Substitute Limited Partner"

The buyer should ensure that the transfer agreement specifically provides that it will become a "Substitute Limited Partner" (or the equivalent defined term in the operative fund documents), so that it has full economic, voting, and information rights in the fund.

Indemnification

The fund manager will want to ensure that neither it nor the fund becomes entangled in disputes between the buyer and the seller. Therefore, the fund manager will want the transfer agreement to provide that the fund, the fund manager, and their affiliates will have no liability for any losses related to the transfer (including any liability for failure to make appropriate disclosures about the financial status of the fund), and that both seller and buyer indemnify it against any such losses. In some cases, the general partner will want the seller and the buyer to be jointly and severally liable for breaches of each other's representations and warranties in the transfer agreement (both seller and buyer will generally strongly oppose such a provision).

Representations From the Seller and the Buyer

The fund manager will want the seller to represent and warrant that it holds its interest free and clear of all liens and that it has not defaulted under the fund documents. The fund manager will also want the buyer to make the same types of representations that are normally present in subscription applications. The fund manager will generally require both buyer and seller to covenant and represent that they have not acted as a finder or broker with respect to the transfer and that each did its own independent review of the transfer transaction.

CONCLUSION

Private equity secondary transactions are often complicated but are always interesting. The transactions can vary between very slow-moving (6 months or more between initial negotiations and closing) or rushed (2 weeks between initial negotiations and closing), often because the parties seek to time the closings simultaneously with quarter- or fiscal-year-ends for accounting reasons. When any of the parties (buyer, seller, or fund manager) is not U.S.-based, there are additional layers of complexity (such as language barriers, different conceptions of basic contract law, and even time-zone differences) that can be both fun and challenging for all parties, including their counsel. Finally, although most of these transactions are basically similar to one another, each one seems to have its own unique twists and issues. For that reason, private equity secondary transactions keep the lawyers who help negotiate, document, and close them always on their feet and always learning something new.

André Brewster, Ben Berk, and Jennifer Starkey of Howard Rice contributed to this article.

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