

Freeborn & Peters LLP and Marsh Co-Present Seminar on Managing Merger and Acquisition Risks

On October 6, 2010, Freeborn & Peters LLP and Marsh co-hosted a breakfast presentation at Marsh's office titled "What's the Deal? Managing Merger and Acquisition Risk." General counsel, risk managers, in-house business development executives and CEO's from the financial, insurance and airline industry attended the seminar. The panelists, Jeff Mattson and Todd Southwell, both from Freeborn & Peters LLP, and Craig Schioppo from Marsh, led a discussion about the current deal environment for middle market companies and private equity firms and strategies for minimizing risks in M&A transactions.

The panel discussed areas of risk in the pre-signing, pre-closing, and post-closing periods and methods for reducing those risks for both sellers and buyers. In the pre-closing period, they discussed the use of confidentiality provisions, access to company information during the due diligence process, protection of the seller's proprietary information, letters of intent, and the use of experts to assist in the diligence process to analyze specific aspects of the business.

The post-closing period discussion focused on the myriad issues in indemnification provisions, including the survival period, caps and baskets, as well as customary exceptions to the survival periods, caps and baskets. When the parties are unable to agree upon the appropriate indemnification provisions, various "M&A insurance" products can be used to provide the same protection that the indemnification provisions would provide. Specifically, the panel highlighted opportunities to eliminate an indemnification escrow through the use of M&A risk insurance, and the tax benefits arising from such a structure, as well as the use of tax indemnity coverage to provide protection to a buyer against pre-closing tax positions taken by the seller.

The panel noted that, in light of the current economy, differences of opinion regarding the value of a particular business are regularly arising, and buyers and sellers can struggle in negotiating a purchase price. The panel suggested post-closing purchase price adjustments and earnouts as customary ways to bridge the gap in valuation between a buyer and seller, but each method requires careful planning and structuring to address the appropriate pricing issues, avoid unnecessary restrictions on the buyer's ability to operate the business, and avoid unintended tax consequences.

The panel closed the program with a brief discussion on the liability of directors and officers, how directors and officers fulfill their fiduciary duties to the corporation, and the steps directors and officers need to take to rely on the business judgment rule.

We are available to make a similar presentation to members of your organization. Please [contact us](#) for additional information.