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Chaotic But PE-Friendly Enviro Expected As Trump Returns

By **Jade Martinez-Pogue**

Law360 (November 27, 2024, 11:25 AM EST) -- Donald Trump's 2024 presidential election victory means that, for only the second time in U.S. history, a former president will make his way back to the White House after a four-year gap, and private equity attorneys are preparing for what his return might mean for the industry.

J. David Washburn

The transition from one presidential administration to another, no matter who is at the helm, can have major effects on the private equity industry, but the fact that Trump is a returning president means there is some insight attorneys can glean about how the PE space might shape-shift over the next four years.

Steve Epstein

Law360 spoke to private equity attorneys from three different firms — David Washburn, co-chair of M&A and private equity at Katten Muchin Rosenman LLP; Steve Epstein, managing partner and co-head of M&A and private equity at Fried Frank Harris Shriver & Jacobson LLP; and private funds partner Jordan Cross and investment funds partner Meaghan Kelly of Simpson Thacher & Bartlett LLP — about what they expect to see from Trump's administration and the ramifications it might have on the industry.

These interviews have been edited for length and clarity.

Jordan Cross

How will the Trump administration affect the private equity space, and what are some major factors to look out for?

Washburn: I think there's a strong expectation by many that there is going to be a significant uptick in M&A activity under the new administration, and there's a series of reasons why. The incoming president ran on a very pro-business platform, a deregulation platform generally. The incoming administration is clearly focused on lowering the corporate tax rates and there is this belief that there will be some kind of sweeping change in the way that the mergers will be reviewed by the Federal Trade Commission and U.S. Department of Justice.

Meaghan Kelly

I'm not sure that it will be quite that easy; I think it's a lot more nuanced. The new administration has a stated goal of U.S. protectionism. There has been much discussion on implementing significant tariffs on everyday goods. If that's the case, some predict that inflation could result. When inflation occurs, interest rates go up and M&A activity goes down. The first term of an incoming president could be characterized as a period of policy

uncertainty, and policy uncertainty has a tendency to affect M&A as well.

Epstein: Based on everything that President-elect Trump has said thus far, I think the private equity industry stands to benefit as I expect an acceleration in dealmaking. A focus on bringing down interest rates, reducing regulation, and creating a more hospitable antitrust environment are all things that drive private equity activity and broader M&A activity.

Cross: As a whole, we expect the return of the Trump administration to be a net positive for private equity firms from the sense that the U.S. Securities and Exchange Commission is less likely to pursue an ideologically driven policy agenda targeting private funds. Two key things we expect to see are, one, an SEC rulemaking — and rulemaking-through-enforcement — agenda that is less targeted at private funds and, two, the continued importance of retail investor access to more private-oriented investment options. Any loosening of the regulatory framework that currently restricts retail investors' ability to access private funds would only serve to accelerate this trend.

Kelly: While we do expect significantly less SEC rulemaking — and rulemaking by enforcement — ambition and activity targeted at private funds than under Biden/Gensler, we do not expect material changes with respect to SEC exams and enforcement activity but rather shifts in emphasis and degree. We expect there will be some, but not a wholesale, reordering of SEC exams and enforcement priorities; for instance, a continued focus on fees and expenses as well as marketing but less emphasis on off-channel communications as well as whistleblower language in what has been a growing set of purportedly applicable agreements under Biden/Gensler.

How will the new makeup of Congress impact the private equity space, if at all?

Washburn: If the GOP controls both houses, you'll see a push for spending cuts, deregulation and broader security measures.

I think the most important thing to watch for me is the 60-vote filibuster rule. In his first administration, the incoming president pushed pretty hard to eliminate the filibuster rule and former Senate Majority Leader Mitch McConnell refused. Clearly, having majority control of both houses is going to have an impact on M&A activity, but it will be tempered by this filibuster rule.

Epstein: The fact that the president and both houses of Congress are going to be from the same political party is definitely going to facilitate legislation. From the standpoint of private equity in particular, there has been a focus in the past on how carried interest is taxed and whether a substantial increase should be imposed. I think with a GOP Congress and a Republican president in the White House, it's unlikely that we will see changes to the way carried interest is taxed. In all likelihood, the current approach will remain in place and, overall, that's going to benefit private equity.

Kelly: As a general matter, the new makeup of Congress has the potential to allow legislation to pass with greater ease. We do not think legislation specifically intending to negatively impact or restrict private equity advisers is on the horizon. What we could potentially see is legislation — or rulemaking — that touches private equity or the underlying investments, such as potentially minimizing barriers to retail investor access to private funds, encouraging the development of artificial intelligence, etc.

What did the private equity space look like last time Trump was president? Based on his 2024 campaign and everything that has happened since, are you expecting any differences?

Washburn: If we were to look back at the way that the FTC and DOJ were analyzing merger transactions in the first Trump administration, on the surface, there was a more streamlined approach to merger analysis. There were a number of merger transactions that were being halted for reasons that weren't exactly clear. Some people believe these deals were picked out by the administration for ways that weren't ideological, and there might be other reasons they were scrutinized.

The AT&T and Time Warner deal was halted for reasons that some might say were somewhat novel. By 2020, merger enforcement seemed to be halted even further. The past may be a predictor of the future. That same kind of choppiness could occur. This belief that we're suddenly going to move to a streamlined merger analysis under the new administration may be a bit myopic. I think the M&A markets and the private equity industry are greatly influenced by certainty and stability. We're going to need to see long-term certainty and policy stability in order for us to really see the M&A markets experience the upticks that some are predicting.

Epstein: Private equity accounts for a very large amount of overall deal activity, and that is a trend that started long before the 2016 administration and has continued as a general matter. 2016 through 2020 was an active period for private equity, and so it continued to grow as an industry, meaning deal activity was strong and assets under management kept rising.

In the beginning of the pandemic, deal activity came to a halt for a short time, but resumed rather quickly. At the same time, because of what was happening with the pandemic, the government — now under a new administration — pumped a lot of money into the system to help the most vulnerable segments within society get through the pandemic. And as a result of pumping that money into the system, we saw an increase in inflation. With interest rates higher, private equity activity slowed, since the cost of borrowing is one of the most important drivers of private equity activity.

Kelly: From an SEC enforcement perspective, we expect the space to remain quite similar, though unlikely to introduce novel policy initiatives through an enforcement mechanism as with the current administration. As context, during the first Trump administration, SEC enforcement brought a number of notable cases against private equity firms involving traditional enforcement priorities. To note a few from 2020, there was a settlement with a private fund adviser involving [material nonpublic information] policies and procedures deficiencies; the settlement with EDG Management Co., which stemmed from an exam referral, was a first-of-its-kind settlement involving the failure to reduce management fees after write-downs to portfolio company securities; and the settlement with Monomoy, which also stemmed from an exam referral, involved failure to disclose that expenses of the firm's operations-focused internal group would be charged to portfolio companies.

These are topics I have continued to see in focus in exams and enforcement during the Biden/Gensler administration. While unlikely to be the highest priority in the second Trump presidency, we do expect exams and enforcement to continue to be active in the private equity space. On a related point, as the retail access to private funds continues to expand, we expect a greater focus under the new administration in exams and enforcement activity related to registered funds, especially where sponsors manage both private and registered funds.

What sectors within private equity do you think will be impacted most by this administration?

Washburn: First and foremost, there are going to be a lot of sectors impacted, a pretty broad variety. I think that the aerospace and defense industry will be impacted. The new administration is expected to increase defense spending as it did in the first term. There will be increased focus on expanded

technology such as drones, so there will probably be an influx of money there. The incoming president has promised to revive and rebuild domestically manufactured goods, and with large tariffs on companies that manufacture goods overseas, I think domestic manufacturing will show an uptick.

Certainly energy. The new administration said it wants to make it easier to build on public land and build pipelines. There has been a robust focus on the U.S. fostering its own fossil fuels, I think that's going to cause a focus on energy broadly.

Epstein: I think that the energy, technology and healthcare sectors are likely to be the three areas that continue to be drivers within the M&A space. If you look today, virtually every company is in one form or another a technology company. Technology has become so important, whether it's in healthcare in terms of maintaining patient records, monitoring equipment, etc. Technology continues to seep into every sector of the economy and, as a result, technology M&A will be very active.

Healthcare is a substantial portion of our economy in general, whether it's pharma, biotech or services. I think healthcare will continue to experience consolidation. Healthcare — like technology — experiences constant innovation. That means new companies are born every day. As some of those companies develop and become successful, one of the ways they can monetize that success is by selling themselves, and that drives M&A activity too.

Cross: The new administration has been clear that it intends to prioritize oil and natural gas energy solutions, which if carried out could obviously benefit traditional oil/gas and midstream strategies and their investors. Consistent with the Trump administration's first term in office, we expect to see a continued emphasis on infrastructure projects, in particular we expect digital infrastructure — especially data centers and power generation projects — to continue to be growth areas in light of their key role in the development of artificial intelligence, which has been indicated as a priority for the administration. Other industries that rely heavily on foreign markets and in particular the Chinese market (such as manufacturing and agriculture) could be at a disadvantage if the administration implements the wide-ranging tariffs proposed during the campaign.

Another potential impact of the administration's expected push for less regulation is on banks and private credit funds. If rules applicable to traditional lenders are loosened, particularly capital requirements under Basel III, they will have greater ability to compete with private credit funds for deals that traditional lenders have widely pulled back from to date. For their part, private credit could also continue to benefit given the current high demand for lenders, and the potential for continued economic growth fueling the need for new loans.

--Editing by Orlando Lorenzo.

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