

Freeborn & Peters LLP

Counsel Connections
Your Business and the Law
Fall 2008

Welcome to the latest issue of Freeborn & Peters' *Counsel Connections*. This publication focuses on current developments and trends in business law. We welcome your suggestions for issues you would like us to address and ways we can make this resource more valuable to you. Feel free to e-mail the editors: Cindy Bergmann at cbergmann@freebornpeters.com, or Jeff Mattson at jmattson@freebornpeters.com.

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Proceed with Caution in Providing Both Debt and Equity Financing

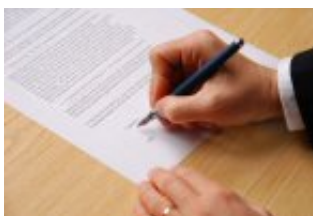
With the credit crunch making acquisition financing scarce, acquirers are considering alternative deal structures and financing sources. Some acquirers are using affiliated entities to provide the senior credit facility or other debt, with the intention of replacing the debt when credit markets return to normal. When the owners of a company's equity also provide the company's debt, the potential for recharacterization of the debt arises in bankruptcy or other proceedings.



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Increasing Use of "Materiality Scrape" Provisions in Acquisition Agreements

With any innovation comes a new set of problems and responses. This proposition holds true in the development of M&A documentation. At one time, representations and warranties were simple and straightforward, and any breach was compensated through a simple indemnification procedure. Over time, buyer-seller negotiations have become more complex, and acquisition agreements have become longer.



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Deadline for Amending Compensation Arrangements Fast Approaching

The deadline for amending nonqualified deferred compensation arrangements to comply with Section 409A of the Internal Revenue Code is December 31, 2008. Any failure to comply with Section 409A will cause the recipient of the deferred compensation to be subject to income tax on the deferred compensation at the time that it is vested (even if not paid) and to *an additional 20 percent penalty tax, plus interest in some cases*



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