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KD Alert: Carlyle Group Strikes Mandatory Shareholder Arbitration Provision From IPO

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The Carlyle Group, one of the nation's largest private equity firms, has withdrawn a provision mandating shareholder arbitration of all claims, including federal securities claims, from the documents filed in connection with its initial public offering (the "IPO"). The forced arbitration provision was met with strong opposition from the Securities and Exchange Commission (the "SEC"), as well as Carlyle Group's investors and other interested parties, including lawmakers and the American Association for Justice, who argued that requiring Carlyle Group shareholders to arbitrate all claims impermissibly impinges on investors' statutorily-protected rights to seek redress in court for securities law violations.

The Carlyle Group's original IPO documents, filed with the SEC in September 2011, did not contain a forced arbitration provision. However, on January 10, 2012, the Carlyle Group filed Amendment No. 2 to Form S-1 (the "Registration Statement") with the SEC, seeking the inclusion of the mandatory arbitration clause. Pursuant to the compelled arbitration requirement, all arbitrations were to be confidential, conducted in Wilmington, Delaware, and, perhaps most notably, all class actions and claims consolidation were barred. The Carlyle Group, via spokesperson Christopher W. Ullman, explained that it offered the provision in an attempt to provide investors with an efficient and cost-effective means of resolving disputes.

The Registration Statement, if approved, would have forbidden investors from bringing individual or class action securities claims in federal and state courts, which sparked much scrutiny from the court of public opinion. However, on February 3, 2012, the SEC issued a statement indicating that it would not approve the IPO as long as the forced arbitration provision was included therein, a decision which mirrors the SEC's refusal to approve a Philadelphia savings and loan IPO that contained a similar compelled arbitration clause in 1990. Accordingly, the Carlyle Group decided to strike the forced arbitration provision, thereby restoring traditional investor protections to future Carlyle Group shareholders.

Prior to the SEC's advisement that it would not sanction the forced arbitration provision, there was some speculation that the United States Supreme Court's recent policy favoring arbitration would persuade the SEC to approve the clause.

Moreover, there was some speculation that since the Carlyle Group securities are being offered in limited partner units and in turn, the Carlyle Group operates as a limited partnership, as opposed to a corporation, the SEC would act with more leniency regarding the mandatory arbitration provision. Now, however, the SEC has quelled the hypotheses regarding its stance on mandatory shareholder arbitration. In addition to resulting in the Carlyle Group nixing the compelled arbitration clause, the SEC's disapproval of the Carlyle Group's amended IPO also firmly establishes its opposition to forced arbitration of shareholder disputes, which will likely guide the SEC to reject any similar provisions proposed by corporations in the future.

For more information on these matters, contact the attorneys in KD's Insurance Coverage & Monitoring practice group or visit us at www.kaufmandolowich.com.